eucrim

THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM

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SUCCESSOR TO AGON

Focus on EC Competences in Criminal Matters
Dossier particulier sur les compétences de la CE en matière pénale
Schwerpunktthema: Kompetenzen der EG für das Strafrecht

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* News contain internet links referring to more detailed information. These links can be easily accessed either by clicking on the respective ID-number of the desired link in the online-journal or – for print version readers – by accessing our webpage www.mpicc.de/eucrim/search.php and then entering the ID-number of the link in the search form. The news in this issue cover the second half of 2006 and extend to 28 February 2007 (the denomination of this issue as 2006 no. 3-4 is for administrative reasons alone).

Editorial

Dear readers, dear friends,

I welcome Prof. Ulrich Sieber's initiative in publishing this new journal, with the financial support of the European Commission's Anti-Fraud Office (OLAF). I am pleased for many reasons.

Eucrim, the successor to Agon, is the journal of the Associations of European Lawyers, whose members are experts in the field of the protection of the Community's financial interests and European criminal law. These experts will continue to contribute to the development of the Community's legal framework in that field. Eucrim helps provide citizens with an overview of what is going on at European level in this field. The information is clear and concise. Communicating the objectives and the mission of OLAF to the widest public is one of our important challenges, and eucrim will help to achieve this quite difficult task. By bringing a "horizontal" approach to the analysis of European criminal law issues, eucrim fills a gap in European publishing. For this reason, I am proud to co-finance such a journal under the Hercule Community programme.

This issue is devoted to European Community's competence in criminal law, and its impact on the protection of its financial interests. The debate has been fuelled by the judgment of the Court of Justice in Case C-176/03, and the contributions focus on the consequences of that judgment at EU level.

The issue of Community competence in criminal matters is of primary importance. It is evident from OLAF's daily work that an administrative investigation into fraud or corruption often has a "criminal" aspect. Criminal conduct needs to be prosecuted. Effective protection of the Community's financial interests presupposes that administrative and criminal investigations are complementary. Again, operational experience acquired at EU level offers important input into thinking on how to shape the Community's competence in criminal law. As the Director-General of the European Anti-Fraud Office, I have learned the lesson that the European Community, and the Commission, has no choice other than to take the lead, together with the Member States and international bodies, in developing standards in sectors relevant to the fight against fraud, including in the field of judicial cooperation on criminal matters.

The EU budget for 2007 is EUR 126.5 billion, not including a variety of other financing instruments such as the European Investment Bank. This money is not used only within the EU's borders, for implementing policies aimed at sustaining economic growth, making Europe a safer place to live, and protecting our natural resources. Increasingly, the budget is spent outside Europe, helping potential members get closer to the EU, working together with our neighbours for mutual prosperity and stability, and tackling poverty and the challenges of good governance in developing countries.

Franz-Hermann Brüner

The EU is one of the biggest donors in the world – it is, more and more, a "global player". Consequently, the Community and its Member States must, crucially, ensure "global" protection of the Community's financial interests around the world, by developing both administrative and criminal law instruments. We need to improve our mechanisms to prevent and curb any kind of mismanagement, but also to be ready to tackle fraud, corruption, and other transnational criminal activities which may harm the EU budget. At EU and international level, common standards in protecting the financial interests of the Community should be identified.

I am convinced, indeed, that standards in this field identified at EU level by Community instruments, such as directives, regulations and agreements, should serve as a tool for setting standards in international organisations and bodies which have similar objectives. Standards such as those of the UN conventions against corruption, the World Bank, the OECD and others contribute to the development of principles in the field of good governance and ethical conduct, and help to endorse respect for open competition in award procedures for procurement contracts and transparency in decision-making by public administrations. Therefore, I can only underline the importance, acknowledged by Vice-Presidents Kallas and Frattini, of the European Community's participation in international fora that identify and shape such standards and principles, including those for criminal law measures. Given not only the amount and value of the European Community's spending, but also the political, economic and social dimension as perceived beyond the EU's boundaries, it is evident that the protection of its financial interests is one major argument for giving the Community effective competence in criminal law.

The recent case law of the Court of Justice highlights the criminal law competence of the European Community. The Commission, and my Office, contribute to the development of relevant criminal law standards. We appreciate your contributions. The Associations of European Lawyers for the protection of the financial interests of the Community have led the way for more than a decade in defending this idea. Please continue to do so. Eucrim is your forum.

Franz-Hermann Brüner
Director General of OLAF

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European Union

Reported by Thomas Wahl

Foundations

The Hague Programme Review

The Area of Freedom, Security and Justice – Implementation and Further Development of The Hague Programme

In June 2006, the Commission presented a comprehensive package of four communications on the past and future implementation of The Hague Programme which defines the political priorities in the area of freedom, security and justice (FSJ). The objective of the communications is threefold: (1) take stock of the progress made and assess the level of implementation at the EU as well as national level; (2) establish a coherent and comprehensive evaluation mechanism for all FSJ issues; (3) propose ways forward to improve the functioning of this policy area. The communications are summarised in the following, including relevant statements.

Report on the Implementation of The Hague Programme for 2005

In keeping with the evaluation of the Tampere programme, the Commission continues to submit annual reports on how the measures foreseen in The Hague Programme and the linked action plan have been implemented. The presented implementation report ("scoreboard") is the first that refers to The Hague Programme. In contrast to the previous Tampere scoreboards, the presented report does not contain only a review of the measures taken at the EU level (annex 1), but also assesses for the first time whether and how they were implemented at the national level by the Member States (annex 2).

As regards the adoption process at the EU level, the Commission considers the achievements as being generally positive. It is pointed out that in FSJ matters negotiated within the framework of the EC Treaty (immigration policy, judicial cooperation in civil matters) and not subject to the unanimity rule, the progress can be regarded as successful. The Commission cites the Directive on data retention as example for the good decision-making in this context. It reiterates its view that the unanimity requirement causes overall slow progress in matters of Title VI EU Treaty (police and justice cooperation). As regards the national level, the report assesses the FSJ policies' implementation as being generally insufficient both in quantitative and qualitative terms. Harmonisation instruments relevant to the fight against terrorism, for instance, are often transposed with delay or incorrectly, according to the evaluation.

➤ eucrim ID=0603001

Evaluating the Area of Freedom, Security and Justice

The Action Plan implementing The Hague Programme mandates the Commission to establish a mechanism which enables evaluation of the implementation as well as effects of all measures in the area of freedom, security and justice. With its Communication on the "evaluation of EU policies on freedom, security and justice", the Commission makes proposals for such a coherent and comprehensive evaluation mechanism at EU level. An evaluation goes beyond the above mentioned scoreboards. Whereas the latter, to date, only monitor the implementation of the EU policy, an evaluation would assess the results, outcomes, and impacts of a policy area.

The Commission proposes a three-step course of action: First, a system of gathering and sharing information would allow compiling "factsheets" for each policy area. Afterwards, the Commission would validate the information received and elaborate an "evaluation report" consolidating and analysing the information provided. This evaluation report would also include political recommendations regarding the different policy areas addressed. Finally, specific "in-depth evaluation reports" in selected areas would provide strategic analysis of a policy. In an annex, the paper lists indicators and evaluation questions for each instrument of the FSJ area.

The communication emphasises involving all stakeholders in the evaluation process, including the civil society, i.e. the non-profit sector, as well as industry. The evaluation mechanism aims at building up good practice and providing greater accountability. It is in line with the overall Commission strategy for better regulation and more transparency of EU activities.

➤ eucrim ID=0603002

Evaluation Meeting

The Justice, Liberty and Security Directorate General of the European Commission deepened the discussion on the evaluation of relevant EU policies at an open conference in October 2006. Four working groups exchanged – on the basis of the aforementioned communication – views on the evaluation mechanism and methods in the following policy areas: External borders, visa policy, free movement of persons, common immigration and asylum policies (Working Group 1), Citizenship and fundamental rights (Working Group 2), Law enforcement cooperation and prevention of and fight against general organised crime (Working Group 3) and Establishing a genuine European area of justice in criminal and civil matters (Working Group 4). The conference participants included EU and Member State policy-makers, practition-

ers and academics and were united in the support of the Commission's desire to evaluate, warmly welcoming plans to provide fora for practitioners' input. The specific evaluation mechanisms developed were analysed critically: in part rejected, modified or replaced. Much discussion was dedicated to the difficulties of gaining useful, comparable data, of ensuring that work is not duplicated and the fact that in-depth, qualitative studies will be essential.

