

# eucrim

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## THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM



### **Focus: Corruption and Fraud**

**Dossier particulier: Corruption et fraude**

**Schwerpunktthema: Korruption und Betrug**

Monitoring International Instruments against Corruption  
*Lorenzo Salazar*

The Reform of the EU's Anti-Corruption Mechanism  
*Alexandre Met-Domestici, PhD*

Criminal Law in European Countries: Combating Manipulation of Sports Results – Match-fixing  
*Carlo Chiaromonte*

The European Union and the UN Convention against Corruption  
*Martin Příborský*

Unjustified Set-Off as a Criminal Offence in Italian Tax Law  
*Enrico Mastrogiacomo*

Administrative and Criminal Sanctions in Polish Law  
*Dr. Agnieszka Serzysko*

# Contents

## News\*

### European Union

#### Foundations

- 2 The Stockholm Programme
- 3 Enlargement of the EU
- 3 Schengen

#### Institutions

- 4 European Council
- 4 European Parliament
- 5 OLAF
- 5 Europol
- 5 Eurojust
- 7 Agency for Fundamental Rights (FRA)

#### Specific Areas of Crime / Substantive Criminal Law

- 7 Corruption
- 8 Market Abuse
- 8 Counterfeiting & Piracy
- 9 Organised Crime
- 10 Cybercrime
- 11 Environmental Crime
- 11 Illegal Online Gambling
- 11 Illegal Migration
- 12 Sexual Violence

#### Procedural Criminal Law

- 12 Procedural Safeguards
- 13 Data Protection

- 14 Victim Protection
- 14 Freezing of Assets

#### Cooperation

- 14 Police Cooperation
- 15 European Investigation Order
- 15 Transfer of Sentenced Persons
- 15 Criminal Records
- 15 Law Enforcement Cooperation

### Council of Europe

#### Foundations

- 16 Reform of the European Court of Human Rights
- 17 Other Human Rights Issues

#### Specific Areas of Crime

- 17 Corruption
- 17 Money Laundering

#### Procedural Criminal Law

#### Legislation

## Articles

### Sanctions

- 20 Monitoring International Instruments against Corruption – Any Need for Better Coordination...?  
*Lorenzo Salazar*
- 25 The Reform of the EU's Anti-Corruption Mechanism  
*Alexandre Met-Domestici, Ph D.*
- 30 Criminal Law in European Countries: Combating Manipulation of Sports Results – Match-fixing  
*Carlo Chiaromonte*
- 34 The European Union and the UN Convention against Corruption  
*Martin Příborský*
- 38 Unjustified Set-Off as a Criminal Offence in Italian Tax Law  
*Enrico Mastrogiacomo*
- 42 Administrative and Criminal Sanctions in Polish Law  
*Dr. Agnieszka Serzysko*

## 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](http://www.mpicc.de/eucrim/search.php) and then entering the ID-number of the link in the search form.

# Editorial

Dear Readers,

In 2009, the Group of States against Corruption (GRECO) – the Council of Europe’s body responsible for monitoring the implementation of the anti-corruption instruments of the organisation, including the Criminal and Civil Law Conventions on Corruption and three “soft law” instruments – celebrated its tenth anniversary. Three evaluation rounds have so far been completed. A fourth round is being launched in 2012, which will focus on corruption in the judiciary and in parliaments. Over the last decade, most of the 49 GRECO Member States have done much to improve their laws, institutions, and working methods to prevent and combat corruption as well as to raise awareness about the impact of corruption on the rule of law and the democratic functioning of institutions. However, a number of important challenges still lie ahead of us.

One of them is the EU’s participation in GRECO’s work, particularly for the future of the anti-corruption movement in Europe and beyond (accession to the Council of Europe’s anti-corruption instruments and participation in GRECO are not limited to Member States of the Council of Europe). Participation in GRECO (which is provided for in its statute) was also outlined as a key element of EU anti-corruption policy in a Communication of 2003; different possibilities for participation were explored, bearing in mind the legal competences of the EU under the Treaty on the European Union and the Treaty establishing the European Community. Given the limited Community competence at that time with regard to the above-mentioned Council of Europe conventions, there was little progress in this area until the adoption of the Lisbon Treaty (December 2007). Furthermore, a Memorandum of Understanding was concluded, in May 2007, between the Council of Europe and the EU, stipulating that legal cooperation covering the rule of law (including the fight against corruption) should be further developed to ensure coherence between EU law and Council of Europe conventions. The Treaty on the Functioning of the European Union (TFEU) provides for more streamlined EU competence on anti-corruption and paves the way for participation in GRECO’s work. The 2010 Stockholm Programme was therefore well received by GRECO, which formally expressed its willingness to contribute to the development of a comprehensive EU anti-corruption policy and

particularly welcomed the invitation from the European Council to the Commission to submit a report on the modalities for the Union to accede to GRECO.

This report is now on the table. It is one of four components of the so-called “anti-corruption package” adopted by the European Commission on 6 June 2011. Another component is the Commission’s decision to establish an EU anti-corruption reporting mechanism, designed to produce a monitoring report every two years – starting in 2013 – on EU Member States’ efforts in the fight against corruption and including recommendations; it is intended to make use of the GRECO *acquis*. Full membership is one of the options discussed in the report. In this regard, the Commission pledges to request the Council to authorise the opening of negotiations for the EU’s participation in GRECO.

I anticipate that this request will be made soon and that the European Council will give the necessary go-ahead for a meaningful cooperation framework. One of the key questions will likely be whether the EU will be treated like an “ordinary” GRECO member or not. As stated in the preamble of GRECO’s statute, “full membership of GRECO should be reserved to those which participate without restrictions in mutual evaluation procedures and accept to be evaluated through them.” At its 50th plenary session in March 2011, GRECO also made clear that, from the start, the EU’s participation should be construed in such a way as to leave the door open for future evaluation of EU institutions. GRECO’s statute certainly allows for the design of specific arrangements, as appropriate.

Marin Mrčela

Judge at the Supreme Court of the Republic of Croatia  
President of the Group of States against Corruption



Marin Mrčela



## European Union\*

*Reported by Dr. Els De Busser, Cornelia Riehle and Claudia Kurpjuweit*

### Foundations

#### The Stockholm Programme

##### First Report on Implementation of Internal Security Strategy

On 25 November 2011, the first annual report on the implementation of the EU Internal Security Strategy (see eucrim 1/2011, p. 2) was presented by the Commission. Adopted in November 2010, the Internal Security Strategy outlined five EU policy objectives for the period 2010-2014:

- Disrupting international criminal networks;
- Preventing terrorism and addressing radicalisation and recruitment;
- Raising the levels of security for citizens and businesses in cyberspace;
- Strengthening security through border management;
- Increasing Europe's resilience to crises and disasters.

The report is the first of a number of annual assessments that the Commission makes regarding the steps taken to translate these objectives into concrete measures. Additionally, together with Eu-

ropol, the Commission has outlined the state of EU internal security. In the same report, the Commission also lists clear and concrete plans for 2012, including:

- Adopting a Communication on a European Information Exchange Model;
- Adopting a package on confiscation and recovery of criminal assets;
- Proposing options for further strengthening of transport security, in particular land transport issues;
- Developing an EU strategy for Internet security
- Making suggestions to improve the coordination of border checks. (EDB)

➤eucrim ID=1201001

##### Perception of Internal Security

Alongside the first report on the implementation of the Internal Security Strategy, the Eurobarometer report on internal security was also published in November 2011. The Eurobarometer is the collection of regular surveys that the Commission carries out in order to gain a perspective on the public's views. In this case, a special survey was conducted among 26,840 citizens (aged 15 and above) in all Member States on national and EU security.

The main finding of the survey is that economic and financial crises are viewed as the main challenge to national and EU security. Terrorism, organised crime, and poverty are listed as other possible threats. When it comes to national security, the proportion of respondents identifying these challenges as threats varies significantly from state to state. Cybercrime is perceived by respondents as the challenge most likely to increase in the next three years.

Another important finding was that about half of Europeans believe that the EU is doing enough to tackle terrorism, organised crime, natural and manmade disasters, cybercrime, and border security, while four out of ten disagree. Also, half of the respondents think that their country is doing enough to respond to these challenges. As for cooperation with third states in dealing with internal security, the US was mentioned most, followed by Russia, China, and Turkey. (EDB)

➤eucrim ID=1201002

##### Proposal for Establishing the Internal Security Fund

On 15 November 2011, the Commission presented a proposal for creation of the Internal Security Fund (COM(2011) 753 final) as planned in the Stockholm Programme of 2009 (see eucrim 4/2009, pp. 122-213). This fund is part of a two-fund structure for future expenditure in the area of home affairs.

The fund should support the implementation of the Internal Security Strategy (see eucrim 1/2011, p. 2). This

\* If not stated otherwise, the news reported in the following sections cover the period November 2011–February 2012.

encompasses the five strategic goals mentioned above (see p. 2).

Due to the different treaty bases of these goals, two separate acts are necessary to set up the different components of the fund: a regulation establishing the components of police cooperation, preventing and combating crime, and crisis management; and a regulation establishing the border management and common visa policy components.

The global budget is €4,648 million for the period 2014-2020. It will be divided into €1,128 million for the regulation on police cooperation and €3,520 million for implementation of the regulation on border management. With regard to the regulation on police cooperation, eligible actions include joint investigation teams, networking and dissemination of know-how, and awareness raising and upgrading of technical equipment such as ICT systems.

Besides these two regulations, a regulation establishing the Asylum and Migration Fund was also proposed for the area of home affairs. (EDB)

►eucrim ID=1201003

## Enlargement of the EU

### Further Expansion of the EU towards the Western Balkans

On 23 January 2012, Croatian voters in a national referendum said yes to the country's accession to the EU. Following a successful vote in the EP on 1 December 2011 and the signing of the Accession Treaty eight days later, Croatia will become the 28th EU Member State on 1 July 2013 pending the ratification procedures in all Member States. Nonetheless, the EP insisted that Croatia make further progress in addressing the remaining challenges, in particular concerning judicial reform and the fight against corruption and organised crime. In addition, the EP called upon the future Member State to increase its efforts in prosecuting war crimes, complying with all International Criminal Tribunal rec-

ommendations for the former Yugoslavia, and to encourage the return of war refugees, especially Serbs.

During the introduction of the current Danish Presidency of the European Council on 16 December 2011, the Danish Minister of European Affairs Nicolai Wammen presented the tasks of the Presidency as regards enlargement. Granting candidate status to Serbia is planned for spring 2012 and negotiations with Montenegro should be opened in June 2012. In the meantime, negotiations with Turkey and Iceland will continue.

On 24 January 2012, the Foreign Affairs Committee of the EP adopted two resolutions regarding further enlargement. The first resolution deals with the Former Yugoslav Republic of Macedonia, as the Committee wants to start previewing the national legislation for conformity with EU legislation and set a date for the start of the accession negotiations. Concentrated media ownership, independence and impartiality of the State Commission for the Prevention of Corruption as well as disagreement regarding the name of the Former Yugoslav Republic of Macedonia are still areas of concern. In the second resolution, the Committee calls upon the five Member States that have not yet recognised Kosovo's independence (Cyprus, Greece, Romania, Slovakia, and Spain), to do so. The Committee lists the return of refugees and internally displaced persons as well as corruption as the remaining challenges for the state.

The two resolutions will be put to vote during the plenary sessions of the EP in March. (EDB)

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## Schengen

### Schengen Evaluation and Monitoring Mechanism

The Commission introduced an evaluation and monitoring mechanism to verify the application of the Schengen acquis (COM(2011) 559 final) that was

supported by the EP's Civil Liberties Committee on 29 November 2011. The proposal is part of the Schengen Governance Package, presented by the Commission on 16 September 2011 (see eucrim 4/2011, p. 135).

On-the-spot inspections and unannounced visits by Commission-led teams and experts from other Member States are among the measures included in the proposed mechanism. In the case of severe situations in which the enforcement of the Schengen rules is at risk, a first step should be to strengthen external borders. Internal border checks should only be a last resort.

Discussions in the Council have started and the proposal is tabled for the plenary session of the EP in May 2012. (EDB)

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### Schengen Enlargement – State of Play

On 19 December 2011, Liechtenstein was the 26th state to join the Schengen zone. The Council Decision lifting the internal border controls with the state as well as all restrictions on the use of the SIS entered into force on 16 December 2011, the day of its publication in the Official Journal.

For Bulgaria and Romania, the accession to Schengen is still pending. A proposal for a two-phased entry did not achieve the required unanimity during the JHA Council of 13-14 December 2011. This proposal would mean to first introduce checks on persons at internal sea and air borders with and between Bulgaria and Romania on 25 March 2012, together with both countries fully joining the SIS. With regard to the second phase, the abolition of checks on persons at internal land borders, a decision will be taken by the Council no later than 31 July 2012. (EDB)

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### European Border Surveillance System EUROSUR Presented

On 12 December 2011, the Commission presented its proposal for a Regu-

lation establishing a European Border Surveillance System called EUROSUR (COM(2011) 873 final). This regulation forms part of the integrated border management of the external borders and the EU Internal Security Strategy (see eucrim 2/2011, p. 95 and 1/2011, p. 2).

EUROSUR aims to strengthen controls at the external borders of the EU, especially in view of the many fatal accidents that have occurred when illegal immigrants attempted to reach the EU by sea. The involvement of criminal networks in these illegal entries, either by trafficking human beings or drug trafficking or other cross-border crime, requires more cooperation between the authorities responsible for border sur-

veillance. EUROSUR will support the information exchange and cooperation between border guards, coast guards, police, customs, and Frontex. This includes the use of so-called situational pictures or graphical interfaces presenting data, information, and intelligence that will assist in identifying and mapping the routes that criminal networks take. Additionally, Frontex will provide modern surveillance technology combining satellite imagery with information derived from ship reporting systems. Funding for this system is incorporated in the Internal Security Fund, more precisely in the Regulation establishing the border management and common visa policy (see p. 3).

The proposal was referred to the EP in February 2012 and is awaiting its first reading. (EDB)

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## Institutions

### European Council

#### JHA Priorities of the Danish Presidency

Denmark took over the European Council Presidency from Poland for the first half of 2012 and presented its priorities in the area of JHA to the Civil Liberties Committee on 25 January 2012.

The key priority for Denmark is establishing the Common European Asylum System. In the same field, migration, resettlement, visa policies, and Schengen governance are points on the Danish agenda.

Furthermore, Denmark wishes to make progress on the proposed Directive for the use of PNR data for law enforcement purposes (see eucrim 2/2011, p. 62), the European Investigation Order (see eucrim 3/2011, p. 113) as well as the proposed Directive on minimum standards for rights of victims of crime (see eucrim 4/2011, p. 147). (EDB)

►eucrim ID=1201008

### European Parliament

#### Elections in the EP

On 17 January 2012, German MEP Martin Schulz was elected as the new EP President until the beginning of the new legislative period in July 2014.

One day later, 14 Vice-Presidents were elected as well as five Quaestors. As members of the EP Bureau, the Vice-Presidents are responsible for drafting the EP's budget and for laying down the EP's rules of organisation. The Quaestors are responsible for handling administrative matters that directly affect the MEPs.

On 26 January 2012, the chairs and

#### 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
FATF	Financial Action Task Force
GRECO	Group of States against Corruption
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



vice-chairs of the EP Committees were elected. Juan Fernando López Aguilar was re-elected for the Civil Liberties Committee, and Michael Theurer was elected as chairman of the Committee of Budgetary Control. (EDB)

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## OLAF

### New Organisational Structure for OLAF

From 1 February 2012 on, OLAF will be working with a new organisational structure and working methods. In March 2011, shortly after taking office, OLAF Director General Giovanni Kessler launched an internal evaluation under consideration of the opinions of the Court of Auditors, the EP, Member States, and other stakeholders. In addition, concerns that came up during the ongoing decision-making process amending OLAF Regulation (EC) No. 1073/1999 were taken into account.

The average length of OLAF investigations is expected to be shortened thanks to the changes, and investigative priorities will be made public, thus adding more transparency to the working methods.

The total amount of OLAF staff remains the same but, due to the stronger emphasis on investigations, about 30% more staff will be dedicated to this area. Investigative procedures have been simplified, and a new unit centralising incoming information on possible fraud cases has been created. Its aim is to ensure a fast decision on the opening of an investigation by using a coherent set of criteria as well as quality and legality checks.

OLAF has also centralised its anti-fraud policy activities in one directorate. This directorate will focus on assisting the Commission as well as the Member States on the subject of prevention and detection policies.

Finally, alongside the new organisational structure, OLAF also renewed its website. The website can still be accessed at the traditional address. (EDB)

►eucrim ID=1201010

### Cooperation Agreement between OLAF and World Bank

On 8 November 2011, a Cooperation Agreement was signed by OLAF and the World Bank's Integrity Vice-Presidency in accordance with their commitment to strengthen the cooperation forged during a Conference of International Investigators in May 2011 (see eucrim 3/2011, p. 97). The Integrity Vice-Presidency is the department of the World Bank that is responsible for the investigation of internal and external allegations of misconduct and fraud. An improved information exchange between OLAF and this department will thus enable joint investigations when both the EC's and the World Bank's financial interests are at stake. (EDB)

►eucrim ID=1201011

### New OLAF Supervisory Committee Appointed

On 24 January 2012, the EP, the Council, and the Commission formally appointed the new members of the OLAF Supervisory Committee. All members hold high-level positions in their home country in the areas of fraud, corruption, and law enforcement and will be serving a three-year term from 2012 to 2015. The five new members are:

- Mr. Herbert Bösch (Austrian), former Member of the EP;
- Mr. Johan Denolf (Belgian), Director of the Belgian Federal Police;
- Ms. Catherine Pignon (French), Chief Public Prosecutor at the Court of Appeal in Angers;
- Ms. Rita Schembri (Maltese), Director-General of the Internal Audit and Investigations Department in the Office of the Maltese Prime Minister;
- Mr. Christiaan Timmermans (Dutch), former Judge at the ECJ.

The members of the Supervisory Committee have the task of independent supervision of OLAF's activities through regular monitoring of the investigations carried out. They also deliver opinions at the request of OLAF's Director or on their own initiative. The Supervisory

Committee does not interfere in ongoing investigations. The Committee presents an annual report on its activities to the European institutions and may report to the European Court of Auditors on the results of and the follow-up to OLAF investigations. (EDB)

►eucrim ID=1201012

## Europol

### Secure Communication Line with Interpol Established

On 20 December 2011, Europol announced that a secure communication line linking the secure networks of Europol and Interpol has been established to facilitate the exchange of operational and strategic information on crime.

The establishment of the secure link is part of the implementation of the Memorandum of Understanding signed between Europol and Interpol in October 2011 (see eucrim 4/2011, p. 138). (CR)

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## Eurojust

### 10th Anniversary of Eurojust and New Website

On 28 February 2012, Eurojust celebrated its 10th anniversary with an official ceremony, followed by an informal meeting of Ministers for Justice and Home Affairs chaired by the Danish Presidency of the EU.

On the occasion of the anniversary, Eurojust also launched its new website containing the same features as the previous one but now available in a faster and more user-friendly fashion. The new structure also provides for a dedicated practitioners area listing Eurojust's operational and strategic activities, objectives and tools, support for JITs, and contact information.

After its first formation as Pro-Eurojust, which started work on 1 March 2001 in the Council building in Brussels, Eurojust was established by the

## Making Europe Safer: Europol at the Heart of European Security

The Hague, 18-19 June 2012

This conference at Europol's new headquarters will mark the tenth anniversary of the organisation and bring together its members, law enforcement agents, civil society representatives, ministry officials and legal practitioners to debate the role of Europol in the coming years.

Two major developments in recent years have confirmed the place of Europol as a major EU actor. First, Council Decision 2009/371/JHA, which entered into force on 1 January 2010, finally established Europol as a European agency and broadened and strengthened its competences. Secondly, on 1 July 2011, Europol inaugurated its new headquarters in a building specifically designed for it. From dealing almost exclusively with drug-related matters at its origins, Europol now has an ever expanding set of priority areas.

Key topics will be:

- The plans for Europol hosting the EU's new cybercrime centre and relation;
- Europol's data protection framework under the EU's new data protection scheme;
- Synergies and overlaps with other European agencies;
- Expectations from the Commission's 2012 proposal for a new Europol Regulation.

The conference will be held in English.

For further information, please contact Ms. Cornelia Riehle, Deputy Head of Section for Criminal Law, ERA. e-mail: [criehle@era.int](mailto:criehle@era.int)

## Eurojust Coordinated Investigation into Assets of Former Presidents Ben Ali and Mubarak

After the revolts in Tunisia and Egypt, the national authorities of Tunisia and Egypt asked various EU Member States for mutual legal assistance to recover the financial assets, properties, and goods of both ex-Presidents and their families that were located in Europe. Upon request of the French authorities, Eurojust coordinated various financial investigations that were opened in different countries. On 12-13 December 2012, Eurojust hosted a coordination meeting for all countries involved in order to exchange information and to better coordinate the approach towards the execution of the letters rogatory as well as further investigation of both cases. (CR)

► [eucrim ID=1201016](#)

Council Decision of 28 February 2002 setting up Eurojust with its headquarters in The Hague.

On the occasion of Eurojust's 10th anniversary, a special edition of its newsletter has been published. The newsletter contains an article on the history of Eurojust as well as interviews with stakeholders:

- Vice-President and Commissioner responsible for Justice, Fundamental Rights and Citizenship, Viviane Reding;
- The EU's Anti-Terrorism Coordinator, Gilles de Kerchove;
- EU Anti-Trafficking Coordinator, Myria Vassiliadou;
- Minister of Security and Justice of the Netherlands, HE Ivo Opstelten;
- The former and current Presidents of the College of Eurojust, Mike Kennedy and Aled Williams, the former and current Administrative Directors, Ernst Merz and Klaus Rackwitz, and different practitioners from the Member States. (CR)

► [eucrim ID=1201014](#)

## Eurojust Newsletter on Child Abuse Published

The fifth issue of the Eurojust News, published on 4 January 2012, is dedicat-

ed to the fight against child abuse, especially sexual abuse, sexual exploitation, and abuse through the Internet.

The newsletter contains an article on the EU's measures against child abuse, e.g., Directive PE-CONS 51/11 on combating the sexual abuse and sexual exploitation of children and child pornography, the MEPs Alliance for Children as well as safer Internet programmes. Within Eurojust, a Contact Point for Child Protection has been established among the Eurojust National Members. The position is currently held by Ola Laurell, Eurojust National Member for Sweden, who also gave an interview for this issue.

Furthermore, the newsletter contains interviews with the European Commissioner for the Digital Agenda, Neelie Kroes, in which she discusses the protection of children on the Internet, and with Yves Goethals, Superintendent of the Team "Child Pornography" at the Belgian Federal Judicial Police. Additionally, the newsletter describes various case examples of judicial cooperation against child abuse, such as operation Koala involving Italy and Belgium and operation Lost Boy involving no less than 12 countries. (CR)

► [eucrim ID=1201015](#)

## New Liaison Prosecutor for the US

On 17 October 2011, Mr. Stewart Robinson was appointed Liaison Prosecutor for the US at Eurojust. Before joining Eurojust, Mr. Robinson served as the Principal Deputy Director of the Department of Justice's Office of International Affairs. Since 2004, Mr. Robinson has also been an adjunct professor of law at several universities in the US.

He replaces the former Liaison Prosecutor, Mary Lee Warren, who returned to Washington.

