

eucrim

2013 / **2**

THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM



Focus: Confiscation, Freezing, and Recovery of Assets

Dossier particulier: La confiscation, le gel et le recouvrement des avoirs

Schwerpunktthema: Einziehung, Sicherstellung und Abschöpfung von Vermögen

Tracking and Tracing Stolen Assets in Foreign Jurisdictions
Charlie Monteith / Andrew Dornbierer

The Financial Execution Inquiry – a Bridge too Far?
Francis Desterbeck

Fighting Corruption in Malta and at European Union Levels
Prof. Kevin Aquilina

First Experiences in Germany with Mutual Recognition of Financial Penalties
Dr. Christian Johnson

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

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Imprint

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Guest Editorial

Dear Readers,

Nothing says more than the figures: \$2.1 trillion is the total amount of criminal proceeds generated in 2009 according to UN estimates. Not only does money laundering facilitate corruption, organized crime, and terrorism, but it steals from all EU citizens. At present, less than 1% of the proceeds of crime are frozen and confiscated, proving that dirty money remains in the criminals' pockets. This is why we must concentrate our efforts on dragging out this money if we ever want to get real results. Otherwise, dirty money will produce new organized crime networks, fund terrorism, or go to the underground economy or into the licit economy through money laundering.

As rapporteur for the draft directive on the freezing and confiscation of proceeds of crime in the European Union, I proposed several progressive, groundbreaking measures. The first move of action will give each Member State the ability to immediately freeze property when it can be sufficiently assumed that the criminal acquired the property through illegal means. This is an indispensable measure because it provides for the ability to freeze property before it can be dissipated or transferred into another jurisdiction.

Furthermore, non-conviction based confiscation is explicitly provided including the cases and circumstances where it can be decided. Non-conviction based confiscation means that even in the absence of a criminal conviction, money or any assets could be confiscated where a court is satisfied or convinced that the money or assets derive from activities of a criminal nature. Certainly, the judicial proceedings will follow the requirements of a fair trial. In some Member States, e.g., the United Kingdom or Ireland, non-conviction based confiscation is decided by civil courts, and the State sues the property itself, proving that it was obtained through activities of a criminal nature. In such cases, a prison sentence is not sought by the State whose priority is to stop the dirty money flows. This step is necessary to hamper the cross-border money laundering that can occur during a criminal investigation, and makes a connection between the criminal activity and the property. If we want to disrupt and eliminate organized crime activities, taking the money is much more effective than sending a few people to prison and leaving the dirty money outside.

In addition, Member States' power to confiscate was increased by allowing extended confiscation of property if it is disproportionate to the lawful income of the convicted person and where the court finds it substantially more probable that the property in question has been derived from activities of a criminal nature than from other activities.

Moreover, the new legislation will fill an existing gap that is continuously being exploited by organized criminal groups: their ability to transfer assets to a third party in order to avoid confiscation. This void will be filled by a provision that allows for the confiscation of property acquired by third parties if they were aware of their illegal origin or had enough elements to be aware of it.

"Follow the money across borders" must be the driving principle if we want to trace the funding of organized crime and terrorism effectively and efficiently. Confiscating criminals' assets, even where a criminal conviction is not possible, is clearly necessary to recover the proceeds of crime. Therefore, after months of intense negotiations with my colleagues at the European Parliament, I am pleased that on 7 May 2013 the Committee on Civil Liberties, Justice and Home Affairs endorsed these proposals by a very strong majority. The next step in this dossier is negotiation with the Council. This will not be easy: there are some Member States that would not like to go further than the system currently in place. However, I believe that the public interest in reducing organized crime by taking its money will prevail.

Monica Macovei
Member of European Parliament



Monica Macovei



European Union*

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

Foundations

Enlargement of the EU

Historic Progress for Serbia and Kosovo

With regard to the EU enlargement towards the Western Balkans, the Council called upon Serbia and Kosovo to normalise their mutual relations (see eucrim 1/2013, p. 1). On 19 April 2013, both countries reached a historical agreement after months of negotiations and two days of discussions in Brussels led by EU High Representative for Foreign Affairs and Security Policy Catherine Ashton. The agreement was followed by a roadmap to implement it on 22 May 2013.

Reaching the accord was a prerequisite for the EU to open accession negotiations with Serbia. Only three days after the deal was made, the Commission and the EU High Representative for Foreign Affairs and Security Policy published a positive joint report on Serbia and Kosovo's progress in EU integration. The Commission recommended to the Member States that negotiations with Serbia

on EU accession be opened and that talks on a Stabilisation and Association Agreement with the EU be commenced with Kosovo. (EDB)

►eucrim ID=1302001

Progress for the Former Yugoslavian Republic of Macedonia

On 16 April 2013, Commissioner for Enlargement and Neighbourhood Policy Štefan Füle, reported on the progress made by the Former Yugoslavian Republic of Macedonia. He reported on the High Level Accession Dialogue and recognised the progress made in five key areas:

- Freedom of expression and the media;
- Rule of law and fundamental rights and inter-ethnic dialogue;
- Public administration reform;
- Electoral reform;
- Strengthening the market economy.

Steps have been taken on bilateral relations with Bulgaria and Greece, and the UN Secretary General's Special Representative has made another proposal to the negotiators regarding the name of the state. (EDB)

►eucrim ID=1302002

Schengen

European Parliament Endorses Schengen Governance Package

On 16 September 2011, the Commission published two documents known as the Schengen Governance Package (see also eucrim 4/2011, p. 135): a communication on Schengen governance, strengthening the area without internal border controls (COM(2011) 561 final), and a proposed regulation on establishing an evaluation and monitoring mechanism to verify the application of the Schengen acquis (COM(2011) 559 final). On 12 June 2013, the European Parliament plenary adopted the proposed regulation, introducing the Schengen evaluation and monitoring mechanism as well as the proposed regulation amending Regulation (EC) No. 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances. The amended regulation is also referred to as the Schengen Borders Code.

Unannounced visits by inspection teams to monitor any illegal checks at internal borders are introduced. Experts from Member States, the Commission, and EU agencies and bodies can carry out such inspections with an advance notice of 24 hours to the Member State in question. Temporarily reimplementing internal border checks is not new as such but has now been amended by the newly adopted proposal. The amendments add a verification mechanism on the EU level and prevent unilateral reintroduction of border checks except for

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

short-term checks in unforeseen circumstances that require immediate action.

It is expected that the Schengen governance package will be adopted formally by the Council this fall. (EDB)

►eucrim ID=1302003

SIS II Operational

As announced, the long awaited SIS II became operational on 9 April 2013. The SIS II stands for the Schengen Information System's second generation and consists of three components:

- A central system;
- The Schengen states' national systems;
- A communication infrastructure between the central and national systems.

Its development had been characterised by technical difficulties that delayed its launch since 2007 (see also eucrim 1/2011, p. 4).

The second generation of the SIS was a necessary step due to new states joining the Schengen area and due to the need to improve information exchange between national border control authorities, customs, and police authorities. The SIS II enhances the SIS that has been operational since 1995 by introducing new functionalities, such as the possibility to enter biometrics (e.g., fingerprints and photographs), including new types of alerts (e.g., stolen aircrafts, boats, containers, means of payment) or the possibility to link different alerts (e.g., an alert on a person linked to an alert on a vehicle). Copies of European Arrest Warrants will also be connected to alerts for persons.

The day-to-day running of the central SIS II system is the responsibility of eu-LISA, the EU's agency for large-scale IT systems in Tallinn, Estonia (see also eucrim 4/2011, p. 147). (EDB)

►eucrim ID=1302004

Smart Borders Proposals Discussed and Criticised

On 7 March 2013, the Council discussed the so-called Smart Borders proposals, a system that would facilitate and reinforce border check procedures for people travelling to the EU. It consists of two

legislative proposals: a proposed regulation establishing an Entry/Exit System (EES) to register entry and exit data of third-country nationals entering the EU (COM(2013) 95) and a proposed regulation establishing a Registered Traveller Programme (COM(2013) 97). A third proposal amounts to amending the Schengen Borders Code in order to set up both systems. The Council's preparatory bodies continue working on these proposals. On 3 May 2013, the Standing Committee of Experts on International Immigration, Refugee and Criminal Law (also known as the Commission Meijers) called upon the EP to vote against the Smart Borders proposals. The committee expressed deep concerns regarding this initiative, highlighting *inter alia* the lack of experience with the functioning of centralised databases such as SIS II that have only recently been set up, data protection matters such as proportionality and data retention, and possible access to the system for law enforcement purposes. (EDB)

►eucrim ID=1302005

Bulgaria and Romania Accession Postponed

During the JHA Council on 7-8 March 2013, the Council held a debate on the accession of Bulgaria and Romania to the Schengen zone. It was decided to address this issue again by the end of 2013, with a view to considering the way forward on the basis of the two-step approach that was discussed during the JHA Council of 25-26 October 2012 (see eucrim 4/2012, p. 143). (EDB)

►eucrim ID=1302006

Institutions

OLAF

OLAF Annual Activity Report 2012

On 23 May 2013, OLAF published its Activity Report for 2012. OLAF is continuously improving the efficiency of

its investigations, and these efforts are evident in the report (see also eucrim 2/2012, p. 51).

The duration of investigation and coordination cases decreased by 22% in comparison to 2011. By employing new and improved case selection procedures, the average duration of case selection has even been reduced by 80% compared to 2011. A total of € 94.5 million was reported by the competent authorities as having been recovered.

With regard to incoming information, data received from the Member States has doubled in volume from 2011, with the total volume of incoming information having increased 21%. 1264 received items ultimately resulted in 718 newly opened cases. At the end of 2012, 716 cases were still ongoing. (EDB)

►eucrim ID=1302007

OLAF Press Statement Regarding Allegations

On 24 April 2013, OLAF released a press statement reacting to allegations made regarding the investigation concerning former Commissioner Dalli. The claims that were made referred to a document described as having been written by the OLAF Supervisory Committee. In the press release, OLAF regrets these attempts to mislead and manipulate public opinion. (EDB)

►eucrim ID=1302008

Europol

European Law Enforcement Training Scheme

On 27 March 2013, the Commission proposed a European Law Enforcement Training Scheme. The objectives are to:

- Offer a more effective response to common security challenges;
- Raise the standard of policing across the EU;
- Stimulate the development of a common law enforcement culture as a means of enhancing mutual trust and cooperation.

The proposed Training Scheme applies to law enforcement officials of all ranks, from police officers to border guards and customs officers as well as, where appropriate, other officials, e.g., prosecutors. It focuses on improving knowledge, skills, and competence in the following four areas:

- Basic knowledge of the EU dimension of law enforcement;
- Effective bilateral and regional cooperation;
- EU thematic policing specialism;
- Civilian missions and capacity-build in third countries.

In parallel with this Training Scheme, the Commission also proposed a new legal framework for Europol, granting it

powers beyond those of CEPOL to work on training. (CR)

►eucrim ID=1302009

Regulation Proposal Published

On 27 March 2013, the Commission published a proposal for a new Regulation establishing a European Union Agency for Law Enforcement Cooperation and Training (Europol).

The main novelties of the regulation include the proposal for Europol to take over and build on the tasks formerly carried out by CEPOL, to enhance the supply of information by Member States to Europol, to increase its accountability according to the requirements of the Treaty of Lisbon, to reinforce its data

protection regime, and to improve its governance.

By merging Europol and CEPOL, the Commission expects synergies and efficiency gains as well as more targeted and relevant training for law enforcement officers. According to the Commission's assessment, €17.2 million could be saved over the 2015-2020 period. The "Europol Academy" would be responsible for supporting, developing, delivering, and coordinating training for law enforcement officers at the strategic level (CEPOL's current mandate only covers senior police officers).

Additionally, Europol may develop centres to fight specific forms of crime, such as the new European Cybercrime Centre. These centres shall enhance the EU's capacity to confront specific crime phenomena that particularly call for a common effort.

Regarding parliamentary scrutiny, the regulation proposes that the European Parliament and national parliaments shall receive information through Europol's various reports, final accounts, threat assessments, strategic analyses, and work programmes as well as the results of studies and evaluations commissioned by Europol. The European Parliament and national Parliaments may discuss with the Executive Director and the Chairperson of the Management Board matters relating to Europol, taking into account the obligations of discretion and confidentiality.

In addition, the European Parliament shall fulfil its functions as budgetary authority, in particular by receiving the statement of estimates, the report on the budgetary and financial management for that financial year. It may ask for any information required for the discharge procedure and issue a discharge to the Executive Director in respect of the implementation of the budget. It may invite the candidate for the Executive Director of Europol or a Deputy Executive Director selected by the Management Board for a hearing before the competent parliamentary committee and may also in-

Report

Making the Fight Against Corruption in the EU More Effective

Towards the development of new evaluation mechanisms

St. Julians/Malta, 16-17 May 2013

This event was organised by the ERA in cooperation with the University of Malta (Criminal Law Department) / Maltese Association for European Criminal Law and for the Protection of the EU's Financial Interests with the financial support of the European Commission, OLAF (Hercule II Programme). In 2011 the European Commission adopted the so-called "anti-corruption package", a set of measures to address more vigorously the serious harms generated by corruption at economic, social, and political level. In March 2012, the new proposal for a directive on freezing and confiscation was published. In spring 2013 the Commission intended to publish the results of a study aimed at collecting information, developing methodologies and tools for the Commission to implement, and to assist Member States' authorities with the implementation of the new EU anti-corruption policies. Such a study was intended to provide tools which may feed into the general anti-corruption review mechanism, improve the application of public procurement rules as well as promote implementation of the Commission's anti-fraud strategy in the Member States.

The key objective of this conference was to present and debate the first executive summary of this study. The event also aimed at sharing experiences of Member States in dealing with anti-corruption legal instruments. The five main sessions of the conference were:

- Recent initiatives and major challenges in the fight against corruption;
- Assisting Member States' authorities with the implementation of the new EU anti-corruption policies;
- Criminalising active and passive corruption carried out in the course of business activities;
- What makes the fight against corruption so difficult in practice?
- Towards the development of a comprehensive methodology to measure the real costs of corruption.

The main features of the study were presented by experts and were the subject of an intensive discussion with the audience. The audience consisted mainly of EU lawyers, prosecutors, and anti-fraud investigators. The seminar brought together 70 legal practitioners and experts, 25 of them from the national associations for the protection of the financial interests of the EU taking advantage by the fact that the day before the annual meeting of all Presidents was organised in St. Julians.

Laviero Buono, Head of European Criminal Law Section, ERA

vite the Executive Director to reply to its questions on his/her performance.

Furthermore, the regulation would like to enhance the supply of information provided by Member States to Europol by strengthening Member States' obligation to provide Europol with relevant data. An incentive offered to achieve this aim would be the possibility to receive financial support for cross-border investigations in areas other than euro counterfeiting. The regulation would also introduce a reporting mechanism by which to monitor Member States' contribution of data to Europol.

Novelties for the new data protection regime include the strengthened role of Europol's external data protection supervisory authority and supervision competence of the European Data Protection Supervisor.

The proposed regulation would repeal Decisions 2009/371/JHA and 2005/681/JHA. (CR)

►eucrim ID=1302010

EU Serious and Organised Crime Threat Assessment (SOCTA) 2013 Published

For the first time, Europol has published the EU Serious and Organised Crime Threat Assessment (SOCTA), a strategic report providing information to Europe's law enforcement community and decision-makers about the threat of serious and organised crime to the EU. The SOCTA also forms the cornerstone of the multi-annual policy cycle established by the EU in 2010. It builds on the work of successive EU Organised Crime Threat Assessments (OCTA) that Europol produced between 2006 and 2011.

The 2012 SOCTA report looks at "crime enablers" (crime-relevant factors that shape the nature, conduct, and impact of serious and organised criminal activities), areas of crime, and organised criminal groups (OCGs).

Factors identified as crime enablers under the SOCTA include:

- The economic crisis;
- Transportation and logistical hotspots;

- Diaspora communities;
- Corruption and the rule of law;
- Legal business structures;
- Professional expertise;
- Public attitudes and behaviour;
- Profits vs. risks and ease of entry into markets;
- The Internet and e-commerce;
- Legislation and cross-border opportunities;
- Identity theft;
- Document fraud.

Looking closer at these factors, the SOCTA finds that, although the economic crisis has not led to an increase in organised criminal activity, there have been notable shifts in criminal markets, i.e., to more counterfeit products. Due to the Internet and other technological advances, penetrable geographic boundaries have stimulated a higher degree of international criminal activity to the extent that OCGs can no longer be easily associated with specific regions or centres of gravity. Furthermore, OCGs in source or transit countries seem to exploit ethnic and national ties to diaspora communities across the EU. According to the SOCTA, the infiltration of the public and private sectors by organised crime through corruption remains a serious threat. Additionally, OCGs exploit various legal business structures and professional expertise to maintain a façade of legitimacy. They seek out criminal markets within their capacities and knowledge, especially those offering high profits and low risks such as, e.g., product counterfeiting, the production and distribution of new psychoactive substances, and fraud. The Internet is becoming an even more important marketplace for illicit commodities and criminal services in the future, giving OCGs perceived anonymity and the ability to commit crimes remotely, making detection and prosecution more complex. OCGs exploit legislative loopholes and are able to quickly identify, react to, and even anticipate changes in legislation. Document fraud is an important facilitator and enables OCGs to freely move

people and trade goods within the EU. Finally, the assessment finds that the attitudes and behaviour of the general public have a considerable influence on serious and organised crime, e.g., social tolerance towards new psychoactive substances and the purchase of counterfeit luxury goods.