By Dr. Marianne Wade

➤ eucrim ID=0603003

View into the Future: Priority Actions of The Hague Programme

The Communication "Implementing The Hague Programme: the way forward" identifies those domains in the field of freedom, security and justice in which action and implementation shall be focused on before the expiry of The Hague Programme in 2009. It supplements the general Commission Communication on the future of the constitutional treaty "A Citizens' Agenda for Europe" (COM(2006) 211, see eucrim 1-2/2006, p. 4). Special attention in the EU's future work ought to be paid, inter alia, to the following:

Fundamental rights are to be promoted and the concept of EU citizenship developed. The mutual recognition (MR) programme will be followed-up. In this context, the Commission stresses that the principle of mutual recognition will continue to be the cornerstone of the Union's policies. Facilitating the exchange of information between law enforcement authorities, in particular by implementing the principle of availability, will be another focus. In parallel, a coherent data protection scheme for the area of police and judicial cooperation has to be finalised. As regards the fight against terrorism and organised crime, the Commission stresses the continuation of its efforts to build a common policy at the EU level, including the development of an "Internal Security Strategy" (regarding the future role of Europol in this context, see below). Finally, priority will be given to the implementation of the strategy for the external dimension of freedom, security and justice (see below).

The Communication also explores ways to improve the functioning of the FSJ area by using the possibilities given in the existing treaties, in particular by using Art. 42 TEU. This aspect of the communication was already presented in eucrim 1-2/2006, pp. 4-5.

➤ eucrim ID=0603004

Stronger Role for the ECJ in Justice and Home Affairs of the First Pillar

The fourth communication also looks into the future. The Commission pleads for widening the powers for preliminary rulings of the European Court of Justice (ECJ) in the field of visa, asylum, immigration, and judicial cooperation in civil matters (Title IV TEC). To date, only a court or tribunal of a Member States against whose decisions there is no judicial remedy under national law can request a preliminary ruling by the ECJ. The communication proposes applying the general scheme of the EC Treaty (Art. 234) to the jurisdiction under Title IV TEC. This would also mean that courts or tribunals of the first instance or ordinary appeal courts can refer the question of the interpretation of acts in the above-mentioned areas to the European Court. Moreover, exclusion of jurisdiction for certain measures as provided for in Art. 68(2) TEC would be abolished. The proposal is based on Art. 67(2), second indent, which allows the adaptation of the provisions concerning the jurisdiction of the Court of Justice after a transitional period of five years. This already expired on 1 May 2004.

➤ eucrim ID=0603005

European Court of Justice: Reflection on Preliminary Rulings in AFSJ

In view of the conclusions of the European Council of 4-5 November 2004 in which solutions for a speedier handling of preliminary rulings concerning the area of freedom, security and justice (AFSJ) were requested, and after the above-mentioned Commission Communication in which the extension of the preliminary rulings under Title IV is suggested, the Court of Justice presented a reflection paper with proposals for a more expeditious procedure. The Court suggests the creation of an emergency preliminary ruling procedure where time limits under the normal procedure or accelerated procedure need not be observed. The paper also suggests that cases in which the emergency preliminary ruling procedure is requested would be handled by a special chamber.

➤ eucrim ID=0603006

Presidency's Review of The Hague Programme

The Finnish Presidency sought to give a new impetus to the policies in the area of freedom, security and justice along with the Commission. In its report on the review of The Hague Programme of 27 November 2006, the Presidency follows the Commission's opinion that the current decision-making process under the third pillar hampers progress in the area of freedom, security and justice. The report further identifies those areas in which special attention should be given and where renewed efforts are needed during the second term of the Hague Programme (2007–2009).

➤ eucrim ID=0603007

Council Conclusions on the Hague Programme Review

The Commission package and the Presidency report on The Hague Programme were discussed at the JHA Council meeting on 4-5 December 2006. The Council concluded that insufficient progress was being made in certain areas of judicial cooperation, particularly in criminal matters and police cooperation. The Council is considering focusing on the following issues until the expiry of the Hague Programme: mutual recognition in criminal and civil matters, the development of a comprehensive EU migration policy, strengthening police cooperation through the principle of availability and more operational cooperation, the fight against terrorism and organised crime, the development of external aspects of justice and home affairs, setting up of a new generation of the Schengen Information System, and the enlargement of the Schengen area. Furthermore, the Council invited the Commission and the incoming Presidencies to update the Action Plan on the implementation of the Hague Programme of June 2005.

➤ eucrim ID=0603008

Advisory Group Set to Prepare Post-Hague Programme

At the informal Justice and Home Affairs Ministers meeting in Dresden/Germany from 14 to 16 January 2007, Germany's Federal Minister of the Interior, Dr. Wolfgang Schäuble, presented a plan to convene a high-level advisory group whose task is to reflect on a new multi-year programme on home affairs policy after the expiry of the Hague Programme in 2009. The group is to submit a dossier with recommendations and options by autumn 2008. This dossier should give an impetus to the discussions and serve as a basis for facilitating the negotiations in the Council towards setting new aims and guidelines regarding the EU's home affairs policy as from 2010. The group should, for instance, identify the areas where more cooperation at the EU level is beneficial, where actions at the national level are sufficient, and where existing EU regulations can be improved or simplified. However, it was clarified that issues which touch upon primary EU law, decision-making, or other matters that might affect the further treatment of the Treaty establishing a Constitution for Europe must be left aside. The group is made up of Commission Vice-President Franco Frattini, the Ministers of Interior of the two trio Presidencies (Germany, Portugal, and Slovenia plus France, the Czech Republic, and Sweden), and research experts from individual Member States.

➤ eucrim ID=0603009

European Parliament Resolution

The European Parliament, on 30 November 2006, adopted a motion for a resolution on the progress made in the EU in the Area of freedom, security and justice (AFSJ). The motion was prepared by French liberal Jean-Marie Cavada. The Parliament – in opposition to the Council – calls on the Commission to submit to the Council in 2007 a draft decision activating the passerelle (Art. 42 TEU) and bringing the provisions on police and judicial cooperation in criminal matters into the Community sphere. A decision based on Art. 67 para. 2 TEC with regard to removing the restriction on the powers of the Court of Justice in the context of Title IV TEC should likewise be adopted. Communitarisation of police and judicial cooperation should go hand in hand with a right to scrutiny, especially as regards national parliaments. The EP also favours conferring more powers to Eurojust and Europol. The resolution expresses concerns about a decrease in the protection of fundamental rights, notably as regards the processing of personal data. Another important item of the resolution is that AFSJ-linked policies and measures are to be backed up by human and financial resources.

➤ eucrim ID=0603010

The implementation of the Tampere and Hague Programme, as well as an assessment of possible future achievements with a view to fostering European cooperation and increasing efficiency and democratic accountability of measures already adopted in the AFSJ, was the subject of a joint parliamentary meeting on 2 and 3 October 2006.

➤ eucrim ID=0603011

Passerelle

Member States not Ready to Give up Veto Right

Despite tireless efforts by the Finnish Presidency and the Commission – especially at the informal JHA Council meeting in Tampere on 22 September 2006 – the EU 25's justice and home affairs ministers could not be convinced to abandon their right to veto decisions in the third pillar, especially relating to combating organised crime and terrorism. At their meeting on 4-5 December, they decided to take the issue of the use of the "passerelle clause" (see eucrim 1-2/2006, pp. 4-5) to the European Council. The European Council, at its summit in June 2006, requested the exploration of possible ways to improve the functioning of freedom, security and justice policies by using the possibilities provided for in the current treaties. Now, however, the EU leaders seem to have put an end to the discussion. In their conclusions on the December summit, they expressed their intention to pursue the Union's policy in this area with the existing veto-based regime and to make no use of the "passerelle".

➤ eucrim ID=0603012

Although the justice and home affairs ministers denied using the passerelle, they agreed on the reinforcement of making legislative instruments. Proposals or initiatives should be prepared more carefully, in particular in line with the principles of subsidiarity and proportionality and a more rigorous impact assessment of new instruments should be carried out in advance. The timely and accurate implementation of the EU instrument in the Member States must also be followed more efficiently.

➤ eucrim ID=0603013

PNR Data

PNR Data – New Agreement

In eucrim 1-2/2006 (p. 3 et al.), it was reported that the European Court of Justice annulled the EU-US agreement on the transfer of passenger name records from airline carriers to US authorities, but preserved the effects until 30 September 2006. On 19 October 2006, the EU and the US were able to conclude a new agreement, now based on the third pillar (Art. 38 in connection with Art. 24 TEU). Negotiations proved difficult because the US wanted to revise the previous agreement. Now, the US Department of Homeland Security (DHS) is allowed to share PNR data with more US counter-terrorism agencies and in a quicker way.