The appointment of a Liaison Prosecutor for the US at Eurojust is based on Art. 5 of the Agreement between Eurojust and the US of 6 November 2006. (CR)

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## Final Meeting of the Informal Working Group on the Implementation of the New Eurojust Decision

On 10-11 November 2011, the Informal Working Group on the implementation of the new Eurojust Decision in the Member States held its final meeting.

The following topics were at the heart of the meeting:

- Transmission of information to Eurojust;



- Information and feedback from Eurojust;
- The development of respective Eurojust products;
- The new Eurojust National Coordination System.

The meeting was attended by national representatives who deal with legislative and technical aspects of the new Decision as well as representatives of the General Secretariat of the Council of the EU, the European Commission, the LIBE Committee of the European Parliament, Europol, and the European Judicial Network. (CR)

➤eucrim ID=1201018

## Agency for Fundamental Rights (FRA)

### Report on Implementing the Racial Equality Directive

The Racial Equality Directive 2000/43/EC was adopted in 2000. It aimed at harmonising Member State's legislation regarding the prohibition of discrimination on the grounds of racial or ethnic origin. On 25 January 2012, the FRA published an extensive report on the progress made so far and the remaining challenges.

The key findings of the FRA's research include a low degree of awareness of the legal framework among racial minorities and social partners in some Member States, adversely affecting enforcement of the legislation and its deterrent effect. It is crucial for the successful implementation of this directive that victims are not reluctant to use judicial or quasi-judicial procedures or mediation. For this reason, the FRA suggests measures that widen access to complaint procedures such as:

- Broadening the mandate of equality bodies that are not currently competent to act in a quasi-judicial capacity;
- Relaxing the rules on legal standing for NGOs and other civil society organisations or allowing them to bring claims to court or conduct investigations without the victim's consent.

Further conclusions of the FRA's re-

## Report

### Annual Forum on Combating Corruption in the EU 2012

#### Protecting the European Union's Financial Interests: Internal and External Auditing

*ERA, Trier, 16-17 February 2012*

This forum was the sixth event in a row organised by ERA with the financial support of the European Commission/OLAF (under the Hercule II programme) on the anti-corruption policy of the EU. This year's forum aimed mainly at discussing the topic of auditing (internal and external).

As per previous forums, the first morning session was dedicated to an overview of the European and international legal framework to combat corruption and protect the EU's financial interests, highlighting recent issues and comparing the UN rules with European legislation.

The event included three dimensions:

- The EU dimension (with a representative of the European Commission, DG Home);
- The pan-European dimension (with a representative of the Council of Europe);
- The international dimension (with a representative of the Basel Institute in Switzerland).

Of particular interest was the EU perspective because, in 2011, the new "Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers' money" was launched. This document was amply debated during the entire forum.

The afternoon session focused on auditing. Different views were gathered. The European Commission, the Court of Auditors, the private sector, and national experts confronted the challenges posed by internal and external auditing.

The seminar was to be a discussion forum where international, European, and national experts could present the topic from their own points of view. Representatives from OLAF, the European Commission, the Court of Auditors as well as national experts (defence lawyers and the private sector were strongly represented) delivered presentations.

The audience consisted mainly of EU lawyers, prosecutors, and anti-fraud investigators.

The number of participants this year was also more than satisfactory. All in all, the 2012 forum brought together 90 legal practitioners and experts, some of them (approximately 20) from the national associations for the protection of the financial interests of the European Communities.

*Laviero Buono*

*Head of Section for European Public and Criminal Law, ERA*

search include the need for a preventive approach towards indirect discrimination and the improvement of collecting and analysing statistical data. (EDB)

➤eucrim ID=1201019

## Specific Areas of Crime / Substantive Criminal Law

### Corruption

#### Grand Corruption Report Reveals Involvement of EU Member States

On 1 November 2011, the Stolen Asset Recovery Initiative (StAR) of the World

Bank published a report called "The Puppet Masters" in which corporate and financial structures are exposed that assist in hiding money trails. According to StAR, two EU Member States, Cyprus and the UK (including its overseas territories), are among the leading countries harbouring corporations and trusts that are covers for corruption and money laundering.

StAR compiled a database of 150 cases of grand corruption involving more than US-\$1 million. Grand corruption was defined as corruption involving high-level public officials or persons with significant influence over political or bureaucratic processes. Only cases in which corporations were misused for

## Financial Market Integrity and Private Sector Corruption in the EU

London, 12 May 2012

This intensive seminar will provide legal practitioners with an analysis of recent developments at the EU level concerning insider trading and market manipulation. It will also discuss corruption and corporate practice in view of the recent amendments to UK legislation in this field.

On 20 October 2011, the European Commission presented its proposal for a directive on criminal sanctions for insider dealing and market manipulation. The UK has decided to opt out of the directive but to remain fully involved in the negotiation process. The directive is accompanied by a draft regulation on insider trading and market manipulation. The proposal extends the scope of existing EU legislation, as it also applies to derivatives on commodities and emission allowances.

These proposals follow a policy package launched by the Commission on the protection of the licit economy, with a strong focus on private sector corruption. In the UK, a new anti-bribery law has been in force since 1 July 2011, sanctioning the failure of commercial organisations to prevent bribery.

Key topics will be:

- Definitions of “inside information” and “market abuse”;
- Investigative and sanctioning powers of regulatory authorities;
- Financial penalties and other sanctions
- Criminal sanctions: judicial practice with regard to serious forms of market abuse.
- Corporate liability for criminal offences: judicial and corporate practice.

The conference will be held in English. It is being organised by ERA (Corina Badea) and BIICL (Justine Stefanelli).

*For further information, please contact Ms. Corina Badea, Course Director, Criminal Law, ERA, e-mail: cbadea@era.int*

the purpose of hiding the illegal scheme (corporate vehicles) were analysed.

The research revealed that the US is the world’s leading jurisdiction harbouring 102 corporate vehicles. The UK is listed as hosting 24 corporate vehicles, a number that reaches over 150 when the UK overseas territories (Virgin Islands, Cayman Islands, Bermuda, Jersey, and Isle of Man) are also included. Cyprus hosts no less than 11 companies misused for the purpose of grand corruption. Other countries high on the list are Panama, Liechtenstein, and China. (EDB)

►eucrim ID=1201020

## Market Abuse

### Questions Regarding Sanctions in Market Abuse Directive

During the Informal JHA Council of 26-27 January 2012, one of the agenda points was the fight against insider dealing and market abuse. On 20 October

2011, the Commission adopted proposals for a Regulation on insider dealing and market manipulation (market abuse), and for a Directive on criminal sanctions for insider dealing and market manipulation. The debate regarding the proposed Regulation introducing criminal sanctions for these crimes focused on the following three questions:

- Is it appropriate not to define a specific level of sanctions in the regulation?
- Would providing common minimum and maximum sanctions in a legal instrument of this kind have added value?
- In future criminal law directives, should defining specific levels of sanctions be the general rule, or should this be decided on a case-by-case basis?

In the meantime, the EP Committee on Economic and Monetary Affairs held a hearing on the market abuse regulation on 24 January 2012 and has scheduled voting on the text for 9 July 2012. (EDB)

►eucrim ID=1201021

## Counterfeiting & Piracy

### Anti-Counterfeiting Trade Agreement Signed

On 26 January 2012, the Commission and 22 Member States signed the Anti-Counterfeiting Trade Agreement (ACTA). According to the Commission, the fact that Cyprus, Estonia, Germany, the Netherlands, and Slovakia have not signed yet is only a procedural matter.

The rather controversial ACTA (see eucrim 2/2011, p. 58) aims at improving the fight against counterfeiting and piracy as well as the global enforcement of intellectual property rights. The multilateral agreement was negotiated between the EU and its Member States, Australia, Canada, Japan, the Republic of Korea, the United Mexican States, the Kingdom of Morocco, New Zealand, the Republic of Singapore, the Swiss Confederation, and the US.

The next step before the ACTA can enter into force is a debate in the EP. The provisional date for a plenary debate is 12 June 2012. Before taking a position, the EP is collecting the views of experts, representatives of civil society, and other concerned parties. (EDB)

►eucrim ID=1201022

### Successful Fight against Euro Coin Counterfeiting

On 27 January 2012, Commissioner for Taxation and Customs Union, Audit and Anti-Fraud Algirdas Šemeta announced that, in 2011, the number of counterfeit euro coins taken out of circulation had decreased by 15% in comparison to 2010. This is the result of preventive and detection measures on national and EU levels and the efforts of national agencies, OLAF, and other EU institutions.

With regard to euro banknotes, the European Central Bank announced that the number of counterfeit notes taken out of circulation in 2011 was 19.3% lower than in 2010.

Under the Pericles Programme run by the Commission (OLAF), 16 conferences and seminars were held in 2011

focusing on training, information exchange, and raising the awareness of euro counterfeiting among bank sector representatives as well as police and judicial authorities. On 19 December 2011, the Commission adopted a proposal for the new “Pericles 2020” programme that, upon its adoption, will run for seven years, starting January 2014, with a budget of €7.7 million. (EDB)

►eucrim ID=1201023

### ECJ on Counterfeit Goods in Transit in EU

On 1 December 2011, the ECJ’s General Court ruled on a question of interpretation referred to the Court by the Court of First Instance of Antwerp, Belgium and the British Court of Appeal in the joined cases C-446/09 and C-495/09. In both cases, goods coming from a third state were suspected of being counterfeit, thus infringing intellectual property rights that are protected by EU legislation. The goods that arrived in the Antwerp port, fake Philips shavers, were detained by Belgian customs authorities. Philips brought action against the Hong Kong manufacturer of the shavers. The goods that arrived at Heathrow Airport, fake Nokia phones, were not detained, as British customs authorities claimed that goods in transit from a third state to another third state cannot be considered counterfeit goods for the purposes of EU law. This decision was challenged in court by Nokia.

The preliminary question thus brought before the General Court is whether goods coming from a third state and in transit or stored in a customs warehouse on EU territory can be treated as counterfeit or pirated goods in accordance with EU law merely based on the fact that they are brought into the EU without being marketed or sold there.

The General Court ruled that goods for which it is not proven, after substantive examination, that they are intended to be sold on the EU market cannot be classified as counterfeit goods and pirated goods. It should be examined for

each particular case whether there is suspicion that the goods will be sold in the EU. (EDB)

►eucrim ID=1201024

## Organised Crime

### Three Reports from EU Counter-Terrorism Coordinator

During the JHA Council of 13-14 December 2011, the Council discussed three reports that were submitted by Counter-Terrorism Coordinator Gilles de Kerchove.

The first report concerns a discussion paper on EU Counter-Terrorism Strategy. This paper is a non-exhaustive selection of what the Counter-Terrorism Coordinator considers to be the key issues for future debate and is updated every six months.

■ Firstly, pointing out the fact that terrorism does not come from a single source, he stresses the importance of understanding the threat. This understanding encompasses internal as well as external aspects of terrorism in order to get a full picture of what we are facing, on the one hand, and clarity on what we are fighting, which is “violence in support of an extremist agenda of any kind,” on the other.

■ Improving coherence between internal and external policies – highlighting the significance of relationships with key third states – is identified as a second point of reflection for the Council.

■ As a third issue, the Counter-Terrorism Coordinator mentions security-related research carried out in order to provide a technical response to the threat of terrorism, e.g., EUROSUR (see pp. 3-4).

■ The fourth issue is improving transport security.

■ The fifth issue is the fight against terrorist financing.

The implementation of the revised strategy for terrorist financing was the subject of the second report submitted by the Counter-Terrorism Coordinator. In this report, recommendations have

now been formulated on how to implement the strategy that was approved by the Council in 2008 more effectively. The recommendations include monitoring of legal instruments, enhancing existing actions such as the freezing of assets, cooperation between Financial Intelligence Units of the Member States, and cooperation with the private sector.

The third report is the EU Action Plan on Combating Terrorism as presented on 9 December 2011. It offers an update of progress made in the past 12 months with regard to the four pillars of the EU Counter-Terrorism Strategy (prevent, protect, pursue, and respond) and international cooperation. Whereas the pillar “prevent” contains mostly research conducted on national and international levels, the protection of citizens and infrastructure falls within the “protect” pillar and includes, among many other initiatives, the new Frontex Regulation (see eucrim 4/2011, p. 141) and the Computer Emergency Pre-Configuration Response Teams (see eucrim 3/2011, p. 106). Under the heading “pursue”, progress regarding the EU-US terrorist finance tracking system (see eucrim 3/2011, p. 109) and transfer of PNR data (see eucrim 4/2011, pp. 147-148) are only two of the listed achievements. The rights of victims (see eucrim 4/2011, p. 147) and the EU Action Plan on chemical, biological, radiological, and nuclear threats and risks (see also eucrim 3/2011, p. 113) are among the points discussed under the pillar “respond”. Finally, the subtitle “external dimension” identifies key partners and relationships, e.g., cooperation with the US and the UN as well as the Western Balkans. (EDB)

►eucrim ID=1201025

### Sports Events and Terrorism

During the JHA Council of 13-14 December 2011, the Council adopted an annex to the handbook for police and security authorities dealing specifically with the protection of mass sports events in the event of terrorist attacks.

The handbook for police and security authorities stems from the need for increased cooperation and information exchange between authorities responsible for public security during large events with an international dimension in the Member States. It was published in the Official Journal of 22 December 2007 as an annex to a Council Recommendation. The Polish Presidency took the lead in proposing and discussing an annex that would fill a gap in the guidelines by introducing additional guidelines from a counter-terrorism perspective. Big public gatherings such as mass sports events can be vulnerable targets for terrorist attacks and therefore require special precautions and counter-measures to protect attendees and sports venues.

The Council approved the proposed annex that will be included in the next revision of the handbook. (EDB)

►eucrim ID=1201026

#### New Threats Identified by EMCDDA

The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA)

published its annual report on 15 November 2011. The main conclusion of the report concerns the relative stability of drug use in Europe, with a continuing decline in cannabis use among young people. However, the EMCDDA also reported on new threats emerging:

- The use of new substances;
- The growing market for synthetic drugs and “polydrug” use;
- The simultaneous use of multiple drugs.

Potential HIV infections among users who inject drugs are mentioned as another concern.

The report triggered a reaction from Commissioner for Home Affairs Cecilia Malmström who pointed out the continuing efforts of law enforcement in tracing and investigating organised criminal groups involved in drug trafficking. A key legal instrument in this battle, the confiscation and recovery of assets from serious crime, will be the subject of an upcoming proposal by the Commission. (EDB)

►eucrim ID=1201027

#### Commission Proposal on Use of Security Scanners at Airports

On 14 November 2011, the Commission adopted a proposal for an EU legal framework on security scanners (see eucrim 2/2010, p. 46). The proposal lays down strict rules for Member States and airports that wish to install the scanners, even though they are not required to install them. These rules include the prohibition to store, retain, or print images; information to passengers regarding the use of the scanner; and an opt-out for passengers who wish to undergo an alternative method of screening.

The proposal also ensures uniform application of security rules at all airports and provides safeguards to ensure compliance with fundamental rights and the protection of health. (EDB)

►eucrim ID=1201028

#### Cybercrime

##### ENISA Recommends Making Computer Emergency Response Teams More Effective

On 7 December 2011, ENISA published the final report of the “Proactive Detection of Network Security Incidents” study. The report identifies 16 technical and legal shortcomings that keep Computer Emergency Response Teams (CERTs) from functioning effectively in the fight against cyber-threats (see also eucrim 1/2011, pp. 10-12).

The report was based on a survey among 105 CERTs and a group of external experts. One significant conclusion was that CERTs are not using all sources available to them and not sharing relevant data with each other. Especially in the case of combating malware and malicious activities, there are crucial gaps in the functioning of CERTs. Furthermore, the report concludes that improvement is necessary as regards data quality, standardisation of formats, tools, resources, and skills. Legal issues include privacy and data protection legislation preventing information exchange between CERTs.

#### A New Set of Rules to Fight Cybercrime in the European Union

Università degli Studi di Milano-Bicocca, Milan, 24-25 May 2012

This seminar will provide a platform for debate on and assessment of how the (proposed) new EU Directive on attacks against information systems (“Directive on Cybercrime”) is addressing large-scale cyberattacks and other threats posed by methods such as botnets, i.e., networks of compromised computers infected by malicious software and remotely controlled by a “botmaster.”

Key topics will be:

- Modus procedendi and consequences in the real world of Stuxnet and other recent malware;
- 2001 Council of Europe Convention on Cybercrime;
- Activities of the United Nations;
- Ongoing cooperation with the Internet industry.

After the introductory lectures by national, European, and international experts, panels will discuss the concrete implementation of these measures at the domestic level as well as the differences in national legislative acts that can impede the effective fight against cybercrime.

The Internet industry will be represented by Facebook, Google, Microsoft, and Go Daddy.

The conference will be held in English.

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



In order to address these shortcomings, ENISA formulated 35 recommendations for data providers, data consumers and for national and EU policy makers. The recommendations for the national and EU levels focus on a better balance between privacy and security needs, common formats, integration of statistical incident data, and research into data leakage reporting. (EDB)

►eucrim ID=1201029

### First Transatlantic Readiness Test for Cyber-Attacks

After the EU Emissions Trading Scheme, the European Commission, the European External Action Service, and Sony Playstation had all been subject to cyber-attacks, the first transatlantic exercise in responding to such attacks was held in Brussels on 3 November 2011. The test was called “Cyber Atlantic 2011,” a proposal that grew out of the EU-US Working Group on Cyber-security and Cyber-crime (see eucrim 1/2011, pp. 10-12 and eucrim 4/2010, p. 136).

The readiness test was organised as a desktop exercise and lasted one full day. It joined experts from the US government and their counterparts from EU Member States in simulating how cyber-security authorities would cooperate internationally in response to attacks. It aimed at testing two hypothetical scenarios:

- A cyber-attack attempting to extract and publish sensitive online information from the EU’s national cyber-security agencies;
- An attack on supervisory control and data acquisition (SCADA) systems in EU power generation equipment.

From the EU side, a key role was played by ENISA that facilitated the test with technical contributions. The EU Computer Emergency Response Team participated as an observer (see also eucrim 3/2011, p. 106). More than 20 Member States were involved, 16 of them actively participating in the exercise. From the US side, the Department of Homeland Security was the leading partner.

The exercise draws on lessons learned in the first pan-European cyber-security exercise – called Cyber Europe 2010” – which was also facilitated by ENISA (see eucrim 1/2011, pp. 10-12). (EDB)

►eucrim ID=1201030

## Environmental Crime

### Poland Faces Financial Penalties for Not Implementing Air Quality and Marine Policy

On 24 November 2011, the Commission referred Poland to the Court of Justice after issuing several warnings regarding the lack of implementation of EU legislation.

The case concerns two Directives: the Ambient Air Quality Directive (2008/50/EC), which should have been in place since 11 June 2010 and the Marine Strategy Framework Directive (2008/56/EC) which should have been transposed by 15 July 2010 at the latest. The Commission requested penalty payments of €71,521 per day for the Ambient Air Quality Directive and €59,834 per day for the Marine Strategy Framework Directive. (EDB)

►eucrim ID=1201031

## Illegal Online Gambling

### EP Wants Commission to Take Action against Illegal Online Gambling

On 15 November 2011, the EP adopted a Resolution on online gambling in the Internal Market, urging the Commission to propose stronger cooperation among Member States in this area.

Online gambling is a rapidly developing business in the EU, with a value of more than €10 billion a year, which corresponds to 10% of all gambling in Europe. Nevertheless, national legislation varies considerably, ranging from open markets to bans on certain games. The EP proposes coordinating to a certain extent rules on online gambling, introducing a licensing model, and it

has asked the Commission to look at the possibility of blocking transactions between credit card issuers and blacklisted gambling providers.

In addition, the EP is concerned about the involvement of minors in online gambling. Restricted access to games by means of age verification or by restricting electronic payments are among the proposed measures. Finally, the Commission is asked to study the option of common standards for operators, with a shared European code of conduct on online gambling as a possible first step.

The EP Resolution follows the Green Paper on online gambling in the Internal Market of 24 March 2011. (EDB)

►eucrim ID=1201032

## Illegal Migration

### Illegal Migration and Human Trafficking among Priorities in Commission's Global Migration Approach

On 18 November 2011, the Commission published its Global Approach to Migration and Mobility (COM(2011) 743 final). This Communication outlines the future policy priorities for the EU institutions and should be seen in connection with the increased pressure on the external borders of the EU and the Schengen zone (see pp. 3-4). Four key priorities were identified:

- Organising and facilitating legal migration and mobility;
- Preventing and reducing irregular migration and trafficking in human beings;
- Promoting international protection and enhancing the external dimension of asylum policy;
- Maximising the development impact of migration and mobility.

The Communication aims to offer an overarching framework for the EU External Migration Policy, based on genuine partnership with third states and addressing migration and mobility issues in a comprehensive and balanced manner. (EDB)

►eucrim ID=1201033



## ECJ Says Prison Sentences Not Allowed During Return Procedure

On 6 December 2011, the ECJ ruled in case C-329/11 on the imposition of sentences during a return procedure in accordance with Directive 2008/115/EC (also known as the Return Directive).

The facts of this case are the following: An Armenian citizen illegally living in France since 2008 was required to leave the country in accordance with a prefectoral decision issued in 2009. Upon refusal, a deportation order was issued in June 2011. Following this order, he was taken into custody by French police and detained for illegally residing in France. This detention ordered by the *juge des libertés et de la détention* of the *Tribunal de grande instance de Créteil* was challenged before the *Cour d'Appel de Paris* and triggered the referral for a preliminary ruling to the ECJ.

The question referred to the ECJ is whether the Return Directive precludes national legislation to impose a prison sentence on an illegally residing third country national. The ECJ decided that the directive does not prevent national legislation from sanctioning the offence of illegal residence with imprisonment. Holding a person in detention in order to examine whether his stay is illegal or not is permitted and the same goes for measures – coercive measures or other measures – leading to the removal of the person concerned. The removal should be arranged as soon as possible; a prison sentence, however, would delay the removal and cannot be considered a justification for postponement of the removal.

Thus, the ECJ decided that the Return Directive does not preclude legislation permitting the imprisonment of a third-country national to whom the return procedure has been applied in accordance with the directive. It also does not preclude legislation permitting imprisonment if the person concerned is illegally staying in the territory with no justified ground for non-return. (EDB)

►eucrim ID=1201034

## Sexual Violence

### Directive on Fighting Sexual Exploitation of Children Enters into Force

On 15 November 2011, the Council adopted the Directive on combating the sexual abuse and sexual exploitation of children and child pornography, which entered into force after publication in the Official Journal on 17 December 2011 (see also eucrim 4/2011, p. 144 and eucrim 3/2011, pp. 107-108).

Approximately 20 relevant criminal offences are included in the directive, and they are punished with aggravated penalties. The main intention is to come down hard on offenders, dry up the supply of child pornography on the Internet, and fight sex tourism. Another aim is to prevent convicted offenders moving to another EU Member State from performing professional childcare activities. Therefore, in the future, Member States will be obliged to circulate data on disqualifications from their criminal records after having implemented the directive. Regarding the special need for protection of children, the directive additionally introduces measures to protect child victims during investigations and legal proceedings (see eucrim 3/2011, p. 107; eucrim 1/2011, p. 13). The new rules have to be transposed into national law by 18 December 2013. (CK)

►eucrim ID=1201035

## Procedural Criminal Law

### Procedural Safeguards

#### Right to Information Strengthened for Persons Suspected of Crime

On 16 November 2011, EU Member State representatives agreed on a draft directive that aims to ensure defendants' rights in criminal proceedings wherever they are in the EU. Following the directive's approval by the EP in

its vote of 13 December 2011, suspects soon will receive *inter alia* a so-called "Letter of Rights" informing them about their basic rights in criminal proceedings (see eucrim 1/2011, p. 13). Enforcing the right to information is one of several fair trial measures (see eucrim 4/2009, p. 134; eucrim 3/2011, p. 108 with further references) setting common EU standards in criminal cases and boosting confidence in the EU's single area of justice. Under the new directive, which has to be transposed into national law within two years, suspects must be informed of their rights in a language they understand. Suspects or accused persons have to at least be orally informed of the following rights before their first police interview:

- The right of access to a lawyer;
- Any entitlement to legal advice free of charge and the conditions for obtaining it;
- The right to be informed of the accusation;
- The right to interpretation and translation;
- The right to remain silent.