Concerning areas of crime, the assessment looks at:

- Drugs;
- Counterfeiting;
- Crimes against persons;
- Organised property crime;
- Economic crimes;
- Cybercrime;
- Environmental crime;
- Weapons trafficking.

With regard to drugs, it is found that drugs constitute the most dynamic area of crime, with a highly competitive market and highly innovative OCGs. Cocaine remains one of the most popular mass consumption drugs of choice. Due to its low risks and high profitability, counterfeiting increasingly attracts OCGs. Hence, the assessment also finds the number of seized counterfeit health and safety products to be continuously increasing. Counterfeit health products are predominantly distributed via illicit online pharmacies but, in some cases, counterfeit products have also infiltrated the legitimate supply chain. Furthermore, counterfeit goods are being increasingly produced in EU Member States. Counterfeiting of the euro is found to be carried out by only a small number of illegal print shops with digital print shops printing counterfeit euro notes becoming more common.

With regard to crimes against persons, it has been found that persistent socio-economic inequalities between the developed and developing world as well as continued demand for cheap labour will result in increased pressure from migratory flows and related OCG involvement. Apparently, the volume of migration flows along the different routes used to enter the EU fluctuates, but traditional routes remain largely the

same while the intra-EU movements of irregular migrants generally do not follow established routes.

In the area of trafficking in human beings (THB), the levels of intra-EU trafficking are escalating. OCGs involved in THB seem to be very flexible and able to adapt quickly to changes in legislation and law enforcement tactics. The increase in THB has been linked to benefit fraud. Also, the economic crisis has increased demand on the illegal labour market, which is exploited by OCGs. The number of cross-border investigations against OCGs involved in THB in the EU remains low.

Organised property crime is found to be a significant area of crime that affects all EU Member States. A defining characteristic of the OCGs involved is their mobility, ensuring their widespread impact in the EU. Sadly, elderly people are being increasingly targeted.

With regard to fraud, missing trader intra community (MTIC) fraud generates multi-billion euro losses to EU Member States. Dubai seems to be a major centre for international fraud schemes. With their well established links to both Western-style banking systems and regional Informal Value Transfer Systems, local OCGs exploit the city's globally connected import/export industry and financial infrastructure. Furthermore, tax fraud causes major financial losses to EU Member States amounting to billions of euros in uncollected excise duties.

Money laundering also involves billions of euros. Traditional methods of money laundering, such as the use of shell companies and accounts in offshore jurisdictions, are still used. However, money launderers are also increasingly making use of the Internet and other technological innovations such as pre-paid cards and electronic money. OCGs are adept at exploiting weaknesses such as Money Service Businesses, Informal Value Transfer Systems, and countries with relatively weak border controls and anti-money laundering regimes.

In the area of profit-driven cybercrime and hacktivism, it is apparent that cyberattacks are primarily linked to financial fraud offences. The modus operandi of "crime as a service" is further emerging with Russian-speaking criminals being prominent in this crime area.

The threat of online child sexual exploitation is found to be increasing in response to high levels of demand for new child abusive material, the continued development of technical means and offender security measures, and greater Internet adoption rates. Desirable images and videos are traded as a currency in non-commercial environments. Also, offenders continue to seek out online environments that are popular with children and youths. The use of services for encrypting and anonymising online activity is increasing.

In the field of payment card fraud, SOCTA sees the continued expansion of online credit card payments as increasing the number of card-not-present frauds. The growing popularity of mobile payments and the emerging use of contactless Near Field Communication payments offer new opportunities for data theft and fraud. Criminal groups are likely to invest in technical and social engineering methods to compromise mobile and contactless payments.

With regard to environmental crime, increasing amounts of waste and the high price of waste disposal attract the involvement of OCG in this sector. Illicit waste is smuggled to West Africa and China and illicit waste dumping is being increasingly reported by EU Member States.

Trafficking in endangered species appears to be a niche market attracting highly specialised OCGs.

Finally, with regard to weapons trafficking, it has been found that the illicit trade in firearms in the EU remains limited in size.

Looking at OCG, SOCTA estimates that there are 3600 international OCGs active in the EU and involved in a broad range of criminal offences. Drug

trafficking seems to be by far the most widespread criminal activity, followed by fraud (representing more than half of all OCG activity). Apparently, more than 30% of the groups active in the EU are poly-crime groups, involved in more than one criminal area, and over 40% of criminal groups have a "network" type of structure, which suggests that criminal groups are becoming more networked in their organisation and behaviour. Criminal groups often adopt a shared (or "group") leadership approach and/or a flexible hierarchy. Criminal networking has emerged as another key aspect, with criminal groups becoming increasingly international.

Based on the findings of this assessment, Europol recommends that the operational response to serious and organised crime in the EU should focus on the following high priority threats:

- Facilitation of illegal immigration;
- Trafficking in human beings;
- Counterfeit goods with an impact on public health and safety;
- Missing Trader Intra Community fraud;
- Synthetic drugs production and poly-drug trafficking in the EU;
- Cybercrime;
- Money laundering.

Emerging threats that stood out in 2012 include illicit waste trafficking and energy fraud. (CR)

➤ [eucrim ID=1302011](#)

EU Terrorism Situation and Trend Report (TE-SAT) 2013 Published

Europol published the EU Terrorism Situation and Trend Report (TE-SAT) 2013, giving an overview of the situation in 2012.

According to the TE-SAT, 17 people died as a result of terrorist attacks in the EU, and 219 terrorist attacks were carried out in EU Member States in 2012, an increase of 26% compared to 2011. Looking at arrests, 537 individuals were arrested in the EU for terrorist-related offences (53 more than in 2011), and 400 individuals were involved in court

proceedings for terrorism charges, with 149 concluded court proceedings.

Looking at religiously inspired terrorism, the TE-SAT counts six attacks on EU territory in 2012 compared to no attacks defined as terrorism in 2011. Arrests related to religiously inspired terrorism increased from 122 in 2011 to 159 in 2012. Furthermore, the report finds that EU citizens were increasingly targeted for kidnapping by terrorist groups. EU nationals continue to travel to regions such as the Middle East and North Africa (MENA), Afghanistan, Pakistan, and Somalia for terrorist purposes.

In the field of ethno-nationalist and separatist terrorism, the report states that 167 attacks were carried out and 257 individuals arrested in EU Member States. Arrest numbers continued to decrease in Spain to 25 in 2012 (41 in 2011).

For left-wing and anarchist terrorism, 18 terrorist attacks were counted in the EU in 2012, continuing the downward trend since 2010. 24 individuals were arrested in four EU Member States.

Two right-wing terrorist attacks were reported in 2012, and 10 individuals arrested for right-wing terrorist offences. Internet and social media seem to continue to facilitate violent right-wing extremism.

In its annexes, the TE-SAT offers an overview of the failed, foiled, and completed attacks, the arrests per Member State and per affiliation in 2012 as well as the convictions and penalties. (CR)

► [eucrim ID=1302012](#)

Eurojust

Annual Report 2012

On 29 May 2013, Eurojust published its annual report, reviewing its activities in the year 2012, the year of its 10th anniversary.

The four main chapters of the report focus on Eurojust's operational activities, its relations with EU institutions and partners, the Eurojust Decision and

its future, as well as its administrative developments.

Compared to 2011, the number of cases dealt with at Eurojust increased by 6.4%, from 1441 cases in 2011 to 1533 cases in 2012. Furthermore, Eurojust's involvement in the setting up of JITs increased by 42%, increasing to 47 in comparison with 33 in 2011.

2012 saw a small decrease in the coordination meeting tool, with 194 meetings held in 2012 compared to 204 in 2011. Furthermore, the newly developed coordination centres were used seven times to target illegal immigration, trafficking in human beings, drug trafficking, child pornography, and tax fraud linked with manure trading. Europol participated in six out of seven of these coordination centres.

Formal casework recommendations to competent national authorities by National Members and/or the College under articles 6 and 7 of the Eurojust Decision were used nine times in 2012.

Recurrent obstacles encountered in Eurojust's judicial cooperation casework include legal obstacles arising due to differences between the legal systems of the Member States and due to different rules on admissibility of evidence. 259 cases concerning the execution of EAWs were registered at Eurojust, amounting to 16.8% of all cases registered at Eurojust. The report also outlines the main practical problems reported with regard to the EAW such as the poor quality of translation of the EAW, delays, proportionality issues, multiple EAWs, etc.

Looking at Eurojust's activities in crime priority areas, the report states that the number of terrorism cases registered increased to 32 cases. Three coordination meetings were held. Furthermore, a practitioners' workshop was organised by Eurojust and Europol for counter-terrorism specialists from India and the European Union.

In the field of drug trafficking, the numbers of cases, coordination meetings, and JITs rose to 263 cases compared to the previous years, 59 coordina-

tion meetings, and 13 JITs. Furthermore, Eurojust participated in four projects related to drug trafficking with a special focus on synthetic drugs, trafficking by West African organised criminal groups, trafficking through the Western Balkans, and trafficking in container shipments.

For trafficking in human beings, the number of registered cases dropped to 60 compared to 79 in 2011. In 2012, Eurojust initiated a strategic project, Eurojust's Action against Trafficking in Human Beings, to strengthen and improve cooperation between national judicial authorities in the fight against THB. Registered fraud cases increased considerably to 382 cases (218 in 2011) but cases of corruption, money laundering, and crimes affecting the EU's financial interests registered at Eurojust also increased.

In 2012, Eurojust hosted one coordination centre concerning cybercrime, established a task force on cybercrime and cyber-related crime, seconded a staff member to the EC3, and registered 42 cases, mostly concerning phishing or child abuse images.

Regarding the setting up and running of JITs, there were 78 active JITs, with 62 JITs receiving funding from Eurojust. The report outlines some obstacles identified with JITs such as different levels or paces of the investigations in the Member States, the absence of a parallel investigation in those Member States requiring such an investigation to enable them to participate in a JIT, and differences in legal systems, especially with regard to the rules for secrecy of proceedings, access to case file documents, time limits for data retention, and the providing of evidence via videoconference or in relation to a judicial control mechanism.

In 2012, Eurojust requested the assistance of third states on 242 occasions, mostly concerning Switzerland, Norway, the USA, Croatia, Serbia, Albania, Brazil, and Ukraine. Third state representatives from Norway, Switzerland, Turkey, the USA, Albania, the former

Yugoslav Republic of Macedonia, Croatia, and Serbia were most frequently represented on the 49 occasions when third states participated in Eurojust coordination meetings.

Looking at Eurojust's institutional relations and relations with other agencies, in July 2012, a Memorandum of Understanding was signed with the European Commission. Furthermore, on 1 April 2012, an updated Memorandum of Understanding on the establishment of a secure communication line entered into force. It creates the legal prerequisite for use of the Secure Information Exchange Network Application (SIENA) for information exchange with Eurojust.

Concerning the implementation of the Eurojust Decision by the end of 2012, the report states that only 12 Member States had fully implemented the Eurojust Decision (7 legislatively and 5 administratively), 4 Member States had partially implemented it, and 11 had not yet implemented it. (CR)

►eucrim ID=1302013

Consultative Forum Meeting Held at Eurojust

On 25 and 26 April 2013, Eurojust and the Office of the Director of Public Prosecutions of Ireland coorganised the Consultative Forum of Prosecutors General and Directors of Public Prosecutions of the Member States of the European Union at Eurojust in the Hague. Key issues of the meeting included the practical operation of the European Public Prosecutor's Office and the implementation of the Directive on the Rights of Victims. (CR)

►eucrim ID=1302014

Cooperation Agreement with Liechtenstein

On 7 June 2013, Eurojust and the Principality of Liechtenstein concluded a cooperation agreement governing closer cooperation as well as providing for the exchange of operational information, including personal data, in accordance with Eurojust's data protection rules.

The agreement also provides for the possibility for Liechtenstein to second a Liaison Prosecutor to Eurojust and for Eurojust to post a Liaison Magistrate to Liechtenstein. (CR)

►eucrim ID=1302015

Frontex

Frontex' Work Programme 2013

Frontex published its Work Programme outlining areas of possible activities for the year 2013.

According to the programme, Frontex continues to apply a goal-oriented approach. However, Frontex' initial goals have been redefined, changing from awareness, response, interoperability, and performance to development, situational awareness, supporting response, emergency response, organisation, and staff. These six goals will be the basis of the elaboration of Frontex' objectives and outputs. (CR)

►eucrim ID=1302016

Council of Europe Report on Human Rights Implications

On 8 April 2013, the Committee on Migration, Refugees and Displaced Persons of the Council of Europe published a report regarding Frontex' operations and activities and their human rights implications. The report includes a draft resolution asking Frontex and EU Member States to address a range of issues at both the operational and structural levels of Frontex and its activities.

On the operational level, it is suggested to:

- Ensure that persons with international protection needs are identified during border and interception operations and that these persons are provided with appropriate assistance;
- Guarantee the rights of all returnees during joint return flights or other return operations;
- Guarantee the implementation of the Frontex Code of Conduct and the future code of conduct for joint return opera-

tions and to spell out consequences for non-compliance;

- Make use of the power to suspend or terminate joint operations and pilot projects in cases of serious or persistent breaches of fundamental rights or international protection obligations;
- Apply basic standards for return monitoring to ensure it is effective.

On a structural level, Frontex shall:

- Improve its transparency and public communication regarding the nature of the operations carried out on the ground and their impact on human rights;
- Recognise its responsibility as owner or co-owner of the projects it coordinates and implements;
- Carry out human rights training activities for all Frontex staff and deployed border guards in cooperation with external partners;
- Build up an effective human rights monitoring system for Frontex' operational activities;
- Integrate into risk analysis the likelihood of search and rescue at sea as a factor in conducting joint sea operations;
- Pre-check that the vessels provided have the equipment allowing for search and rescue at sea.

Ultimately, the draft resolution also calls on the European Union to ensure that Frontex and EU Member States comply with their human rights obligations by revising the Schengen Borders Code; by enhancing the European Parliament's democratic scrutiny of Frontex; by strengthening the role of the Fundamental Rights Officer, the status of the Consultative Forum, and the cooperation of Frontex with human rights expert organisations.

Within their own participation in Frontex' activities, Member States shall ensure that they comply fully with all their human rights responsibilities, e.g., that deployed officers possess the required knowledge of their human rights obligations and that they have undergone human rights training, ensuring that vessels and other equipment provided is human rights compliant.

The report further entails draft recommendations asking the Committee of Ministers to support and encourage Frontex in human rights matters, especially to ensure that the Council of Europe takes an active part in Frontex' human rights related activities and that the relevant Council of Europe standards are duly taken into account. Furthermore, the Committee shall assist Frontex in strengthening its monitoring mechanisms and its efforts to protect and promote human rights. (CR)

►eucrim ID=1302017

Annual Risk Analysis 2013 Published

Frontex published its annual Risk Analysis outlining a situational picture of the year 2012. The analysis looks at passenger flow across the EU's external borders, visa issues, illegal border-crossing, detections of facilitators, document fraud, refusals of entry, detections of illegal stays, asylum applications, returns, and other illegal activities.

The analysis finds that, for the first time since systematic data collection began in 2008, annual detections of illegal border-crossing plunged under 100,000 to 73,000 along the EU's external borders in 2012, i.e. half the number reported in 2011.

Despite the decrease at the Greek-Turkish land border (after the deployment of 1800 additional Greek police officers), detections there of illegal border-crossing on the Western Balkan route increased by 37% to 6390. However, detections of illegal border-crossing in the Western Mediterranean area between North Africa and Spain decreased by nearly a quarter compared to 2011 but remained above the levels recorded in previous years (6400, minus 24%). Afghans remained the most frequently detected nationality for illegal border-crossing at the EU level, but their number has dropped considerably compared to 2011. Syrians stand out, with large increases in detections of illegal border crossings and use of fraudulent documents compared to 2011. Most of the de-

tected Syrians applied for asylum in the EU, fleeing the civil war in their country.

All in all, the total number of refusals of entry resulted in a stable total at the EU level compared to 2011, with a decrease by 3% to 115,000 refusals of entry. In 2012, a total of 350,000 illegal stayers were counted in the EU.

The overall trend of detections of facilitators of irregular migration has been decreasing since 2008, totalling about 7700 in 2012. A total of 8000 migrants were detected using fraudulent documents to enter the EU or Schengen area illegally. Asylum applications in 2012 indicate an overall increase of about 7% compared to the previous year. About 160,000 third-country nationals were effectively returned to third countries.

The report concludes that, despite a sharp reduction in detections between 2011 and 2012, the risks associated with illegal border-crossing along the land and sea external borders remain among the highest, in particular in the southern part of the border of the EU. (CR)

►eucrim ID=1302018

Specific Areas of Crime / Substantive Criminal Law

Tax Fraud

Platform for Tax Good Governance Established

On 6 December 2012, the Commission presented its action plan on tax evasion and avoidance (see eucrim 1/2013, p. 6). One of the key measures of this plan was to set up a Platform for Tax Good Governance, which was realised on 23 April 2013.