Beyond the Council Decision on the signing of the Agreement on behalf of the European Union and the Agreement itself, the Undertakings provided by DHS on 11 May 2004 continue to be applied. These Undertakings lay down in more detail the processing of PNR data received by DHS. The interpretation of the undertakings in view of the new agreement is set forth in a letter from the DHS which was accepted by the EU.

Under the Agreement, the EU will ensure that air carriers operating passenger flights in foreign air transportation to or from the US process PNR data contained in their automated reservation systems as required by the DHS. The air carriers will continue to transfer 34 types of data as previously set out in the attachment of the Undertakings. The US Administration may electronically access PNR

data from the air carriers' reservation/departure control systems located within the territory of the EU Member States ("pull" system). However, the intention is to introduce a "push" system whereby the carriers pass over data in response to requests from the US.

According to the Council Decision, the competent authorities of the EU Member States may suspend data flows to the DHS in order to protect individuals with regard to the processing of their personal data where a competent US authority has determined that DHS is in breach of the applicable standards of protection or if the processing of PNR data is not in accordance with the standards of protection provided for in the Undertakings. A first row on the accordance with the Undertakings meanwhile occurred when it emerged that DHS used PNR data in their "Automated Targeting System" – a security screening system for the risk assessment of international travellers.

The new accord will expire on 31 July 2007 and is to be replaced by a more permanent PNR system. The new legal framework is currently being negotiated.

➤ eucrim ID=0603014

Institutions

Council

First Trio Presidency Programme in Justice and Home Affairs

For the first time, three successive Council presidencies agreed on a coordinated joint working programme in order to ensure continuity and sustainability over the next 18 months. The programme started with the German Presidency in January 2007 and encompasses the subsequent presidencies of Portugal and Slovenia. The key objectives of the programme of the trio presidency in Justice and Home Affairs include:

• Strengthening citizens' rights: The presidency will focus on the finalisation of the Framework Decision on procedural rights in criminal proceedings (see below). The conclusion of the Framework Decisions on the presumption of innocence and on judgments rendered in absentia is also envisaged. The frozen negotiations on the Framework Decision on combating racism and xenophobia are to be resumed (see below). It is also intended to partially precise the principle of mutual recognition of judicial decisions, e.g., relating to the list of offences which makes verification of double criminality dispensable.

• Improving police cooperation: This objective entails, above all, strengthening the role of Europol and extending its capacity to share and analyse information (see below as to the future of Europol).

• Ameliorating EU information systems: Priority is to be given to the preparation of the Schengen Information System (SIS), so that the new Member States can soon join the Schengen area and internal border checks be lifted by the end of 2007. The SIS is a central database in which police and border officials can search for certain persons or objects (especially stolen cars); it is considered to be the major compensatory measure after the abolishment of internal border checks among the participating Member States of the Schengen area. Another issue is the modernization of the Customs Information System (CIS) which helps customs administrations to exchange and disseminate information on breaches of customs and agriculture legislation within the Community and on smuggling activities. In general, it is aimed at improving access to national databases in view of the development of the principle of availability.

• Improving customs cooperation: Operational customs cooperation is to be boosted and the new Action Plan on Customs Cooperation 2007–2008 will be launched. Another task is the evaluation of the Naples II Convention of 1997 which is the essential legal basis for mutual assistance and cooperation between customs authorities (for more information on customs cooperation, see below).

• Strengthening judicial cooperation: An important goal of the joint work programme is the increased and better use of IT technology in cross-border judicial cooperation within Europe (e-Justice), e.g., the improvement of the exchange of information between criminal registers (see below).

• Intensifying cooperation with third countries: Building upon the work carried out by the Austrian and Finnish presidencies in 2006, further care will be taken that justice and home affairs is part of the EU's foreign policy (see below as to this so-called external dimension of JHA).

➤ eucrim ID=0603015

OLAF

Action of German Journalist against OLAF Unsuccessful

On 4 October 2006, the Court of First Instance (CFI) dismissed an action brought against the forwarding of information held by OLAF to Belgian and German judicial authorities by a German journalist (Case T-193/04, "Tillack v Commission"). OLAF suspected the journalist of having received confidential documents about irregularities in several Commission services by paying money to an OLAF official. As a result of investigations, OLAF forwarded information concerning suspicions of breach of professional secrecy and bribery to the prosecutors in Brussels and Hamburg. The journalist objected to this act with his application for annulment to the European court on the grounds that the forwarding led to a search at the applicant's home and office and seizure of professional documents and belongings by the Belgian police. Furthermore, he claimed it was necessary to award him compensation because actions taken by OLAF in this case allegedly damaged his professional reputation. In this context, it is important to point out that the applicant also complained to the European Ombudsman who stated in 2003 that OLAF's actions constituted an instance of maladministration.

The CFI first declares the application for annulment inadmissible because it holds that the act of forwarding information by OLAF to the national authorities has no binding legal effect (see also Case T-309/03, "Camós Grau" in eucrim 1-2/2006, p. 8). The legal position of the applicant is only affected by the legal acts of the national authorities. They are free to decide how to proceed following disclosure of the OLAF information, so further measures lay in their sole and entire responsibility. Furthermore, the CFI

dismisses the application for damages as compensation for non-material injury with the argument that there is no direct causal link between the forwarding of information and the damage claimed. As far as other actions of OLAF are concerned (press releases published), the Court found that a sufficiently serious breach of a rule of law did not exist – a requirement of the case law for the non-contractual liability of the Community. The CFI, in particular, stresses that the classification as an "act of maladministration" by the Ombudsman does not mean, in itself, that OLAF's conduct constitutes a sufficiently serious breach of a rule of law.
➤ eucrim ID=0603016

Court of Auditors' Opinion on OLAF Reform Proposal

On 6 December 2006, the European Court of Auditors (ECA) adopted its opinion on the Commission proposal for a reform of OLAF's basic legal framework – Regulation 1073/1999 (COM(2006) 244 – see eucrim 1-2/2006, pp. 6-7). The Court, inter alia, welcomes the introduction of the proposed Review Adviser, who is to monitor ongoing investigations, particularly in view of compliance with procedural rights, but takes the view that its role and responsibilities need to be explicitly set out in the basic act, i.e., the Regulation. The ECA also thinks that the Review Adviser should not intervene once the results of an investigation have been transmitted to the national authorities. Furthermore, the ECA believes that the discretionary power of the Director-General regarding whether to submit a final report to the judicial authorities if he considers an internal procedure more appropriate must be clearly defined. Regarding the Community's anti-fraud legislation the Court advocates its simplification and consolidation, especially with regard to Regulation 2185/96.
➤ eucrim ID=0603017

Rules of Procedure of OLAF Supervisory Committee

The new OLAF Supervisory Committee (see eucrim 1-2/2006, p. 6) adopted its rules of procedure pursuant to Art. 11 para. 6 of Regulation 1073/1999. The provisions deal with the role and responsibilities of the Supervisory Committee, its composition and operation, and the excise of its powers.
➤ eucrim ID=0603018

OLAF Investigations beyond Europe

As reported in eucrim 1-2/2006, OLAF is increasingly investigating fraud and corruption beyond the EU borders. Since the EU is one of the major providers of development and humanitarian aid, OLAF is playing a more and more substantial role in foreclosing and detecting fraud against international aid and development funds. The evasion of anti-dumping duties is another classic key area of OLAF activities. To facilitate anti-fraud work, OLAF started to improve cooperation and information exchange with international partners and authorities. Some prominent cases and events are highlighted in the following.