In case of arrest or detention, authorities are required to hand out a written "Letter of Rights" with information in addition to the rights mentioned above:

- The right to access the materials of the case;
- The right to inform consular authorities and one other person (e.g., a family member or employer);
- The right of access to urgent medical assistance;
- The number of hours/days he may be deprived of liberty before being brought before a judicial authority;
- How to challenge the lawfulness of the arrest, obtain a review of the detention, or ask for provisional release.

Currently, the letter is available in 23 EU languages. Member States are encouraged to add additional useful information. EU Justice Commissioner Viviane Reding called the developments "an important milestone in ensuring suspects to enjoy fairer trial rights in criminal proceedings". The Council's final

approval is the last step before the directive can enter into force and, is expected soon.

The United Kingdom and Ireland decided to take part in the adoption and application of this directive. Denmark is the only State not participating. (CK)

►eucrim ID=1201036

## Data Protection

### Proposal for Reviewed Data Protection Directive and Regulation

As announced earlier, on 25 January 2012, the Commission presented two new proposals for a revised data protection legal framework. This first concerns the proposed Regulation on the protection of individuals with regard to the processing of personal data and on the free movement of such data (also known as the General Data Protection Regulation). This regulation is intended to replace Directive 95/46/EC, the current legal instrument on data protection in the former first pillar.

Secondly, it concerns a new legal instrument for data protection in the former third pillar: the proposed Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences, or the execution of criminal penalties, and the free movement of such data. This directive will replace Framework Decision 2008/977/JHA.

In order to adapt the legal framework on data protection to the emergence of new technologies affecting the way in which public authorities, private companies, and also individuals use, process, and make available personal data, the Commission has been preparing this revision since 2009. Preparations included two rounds of public consultations, targeted consultations with key stakeholders, a Eurobarometer survey (see eucrim 3/2011, pp. 110-111), and a number of studies as well as an impact assessment.

In addition, the Article 29 Working Party and the European Data Protection Supervisor issued their opinions regarding the review.

With regard to the proposed Directive on data protection in criminal matters, the following new features should be highlighted:

- Firstly, the scope of the directive will be wider than the scope of Framework Decision 2008/977/JHA. Whereas the Framework Decision was not applicable to purely domestic data processing, the proposed directive will be applicable to all processing activities carried out by “competent authorities,” including cross-border processing of data and processing of domestically gathered data.

- The concept of “competent authorities” is one of the new definitions that has been introduced. The other new definitions include “personal data breach,” “genetic data,” and “biometric data.” This is the second innovation in the legal instrument.

- Thirdly, additional principles have now been explicitly included in the rules on data protection: the transparency principle, the data minimisation principle, and the accountability of the data controller.

- Fourthly, as was already recommended by the Council of Europe in its Recommendation of 1987 (R (87)15), different degrees of accuracy and reliability of data as well as the distinction between different categories of data subject (accused, victim, and witness) have now been explicitly incorporated in the proposed directive.

- Fifthly, with regard to the transfer of personal data to third states, the proposed directive improves the mechanism for assessing a third state’s level of data protection.

The proposed directive and the proposed regulation were accompanied by the Commission’s Communication “Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21st Century” (COM(2012) 9 final). Besides the Eu-

ropean Commission, there are two other institutions that are momentarily reviewing their data protection standards:

- The Council of Europe launched a revision of the 1981 Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data in January 2012;

- The Organisation for Economic Co-operation and Development (OECD) published the Terms of Reference for reviewing its Guidelines Governing the Protection of Privacy and Transborder Flows of Personal Data on 31 October 2011. (EDB)

►eucrim ID=1201037

### Financial Impact of the Use of PNR Data for Law Enforcement Purposes

During the Informal JHA Council of 26-27 January 2012, discussions were held on the financial impact of the proposed Directive on the use of PNR data for the prevention, detection, investigation, and prosecution of terrorist offences and serious crime (see eucrim 2/2011, p. 62). National implementation of this directive means providing additional data security and installing the so-called push-system that allows data to be sent in advance rather than having the requested party retrieve them. This implies that the Member States would be responsible for bearing the costs. The Commission as well as the Legal Service of the Council have expressed serious budgetary and legal concerns in regard to inserting explicit provisions on costs into the proposed PNR Directive.

Since the Internal Security Fund (see pp. 2-3) is being set up to provide funds for police cooperation, preventing and combating crime, and crisis management, one of the questions is whether the use of PNR data in accordance with the proposed directive could be financially covered by this Fund. Moreover, the Council reminded the Commission of its previous commitment to providing financial support for the EU PNR system. (EDB)

►eucrim ID=1201038

## EU Law Prohibits Mandatory Filtering System as Prevention for Illegal Downloading

The ECJ issued a preliminary ruling on a question regarding the proportionality of measures against illegal downloading on 24 November 2011. The case (C-70/10) concerns the Belgian based provider Scarlet Extended SA, an Internet service provider that allowed customers to download music through peer-to-peer networks.

Scarlet was sued by the *Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, a company responsible for authorising the use of music by third persons, since no authorisation had been granted and no royalties paid for these downloads. The Brussels Court of First Instance ordered Scarlet to make it impossible for its customers to send or receive music from the repertoire of SABAM on threat of a periodic penalty. This implies that Scarlet needs to monitor communications on its network, something that is prohibited not only by Directive 2000/31/EC on e-commerce but also by fundamental rights such as the right to protection of personal data. Scarlet appealed to the Brussels Court of Appeal using this argument, upon which the Court of Appeal turned to the ECJ. The question referred to the ECJ was whether EU law precludes Member States from authorising a national judge to sanction an Internet service provider by ordering it to install – as a preventive measure, exclusively at its expense, and for an unlimited period – a system for filtering all electronic communications in order to identify illegal file downloads.

The ECJ states in its argumentation that general monitoring of communication is indeed incompatible with the Directive on e-commerce and with fundamental rights, including the right to data protection, as IP-addresses are considered to be personal data, and freedom of information. The effects of the sanction would thus not be limited to Scarlet but would apply indiscriminately to

all its customers for an unlimited time. According to the ECJ, a national judge would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data, and the freedom to receive or impart information, on the other. (EDB)

►eucrim ID=1201039

## Victim Protection

### General Approach on Victim's Rights Directive Adopted

During the JHA Council of 13-14 December 2011, the Council adopted a general approach regarding the proposed Directive establishing minimum standards on the rights, support and protection of victims of crime (see also eucrim 4/2011, p. 147).

The Ministers were pleased that the text managed to strike a balance between the needs of victims of crime and the necessity to maintain smooth proceedings, taking into consideration the financial consequences for the Member States.

Ireland and the UK are taking part in the adoption of the proposed directive. Denmark decided not to use its opt-in. However, since Denmark has the Presidency of the European Council in the first half of 2012, it will now start negotiations with the EP on the text of the proposed directive. (EDB)

►eucrim ID=1201040

### Directive on European Protection Order Enters into Force

On 13 December 2011, the EP gave the final green light to the adoption of the Directive on the European Protection Order (EPO). It entered into force 20 days after its publication in the Official Journal on 21 December 2011.

Originally an initiative on the part of Belgium, Bulgaria, Estonia, Spain, France, Italy, Hungary, Poland, Portugal, Romania, Finland, and Sweden, the EPO aims to improve the protection

granted to victims of crime, or possible victims of crime, who move between the Member States (see also eucrim 4/2011, p. 148 and the references there).

The deadline for Member States to implement the directive is 11 January 2015. (EDB)

►eucrim ID=1201041

## Freezing of Assets

### Council Increases Asset Freezing Measures on Syria

In view of the aggravated situation in Syria, the Council decided on 14 November 2011 to again raise the number of persons targeted by an asset freeze and travel ban (see also eucrim 4/2011, p. 148). 18 more persons responsible for human rights violations have been added to the list, bringing the total number of persons subject to these measures to 74. Additionally, 19 entities are currently subject to an asset freeze.

The Council also took other measures by prohibiting disbursements by the European Investment Bank connected to existing loan agreements between Syria and the bank. The continuation of technical assistance contracts for sovereign projects in Syria by the European Investment Bank was stopped as well. (EDB)

►eucrim ID=1201042

## Cooperation

### Police Cooperation

#### Cooperation with Third States for Sports Events

The JHA Council of 13-14 December 2011 adopted conclusions on strengthening police cooperation with non-EU countries in the area of sports events safety and security (see also the new annex to the handbook for police and security authorities dealing specifically with

the protection of mass sports events in the event of terrorist attacks, p. 9-10).

Considering the high security risks that mass sports events attracting an international crowd create for police authorities, the Council drafted conclusions regarding cooperation with third states. Besides improving the information exchange with third states, also using the channels that Interpol and Europol have installed, the conclusions also include assessing existing legal instruments in this field, evaluating the National Football Information Points, and promoting the establishment of such Information Points in states where they do not yet exist. With two important events coming up (European Football Championship UEFA EURO 2012 and the Olympic Games 2012), the lessons to be learnt from the preparation and organisation of these events are paramount. (EDB)

➤eucrim ID=1201043

## European Investigation Order

### EIO – State of Play

At its meeting on 13-14 December 2011, the JHA Council agreed on a general approach to the European Investigation Order (EIO) in criminal matters, after having reached a consensus on the main principals in June 2011 (see eucrim 3/2011, p. 113). The Ministers pointed out that they made a step forward by substituting the current patchwork of legal provisions in this area. The new instrument aims to improve legal cooperation on investigations, thus making them faster and more efficient.

The Danish Presidency now can start negotiations with the EP. The EP Committee on Civil Liberties presented its draft report containing amendments to the text on 23 January 2012.

The United Kingdom has indicated its wish to participate in the EIO, while Ireland and Denmark have declined. (CK)

➤eucrim ID=1201044

## Transfer of Sentenced Persons

### Implementing the Framework Decision on Transfer of Sentenced Persons

5 December 2011 was the deadline for implementing Framework Decision 2008/908/JHA on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the EU. The Danish Presidency wishes to initiate a debate on the implementation of this Framework Decision. During the Informal JHA Council of 26-27 January 2012, the Presidency asked the Council whether additional measures are necessary to ensure successful implementation or whether setting up procedures or structures could help implement the Framework Decision in practice. Ultimately, the Presidency opened the debate on the need for EU measures on social rehabilitation in prisons. (EDB)

➤eucrim ID=1201045

## Criminal Records

### ECRIS – Manual and Technical Specifications

On 8 December 2011, the Working Party on cooperation in criminal matters reported to the Council on progress made with regard to the European Criminal Records Information System (ECRIS). Technical progress in 2011 included:

- Setting up logging systems and procedures;
- Adopting technical specifications of the exchange;
- Establishing procedures verifying the conformity of the national software applications with the technical specifications.

Additionally, a manual was written for practitioners who will be working with ECRIS. The non-binding manual was accepted in a silent procedure at the beginning of December. (EDB)

➤eucrim ID=1201046

## Law Enforcement Cooperation

### Strategy for Customs Law Enforcement Cooperation

During the JHA Council of 13-14 December 2011, the Council adopted a Resolution on the future of customs law enforcement cooperation.

A customs representatives meeting held on 22 November 2011 had decided on the draft resolution presented to the Council. The resolution contains a strategy for further cooperation between customs authorities and law enforcement authorities. The strategy aims to determine the measures that need to be undertaken in order to enhance this cooperation and strengthen the role of customs as the leading authority for controlling the movement of goods within the area of freedom, security and justice.

The resolution replaces the Resolution of 23 October 2009 on a reinforced strategy for customs cooperation. (EDB)

➤eucrim ID=1201047

### Europol and Law Enforcement Dismantle Large Synthetic Drugs Network

On 12 January 2012, Europol announced a successful international cooperation against a large network of synthetic drug producers and traffickers, involving *inter alia* Sweden, Germany, the Netherlands, and Bulgaria.

The extensive investigation started when Swedish authorities discovered large amounts of amphetamines being trafficked into Sweden as part of a larger operation. This led to Europol launching “Operation Fire” in March 2011, based on intelligence and links identified with several states. Europol’s assistance consisted of exchanging criminal intelligence and coordination of the operation, while Sweden and Germany conducted their own investigations into the network. The international cooperation finally resulted in the seizure of 30 kg of amphetamines in Sweden and the arrest of a total of six suspects in Sweden, Germany, and the Netherlands. In Bul-



garia, 75 litres of amphetamine base and large quantities of other chemicals used to produce amphetamines were seized as well as machines used for their production, firearms, and explosives. Furthermore, three illegal labs were dismantled and three persons arrested.

Commissioner of Home Affairs Ce-

cilia Malmström reacted to the results of this international investigation by stating that “This joint operation goes to show just how immensely important it is for national law enforcement and Europol to effectively exchange information about dangerous criminal activities.” (EDB)

►eucrim ID=1201048

ment. Failing to satisfy basic application conditions is why the vast majority of applications were rejected. Therefore, the ECtHR has launched a short video on the criteria for admissibility, which is aimed at the general public and is available in English and French. It sets out the main conditions required for an application to the Court.

The Court encourages use of this video for any initiatives such as awareness-raising programmes on human rights or education courses.

►eucrim ID=1201051



## Council of Europe\*

Reported by Dr. András Csúri

### Foundations

#### Reform of the European Court of Human Rights

##### New British Court President takes Office

On 4 November 2011, the new President of the ECtHR, Sir Nicolas Bratza (see eucrim 3/2011 p. 115), took office. He is the third British President in the history of the Court.

►eucrim ID=1201049

##### Court Issues Annual Table of Violations and Survey of Activities

On 26 January 2012, the President of the Court held its annual press conference in Strasbourg emphasising that, even in the current economic climate, human rights and the rule of law and justice are shared responsibilities of the European governments that signed the ECHR. However, the huge amount of repeat cases pending before the Court indicates structural problems in the respective countries. The President further reminded the governments that any criticism of the Court

should rely on reasoned arguments. The President underlined that the Court's attempts to enhance its effectiveness, *inter alia* by means of the pilot judgement procedure (see eucrim 4/2009, p. 147 and 4/2010, p. 149), the new prioritisation policy (see eucrim 4/2010, pp. 148-149), and the implementation of Protocol No. 14 (see eucrim 1/2009, pp. 25-26 and 4/2009, pp. 147-148), all resulted in a spectacular 30% increase in applications disposed of under the Single Judge filtering mechanism (see eucrim 3/2011, p. 116).

At the press conference, the Court issued the annual table of violations, which revealed that, in 2011, Turkey had the highest number of judgements (at least one violation of the Convention recorded against it), closely followed by Russia, Ukraine, Greece, Romania, and Poland. The Court also issued its Survey of Activities for 2011.

►eucrim ID=1201050

#### Court Launches Video on Admissibility Conditions

In 2011, fewer than 3% of the applications to the ECtHR resulted in a judge-

#### Fast Track for Complaints of Former Ukrainian Prime Minister Tymoshenko

On 14 December 2011, the ECtHR decided to fast-track an application from former Ukrainian Prime Minister Yuliya Tymoshenko regarding her detention and in view of the serious and sensitive nature of the allegations raised by her. Ms. Tymoshenko, the leader of the main opposition party in Ukraine, was the Prime Minister of Ukraine. She was convicted for allegedly making an illegal order to sign a contract concerning gas imports on 11 October 2011 and sentenced *inter alia* to seven years of imprisonment.

She alleges the following in her August 2011 application:

- Her criminal prosecution and detention were politically motivated;
- There has been no judicial review of the lawfulness of her detention in Kiev;
- Her detention conditions are inadequate, with no medical care provided for her health problems.

She relies principally on Arts. 3, 5, and 18 of the ECHR concerning prohibition of degrading treatment or punishment, the right to liberty and security, and the limitation on use of restrictions on rights, respectively.

►eucrim ID=1201052

\* If not stated otherwise, the news reported in the following sections cover the period November 2011–February 2012.



## Other Human Rights Issues

### Human Rights Commissioner Publishes Annual Activity Report 2011

On 26 January 2012, Thomas Hammarberg, CoE Commissioner for Human Rights (hereinafter: the Commissioner), published the last annual report of his mandate. It gives an overview *inter alia* on the central themes of the Commissioner's work throughout 2011 (the rule of law and impunity, media freedom, human rights of Romani people, human rights in relation to migration, and the human rights of persons with disabilities), the country visits accomplished, and his work related to European and international bodies. The report requests stronger political action regarding the structural dysfunction of the justice systems of several Member States, in which corruption and political interference are still flagrantly present. The report emphasises that court proceedings are often excessively lengthy and pre-trial detention is often used extensively. As a further key point, the report welcomes the strengthening of quasi-judicial mechanisms such as ombudsmen and equality bodies but notes, however, that in several cases their budgets were cut during the economic crisis. Ultimately, the Commissioner once again points out that freedom of the media, which is essential to democracy and human rights, is being undermined in a number of European states by different forms of control over and pressure on their variety and content. Criminalisation of defamation, law-induced censorship, politicisation of the allocation of transmission frequencies and monopoly tendencies undermine pluralism in the media landscape.

►eucrim ID=1201053

### Public Service Media Needed to Strengthen Pluralism

The Commissioner published several comments regarding the state of the media in Europe (see eucrim 4/2011 p. 152). Most recently, on 6 December and 8 November 2011, he addressed

the media's important role in the protection of human rights (exposure of violations) but also pointed out that this power can be misused to the extent that the functioning of democracy is threatened. Therefore, he called for genuine professionalism and ethical journalism. Furthermore, he highlighted that threats to media freedom and media pluralism are twofold. On the one hand, one tendency is the attempt of state authorities to dominate the media market. On the other hand, commercialisation and the monopolistic tendencies of the media are good reasons to strengthen the public service media and thus protect freedom of expression.

►eucrim ID=1201054

## Specific Areas of Crime

### Corruption

#### GRECO Calls US and Austria to Ratify Criminal Law Convention on Corruption

GRECO called on Austria and the USA on 13 January and 26 January 2012, respectively, to ratify the Criminal Law Convention on Corruption and to fully incorporate it into their national law. The report urges the USA to do so even if its respective legislation and practice provides for a high degree of "functional consistency" with the Convention.

In respect of Austria, GRECO states that, while the criminal legislation in this field is quite developed, it does not adequately criminalise offences such as the bribery of members of elected public assemblies or the bribery of senior public officials. Moreover, Austrian top executives are usually not subject to such regulations. In addition, the legal framework on the financing of political parties, which dates back to 1975, does not regulate private donations, and Austria has no public supervision mechanism, even though political financing is seen as a particularly controversial area.

►eucrim ID=1201055

## Money Laundering

### MONEYVAL: Report on Fourth Assessment Visit to Cyprus

On 8 December 2011, MONEYVAL published its fourth round evaluation report on Cyprus. By the enactment of legislation and sector-specific norms since the previous evaluation (see eucrim 2/2011, p. 72), Cyprus has addressed most of the concerns regarding its AML/CTF regimes, which are now largely in line with FATF standards. Money laundering convictions have increased and case law on freezing and confiscation has been established. The financial sector appears to be adequately monitored. The report states, however, that a noticeable decrease in on-site visits in some parts of the financial sector is of concern. Another concern is that real estate agents and dealers in precious metals and stones may not be fully implementing the AML requirements. The legal framework for mutual legal assistance was assessed as being sound. Nonetheless, the report recommends putting into place a system to monitor the quality and speed of executing international requests.

►eucrim ID=1201056

### MONEYVAL: Report on Fourth Assessment Visit to Slovak Republic

On 23 November 2011, MONEYVAL (Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism) published the report on its fourth assessment visit to the Slovak Republic. The fourth cycle of assessments is, in general, a follow-up round in which important FATF recommendations are reassessed as well as those findings for which the state received non-compliant or partially compliant ratings in its third round report. The report summarises, describes, and analyses the major AML/CFT measures in place at the time of the fourth on-site visit (October 2010). It offers recommendations on how to strengthen certain aspects of the AML/CFT monitoring system.

The report welcomed the adoption of the new Act on the Prevention of Legalisation of Proceeds of Criminal Activity and Terrorist Financing, which implements the 3rd EU Directive and brought the Slovak AML/CTF system mostly in line with FATF preventive standards. The act set out a clear legal basis for reporting duties in cases of suspected TF. Despite the emerging legal framework, the report documents a lack of prosecutions and convictions for money laundering in relation to major proceeds generating cases. Therefore, the report recommends that Slovak authorities analyse the discrepancy between the extent of organised crime and the type/quality of money laundering cases being brought forward. Furthermore, the Financial Intelligence Unit (FIU) of the Slovak Republic was assessed as being dedicated and professional. However, the task of analysing information on all criminal offences equally does not allow it to concentrate efficiently and sufficiently on AML and CTF.

The supervisory system works properly and the sanctions provided are broad and effective. The reporting regime significantly improved primarily in the banking and insurance sectors, but a lack of understanding of this obligation remains in other financial institutions.

►eucrim ID=1201057

#### **MONEYVAL: Report on Fourth Assessment Visit to San Marino**

On 24 November 2011, MONEYVAL published its fourth round evaluation report on San Marino. The report states that the country made substantial progress in strengthening the AML/CTF regime by largely implementing MONEYVAL's third round recommendations. This was mainly due to the adoption of a large number of legislative, regulatory, and institutional measures. Increasing awareness of money laundering is indicated by the increasing number of investigations and convictions. Additionally, helpful case law on provisional measures and confiscation was established. The

report states, however, that the financing of terrorism offences is not fully in line with international standards. The current central topic of the country's AML/CTF efforts lies in the establishment of a Financial Intelligence Unit that is, however, entrusted with additional functions and overused by other authorities. These factors seriously weaken the unit's effectiveness. The preventive regime was strengthened by setting out a comprehensive framework; however, it still needs to be brought more in line with FATF standards. MONEYVAL recommends the strengthening of supervision, on one hand, and the effective exchange of information within mutual legal assistance instruments, on the other.

►eucrim ID=1201058

### **Procedural Criminal Law**

#### **CEPEJ: 18th Plenary Meeting**

During its 18th plenary meeting from 7 to 8 December 2011 in Strasbourg, the European Commission for the Efficiency of Justice (CEPEJ) reviewed the evaluation process of judicial systems in view of the preparation of its next report (expected to be released by September 2012). In addition, the work underway in the field of time management in courts, the quality of justice, and the implementation of training programmes proposed to the courts were assessed. CEPEJ also adopted its terms of reference for the two coming years.

►eucrim ID=1201059

#### **CEPEJ Annual Activity Programme**

On 8 December 2011, CEPEJ published its activity report for 2012-2013, which is designed around the six areas of responsibility it is vested with:

1. Developing tools for analysing the functioning of justice and ensuring that public judicial policies are geared towards greater efficiency and quality. The specific objectives in this field are

to have detailed knowledge of European judicial systems and the evolution of the day-to-day functioning of the court systems in order to facilitate the reform process in the Member States and to strengthen mutual confidence in the efficiency and quality of the justice systems of EU Member States;

2. Obtaining in-depth knowledge of the timeframes for proceedings in order to develop tools to support the courts in achieving optimum and foreseeable judicial timeframes;

3. Promoting the quality of judicial systems and courts in order to measure the perception that users have of their judicial system and to develop tools to assess the performance of regional court organisation;

4. Developing targeted cooperation at the request of one or more states in order to provide guidance to improve the organisation of judicial systems and courts;

5. Strengthening relations with users of the justice system as well as national and international bodies in order to bring the justice system closer to the European citizens, to provide a forum for the legal community, and to promote relations with other national and international bodies competent in the field of justice;

6. Promoting among the stakeholders in the Member States the implementation of the measures and the use of the tools designed by CEPEJ in order to ensure sound knowledge of CEPEJ's measures and tools on the part of stakeholders in the central administrations and among the justice professionals.