The platform will monitor Member States' efforts in combating "aggressive tax planning" and tax havens, in line with the Commission's Recommendations in the aforementioned action plan. A total of 46 experts (Member States' tax authorities, EP representatives, busi-

nesses, academics, NGOs, and other stakeholders) will have a seat in the platform. During regular meetings, they will exchange expertise on effectively fighting tax evasion and avoidance. (EDB)

►eucrim ID=1302019

Protection of Financial Interests

Proposed Regulations on the Establishment of the European Public Prosecutor's Office and on Eurojust's Reform

On 17 July 2013, the Commission presented the proposal for a regulation on the establishment of the European Public Prosecutor's Office (EPPO) (COM(2013) 534). This proposal is the second of three legal initiatives for the protection of the EU's financial interests, which the Commission announced that it will adopt in 2013. It was preceded by the proposed directive on the protection of the EU's financial interests by means of substantive criminal law (see eucrim 3/2012, p. 98). A separate proposal for the reform of Eurojust was also presented on 17 July 2013 (COM(2013) 535 final).

The Lisbon Treaty introduced a provision in the TFEU that forms the legal basis of the proposed regulation. Art. 86 TFEU states that "in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulation adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust." In accordance with this provision, the EPPO is now proposed to be built as a decentralised prosecution office with exclusive competence for investigating, prosecuting, and bringing to judgment crimes against the EU budget.

During each of the last three years, an average loss of around €500 million resulted from suspected fraud committed in the Member States; however, this only includes detected fraud. The real figure is estimated to be much

higher. The EU budget originates from the Member States, and fraud against the EU budget can be investigated by OLAF in an administrative investigation. In order to prosecute these cases, however, OLAF needs to rely on the national authorities. At present, only one in five cases transferred by OLAF to the national prosecution authorities leads to a conviction, and conviction rates vary significantly. Eurojust and Europol can assist the national authorities in carrying out criminal investigations, but the prosecution remains exclusively in the hands of the national authorities. Furthermore, fraud cases are frequently international in nature (including the involvement of third states), based on complicated structures and organisations, and related to other criminal offences. These factors make it not only a difficult type of crime to investigate and to prosecute but also make the recovery of the funds be problematic.

By bringing the prosecution to an EU institution such as the EPPO - that has exclusive competence for investigating, prosecuting, and bringing to judgment crimes against the EU budget, - such cross-border cases will be dealt with in a more effective and coordinated way. The EPPO will not have to rely on mutual legal assistance and mutual recognition instruments. Through the European Delegated Prosecutors, it will have cross-border investigative powers in all Member States. These European Delegated Prosecutors are national prosecutors and will continue to work in their national function but, when functioning as European Delegated Prosecutors, they will be independent from their national authorities. Any conflicts of interest will be settled by the EPPO. The Delegated Prosecutor's work for the EPPO shall take precedence over their national cases. In practice, they are to conduct the investigative measures in the Member States for those cases the EPPO is mandated for, using national staff and applying national law. The EPPO will coordinate their actions.

If required, the investigative measures of the EPPO shall be authorised by the national courts, and his actions can also be challenged before these courts. The investigative measures the EPPO can rely on are listed in the proposed regulation and include *inter alia* the questioning of suspects and witnesses, house searches, interception and real-time surveillance of telecommunications, the monitoring of financial transactions, and covert investigations. National law is applicable to the investigative measures. In order to guarantee the efficiency of the EPPO's investigations, evidence that has been gathered lawfully in one Member State shall be admissible in the trial courts of all Member States. The EPPO will not have the power to arrest a suspect but will have to request the national judicial authorities to do so when necessary.

The appointment of the EPPO involves the EU institutions (Council with the consent of the EP) as well as former members of the Court of Justice, members of national supreme courts, national public prosecution services, and/or lawyers of recognised competence who can assist in drawing up a shortlist of candidates. The EPPO's term is limited to eight years and is not renewable. Dismissal of the EPPO is possible by the Court of Justice, following an application by the EP, the Council, or the Commission. When working for the EPPO, the European Delegated Prosecutors cannot be dismissed as national prosecutors by the competent national authorities without the EPPO's consent.

The proposed regulation is complemented by a proposed reform of the Agency for Criminal Justice Cooperation (Eurojust). This proposal aims to improve the overall functioning of Eurojust by addressing its internal management and enabling the College and the National Members to focus more on their operational tasks. A new Executive Board, which will include the Commission, will assist the College in carrying out its administrative tasks. Other ele-

ments of the proposal include a role for the EP and national Parliaments in the evaluation of Eurojust's activities whilst preserving Eurojust's operational independence and ensuring that Eurojust can cooperate closely with the EPPO.

Moreover, Eurojust will be providing the EPPO with resources in the form of personnel, finance, and IT. A future agreement will cover the details of this support. Eurojust will be able to focus more on its operational tasks of improving cooperation and coordination in the fight against cross-border crime within the scope of its mandate.

OLAF will remain responsible for those administrative investigations in areas that do not fall under the EPPO's competence and thus will no longer conduct investigations into EU fraud or other crimes affecting the EU's financial interests. OLAF shall report its suspicions to the EPPO for such offences and will provide assistance upon request. In this respect, the Commission is preparing two more legal initiatives. First, an independent Controller of Procedural Guarantees would strengthen the legal review of OLAF investigative measures. Second, stronger procedural requirements are to be introduced for more intrusive investigative measures (e.g., office searches and document seizures), which OLAF may need to carry out in the EU institutions.

The negotiations in the Council are planned to start in September 2013. For the proposed regulation on the establishment of the EPPO to be adopted, the Council should be acting in unanimity. (EDB)

►eucrim ID=1302020

General Approach Reached on Proposed Directive

On 6 June 2013, the Council reached a general approach regarding the proposed directive on the fight against fraud to the EU's financial interests by means of criminal law (see also eucrim 1/2013, p. 6).

Even though this general approach was agreed upon, several Member States

expressed concerns and noted reservations, in particular regarding:

- The legal basis of the proposed directive;
- The exclusion of fraud concerning revenues arising from VAT;
- The definition of fraud;
- Criminal penalties and prescription periods.

A majority of Member States consider Art. 83(2) TFEU to be the legal basis of the proposal instead of Art. 325(4) TFEU as proposed by the Commission. The text of the agreed general approach is based on the presumption that Art. 83(2) is the legal basis.

The agreed text will form the basis for forthcoming discussions with the EP. The day that consensus on the general approach is reached will mark the commencement of the opt-in period for Ireland and the UK in accordance with Art. 3 of Protocol No 21 to the Treaty. The UK noted that its position is contingent upon whether the general approach commences the said opt-in period. (EDB)

►eucrim ID=1302021

Corruption

EP Wants Action on Match Fixing and Corruption in Sports

On 14 March 2013, the EP adopted a resolution on match fixing and corruption in sports. With the resolution, the EP is asking the Commission to develop a coordinated approach in this area by coordinating the efforts of the main stakeholders (e.g., sports organisations, national police and judicial authorities, and gambling operators) and by providing a platform for discussion and for the exchange of information and best practices. The Commission is also called upon to identify third states that host “betting havens.”

Furthermore, the EP is calling upon sports organisations and governing bodies to adopt a zero-tolerance policy on corruption and to commit to good gov-

ernance practices. The Member States are urged to *inter alia* set up special law enforcement units and to engage gambling operators to report irregular gambling patterns. The Council should make progress quickly on the debate concerning the fourth Anti-Money Laundering Directive (see eucrim 1/2013, p. 6), with a view to addressing the use of online sports betting for money laundering.

The resolution intends to provide input for a Commission recommendation on best practices in the prevention and combating of betting-related match fixing, which should be adopted in 2014. (EDB)

►eucrim ID=1302022

Money Laundering

ECJ Rules on FIU Cooperation and Freedom to Provide Services

On 25 April 2013, the Court of Justice issued a preliminary ruling in case C-212/11 *Jyske Bank Gibraltar Ltd v Administración del Estado*. The case concerns a branch of the Danish Jyske

Anti-Money Laundering in the EU

ERA, Trier/Germany, 24-25 October 2013

This seminar will present the latest developments of the EU anti-money laundering regime, in particular the changes introduced by the proposed 4th anti-money laundering directive. It will also provide updates and insights on the recent national case law and international cooperation from the perspective of all practitioners involved, in particular financial intelligence units, defence counsels, prosecutors and judges. The programme will offer a mixture of training methods, varying from lectures to interactive workshops. The seminar is organized with the financial support of the European Commission's Prevention of and Fight against Crime Programme – (Directorate-General Home Affairs).

Key topics are:

- The 4th EU anti-money laundering directive;
- Exchange of information and cooperation with the private sector;
- Criminal prosecution and defence in money-laundering cases.

Who should attend? Judges, prosecutors, law enforcement officials, and lawyers in private practice. Eligible countries are the EU Member States, Switzerland, and Liechtenstein.

Please note that the number of places available for participants is limited. Registrations will be accepted on a first-come-first-served basis.

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

For further information, please contact Mrs. Annette Geibel, ERA.

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Bank established in Gibraltar and operating on Spanish territory under the rules governing the freedom to provide services.

Directive 2005/60/EC imposes obligations on *inter alia* credit institutions to disclose certain information about clients and transactions to the Financial Intelligence Unit (FIU) of the Member State in whose territory the institution is situated. Regardless of the place of establishment, Spanish legislation obliges credit institutions operating in Spain to inform the Spanish FIU of transfers of more than €30,000 to or from tax havens and uncooperative territories, e.g., Gibraltar.

Since Jyske Bank failed to provide the Spanish FIU with complete information, it was fined a total of €1,700,000. The Bank brought the case before the Spanish Supreme Court, arguing that the Spanish legislation is not in conformity with Directive 2005/60/EC and that Jyske Bank is only obliged to disclose information to the Gibraltar FIU.

The ECJ declared that Directive 2005/60/EC does not expressly pre-

clude the possibility of requiring credit institutions operating in Spain under the freedom to provide services to forward the required information directly to the Spanish FIU in the context of the fight against money laundering and terrorist financing. Thus, the directive does not, in principle, preclude Spanish legislation, in so far as it seeks to strengthen the effectiveness of the fight against such crimes. With regard to the FIUs' mutual cooperation, the Court ruled that where there is no effective mechanism ensuring full and complete cooperation between the FIUs and allowing money laundering and terrorist financing to be combated just as effectively, the legislation – such as the Spanish legislation being discussed in this case – is proportionate. (EDB)

►eucrim ID=1302023

Organised Crime

Counter-Terrorism Priority Topic at JHA Council

During the JHA Council of 6-7 June 2013, the Council exchanged views on terrorism as to the question of foreign fighters and returnees from a counter-terrorism perspective, in particular with regard to Syria. The EU Counter-Terrorism Coordinator had prepared a paper on the topic including suggested measures that were supported by the Council. These measures related to:

- The need for a common assessment of the phenomenon of young Europeans going to Syria to join the Jihad and the need to get a better picture of the different groups fighting in Syria;
- Measures to prevent youngsters from departing to Syria and to offer assistance upon their return;
- Detection of travel movements and the criminal justice response;
- Cooperation with third countries.

The implementation of these measures will be discussed at the JHA Council in December 2013. (EDB)

►eucrim ID=1302024

Annual Conference on EU Criminal Justice 2013

Beyond the Stockholm Programme, What's Next?

ERA, Trier/Germany, 10-11 October 2013

This conference is being organised with financial support from the Criminal Justice Programme of the European Union European Commission – Directorate-General Justice.

The objective of this annual conference is to facilitate the exchange of experiences and ideas among legal practitioners on current developments and future initiatives in the field of EU criminal justice.

Key topics include:

- Institutional updates (Eurojust, Europol);
- Requests and suggestions from practitioners for further developing the European area of criminal justice;
- New horizons for EU criminal justice in 2015-2020: Looking beyond the Stockholm Programme;
- Defence and victims' rights.

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

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

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

EU Concludes Agreement on Control of Drug Precursors with Russia

On 4 June 2013, the EU and Russia signed a new cooperation agreement aiming to prevent drug precursors from being trafficked for the manufacture of illegal drugs. Exchanging information on the chemicals being used and ensuring that their use is only for legitimate purposes is essential. Similar agreements already exist with 11 other third states (EDB)

►eucrim ID=1302025

New EU Action Plan on Drugs and New EMCDDA Report

On 6-7 June 2013, the Council adopted a new Action Plan on Drugs for the period 2013-2016. The plan contains 54 concrete measures concerning drug demand and supply reduction, coordination, international cooperation, information, research, monitoring and evaluation. In addition, each measure is accompanied by a timetable, an indication who the responsible parties are, and what the data collection/assessment mechanisms are. This Action Plan is in line with the recently adopted EU Drugs Strategy for 2013-2020.

During the same JHA Council, the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) presented its latest report, the 2013 European Drug Report. One of the key findings of this report is the fact the EU's drug problem is in a "state of flux." This means new threats are emerging that will challenge the currently existing models of policy and practice. (EDB)

►eucrim ID=1302026

Second Report on Implementation of Internal Security Strategy

On 10 April 2013, the Commission presented the second implementation report of the EU Internal Security Strategy. The first implementation report was published on 25 November 2011 (see eucrim 2/2012, p. 2).

The Internal Security Strategy adopted in November 2010 (see eucrim 1/2011, p. 12) was a key measure of the Stockholm Programme and outlined five EU policy objectives for the period 2010-2014.

The second implementation report reveals that organised crime is still one of the major threats to internal security

and to the EU's economy. The report lists concrete measures that have been proposed or taken with regard to the five policy objectives, e.g.:

- The proposed Fourth Anti-Money Laundering Directive (see eucrim 1/2013, p. 6);
- The proposed Directive on the fight against fraud to the Union's financial interests by means of criminal law (see eucrim 3/2012, p. 98);
- The adoption of the Cybersecurity Strategy for the European Union in 2013 (see eucrim 1/2013, p. 9);
- The preparation by the Commission of a cross-sectoral overview of natural and manmade risks that the EU will face in the future.

For each policy objective, the report lists the measures that should be taken in 2013 by the Commission and by the Member States. (EDB)

►eucrim ID=1302027

Member States' Response to EU Victims of Trafficking in Human Beings is Too Slow

The first report on trafficking in human beings in the EU was published by the Commission on 15 April 2013. Its key finding is that, over the studied period 2008-2010, 23,632 people were identified as or presumed victims of trafficking in the EU. In that same period, the number of victims had increased by 18%, but the number of convictions had decreased by 13%.

Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims should have been transposed into national legislation by 6 April 2013. However, only six Member States have completed this process. Commissioner for Home Affairs Cecilia Malmström therefore called upon the Member States to take action and implement the directive as soon as possible. All Member States contributed to this report; however, figures should be interpreted with caution. In addition, the Commission presented an overview of the rights of the victims of traffick-

ing in human beings to provide clear, user-friendly information on their labour rights, social rights, and residence and compensation rights that individuals are entitled to under EU law. (EDB)

►eucrim ID=1302028

Procedural Criminal Law

Procedural Safeguards

Agreement on the Right of Access to a Lawyer

On 28 May 2013, the EP and the Council reached agreement on the proposed directive on the right of access to a lawyer in criminal proceedings (see also eucrim 3/2013, p. 103).

As one of the measures of the 2009 Roadmap on Procedural Rights, the directive lays down the following minimum standards:

- The right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings;
- The right to have a third party informed upon deprivation of liberty;
- The right to communicate with third persons and with consular authorities while deprived of liberty.

Before the directive can enter into force, it still needs to be formally adopted by the EP and the Council in the coming months. (EDB)

►eucrim ID=1302029

Data Protection

Data Protection Reform – State of Play

The discussions in the EP on the reform of the EU's data protection legal framework are still ongoing (see eucrim 1/2013, p. 10). This includes the proposed directive on data protection in criminal matters and the proposed regulation on data protection in general. Especially the latter has reportedly triggered a so far unseen amount of lobby-

ing from industry and third states aiming for lower data protection standards than those currently in force.

The LIBE Committee held its second debate on the amendments to both legislative proposals on 6-7 May 2013. Opinions providing input for the discussions were published by the EDPS and the Article 29 Data Protection Working Party. The EDPS came forward with additional comments on the reform package on 15 March 2013. With regard to the proposed directive, his comments focused on its scope, the definition of compatible purpose, the role of the data controller, powers of supervisory authorities, data transfers to third states and to private parties, and existing legal instruments. The Article 29 Data Protection Working Party published an elaborate opinion on the principle of purpose limitation on 2 April 2013 and a general opinion offering input on the proposed directive on 26 February 2013. (EDB)

►eucrim ID=1302030

LIBE Committee Rejects PNR Proposal

On 24 April 2013, the LIBE Committee voted on the proposed directive on the use of passenger name record data (PNR) for the prevention, detection, investigation, and prosecution of terrorist offences and serious crime. The proposal was rejected by a slight majority (30 votes to 25, with no abstentions).

The possibility of profiling passengers based on the data collected and storing these data for five years are among the main concerns. The committee recommends that the EP reject the entire Commission proposal and has called on the Commission to withdraw its proposal. (EDB)

►eucrim ID=1302031

EDPS Opinion on New Europol Regulation Proposal

On 31 May 2013, the EDPS published an elaborate opinion on the aforementioned (see p. 36) proposed regulation on the European Union Agency for Law enforcement Cooperation and Train-

ing (Europol) and Repealing Decisions 2009/371/JHA and 2005/681/JHA. The EDPS stresses the great importance of the proposed regulation for the processing of personal data, also due to Europol's position as an information processing agency. The Europol Decision that should be repealed when the proposed regulation would be adopted and would enter into force already contains a strong data protection regime.