Fraud and Bribery in the Context of Water Project in Lesotho

OLAF investigations detected bribery and fraud on a large scale in the context of a significant water project in Lesotho, one of the biggest water projects in the world. The project was supported by considerable EU funds. Successful investigations led to convictions for bribery and the imposition of fines on companies from Italy, France, and Germany by courts in Lesotho. The companies were involved in bribe payments in order to obtain contacts in the framework of the project.
➤ eucrim ID=0603019

Investigations in Burundi

In Burundi, OLAF investigations brought to light fraudulent practices in the context of the establishment of economic and social infrastructures under the Burundi Rehabilitation Programme, supported by Community resources. After OLAF submitted its investigative report, the Burundi authorities affirmed their intention to work together with the EU, to antagonize fraud and corruption, and to take follow-up actions.
➤ eucrim ID=0603020

OLAF Cooperation with the United Arab Emirates

The United Arab Emirates (UAE) is an important centre for transhipment, particularly for goods which come from Asia and then enter the Community market. As a result, the UAE is also the place where – frequently – the true origin of goods is concealed in order to evade anti-dumping duties levied on products from, e.g., China or India. Therefore, OLAF is increasing cooperation with the competent authorities in the Gulf state. An arrangement with the Jebel Ali Free Zone Authority (JAFZA) in Dubai, for instance, intends to develop anti-fraud structures in the so-called Jebel Ali Free Zone and also to establish a guide for good practice in international trade for the zone. The Jebel Ali Free Zone in Dubai is the largest free zone in the Middle East / North Africa Region and prone to being exploited for illicit operations. The cooperation between OLAF and the free zone authority could become a paradigm for similar agreements in other parts of the world.
➤ eucrim ID=0603021

Europol

Europol Cooperation with Australia, China, Liechtenstein, and Montenegro

On 20 February 2007, Europol signed a strategic and operational cooperation agreement with Australia. The agreement aims at establishing a closer cooperation in order to support Europol, the EU Member States, and Australia in the combating of serious international crime, particularly through the exchange of information. The agreement also constitutes the legal basis for the deployment of liaison officers. After Australia has completed its domestic procedures, the agreement can enter into force.
➤ eucrim ID=0603022

The Council also authorised the Director of Europol to enter into negotiations with China, Liechtenstein and Montenegro in order to conclude a cooperation agreement.
➤ eucrim ID=0603023

Ratification of Protocols

Since January 2006, an intensified discussion on the future role of Europol has been launched by the Austrian Presidency. One issue was the ratification of the three Protocols amending the Europol Convention. They will enhance Europol's

role as the central European police office. After notifications were completed by the end of 2006, the protocols can finally enter into force on 29 March 2007 (1st and 2nd Protocol) and 18 April 2007 (3rd Protocol)

The first of the protocols extends the competence of Europol to money laundering, regardless of the type of offence from which the laundered proceeds originate (2000 Protocol). The second protocol clarifies certain powers in relation to participation in Joint Investigation Teams by members of Europol as well as the privileges and immunity applying to members of Europol (2002 Protocol). The third protocol streamlines the internal workings of Europol, particularly in relation to liaison procedures and analysis and processing of data. It will also facilitate the participation of the so-called third partners in Europol's analytical work ("Danish protocol" of 2003).

➤ eucrim ID=0603024

Europol's New Footing: Draft Council Decision

Beyond the issue of the ratification of the three protocols, there is a broad discussion on a new legal framework for Europol. At its meeting on 1-2 June 2006, the JHA Council called upon replacing the current Europol Convention, which governs the tasks and work of Europol, by a Council Decision as foreseen in Art. 34(2)lit. c TEU. A Council Decision would allow the avoidance of lengthy ratification procedures, but would, however, circumvent parliamentary powers. It is aimed at adapting Europol to new security challenges, such as terrorism, and improving the sharing of information by the new legal framework. This new legal framework is to be discussed in the coming months on the basis of a Commission Proposal for a Council Decision establishing the European Police Office (Europol) of 20 December 2006 (COM(2006) 817). The proposal takes into account the changes made by the three protocols (see above) and the options paper from the Friends of the Presidency Group (see below). Europol shall be turned from an international organisation into a proper EU agency financed directly from the EU budget rather than by contributions from the national governments as it is now. In this context, the proposal tries to meet the demands of the European Parliament on more accountability of Europol to the EP. The institutional change would mean, inter alia, that Regulation No. 1073/1999 concerning investigations conducted by OLAF would apply to Europol. Europol employees would become proper EU staff, so that EU Staff Regulations as well as the Protocol on Privileges and Immunities of the European Communities would be applicable.

The proposal entails the following main changes:

• The mandate of Europol is broadened. Europol would be empowered not only to deal with crimes strictly related to organised crime and terrorism, but all forms of serious crime. These forms of serious crimes correspond to those described by Art. 2(2) of the EAW Framework Decision.

• It is envisaged that not only Europol's efficiency of repressive measures, but also the field of crime prevention be strengthened: Europol is to assist Member States which organise "major international events with a public order policing impact", such as international football matches and other sports events.

• Europol's data processing systems will be improved, while it is intended that a high level of protection of personal data be ensured. The two main tools remain the information system and the analysis files. However, the proposal offers the possibility of creating ad hoc databases, which could deal, for instance, with high-risk internet sites or terrorist groups. In contrast to the existing Europol Convention, national units shall have direct and full access to the information system, without having the obligation to prove a need for a specific enquiry. The proposal also prepares Europol for the smooth exchange of information, provided for by future EU legislation (e.g., with respect to the principle of availability), since it foresees that Europol's data processing system needs to be interoperable with the data processing systems in the Member States and the bloc's central databases, such as the Schengen or Visa Information System.

• A single chapter deals with the relations of Europol with other Community or Union-related bodies and agencies as well as with third countries and organisations outside the EU. With respect to OLAF, the new legal framework would also allow the exchange of personal data; this is not possible under the present administrative agreement which only allows the exchange of strategic and technical information. The draft also clearly states that Europol may directly exchange information with OLAF in the same way that authorities of the Member States do according to Art. 7(2) of the second Protocol to the Convention on the protection of the ECs' financial interests. Furthermore, Regulation 1073/99 shall apply to Europol which would confer upon OLAF the power to conduct investigations within the European police office.

• The standard of data protection shall be governed by the Framework Decision on the protection of personal data processed within the framework of police and judicial cooperation in criminal matters (see below). A Data Protection Officer is to be established in order to ensure, in an independent manner, lawfulness and compliance with Europol's new legal framework when personal data are processed.

The Council intends to reach a political agreement on the Council Decision on Europol by the end of the German presidency. The new legal framework is planned to be in force by 1 January 2008. It is contentious whether a protocol is a legal prerequisite to abrogation of the Europol Convention. While the Council legal service took the view that a new legal framework for Europol can only be adopted after a protocol repealing the Europol Convention, the Commission disagrees. The Council, at its meeting in December 2006, concurred with the Commission's opinion that the Europol Convention can be directly converted into a decision.

➤ eucrim ID=0603025

European Data Protection Supervisor Opinion on Draft Council Decision

On 16 February 2007, the European Data Protection Supervisor (EDPS) delivered its opinion on the Commission Proposal for a Council Decision establishing Europol (see aforementioned news). The EDPS particularly examines the conse-

quences on the processing, use, and protection of data as to substantive changes for Europol due to the new legislation, the applicability of a general framework on data protection, and the growing similarities between Europol and Community bodies. The EDPS makes several recommendations.

He pleads, inter alia, for the inclusion of specific conditions and limitations with regard to the supply of data by private entities, in the context of which he especially sees problems in relation to the data protection principles of accuracy and lawfulness. Likewise, he suggests further conditions and guarantees when the interlinking of databases is put in place. The EDPS also criticizes the limitations to one of the individual's basic data protection rights laid down in the Commission proposal, i.e., the right of access.

The EDPS recommends that the present draft Council Decision should not be adopted prior to the Framework Decision on the protection of personal data processed within the framework of police and judicial cooperation in criminal matters (see below). In this context, the EDPS advocates that the new legal framework for Europol also respects two major elements of the said Framework Decision as proposed by the Commission, namely the distinction between data based on opinions and data based on facts ("soft and hard data") as well as the distinction between data of categories of persons, based on their involvement in a criminal offence.

The opinion of the EDPS also addresses the applicability of Regulation No. 45/2001 – the basic legislation concerning the protection of personal data processed within EU institutions and bodies, and establishing and defining the tasks of the EDPS. This question is especially relevant when Europol communicates with Community bodies. In this context, the EDPS also assesses the provisions which regulate the exchange of data with OLAF. He clarifies that Reg. No. 45/2001 applies to the activities of OLAF as carried out in connection with Europol. Last but not least, the EDPS calls on an improvement of the rights of the individual when his data are communicated to Europol by Community bodies.

➤ eucrim ID=0603026

Friends of the Presidency's Report to the Future of Europol

A core item for the discussion on the future of Europol is a report from the Friends of the Presidency Group (FOP), drafted in May 2006. This report presents the results of the discussions held during the Austrian Presidency on a Europol reform. The paper outlines the issues under discussion (e.g. mandate and tasks of Europol, information processing, the role of Europol in the implementation of the principle of availability, data protection rules, etc.) and indicates different options for the further development of Europol. The paper distinguishes between options which can be implemented immediately, without additional preparatory work and without changing the Europol Convention ("quick wins") and those which would require changes to Europol's main legal instrument.

FOP groups are ad hoc groups which can be called into being whenever the Presidency needs help with a specific issue. They are usually composed of experts from the Member States, the General Secretariat of the Council, and the Commission (plus experts from other institutions possibly involved, such as Europol in this case). FOP groups are playing an increasing role in the development of the EU's justice and home affairs policy.