►eucrim ID=1201060

#### **Study on Appeal Proceedings and Length of Proceedings at Supreme Courts**

An in-depth analysis on the length of proceedings on appeal and at the Supreme Court level was published on the basis of information collected in the 2008-2010 CEPEJ evaluation cycle. As one of the priorities of CEPEJ and CoE, the study aimed to help optimise and

foresee the length of judicial proceedings in Europe.

➤eucrim ID=1201061

### CEPEJ Guide for Implementing SATURN Time Management Tools

The guide was drawn up by the CEPEJ SATURN Centre for judicial time management and developed on the basis of a preliminary study of seven pilot courts. The guide intends to help courts and legal professionals to implement the tools developed by CEPEJ in practice in order to improve judicial time management. It may be used within the framework of training programmes offered to voluntary court staff by CEPEJ. The CEPEJ Secretariat may be contacted to this end.

➤eucrim ID=1201062

## Legislation

### GRETA: Twelfth Meeting

The Group of Experts on Action against Trafficking in Human Beings (GRETA) held its 12th meeting on 6-9 December 2011 in Strasbourg. At the meeting, GRETA adopted its final evaluation reports on Georgia and Moldova as amended in the light of the comments received from the respective authorities. Additionally, GRETA expressed its concerns over the fact that Danish authorities have not submitted comments on GRETA's final report on the country. Denmark received an exceptional extension of the deadline but the report will be published without the Danish comments if the extended deadline is missed. In order to ensure that country evaluations are completed expeditiously, the meeting decided to shorten the time period for parties to respond to GRETA's questionnaire from six to four months.

➤eucrim ID=1201063

Council of Europe Treaty	State	Date of ratification (r), signature (s) or acceptance of the provisional application (a)
Agreement on Illicit Traffic by Sea, implementing Article 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (ETS No. 156)	Netherlands	22 December 2011 (s)
Convention on Cybercrime (ETS No. 185)	Switzerland	21 September 2011 (r)
Protocol No.13 to the Convention for the Protection of Human Rights and Fundamental Freedoms, concerning the abolition of the death penalty in all circumstances (ETS No. 187)	Latvia	26 January 2012 (r)
Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189)	Italy	09 November 2011 (s)
Additional Protocol to the Criminal Law Convention (ETS No. 191)	Poland	07 October 2011 (s)
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)	Croatia Bosnia and Herzegovina Turkey Bulgaria	21 September 2011 (r) 12 October 2011 (s) 07 December 2011 (r) 15 December 2011 (r)
Convention on preventing and combating violence against women and domestic violence (CETS No. 210)	Ukraine Albania	07 November 2011 (s) 19 December 2011 (s)
Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211)	Austria Cyprus Finland France Germany Iceland Israel Italy Portugal Russia Switzerland Ukraine Liechtenstein Luxembourg Denmark	28 October 2011 (s) 28 October 2011 (s) 28 October 2011 (s) 28 October 2011 (s) 28 October 2011 (s) 28 October 2011 (s) 28 October 2011 (s) 28 October 2011 (s) 28 October 2011 (s) 28 October 2011 (s) 28 October 2011 (s) 28 October 2011 (s) 04 November 2011 (s) 22 December 2011 (s) 12 January 2012 (s)

➤eucrim ID=1201064

# Monitoring International Instruments against Corruption

## Any Need for Better Coordination...?

Lorenzo Salazar

### I. Introduction

Most of the international instruments adopted in past decades in the criminal law field are not limited to introducing new incriminations in order to approximate national laws or more sophisticated mechanisms of cooperation among judicial authorities. Increasingly, they also accompany the new legal framework with mechanisms aimed at monitoring the effective implementation of an instrument by its state parties, to assess practical experiences and pave the way for possible integration or future modifications.

The characteristics of these monitoring mechanisms may vary but, curiously, the reference model does not seem to stem from an international convention but rather from a non-binding format, e.g., the 40 Recommendations adopted by the Financial Action Task Force (FATF) in the field of money laundering in 1990. At the time of the adoption of the Recommendations (later revised in 1996, in 2003, and currently under new scrutiny), FATF also decided to monitor the progress made by member governments in their implementation by means of a sophisticated multilateral peer review: the mutual evaluation program.

Building on the FATF experience, mutual evaluation models have developed particularly, though not exclusively, in the field of anti-money laundering and corruption. They have been adopted by a number of international organisations such as the Organisation for Economic Cooperation and Development (OECD), the Council of Europe (CoE), and also the European Union (EU).

### II. Legal Framework

A short review of the more relevant instruments adopted at the international level to fight corruption is useful for a better understanding of the matter. The Inter-American Convention, considered the “pioneer” of legally binding instruments against corruption and adopted by the Organisation of American States (OAS) on 29 March 1996, serves as the starting point.

It was soon followed by the considerably more sophisticated and comprehensive EU Convention against corruption involving officials of the European Communities or officials of Member States of the European Union adopted on 26 May 1997, which covers active and passive corruption at the internal level within Member States as well as at the EU level. The Convention had been “announced” some months before, on 27 September 1996, by the 1st Protocol to the Convention on the protection of financial interests of the European Communities, dealing with the same corruption behaviour but only if and when related to European fraud. Just a few months after this major EU achievement, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions was adopted on 21 November 1997; in line with the mission of the OECD, the Convention is limited to active bribery of foreign public officials committed in order to obtain or retain business or other improper advantage in the conduct of international business.

In 1999, it was the CoE’s turn to adopt its Instruments against Corruption, a criminal convention and a civil one (respectively adopted on 27 January and 4 November), dealing with active and passive corruption, in the more general terms, and covering national and international aspects. Finally, the United Nations Convention against Corruption (UNCAC) was adopted in Merida, Mexico on 31 October 2003; this global instrument symbolically concludes, at the global level, this phase of great impetus in the creation of legislative tools to fight corruption.

Beyond the establishment of legal instruments, different actors in the international community are also tackling the problem of corruption at different levels. While the World Bank and the International Monetary Fund (IMF) have already been active on this issue for many years, the interest of the G-20 is more recent and culminated with the endorsement of an anti-corruption action plan at the Seoul Summit in November 2010.<sup>1</sup> The G-20 has also called upon FATF to address the problem of corruption from the specific angle of combating money laundering and terrorist financing.

### III. Monitoring Mechanisms in Place

With the exception of the EU Convention, all the legal instruments mentioned above have been accompanied by a monitoring and evaluation mechanism.

#### 1. The OECD Working Group on Bribery

It does not come as a surprise – taking into account the precedent of FATF being active within the framework of the same organisation – that the OECD Working Group on Bribery in International Business Transactions (WGB) appears to be the oldest and most experimented monitoring body in the field of anti-corruption.<sup>2</sup> It is the 1997 Convention itself (Art. 12, “Monitoring and Follow-up”), which provides that the parties “shall co-operate in carrying out a programme of systematic follow-up to monitor and promote the full implementation” of the Convention within the framework of the OECD Working Group on Bribery in International Business Transactions, which pre-existed the Convention itself and negotiated the instrument until its adoption.

Nowadays, the WGB, which is composed of representatives from the 38 state parties to the Convention, is responsible for monitoring the implementation and enforcement not only of the OECD Anti-Bribery Convention but also of the recently adopted 2009 Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation) and related instruments. Observers (EU, World Bank) and ad hoc observers (states that are not party to the Convention) are also invited to attend the meetings of the WGB. The evaluation procedures are conducted by collecting the information through questionnaires, on-site country visits (during which evaluation teams to ask questions in discussions with domestic representatives of public authorities, civil society, and other relevant stakeholders), and, ultimately, draft evaluation reports. These reports, which are examined, discussed, and adopted by the Plenary of the Working Group, contain recommendations addressed to the evaluated countries in order to improve their level of compliance with the Convention. Measures adopted to implement recommendations are subsequently assessed in a separate follow-up procedure.

The WGB is actually conducting its 3rd round of evaluations (Phase 1 was dedicated to evaluation of the adequacy of a country’s legislation to implement the Convention, *Phase 2* assessed whether a country was applying this legislation effectively), which focuses on the issue of enforcement of the Convention, the 2009 Anti-Bribery Recommendation, and outstanding recommendations stemming from Phase 2.

The activities of the WGB are driven by the Management Group (MG), which helps prepare the ground for discussions, makes proposals for the Programme of Work and Budget, and helps structure plenary discussions. Membership in the MG consists of up to eight WGB experts, including the Chair and Vice Chair, and should comprise differences in legal systems and adequate geographical representation.

OECD member countries and countries that are party to the Convention are also called upon to volunteer as “regional mentors” to non-members to the Convention in their region (e.g., Japan for the Asia-Pacific region; Turkey for countries in Central Asia or the Middle East, etc.).

#### 2. The Group of States against Corruption (GRECO)

The monitoring and evaluation mechanism established by the CoE (Groupe d’Etats contre la Corruption – GRECO) was created in 1999, parallel to the adoption of the two Conventions against corruption, in order to monitor states’ compliance with the organisation’s anti-corruption standards. As also stated by the European Commission, GRECO represents

the most inclusive existing anti-corruption monitoring mechanism at European level, with participation of all EU Member States.<sup>3</sup>

Unlike the WGB, the establishment of GRECO was not provided by the Conventions but decided by means of a separate instrument called “enlarged partial agreement”; this means that its membership is not limited to Council of Europe Member States but open to any state that took part in the elaboration of the enlarged partial agreement or which becomes a party to one of the anti-corruption Conventions; at present, GRECO comprises 49 Member States (48 states are members of the Council of Europe and the United States of America).

Notwithstanding the fact that the activities of the Group are focused on the mutual evaluation process, GRECO also provides a forum for the sharing of best practice in the prevention, detection of, and fight against corruption. As is the case of the WGB of the OECD, beyond its representatives in the Group, each Member has to provide GRECO with a list of experts available for participation in GRECO’s evaluations. Other CoE bodies, the WGB, the United Nations Office on Drugs and Crime (UNODC), the OAS, and the International Anti-Corruption Academy (IACA) benefit from their status as observers in GRECO, while the European Union has already announced its intention to join GRECO with a full membership.<sup>4</sup>

GRECO’s evaluation procedures are very similar to those already described above for the WGB. The subsequent implementation of the recommendations is also assessed by GRECO



under a separate compliance procedure. Since January 2007, GRECO has put in place a 3rd evaluation round, which deals with two distinct themes: the first one covers the incriminations provided for in the Criminal Law Convention on Corruption and its Additional Protocol while the second deals with the issue of transparency of party funding.

The enlarged agreement also provides for the establishment of a “bureau” with a maximum of seven members. They are assigned with a number of steering functions, which, in this case, also do not differ in a substantial manner from the competences of the MG of the WGB.

### 3. Review of the UNCAC (IRG) and the OAS Convention (MESICIC)

After the entry into force of the Merida Convention (December 2005), in November 2009, in Doha, the Conference of the States Parties to UNCAC adopted, through a resolution based on Art. 63, para. 7 of the Convention (according to which the Conference should establish any appropriate mechanism or body to assist in the effective implementation of the Convention), the terms of reference of the Mechanism for the Review of Implementation of the Convention. It decided that an “Implementation Review Group” (IRG) shall be in charge of continuing the work already undertaken by the Working Group on Technical Assistance.<sup>5</sup>

Each review phase shall be composed of two review cycles of five years each. During the first cycle, the review will cover chapters III (criminalisation and law enforcement) and IV (international cooperation) and, during the second cycle, chapters II (preventive measures) and V (asset recovery). The IRG is currently conducting the first review cycle, which should be completed within 4 years. As to the Inter-American Convention, although it was the first to be adopted, only in 2002 did the OAS introduce a mechanism to evaluate its implementation (the name of this follow-up mechanism is MESICIC).

## IV. Evaluating the Evaluators...?

It is certainly not an easy task to come to a judgement on this panoply of mechanisms. The concept does not differentiate substantially among them: a mutual evaluation process aimed to assess the level of implementation by each party of the instruments of reference through “peer pressure.” What can help distinguish one from another, from the perspective of the procedure, is the use of on-site visits in the country under evaluation. Such visits are systematic in the WGB and GRECO but only optional in the system of the United Nations.

The subject of the evaluations also differs, depending on the specific scope of each instrument to be assessed (the WGB’s mandate, for instance, only covers active bribery in international business transactions). The wider the scope, the better (potentially but not necessarily) the opportunity for the evaluators to express their views on the overall system of jurisdiction under examination.

The “pressure” on the parties will depend on many different factors. Hence, it will certainly be more effective in those cases in which the publication of the evaluation report is systematic (for instance, this is the case in the OECD and in the Council of Europe but not in the UN mechanism). Also, the determination shown by the body in publishing “thorough” press communiqués, where needed, instead of *passepapier* ones, can serve as a deterrent to non-compliant states.

In a recently published Communication on Fighting Corruption in the EU,<sup>6</sup> the European Commission renders its judgment on each of the mechanisms described above. After having recognised that they provide an added value and “an impetus for state parties to implement and enforce anti-corruption standards,” the Commission analysed their possible impact at the EU level. It affirms that each of these mechanisms has factors limiting their potential to cope with the problems of corruption at the EU level. In such an analysis, the intergovernmental GRECO evaluation process and its follow-up mechanism would benefit neither from a “limited visibility” nor would it allow for comparative analysis or for the exchange of best practices and peer learning.

Unfortunately, the OECD’s Convention only focuses on the specific issue of bribery of foreign public officials in international business transactions, and could not be extended to other areas of importance in the fight against corruption in the EU.

Coming to the UNCAC, to which EU became a party in September 2008,<sup>7</sup> the potential of the instrument would be limited by its merely intergovernmental nature, the long duration of the review exercise, and the very disparate anti-corruption standards among the state parties.

## V. Towards an (Additional) EU Mechanism...?

The EU was already familiar with mutual evaluation procedures; Joint Action 97/827/JHA<sup>8</sup> established a mechanism for evaluating the application and implementation at the national level of international undertakings in the fight against organised crime (at present in its sixth round), while Council Decision 2002/996/JHA introduced a similar mechanism in the fight against terrorism.<sup>9</sup>

Moving from the loopholes allegedly detected in the monitoring mechanisms already in place, the European Commission has now announced its intention to establish a specific EU monitoring and assessment mechanism, the “EU Anti-Corruption Report,”<sup>10</sup> to be combined with EU participation in GRECO, announced by a sister Communication.<sup>11</sup> The publication of the first report should follow in 2013.

In the Commission’s view, a mandate for such action is to be found in the “Stockholm Programme.”<sup>12</sup> Point 4.4.5 of the Programme in effect provides for the development of indicators to measure efforts in the fight against corruption, but this activity should take place “on the basis of existing systems and common criteria” and in “close cooperation” with GRECO. To prevent and tackle any criticism on this subject, the Communication explicitly states that

when preparing the EU Anti-Corruption Report, the Commission will cooperate with existing monitoring and evaluation mechanisms to avoid additional administrative burdens for Member States and duplication of efforts.

It would be highly desirable if this spirit of self-restraint is affirmed when the moment comes to transform ideas into practice.

In the intention of the Commission, the report will include a first section focusing on specific aspects of the fight against corruption in the EU, including thematic case studies, examples of best practices, and recommendations. A second component should be made of analyses of individual Member States, in a similar fashion to the country reports of GRECO or the WGB. They should also include tailor-made recommendations elaborated on the basis of existing monitoring mechanisms and evidence made available from other relevant sources; in particular, the findings of the OECD’s WGB will be used as an “input” for the EU Anti-Corruption Report. A third section, based on Eurobarometer’s survey and other relevant sources of information, should illustrate trends at the EU level in the perception of corruption among European citizens. A number of experimental or brand new indicators should be used. New indicators will be developed, in particular, where relevant standards are not yet made available in an already existing instrument or where higher standards are required at the EU level. The Communication also specifies that “the need for additional EU policy initiatives, including the approximation of criminal law in the field of corruption” will be considered by the Commission later, after analysis of the findings of the EU Anti-Corruption Report.

## VI. Need (or Opportunity) for More Coordination...?

It is not difficult to imagine that officials in the Ministries of Justice could easily refrain from showing an excess of enthu-

siasm should they be confronted with an additional monitoring system in the field of corruption.

Filling in and answering questionnaires, organising or attending on-site visits, making counter-proposals and defending amendments in the course of the elaboration of the draft reports, are all activities that are too demanding and time-consuming to be indefinitely multiplied with additional monitoring mechanisms.

While a specific action at the EU level – after many years of inertia – that is in line with the high standards and specific needs of the Union is certainly to be welcomed, it is also more than desirable that the Commission contain its engagement to avoid additional administrative burdens and duplication of efforts. Only the concrete experience gained along with the first EU Report in 2013 will indicate whether this will be respected.

Going beyond the new EU impetus, the coexistence of so many monitoring and evaluation mechanisms (OECD, Council of Europe, UN, etc.) certainly confronts the international community with the question of how to try to ensure an acceptable degree of coordination among them.

It seems that there are a lot of elements that could be taken from the different reports for use in evaluations of the same country conducted in other *fora*, at least when it comes to the assessment of statistics or collection of court cases. According to concrete experience, cross references to other evaluation reports do not seem to be the rule among the different mechanisms despite the impressive amount of information that could be extracted from each of them. Questionnaires addressing the country under an evaluation could, for instance, incorporate some relevant assessments taken from other recent evaluations and be submitted for possible revision.

The review cycles also do not seem to give realistic consideration to ongoing activities elsewhere. Both OECD and GRECO are conducting a third cycle of evaluations (which, unsurprisingly, comes after a 1st and a 2nd cycle), while a 4th evaluation round was already launched by GRECO in January 2012.

To use Italy as an example, during all of 2011 and the first part of 2012, the country has had to go through the compliance procedure referred to by the 2nd evaluation round conducted by GRECO in 2008, the Phase 3 evaluation by the WGB of the OECD, and the entire 3rd evaluation round by GRECO.

Also, attendance at the respective plenary meetings of the different bodies by representatives of other mechanisms is not really customary or pro-active. Each representative often limits his participation to the time strictly necessary to present

the ongoing activities of the organisation he belongs to, at the same time refraining from entering into the depth of the discussions (provided that they would be entitled to under the statute of the body).<sup>13</sup> Just to limit the analysis to GRECO (while UNODC, OECD, IACA, and OAS have the status of observers to GRECO), the meeting reports<sup>14</sup> show that their representatives are very often mentioned as “excused” in the list of participants.

It could be argued that possible duplications could also be found, for instance, in the money laundering field where the FATF monitoring process coexists alongside the “Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism” (MONEYVAL) that has been active since 1997 within the framework of the Council of Europe. The difference is that MONEYVAL particularly (but not exclusively) monitors Member States of the Council of Europe that are *not* members of the FATF. In the field of the fight against corruption, the involvement of the same countries in different monitoring mechanisms occurs quite frequently.

## VII. Conclusions

Last but certainly not least in this fragmented scenario, the advent of the EU Anti-Corruption Report could represent either another additional monitoring mechanism – though hidden under a more neutral name – or otherwise serve as the kick-off for a new experience, depending on the effective implementation by the European Commission of its will to “cooperate with existing ... mechanisms to avoid additional administrative burdens ... and duplication of efforts.”

If this model is to prove effective, other bodies could feel incited to follow, suit and maximise the use and updating of “outsourced” material instead of producing new analyses (which could also sometimes risk conflict with previous ones).



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The creation of a sort of “platform,” composed of the different subjects playing an active role in the field of anti-corruption could also be envisaged. Such a platform could be made up of representatives from the steering bodies already established under each mechanism and be hosted by the UN or under a more neutral “umbrella” to be determined (could the European Anti-Fraud Office, OLAF, consider playing a role?).

Far from running the risk of creating a sort of additional super-monitoring mechanism, such a platform should constitute a forum where it would be possible to coordinate the respective action of each body, in particular in order to help plan the evaluations processes with full respect to the specificities of each. It could also help in assessing the more factual and descriptive parts of the evaluation reports prepared according to the different procedures, at the same time preventing the risk of possible inconsistencies among documents related to the same country.

A “round table,” where all the actors involved in the efforts of the international community in a given sector could meet and coordinate their action on a genuine equal footing basis, could also be a test and become a valuable precedent for other, similar situations. It could be felt that there is a need to go further but in a less dispersed order.

1 Annex III of the G-20 Seoul Summit Leaders' Declaration, 11-12 November 2010.

2 For the activities of the WGB, see [http://www.oecd.org/departement/0,3355,fr\\_2649\\_34855\\_1\\_1\\_1\\_1\\_1,00.html](http://www.oecd.org/departement/0,3355,fr_2649_34855_1_1_1_1_1,00.html)

3 See the *Report from Commission to the Council on the modalities of EU participation in GRECO*, COM(2011) 307, p. 2.

4 See the *Report* mentioned under Fn. 3.

5 See <http://www.unodc.org/unodc/en/treaties/CAC/index.html>

6 See doc. COM(2011) 308 final.

7 Council Decision 2008/801/EC (O.J. L 287, 25.9.2008, p. 1).

8 O.J. L 344, 15.12.1997, p. 7.

9 O.J. L 349, 24.12.2002, p. 1.

10 See doc. C(2011) 3673 final.

11 See the *Report* mentioned under Fn. 3.

12 Council document 17024/09, adopted by the European Council on 10/11 December 2009. (O.J. C 115, p. 1). See also the Resolution of the Council 6902/05, adopted on 14.4.2005, which called upon the Commission to also consider the development of a mutual evaluation and monitoring mechanism.

13 E.g., in GRECO, observers can also be present during discussions on mutual evaluation reports while, in the WGB, they can only attend sessions of a general nature but not those where evaluation reports are discussed.

14 See [http://www.coe.int/t/dghl/monitoring/greco/meetings/plenarymeetings\\_en.asp](http://www.coe.int/t/dghl/monitoring/greco/meetings/plenarymeetings_en.asp).

# The Reform of the EU's Anti-Corruption Mechanism

Alexandre Met-Domestici, Ph D.

The budget of the EU in 2012 amounts to over € 142 billion, which is more than the budget of 20 of the 27 Member States. It can easily be tempting to misuse part of these funds. The current preparation of the multi-annual financial framework provides the Commission with an opportunity to reinforce the fight against corruption. Such an approach is of particularly high importance in a time of budget cuts and austerity measures.

More than twelve years after the creation of the European Anti Fraud Office (OLAF),<sup>1</sup> the fight against corruption still faces major challenges. Although OLAF has proven to be highly effective in uncovering and investigating offences against the EU's financial interests, its investigations often lack proper follow-up. Since OLAF is deprived of any prosecuting power, it must refer the cases it has investigated to national prosecuting authorities. At this point, many cases are simply dropped or not thoroughly prosecuted. Despite the signing of the Convention on the Protection of the Financial Interests of the EU (PFI)<sup>2</sup> more than 15 years ago, criminal investigations into offences committed against the Union's financial interests are conducted within the Member States and according to national law. It is indeed entirely up to national authorities to decide whether or not to prosecute a case referred by OLAF. This major flaw needs to be addressed in the ongoing reform process.