The EDPS supports the fact that the proposed regulation makes Regulation (EC) No. 45/2001, including the provisions on supervision, fully applicable to Europol's staff and administrative data. However, this does not mean that Regulation (EC) No. 45/2011 is applicable to Europol as such. Europol's core business to support and strengthen Member States' action in combating serious crimes is covered by an autonomous data protection framework. The EDPS recommends specifying in the recitals of the proposal that the new data protection framework of the EU institutions and bodies will be applicable to Europol as soon as it is adopted.

The EDPS also highlights article 24 of the proposed regulation that lists the purposes of Europol's information processing activities. Due to the purpose limitation principle limiting processing for incompatible purposes to those that are strictly necessary, the EDPS recommends adding elements to article 24 that ensure the necessity requirement and transparency are fulfilled.

With regard to supervision, the proposal stresses the cooperation between national data protection authorities and the EDPS. When transferring personal data, Europol should not assume a Member States' consent. Thus the EDPS recommends deleting this provision.

Further conclusions regarding the proposed regulation include deleting the possibility for Europol to directly access national databases and inserting a provision that Europol must have a transparent and easily accessible policy on the processing of personal data and for

the exercise of the data subjects' rights, in an intelligible form, using clear and plain language. (EDB)

►eucrim ID=1302032

EDPS Opinion on European Information Exchange Model

On 7 December 2012, the Commission presented a communication aimed at strengthening law enforcement cooperation in the EU: the European Information Exchange Model (EIXM) (see eucrim 1/2013, p. 11). Because this model has significant implications related to data protection, the EDPS presented an opinion on this communication on 29 April 2013.

The EDPS is pleased that the communication does not imply setting up new information exchange channels or databases, but he would like to see an evaluation of the existing legal instruments and initiatives in this area. According to the EDPS, it is important for the Commission to reflect upon the effectiveness of the data protection standards in light of developments in technology and large-scale IT systems as well as the increasing use of data by police that were initially collected for other purposes. In addition, an inventory should be taken of data protection risks, problems, and possible improvements in the current legal framework, e.g., the distinction between the processing of data regarding suspects and data regarding non-suspects. (EDB)

►eucrim ID=1302033

Freezing of Assets

LIBE Committee Endorses Proposed Directive on Freezing and Confiscation of Proceeds of Crime

With 46 votes in favour, seven against, and three abstentions, the proposed directive on freezing and confiscation of proceeds of crime received the approval of the LIBE Committee on 8 May 2013 (see also eucrim 1/2013, pp. 10-11).

The proposed directive covers conviction-based confiscation and confiscation

in the absence of a conviction as well as extending the confiscation to proceeds from similar crimes. Moreover, provisions on recovering assets from third parties should be included in the national legislation of the Member States.

Negotiators from the EP will now start debating the text with the Member States with a view to reaching a consensus. (EDB)

►eucrim ID=1302034

Cooperation

Police Cooperation

2012 Statistics on Prüm Decisions

On 26 March 2013, the General Secretariat of the Council of the EU published its 2012 statistics of the Prüm Decisions regarding the automated exchange of DNA data, dactyloscopic reference data as well as Vehicle Registration Data (VRD). According to the report, on 31 December 2012, 19 Member States could have been operational, but not all were interconnected with regard to the automated exchange of DNA data.

14 Member States could have been operational, but not all were interconnected with regard to automated dactyloscopic reference data exchange.

13 Member States were interconnected with regard to the automated exchange of VRD. The report further outlines the individual match results for DNA data, outgoing requests for dactyloscopic data as well as overviews on the amount of inquiries and responses regarding VRD for each EU Member State in the year 2012. (CR)

►eucrim ID=1302035

Police Access to Eurodac Adopted

On 24 April 2013, the Civil Liberties Committee of the European Parliament agreed to allow police access, including Europol, to Eurodac, the EU database storing fingerprints of asylum seekers

aged over 14, on a “hit/no hit” basis.

In return, MEPs insisted on inserting stricter data protection provisions and new safeguards to ensure that data is not used for purposes other than fighting terrorism and serious crime. Police access is only possible if “there is an overriding public security concern,” which makes such a request proportionate.

The text was adopted on 26 June 2013. (CR)

►eucrim ID=1302036

Europe-wide Anti-Terrorism Exercise

On 17-18 April 2013, as part of the European-sponsored ATLAS Network, anti-terrorist police forces of the EU Member States undertook a joint training exercise named “Common Challenge,” simulating simultaneous terrorist attacks in nine different EU Member States (Austria, Belgium, Ireland, Italy, Latvia, Slovakia, Spain, Sweden, and Romania) in different areas of public life (trains, buses, ships). The EU Counter-Terrorism Coordinator, Gilles de Kerchove, strongly welcomed the initiative.

The Atlas Network is an association consisting of the special police units of the 28 states of the European Union. Its goal is to improve cooperation among the police units and to enhance skills by training with the other units. (CR)

►eucrim ID=1302037

European Investigation Order

Member States Ask Irish Presidency to Make Progress on EIO Negotiations

On 5 March 2013, the Council published letters that had been sent by the Member States initiating the EIO proposal to the Irish Presidency, asking for a new approach to the negotiations. Since the initiative was first presented in 2010, the negotiations on the text were suspended in 2012.

While three trilogue meetings took place in March, April, and May 2013, the documents of these meetings have not been made public. On 26 March

2013, however, the Irish Presidency presented the following:

- A table showing the text of the original initiative;
- The text of the general approach agreed upon by Council;

- The text of the draft amendments approved by the LIBE Committee;
- The Presidency proposal for a Council position in negotiations with the EP and the Commission. (EDB)

►eucrim ID=1302038



Council of Europe*

Reported by Dr. András Csúri

Foundations

Reform of the European Court of Human Rights

Improved Online Presence

As of 4 March 2013 – in order to improve its online presence – the ECtHR is making available its press releases via Twitter. Furthermore, on 22 May 2013, the Court launched its newly designed Internet website to provide, for instance, better access to more comprehensive information on its work as well as enhanced search options.

►eucrim ID=1302039

Specific Areas of Crime

Corruption

GRECO: Evaluation Report on the UK

On 6 March 2013, GRECO published its evaluation report on anti-corruption measures for the UK’s judges, prosecutors, and Members of Parliament. The report was extremely positive as it did not find any indications of corruption of judges and judicial decisions in the UK.

The same applied to the integrity and impartiality of prosecutors. Regarding the Members of Parliament, the report suggested that parliamentarians should be responsible for the conduct of their staff when carrying out official duties on their behalf. The report further recommended that a lowering of the thresholds for reporting the financial holdings of Members of Parliament should be considered.

►eucrim ID=1302040

GRECO: Evaluation Report on Finland

On 27 March 2013, GRECO published its evaluation report on anti-corruption measures among judges, prosecutors, and parliamentarians in Finland. The report noted that Finland is regarded as one of the least corrupt European countries and that it has an effective system for preventing corruption. Nevertheless, the report stressed that there is still room for improvement with regard to conflicts of interest among Members of Parliament.

For this purpose, the report suggested the drawing up of a Code of Conduct for parliamentarians and the clarification of

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

what is understood under “conflict of interest.” The report also recommended that the Ethical Principles of Judges should be communicated effectively to all lay judges and complemented with dedicated training. It also recommended that a set of clear ethical standards should be made applicable to all prosecutors.

►eucrim ID=1302041

GRECO: Evaluation Report on Iceland

On March 28 2013, GRECO published its evaluation report on anti-corruption measures among judges, prosecutors, and parliamentarians in Iceland. The report stated that Iceland’s unique circumstances – like its small population, remote location, and interlinked personal and professional relationships – easily give rise to conflicts of interest. The report underlined that initial progress has been made in this field, particularly since the collapse of the banking system. GRECO welcomed the improvements that had been made to the rules on financial declarations of parliamentarians and that a code of conduct is currently being drawn up. The report further recommended introducing a requirement of *ad hoc* disclosure when conflicts of interest emerge between individual MPs and a public matter. The report further argued in favour of enabling greater independence and impartiality of prosecutorial decisions on a district level. For this reason, GRECO recommended ensuring the security of tenure for all prosecutors and introducing the possibility to appeal decisions taken by a prosecutor during the preliminary investigative phase.

►eucrim ID=1302042

Money Laundering

MONEYVAL: Fourth Round Evaluation Report on Moldova

On 18 February 2013, MONEYVAL published its fourth evaluation report on Moldova. The report sets out Mol-

dova’s levels of compliance with the FATF 40+9 Recommendations and provides recommendations on how certain aspects of the system could be strengthened. The report noted that progress has been achieved by bringing criminal legislation more into line with international standards and that AML now also covers money laundering by the perpetrator of the predicate offence. Nevertheless, it stressed the need for further improvements as the precondition of a prior conviction for the predicate offence remains a major deficiency. The legislation on CTF covers all offences contained in the relevant international treaties. Though the provisional measures and confiscation regime have been improved, the relevant authorities do not make sufficient use of these existing legislative powers to seize and confiscate. The Anti-Money Laundering and Counter Terrorist Fi-

nancing law, in force since 2011, has given the Moldovan FIU functions and responsibilities that comply with the core international standards, and it has solved the prior lack of independence of the unit – at least at the legislative level.

►eucrim ID=1302043

Trafficking in Human Beings

GRETA: 16th Meeting

On 11-15 March 2013, GRETA held its 16th meeting and the first in its new composition, following the election of eight new GRETA members in November 2012 (see eucrim 4/2012, p. 153). At this meeting, the final evaluation reports on Bosnia and Herzegovina, Norway, and Poland were adopted, which will be made public after the final comments of the respective national authorities.

Council of Europe Treaty	State	Date of ratification (r), signature (s) or acceptance of the provisional application (a)
Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)	Uruguay Russia	10 April 2013 (acceded) 15 May 2013 (r)
European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches (ETS No. 120)	Morocco	17 January 2013 (acceded)
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).	Turkey The Netherlands	26 February 2013 (r) 7 March 2013 (r)
Criminal Law Convention on Corruption (ETS No. 173)	Italy	13 June 2013 (r)
Additional Protocol to the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, regarding supervisory authorities and transborder data flows (ETS No. 181)	Uruguay Georgia	10 April 2013 (acceded) 15 Mai 2013 (s)
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182)	Italy Georgia Slovenia	23 January 2013 (s) 25 March 2013 (s) 26 March 2013 (r)

Council of Europe Treaty	State	Date of ratification (r), signature (s) or acceptance of the provisional application (a)
Convention on Cybercrime (ETS No. 185)	Australia Dominican Republic Andorra	30 November 2012 (acceded) 7 February 2013 (acceded) 23 April 2013 (s)
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)	Andorra Czech Republic	23 April 2013 (s) 17 Mai 2013 (s)
Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191)	Andorra Iceland Georgia Azerbaijan	20 November 2012 (s) 6 March 2013 (r) 25 March 2013 (s) 3 April 2013 (r)
Convention on the Prevention of Terrorism (CETS No. 196)	Luxembourg	31 January 2013 (r)
Convention on Action against Trafficking in Human Beings (ETS No. 197)	Switzerland Germany Hungary	17 December (r) 19 December (r) 4 April 2013 (r)
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (CETS No. 198)	Bulgaria Estonia Georgia	25 February 2013 (r) 7 March 2013 (s) 25 March 2013 (s)
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)	Bosnia and Herzegovina Italy Latvia Belgium Lithuania	14 November 2012 (r) 3 January 2013 (r) 7 March 2013 (s) 8 March 2013 (r) 9 April 2013 (r)
Third Additional Protocol to the European Convention on Extradition (CETS No. 209)	Czech Republic Italy Republic of Moldova	17 January 2013 (r) 23 January 2013 (s) 12 April 2013 (s)
Convention on preventing and combating violence against women and domestic violence (CETS No. 210)	Poland Croatia Albania Portugal Andorra Bosnia and Herzegovina Montenegro Lithuania	18 December 2012 (s) 22 January 2013 (s) 4 February 2013 (r) 5 February 2013 (r) 22 February 2013 (s) 8 March 2013 (s) 22 April 2013 (r) 7 June 2013 (s)
Convention on the counterfeiting of medical products and similar crimes involving threats to public health (CETS No. 211)	Morocco	13 December 2012 (s)
Fourth Additional Protocol to the European Convention on Extradition (CETS No. 212)	Italy	23 January 2013 (s)

►eucrim ID=1302047

GRETA also approved draft reports on Belgium, Ireland, and Spain. In addition, on 15 March 2013, Nicolas Le Coz was reelected as GRETA's President. Alina Braşoveanu and Helmut Sax were elected as First and Second Vice-President, respectively. These three GRETA members will lead the Bureau of GRETA for a period of two years.

►eucrim ID=1302044

GRETA: 40th Ratification of the Convention by Hungary

On 4 April 2013, Hungary ratified and thus became the 40th Party to the CoE Convention on Action against Trafficking in Human Beings (Convention), which will enter into force for Hungary on 1 August 2013. The Convention entered into force on 1 February 2008 and was last ratified in 2012 by Switzerland and Germany (see eucrim 4/2012, p. 153).

►eucrim ID=1302045

GRETA: First Assessment Reports on Poland, Norway, and Bosnia and Herzegovina

In May 2013, GRETA published first assessment reports with regard to Poland, Norway as well as Bosnia and Herzegovina. These reports assess the extent to which the Convention provisions have been put into practice by the respective authorities. The common weak spots identified in these reports were the identification and compensation of victims, especially child victims of trafficking.

The report on Poland was published on 6 May 2013. It noted that the criminalisation of Trafficking in Human Beings (THB) only took effect in Poland in September 2010 and that there is still a significant gap between the number of identified victims and successful prosecutions. The report also considered the need to improve the knowledge and sensitivity of relevant professionals in this field. GRETA welcomed and highlighted the transparent approach to the planning and financing of anti-traffick-

ing activities and the multi-disciplinary approach to victim identification (with special instructions to the Police and Border Guard). Nevertheless, the report recommends paying more attention to cases of labour exploitation, which have been on the rise in Poland as well as introducing a nationwide procedure for the identification of child victims. Ultimately, the report noted that, despite the legal possibilities, victims only rarely receive compensation, the access to which should be facilitated and guaranteed by the authorities.

The report on Norway was published on 7 May 2013. Even though the report acknowledges Norway's leading international role in combating THB, it called on the authorities to set up a national system for identifying and assisting victims of trafficking so that they are not prosecuted for immigration-related crimes. GRETA further called for the adoption of a proactive approach towards identifying child victims of trafficking. Regarding the legal background, the report noted that the legal definition of THB should be fully brought in line with the Convention and that penalties should be increased to help deter traffickers.

The report on Bosnia and Herzegovina was published on 14 May 2013. It highlighted as a main deficiency that THB is not criminalised in all criminal codes applicable to the country's territory (only on the state level). The report recommended improving the identification of victims of trafficking by not connecting this to the initiation of a criminal case. The report stressed putting increased attention on identifying child victims. Therefore, it suggested ensuring the registration of all children at birth. GRETA also called upon the authorities to ensure that victims can obtain compensation and made recommendations for a comprehensive awareness raising campaign for both the general public and specific vulnerable groups.

► **eu crim ID=1302046**

Towards a More Effective Fight against Cybercrime

Cooperation between Law Enforcement Authorities and the Internet Industry (Symantec, Yahoo!, Facebook, Google, Microsoft, and eBay/PayPal)

Vilnius/Lithuania, 7-8 November 2013

The conference is being organised by ERA in cooperation with the Lithuanian National Courts Administration (NCA) and with the financial support of the European Commission's Prevention of and Fight against Crime Programme – (Directorate-General Home Affairs).

This conference is part of a project sponsored by the European Commission and consists of a series of six events in Madrid, Lisbon, Vilnius, London, Sofia, and Stockholm. Each event in conjunction with "Fighting cybercrime: Series of intensive seminars for EU legal practitioners" will have a specific focus.

This particular event is intended as a platform to debate and assess effective cooperation between law enforcement authorities and the Internet industry in order to prevent, detect, and respond to crimes committed using Information and Communication Technologies (ICTs). The most pertinent European legal acts and complementary measures will be analyzed.

After introductory presentations by national and European experts, panels with speakers from the public and private sectors will discuss the concrete implementation of these measures at the domestic level as well as the differences in national legislative acts that impede the effective fight against cybercrime.

Key topics are

- The role of Interpol, Europol, Eurojust, and other national authorities;
- The policy of the Internet industry (Symantec, Yahoo!, Facebook, Google, Microsoft and eBay/PayPal);

Who should attend? Law enforcement officers, ministerial officials, judges, prosecutors, and representatives of the Internet industry.

The conference will be held in English.

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Common abbreviations

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

Tracking and Tracing Stolen Assets in Foreign Jurisdictions

Charlie Monteith / Andrew Dornbierer

It has been estimated that roughly 1.6 trillion USD in criminal proceeds are laundered through the international financial system each year.¹ To put this in perspective, this sum is more than the combined GDPs of Switzerland, Portugal, Romania, Belarus, and Austria in 2011. To enjoy this unnerving amount of illicit assets, criminals are forced to launder these funds through legitimate international financial channels in an attempt to disguise their illegitimate origins. Consequently, if an investigator knows how and where to look, there is always a connection that links a criminal's assets to his or her crimes – and if sufficient evidence of this connection can be shown, then law enforcers can use it to successfully take legal action and return the assets to the victims of their crime.

For this reason, it is very important that effective asset tracing tools and techniques are developed and shared amongst law enforcement bodies to help stem the tide of illicit financial flows, deny criminals the chance to enjoy the proceeds of their crime, and ultimately, to achieve justice.