➤ eucrim ID=0603027

Conference on the Future of Europol under Austrian Presidency

In the context of the future development of Europol, two conferences deserve mention:

A so-called "High Level Conference on the Future of Europol" was held in Vienna on 23/24 February. It aimed at continuing the discussion on Europol which had been stimulated by the Austrian Presidency at the informal JHA Council meeting in January 2006. Three working sessions were held. In the first session, delegates discussed the role of Europol in the area of freedom, security and justice. They suggested carefully widening Europol's mandate, the result of which would be more operational powers, meaning that Europol could more directly support joint investigation teams and deal with crimes of a particular European nature, such as trafficking in human beings or counterfeiting of the Euro. However, extending Europol's mandate would raise problems of how judicial control could be ensured and for whom Europol works, particularly in the absence of an Office of the European Public Prosecutor (an issue which was tackled in the January JHA Council meeting).

Improvement of the exchange of information was another important issue discussed. In this context, Europol should also be able to exchange information with countries that do not have the same data protection standards as those that are applicable within the EU. The second session addressed the development of Europol's operational work where it was felt that Europol is called upon to deal with "transborder serious crime". The third session looked into a new architecture of the internal structures of Europol and talked about the potential value of cooperation via Europol. The ideas of the High Level Conference were taken up afterwards by the Friends of the Presidency Group (see above).

➤ eucrim ID=0603028

Parliamentary Discussions on Current and Future Challenges of Europol

The EP tackled the future development of Europol and the role of parliaments therein several times. In this context, two major meetings should be mentioned. On the occasion of the joint parliamentary meeting "From Tampere to The Hague: Moving Forward? Progress and Shortcomings in the Area of Freedom, Security and Justice" on 2 and 3 October 2006, a session on "What Future for Europol?" had a look at parliamentary supervision over Europol and Europol's accountability. Hubert Haenel (Chairman of the European Union Delegation of the French Senate) discussed whether a committee of national and European parliamentarians should be created to scrutinise Europol. Max-Peter Ratzel, Director of Europol, pointed out in the context of the discussion that Europol already has several control mechanisms, such as the Management Board, and stressed that Europol's role is to facilitate data exchange between the Member States and not to ask for coercive powers in the Member States.

➤ eucrim ID=0603029

Another conference in the Parliament which addressed the main challenges of Europol was the joint parliamentary meeting entitled "Improving Parliamentary Scrutiny of Judicial and Police Cooperation in Europe" in Brussels on 17 and 18 October 2005. Presentations mainly addressed Europol's mission and objectives, the lack of parliamentary supervision and judicial review of Europol, the obstacles to ratifications of Europol protocols, and the role assigned to the parliaments to improve police cooperation throughout Europe.
➤ eucrim ID=0603030

Eurojust

Cooperation Agreement Eurojust – USA

The EU and the USA agreed on a cooperation agreement which enables Eurojust to exchange information with the competent US authorities in terrorist and other cross-border cases. The agreement will also facilitate the cooperation between the prosecutors. Both parties can, for example, arrange common meetings at which data on cases under investigation can be considered. National members of Eurojust are allowed to participate in meetings arranged by the US authorities, and, vice versa, US national authorities may participate in meetings arranged by Eurojust. The US will second a liaison prosecutor who operates on Eurojust premises. Specific provisions on data protection are another important point of the agreement. They seem to go beyond existing cooperation agreements between EU institutions and the USA.
Further information on the cooperation between Eurojust and non-EU countries is contained in the news in the category "Cooperation – External Dimension" below.
➤ eucrim ID=0603031

The Future of Eurojust – Seminar with 2020 Vision

Besides discussions on Europol, discussions are also going on with regard to the future of Eurojust. In this context, a seminar convened in Vienna at the end of September 2006 encompassing representatives from Eurojust, EJN, Europol, EJTN, CoE and the UN, senior officials and expert academics to discuss the future of Eurojust and the European Judicial Network. A number of presentations focussed upon the development and the strengths and weaknesses of Eurojust and the EJN. The successful work carried out by both institutions was emphasised and some paths for further improvement suggested. In particular, uneven implementation of the relevant provisions by Member States was pinpointed as a major obstacle to effective work in some cases. Beyond that, there were calls to focus pragmatically upon the problems currently facing the institutions rather than those arising from political proposals. A general discussion followed as well as discussions in two working groups focussing on the powers of Eurojust on the one hand and gathering, managing, and exchanging information on the other. Conference participants and additional speakers presented ideas ranging from calls to preserve the flexibility of the current system − in particular ensuring that practitioners are aware of Eurojust and the EJN and that these two institutions are able to work at full capacity −, to clarify responsibility between the two institutions, and to give Eurojust operative powers subject to legal control. The seminar raised many questions relating Eurojust's role in particular to the political question as to what kind of European Union the institution should serve.
The Presidency's report on the seminar lists four different premises for the strengthening of Eurojust:
(1) No changes are to be made to the acquis. In this case, the evaluation of Eurojust's work must continue. Closer cooperation with Europol and OLAF and the possibility of the creation of national Eurojust offices within the framework of the EJN should be considered.
(2) New legislative instruments are to be adopted, but no changes need be made to the legal basis for the operation of Eurojust. EU legislative instruments guiding national implementation are to be adopted as well as those on the minimum powers of national members. Conflicts relating to Eurojust jurisdiction should be solved and a European documentation and clearinghouse for judicial cooperation should be created. Eurojust is to be provided with community financing and a long-term budget. Better cooperation by means of direct access to information and joint investigation teams should be set up in the long run.
(3) New legislative instruments are to be adopted which change the legal basis of the operation of Eurojust. Eurojust should have access to and receive information and have direct contact with national authorities at all levels, be party to Europol's analytical work files, and have a seat on the Europol board. Eurojust should be able to initiate investigations and prosecutions. Further proposals include the linking of Eurojust and Europol databases, lending Eurojust powers to issue European Arrest Warrants, and judicial control over Eurojust.
(4) A fourth premise is the establishment of the European Public Prosecutor.
By Dr. Marianne Wade / Sarah Kiesel
➤ eucrim ID=0603032

Talk about the Role of Eurojust in the European Parliament

The European Parliament also discussed current difficulties and the potential future of Eurojust in the above-mentioned joint parliamentary meeting on 17/18 October 2005. Jean-Marie Cavada, Chair of the EP Civil Liberties Committee, said that Eurojust should have a more central role in judicial cooperation. Michael G. Kennedy, President of Eurojust, pointed out recent successes, but he regretted that lack of transposition of the Eurojust decision in Member States hindered the activity of Eurojust. Hubert Haenel, Chairman of the EU delegation at the French Senate, called for the creation of a new European Public Prosecutor to reinforce Eurojust. The following link leads to documentation of the meeting:
➤ eucrim ID=0603033

European Union Agency for Fundamental Rights

By Julia Macke

EU Agency for Fundamental Rights Started

For a long time, it was not clear if the planned European Union Agency for Fundamental Rights could begin its work by the intended date of January 2007 because it was controversial whether police and judicial matters which fall un-

der the EU's third pillar on justice and home affairs would be within the scope of the new watchdog. But the last Justice and Home Affairs Council of the Finnish Presidency on 4 and 5 December 2006 in Brussels reached a general agreement on its establishment. At the JHA meeting in Brussels on 15 February 2007, the Council, now under the German Presidency, finally approved the Regulation establishing the European Union Agency for Fundamental Rights, enabling the Agency to take up its work from 1 March 2007 onwards. The mandate of the Agency in the fields of police and judicial cooperation in criminal matters is now based on voluntary consultation. However, the Council is committed to reviewing the Agency's mandate in these areas by the end of 2011.

The Agency will be an independent centre of expertise on fundamental rights issues through data collection, analysis, and networking, which currently does not exist at the European Union level. However, the Agency will not deal with individual complaints. It will have the right to formulate opinions to the Union institutions and to the Member States when implementing Community law, either on its own initiative or at the request of the European Parliament, the Council, or the Commission. Additionally, it will present an annual report on fundamental rights issues, including examples of good practice, and produce thematic reports on topics of particular importance to the Union's policies. Geographically, the Agency will focus on the Community and its Member States, but candidate and Western Balkan countries will also have the possibility to participate. In order not to overtax the Agency, Germany especially has advocated a streamlined Agency whose geographic area of activity is limited to the EU and its applicant countries.

According to the Council, the Agency on the one side, and the Council of Europe and the European Court of Human Rights on the other, will complement one another in a way which will avoid duplication of work. While the Agency will concentrate on Community law and its implementation, the Council of Europe and the European Court of Human Rights will focus on ensuring compliance with the European Convention on Human Rights. A cooperation agreement between the EU agency and the Council of Europe is envisaged to ensure good relations in the future.