The reform process of the EU's anti-corruption mechanism has been a protracted one. It started with the Commission's 2003 Communication on a Comprehensive Policy against Corruption. It underlined several goals such as the need to detect and punish all acts of corruption, to establish transparent and accountable public administration standards, and to establish transparency in the financing of political parties and trade unions. It emphasised the need to set up peer-review evaluations. Finally, the Commission laid out ten anti-corruption principles designed to help candidate countries and third countries fight corruption.

The Commission first issued a proposal in 2006 on achieving better operational efficiency and improved governance. It aimed at improving the information flow between OLAF, European institutions, and Member States. It also set the goal of strengthening the procedural rights of persons subject to OLAF's investigations.

The Lisbon Treaty provides for some improvements in the fight against corruption, starting with Arts. 82 and 83 TFEU, which deal with general criminal law rules.<sup>3</sup> The most striking provision is Art. 86 TFEU providing for the creation of a European Public Prosecutor's Office (EPPO) from Eurojust. The establishment of such an EPPO shall stem from a unanimous decision of the Council. The office will be in charge of investigating, prosecuting, and bringing to justice the perpetrators of offences against the EU's financial interests, as well as serious crimes with a cross-border dimension. Thanks to this EPPO, European institutions will be able to undertake direct action, with an increased efficiency, in comparison to mere cooperation between national prosecuting authorities. Art. 317 TFEU provides for the general fight against fraud and illegal activities affecting the financial interests of the EU. Art. 325 TFEU provides for the coordination between the Union and its Member States as well as between Member States themselves.

Most importantly, the Commission published in 2011 a regulation proposal and three communications dealing with the fight against corruption. These documents set the framework for the current reform process. Initially, in its 17 March 2011 proposal,<sup>4</sup> the Commission called for a new regulation concerning OLAF's investigations. It set two main goals: "strengthening the efficiency of the Office's investigations"<sup>5</sup> and achieving a better "balance between independence and accountability of the Office,"<sup>6</sup> thus improving its governance.

In its 26 May 2011 communication entitled "an integrated policy to safeguard taxpayers' money,"<sup>7</sup> the Commission identified the main flaws in the fight against corruption<sup>8</sup> and stressed the need for better coordination between criminal law and administrative investigations. It called for the strengthening of both substantive criminal law and procedural rules.<sup>9</sup> A comprehensive approach is therefore needed, especially in order to overcome the differences between national legal systems.

In its 6 June 2011 communication,<sup>10</sup> the Commission then paved the way for further improvements. It advocated stronger monitoring of anti-corruption efforts, both at the national and EU levels,<sup>11</sup> and called for a better implementation of existing anti-corruption instruments<sup>12</sup> as well as a stronger focus on corruption in both EU internal policies<sup>13</sup> and external policies.<sup>14</sup>

Finally, in its 24 June 2011 communication,<sup>15</sup> the Commission laid the foundations for its anti-fraud strategy. It stressed aspects such as prevention and detection of fraud,<sup>16</sup> OLAF's investigations,<sup>17</sup> and sanctions.<sup>18</sup> It ultimately underlined the task of monitoring and reporting of OLAF's activities.<sup>19</sup>

These various reform paths show the need for further study into the current anti-corruption mechanism. The shortcomings in the fight against corruption in the EU require further analysis prior to describing the solutions offered by the ongoing reform process.

## 1. Shortcomings in the Fight against Corruption

The main shortcomings of the current mechanism lie within the transmission of OLAF's investigation reports to national prosecuting authorities and the compliance of the Office's investigation reports with procedural rights.

### 1. Transmission of OLAF's Reports to National Prosecuting Authorities

One of the main goals of the ongoing reform process is to strengthen the efficiency of OLAF's investigations. The Office can carry out both internal investigations (within European institutions and bodies) and external investigations (in Member States and third countries). In the latter, OLAF can investigate both individuals and legal entities such as companies, state agencies, and bodies, even NGOs. These investigations may consist of on-the-spot inspections, checks of financial books and business records, examination and copying of all relevant documents. Member States must provide OLAF with all necessary support.

OLAF's investigating powers are thwarted by a major limitation. Whatever the in-depth nature of the investigations conducted by the Office, their follow-up relies entirely on national prosecuting authorities.<sup>20</sup> OLAF is deprived of any means to force national authorities to act. Member States tend to favour the recovery of unpaid national taxes or undue social benefits rather than that of unduly spent EU funds.

This lack of follow-up threatens the efficiency of the fight against corruption. The admissibility of OLAF's reports as evidence in criminal cases is limited. OLAF does not enjoy a specific procedural status in national criminal proceedings. Member States do not have any judicial authority with specific competence to deal with cases referred by OLAF. Moreover, national prosecuting authorities sometimes lack the adequate means and structures to prosecute offences committed against the EU budget.

## 2. Compliance of OLAF's Investigations with Procedural Rights

OLAF's investigations are under scrutiny, especially judicial review performed by the European Court of Justice (ECJ) and the Court of First Instance<sup>21</sup> (CFI). The Office might unfortunately breach the fundamental rights of those investigated. Procedural rights – such as the presumption of innocence, the right to be informed and heard, and defence rights as a whole – are at stake during the Office's investigations.

The ECJ, however, has always held that requests for annulment of OLAF's reports are inadmissible.<sup>22</sup> As far as external investigations are concerned, OLAF's investigations are preparatory measures. Its reports are therefore not subject to judicial review,<sup>23</sup> as is the case with internal investigations. Such reports indeed have no legal binding force, since national authorities are free to decide whether or not to prosecute in light of OLAF's findings. In its *Commission v. ECB* ruling,<sup>24</sup> the ECJ held that procedural guarantees apply to all investigations conducted by OLAF, whether internal or external.

Regarding the presumption of innocence, the CFI held in *Franchet and Byk*<sup>25</sup> that this right had been breached by OLAF's statements reflecting on the guilt of the persons involved. The Office referred to the two Eurostat officials who were under investigation, well before a final decision was taken. The Commission breached the presumption of innocence by issuing a press release on the investigation. In contrast, OLAF's Director General did not breach the presumption of innocence by mentioning the two officials in his statement before the European Parliament's Committee on Budgetary Control. OLAF's approach may further influence the assessment of the facts by the national court to which the case is then referred. In *Franchet and Byk*, the Office did not inform the persons under investigation nor the Supervisory Committee that it had handed over the case to national prosecuting authorities. Since the role of the Committee is to protect the rights of the persons under investigation, the Office must consult it prior to forwarding information to national prosecuting authorities. Moreover, this investigation did not meet the conditions for cases requiring absolute secrecy. This amounted to further non-material damage undergone by the two Eurostat officials.

In *Camos Grau*,<sup>26</sup> the CFI held that OLAF was responsible for impairing an official's honour and reputation. Moreover, the investigation had been conducted by an investigator whose impartiality was questionable. Even though he was later dismissed, the evidence he had collected was not reassessed. OLAF thus included undue accusations in its final report. The CFI held that the Office's undue accusations and breach of impartiality – resulting from the presence of evidence gathered



by a potentially partial investigator – constitute non-pecuniary damage and granted the official compensation.

In *Giraudy*,<sup>27</sup> the CFI awarded compensation to an official whose reputation had been harmed by the publicity following the opening of OLAF's investigation. According to the CFI, the Office suggested that the official was involved in the irregularities it was investigating. The CFI interpreted Art. 8 para. 2 of regulation 1073/1999 in such a way that it should be understood as protecting not only the confidentiality of information obtained by OLAF but also the presumption of innocence. Moreover, the Office had violated defence rights by confirming facts that had already been reported in the press. This is also the case when OLAF, though only confirming indirect information without mentioning an official's name, makes it easy to identify this person.

The right to be informed and heard allows the persons affected by an administrative investigation to make their own views known. In *Franchet and Byk*,<sup>28</sup> the CFI held that OLAF had breached this right, since it had investigated the case and then transmitted its report to national prosecuting authorities without hearing the persons concerned beforehand. In *Nikolaou*,<sup>29</sup> the CFI added that OLAF must inform the persons affected by its investigations of all the facts at an early stage of the investigation. The Office must then allow them to be heard in order for them to be able to express their views. It is obligated to record any comments made by these persons. OLAF must make sure that no information regarding its investigations is leaked, and it must avoid any publicity, especially the publication of allegations which could seriously harm an official's reputation.

Defence rights are, of course, at the heart of procedural rights.<sup>30</sup> The CFI held in its *Gomez-Reino*<sup>31</sup> order that its failure to take into account the defence rights of an EU official under investigation amounts to an infringement of the formal requirements applicable to the procedure. The principle against self-incrimination protects persons under investigation. They cannot be forced to implicate themselves. When assessing the violation of this principle, the Court should examine the degree of coercion used to obtain the evidence, the degree of public interest in the investigation, and the existence of procedural safeguards. Hence, the ECJ has held that an individual under investigation may be forced to provide all necessary information but not to answer in a way which might imply acknowledgement of an infringement.

On the contrary, a person's right to access his or her case file does not benefit from standard protection where OLAF's investigations are concerned.<sup>32</sup> Unlike the protection granted in the course of judicial proceedings, the CFI has held that the

effectiveness and the confidentiality of such investigations could be hampered if a person under investigation were to have access to the file before the investigation is concluded.<sup>33</sup> Such a limitation of the rights of defence is justified by the fact that OLAF's reports are not documents adversely affecting the persons under investigation. Therefore, access need not be granted.

The reform process of the EU's anti-corruption mechanism aims at addressing its main shortcomings. Several solutions are put forward in the Commission's proposals.

## II. Solutions

The solutions advocated by the Commission consist of ensuring an increased efficiency of OLAF's investigations and a re-inforced supervision of its activities.

### 1. Towards More Efficient Investigations: Better Cooperation and the Creation of the EPPO

#### a) A Coordinated Fight against Corruption

The Commission calls for an integrated approach, which is to enable a more efficient fight against corruption.<sup>34</sup> This approach will encompass both the criminal law aspects and the administrative law dimension of anti-corruption investigations.

In this respect, the Commission suggests that the distinction between internal and external investigations conducted by OLAF be limited. The boundary between internal and external investigations can easily be blurred. Some investigations start as internal ones and turn into external ones. The opposite happens as well. The persons who are the subject of internal investigations must cooperate according to Staff Regulations or the Protocol on the Privileges and Immunities of the European Union. The Office also enjoys more detailed powers in internal investigations as opposed to external investigations. The distinction may, however, hamper the efficiency of OLAF's investigations.

This policy requires cooperation between national authorities, as well as OLAF and Eurojust, throughout investigation and prosecution. Firstly, the judicial authorities of a Member State that are involved in OLAF's investigations have to inform the Office of the actions they have taken in the wake of its report. They must let OLAF know whether they have prosecuted the case or not. However, this obligation exists only where national law does not rule it out. Secondly, OLAF is granted the right to provide evidence in proceedings before national courts, insofar as this complies with national law and staff regulations.

Another improvement might result from cooperation between OLAF, Eurojust, and Europol. Such cooperation will allow for a greater involvement of Eurojust in the protection of the EU's financial interests and may induce national authorities to better collaborate with OLAF and Eurojust altogether.

Contact points in Member States will play an increased role. They are part of the EU contact-point network against corruption (EACN) made up of OLAF, the Commission, Europol, and Eurojust. According to the Commission, the EACN will adopt a more concrete approach, providing operational support to anti-corruption investigators.<sup>35</sup> The network fosters cooperation between national authorities involved in the fight against corruption, thus facilitating the exchange of information. Moreover, OLAF could take part in joint investigation teams.

In addition, an enhanced fight against corruption requires better cooperation between Member States. Such cooperation is often still hampered by the fact that evidence collected in one jurisdiction is often not admissible in another. This issue may be addressed through the creation of a European Investigation Order (EIO). It would enable Member States to request evidence with standard characteristics. It would then be admissible before national courts in other Member States. Moreover, the evidence could be required by a prosecuting authority in a given Member State from an authority in another Member State. This would be a major improvement over the current European Arrest Warrant (EAW), which only permits the exchange of information that has already been acquired.

The EU's anti-corruption policy should also be coordinated with the fight against money laundering. Corruption is one of the predicate offences that can lead to money laundering.<sup>36</sup> The proceeds of corruption can be washed into the legal economy. This is why the Commission calls for strengthened cooperation between national financial intelligence units, whose task is to combat money laundering, and anti-corruption and law enforcement agencies.<sup>37</sup> It calls upon Member States to carry out financial investigations more thoroughly, especially in corruption cases. National prosecuting authorities should always take into consideration any links – or potential links – with regard to money laundering and organised crime.

## b) The EPPO

The establishment of an EPPO is probably the most striking improvement in the area of criminal law provided for in the Lisbon Treaty. In the Stockholm Programme, the European Council made it clear that the establishment of the EPPO required a thorough implementation of the decision on Eurojust by Member States in advance. The Action Plan of the Stockholm Programme has therefore scheduled a proposal for

a regulation on Eurojust in 2012 – which is to streamline its internal structure and provide Eurojust with powers to initiate investigations – and then a communication on the establishment of the EPPO in 2013.

The EPPO could be very helpful in the fight against corruption. It could improve communication between national prosecuting authorities. This is especially necessary given the lack of follow-up on OLAF's investigations by national authorities. Moreover, direct action undertaken by the European institutions could play a major role.

The EPPO could be established in different ways. On the one hand, a "minimalist" EPPO would be a supranational body entitled only to issue EAWs or EIOs, which would be executed in a decentralised fashion by national prosecuting authorities. On the other hand, a full-fledged EPPO would be a centralised supranational body capable of performing investigations and prosecuting thanks to harmonised rules. An in-between solution may well be chosen by the Council, as Art. 86 leaves open the choice between supranational criminal law rules and mutual recognition.

The scope of the EPPO's competences is yet to be defined. Crimes against the financial interests of the EU will be part of it. It may also encompass serious crimes with a cross-border dimension.

The degree of harmonisation required is also to be defined. The need for a minimum set of harmonised procedural rules is obvious. The EAW shows the effectiveness of harmonised rules to fight crime at the EU level. The EPPO will hopefully take this process one step further. It is worth considering whether it is necessary to adopt common substantial rules or to leave substantial rules up to national legislation implementing EU directives. Were the full-fledged approach to prevail, the EPPO might need actual European substantive criminal law rules, on top of harmonised rules for investigative measures such as warrants valid throughout the EU. This would allow centralised investigations into offences defined at the EU level, thus increasing the efficiency of EU-wide criminal prosecutions into offences such as corruption, organised crime, and money laundering. Will the EPPO be allowed to investigate into such cases, even to prosecute cases referred by OLAF, and bring suspected offenders to justice? Will its role be limited to pre-trial proceedings, or will the EPPO be able to be heard in court? OLAF might also become less of an administrative body and more of a financial police body investigating cases, then referring them to the EPPO. In this case, the Office would require greater independence from the Commission. This would probably justify another reform process, exceeding the scope of the current one.

The actual establishment of the EPPO might, however, require a more pragmatic approach. A political consensus among Member States could probably more easily be found on a less ambitious EPPO that still relies on national prosecuting authorities' investigations into offences defined at the national level. Under such a premise, the competence for authorizing the use of coercive powers would still lie with national judges. However, harmonised rules governing investigative measures would nonetheless be needed. Such rules may indeed help increase the efficiency of investigations initiated at the EU level – through the EPPO – and then carried out at the national level.

## 2. OLAF's Supervision

OLAF's accountability is key to the efficiency of the fight against corruption within a democratic union. It balances the independence the Office enjoys in its investigations. It is of a disciplinary, political, auditable, administrative, and judicial nature. OLAF is answerable to the Commission, the Parliament, the Council, the Court of Auditors, the Supervisory Committee, the European Ombudsman and, of course, the ECJ.

The proposed reform will lead to the amendment of the role of OLAF's Supervisory Committee. It will still monitor the Office's activities in order to make sure that they are performed in full independence.<sup>38</sup> It will supervise information exchanges between the Office and the various institutions and bodies. It will moreover examine the duration of OLAF's investigations. When they exceed one year, OLAF will be required to inform the Supervisory Committee of the reasons preventing it from completing them. OLAF must provide the Committee with such information every six months. The Committee must perform its tasks without interfering with the proper conduct of investigations. It will be informed of the transmission of OLAF's reports to prosecuting authorities.

The Commission also calls for a periodical exchange of views<sup>39</sup> on OLAF's investigations between the Supervisory

Committee and the Commission, the Council, and the Parliament. This exchange of views is to be performed in an informal fashion rather than through structured dialogue, in order not to threaten OLAF's independence. This exchange of views will address OLAF's strategic priorities and its relations with national authorities. It will also encompass the effectiveness of the Office's work and that of the Supervisory Committee.

The proposal also provides for improved supervision of the cooperation between OLAF and EU institutions. In the course of its investigations, the Office shall inform the staff and members of the institutions and bodies concerned without undue delay in order to enable them to take precautionary measures. They could therefore avoid further harm to the EU's financial interests by putting an end to irregularities and limiting financial loss. OLAF's duty to inform should be performed through alternative channels when confidentiality is required. This could be the case if the top management or the highest political level of a body or an institution were involved in a corruption case. OLAF will retain its right to immediate and unannounced access to information held by these institutions and bodies.

## III. Conclusion

The reform of the EU's anti-corruption mechanism is currently standing at a crossroads. The main shortcomings of the anti-corruption mechanism lie both within the efficiency of OLAF's investigations and their compliance with procedural rights. The changes put forward in the Commission's proposal and communications seem viable to greatly enhance the fight against corruption. Improved cooperation between the Office and national prosecuting authorities could greatly improve the follow-up of its investigations. An increased scrutiny of OLAF's investigations could address the issues related to procedural rights. Moreover, the establishment of an EPPO would greatly improve the coordination between the Office, Europol, Eurojust, and national prosecuting authorities.

1 OLAF was created in 1999 by Regulations No. 1073/99 /EC and 1074/99 /EC of 25 May 1999, O.J. L 136, 31.5.1999, p. 1.

2 Convention of July 26th, 1995 (O.J. C 316, 27.11.1995, p. 49).

3 Art. 82 deals with procedural criminal rules. The Council may adopt minimum common rules in order to facilitate mutual recognition of judicial decisions and police and judicial cooperation. Art. 83 provides for the approximation of substantive criminal law rules. The Council and the European Parliament can enact minimum common rules concerning the definition of offences and sanctions, provided that they include serious crimes of a cross-border dimension. Some offences are already defined by EU law such as terrorism, organised crime, money laundering, and corruption.

4 European Commission, 17 March 2011, Amended proposal for a Regulation of

the European Parliament and the Council amending Regulation (EC) No. 1073/1999 concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing Regulation (EURATOM) No. 1074/1999, COM(2011) 135 final.

5 COM(2011) 135 final, p. 3.

6 COM(2011) 135 final, p. 5.

7 European Commission, 26 May 2011, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the Protection of the Financial Interests of the European Union – An integrated Policy to Safeguard Taxpayers' Money -, COM(2011) 293 final.

8 COM(2011) 293 final, p. 2.

9 COM(2011) 293 final, p. 10.



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10 European Commission, 6 June 2011, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee, Fighting Corruption in the EU, COM(2011) 308 final.

11 COM(2011) 308 final, op. cit., p. 5.

12 COM(2011) 308 final, p. 8.

13 COM(2011) 308 final, p. 10.

14 COM(2011) 308 final, p. 15.

15 European Commission, 24 May 2011, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions and the Court of Auditors on the Commission Anti-fraud Strategy, COM(2011) 376 final.

16 COM(2011) 376 final, p. 9.

17 COM(2011) 376 final, p. 13.

18 COM(2011) 376 final, p. 15.

19 COM(2011) 376 final, p. 17.

20 For instance, from 2003 to 2009, 73 of 438 cases referred to national authorities by OLAF were dismissed. In most cases, national authorities did not bother to

explain why they dropped the case.

21 With the entry into force of the Lisbon Treaty, the Court of First Instance is renamed to General Court. However, the cases mentioned in this paper were dealt with before the entry into force of the Lisbon Treaty and therefore refer to the Court of First Instance.

22 For instance, Case C-521/04, *Tillack v. Commission*, 19.4.2005.

23 Case T-215/02, *Gomez Reino v. Commission*, 18.12.2003.

24 Case C-11/00, *Commission v. ECB*, 10.7.2003.

25 Case T-48/05, *Yves Franchet and Daniel Byk v. Commission*, 8.7.2008.

26 Case T-309/03, *Camos Grau v. Commission*, 6.4.2006.

27 Case F-23/05, 2.5.2007.

28 Case T-48/05, *Yves Franchet and Daniel Byk v. Commission*, 8.7.2008.

29 Case T-259/03, *Nikolaou v. Commission*, 9.12.2003.

30 They are part of the general principles of EU law (ECJ, 9.11.1983, *Michelin v. Commission*, case 322/81).

31 Case T-215/02, *Gomez Reino v. Commission*, 18.12.2003.

32 Read *Simone White*, Rights of the Defence in Administrative Investigations: Access to the File in EC Investigations, *Review of European Administrative Law*, Vol. 2, no. 1, 2009, p. 57.

33 Such was the case in the *Franchet and Byk*, *Nikolaou*, and *Gomez Reino* cases.

34 COM(2011) 293 final, p. 2.

35 COM(2011) 208 final, p. 11.

36 Directive 2005/60 /EC of the European Parliament and of the Council of 26 October 2005 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering and Terrorist Financing, O.J. L 309, 25.11.2005, p. 15.

37 COM(2011) 308 final, p. 12.

38 COM(2011) 135 final, p. 5.

39 COM(2011) 135 final, p. 6.

## Criminal Law in European Countries

### Combating Manipulation of Sports Results – Match-fixing\*

Carlo Chiaromonte

#### I. Introduction

On 28 September 2011, the Council of Europe (hereinafter “the CoE”<sup>1</sup>) adopted Recommendation CM/Rec(2011)10 on “Promotion of the integrity of sport against manipulation of results, notably match-fixing.”<sup>2</sup> As stressed in the recommendation,<sup>3</sup> the problem of match-fixing is, *inter alia*, a serious threat to “confidence among the public if it perceives sport as a place where manipulation gives substantial financial benefits to certain individuals, rather than as an activity where the glorious uncertainty of sport predominates.”<sup>4</sup> The growing commercialisation of sport mirrors the lucrative nature of some types of sporting activities and the even more lucrative gains

from sport-related betting, and it has undoubtedly led to the establishment of certain profit-making structures where the main activities are concentrated in the field of sports. Some of those structures are of a fully legal nature (i.e., legal betting operators), but many of them – at least according to the latest findings of law enforcement agencies throughout the world – are not. In this environment, ethical practices and behaviour in sports need to be forcefully and effectively applied in order to preserve the spirit of sport itself, which is based on fair play and competition among equals.