This article will discuss some of the common techniques and tools used by investigators to track and trace stolen assets. It will focus predominantly on a context whereby funds have been stolen through public corruption. However, the principles discussed in this article are also applicable to most cases in which criminally obtained assets have been laundered into foreign jurisdictions.

I. The Multifaceted Purpose of an Asset Tracing Investigation

Asset tracing refers to the process whereby an investigator tracks, identifies, and locates proceeds of crime. Asset tracing can be conducted by a number of parties, including law enforcement authorities, prosecutors, investigating magistrates, private investigators, or interested parties in private civil actions. This article however, will primarily focus on the context of an investigation conducted by government law enforcement authorities. Investigators in these authorities trace assets for the purpose of freezing and seizing them, so that these assets can ultimately be confiscated through a judicial order and returned to the victims of crime, be that a private party or the state.

Consequently, asset tracing investigations are a multifaceted activity, and they must accomplish more than simply locate a criminal asset. Investigators also need to acquire sufficient evidence to connect the asset to an unlawful activity so that a judicial order for confiscation can be obtained. At the same time, investigators should also try to gather evidence that can be used to prosecute the offender for the underlying criminal activity (or predicate offence) that generated the illicit assets.

In an asset tracing investigation, these three objectives – locating the assets, linking them to a unlawful activity, and proving the commission of the offence – should not be considered as three distinct and separate steps but as overlapping objectives that investigators should work towards achieving simultaneously, for the purpose of achieving a final goal: to deny criminals of the proceeds of their crime.

II. Establishing the Illegality of Funds

From the outset, it is very important that investigators conducting an asset tracing exercise always remember that even if they find the assets, a jurisdiction where funds have been secreted will not confiscate or repatriate these funds to the jurisdiction of origin unless actual evidence is presented linking the funds to an illicit source. Consequently, throughout the entire investigation, emphasis needs to be placed on establishing that the funds being sought are undoubtedly illegal in origin. This can be done directly, through specific proof establishing criminal activity (such as a recording of a bribe) or, alternatively, indirectly through circumstantial evidence.

One particular indirect approach is to apply the Source and Application Method.² The basic theory of this method is to establish that the person under investigation spent far more money during a set period of time than is legally available to them. Take, for example, a case in which there is an investigation into a corrupt public official who has been taking bribes from corporations in return for granting procurement contracts. When establishing the illegality of this official's assets, investigators can indirectly establish that he received more money during his time in office than was afforded to him by his salary by listing all his known assets (savings balances) and expenses

(living expenses, major purchases) during that same period, and subtracting the total official income he received. If, after this subtraction, there is still money remaining and the source of this money cannot be explained, this indirectly suggests that these funds must have come from an illicit source (in this case, bribery). This will go a long way towards securing a criminal conviction for his bribery offences, which will in turn lead to a successful confiscation of his criminally obtained assets.

III. Common Barriers Faced when Seeking Stolen Assets

Unfortunately, when it comes to tracking and identifying the proceeds of crime, enforcement authorities can face many hurdles. Criminals are becoming increasingly skilled at developing new and innovative ways to disguise illegally obtained assets, and the complex nature of even the most common money laundering techniques can generate problems for investigators.

For instance, the obvious fact that assets can take a multitude of different forms can make them very difficult to track. Assets can easily be converted into many tangible and intangible forms (including physical or digital money, corporate stocks or market investments, real property, moveable property with objective value – such as cars or boats – or a subjective value – such as jewelry and works of art, or even educational scholarships). Furthermore, the widespread use of e-money currencies such as Bitcoins (an Internet-based currency often used in online black market transactions) and even traditional cash (e.g., in cross-border transaction schemes such as Hawalla systems) poses enormous problems for investigators due to their difficulty to track. Consequently, the multiple forms assets can take means that investigators must have an understanding of a wide range of spheres, including financial markets, corporate and commercial structures, banking practices, property and insolvency law, and online currencies in order to successfully trace the path of a converted asset.

Difficulties can also arise in determining the beneficial owner of illicit assets. For example, criminals can adopt a number of techniques to disguise their ownership, including putting assets in the name of family, friends, or close associates, or setting up intricate structures of special purpose vehicles, such as shell companies and trusts. By cleverly disguising ownership and by adding layers of complexity to money laundering schemes, criminals can make it extremely difficult for investigators, firstly, to locate their concealed assets and, secondly, to establish enough evidence to prove actual beneficial ownership of these proceeds of crime.

Furthermore, as most stolen assets cases are international in nature and involve multiple jurisdictions, this creates a long

list of barriers surrounding the effective interaction and co-operation of state intelligence gathering and law enforcement agencies. For example, problems in communication can arise when two jurisdictions use different languages and issues of coordination may result from dissimilarities in institutional structures. Moreover, stark contrasts in legal systems or approaches to criminality (as represented by the recognition of certain criminal acts as predicate offences to money laundering or the punishment foreseen for the commission of these offences) may also serve to hinder an investigation and a subsequent prosecution.

Overall, in most cases, tracing stolen assets is not an easy task. Nevertheless, different practices and tools can assist law enforcement authorities in their efforts to disentangle money laundering schemes and can vastly increase the chances of a successful repatriation.

IV. The Investigator's Toolkit for Tracing Assets

The success of an investigation often largely depends on the investigating authority's ability to utilize all the tools available to it for tracing assets. The types of tools vary in nature and can include specialized investigating agencies such as Financial Intelligence Units (FIUs), different sources of intelligence, as well as strategies of cooperation with foreign enforcement agencies.

1. Financial Intelligence and FIUs

When assets flow through the financial system, the transfer of funds in and out of accounts usually leaves an audit trail, which can be tracked and detected. Financial intelligence refers to any data that can be obtained to assist in this discovery process and can ultimately be used to create the financial profile of a suspect. This data can come from a wide range of sources and can include information obtained from financial institutions (such as account statements, account opening information, and suspicious activity reports), government agencies, e-banking facilities, money service providers, law and accounting firms, real estate agents, trust and company service providers, and business competitors.³

To assist in collating such data, FIUs have been established in most jurisdictions around the world. Primarily, they receive, analyze, and disclose information provided by financial and non-banking financial institutions relating to suspicious or unusual financial transactions, but they also build up profiles of individuals and money laundering techniques.⁴ Furthermore, in 1995, the Egmont Group of Financial Intelligence Units was created, which provides a forum within which the FIUs of dif-

ferent states can share financial intelligence relevant to suspects being investigated in different jurisdictions, thus greatly speeding up international coordination efforts.

To illustrate the importance of financial intelligence, imagine again an example in which the law enforcement agency of a jurisdiction is investigating a former public official on charges of accepting bribes. When establishing both the location of the stolen money and the fact that bribery has taken place, investigators (or their intelligence services via the FIUs) can use financial intelligence to locate the bank accounts of the public official (or those of his close family or associates) to determine whether any unusual transfers have been received in these accounts and whether any subsequent suspicious transfers have been sent out of these accounts (including the location of any further institutions involved in these transfers). Furthermore, financial intelligence sources can also be used to determine the existence of any corporate or trust holdings or whether any major property purchases have taken place on behalf of the corrupt official.

2. Human Intelligence

Human intelligence sources remain one of the key intelligence tools for law enforcement agencies, particularly when dealing with money laundering networks that are very difficult to penetrate. Human intelligence encompasses all instances in which an individual comes forward and provides information that can assist in the investigation and generally refers to informants, whistleblowers, victims, or disgruntled co-conspirators. The information provided by such intelligence can be critical to a successful investigation, as it can provide inside information into criminal networks as well as new directional leads that may result in the gathering of further incriminating evidence.

However, while the information provided by such individuals can be invaluable, it is important to exercise a considerable level of caution, particularly when evaluating the motives of the individual providing such information, as misleading or wrong information can compromise and taint an entire investigation.

To apply this to the example of the corrupt public official mentioned above, human intelligence may take the form of a whistleblower within the official's ministry or the irritated directors of a corporation that has lost out to competitors because they refused to give a bribe. In this example, the information from such human intelligence may assist in establishing that an offence of bribery has taken place and may also assist investigators in following assets by, for example, providing information pertaining to the method through which bribes are accepted. Nevertheless, it is important to remember that, as with all such human intelligence sources, investigators

must take care to verify the integrity of any information that is offered so as to rule out any chance that the information may taint the investigation.

3. Open Sources of Intelligence

A particular source of intelligence that has been increasingly utilized in the past decade is open source intelligence, which involves the acquisition and analysis of information from publicly available sources. For instance, due to the exponential growth of the Internet, an increasing amount of sources are becoming publicly available – providing investigators with a wealth of high-quality evidence that can be used to support strategic and operational decisions. Examples of such sources include online media (newspapers, blogs, etc.), directories, government reports and documents (including asset declaration forms), statistical databases, and publicly available databases (such as property and corporate databases), which can all be easily located using publicly available search engines, such as Google, or analyzed using specifically tailored programs, such as the International Centre for Asset Recovery (ICAR) Asset Recovery Intelligence System (ARIS) tool.⁵

Social media websites are an online open source that has been of particular use to investigators in recent years. Facebook and LinkedIn, for instance, have become a rich source of information, as they can provide a detailed insight into an individual's contacts and movements and, on some occasions, even his or her major purchases. For instance, returning to the example of our corrupt public official, an investigator may be able to acquire a great deal of valuable information by examining the Facebook profile of this public official or, if he does not have one, the profile of his wife, children, or known contacts. During the course of such analysis, investigators may discover photos of holidays that this public official has taken with his family, including pictures displaying assets such as recently purchased cars or holiday homes. The location of such pictures may further indicate the jurisdictions in which these assets could be found and seized.

4. Cooperation with Foreign Enforcement Agencies

When assets are situated in foreign jurisdictions, enforcement agencies can cooperate with foreign counterparts to both obtain information and evidence pertaining to the location of assets as well as to actually have the assets frozen and seized. For instance, if we imagine that our corrupt official has transferred his criminally obtained assets from a bank account in his own country (A) to an account in a second country (B) and then into an account in a third country (C), the law enforcement agents in (A) will require cooperation from the enforcement agencies of both these latter countries. Particularly, coopera-

tion with (B) will be necessary in order to investigate the trail of assets and to establish that the assets have been moved into (C), and cooperation from (C) will be necessary to ultimately freeze and seize the assets located there.

In initially tracing the path of the assets, the investigators in (A) could informally exchange information with the enforcement agencies from (B). For instance, if both countries have an FIU that is a member of the Egmont Group, they can utilize this network and its mechanisms to allow for the informal and rapid exchange of information regarding the suspicious assets. Alternatively, if each state is a member of the Camden Assets Recovery Interagency Network (CARIN) or another similar network, such as the Asset Recovery Inter-Agency Network of Southern Africa (ARINSA), they could utilize them to also informally share and receive information. This would allow (B) to quickly inform (A) of the transfer of the assets to (C). As a result, (A) would be able to contact (C) to informally request that a preliminary freeze be put on the suspicious assets to prevent them from being moved again.

However, in order to seize the suspicious assets, (A) will need to ask (C) to do so through a request for mutual legal assistance (MLA). MLA is a means through which one jurisdiction formally provides assistance to competent authorities (such as prosecutors, magistrates, and even law enforcement agents) in another jurisdiction so that the former may have certain investigatory or judicial acts (such as service of process, evidence, or seizure of assets) recognized, processed, and carried out in the latter, as the authorities of the requesting jurisdiction do not have the legal standing to enforce them in the requested jurisdiction. Thus, if prosecutors in (A) wish to use evidence (such as bank statements) located in (B) or (C) in a criminal proceeding in (A) against the public official, they will also need to extract this evi-

dence through a formal request for MLA in order to ensure that this evidence is admissible during legal proceedings.

Overall, the ability of law enforcement agencies to engage and cooperate with foreign counterparts may make or break an asset tracing effort. For instance, the ability of investigating agencies to quickly exchange intelligence at the beginning of an investigation can greatly affect their ability to ultimately “catch up” and seize the illegally obtained assets, while the execution of timely and well-drafted MLAs can be crucial to gathering sufficient evidence in order to obtain orders for confiscation. Fortunately, an increasing number of enforcement agencies are establishing international agreements (be it state-to-state cooperation agreements, inter-agency cooperation agreements, mutual legal assistance agreements, or joining international information sharing networks such as Egmont and CARIN), and this is greatly assisting international efforts to trace and recover assets both at the informal and at the formal levels.

V. Conclusions – Where to Now for Asset Tracing?

There is no doubt that the ability of enforcement agencies to track and trace stolen assets is improving. However, there is certainly still a great deal of room for improvement. This year marks the tenth anniversary of the United Nations Convention Against Corruption, which has been instrumental in raising the awareness of issues relating to asset recovery over the past decade. While many countries have ratified and implemented their obligations under this convention, there is still a significant number who have yet to utilize the potential of UNCAC to assist them in asset tracing efforts. Criminals are always finding new ways to conceal their assets, and investigators need to use all the tools at their disposal if they are to continue to discover and crack money laundering schemes. While intelligence sources are crucial to investigations, the multijurisdictional nature of most asset tracing cases means that effective international cooperation plays an equally important role. Consequently, in order to further develop and improve asset tracing techniques, state enforcement authorities need to focus on building relationships of trust with their foreign counterparts and on enhancing their ability to exchange information quickly and efficiently.



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1 <http://www.fatf-gafi.org/pages/faq/moneylaundering/>

2 The International Centre for Asset Recovery, Tracing Stolen Assets: A Practitioner's Handbook, The Basel Institute on Governance, 2009.

3 J. Brun, L. Gray, C. Scott and K. Stephenson, Asset Recovery Handbook: A Guide for Practitioner's, the World Bank, 2011.

4 Above, n. 4

5 For more information on ARIS, please visit the Basel Institute on Governance's website: <http://www.baselgovernance.org/icar/it-services/>

The Financial Execution Inquiry – a Bridge too Far?

A critical analysis of a new Belgian initiative

Francis Desterbeck

At the end of 2012, the Belgian government decided to introduce a new form of financial investigation. This new form of investigation, the “Financial Execution Inquiry,”¹ should result in a more efficient execution of confiscation orders, especially in those cases where sums of money, which could not be seized during the criminal investigation itself, were confiscated. The recovery of fines and legal costs will also be made easier by the new investigation. The Financial Execution Inquiry (hereafter FEI) can be initiated after the sentence has been passed and become definitive, but enforcement of the confiscation order appears to be impossible. The investigation itself is conducted by the public prosecutor.

The Dutch Financial Execution Inquiry² served as a model for the new form of investigation. After a brief outline of the new Belgian FEI, we will deal with the possibility of imposing the obligation to pay to the government an amount of money equaling the value of crime-related proceeds in the Netherlands as well as the possibility of the Dutch Public Prosecution Service to deprive convicted criminals of illegal profits obtained by crime. The Belgian legislator’s concerns were justified. By introducing the new form of financial investigation, the legislator intended to solve an old problem. According to Belgian law, the offices of the Ministry of Finance are responsible for the execution of confiscation orders. Practice, however, shows that those offices lack the competences to collect confiscated sums of money that were not seized in the pre-trial phase, i.e., during the criminal investigation itself. This causes a feeling of impunity, which is of course damaging.

The two forms of financial investigation, which are already at the disposal of the Belgian Prosecution Service, are not used in actual practice. In the third part of our contribution, we will discuss the already existing forms of investigation in further detail. In the last part, we will address the issue of whether the Dutch forms of investigation can be transposed and applied in Belgian law without further ado. The answer to these questions leads to some critical remarks. In the end, the conclusion is reached that the problem of the enforcement of confiscation orders can also be resolved by means of a measure that already exists and that has already proven its efficiency in practice, namely the criminal investigation into the offence of money laundering.

I. The Financial Execution Inquiry

As already stated, the FEI is conducted by the Belgian Prosecution Service after a confiscation order has become peremptory. We will examine the purpose of and the reason for establishment of the investigation, and we will examine the role of the actors who take part in the investigation.

1. Purpose and Reason for Establishment

a) Purpose

The aim of the FEI is to inquire into the assets of convicted criminals who have been sentenced to the confiscation of, in principle, a sum of money that cannot be recovered by means of civil law. Besides confiscated sums of money, unpaid fines and legal costs can also be collected by a FEI. The purpose of the FEI is thus to seize and to capitalize the property of convicted criminals in order to recover confiscated sums of money, fines, and legal costs.

b) Reason for establishment

In Belgium, a lot of authorities intervene where the execution of confiscation orders is concerned. The decision to grant a confiscation order is made by the trial judge. It is important now to already underline that, according to Belgian law, confiscation is always considered a punishment.³ This is a fundamental distinction from Dutch law. Dutch law makes a distinction between a measure of confiscation, which is a punishment, and deprivation, which is not a punishment but merely a measure *sui generis* to reinstate the convicted criminal in the *status ante quem*. We will analyze this difference more deeply later.

The confiscation order is thus granted by the judge, the initiative for execution of the order lies in the hands of the Public Prosecution Service. The execution itself is the task of the Ministry of Finance, officially the Belgian Federal Public Service for Finance. When a sum of money is confiscated, which had not been seized during the criminal investigation, or when a value-based confiscation⁴ is pronounced, the confiscation is considered a debt that has to be recovered according to the

rules of civil law. Fines and legal costs are also recovered by the Federal Public Service for Finance according to the rules of civil law. In spite of the lack of precise statistics, practice has shown that the recovery of confiscated money does not pass off efficiently.⁵ This causes a sense of impunity, which is of course detrimental to the maintenance of law and order in general.