The idea for an EU Fundamental Rights Agency was first proposed by Member States in December 2003 in order to analyse and collect data on how each EU Member State adheres to the basic rights enshrined in the EU's treaties. Then, the European Commission adopted a proposal for a regulation establishing a European Union Agency for Fundamental Rights on 30 June 2005. The proposal followed the decision of the Heads of State and Government, taken in December 2003, to extend the mandate of the European Union Monitoring Centre on Racism and Xenophobia, based in Vienna, by converting it into a Fundamental Rights Agency.

➤ eucrim ID=0603034

Council of Europe Position

In the past, the representatives of the different institutions of the Council of Europe frequently expressed deep concerns about the plans to set up the EU's Fundamental Rights Agency. During a visit in Germany in December 2006, Council of Europe Parliamentary Assembly President, René van der Linden, recently still stressed that the Agency risks creating unnecessary duplication.

On 9 February 2006, in a speech in Athens, he reprimanded the Agency for not having an added value. He was further concerned about the geographical remit of such an Agency, requesting that the Agency should gather and analyse data within the EU 25 member states only.

➤ eucrim ID=0603035

However, after the EU Council decision on 15 February 2007, Secretary General Terry Davis thoroughly welcomed its decision to create a new Fundamental Rights Agency. According to Davis, this is an important and challenging task, and the new Agency can make a useful contribution to helping the EU to comply with the Council of Europe standards based on the European Convention on Human Rights. He further welcomed that the EU had asked the Council of Europe to participate in the administration of the new Agency and announced immediate talks in this context.

➤ eucrim ID=0603036

Council of Europe Recommendation on the Agency

The Recommendation 1744 "Follow-up to the Third Summit: the Council of Europe and the Fundamental Rights Agency of the European Union", which the Parliamentary Assembly adopted on 13 April 2006, summarized previous concerns regarding an EU body for Human Rights, inter alia: possible duplication of activities already undertaken by the Council of Europe which has already developed a complete range of instruments and mechanisms for promoting and protecting human rights, possible "forum shopping" by countries, waste of public money, creation of new dividing lines in Europe, and insufficient consideration of national parliaments' positions. The Agency should therefore be explicitly limited and required to refer in its work to the principal human rights instruments of the Council of Europe.

➤ eucrim ID=0603037

European Parliament: Support with Amendments

The European Parliament firmly supported the Commission proposal on the establishment of an EU Agency for Fundamental Rights. On 30 November 2006, the EP adopted a report from MEP Kinga Gál which proposes several amendments to the Commission proposal. The EP suggested, inter alia, that EU institutions should be able to request opinions on their legislative proposals or on positions taken in the course of legislative procedures as regards their compatibility with fundamental rights. Moreover, the amendments stress close cooperation with the civil society and request the introduction of a Scientific Committee to guarantee the scientific quality of the Agency's work.

By adopting a report from MEP Kósáné Kovács, the EP pleaded that the Agency's mandate also covers areas of Title VI TEU. However, the Parliament's resolutions were only taken into account in the consultation procedure, thus the Council was not bound to them.

➤ eucrim ID=0603038

EESC in General Favour

The European Economic and Social Committee (EESC) also welcomed the EU Agency for Fundamental Rights. In

its opinion of February 2006 it favoured the extension of the Agency's remit to include the third pillar which is a key element in the view of the EESC. It also favours including a wide range of civil society groups in the Agency's bodies.
➤ eucrim ID=0603039

Committee of the Regions

The Committee of the Regions (CoR) already gave an opinion on the sphere of action, missions, geographical scope, and structure of the new EU's human rights watchdog in June 2005. The CoR recommended that the Agency have access to the necessary intellectual and material resources to fulfil its mission and suggested that the geographical sphere of action should be restricted to the EU Member States.
➤ eucrim ID=0603040

CCBE Position

The Council of Bars and Law Societies of Europe (CCBE), which represents more than 700,000 European lawyers, submitted its statement on the Agency for Fundamental Rights in February 2006. The CCBE stressed the need for a more explicit stipulation of the Agency's advisory capacity at the early stages of policy and decision making. The CCBE also favoured a mandate for the monitoring of human rights in third countries, even if no association agreement was concluded and advocated an obligation for Member States to regularly report to the Agency.
➤ eucrim ID=0603041

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

Commission Can Start Negotiations for PFI Agreement with Liechtenstein

The Minister for Economic and Financial Affairs, at its Council meeting on 7 November 2006, authorised the Commission to open negotiations for an agreement between the EC and Liechtenstein in order to counter fraud and other illegal activities which are detrimental to the financial interests of the Community.
➤ eucrim ID=0603042

OLAF Investigations – Some Cases Reported

OLAF, together with its partners, was successful in detecting several fraud cases, some of which are highlighted in the following:
Anti-dumping duties on products from China lead ex- and importers to circumvent their obligations. The latest success of OLAF and its partners in this respect was the detection of illegal trade in cigarette lighters. Imports evaded anti-dumping duties imposed on China by misdeclaring the country of origin (Indonesia or Malaysia instead of China). Transhipment in Malaysia alone led to an illegal import of 300 million lighters from China during the past four years and therefore damaged the EU budget considerably. The duties will now be recovered from the importers.
➤ eucrim ID=0603043
Likewise, OLAF, together with the "Zollkriminalamt" (German Customs Investigations Office), detected the evasion of anti-dumping duties on energy-saving lamps, the rate of which is currently up to 66.1 %. Energy-saving lamps were allegedly produced in China, transhipped through third countries and reloaded there, provided with false certificates of origin and then imported into the EU. The German customs administration was able to recover € 7 million from the fraudsters.
➤ eucrim ID=0603044
Investigations co-ordinated by OLAF revealed fraudulent practice by an importer who falsely declared the countries of origin concerning raw cane sugar. The plan was to benefit from the preferential treatment given to products originating from ACP countries (Asia-Caribbean-Pacific Group of States). A respective agreement allows products from the ACP to enter the EC free of duty. Instead coming from ACP countries, the sugar in fact originated from Brazil and was refined in Bulgaria; thus it could not benefit from exemption from customs duties. The total damage is estimated to be up to € 30 million.
➤ eucrim ID=0603045
Another field in which OLAF is currently carrying out investigations is the smuggling of garlic. Smugglers use different methods in order to benefit illegally from preferential trade arrangements on fresh garlic between the EC and certain countries. Whereas the import of garlic from these countries is duty-free, imports from China are liable to high duties. Evasion of this levy is attractive because China is one of the world's leading producers of garlic and production costs there are low. OLAF estimates the financial damage to the EU taxpayer to be at least € 60 million.
➤ eucrim ID=0603046

EU Expenditure Still Often Spent Incorrectly, European Court of Auditors Says

Each year in October, the European Court of Auditors (ECA) presents its Annual Reports covering the previous financial year. The main content of the reports is the Statement of Assurance (also known as "DAS" after the French acronym "Déclaration d'Assurance) which comprises conclusions on i) the reliability of the accounts and ii) the legality and regularity of the underlying transactions (see Art. 248 TEC).
In its 2005 annual report, which was presented in October 2006, the ECA was generally satisfied with the financial management as to the EC's revenue, the EU administrative expenditure, and the pre-accession strategy. However, with regard to expenditure, the ECA found a continuing material level of errors in the underlying transactions (the ECA gives a so-called "qualified opinion" in this case). This concerns the four principal areas of the general EU budget: agriculture, structural measures, internal policies, and external action. Deficiencies in internal control, in particular in Member States for shared management expenditure are the main reason. But the ECA also blames the internal controls carried out by the Commission. It should be mentioned that the ECA confirmed similar findings in its previous annual reports.
Hubert Weber, the Court's President, said: "Overall, the situation [relative to the legality and regularity of underlying transactions] has not substantially changed since last year. However, this does not mean that all, or even the majority of, payments from the EU budget are affected by errors, nor can it be interpreted as an indication of fraud. What

it does signify, however, is that, judging by the results of the Court's detailed audit work, errors with the financial impact are found too frequently for the Court to conclude that all is well. The underlying reason why most errors occur is that beneficiaries – farmers, local authorities, project managers – claim more that they have the rights to claim. Explanations range from simple neglect or error, through poor knowledge of the complex rules up to resumed attempts to defraud the EU budget. However, it is the responsibility of the Commission to administer the budget in a way that reduces the risk of irregularities through preventive measures and controls that are properly carried out."
➤ eucrim ID=0603047