The above-mentioned recommendation was adopted in response to this need. In particular, it specifies that the expres-

sion “manipulation of sports results” covers: “the arrangement of an irregular alteration of the course or the result of a sporting competition or any of its particular events (such as matches, races) in order to obtain an advantage for oneself or for others and to remove all or part of the uncertainty normally associated with the results of a competition.”<sup>5</sup>

The recommendation stresses that states should take the following measures in order to combat the manipulation of sports results. Firstly, they should make sure that their legal and administrative systems are provided with “appropriate and effective legal means” to combat this practice.<sup>6</sup> Secondly, where states already have existing legislation in place, this legislation should be reviewed to ensure that “manipulation of sports results – especially in cases of manipulation of competitions open to bets – including acts or omissions to conceal or disguise such conduct (...) can be sanctioned in accordance with the seriousness of the conduct.”<sup>7</sup>

Following a number of measures undertaken after the adoption of this recommendation, the CoE decided to prepare a feasibility study on the possible elaboration of a binding instrument (i.e., a convention) on match-fixing.<sup>8</sup> In this context, the Council of Europe’s European Committee on Crime Problems (hereinafter “the CDPC”) was asked to contribute to this feasibility study as regards criminal law issues. Set up in 1958, the CDPC is responsible for overseeing and coordinating the Council of Europe’s activities in the field of crime prevention and crime control. For instance, it identifies priorities for inter-governmental legal cooperation in Europe; makes proposals on activities in the fields of criminal law and criminal procedure, criminology, and penology; and implements these activities. It is responsible for drafting various conventions, recommendations, and reports in the field and, to this end, organises, *inter alia*, conferences for Ministers of Justice and conferences for directors of prison administrations.

This paper is mainly based on information on criminal law provisions applicable to the manipulation of sports results and on possible legislative plans that states may have in this respect. Some examples of practical experience during the investigation and prosecution of such conduct is also included.

## II. CoE Member States’ Criminal Law Applicable in Cases of Manipulation of Sports Results

Specific criminal law provisions to address certain types of manipulation of sports results have been introduced – recently in some cases – in 11 European states (Bulgaria, Cyprus, Georgia, Greece, Italy, Poland, Portugal, Spain, Russian Federation, Turkey, and the United Kingdom). In other countries,

such conduct – or at least certain forms thereof – fall under their general criminal law provisions. While the legal framework varies in this respect, the relevant criminal law provisions are most often those concerning fraud and different forms of corruption.

Most states, in which specific criminal law provisions on the manipulation of sports results do not exist, do not seem to have any plans to develop specific legislation in this respect in the near future. Only in Sweden is specific legislation currently being prepared, and the advisability of legislative measures in Switzerland is currently being studied.

In 13 European states, investigations/prosecutions (and sometimes convictions) in cases of manipulation of sports results have recently taken place. This applies equally to states with specific legislation (Cyprus, Greece, Italy, Portugal, and Turkey) as well as to states where general criminal law provisions have been applied (Belgium, Czech Republic, Finland, France, Germany, Lithuania, Monaco, Switzerland). In many other states, it appears that no investigations/prosecutions regarding cases of manipulation of sports results have been recently carried out (Azerbaijan, Bosnia and Herzegovina, Bulgaria, Denmark, Estonia, Georgia, Iceland, Ireland, Norway, Serbia, Sweden). It is likely, however, that even more states have carried out investigations/convictions with regard to the manipulation of sports results: if a state has no specific legislation in place but instead applies general provisions on fraud or corruption, relevant statistical data on whether such an investigation or conviction was for an offence of fraud or corruption related to the manipulation of sports results may simply not be available.

### 1. Specific Criminal Law Provisions in CoE Member States

In the 11 countries that have introduced specific criminal law provisions, the definition of manipulation of sports results is based on general definitions of active and/or passive corruption and/or fraud. However, these provisions may introduce specific elements and/or a specific range of sanctions. For example, these criminal law provisions may apply to conduct:

- Intended “to influence the development or outcome of a sports competition” (Bulgaria), or “influencing results of the competition and contest” (Georgia), or “exerting influence on the results” (Russian Federation), or “to influence a specific sports competition” (Turkey);
- Having the purpose of “the alteration of the result of any team or individual sport” (Cyprus), or “to alter the result in favour or against sports clubs, groups of paid athletes or athletic



public limited companies” (Greece), or “to alter or distort the result of a sporting event” (Portugal);

- Undertaken “in order to get a different result from the one which would have been reached by a regular competition” (Italy);
- Intended to induce “unfair behaviour that might influence the result of the competition” (Poland).

In some cases, such provisions also refer to specific actors, whose behaviour must be influenced by such conduct in order for these provisions to be applicable, e.g., athletes, managers, or members of sports clubs (Cyprus), a participant, a referee, a coach, a leader of a team, or an organiser of professional sports competitions, as well as an organiser or a jury member of a commercial entertainment contest (Georgia, Russian Federation).

Criminalisation on the grounds of these provisions does not appear to be dependent on whether or not the manipulation of sports results is actually successful, i.e., the intended (manipulated) result of the sporting match is achieved. In Cyprus and in Greece, for instance, such a case of successful manipulation would, by definition, be considered an aggravating circumstance. The [offence of] manipulation of sports results related to the participation in betting schemes is considered to be an aggravating circumstance under Bulgarian and Italian law whereas Polish criminal law specifically punishes a person who participates in betting schemes – or advocates such participation – and knows that the [offence of] manipulation of sports results has taken place.

## 2. General Criminal Law Provisions in CoE Member States

In the majority of European states, one or more “general” criminal law provisions could be applicable to cases of manipulation of sports results. Successful convictions on such grounds have taken place in some of these countries. In other countries, it appears that some of their criminal law provisions would or should be applicable in such cases.

In several states, the criminal law provisions on fraud and corruption cover most or at least some of the types of conduct that may be involved in the manipulation of sports results (Denmark, Estonia, Finland, France, Germany, Ireland, Latvia, Lithuania, Montenegro, Serbia, Slovenia, and Switzerland). In many of them, reference is made to provisions on different types of corruption (Azerbaijan, Belgium, Czech Republic, Finland, France, Iceland, Latvia, Monaco, Norway, and Sweden). In a number of others, there are cases where criminal law provisions on extortion (Belgium and Latvia), money laundering (Belgium, Denmark and France), or illegal gambling (Slovenia) could become applicable. It would obviously depend on

the specifics of a particular case as to whether or not one or the other criminal law provision could apply.

The existence of general legislation in most of these states seems to suggest that these general provisions would be sufficient to deal with the phenomenon of manipulation of sports results and, therefore, that many of these states would not see the need to introduce new, specific offences in order to be able to combat such crimes.

## III. Jurisdiction of CoE Member States’ Courts and Conflicts of Jurisdiction

Manipulation of sports results and the exploitation of legal or illegal betting schemes that may be linked to such conduct often take place in a multi-country setting. Thus, for example, players of a fixed match may come from one country, the match may take place in another country, the person(s) behind the fixing may come from a third country, and the illegal profits stemming from such an operation may be collected in yet another country. This may raise difficult issues of jurisdiction, either because the prosecutor or the court may not feel competent to address the case in its full complexity or because investigators and prosecutors in different countries may be attempting to bring the same persons to court for the same offences.

CoE conventions in the criminal law field normally require Member States to introduce jurisdiction on the basis of the territoriality principle, i.e., on the basis of where the offence has taken place (which may, however, sometimes be difficult to determine, or there may be more than one country to which this criterion applies in a specific case). In order to avoid impunity, CoE conventions in the criminal law field normally also require Member States to exercise jurisdiction on the basis of the active and passive nationality principles (nationalities of the offender(s) and the victim/s). In most cases, however, CoE conventions allow state parties to enter reservations in respect of the latter.

When CoE Member States are not bound by a convention in this respect, they are free to determine the extent to which they wish to introduce and exercise jurisdiction. Even when Member States have become party to a CoE criminal law convention, the provisions on jurisdiction merely set “minimum rules,” which do not prevent Member States from also extending their jurisdiction to other cases beyond those with territorial links or links based on the nationality or place of residence of the offender or victim. In many cases, CoE conventions contain a specific “safeguard clause,” which clarifies that the convention in question does not exclude any criminal jurisdiction exercised by a party under its national law.

Some, but not all, CoE conventions contain a provision on positive jurisdiction conflicts, i.e., situations in which more than one party asserts jurisdiction and the parties are thus required to consult each other in order to establish which party should be in charge of prosecution.

#### IV. Conclusion

Based on the findings of Recommendation CM/Rec(2011)10, it appears that a concerted and a more coordinated international response is needed to tackle the phenomenon of manipulation of sports results. In this context, practical steps have already been taken both internationally and domestically. However, these measures do not seem to have been effective enough so far. In fact, the manipulation of sports results continues to spread throughout the sporting world. Therefore, it may be advisable to reinforce these efforts by way of a new legal instrument to be drafted under the auspices of the CoE. Furthermore, as the phenomenon of the manipulation of sports results is in itself mostly transnational, a wide political forum may be required and the CoE is conceivably a legitimate “*agora*” in which it is possible to involve not only its member states but also of other states, international sports federations and specialised NGOs. The CoE, by adopting the above recommendation, has certainly started this process.

It is quite clear, however, that any possible future convention should focus on other ways of dealing with this phenomenon rather than on criminal law aspects. It appears that, irrespective of whether or not CoE Member States have chosen to introduce specific criminal law provisions on the manipulation of sports results, Member States’ authorities feel confident that, by and large, the majority of cases can be dealt with under existing criminal law provisions, be they specific provisions or general criminal law on fraud, corruption, or other types of offences.

In light of this, and considering the large range of possible types of conduct that may be linked to the manipulation of sports results as well as the variety of ways the Member States deal with such cases, it appears advisable that any possible future convention in this field could be complemented by a general provision appealing to state parties to ensure effective criminalisation and investigation of such crimes based on applicable national law, e.g., along the lines of Section 13 of Recommendation CM/Rec(2011)10.

In respect of jurisdiction, it may also be useful to specify that parties to such a convention shall exercise jurisdiction on the basis of the territoriality and the active nationality principles. They should also foresee that, in cases where more than one state asserts jurisdiction, authorities consult each other to establish which party should be in charge of prosecution.

\* This article expresses the personal view of the author only.

1 The Council of Europe, based in Strasbourg (France), covers the entire European continent, with its 47 member countries. Founded on 5 May 1949 by ten countries, the Council of Europe seeks to develop common and democratic principles throughout Europe based on the European Convention on Human Rights and other reference texts on the protection of individuals. The Committee of Ministers is the Council’s decision-making body and is made up of the ministers of foreign affairs of each Member State or their permanent diplomatic representatives in Strasbourg.

2 Full text of Recommendation CM/Rec(2011)10: <https://wcd.coe.int/ViewDoc.jsp?id=1840345&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383>

3 Within the meaning of Art. 15b of the Statute of the Council of Europe, a recommendation is a legally non-binding instrument. Although legally non-binding, recommendations may develop new standards that may subsequently serve as the basis for a legally binding instrument, such as a convention. Recommendations are sometimes quoted by the European Court of Human Rights as relevant Council of Europe instruments insofar as they reflect legal, political, and societal developments in the Council of Europe Member States.

4 Recommendation CM/Rec(2011)10, adopted by the Council of Europe on 28 September 2011, p. 2

5 Appendix to Recommendation CM/Rec(2011)10, Guidelines, Sect. A, para. 1.

6 Appendix to Recommendation CM/Rec(2011)10, Guidelines, Sect. C, para. 12.

7 Appendix to Recommendation CM/Rec(2011)10, Guidelines, Sect. C, para. 13.1

8 According to Recommendation CM/Rec(2011)10, adopted by the Council of Europe on 28 September 2011, the Committee of Ministers: “Invites EPAS, where appropriate, in co-operation with other relevant national and international bodies: ... to carry out a feasibility study, in co-operation with the other concerned bodies, on the basis of this recommendation, on a possible international legal instrument that covers all aspects of prevention and the combat against the manipulation of sports results.”

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# The European Union and the UN Convention against Corruption\*

Martin Příborský

## I. Introduction

The European Union (EU) has gradually intensified its activities within the area of anti-corruption policies over the last decade. In 2011, the European Commission announced several policy initiatives, which might completely change the dynamic of policy development in this field within the EU in the near future.<sup>1</sup> The Communication on Fighting Corruption in the EU, which is analysed in another article of this issue, outlines a new mechanism, the so-called “EU Anti-Corruption Report,”<sup>2</sup> to monitor the EU Member States’ efforts in the fight against corruption. It also suggests that the EU should join the Council of Europe Group of States against Corruption (GRECO). By means of this particular GRECO membership, the EU institutions could profit from the knowledge of one of the most developed review mechanisms, experience with country reviews, and access to information on the situation in individual Member States. These data could be extended further and used for the EU Report, which should be more ambitious in certain aspects and offer more possibilities than the GRECO reviews. It might, however, also require that the EU institutions themselves undergo a scrutiny of their anti-corruption standards by GRECO, which would be the first such experience for the EU institutions.

In this context, it is useful to recall the EU’s experience with another international anti-corruption standard that it became party to in 2005, the United Nations Convention against Corruption (UNCAC). The UNCAC also includes a review mechanism that the EU was supposed to join recently, however the EU is facing certain difficulties in doing so.

The objective of this article is to briefly describe the content of the UNCAC as well as structures and procedures for its implementation. An explanation will follow as to the position of the EU within the process. Ultimately, an analysis of the situation regarding the expected review of the EU institutions will be given.

## II. The UN Convention against Corruption

The UNCAC is the first universal legally binding anti-corruption instrument<sup>3</sup> and a very comprehensive legal document

covering various aspects of the fight against corruption. Its chapters address issues of prevention, criminalisation and law enforcement, international cooperation, asset recovery and technical assistance, and information exchange. It covers corruption in both public and private sectors. Besides prevention, investigation, and prosecution, it governs the freezing, seizure, confiscation, and return of the proceeds of corruption.

Furthermore, it also encompasses related offences such as money laundering, embezzlement, trading in influence, illicit enrichment, concealment or protection of property, to name just a few. It underpins many other aspects of the effective fight against corruption, e.g., transparency or the participation of civil society, and it deals with various practical tools for the detection, investigation, and prosecution of corruption acts.

The Convention was negotiated between January 2002 and October 2003, following UN resolution 55/61 of 4 December 2000,<sup>4</sup> by which the UN General Assembly requested preparation of a specific convention on corruption. The resolution required the Secretary General and the UN Office for Drug Control and Crime Prevention in Vienna<sup>5</sup> to conduct the preparatory work. Subsequently, a report was submitted to the UN Commission on Crime Prevention and Criminal Justice. Afterwards, an expert group elaborated draft terms of reference, which were adopted as a basis for the negotiations. The Convention was negotiated within an *ad hoc* committee set up for this purpose.

The Convention was adopted by the UN General Assembly on 31 October 2003<sup>6</sup> and opened for signatures at a conference in Mérida, Mexico on 9 December 2003. Therefore, it is sometimes called the “Mérida Convention.” In addition, 9 December 2003 was designated by the UN General Assembly as International Anti-Corruption Day. It entered into force on 14 December 2005. To date, it has 159 full members, State Parties, and 14 other signatories that have not completed the ratification process yet. Among these, 25 EU Member States and the European Union as a regional economic integration organisation have completed the internal ratification procedures and become State Parties, and two Member States (Czech Republic and Germany) are only signatories.<sup>7</sup>

### III. EU Accession to the Convention

In addition to states, the UNCAC is open for membership to regional economic integration organisations (REIOs)<sup>8</sup> such as the EU, “provided that at least one member State of such organisation has signed this Convention” (Art. 67(2) of the UNCAC). The European Community, which at that time enjoyed a legal personality and thus had the necessary legal capacity, signed the UNCAC on 15 September 2005 and became a State Party on 12 November 2008, following the ratification by the Council.<sup>9</sup> It is so far the only REIO that has joined the Convention. As with any other REIO in the context of international treaties, the Community acceded to the UNCAC only with respect to the extent of competence conferred upon it by its Member States. Hence, the EU is a full member (State Party) of the Convention, but it is obliged to implement only those provisions of the UNCAC that fall within its scope of activities. In accordance with Art. 67(3) of the UNCAC, the Community declared the extent of its competence, which is annexed to the instrument of ratification.<sup>10</sup> It covers the competence provided for in the treaties establishing the European Community, the so-called first pillar, which corresponds to the scope of the UNCAC. According to the Declaration, the Community claims an exclusive competence with respect to its own administration. This comprises such areas as prevention policies within Community structures, including transparency measures, recruitment policies, codes of conduct and other integrity measures, public procurement standards, etc. It covers the establishment of EU anti-corruption bodies, in particular the European Anti-Fraud Office (OLAF), and provides for their functioning. Furthermore, the Community declares competence in policy areas in which powers are shared with Member States. The UNCAC is relevant here, in particular for rules governing the internal market, including access to public contracts, standards on accounting and auditing, and the prevention of money laundering. The Community competence also extends to supporting anti-corruption efforts within development policies.

From the date of entry into force of the Treaty of Lisbon on 1 December 2009, the European Union replaced the Community as the State Party to the Convention. The three pillars disappeared, and the EU also assumed the competence in the common foreign and security policy (former second pillar) and in the area of justice, freedom and security (former third pillar). The latter especially is very relevant for the UNCAC. In this area,<sup>11</sup> there are rules, mainly on police and judicial cooperation in criminal matters, that match the provisions of the UNCAC. Among them, Art. 83 of the Treaty on Functioning of the EU (TFEU) explicitly mentions corruption as one of the subjects against which an EU action may be taken. As a consequence, the EU is obliged to update its declaration of

competence in line with Art. 67 of the UNCAC. So far, there has been no action taken by the EU institutions in this sense.

As for the legal position of the EU within the context of the UNCAC, the EU enjoys full membership independent from its Member States and acts individually alongside them unless the EU acts represented by the Council Presidency, currently in cooperation with the EU Delegation (see below). Due to its membership, the position of the EU is different in comparison to other parts of the UN, notably the UN General Assembly, where the EU has only an enhanced observer status. Theoretically, when voting on matters for which the competence has been transferred from the Member States to the Union, the EU would vote on behalf of all Member States, which are State Parties, having a corresponding number of votes. However, in practice, voting is not used within the UNCAC structures, and all decisions have so far been reached by consensus.<sup>12</sup>

### IV. Implementation of the Convention

The UNCAC established a special mechanism for the implementation of the Convention in order to facilitate cooperation among the State Parties and to improve their capacity to properly implement the complex provisions thereof. It consists of a hierarchical structure of different bodies. The supreme decision-making body is the Conference of the State Parties (COSP), which meets regularly, adopts its own Rules of Procedures, establishes other bodies and procedures for implementation of the Convention, receives information required from the State Parties, and deals with all other matters relevant to implementation. The COSP has met four times so far.<sup>13</sup> It has established several working groups<sup>14</sup> and made arrangements in order to collect and exchange information on various subjects.

A very important role is also played by the Secretariat of the Convention provided by the United Nations Office on Drugs and Crime (UNODC), which takes care of the administration, organisation of events, collection and distribution of information and documents, training, and other support to the State Parties.

The most challenging task of the COSP has been the establishment of a mechanism to review the implementation of the Convention, based on Art. 63(7) of the UNCAC. It was debated by the COSP during its first three sessions and by the Working Group on Review of the Implementation between 2006 and 2009. The Terms of Reference were finally adopted at the third session in Qatar in November 2009.<sup>15</sup> Another specific body, the Implementation Review Group (IRG), was established to overview the process. The review mechanism was launched by the drawing of lots at the first session of the IRG in July 2010.

The mechanism is based on mutual peer reviews by the State Parties. Each State Party shall be reviewed within two cycles of five years, as the provisions of the UNCAC were divided into two groups. Within the first cycle, only chapters III (criminalisation and law enforcement) and IV (international cooperation) of the Convention shall be reviewed and, during the second cycle, chapters II (preventive measures) and V (asset recovery). All State Parties should be reviewed during one of the first four years of the cycle, based on drawing of lots. The fifth year is reserved for signatories and State Parties that would defer the review. Each State Party is reviewed by two other State Parties, which should include one from the same geographical region as the State Party under review and possibly have a similar legal system. Each State Party should serve as the reviewing State Party one to three times during each cycle. All State Parties under review are drawn at the beginning of the cycle for all of the first four years. The reviewing State Parties are selected at the beginning of each review year.

One of the first steps and the basis for the review is a comprehensive self-assessment checklist, which each State Party must deliver to the Secretariat, describing the level of implementation of the UNCAC, in particular legislation and other measures within the national system. Each State Party must also state its focal point for the coordination of the process and draw up a list of experts who will participate in the review. The review itself may take the form of a desk review of provided documents, namely the self-assessment checklist, or be a constructive dialog, or even make use of other means of exchanging information, e.g., country visits. The review reports remain confidential and are not debated by the UNCAC bodies. The Secretariat drafts thematic reports summarizing the findings of the individual country reports and provides overall statistics on the review process, which are then discussed by the IRG and by the COSP. The review process is currently in the second year of the first cycle. The reviews of the first year were marked by certain difficulties because several State Parties struggled to meet the procedural deadlines. Therefore, due to the delays, only a few country review reports and a limited amount of information was available for discussion during the last session of the IRG and at the 4th COSP in November 2011.

## V. The EU within the Implementation Process

### 1. EU Positions and Cooperation with the Member States

The EU institutions have been participating in the process since the Commission signed the UNCAC on behalf of the Community in 2005. The Community (later the Union) has been represented at the COSP and the other bodies by the Commission, namely by the lead service responsible for the fight

against corruption,<sup>16</sup> by OLAF, and by the EU Delegation to the UNODC in Vienna. At the beginning, the Commission assumed the role of an observer together with other signatories, actively contributed to the debate, and promoted the widest possible implementation of UNCAC provisions worldwide. In concrete terms, it advocated the most ambitious review mechanism that would include mandatory country visits, the active participation of civil society, and full transparency of the review reports. It has also promoted the idea that the UNCAC should be implemented by major international organisations that cannot become formal members of the Convention.<sup>17</sup>

The Commission has aligned its positions with the other EU Member States. The EU as a whole coordinates its actions regularly during the sessions of the UNCAC bodies as well as in between these meetings. The EU representatives meet in Brussels (within the Council structures) or in Vienna. To formally harmonise its activities, the Council adopted several common positions:

- Three Common Positions (in general, on the Review Mechanism and on Asset Recovery) and one Position (together with the representatives of the governments of the Member States) on Technical Assistance<sup>18</sup> before the 2nd COSP in 2008;
- A Common Position on the UNCAC for the preparation of the 3rd COSP and one Position (together with the representatives of the governments of the Member States) on Technical Assistance before the 3rd COSP in 2009.<sup>19</sup>

They remain the basis for the coordinated approach. The EU has tried to speak with one voice, represented by the EU Presidency.

With the entry into force of the Treaty of Lisbon, which took place only one year after the Community became a full member of the UNCAC, the situation should change. According to the Treaty, in areas of common EU policy, the Union should no longer be represented by the Council Presidency but by the European External Action Service (EEAS) and the EU delegations. Therefore, it should be the EU Delegation to the International Organisations in Vienna that should coordinate and represent the EU and communicate its common positions whenever a common approach is agreed upon among the Member States. In practice, however, given the limited resources of the EU Delegation, a temporary arrangement has been reached that the EU Delegation should lead the EU together with the Council Presidency.

### 2. EU Institutions in the Review Mechanism

The most significant task for EU institutions in the implementation process is the issue of participation in the review mechanism. As a full State Party, the EU should undergo the same scrutiny and possibly also serve as a reviewer like any other



State Party. Nevertheless, the EU has not yet formally joined the review process. It has not participated in the drawing of lots, it has not nominated its experts for the review, and there is no specific mention of the EU or any special arrangement in the Terms of Reference of the review mechanism. It had started preparing the self-assessment checklist before the entry into force of the Lisbon Treaty, but the draft was not completed after the Treaty became applicable, as the changes in EU primary law substantially enlarged the scope of EU competence. However, the impact these changes have on EU participation in the UNCAC has not been thoroughly analysed so far.

The EU is a strange entity in this process. It does not have the standard characteristics of state. Its competence with respect to the UNCAC and the applicability thereof on EU institutions is only partial. Therefore, at least until the update of the EU declaration of competence, the implementation of which provisions should be reviewed is not clear. Moreover, the EU has a different structure of institutions with different roles and powers than that of a nation state. Hence, it would be a challenge for any reviewer to properly grasp the EU specificities. If it were a state with limited resources and from a different geographical region, it might be almost impossible.