It is generally accepted that the means of civil law, which are at the disposal of the tax collector of the Ministry of Finance, are not sufficiently effective to take action against a convicted person who organizes his own insolvency. In practice, the hands of the collector are especially tied when a convicted person sublets his property to a third party, or hides it behind company structures, or transfers it to a foreign country. By means of the FEI, the profits of the convicted criminal, obtained as a result of his having committed criminal offences, are traced and seized when he wants to back out of his sentence. The FEI ends when the confiscated sum of money has been completely paid or recovered, when the confiscated object is found - in the, presumably, rather rare case that such an object could remain hidden during the investigation -, and in case of preclusion of proceedings, e.g., by prescription.

2. Participants in the Inquiry

The FEI is conducted by the public prosecutor. The Asset Recovery Office can also be involved. When coercive measures are necessary, or in case of dispute, the “judge in charge of the administration of sentences”⁶ is the competent person for dealing with the case.

a) The public prosecutor

The FEI is conducted by an organ of the Public Prosecution Service responsible for the enforcement of the confiscation order: the public prosecutor at the criminal court or at the Labour Court or the Prosecutor General at the Court of Appeal. According to Belgian law, the members of the Public Prosecution Service are magistrates of the judiciary, even though they are sometimes tasked with administrative assignments. As magistrates of the judiciary, they conduct criminal investigations and they prosecute the defendants. If coercive measures are necessary within the framework of a criminal investigation, they are ordered and enforced by an investigating judge.⁷ However, the competences of the Public Prosecution Service to conduct criminal investigations and to prosecute come to an end when criminal proceedings become final and conclusive. A specific legal basis is necessary for investigations conducted after a final judgment that are within the scope of the enforcement of the judgment.

b) The Asset Recovery Office

The public prosecutor can delegate its competences to the Belgian Asset Recovery Office, the Central Office for Seizure and Confiscation (COSC).⁸ The COSC is an organ of the Public Prosecution Service that is especially in charge of giving advice and rendering assistance to the judicial authorities in the execution of confiscation orders. A specific assignment of the office is also to maintain relations with the Federal Public Service for Finance for the same purpose. The office consists of about 30 staff members, among them four magistrates of the Public Prosecution Service. Delegation of competences to the COSC is seen by the legislator as an absolute added value. Apart from this, the COSC already has the competence to conduct an investigation into the solvency of convicted persons. In practice, however, not much use is made of that competence. This aspect will be examined in greater detail later.

c) The judge in charge of the administration of sentences

The authorization to carry out coercive measures, if necessary for conducting a FEI, must be rendered by the judge in charge of the administration of sentences.⁹ This judge is the president of the tribunal that is responsible for the supervision of imprisonments. The intervention of the judge in charge of the administration of sentences is seen as necessary, especially for the protection of the rights of third persons who are hiding crime-related proceeds but who are not convicted by the criminal judge. The power of the judge in charge of the administration of sentences to control the intended coercive measure is very limited. The original text of the preliminary bill limited the competence of the judge in charge of the administration of sentences to an opinion about the legality and the proportionality of the measure intended. The expediency or the subsidiarity, thus the question of whether a certain measure should or should not be replaced by another, or the question of whether the measure was perhaps premature, may not be answered by the judge, according to the original text of the preliminary bill.

The Belgian Council of State had to give advice about the preliminary bill and asked itself whether it was appropriate to apply all coercive measures that are possible in the course of a criminal investigation to the new FEI.¹⁰ The Council of State also criticized the limited competences of the judge in charge of the administration of sentences. Within the framework of the control of proportionality, it should be possible, according to the Council, to examine the possibility to replace an intended measure, which affects fundamental rights, by another, which affects those rights less. This makes a certain form of control of expediency inevitable. As a result of this remark, the original text was adapted. Ac-

According to the definitive text, the judge cannot only control the legality and proportionality but also the subsidiarity of the intended coercive measure.

The judge in charge of the administration of sentences is also the instance that has to decide on the legal remedies of persons who consider their rights to be prejudiced by an investigation measure (in practice, by a measure of seizure). The powers of the judge in charge of the administration of sentences is also limited to the legality and the proportionality of the disputed measure on this point. The control of the lawfulness of observations is tested *a posteriori* by the indictment division of the court of appeal. This is the same course of events as the control of observations during criminal investigations.

II. The Dutch Example

1. In General

The Belgian Financial Execution Inquiry is inspired by a Dutch investigation measure with practically the same name,¹¹ which was introduced into the Dutch Code of Criminal Procedure on the 31 March 2011.¹² The Dutch FEI cannot be seen as being separate from the specific action of depriving the criminal from his crime-related proceeds. In criminal cases, this action is carried out in parallel but not necessarily simultaneously with the legal action concerning the facts of the case.

The procedure of deprivation is enshrined in Art. 36e, al. 3 of the Dutch Penal Code. A deprivation action is only possible for serious crimes, for which fines of the fifth category are possible.¹³ Furthermore, it has to be accepted that the offender has obtained criminal gains by his acts. The deprivation case is investigated and tried in parallel, but again not simultaneously with the legal action, concerning the facts. In practice, the deprivation case is usually tried after the judgment about the facts became pre-emptory.

For the calculation of the criminal gains, the investigation can go back in time for six years but this term can also be shortened under certain conditions. Not only can the facts, which are the subject of the criminal case, be used in this calculation but also other criminal offences, for which there are sufficient indications that they were committed by the convicted person. In practice, a comparison of assets is made for the fixed period of six years or less. Legally obtained income and assets are compared with income and assets, the legal origin of which cannot be proven. The difference between these two terms is the amount for which there is a presumption that it had been obtained by illegal gains. Otherwise, the burden of proof is divided: the public prosecutor adduces certain facts and circumstances that have to be refuted by the accused person.

2. The Aids: The Criminal Financial Investigation and the Financial Execution Inquiry

Concerning a deprivation case, two forms of investigation are possible: the Criminal Financial Investigation¹⁴ and the Financial Execution Inquiry. The Criminal Financial Investigation can be conducted to determine the amount of the crime-related proceeds and to get an idea of the possessions of the defendant or the convicted person. Within the framework of this Criminal Financial Investigation, more intrusive methods of investigation can be applied than in the classical criminal investigation, which remains possible, also in deprivation cases. The Criminal Financial Investigation is applied in cases where the crime-related proceeds are considerable (more than €12,000). It can be launched following an action brought by the public prosecutor, under the authority of the examining judge,¹⁵ or the judge who deals with the deprivation case. The judge can order the investigation in order to throw some light on the calculation of the level of the ill-gotten capital gains. The Dutch Financial Execution Inquiry is conducted in the phase of the execution of the judgment of deprivation and can follow the Criminal Financial Investigation. The Dutch FEI is conducted when full payment of the amount imposed by the court in the deprivation case fails to occur within the deadline set by the public prosecutor, and there are indications that the convicted person has the means to pay at his disposal. The inquiry must reveal the property of the convicted person.

Just like the Criminal Financial Investigation, the Dutch FEI is the result of an action brought by the public prosecutor, under the authority of the examining judge, when, as a result of the deprivation verdict, considerable amounts of money have to be paid and there are indications that the convicted person has still possessions at his disposal. In this way, the Dutch Financial Execution Inquiry served as a model for the Belgian FEI.

III. The Existing Forms of Financial Investigation in Belgium

The Belgian legislator has also developed specific kinds of financial investigations to recover criminal proceedings. The “special financial investigation”¹⁶ is the counterpart to the Dutch “deprivation investigation.” In addition, the Belgian Asset Recovery Office has the competence to investigate the solvency of persons who have been sentenced. The most striking characteristic of both procedures is that they are not applied in practice. There is not enough specialized manpower to conduct the investigations, and there is also a lack of motivation on the part of the magistrates of the Prosecution Service to institute the existing procedures.

1. The Special Financial Investigation

This counterpart to the Dutch “deprivation investigation” was enshrined in Belgian legislation by law on 19 December 2002.¹⁷ When the new law went into force, the preparatory works made explicit references to the already existing Dutch “deprivation investigation.”¹⁸

a) Procedure

The procedure is enshrined in Arts. 43^{quater} of the Belgian Penal Code and in 524^{bis} of the Belgian Code of Criminal Proceedings. The procedure is only possible for a number of serious crimes, exhaustively enumerated in the law. These are, amongst others, corruption, money laundering, terrorist crimes, crimes committed within the framework of a criminal organization, and serious tax fraud. The investigation is conducted after the judge has pronounced a sentence on the guilt of the defendant and determined all penalties, except the confiscation itself. Because confiscation is a punishment in Belgian law, this means that an exception is made on the principle that, in criminal matters, the verdict on guilt and punishment must be laid down in one judgment. Before the introduction of the special financial investigation in Belgian law, the only exception on that principle had been included in the procedure before the Assize Court. The procedure before the Assize Court is reserved for the most serious crimes and is the only procedure in Belgium that involves a jury. At the end of the procedure before the Assize Court, a decision about the guilt of the defendant is rendered first and, in a later stage, a verdict on his punishment.

The special financial investigation is optional and can only be conducted when the public prosecutor proves that the convicted person, as mentioned before, obtained crime-related proceeds of a certain magnitude as a result of the crimes. The investigation is conducted by an order of the court that decided on the guilt of the defendant, under the direction and on the authority of the public prosecutor. Except for seizure, no coercive measures are possible. For the appointment of an expert, house searches, and telephone taps, the authorization of the court that ordered the investigation is necessary. For the execution of a telephone tap, an investigating judge is appointed.

At the start of the investigation, a relevant period is determined. This is a time span of five years, before the moment that the convicted person was considered to be a defendant until the date of the judgment. For this period, a property comparison is made on the basis of two terms. The first term consists of the possessions, proven to exist by the public prosecutor; the second term concerns the possessions

for which the convicted person can prove that they do *not* originate from the fact for which he has been convicted or from identical facts. Just like in the Netherlands, there is a division of the burden of proof: the public prosecutor adduces certain proceeds or facts that have to be refuted by the convicted person. The results of the investigation are submitted to the court by the public prosecutor within two years, counting from the date of the judgment that made the investigation possible. The court that confiscates the assets can decide not to take into account a certain part of the relevant period of the revenues, assets, and values, in order to prevent the convicted person from being subjected to an unreasonably heavy punishment.

b) Similarities to and differences from the Dutch deprivation procedure

There are striking similarities between the Belgian special financial investigation to recover criminal proceedings and the Dutch deprivation action, whether or not a Criminal Financial Investigation has been conducted before. Both kinds of investigation are only possible for serious crimes. In both cases, a reference period is determined, the investigation is conducted by the public prosecutor with the intervention of an investigating judge, and there is a shifting of the burden of proof.

The fundamental difference between both procedures relates to the very nature of the Belgian concept of confiscation, which is different from the Dutch notion of deprivation. In Belgian law, the concept of deprivation is unknown. All forms of deprivation are heaped together under the notion “confiscation.” There is more than a terminological difference between “deprivation” and “confiscation;” the difference is fundamental. According to Belgian law, confiscation is a punishment. According to Dutch law, deprivation is not a punishment but a measure that aims to create for the convicted person the *status ante quem*. The purpose of a punishment is to add harm to the offender because of his behavior and his guilt. A measure, however, is not aimed at the addition of harm but at the protection of society and the reparation of a legitimate situation. In the case of a deprivation action, this legitimate situation is repaired by depriving the convicted person of what *de jure* does not belong to him. The convicted person is brought back into the situation he had been in before committing his offences. In the process, his financial capacities, in principle, play no role. It goes without saying that the introduction of the concept of deprivation into a legal system is so fundamental that it requires an initiative on the part of the legislator that clearly introduces and defines the measure. Such an initiative was never taken in Belgium.

2. The Investigation of the Solvency of a Convicted Person by the COSC

This procedure is to be found in a law of the 26 March 2003 that regulates the competences and the functioning of the COSC.¹⁹ Art. 15*bis* of the law gives the office competence to request information from the agencies that have to report suspicious transactions to the Belgian FIU. This information relates to financial accounts and safe-deposit boxes of which the convicted person is holder, representative, or ultimate beneficial owner. Information can also be requested about financial transactions, carried out within a certain period, and about the identity of the persons who had access to the safe-deposit boxes.

As has already been said, the COSC is a body of the Public Prosecution Service. The competence to conduct an investigation regarding solvency lies in the hands of the magistrates of the COSC (four in number). When the investigation indicates that the convicted person possesses funds, the COSC has the power to freeze these assets for a maximum delay of five working days. The freezing measure ends by voluntary payment of the amount due by the person concerned or from the moment the tax collector has taken the necessary precautionary measures to recover the due amount. The purpose of the freezing measure is, of course, to inform the tax collector of the existence of funds, so that he can take the necessary executive measures to recover the frozen assets. Those who have to execute the freezing action must maintain absolute secrecy about the measure. The removal of the assets, the object of the action, is punishable.

IV. Critical Remarks on the Belgian FEI

The Belgian FEI causes different problems, both practically and theoretically. Practically speaking, it has to be remarked that the COSC, which plays a crucial role in the FEI according to the legislator, consists of four magistrates. These magistrates are also in charge of the management of the office and have the ultimate responsibility for the execution of the other competences of the agency. The investigation of the solvency of convicted persons by means of a separate competence within the office was never carried out in practice in the past, due to capacity problems.

As already said, the special financial investigation was also not applied in practice in the past. Therefore, we ask ourselves whether the new FEI is not already doomed to failure, before it has even been introduced into the law. Until now in Belgian law, the judge in charge of the administration of sentences, who has to authorize coercive measures, is only competent for

prison sentences and is now already overloaded with work. The competences concerning the new financial investigation are completely new. These new competences will cause capacity problems and, of course, the law on this point will have to be changed, too.

On the theoretical level, there are even more problems. A first problem concerns the cooperation with the tax collector. Can crime-related assets, seized in the course of a FEI, be transferred to the collector without further ado, or is seizure according to the rules of civil law necessary? Criminal seizure by the public prosecutor and civil seizure by the tax collector are two completely different procedures according to Belgian law. Can the tax collector appropriate funds on the basis of a measure of seizure by the public prosecutor, even if the funds were confiscated somewhere in the past? It is to be feared that the transition of assets, seized by the prosecutor and transferred to the tax collector, will cause severe problems, especially when third parties can assert their rights to the seized assets. A second problem arises when sums of money are seized that are in the hands of third persons who are not only holders of the money but are *prima facie* even proprietors in the legal sense of the word. The same problem, which caused the intervention of the judge in charge of the administration of sentences in the course of the investigation, arises here too. Can funds in the hands of third parties, be seized and transferred to the tax collector just like that, or are complicated judicial procedures (*actio pauliana*) by the collector necessary to make him competent to transfer the funds to the Treasury?

A related problem is that of the protection of the rights of third parties who are affected by the new procedure. The rights of third parties are not regulated in the new bill. The new FEI makes it possible to execute a judgment of confiscation, confiscation being a punishment, possible on assets, which judicially belong to third parties, on the basis of an investigation, conducted by the public prosecutor, without intervention of any judge at all. Third parties are not judged, and their rights are not protected. A further problem is the international cooperation regarding the execution of the FEI, it being a procedure *sui generis*. The new procedure was especially introduced for those cases in which assets are transferred to foreign countries. The existing legal instruments are probably sufficient for the seizure of such assets, but insurmountable difficulties will most probably arise when those assets have to be transferred to Belgium.

The most fundamental objection against the new procedure, however, is that the new FEI to a large extent makes double use of already existing procedures. Hiding illegal assets is a crime as such, namely the crime of money laundering, which can be investigated and sanctioned by conventional methods, with respect of the rights of all parties concerned. Art. 505,

§ 1, 4° of the Belgian Penal Code punishes the concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing or having to know from the outset that such property is derived from criminal activity or from an act of participation in such activity. This article not only makes punishable those who hide criminal assets but also punishes *self-laundering*, the act whereby the person who committed the predicate offence himself hides those assets.

According to Belgian law, confiscation of assets, the subject of the crime of money laundering, is compulsory. Moreover, there is no condition of ownership with regard to the criminal assets. This means that assets can be confiscated, even if they formally belong to third parties.²⁰ Also, a value-based confiscation is explicitly possible by law since 2007.²¹ According to Belgian law, money laundering is an autonomous crime. A link with a precise predicate offence need not to be proven. The only circumstance that has to be proven as regards criminal prosecution and conviction for money laundering is that the judge can exclude, on the basis of the criminal file, every lawful origin of the criminal assets.²² A conviction for hiding criminal assets can thus be incurred even if the predicate offence is the object of a previous condemnation.

V. Conclusion

The new Financial Execution Inquiry is a measure that will cause numerous problems when applied in practice. To a large extent, it makes double use of existing measures and procedures and, in fact, it is superfluous given the fact that the concealment of property, derived from criminal activity, is now already a crime on its own, which can be investigated and pun-

ished by the normal rules of criminal procedure that observe the rights of everyone implied in the case. As such, the new Financial Execution Inquiry does not solve the problems related to the execution of confiscations. Besides the practical obstacles, like problems of capacity on the part of the authorities charged with the investigations, fundamental problems arise concerning the protection of the rights of the persons whose possessions are to be investigated.