Better Financial Management of EU Budget at Stake in the EP

Against the background of the repeated negative Statements of Assurance of the European Court of Auditors as to the lack of supervisory systems and controls in the Member States relating to the aforementioned underlying transactions, the European Parliament's Committee on Budgetary Control initiated a "Joint Committee Meeting" on the role of budgetary control committees in national parliaments with regard to the control of the Community budget. The meeting was held on 9 and 10 October 2006 in Brussels. The meeting analysed the fundamental weakness of the shared management system and tried to develop solutions on how financial management and accountability in the European Union can be improved. In this context, the role that budgetary control committees of national parliaments have in the control and scrutiny of the Community budget was discussed. Another issue addressed the role of national audit institutions in relation to EU funds since national audit institutions have very different audit cultures and mandates in the various EU Member States. In doing so, the meeting contributed to a better understanding of each other's legal budgetary control and audit systems.
This was the first "Joint Committee Meeting" which was organised by the Committee on Budgetary Control. "Joint Committee Meetings" are a rather new instrument designed by the European Parliament to enhance cooperation with national parliaments at the committee level. They intend to foster the exchange of views and information between the committees of the European Parliament and the national parliaments with regard to a concrete area of European politics.
➤ eucrim ID=0603048

EP Resolution on the Recovery of Community Funds

The difficulties and complexity of recovery procedures, particularly in the context of the shared management of agricultural funds, was subject to a resolution on the recovery of Community funds adopted by the European Parliament on 24 October 2006. The resolution is based on an own-initiative report from MEP Paulo Casaca, Member of the Committee of Budgetary Control. The resolution reflects various aspects related to the lack of sound financial management and improper recovery of Community funds. The most important are as follows:
The resolution first welcomes the three proposals submitted by the Commission in the framework of the 2002 reform of the Financial Regulation, including a five-year deadline for recovery of sums owed to the Community. The EP calls on Member States to prove their compliance with international accounting standards and consider whether it could be used by the EU in order to develop a common approach in this matter. It is recommended that the authorising officer should inform OLAF immediately if he establishes that the expenditure is not consistent with the contact or that authorisation was obtained by deceit, threat, or bribery.
The MEPs state that procedures of recovery, which must be carried out in the Member States, take far too long, so that recovery is often subject to delays or cannot even be effected. With regard to enforcement orders, it is considered important that communications between the Commission and the Member States be simplified and closer links established between the Commission's services and those responsible in the Member States. With regard to the reform of OLAF, the EP believes that the possibility of closer cooperation with Eurojust and Europol needs to be explored in order to strengthen the real protection of the EU's financial interests; furthermore, the possibility of OLAF's full administrative independence from the Commission and the other institutions should be evaluated.
A major part of the resolution is dedicated to the risks to human and animal health in cases of fraud in trade in agricultural products – as discussed at the seminar in Bled/Slovenia in spring 2006 (see eucrim 1-2/2006, pp. 10-11). In this context, the resolution stresses that closer cooperation between the national customs authorities, the veterinary services, and EU authorities such as OLAF is urgently needed. The MEPs suggest that, where fraud could at any given moment have health repercussions, the health services responsible should be informed, have access to samples, and that such samples should be kept for a considerably longer period than is now the case.
In addition, the resolution notes that a main obstacle to recovery is that OLAF does not possess suitable information on the quantities of incriminated products, while application of the criminal law to the inquiries (in the Member States) has proven disastrous for recovery. Lastly, the EP stresses the need for the creation of the European Public Prosecutor whose presence, as envisaged in the Constitutional Treaty, would lead to more "joint-up" procedures and reduce the complexity of the current situation.
➤ eucrim ID=0603049

Commission Recovers Incorrectly Spent Farm Subsidies from Member States

As reported in eucrim 1-2/2006, p. 10, the Commission regularly takes decisions on the conformity of CAP (Common Agricultural Policy) expenditure with EU law and requires Member States to pay back unduly paid funds if they apply audit procedures negligently. In its decision from October 2006, the Commission found that some Member State's recovery procedures were inadequate and therefore reclaimed a total of € 317.3 million from the bloc's big five parties: Italy, Spain, the UK, France, and Germany. These recoveries relate to irregularities communicated by the Member States before 1 January 1999. The Commission's statement also concluded

that € 176.3 million should be written off at the cost of the Community budget as their non-recovery was not due to negligence on the part of the Member States.
➤ eucrim ID=0603050

EC and Member States Agree on Distribution of Philip Morris' Money

In October 2006, the European Community (EC) and the ten Member States which initially signed the anti-contraband and anti-counterfeit agreement with Philip Morris International (PMI) arranged how to distribute the payments from the tobacco giant. On 9 July 2004, PMI concluded a multi-year agreement which includes the establishment of an effective system for combating cigarette smuggling and counterfeiting in the future and which ends all litigation between the parties in this area. The European Commission had accused the world's biggest tobacco manufacturer of collusion with tobacco smugglers to EU destinations. The agreement includes substantial payments by PMI, which could total approximately 1.25 billion USD over 12 years. The arrangement now made between the EC and the said Member States applies to the payments already received by PMI since 2004 and to the future annual payments that will be paid through 2016. The Commission proposed increasing the financial envelope of the next Hercule Programme 2007–2013 (see below) by € 44 million taken out of the PMI payments. It could be used to finance training actions and the purchase of equipment in order to prevent smuggling of cigarettes.
➤ eucrim ID=0603051

EU Strategy to Fight Fiscal Fraud

Because of the free movement of goods and services within the internal market and the globalisation of the economy, Member States are increasingly unable to fight fiscal fraud on their own. Therefore, with its Communication "concerning the need to develop a co-ordinated strategy to improve the fight against fiscal fraud" (COM(2006) 254), the Commission initiated a new campaign in order to trigger indepth discussions on finding common solutions to the growing problem of tax fraud. Although there are no official figures on the level of tax fraud, economic literature estimates that tax fraud accounts for 2-2.5 % of GDP. This would amount to about 200 to 250 billion € at the EU level. László Kovács, European Commissioner for Taxation and Customs, pointed out an interesting link between the fight against tax fraud and the Lisbon strategy. The huge sum of lost tax money could be used to accelerate economic growth, create new jobs, or increase competitiveness. The Communication presents actions which could be implemented in the short term, mainly in the following three areas:

• Reinforcing (administrative) cooperation between the Member States: The absence of a Community administrative culture is seen as a major obstacle to the fight against fraud. In this context, the Commission stresses the need to make more coherent use of OLAF's services and provide OLAF with a strengthened framework for operational assistance and intelligence. Furthermore, current legislation regarding cooperation in the field of direct taxation and assistance in the recovery of taxes should be tightened up, as well as risk management improved, so that countries can be rapidly informed of the potential risks that particular companies may represent. In addition, a permanent forum should be created at the Community level for all direct and indirect taxes where issues relating to fraud and cooperation could be discussed.

• Increasing cooperation with third countries: The current cooperation is based on bilateral agreements which lead to different situations that are exploited by fraudsters. This system could be replaced by a common EU agreement with third countries. Moreover, the inclusion of tax cooperation clauses into the economic partnership agreements is proposed.

• Modifying the current VAT system: Since VAT fraud still raises the most concern, the Communication gives some impetus on how to reduce the losses of VAT income. The Commission calls upon the introduction of the "definitive VAT regime", i.e. taxation of goods and services in the Member State of origin. However, this would mean a fundamental change to the current VAT system and it is unlikely that all Member States would follow it. The Commission would also like to consider the so-called "reverse charge mechanism", particularly in order to avoid carousel fraud. This would mean that, instead of the supplier (in principle, the current system), it would be the recipient/customer of goods or services who declares the VAT in business-to-business relations. The customer can then set off this payment against his input tax deduction. Thus, any flow of money which is currently being exploited by fraudsters can be avoided.

Beyond these areas, the Communication examines some single aspects, such as improvements in the exchange of information and the reinforcement of tax declaration obligations.
➤ eucrim ID=0603052

Council Position on Common Strategy to Fight Fiscal Fraud

The ECOFIN Council addressed the aforementioned strategy in two meetings in 2006. At its meeting on 7 June, the Council stimulated further discussion on the reverse charge mechanism for VAT but showed reservations about a rigid change. However, the Austrian Presidency called on the Commission to propose a directive which would allow Member States the option of applying the reverse charge mechanism to domestic business-to-business supplies where the invoice amount exceeds 5,000 €.

At its meeting on 28 November 2006, the Council laid down the priorities by which to proceed with the strategy:

• Establishment of an action plan, including a follow-up mechanism with the aim of ensuring a more efficient use of administrative cooperation;

• Exploration of ways to enable Member States to take more efficient measures against fraudsters and give as much priority to the protection of other Member States' VAT revenue as to their own;

• Possibilities for quicker and more detailed exchange of information between Member States, including the study of legal and practical possibilities of access to data on taxpayers for tax administrations in other Member States; this should also include the elaboration of legislative proposals, where necessary, to ensure that Member States obtain the

relevant information from businesses, accompanied by an assessment of the effects in terms of the additional burden on businesses and administrations by taking into account the possibilities offered by electronic technologies;

• Examination of potential legal changes to the current VAT system in view of enhancing the legal possibilities for combating fraud, such as joint and several liability.