There is also another political issue. Could the EU institutions be reviewed by one or two of its own Member States? Would the necessary independence of the Member State be guaranteed? And would it be acceptable for the EU? The situation in the EU's legal and policy context is usually the opposite – the EU reviews and sanctions its Member States if they do not comply with EU law. The EU should resolve this situation before entering into other international mechanisms for review of the EU policies. The most topical is the accession to GRECO, which was outlined in the new Commission anti-corruption communication and which is under preparation.<sup>20</sup>

All in all, it is evident that the issue merits thorough consideration and that some sort of special arrangement for EU participation in the review process could be useful. Formally, it could be arranged by adopting an amendment to the Terms of Reference.

The Commission assessed the situation in its Communication on Fighting Corruption in the EU of June 2011. It states that the

process is complex as it involves cooperation between all EU institutions, as well as with Member States in the matters falling under shared competence.<sup>22</sup>

It also stresses the need to analyse the changes brought about by the Lisbon Treaty in order to determine the scope of the EU's obligations under the UNCAC. Nonetheless, at the same time, the Commission also undertook to duly implement the UNCAC within its recent Communication on the Commission Anti-Fraud Strategy.<sup>22</sup>

In any case, the process of internal review within the EU institutions should be completed as soon as possible if the EU wishes to join the review mechanism timely during the first review cycle. As a State Party with completed ratification, the EU is expected to join the process at the latest during the 4th year of the cycle. The drawing of lots for the 4th year will likely take place during the first half of 2013. Therefore, there is only about one year remaining to resolve the technical and legal issues and to also arrange the procedural matters for the EU to join the mechanism. It is theoretically possible to foresee the EU's entry into the process in the 5th year.

However, this is really the last deadline for EU participation. The issue is even more sensitive as some State Parties started raising questions as to whether and when the EU will undergo the review, suggesting that, if it is not to be reviewed, it should not be considered a State Party and have only an observer status. Such voices are rather sporadic and isolated within the UN. A continuation of the current situation, however, might be harmful for the EU's reputation and its ambitions in the area of anti-corruption policy.

## VI. Conclusions

It is widely believed within the European Commission that the EU institutions at least formally fulfil most, if not all, of the UNCAC requirements. Therefore, there should be no difficulty to successfully undergo the review. It is more a legal and procedural issue that has prevented full participation of the EU in the UNCAC review mechanism so far. However, the EU has little space for manoeuvre here, as the UNCAC rules are clearly set and the EU has committed itself to respecting them. This is in contrast to the GRECO mechanism, where the modalities of participation still have to be negotiated or, in case of other policy initiatives, where the EU is not bound by international law.

Consequently, it would be desirable to quickly finalise the internal legal analyses and update the EU declaration of competence for the UNCAC. This first step seems quite complicated and perhaps legally somewhat doubtful because the EU's area of competence is in constant development, especially in the area of shared competence with the Member States. Nevertheless, it is a necessary practical step that will allow the EU to fulfil its obligations under the UNCAC and possibly also clarify the conditions for the accession to GRECO or other similar mechanisms. Primarily, however, it will take the burden off the Commission's shoulders, reinforce its good reputation in this area, and free its hands for future policy work in the development of anti-corruption standards.



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\* The opinions expressed in the text are those of the author, not of the European Commission.

1 See, namely, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Fighting Corruption in the EU of 6 June 2011 (COM(2011)308) and also Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors on the Commission Anti-Fraud Strategy of 24 June 2011 (COM(2011)376) as well as Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations: An integrated policy to safeguard the taxpayers' money of 26 May 2011 (COM(2011)293).

2 Commission Decision establishing an EU anti-corruption reporting mechanism for periodic assessment ("EU Anti-corruption Report") of 6 June 2011 (C(2011)3673), which was adopted together with the Communication.

3 There are older anti-corruption conventions, but they are only regional. Among the most important are the Inter-American Convention against Corruption of 1996, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions of 1997, the Council of Europe Criminal and Civil Law Conventions on Corruption of 1999, and also the African Union Convention on Preventing and Combating Corruption of 2003, which entered into force after the UNCAC, however, in 2006.

4 UN Resolution 55/61 – An effective international legal instrument against corruption.

5 Renamed the UN Office on Drugs and Crime (UNODC) in 2002.

6 UN Resolution 58/4.

7 Source: UNODC website (<http://www.unodc.org/unodc/en/treaties/CAC/signatories.html>).

8 The term REIO is not defined by the UNCAC, and there is no unified international definition. Therefore, we have to look at different definitions in national law or various international definitions. For example, according to US law, in the anti-trust context, the term regional economic integration organisation means "an organization that is constituted by, and composed of, foreign states, and on which

such foreign states have conferred sovereign authority to make decisions that are binding on such foreign states, and that are directly applicable to and binding on persons within such foreign states, ..." (15 USCS § 6211 (9)). Aside from the EU, the other major REIOs include, for example, the Association of Southeast Asian Nations (ASEAN), the North American Free Trade Area (NAFTA), the Common Southern Market (Mercosur), and the Andean Community of Nations (CAN, both within the Union of South American Nations (USAN)), etc.

9 Council Decision of 25 September 2008 on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption (O.J. L 287, 29.10.2008, p. 1-110).

10 Declaration concerning the competence of the European Community with regard to matters governed by the United Nations Convention against Corruption, Annex II to Council Decision of 25 September 2008 on the conclusion, on behalf of the European Community, of the United Nations Convention against Corruption (O.J. L 287, 29.10.2008, p. 1-110).

11 Currently Title V, Area of freedom, security and justice, of the Treaty on the Functioning of the EU (TFEU).

12 The diplomats in the UN organisations in Vienna call it the „Vienna spirit.“

13 In 2006 (Jordan), 2008 (Indonesia), 2009 (Qatar), and 2011 (Morocco). The next meetings are scheduled for 2013 (Panama), 2015 (Russia), and the seventh session at the seat of the Secretariat in Vienna (probably in 2017).

14 Currently there exist an Open-ended Intergovernmental Working Group on Asset Recovery and an Open-ended Intergovernmental Working Group on Prevention, which also took over tasks of the former Open-ended Intergovernmental Working Group on Technical Assistance. An Open-ended Intergovernmental Working Group on Review of the Implementation of the UNCAC prepared the review mechanism before the 3rd COSP.

15 CAC/COSP 3, Resolution 3/1 – Review mechanism.

16 Originally the Directorate-General (DG) Justice and Home Affairs (JAI), later DG Justice, Liberty and Security (JLS), and currently DG Home Affairs (HOME).

17 Such a process of voluntary implementation has been initiated within the organisations of the UN system.

18 Council documents No 15012/1/06 REV 1 CRIMORG 165 RESTREINT UE, 14412/1/07 CRIMORG 164 RESTREINT UE, 15233/1/07 CRIMORG 172 RESTREINT UE and 5359/08 CRIMORG 10 DEVGEN 8 RESTREINT UE.

19 Council documents No 11452/2/09 REV 2 CRIMORG 104 RESTREINT UE and 11455/2/09 REV 2 CRIMORG 105 RESTREINT UE.

20 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on Fighting Corruption in the EU of 6 June 2011 (COM(2011)308).

21 Ibid., Section 3.3.

22 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors on the Commission Anti-Fraud Strategy of 24 June 2011 (COM(2011)376), Section 2.6.1, p. 16.

## Unjustified Set-Off as a Criminal Offence in Italian Tax Law

Enrico Mastrogiacomo

### Introduction

Non-payment of an amount due by way of tax as calculated by a taxpayer in his tax return, including value added tax (VAT), is currently one of the most frequent forms of tax evasion in

Italy. Two new offences have been added<sup>1</sup> to the *corpus* of Italian direct taxes and VAT legislation with a view to curbing this practice: non-payment of VAT and unjustified set-off, as laid down by Sects. 10 *ter* and 10 *quater*, respectively, of Legislative Order No. 74 of 10 March 2000 entitled "New measures

against income tax and value added tax offences.” Sect. 10 *ter* prescribes imprisonment for a term of six months to two years for the non-payment of VAT amounting to more than € 50,000 as calculated on the annual return. Sect. 10 *quater* prescribes the same punishment for *anyone who fails to pay the sums due as the result of having set off, within the meaning of sect. 17 of Legislative Order No. 241 of 9 July 1997, credits not applicable or non-existent amounting to more than € 50,000 for each taxation period.*

Unjustified set-off is a more insidious offence than simple failure to pay. Non-payment of tax debts duly declared in a return, in fact, is readily detectable by Inland Revenue through the use of IT procedures that cross-check the figures on the returns lodged by taxpayers against the amounts actually effectuated. An unjustified set-off, however, is not immediately apparent but must await the determination of the non-existence or non-applicability of the credits thus employed.

Italy has introduced another measure against VAT carousel frauds perpetrated by insertion of a “missing trader” between the Community supplier and the Italian customer. When the annual VAT return is presented, the VAT debt for sales in Italy (as against the *neutrality* of intra-Community acquisitions) emerges. Failure to pay the tax owed according to the return would be readily detectable. Instead, the taxpayer seeks to conceal his position by setting off non-existent credits against his VAT debt.

## I. Set-Off as a Legal Institution

A fuller understanding of the constituent features of this offence can best be obtained from a brief examination of the term “set-off.” Set-off is a means whereby tax liabilities can be discharged via employment, for the payment of such debts, of tax and contribution credits claimed against the State. It is classified as either *vertical* or *horizontal*.

*Vertical* set-off occurs when credits and debts relating to the same type of tax are involved. It is effectuated upon the presentation of the corresponding tax return. A VAT credit, for example, arising from a return filed for the fiscal year 2008, can be used, wholly or in part, to set off a VAT debt resulting from the return filed for the fiscal year 2009. Sect. 17 of Legislative Order No. 241 of 9 July 1997 introduced *horizontal* set-off (the subject of the offence in question). This differs from vertical set-off in four ways:

- It applies to credits and debts arising from different taxes. An income tax credit, for example, can be set off against a VAT debt;
- Only credits arising from annual returns can be set off;
- No more than € 516,456.90 can be set off per annum;
- Set-off is not applied on the occasion of the filing of an an-

nual return but when Form F24 is filled in. F24 is the form prescribed by Italian law for the payment of taxes and duties. It is composed of several boxes in which the taxpayer is required to indicate the relevant *codes*, the tax debt he has to pay, and such tax credits as he intends to use to offset the said debt, together with the balance (if any) still owing. If this balance is nil, Form F24 must nonetheless be duly filed in by the taxpayer.

Form F24 is lodged in two ways: electronically or in paper form. Holders of a *VAT number* are required to deliver their Form F24 via the *Internet* (either directly or through duly enabled *intermediaries*). Payment of such amounts as may be due is also effectuated electronically by withdrawal, in favour of Inland Revenue, of the sum concerned from the taxpayer’s current account. The account must be at one of the banks operating in accordance with the terms of an agreement with Inland Revenue or be accessible through the *home banking* services of the banks themselves or the Italian GPO. Taxpayers who do not have a VAT number can also file using the Internet. In addition, they can hand in their (paper) Form F24 at any bank or post office.

## II. Unjustified Set-Off as a Criminal Offence

### 1. Offenders

Criminal responsibility is a personal liability (Sect. 27, Italian Constitution). The actual perpetrator (or principal in the first degree) will thus be held responsible for the offence of unjustified enrichment.

Other actors may be involved in the wrongdoing, particularly the *intermediary*, that is to say the person who sees to the electronic transmission of the Form F24 and is frequently the one who also handles a taxpayer’s accounting and fiscal affairs. In accordance with the general principles of participation in criminal offences (Sects. 110 et seq. of the Criminal Code), an intermediary may be charged as an accessory if, for example:

- He has suggested to the taxpayer that an illicit advantage may be gained through an unjustified set-off and he has duly completed and filed the corresponding false Form F24;
- While not actually suggesting the wrongdoing, he has completed and filed Form F24 according to the taxpayer’s instructions, with full knowledge of the unjustified set-off thus perpetrated.

### 2. Conduct Giving Rise to the Offence

The offence is one of *commission* perpetrated in two distinct stages: setting off in Form F24 of non-existent or non-applica-

ble credits against other debts; filing of such a falsely completed form, whether electronically or by physical presentation. The credit thus unjustifiably set off may be of any type. It is not confined to income taxes and VAT. The components of the conduct that constitute the offence are as follows:

#### a) Exploitation of a non-existent or non-applicable credit

A *non-existent* credit is one invented by the taxpayer, with or without the support of a false document. A *non-applicable credit* is one that actually exists but is not included among those that can be offset within the framework of Sect. 17 of Legislative Order No. 241 of 1997 or exceeds the prescribed € 516,456.90 threshold.

#### b) Failure to pay sums that are due

Following his resort to an unjustified set-off, the taxpayer does not pay the corresponding fiscal debts that would otherwise be due. It is not yet clear from the case law whether the rule is confined to the non-payment of direct taxes and VAT or whether it also extends to other taxes and duties. Two approaches can be taken:

- The narrower view starts from the premise that the rule itself forms one of the provisions of Legislative Order No. 74 of 2000, whose sole purpose is the ordering of offences relating to income taxes and value-added tax.
- The broader view is founded on the literal formulation of the rule insofar as it expressly punishes non-payment, not of taxes but simply of *sums due* within the meaning of Sect. 17 of Legislative Order No. 241 of 1997, through the unjustified setting off of non-applicable or non-existent credits.

#### c) The punishability threshold

Legislative Order No. 74 of 2000 has been drafted with the intention to confine the imposition of a criminal sanction to actions that result in a serious detriment to the economic interests of the State. The perpetrator of an unjustified set-off can therefore only be charged with a criminal offence if his action results in the non-payment of *sums due amounting to more than €50,000 for each taxation period*. This punishability threshold is a constituent component of the offence.

The term *taxation period* means the calendar year.

### 3. The Subjective Element

*Mens rea (generic dolus)* – the subjective intention or knowledge of wrongdoing – is a necessary element of the offence. The perpetrator must have been aware of two facets of his ac-

tion: payment of less than that which was due, owing to his having offset a non-existent or non-applicable credit; non-payment of sums amounting to more than € 50,000 in the same year.

The offence is equally punishable in the event of a *contingent* intention, that is to say when the main objective of the offender was not to avoid payment of what was due but to counterbalance a company's temporary shortage of cash or to create unjustified financial assets for the commission of other offences.

### 4. The Moment of Commission

The offence is deemed to have been committed at the moment a falsely completed Form F24 (resulting in the non-payment of a sum exceeding €50,000) is filed. In the event of the filing of several forms during the course of a year, each resulting in the non-payment of a sum less than the threshold of €50,000, commission of the offence begins at the moment Form 24 is filed and whose unpaid amount, when added to the previous unpaid amounts, results in the crossing of this threshold.<sup>2</sup>

Effectuation of further unjustified set-offs aggravates the offence thus substantiated by the crossing of the threshold. It does not give rise to a further offence, irrespective of the amount involved.

### III. Unjustified Set-Off as an Administrative Offence

A person who perpetrates an unjustified set-off also commits an administrative violation within the meaning of Sect. 13 of Legislative Order No. 471 of 1997. Application of the administrative sanction on the part of Inland Revenue is accompanied by proceedings for recovery of the tax not paid.

The administrative sanction for unjustified set-off of a non-applicable credit is 30% of the amount not paid.<sup>3</sup> The administrative sanction for unjustified set-off of a non-existent credit ranges from 100% to 200% of this credit. It is also fixed at 200% for credits exceeding € 50,000.<sup>4</sup>

#### 1. Relationship Between the Administrative and the Criminal Sanction: The Speciality Principle

Sect. 19 of Legislative Order No. 74 of 2000 lays down that, when the same offence is punishable in accordance with one of the provisions of this Order and a provision imposes an administrative sanction, the "special provision" is to be applied. This term is used for a provision that comprises all the components

of the other (general) provision, plus one or more specialising features.

According to Inland Revenue,<sup>5</sup> the criminal provision usually proves to be special on account of the specific elements it requires, e.g., specific *dolus*, crossing of the punishability threshold, and the particular ways and means of commission. Application of the speciality principle presupposes identical nature of the act punished by one of the provisions of Legislative Order No. 74 of 2000 with that punished by an administrative sanction.

In any event, Sect. 19 (2) prescribes that exclusion of the administrative sanction applies solely to a natural person to whom the offence is ascribed. The aim of this provision is to prevent punishment of the same subject twice for the same offence, while simultaneously retaining the possibility of splitting punishment between different types of offenders such as a director (the active offender) and the company (liable to the administrative sanction). In view of the fact, therefore, that Sect. 7(1) of Legislative Order No. 269 of 30 September 2003, converted into Law No. 326 of 24 November 2003, prescribes that *administrative sanctions relating to the fiscal relationship proper to companies or bodies with a legal personality are solely chargeable to the legal person*, whereas criminal liability is always personal, it follows that the speciality principle is only applicable to violations committed within the context of private firms or by artists, professionals, or associations, bodies or societies devoid of a legal personality in cases where the fiscal violation and the criminal violation can be attributed to the same natural person.

## 2. Relationship Between the Administrative and the Criminal Sanction: The Attenuating Circumstance

A taxpayer can correct his administrative offence by paying the tax due plus a reduced sanction. If he has received a notification of irregularity from Inland Revenue, he can regularise his position by paying an administrative sanction corresponding to 3% of the credits unjustifiably set off.<sup>6</sup> He is also free to proceed to what is called effective remediation prior to receiving such a notification by spontaneously paying an administrative sanction corresponding to 3%. This step must be taken no later than 30 days after the violation or 3.75% is taken within the term for presentation of the income tax return for the year in the course of which the offence was committed.<sup>7</sup>

Settlement of the administrative offence prior to the opening of the criminal proceedings initially enables a person eventually found guilty of the criminal offence to take advantage of this special attenuating circumstance, and to pay only one

third of the criminal sanction that would otherwise have been imposed.<sup>8</sup>

Legislative Order No. 138 of 13 August 2011 introduced a significant amendment of the corpus of Legislative Order 74/2000. “Plea bargaining” within the meaning of Sect. 444 of the Code of Criminal Procedure<sup>9</sup> is only admissible for all tax offences in cases where the attenuating circumstance as per Sect. 13 are given. This amendment applies to offences committed after 17 September 2011.

## IV. Conclusions

The introduction of the offences of non-payment and unjustified set-off has criminally sanctioned, according to the specific conditions prescribed, all possible ways and means of evasion in each of the stages in the process of determining and paying taxes:

- Quantification of the taxable amount, with the tax return offences (return not lodged, inexact or fraudulent return: Sects. 2 to 5 of Legislative Order 74/2000);
- Payment, with the payment offences (non-payment, unjustified set-off, and fraudulent underpayment of income taxes: Sects. 10 bis to 11 of Legislative Order 74/2000).

This deterrent scenario sets out to encourage all taxpayers to comply with their fiscal obligations. Maximum prevention is in the interest of the State in its upstream curbing of the tax evasion still rife in Italy.

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1 By Sect. 37 (7) of Legislative Order No. 223 of 2006

2 Inland Revenue Circular No. 28 of 4 August 2006

3 Sect. 13 of Legislative Order No. 471 of 1997

4 Sect. 27 of Law No. 185 of 29 November 2008

5 Circular No. 154/E of 4 August 2000

6 Sect. 2 of Legislative Order 462/1997

7 Sect. 13, Legislative Order 472/1997

8 Sect. 13, Legislative Order 74/2000

9 Sect. 444 of the Code of Criminal Procedure

1. The accused and the public prosecutor may request the Court to apply, in the manner and measure indicated, an alternative sanction in the place of either a pecuniary penalty, reduced by up to a third, or punishment by way of imprisonment



when this, in consideration of the circumstances and reduced by up to a third, does not exceed five years, whether alone or in conjunction with a pecuniary penalty.

2. If there is also consent on the part of the party that has not formulated the request, and an acquittal is not to be pronounced within the meaning of sect. 129, the Court, on the basis of the record, may, if it regards the juridical qualification of the fact, and the application and comparison of the circumstances advanced by the parties as correct, and the penalty indicated as congruent, order the application of

the same and state in its decision that it has been requested by the parties. In the event of the appearance of a civil party, the Court does not decide on the relative request; the accused, however, is ordered to pay the costs of the civil party in the absence of just reasons for their total or partial set-off.

3. The party formulating the request may make its efficacy subject to the granting of conditional suspension of the punishment. In this case, the Court will disallow the request if it decides that conditional suspension cannot be granted.

## Administrative and Criminal Sanctions in Polish Law

Dr. Agnieszka Serzysko

On 12 April 2011, the Constitutional Tribunal of the Republic of Poland (official translation of “Trybunał Konstytucyjny Rzeczypospolitej Polski”, hereinafter “CT”) heard case P 90/08 and adjudicated that the provisions of law – based on which, first, the lump-sum tax liability and, second, the criminal liability of the taxpayer (natural person) for the fiscal misdemeanour or the fiscal crime (for the same act) was imposed – are in accordance with the Constitution of the Republic of Poland (hereinafter “Constitution”).<sup>1</sup>

The CT adjudicated that taxes from undisclosed earnings are not a criminal sanction but a “special type of tax.” In its conclusion, the CT stated that imposing both additional taxes and criminal sanctions does not constitute a breach of the *ne bis in idem* rule.

### I. The Background of the Case

The issue of constitutional aspects appeared in connection with a case in which, 75% additional tax from undisclosed earnings was imposed on the taxpayer on the basis of personal income tax law<sup>2</sup> (hereinafter “PIT”) as a sanction, on the one hand, and, on the other, a criminal sanction was imposed on the same natural person for the same act on the basis of Art. 54 § 1, 2, and 3 of the tax penal code<sup>3</sup> (hereinafter “k.k.s.”).

The District Court for the City of Miedzyrzecz, VI Grodzki Division, referred this legal question to the CT. In the applicant’s opinion, according to the law, there is no mechanism to avoid double liability – administrative and criminal sanctions

– for the same act. In the opinion of the District Court this situation is too restrictive. As a result of his particular situation of not paying taxes from undisclosed earnings to the proper authority, the taxpayer was imposed with a 75% tax on undisclosed earnings. Additionally, the taxpayer was also liable as a perpetrator of the fiscal misdemeanour or the fiscal crime under the provisions of Art. 54 § 1, 2, and 3 of the k.k.s. In the District Court’s opinion, this situation breached the *ne bis in idem* rule and also constituted a disproportionate reaction on the part of the State for the breach of the law.<sup>4</sup>

The lump-sum tax is calculated for income from undisclosed sources or earnings whose source is not visible in the real income, in the event that the increase in property or incurred expenses is higher than the disclosed earnings. If so and if the person cannot justify in a credible manner the sources of his expenses or the increase in property, the tax authority, on the basis of internal fiscal indications, will calculate the amount of earnings and assess the tax to the amount of 75% (Art. 30 section 1 point 7 PIT). The high 75% tax is considered to have a repressive effect and to be a serious burden for the taxpayer to pay. It is not the normal tax rate calculated on the basis of PIT but a sanction connected with the disclosure of earnings from illegal sources or earnings from unknown sources.

In accordance with Art. 54 of the k.k.s., the taxpayer who evades taxes, does not disclose income to the tax authorities or the basis for a certain tax payment, or does not make a tax declaration (which results in the evasion of tax) will be sentenced to a fine of 720 daily rates<sup>5</sup> or to imprisonment, or to both of these two punishments. If the amount of tax evaded is small,

only the fine can be applied. However, “small value” means an amount that does not exceed two thirds of the amount of minimum wage (Art. 53 § 14 k.k.s.) at the time the crime was committed.