Unquestioningly adopting the Dutch example is not a good idea, considering the differences in judicial culture between Belgium and the Netherlands. The Dutch legislator focused on the aspect of deprivation of criminal assets and created a coherent legislation in this respect. The fight against money laundering was only really brought to the attention of the Dutch legislator at a later stage. In Belgium, the situation was exactly the opposite. In Belgium, the aspect of deprivation was neglected until the beginning of this century, and a lot of work remains to be done in the field of legislation. Unlike the Dutch legislator, the Belgian one had concentrated on the fight against money laundering from the start and, since the 90s, a preventive and repressive legislation was developed that acts as a model for other countries.

We dare to suggest that the problem of the execution of confiscation orders in Belgium should preferably be solved by a more efficient application of existing legislation to the field of money laundering. In connection with this suggestion, it is hoped that Belgian authorities will consider the establishment of a Ministerial Committee and a College for the coordination of the fight against money laundering. In these institutions, all actors involved in the fight against money laundering would be brought together to coordinate the fight against money laundering in a more efficient way.



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1 In Dutch: 'Strafrechtelijk Uitvoeringsonderzoek'; in French: 'Enquête Pénale d'Exécution'.

2 In Dutch: 'Strafrechtelijk Executie Onderzoek'.

3 E.g. Arts. 7, 42 and following, 43^{quater} § 3, *in fine* and 505 Belgian Penal Code.

4 In Belgian law, a 'verbeurdverklaring bij equivalent' (Dutch) or a 'confiscation par équivalent' (French).

5 According to a recent press release of the Secretary of State, in charge of

the fight against fraud, the Belgian FIU reported a sum of €2.2 billion presumably laundered money to the Public Prosecution Service in 2012. In the same year, €33 million in fines and confiscations were imposed. It is totally unclear which amount can actually be recovered.

6 In Dutch: 'strafuitvoeringsrechter'; in French: 'le juge de l'application des peines'.

7 According to Belgian law, the assignment of an investigating judge is broader than granting authorization to execute coercive measures. When, within the framework of a criminal investigation, an appeal is made to an investigating judge, he takes over the entire investigation from the public prosecutor.

8 In Dutch: 'Centraal Orgaan voor de Inbeslagneming en Verbeurdverklaring'; in French: 'l'Organe Central pour la Saisie et la Confiscation'.

9 Unlike the intervention of the investigating judge in a criminal investigation, the intervention of the judge in charge of the administration of sentences is limited to the issuing of an authorization. After the authorization, the investigation is continued by the public prosecutor.

10 The Council of State asked itself this question for methods of investigation that are subject to very strict conditions according to Belgian law, e.g., tapping a telephone line. Furthermore, the Council of State noted that investigative measures like telephone tapping are only possible for a limited number of very serious

crimes, which are exhaustively accounted for in the Code of Criminal Procedure. This limitative enumeration cannot be found in the preliminary bill. Thus, we have to conclude that these very intrusive methods of investigation are also possible in a FEI concerning all types of crime but are subject to very strict conditions during criminal investigation, which seems to be discriminatory.

11 Strafrechtelijk Executie Onderzoek.

12 Arts. 577ba to 577 bg of the Dutch Code of Criminal Procedure, effective since 1 July 2011.

13 In Dutch criminal law, there are six categories of fines. A crime for which a fine of the fifth category can be imposed allows the judge to impose a maximum fine of €78,000.

14 Strafrechtelijk Financieel Onderzoek.

15 In Belgium: 'the investigating judge'.

16 In Dutch: 'bijzonder onderzoek naar vermogensvoordelen'.

17 Wet van 19 december 2002 houdende uitbreiding van de mogelijkheden tot inbeslagneming en verbeurdverklaring in strafzaken, *Belgian Official Journal*, 14 February 2003.

18 *Parlementary Documents*, Belgian Chamber of Deputies, Doc 50 1601/001, pp. 12–14, www.dekamer.be.

19 Modified by the law of 30 December 2009, *Belgian Official Journal*, 15 January 2010.

20 These third parties have the right to exert their rights to the confiscated assets before a judge; this statutory regulation is included in a Royal Decree of 9 August 1991, *Belgian Official Journal*, 17 October 1991.

21 In our opinion, a value-based seizure is also possible, but the fact that this is not explicitly foreseen by law causes some authors to consider this to be a legal vacuum; perhaps the law can be specified on this point in the future.

22 Inter alia Court of Cassation, 25 September 2001, *Arr. Cass.*, 2001, no. 493.

Fighting Corruption in Malta and at European Union Levels

Prof. Kevin Aquilina

Undoubtedly, the fight against corruption is no easy job, mainly because of the very secretive nature of such an offence that, at times, makes it next to impossible to detect, especially when hardly anyone files a report with the law enforcement authorities. Hence, new methods need to be identified and devised to fight corruption at a national level and in the European Union whilst at the same time safeguarding human rights, especially the right to a fair and public trial as well as the right to privacy. This is indeed an arduous task for all the public authorities involved in the process. It is hoped, however, with developments taking place in technology and forensic science and with the assistance of new legal provisions being revised on an ongoing basis, that novel and sophisticated laws, policies, strategies, procedures, and other measures may be conceived at national and at EU levels to make it easier for public authorities to catch, prosecute, and condemn fraud perpetrators. Nevertheless, there has to be a harmonious concordance at both these levels in order for law enforcement agencies to succeed in their unenviable task.

Typology of the Fight against Corruption: From a legal perspective, corruption can be fought at different levels. Naturally, the first level that comes to mind involves criminal law and criminal procedure. After all, in law corruption is categorised as principally a criminal offence. But it does have a spill-over effect into other branches of the law such as administrative law and civil law.

I. The Maltese Scenario

Insofar as Malta is concerned, there are provisions in the Criminal Code that penalise fraud. There is a special commission – the Permanent Commission against Corruption¹ – which is specifically tasked with investigating corruption. Furthermore, there are other laws, which, though not necessarily related directly to corruption, play a vital role in exposing it. A number of administrative measures can reasonably easily be introduced to cut down on corruption.

1. Administrative Law as a Tool to Fight Corruption

Effective mechanisms aimed at combating corruption go beyond the criminal law and criminal procedure and spill over into such areas as constitutional law and administrative law. I will cite here some administrative law measures, which, if well implemented, can assist in the fight against corruption:

Asset Reporting Duties of MPs: In terms of the Code of Ethics for Members of Parliament,² MPs have a duty to report publicly on their assets. However, there have been a few MPs who, for a number of years, did not file their asset return. There was a situation in which a Minister “forgot” to declare in his annual asset return a bank account in Switzerland for eight years. There was also a case in which an MP failed to file his

asset return for four consecutive years. To my knowledge no action has been taken in all these cases. It cannot be said, in the case of annual asset reporting to the House of Representatives, that there is no machinery in place to act as a deterrent against abuse. On the contrary, the machinery is there, but it is a dead letter.

Freedom of Information: Another measure that can cut down on corruption is to make the records of the public administration more readily accessible to the media for scrutiny. However, the Maltese Freedom of Information Act³ enacted in 2008 (which only came into force in September 2012) is not optimal as far as empowering persons to have access to government-held information is concerned. This is because the records of certain authorities are totally exempt from public scrutiny whereas, in those cases where the public enjoys such a right, it is marred by other hurdles and pitfalls intended specifically to deny access. The struggle for openness and transparency in the government is still one against state secrecy.

Political Parties' Finances: In Malta, there is no law regulating political parties and, more importantly, their sources of financing. It is up to the political parties themselves to decide whether, when, and to what extent to divulge their sources of financial support.

Ineffective Auditor-General Controls: In other instances, where the Auditor General successfully audits the public administration's financial records, financial maladministration is not always rectified and whoever was responsible for the irregularity is not always punished. A strong internal audit system at the ministerial level should complement the detection of corruption within the departments, agencies, and other entities falling within a ministry's portfolio.

Exclusion from Public Procurement Procedures: Persons and companies investigated for and convicted of fraud should be excluded from the award of tenders in the public procurement process. Before a tender is awarded, the Department of Contracts should, in conjunction with the police and the Malta Financial Services Authority, ensure that the companies tendering are investigated in order to ascertain the identity of their directors, shareholders, and beneficiaries. Furthermore, if any one or more of these persons have been convicted of fraud by a court of criminal jurisdiction, their tender should be declared inadmissible.

Conflicts of Interest: There is the need to define by law what constitutes a conflict of interest that ought to debar a public officer or a holder of political office from acting in certain situations.

Duty to Disclose: All holders of political office and all public officers should be obliged by law to disclose all donations re-

ceived, regardless of the amount involved. This should include accepting goods or services free of cost or at lower prices or by taking commissions. Should a person be found guilty of accepting gifts or services as aforesaid, criminal and disciplinary action should be taken against him, which might, depending on the gravity of the case, lead to dismissal from office and/or imprisonment.

Asset Declaration by Judiciary and Public Officers: All members of the judiciary and all public officers and other key office holders in the public sector – like MPs – should file a yearly declaration of assets with the Auditor General. The database containing such information should be accessible to Inquiring Magistrates. In the case of public officers, the declaration should be filed by officers in salary scales 1 to 10 and, in the case of the public sector, by employees holding grades comparable to salary scales 1 to 10 in the public service.

Duty to report criminal offences and misbehaviour: Maltese law does not impose on any person the duty to report crimes except in very exceptional cases concerning national security or public health. A duty should be established by law to require any person who comes to know of corruption to report it and, in the case of public officers and public sector employees, they should also be required to report breaches of their code of ethics to their respective Permanent Secretaries.

Corruption Prevention and Response Plan: The ministry responsible for justice should spearhead a corruption prevention and response plan to be introduced in all government departments and agencies and bodies corporate established by law.

2. Criminal Law and Criminal Procedure

Criminal law and criminal procedure remain a pivotal tool in the fight against corruption. From a Maltese perspective, several measures can be taken to reinforce the role of criminal law and criminal procedure to make it better equipped to guarantee the detection and successful prosecution of corruption-related crimes.

Permanent Commission against Corruption: Although the Permanent Commission against Corruption has existed since 1988, it has not necessarily been a success story. In the cases prosecuted by the Police for corruption, it appears that the Commission was involved in none of the cases in which investigations led to prosecution and conviction. On the contrary, the impression is given that this Commission was used more as a sort of a shield to protect Ministers and public officers upon their request, with the ensuing result that their behaviour was investigated with the Commission issuing a clean

conduct certificate declaring no wrongdoing on their part. The Commission has not served its purpose well and should be rethought. Perhaps its task should be taken over by a new and revamped system of Inquiring Magistrates.

The Role of the Inquiring Magistrate: As the law stands today, the Inquiring Magistrate does everything except inquire. Essentially, the Inquiring Magistrate collects and preserves all the evidence adduced before him by the police and submits his findings together with all the documentation received to the Attorney General. He does not take an active role in the inquiry but is at the receiving end, collecting evidence provided to him by third parties. Inquiring Magistrates do not take the initiative to conduct the inquiry. Unlike the police, neither the Inquiring Magistrate nor the Attorney General is equipped to investigate. For the law to function well, Inquiring Magistrates should be empowered to investigate directly. There should be a pool of magistrates specifically and solely tasked with carrying out magisterial inquiries headed by a Chief Inquiring Magistrate. These magistrates should not be assigned any other judicial duties but should concentrate only on one task: leading and conducting criminal investigations. Once they decide that a person should be prosecuted in court, it should be the pool of Inquiring Magistrates – not the police or the Attorney General – who should prosecute. The police should assist and take instructions from these Inquiring Magistrates. Inquiring Magistrates should be in a position to order the police to carry out extended surveillance, infiltration, interception of communications, arrests, and searches. Inquiring Magistrates should also authorise the seizure of assets.

Judicial Database: Inquiring Magistrates do not have a judicial database. Such a database is maintained by the police. The Inquiring Magistrates should have an archive of digital information instead of the current mode of paper documentation. Interestingly enough, the reports of Inquiring Magistrates are retained by the Attorney General and not by the Inquiring Magistrates. Moreover, Inquiring Magistrates act individually and do not work in a team, nor do they share intelligence among themselves. There is no central repository where a copy of their reports is kept in the courts building. This database is a must in order to have access to the latest up-to-date information to assist in magisterial inquiries. Moreover, Inquiring Magistrates should have their own office, which should not be located in the Courts of Justice building but in a separate building and allowing them to have registries for their files, rooms for interrogation purposes (equipped with audiovisual recording facilities), digital archives, crime conference rooms, facilities for conducting overseas crime conferences, etc.

Collaborators of Justice: In the case of criminals who would have reneged on their past behaviour and chosen to collaborate

with law enforcement officers, the law should ensure that these collaborators (the *pentiti* as they are called in Italy) should be offered a considerable reduction or complete amnesty in regard to any punishment to be dispensed in their regard. They should also be offered protection through a witness protection scheme. Their families and relatives should also be protected from any vengeance that might be perpetrated against them by criminal organisations.

Whistle Blowers: The Whistle Blowing Bill⁴ was presented to the House of Representatives as a bill in 2010. However, it was never enacted into law. Whistle blowers should be given full protection when they blow the whistle in corruption matters, and this includes job provision if the circumstances of the case so warrant.

Witnesses Protection Schemes: A witness protection scheme should not simply be used to protect witnesses from any attempts on their lives but also to film their evidence before it reaches court. Such evidence should be taken down by an Inquiring Magistrate and filmed. Should the witness not be in a position to attend court, the Inquiring Magistrate could use the evidence – which is to be considered, for all intents and purposes of law, as legally admissible evidence – in court. Sometimes, in order to protect a witness, s/he should not appear physically in court, especially where the threats on his or her life have been assessed by the Inquiring Magistrate as too high a risk to take. Should the defence wish to cross-examine the witness, this can be done either by shielding the witness in court so that he cannot be seen (provided that the presiding judge is in a position to ascertain the witness's identity), or else the witness may provide testimony from an off-site location by recourse to remote technology. In certain cases, a court should be allowed not to reveal the identity of the witness to the accused.

National Coordinating Agency: It would benefit Malta to have a committee responsible for ensuring coordination at the national level of all anti-corruption efforts involving judicial and law enforcement authorities, prosecution services, Inquiring Magistrates, customs, police, and the military when they perform police functions such as coast guard functions, etc. The Malta Financial Services Authority can also participate in this committee and should have anti-bribery and corruption systems and controls in place.

Lifting the Corporate Veil: In order to ensure that criminals do not hide behind companies or other moral entities, howsoever designated, the criminal law should lift the corporate veil, meaning that, where it is clear that the accused person is hiding behind a corporate body, the criminal law should not – for the purposes of evidence, conviction, and punishment – dis-

tinguish between the person of the accused and the juridical *persona* of a body corporate once a direct nexus is established between both *personae*.

II. Arrangements at the EU Level

Transnational Arrangements for the Detection of Criminals: At the EU level, the EU should make laws to authorise law enforcement infiltrators in criminal organisations. They should be authorised to proceed to another European Union Member State in order to identify the criminals involved in that state without the other state taking any criminal action against such infiltrators. EUROPOL should be tasked with coordinating such measure.

Letters of Request: Measures should be taken both at the EU and international levels to expedite letters of request in order to ensure that evidence collected abroad by judicial authorities is dispatched in a timely manner to the judicial authorities in Malta and vice versa. The EU has admirably solved the delays associated with extradition between EU countries through the European Arrest Warrant. The next step is to fast-track letters of request, if this is not already the case. In one case,⁵ such letters of request had taken more than four years to be returned to Malta, and the Constitutional Court found in favour of the accused for the delay caused by the slow process of returning the letters of request which was brought about in the compilation of evidence. Judicial cooperation requires that letters of request are given priority, and they should not take more than three to six months to be remitted back to the requesting court. On a national level, there should be only one body involved in dealing with letters of request. This should be the courts. In

the case of Malta, the Prime Minister and the Attorney General are also involved in this process, which ensures further delays in the external and internal forwarding and receipt of letters of request.

Access to Information Held by Banks and Other Entities: Inquiring Magistrates should have access to all banking documents and other information held by other bodies, including government departments, e.g., tax authorities, whether such information is held in Malta or abroad in an EU Member State. If, for instance, a Maltese citizen or a company conducting business in Malta, wherever registered, is suspected of having moved proceeds derived from illegal activities in Malta to any European Union country, or vice-versa, the EU should have legislation in place allowing the sharing and divulging of the required information by banks etc. via their respective law enforcement agencies – on penalty of banking licence revocation and the imposition of other criminal sanctions, including imprisonment, for those bankers and other persons who do not collaborate in the administration of justice. At a later stage, the EU should make the necessary effort to establish this arrangement on an international level.

IV. Conclusion

Maltese criminal laws regulating corruption tend to be antiquated, and it is therefore welcome news to learn of the work being carried out by OLAF and GRECO in nipping in the bud all forms of corruption. This type of offence does indeed have an EU dimension and hence it requires cooperation between all EU Member States for it to be prosecuted successfully. The situation is thus far from ideal.



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1 The Permanent Commission against Corruption is established by the Permanent Commission Against Corruption Act, Chapter 326 of the Laws of Malta.

2 The text of the Code of Ethics for Members of Parliament is available at: <http://www.parlament.mt/codeofethics-mp?l=1>. Last accessed on 1 July 2013.

3 Chapter 496 of the Laws of Malta.

4 Bill 58 of 2010. The text of this Bill is available at: <http://justiceservices.gov.mt/DownloadDocument.aspx?app=lp&itemid=21495&l=1>. Last accessed on 1 July 2013.