The question of double sanctions shall be considered in the context of the proportionality of the reaction of the State upon infringement of the law, as derived from Art. 2 of the Constitution. Due to excessive repressiveness, the situation here can be assessed as disproportionately burdensome because of the accumulation of several negative results of one situation: not only the criminal sanction but also the administrative sanction, its severity, procedural restrictions, evidence restrictions, etc.

The CT did not agree with these arguments. In the CT’s opinion, the sentence is proportional and did not breach Art. 2 of the Constitution because this type of tax is not a criminal sanction.

## II. The Constitutional Court’s Opinion

The CT adjudicated that the lump-sum tax is one of the instruments used to fight criminal acts that lie in the “grey area,”<sup>6</sup> hence these acts are on the verge of legal economic activity. Furthermore, the payment of a 75% tax is a type of compensation of the state treasury for not paying tax and interest on time and is intended to have a preventive effect. The aim of this tax is to compensate the decrease in the state budget by the amount of tax and interest. The 75% rate is so high in order to demonstrate that tax evasion is not profitable.

Additionally, the high amount of the lump-sum tax is justified by the fact that, besides the tax itself, interest for the delay caused by not paying income tax is not calculated, and the Inland Revenue Department bears the costs of calculation.

The obligation for all taxpayers to fund the State’s financial resources in the form of taxes is an important issue from a constitutional point of view. This type of financing is a way of ensuring maintenance and efficient functioning of the State – Art. 84 of the Constitution.<sup>7</sup> Art. 2 of the Constitution<sup>8</sup> includes rules of social justice: the system of competition in a capitalist economy is combined with the rule of fairness require paying taxes.

In this context, it is also important that sanctions can be imposed on the basis of provisions of the k.k.s. that were in effect prior to a decision on the guilt of the taxpayer.

The new opinion of the Polish Parliament dated 31 March 2011, which replaced the opinion on similar issues dated 22 April 2009, states that improper calculation of taxes can have many reasons (an unintentional act, a mistake in account-

ing, lack of knowledge about the interpretation of the tax law), but not disclosing certain earnings is more likely to have been an intentional action. This type of omission does not require knowledge of tax law but it is important from a social point of view.<sup>9</sup>

Undisclosed earnings and their sources forced the State to introduce a special instrument and create a new legal construction to ensure the rule of social equality and generalisation of tax. This construction also has another aim, namely restoring the legal situation by imposing a 75% tax on undisclosed earnings.<sup>10</sup>

In the new opinion of the Polish Parliament dated 31 March 2011, the rate of 75% is connected with a special type of tax and, more importantly, it is a mechanism for compensation of interest that has not been collected. Not the aim, nor the legal construction, nor even the amount of taxes on these earnings is a basis for the introduction of a “punishment.” The above-mentioned regulation fulfills the constructive elements of tax. It is not connected with the taxpayer but with his earnings, and its aim is not to punish the taxpayer but only to make him realise that he has an obligation to pay taxes and to restore the legal situation. The location of Art. 30 PIT (not in the k.k.s.) supports this opinion.

Paying taxes is an obligation. In the case of imposing tax on undisclosed earnings, it is assumed that it is impossible to reconstruct the value and the costs of earnings. For this reason, the calculation of the value of earnings is based on the proven lack of justification for expenses incurred and the value of the property that comes from taxed earnings or that is free from tax.<sup>11</sup> Taxation of undisclosed earnings is connected with the interpretation of the phrase “expenses incurred” and “value of the collected property in this year” in Art. 20 section 3 PIT.

This problem is of concern only with regard to natural persons, because only in these cases is there a possibility to share the sources of earnings: types of criminal acts (legal or factual) for which income is received as a basis for tax.<sup>12</sup>

From a procedural point of view, the taxation of earnings from undisclosed sources is an extraordinary, substitute, and amended method of measurement of an obligation that replaced taxation based on the general rules of tax law.<sup>13</sup> Taxation of earnings from undisclosed sources and taxation based on general rules of tax law differ as to their base of taxation.<sup>14</sup>

The *ratio* of this rule is the fact that it is useful if the restoration of the former legal situation is not possible by reconstruction of the real tax state. For the taxation of undisclosed earnings, the State incorporates equality into the taxation process.

This form of restitution completes and compensates losses of the State that resulted from the unreliable fulfilment of the taxpayer's obligation.<sup>15</sup>

To answer the legal question raised here, the main issue was the definition of criminal sanctions and administrative sanctions. The lines between administrative sanctions, misdemeanours, and penal offences are undefined.<sup>16</sup> From a constitutional point of view, the main point is not the "name" of the type of tax but its "essence". This means that restrictive provisions are not *sensu stricto* criminal provisions but provisions which imposed some form of punishment on the person.<sup>17</sup> The European Court of Human Rights (hereinafter "ECtHR") has a similar point of view in this matter.<sup>18</sup> The ECtHR stated that the term "criminal case" refers to the repressive character of a sanction.<sup>19</sup>

Based on this point of view, the CT adjudicated that Art. 30 PIT does not have a repressive essence. However, it has a preventive function.<sup>20</sup> Therefore, it should not be assessed in the context of breaching the *ne bis in idem* rule.

Questioning the penal character of Art. 30 PIT does not mean that we do not have elements of a criminal sanction in this provision. Tax sanctions cause a financial burden.<sup>21</sup>

Judge M. Zubik submitted another opinion to the judgment of CT P 90/08. The judge said that this situation causes excessive taxation and disproportional repressiveness: paying a lump-sum tax of a higher than normal value (75% of the earnings) exceeds the reasonable level that should serve the public interest and is not balanced with the taxpayer's interests.

A double sanction for one person, meaning the obligation to pay the lump-sum as well as criminal measures according to the k.k.s., can lead to the deprivation of all undisclosed earnings and also to an excessive burden due to the deterioration of the personal and economic situation of the person concerned.

### III. *Ne bis in idem*...

The *ne bis in idem* rule is not explicitly formulated in the Constitution but, as a fundamental principle of the criminal law, it is derived from the rule of law. The rule of *ne bis in idem* means that a person cannot be punished twice for the same crime. Double punishment of the same person for the same act breaches the principle of proportionality.<sup>22</sup>

The CT adjudicated that the *ne bis in idem* rule refers not only to the criminal sanctions for the offence but also to the administrative sanctions.<sup>23</sup> The additional fine is a sanction that has

a repressive effect and shall be considered when evaluating the *ne bis in idem* rule. This situation is intensified by the tendency to guarantee compliance with different obligations of a public nature in a different manner, e.g., using economic sanctions that have a different name but without using the term "punishment." These sanctions are not imposed by a court but by an administrative authority. Imposing the sanctions is done objectively as the "guilt" of the perpetrator is not referred to. This means that, beyond the official bearing of criminal liability, we have an additional manner of imposing burdensome sanctions such as economic sanctions.<sup>24</sup> With regard to the *ratio legis* of this argumentation, the CT stated that the tax described in Art. 30 PIT does not have the character of a tax that would double the criminal sanction.

### IV. In the past...

The problem of double sanctions was also considered by the CT in other judgments. In the judgment dated 29 April 1998 r., sygn. K 17/97,<sup>25</sup> the CT issues a reminder that "the taxpayers' actions to calculate their taxes is based on trust in the taxpayer. This trust includes not only the honesty of the taxpayers, but also appropriate care in their calculation of the amount of due tax liability. Sanctions for decreasing the amount that is due to the tax office in the tax declaration are applied automatically under tax law based on his objective fault and has a preventive character. The aim of that preventive character is to convince taxpayers that the reliable and careful completion of the tax declaration is in his best interest. Making mistakes in the tax declaration entails the obligation to pay an increased amount which equals the difference between the taxes that were due and taxes that were declared."

This argumentation was strengthened in the judgment of the CT dated 30 November 2004, sygn. akt. SK 31/04 (OTK ZZU no 10/A/2004, pos. 110), in which the CT considered the constitutional complaint of a limited liability company, which is a legal entity, and confirmed the constitutionality of Art. 27 section 6 of the Act of VAT.<sup>26</sup>

The CT thus concluded, with a significant statement for the assessment of Art. 27 section 6 of the Act of VAT, that

this provision does not establish a "normal" tax or pecuniary burden, which decreases the property of the taxpayer. This provision establishes a sanction for breaching the rules on the tax on goods and services such as the obligation to provide evidence.

The CT continued:

Additional tax obligations (sanctions) arising in connection with defaulting on the duty to provide evidence refer to the situation when the taxpayer did not regularly submit a reliable tax declaration in the form of VAT-7. The main aim of this obligation is assuring quality, it is a general rule with regard to taxes (article 32 in connection

with article 84 of the Constitution). Additional tax obligations are an obligatory administrative sanction for the submission of unreliable tax declarations. Applying a sanction is the necessary result of a breach by the taxpayer of the evidence obligation that is specified by the act. It is important for the efficient functioning of taxes on goods and services that are based on the fundament of self-accounting and “evidence efficiency” of taxpayers. Each breach of this efficiency, even if not followed by a decrease in the amount of tax liabilities to the state, is an obstacle in the efficient functioning of this tax. The liability of the taxpayer has an objective nature, because in article 27 of the act the terms “guilt” or “dishonesty” are not included, however “unreliability” is. Each violation, even if accidentally and unintentional, of the evidence obligation that is specified in the hypothesis of article 27 section 6 is threatened by a sanction.

Additionally, the CT agreed with the conclusions of the judgment dated 29 April 1998 in that

accumulation of administrative and penal responsibility is too harsh and does not respect the interest of the taxpayers, who also bear an administrative sanction (sygn. K 17/97, p. 173).

In this context, the Human Rights Defender said that increasing an established tax is the equivalent of a new fine imposed without starting a criminal procedure. In the situation discussed above, the sanction was imposed in the administrative procedure and not in a fiscal-penal procedure. In an administrative procedure, the person who committed the prohibited act does not have the right to defence and is deprived of the right to demand an investigation of the case.<sup>27</sup>

In addition, the Act of VAT neither defines the offence or misdemeanour nor does it include other criminal provisions. The provisions of the Act of VAT were not clear enough, which means that it could be interpreted in different ways.<sup>28</sup>

Here, it is important that continued coexistence of both types of sanctions – administrative and penal – requires a precise specification of the limits for imposing fiscal-penal sanctions. At present, we can refer to the judgment of the CT dated 12. September 2005,<sup>29</sup> in which the view is expressed that many tax regulations need to include a proportionality rule with regard to imposing fiscal-penal sanctions. It is unacceptable to shift onto the taxpayer not only the economic risks connected with a deficient implementation of the rules of European Community law into Polish tax law but also criminal liability. Additionally, Art. 42 section 3 of the Constitution excludes the presumption of innocence of the taxpayer in a fiscal-penal procedure. It also refers to the taxpayer who performs a business activity, due to the fact that the tax law is complicated and unclear and that simple use of the rule *ignorantia iuris nocet* is unjustified in these situations.<sup>30</sup>

Next came a judgment sygn. akt P 43/06 dated 4 September 2007 ruling on a legal question posed by the Provincial Administrative Court in Poznań. The judgment had been issued in connection with the case of a taxpayer who sold imported

cars. In the opinion of the tax authorities, the taxpayer overstated the amount of the calculated tax in order to transfer this tax to the next year of assessment. In this situation, taxes on goods and services were calculated and “additional tax liability” was imposed to the amount of 30% of the overstated amount. The Provincial Administrative Court, which heard the case, submitted the following legal question: if applying to the same person for the same act, is the administrative sanction specified as “additional tax liability” and is liability for a fiscal crime or fiscal misdemeanour in a fiscal penal proceeding lawful and in accordance with the Constitution, making Art. 109 sections 5 and 6 of the Act dated 11 March 2004 of the Tax on Goods and Services constitutional?

This issue goes beyond the scope of the tax liability of a natural person carrying out a business activity. The Provincial Administrative Court argued that in, Art. 109 sections 5 and 6 of the Act on Taxes on Goods and Services dated 11 March 2004,<sup>31</sup> we can distinguish between three hypothetical situations:

- 1) The taxpayer, in a tax declaration, submits the refund amount of difference between paid and due tax as higher than the due amount;
- 2) The taxpayer, in the tax declaration, submits the refund amount of calculated tax as higher than the due amount;
- 3) The taxpayer, in the tax declaration, submits the amount of the surplus of calculated tax, which will be transferred to the future year of assessment as higher than the due amount.

In the Provincial Administrative Court’s opinion, each of these types of behaviour on the part of the taxpayer is *also* penalised in Art. 56 of the k.k.s. as a treasury offence or crime. This means that actions resulting from administrative liability in the form of VAT tax (“additional tax obligation”) can, in relation to a natural person, be additionally classified as fiscal misdemeanours or fiscal crimes threatened by sanctions mentioned in the k.k.s. In the opinion of the Provincial Administrative Court, combining both administrative and fiscal-penal liability is not consistent with democratic rules (Art. 2 of the Constitution) and the rules of tax law.<sup>32</sup> Moreover, it is excessive from a fiscal point of view, and the interests of the taxpayer are not taken into consideration.

The CT, in its reasoning, referred to the resolution of the Supreme Administrative Court dated 16 October 2006 in which said Court stated that

the provisions of article 27 section 6 of act dated 08.01.1993 of taxes on goods and services and excise tax<sup>33</sup> are not the basis for additional obligations for the natural person if there is also a sanction for the fiscal crime. It is unacceptable in the state of law to impose double sanctions for the same act.<sup>34</sup>

Referring to the judgment regarding the act dated 8 January 1993 concerning taxes on goods and services and excise tax,

the Constitutional Court of the Republic of Poland remarked that this is a conclusion *a minori ad maius* (a more general rule is contained in a strictly formulated rule).

In its reasoning, the CT had the possibility to refer to the previous judgment of the CT – P 43/06 (prejudicial question from the Provincial Administrative Court dated 28 July 2006 (sygn. akt I SA/Po 1196/05)) dated 4 September 2007 and state that Art. 109 sections 5 and 6 of the Act dated 11 March 2004 on Taxes on Goods and Services is unconstitutional.

In the opinion of the lawyer D. Korczyński, which I support, this view can be approved, as a result of the fact that the judgment from the CT refers to the Supreme Court of the Republic of Poland and the Supreme Administrative Court judgments. The problem of accumulating administrative and criminal liability, which is the conclusion of the judgment, is a broad and very significant problem from a theoretical and from a practical point of view as to the nature of administrative sanctions, including tax sanctions. In this context, we should point out that, in the Polish law, there are no clear instructions on how to use administrative sanctions, which means that the rules of the process of imposing these sanctions is based on general rules of administrative and criminal law. As a result, we have new branch of law – administrative-criminal law – which is a precedent. The existence of this branch of law is based on the judgments from the ECtHR, the CT, the Supreme Court of the Republic of Poland, and the Supreme Administrative Court.<sup>35</sup>

This issue was also under discussion by the Parliament of the Republic of Poland. In the opinion of the Ministry of Justice, in answer to parliamentary question no 8454, the *ne bis in idem* rule in criminal procedure means that one person should not be punished twice for the same criminal act. On the basis of criminal law, this rule is applicable, and there is no doubt about how to use it but, based on the conjunction of both administrative and criminal law, this rule is not easy to use. The main problem is the close connection between the result of the acts that fall within the scope of both criminal law and administrative law.

If the provisions of administrative law foresee imposing on the perpetrator of the crime act-specific consequences of a repressive nature that are connected with the injury caused by his criminal behaviour, applying both administrative and criminal sanctions for the same person breaches the rule of the state of law expressed in Art. 2 of the Constitution.<sup>36</sup> However, if the main aim of the administrative sanction imposed on the perpetrator for committing a prohibited act is not repressive (e.g., the aim could be to ensure the regularity of the fulfilment by public officers in their functions, to ensure the credibility of documents, or to ensure the security of road traffic), it is

impossible to conclude that the rule of double punishment has been violated – even in the situation in which using administrative sanctions would also cause hardship to the perpetrator. The essence of administrative interference in this situation is the protection of specific social values, which also happens to result in the deterioration of the personal liberty of the citizen.

On 18 November 2010, the CT ruled in a case in which the issue of Social Insurance Institute (*Zakład Ubezpieczeń Społecznych*, hereinafter “ZUS”) sanctions (sanctions of an administrative character) and criminal sanctions (104/9/A/2010, sygn. akt P 29/09) was settled. The CT stated that the provisions of law imposed on the same person for the same act regarding criminal responsibility (Penal Code dated 6 June 1997)<sup>37</sup> and the additional fee (on the basis of act dated 13 October 1998 on the system of social insurance,<sup>38</sup> hereinafter “Act of Social Insurance”) are not in accordance with Art. 2 of the Constitution. The background of the case is as follows: Rafał K. was the owner of a firm employing several employees. The employer did not pay fees into the Social Insurance Fund and the Welfare Insurance Fund. The ZUS, on the basis of Art. 24 section 1 of Act of Social Insurance, imposed additional fees as a sanction for not paying the fees that were due. Subsequently, the prosecutor charged the employer for the criminal act described in Art. 218 of the Criminal Code.

The statement of the Polish Parliament dated 14. September 2010 explains that the aim and legal function of the additional fee, specified in Art. 24 section 1 of the Act of Social Insurance, is a *sui generis* sanction for non-performance or undue performance of the obligatory payment, the aim of which is not to “automatically” punish the taxpayer in relation to the ZUS but rather to exercise a disciplinary measure. The additional fee shall be imposed if it is possible to ascribe guilt for lack of compliance with the offender’s obligation in relation to the ZUS. The additional fee has a *strict* penal character. It is therefore a measure of an administrative-penal nature.

In the CT’s opinion, the *ne bis in idem* rule should not be limited to the criminal matter in the code of criminal procedure (hereinafter “k.p.k.”). The CT stated that

in Polish law there is no special provision, on the basis of which it can be possible to use analogy and using the instruments included in criminal code.<sup>39</sup>

## V. The Next Steps – Prejudicial Question in Case No. V KK 179/10

On 27 September 2010, the Supreme Court of the Republic of Poland on the basis of Art. 267 of the Treaty of the Functioning of the European Union (hereinafter “TFEU”) referred



to the Court of Justice of the European Union (hereinafter “ECJ”) the prejudicial question of whether the legal character of the proceedings that lead to imposing an administrative sanction can be recognised as the proceedings mentioned in Art. 17 § 1 point 7 of the k.p.k. Taken literally, the provisions in which “criminal proceedings” are mentioned would lead to a negative answer to this question. The reason for this is that the provision of Art. 17 § 1 point 7 k.p.k. must be interpreted in connection with Art. 5 of the additional protocol to the European Convention of Human Rights (hereinafter “ECHR”), in which a prohibition of repeated judgment or punishment is laid down. This provision must be interpreted by taking Art. 6 section 1 ECHR into consideration with regard to the interpretation of the term “criminal case.” As regards the nature of the proceedings, during which administrative sanctions are imposed, the question of whether or not there is a double sanction must be decided not only based on the type and nature of the sanction but also based on the functions of both types of liability: administrative liability and criminal liability.<sup>40</sup>

Some conclusions can be drawn from the reasoning of the sentence by the First Instance Court (hereinafter “FIC”) dated 26 September 2002 in the case of T. – 199/99. A situation in which the authority of a Member State did not take into consideration sanctions of an administrative character imposed by an authority of the EU can lead to a violation of both the *ne bis in idem* rule and the proportionality rule (point 138).<sup>41</sup>

Other conclusions follow from case C – 45/08 (ETS judgment dated 23 December 2009 r., *Spector Photo Group NV, Chris Van Raemdonck v. Commissie voor het Bank, Financie en Asurantiewezen*, par. 74 ff.), in which the possibility to impose a criminal sanction on a person who had previously been punished with a sanction of an administrative nature, under the condition that the legislative conditions of the proportionality principle are in place in the national state. In this judgment, the ECJ remarked that

administrative sanctions were efficient, proportional and deterrent without damage for the law of the member states to impose the criminal sanctions (point 75).

However, the ECJ added that, if a Member State provides the possibility to impose criminal sanctions of a pecuniary nature in addition to administrative sanctions

it is not necessary, for the purposes of assessing whether the administrative sanction is effective, proportionate and dissuasive, to take account of the possibility and/or the level of a criminal sanction which may subsequently be imposed (point 77).<sup>42</sup>

More arguments on this subject can be found in the jurisprudence of the ECtHR. In particular, in the judgment dated 16 June 2009 regarding the case of *Ruotsalainen v. Finland*,<sup>43</sup> the ECtHR stated the breach of Art. 4 additional protocol No. 7 as regards the situation in which a criminal and, subsequently, an

administrative sanction had been imposed for a tax offence. Also, in the case *Gradinger v. Austria*,<sup>44</sup> in which the perpetrator of a traffic accident resulting in death had been sanctioned first on the basis of criminal liability, and then received an administrative sanction on the basis of traffic law, the ECtHR concluded a breach of this provision (the ECtHR concluded that there was no breach of the Art. 4 Additional Protocol No. 7 in the case of *Göktan v. France*).<sup>45</sup>

## VI. Conclusion

The Supreme Court of the Republic of Poland leans towards the standpoint that takes the nature of the proceedings into account. This means that when an administrative sanction is imposed, the decision as to whether or not there is a double (penal) sanction should be decided based on not only the type and legal character of this sanction, but also the function which they both fulfil.<sup>46</sup>

This issue was also touched upon in the judgments of ECtHR, which in its opinion stated that the issue of the qualification of the case as criminal is connected with the retributive character of the sanction. At the same time, the Court ruled that, if a sanction does not have a repressive character but only a deterrent character, the sanction is preventive and the case is not a criminal case.<sup>47</sup>

The “competition” between administrative and criminal sanctions is a controversial issue as we can observe on the basis of the above-mentioned judgments. As a result, we can anticipate the creation of a new legal discipline: criminal-administrative law. In the future, we can also count on the opinion of the ECJ to provide answers to questions posed by the Supreme Court of the Republic of Poland.

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1 Sygn. akt P 90/08.

2 Act of 26 July 1991 regarding income tax from natural person (unofficial translation of „ustawa z dnia 26 lipca 1991 r. o podatku dochodowym od osób fizycznych”), Dz. U. from 2010, No. 51, pos. 455.

3 Act of 10 September 1999 regarding tax penal code (unofficial translation of “Kodeks karny skarbowy”), Dz. U. 2007, No. 111, pos. 765.

- 4 K. Potocki, <http://www.iform.pl/wyrok-tk-w-sprawie-zroznicowania-opodatkowania-w-zalezności-od-posiadania-rodziny-na-utrzymaniu---dotyczy-pit-N455.html>
- 5 In the Polish law, criminal sanctions in the form of fines are calculated on the basis of a daily rate. This means that the daily rate is connected to the minimum wage for work. Minimum wage for work is currently 1.386,00 PLN.
- 6 Judgments of Supreme Administrative Court (hereinafter "NSA") sygn. akt I SA/Wr 948/96, Lex No. 31000, dated 04.09.1997 and sygn. akt I Sa/Wr 291/96, Lex No. 29058, dated 28.02.1997.
- 7 "Everyone shall comply with his responsibilities and public duties, including the payment of taxes, as specified by statute" (unofficial translation of "Każdy jest obowiązany do ponoszenia ciężarów i świadczeń publicznych, w tym podatków, określonych w ustawie").
- 8 "The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice" (unofficial translation of "Rzeczpospolita Polska jest demokratycznym państwem prawnym, urzeczywistniającym zasady sprawiedliwości społecznej").
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