5 *The Police versus Carmelo sive Charles Ellul Sullivan et al.*, Constitutional Court, 24 January 1991 (the text of this judgment is published only in Maltese).

First Experiences in Germany with Mutual Recognition of Financial Penalties

Dr. Christian Johnson

I. Framework Decision 2005/214

1. Introduction

Framework Decision 2005/214/JHA on the application of the principle of mutual recognition of financial penalties (hereinafter FD 2005/214) was adopted on 24 February 2005.¹ It set a deadline for Member States to comply with its provisions: 22 March 2007. As of today, 24 Member States have transposed FD 2005/214 into their respective national law.² This instrument provides for an EU-wide execution of financial penalties on the basis of the principle of mutual recognition. FD 2005/214 has broken new ground. Before 2005, a multilateral or EU instrument for the trans-border execution of financial penalties had never existed.³ For the first time, administrative offences were included in an EU instrument on cooperation in criminal matters.⁴ For the general public, FD 2005/214 has, above all, been perceived as an instrument that allows the trans-border execution of road traffic offences and Recital 4 explicitly states that FD 2005/214 should also cover financial penalties imposed in respect of road traffic offences. The list of offences in Art. 5 para. 1, where double criminality is not to be verified, was extended by adding, among other offences, “conduct which infringes road traffic regulations.”

In contrast, above all, to Framework Decision 2002/584 of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States, FD 2005/14 appears not to have enjoyed the attention it deserves at the EU level yet. No current statistical data are available, and there is no manual in place as is the case for the European Arrest Warrant.⁵ The report from the Commission based on Art. 20 of FD 2005/214 was published on 22 December 2008.⁶ In October 2012, the state of play of the implementation of FD 2005/214 was compiled.⁷

2. The Situation in Germany

a) Implementation

Germany transposed FD 2005/214 by the act of 18 October 2010 that entered into force on 28 October 2010.⁸ The Federal Office of Justice in Bonn, an authority within the remit of the Federal Ministry of Justice, has been designated as the

competent authority for all incoming and outgoing cases under FD 2005/214. No reliable estimates as regards the possible number of cases were available when preparing the practical functioning of FD 2005/214. This article aims to present the experiences that Germany has made both as executing and as issuing state by discussing the main features of FD 2005/214.

b) Numbers of cases: Germany as executing state

As executing state, Germany received 2869 decisions from other Member States in 2011; in 2012, 6095 decisions have already been transmitted to Germany. In 2013, the numbers will most probably rise again. The most decisions by far are transmitted by the Netherlands. For example, in 2011, 2823 of all 2869 decisions were of Dutch origin. Most of them were road traffic offences, above all speeding and red-light offences. As of today, Germany has received no more than 261 decisions from other Member States (Slovenia, Poland, Sweden, Spain, France, Romania, Austria, Bulgaria, Latvia, Lithuania, Portugal, the Czech Republic, Hungary, and the United Kingdom). This rather low number has started to increase significantly in recent months. Germany has so far taken in more than €180.000, but not all cases have been processed yet. In Germany, the person sentenced by another Member State is heard before formal recognition and execution, and he or she is given the opportunity to raise any objections or to pay the financial penalty. In many cases, the sentenced persons choose to pay immediately, and the case is closed within a few weeks. Both the numbers and the nature of cases demonstrate the relevance the new instrument potentially has for every EU citizen.

c) Numbers of cases: Germany as issuing state

In 2011, the Federal Office of Justice received 1802 decisions from the public prosecutor's offices and various other German authorities. In 2012, 4035 decisions were registered. Not all decisions have yet been transmitted to other Member States. In particular, translation of the certificate (the standard form in the annex of FD 2005/214) is costly and time-consuming. Road traffic offences are responsible for about 35% of all decisions. In 2011, about 2/3 of the decisions were decisions in criminal matters, while 1/3 covered administrative offences. So far, 346 German decisions have been recognized and suc-

successfully executed in Poland, the Netherlands, Romania, Lithuania, the United Kingdom, Austria, the Czech Republic, Spain, Portugal, Denmark, Luxemburg, and Sweden. These states have taken in more than €85.000. Cooperation especially with the Dutch and Polish authorities has proven to be both extensive and successful. Many decisions have already been recognized and are currently being executed. Execution may take time – no different from a purely national execution – where the sentenced person is accorded the possibility to pay in instalments.

II. Practical Experiences

1. Decision and Financial Penalty (Art. 1)

Art. 1 defines the key terms “decision” and “financial penalty.” “Decision” refers to a final decision requiring a financial penalty to be paid by a natural or legal person, where the decision was made by a court or by an authority that meets the requirements set out in Art. 1 (a).⁹ “Financial penalty” means the obligation to pay a sum of money upon conviction of an offence, imposed in a decision (Art. 1 (b) (i)), and a sum of money in respect of the costs of court or administrative proceedings leading to the decision. In principle, the practical application of these key terms has posed no problems. In a limited number of cases, however, Germany as executing state received certificates with which the respective issuing state demanded the recognition and execution of costs of proceedings that had led (only) to a prison sentence. The scope of applicability of FD 2005/214 does not cover this scenario. It is admissible to recognize and execute only the costs of proceedings, but the main sanction must always be a financial penalty (or a combination of a prison sentence and a financial penalty).

2. Competent Authorities (Art. 2)

FD 2005/214 leaves it to the Member States to decide on the national competences (Art. 2 para. 1). The competence of a single authority¹⁰ – as in the Netherlands and in Germany – has the invaluable advantage of a uniform practice. In the Netherlands, the Centraal Justitieel Incassobureau (CJIB) in Leeuwarden has been designated as the competent authority. Because of the high number of cases between the two countries, the CJIB and the German Federal Office of Justice have early established very close cooperation. Representatives from both authorities convene regularly. General as well as case-related information, e.g., clarifications, withdrawals of decisions, and notifications of execution, are exchanged, for the most part without expensive and time-consuming translations. This is particularly helpful when (partial) payments need to be traced, e.g., in a constellation where the Netherlands transmitted the decision to Germany and the sentenced person claims to have

already paid in the Netherlands (which is possible under Art. 9 para. 2). Many other Member States have opted for a decentralised system, which is in line with the general development of cooperation in criminal matters in the EU. In practice, however, quite different approaches to FD 2005/214 are likely, particularly when it comes to providing information under Art. 14.

3. Decision and Certificate (Art. 4), Languages (Art. 16)

a) Decision and certificate (Art. 4)

According to Art. 4 para. 3, the decision together with the certificate must be transmitted to the executing state.¹¹ Art. 7 para. 1 allows refusal of the decision if the certificate is not produced, is incomplete, or manifestly does not correspond to the decision. In practice, the 8-page certificate is often not correctly completed. This triggers cumbersome consultations (Art. 7 para. 3). For German authorities wanting to benefit from FD 2005/214, the Federal Office of Justice has designed a web-based form that may be completed electronically; several tool-tips guide the user through the different segments and are regularly updated.¹²

b) Languages (Art. 16)

Under FD 2005/214, only the certificate, not the decision, needs to be translated into the official language of the executing state (Art. 16 para. 1). Many Member States’ authorities have translated not only the individual case-specific information but also the certificate as such. This produces unnecessary translation costs because the certificate is available in all languages as annexed to FD 2005/214. When Germany is the issuing state, the Federal Office of Justice provides the translator with the certificate in the target language, which then only requires translation of the case-specific information. In general, it must be noted – especially with regard to any consideration to abolish the €70 threshold (Art. 7 para. 2 (h)) – that every case under FD 2005/214 requires costly translation and a considerable administrative effort.

4. List of Offences and Double Criminality (Art. 5)

The offences listed in Art. 5 para. 1, if they are punishable in the issuing state and as defined by the law of the issuing state, shall, without verification of the double criminality of the act, give rise to recognition and enforcement of decisions. The list was copied from FD 2002/584 on the European Arrest Warrant and extended by the last seven offences or groups of offences.¹³ Unlike earlier legal instruments, FD 2005/214 is applicable both to criminal and administrative offences. It appears, however, that a number of Member States have transposed FD 2005/214 in a way that allows them to recognize and execute

only decisions in respect of criminal offences. For the concept of list offences, it cannot be of any relevance whether the issuing state classifies the act as a criminal offence whereas it would only constitute an administrative offence under the law of the executing state (or vice versa). The same consideration is valid for unlisted offences and the lack of double criminality as a ground for refusal (Art. 5 para. 3, Art. 7 para. 2 (b)): recognition and execution of a decision may not be refused if the classification of the act as a criminal or an administrative offence differs between the issuing and the executing states, provided, of course, that the act may be sanctioned with a financial penalty in the executing state.¹⁴

5. Grounds for Non-Recognition and Non-Execution (Art. 7)

The scope of FD 2005/214 has been considerably enlarged by the inclusion of administrative offences. Such offences differ from Member State to Member State more than criminal offences, and therefore lack of double criminality (Art. 5 para. 3, Art. 7 para. 2 (b)) has been applied in a number of cases by the respective executing states. Most of the other grounds for refusal listed in Art. 7 have enjoyed no practical relevance so far.

Circumstances that FD 2005/214 has technically not conceived as grounds for refusal play a more prominent role. This is particularly the case with Art. 4 para. 1. Quite often, the sentenced person does not (or no longer) live or reside under the address provided by the issuing state. FD 2005/214 remains silent on the efforts that the executing state must undertake to get hold of the person. This practice seems to differ considerably from Member State to Member State. Some executing states leave it at that if the person cannot be found under the given address; others inquire with different registers or even make the police investigate his or her whereabouts. In a considerable number of cases, execution turned out to be unsuccessful simply because the person had no means to pay the financial penalty. If the issuing state has excluded the possibility of any alternative sanctions, including custodial sanctions, in the certificate (Art. 10), the possibilities of the executing state being able to execute the decision regularly come to an end. Therefore, Member States should carefully consider whether to exclude alternative sanctions or not.

6. Determination of the Amount to Be Paid (Art. 8)

As an outflow of the principle of mutual recognition, the executing state may not reduce the financial penalty to the maximum amount provided for acts of the same kind under its national law. As an exception, a reduction is admissible where it is established that the decision is related to acts that were not

carried out within the territory of the issuing state and when the act falls within the jurisdiction of the executing state (Art. 8 para. 1). These two requirements are so exceptional that Germany as executing state did not reduce a financial penalty in one single case. If one of the two states involved belongs to the Eurozone and the other not or both do not belong to the Eurozone, the executing state must convert the financial penalty into its currency at the exchange rate in effect at the time the penalty was imposed (Art. 8 para. 2). In general, the application of Art. 8 has raised no issues.

7. Accrual of Monies Obtained from Enforcement of Decisions (Art. 13)

Monies obtained from the enforcement of decisions shall accrue to the executing state unless otherwise agreed between the issuing and the executing states, in particular in cases of victim compensation (Art. 13). Some German authorities who expected “their” money to be transferred to Germany after successful execution in another Member State had to be advised otherwise. In one case, the Federal Office of Justice received a cheque from the executing state. Consultations led to the solution that the money remained where it was, and the cheque was destroyed. Besides standing for the political idea of a single area of justice, the distribution of monies as provided for in Art. 13 has the advantage of saving the cost and administrative difficulties of transferring the money.

8. Information from the Executing State (Art. 14)

FD 2005/214 obliges the executing state to provide information on the outcome of the case. Above all, the issuing state must be informed of the execution of the decision as soon as it has been completed (Art. 14 (d)) or why the decision has not been recognized or executed (Art. 14 (b) and (c)). Ideally, it should be possible to render this information in very few sentences. In practice, however, the (judicial or administrative) decision to recognize the foreign decision is often transmitted. These decisions on recognition are often very long, and they are regularly written in the language of the executing state.¹⁵ Costly translation of the lengthy decision is required to inform the issuing state that its decision has been recognized and that the entire process has moved one step further. Though only a technical issue, EU-wide cooperation could be significantly improved if the executing state confined itself strictly to transmitting only the information required by Art. 14. In the middle and long terms, costs of translation – besides the translation of the certificate – that far exceed the financial penalty cannot be justified. The Dutch practice is exemplary: short CJIB letters in English first confirm the receipt of the case and later convey its final outcome.

9. Consequences of Transmission of a Decision (Art. 15)

Once the decision has been transmitted to another Member State, the issuing state may not, according to Art. 15 para. 1, proceed with its execution. Double execution must be avoided.¹⁶ The sentenced person may, however, at all times voluntarily pay the financial penalty to the competent authorities of the issuing state (Art. 15 para. 3). Such (partial) payments have often occurred in practice, and they make swift communication between the authorities involved a necessity. In a significant number of cases, it appears that the sentenced person paid the financial penalty to the issuing state after he or she had been approached by the authorities of the executing state. In other words: the transmission of the decision increased the “pressure” on the sentenced person and made him or her pay in the issuing state. This is not the technical aim of FD 2005/214, but it is nevertheless a success. In a few cases, the Federal Office of Justice has observed that the competent authority of the executing state expressly gave the sentenced person the opportunity to pay the issuing state before continuing with the proceedings under FD 2005/214.

III. Outlook

Taking into account that FD 2005/214 has broken completely new ground, cooperation between many Member States and Germany has turned out to be successful.¹⁷ The numbers of incoming and outgoing cases are already remarkably high. Awareness of FD 2005/214 and the opportunities it offers is increasing. This makes it necessary to further improve and streamline cooperation. One way to proceed could be a comprehensive handbook. Ideally, the issuing state would be put in a position to reliably assess whether the transmission of a decision has any chance of successful execution. In the interest of uniform practice, the national implementation of each Member State should be evaluated as to whether it fully complies with all provisions of FD 2005/214. Particular focus should be on the legal treatment of administrative offences. Only a technical point, but practically very important is the improvement of communication under Art. 14, which should be strictly limited to the information required by that provision. In particular, no decisions on recognition should be transmitted to the issuing state.



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1 The German title of FD 2005/214 contains a small but remarkable error: “Rahmenbeschluss 2005/214/JI des Rates vom 24. Februar 2005 über die Anwendung des Grundsatzes der gegenseitigen Anerkennung von Geldstrafen und Geldbußen” translates as “... application of the principle of mutual recognition of [not: to] financial penalties ...”

2 Italy, Ireland, and Greece remain late.

3 The EC Convention on Enforcement of Foreign Criminal Sentences of 13 November 1991 has never entered into force. It had been declared preliminarily applicable (Art. 21 para 3) only between the Netherlands, Latvia, and Germany but has not gained any practical importance.

4 In German terminology: “Ordnungswidrigkeiten.”

5 Doc. 17195/1/10, REV 1 of 17 December 2010.

6 COM (2008) 888 final.

7 Doc. 9015/2/12 REV 2. Refer also to doc. 7941/12 of 21 March 2012 (questionnaire and answers by Member States). All other available information can be found on the EJM website (<http://www.ejm-crimjust.europa.eu>).

8 Gesetz zur Umsetzung des Rahmenbeschlusses 2005/214/JI des Rates vom 24. Februar 2005 über die Anwendung des Grundsatzes der gegenseitigen

Anerkennung von Geldstrafen und Geldbußen (BGBl. I S. 1408). For an introduction to German implementation: C. Johnson and St. Plötzgen-Kamradt, Gegenseitige Anerkennung von Geldstrafen und Geldbußen in Deutschland, eucrim 2011, pp. 33-39.

9 The European Court of Justice (Case C-60/12) will adjudicate whether “Unabhängige Verwaltungssenate” in Austria falls within the term “a court having jurisdiction in particular in criminal matters” in Art. 1 (a) (ii) and (iii).

10 If a Member State designates (only) one competent authority, this is not to be confounded with a “central authority” within the meaning of Art. 2 para 2.; this central authority is only responsible for the administrative transmission and reception of decisions and for assistance.

11 Out of consideration are the changes in the certificate (doc. 13298/11 of 27 July 2011) by Framework Decision 2009/299 on *in absentia* decisions. The legal and practical difficulties caused by the necessity to work with two versions of the certificate at the same time are considerable.

12 https://www.bundesjustizamt.de/DE/Themen/Gerichte_Behoerden/EUGeld/EUGeld_node.html.

13 This has the rather bizarre consequence that serious crimes like murder, organized or armed robbery, or rape appear in a Framework Decision on Financial Penalties.

14 In this context, the term “double criminality” is, to a certain extent, misleading, as FD 2005/214 also covers administrative and not only criminal offences.

15 Art. 16 requires translation of the certificate into the language of the executing state. FD 2005/214 does not, however, install a language regime for the communication besides the transmission of the decision and certificate, e.g., consultations (Art. 7 para. 3) or information from the executing state (Art. 14).

16 The same reasoning is behind Art. 4 para. 4, according to which the issuing state shall only transmit a decision to one executing state at any one time.

17 No reliable information is available as regards cooperation on the basis of FD 2005/214 between other Member States.

Imprint

Impressum

Published by:

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

represented by Director Prof. Dr. Dr. h.c. mult. Ulrich Sieber
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Official Registration Number:
VR 13378 Nz (Amtsgericht
Berlin Charlottenburg)
VAT Number: DE 129517720
ISSN: 1862-6947



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Typeset: Ines Hofmann, Max Planck Institute for Foreign and International Criminal Law, Freiburg
Produced in Cooperation with: Vereinigung für Europäisches Strafrecht e.V. (represented by Prof. Dr. Dr. h.c. mult. Ulrich Sieber)
Layout: JUSTMEDIA DESIGN, Cologne
Printed by: Stückerle Druck und Verlag, Ettenheim/Germany

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



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