➤ eucrim ID=0603053

VAT

Commission Objects to Austrian and German Introduction of Reverse Charge System

In the context of the reverse charge mechanism (see above), it is worth mentioning a decision of the Commission from July 2006 which rejected a request from Austria and Germany for a general introduction of the mechanism to all business-to-business supplies of goods and services in their territory where the invoice value exceeds 5,000 € and 10,000 € respectively. The request was based on Art. 27 of the Sixth VAT Directive (Dir. 77/388/EEC) by which Member States can be authorised to introduce special measures for derogation from the provisions of the Directive, inter alia, in order to combat fiscal fraud. The authorisation is taken up by the Council, acting unanimously on a proposal from the Commission; the European Parliament or the European Economic and Social Committee is not consulted. The Commission decided not to make such a proposal because it takes the view that Art. 27 only allows derogations in specific cases, whereas the request by Germany and Austria would entail a fundamental change to the current VAT system. The Commission believes that the only possible route is a legislative act under Art. 93 TEC, providing for an agreement by all Member States in the Council, after consultation of the European Parliament and the Economic and Social Committee.

➤ eucrim ID=0603054

VAT Directive Recast

On 1 January 2007, Council Directive 2006/112/EC of 28 November 2006 on the common system of value-added tax entered into force. Hence, the Directive puts the European turnover tax system on a new legal foundation. Significant amendments to the 6th VAT Directive of 1977 on several occasions necessitated a complete revision for reasons of clarity, transparency, and rationalisation. Some unclear rules were transformed into new articles, some outdated rules were deleted. Directive 2006/112, in principle, does not bring about substantive changes in content but recasts the structure and wording of the older directive. The new Directive alters the format of the 38 articles of the 6th Directive and now contains 414 new articles plus 11 annexes. The 12th annex contains a correlation table with the old and new EC turnover tax law. The 1st VAT Directive of 1967 and the 6th VAT Directive, as well as all directives which amended them successively and were incorporated into the new framework, are repealed. Directive 2006/69/EC regarding certain measures assisting in countering tax evasion and avoidance, mentioned below, was also taken into account.

➤ eucrim ID=0603055

Amendments to Present VAT Scheme Still Open

The Council could not yet agree on a package with several modifications to the current VAT regime. It intends to reach a solution on the draft legislation by June 2007. The package also takes into account aspects of combating VAT fraud. The individual elements are as follows: (1) A draft directive on the place of supply of services as concerns VAT payments aims at changing the place of taxation for VAT from the place where the supplier is located to the place where the customer is located. (2) Two draft directives and a draft regulation have the objective of simplifying cross-border VAT obligations and refund procedures for business; the core element is the creation of a "one-stop" scheme which would facilitate registration and declaration of VAT by business in Member States in which they are not registered. (3) Other measures will rearrange VAT for e-commerce.

➤ eucrim ID=0603056

New Council Directive Aims for Unified Struggle against Tax Evasion

As mentioned above, the 6th VAT Directive allows Member States to derogate from the common Community VAT provisions in order to simplify the procedure for charging the tax or to prevent certain types of tax evasion or avoidance. However, these derogations can only be made for single Member States. Directive 2006/69/EC makes certain particularly effective individual derogations applicable to all Member States. It authorizes, for instance, Member States to take steps against avoidance schemes relating to taxable persons and the transfer of a business as a going concern. Another example is the possibility for Member States to re-valuate supplies and acquisitions under specific limited circumstances to ensure that there is no loss of tax through the use of associated parties to derive tax benefits. Furthermore, the reverse charge mechanism (see above) can be introduced in specific sectors (e.g., construction, waste) where VAT carousel fraud has proven to be a frequent problem. Member States are not obliged to apply the rules of the Directive. They are seen as an alternative – an option for Member States to take action selectively and in a more flexible way. The Directive is based on a Commission proposal from 2005 (COM(2005) 089).

➤ eucrim ID=0603057

European Court of Justice Approves Italian Regional Tax

On 3 October 2006, the European Court of Justice (ECJ) delivered its answer to the question posed by an Italian court regarding whether the Italian regional tax on productive activities (imposta regionale sulle attività produttive, "IRAP") is compatible with the 6th VAT Directive (see eucrim 1-2/2006, p. 11). The IRAP is levied on the net value of production (the difference appearing in the profit and loss account between the "value of production" and the "production costs" as defined by Italian legislation) of an undertaking (a company or natural person) within the territory of a region in a given period. Art. 33 of the Directive, however, prohibits Member States from maintaining or introducing taxes with the characteristics of a turnover tax. The

ECJ decided that the tax in question cannot be characterised as a turnover tax and can consequently be maintained. The Court takes the view that IRAP does differ from the main characteristics of VAT because there is no direct connection to the supply of goods or services as such, it is not proportional to the price of goods and services, and not all taxable persons have the possibility of passing on the burden of the tax to the final consumer. The judgment is one of the rare cases in which the Court does not follow the opinion of the Advocate General (see eucrim 1-2/2006 as cited).
➤ eucrim ID=0603058

Money Laundering

Advocate General Sees 2nd Anti-Money Laundering Directive in Line with Fundamental Rights

In response to the action lodged by the Belgian Bar Association on the validity of the second anti-money laundering Directive (see eucrim 1-2/2006, p. 11), Advocate General (AG) Maduro endorses the system established by the Directive as to new obligations for independent legal professions. The petitioners defended themselves against the extension of obligations to report suspicious money laundering activities to advocates and notaries. They claimed that these obligations would infringe the principle of professional secrecy and the lawyer's independence. The AG has no objections against the provision of the Directive which, on the one hand, covers notaries and independent legal professionals who participate in financial or corporate transactions (Art. 2a point 5), but, on the other hand, leaves Member States the possibility of exempting these professionals from their obligations when ascertaining the legal position of a client or representing a client in legal proceedings (Art. 6 para. 3 subpara. 2).
After having professional secrecy recognised as a fundamental right in the sense of Art. 6 para. 2 TEU, the AG addresses the limits of this right and examines whether the Directive respects its essence. The AG argues that the privilege not only protects the client's interests, but also serves the interests of justice and the respect of law. In this context, the AG makes an important clarification on the notion of "ascertaining the legal position". He concludes that Art. 6 para. 3 not only covers the advocates' missions of representation and defence but also those of assistance and legal advice to the client. The AG then develops criteria for the differentiation between the said protected activities under the right of professional secrecy and the non-protected ones. He concludes that the activities described in Art. 2a point 5 of the Directive concern the realisation and preparation of commercial or financial transactions and, in doing so, the advocate performs a "non-judicial activity". These activities fall outside the scope of professional secrecy since they are only carried out in the client's interest.
➤ eucrim ID=0603059

Improper Implementation of Anti-Money Laundering Law

The City of London Corporation released a report which examines the comparative implementation of the Second Money Laundering Directive (Dir. 2001/97/EC – hereinafter: 2MLD) in six EU Member States: the UK, Spain, Italy, Greece, Poland, and Lithuania. The report shows that differing implementation of the 2MLD hampers a consistent EU fight against money laundering. According to the report, difficulties occur, in particular, due to the lack of clarity in the definitions. National laws vary, for instance, as to the notions "serious crime", "accounting services", or "legal professionals". Compliance also varies widely because the 2MLD fails to provide for the establishment of competent authorities in each Member State to monitor and enforce compliance with the requirements of the Directive. Practical problems arise about the verification of identity when the customer is not physically present during the transaction. The report eventually points out a clash between the 2MLD prohibition on "tipping off" and the right of the individual to have access to his data, set out in the Data Protection Directive. The report intends to be a basis towards helping to identify the changes that will be required to implement the Third Money Laundering Directive by December 2007.
➤ eucrim ID=0603060

Regulation on Transfers of Funds in Force

The European Parliament and the Council endorsed a Regulation which lays down rules on information on the payer accompanying transfers of funds. It is based on the Commission proposal which was outlined in eucrim 1-2/2006, p. 12. The Regulation, which applies from 1 January 2007, aims at guaranteeing the full traceability of payments and settlements, which is seen as a significant tool in combatting money laundering and terrorist financing. The Regulation, in principle, applies to all transfers of funds, in any currency, which are sent or received by a payment service provider established in the Community. However, the Regulation provides for some exceptions from the scope as regards certain transactions which represent a low risk of money laundering and terrorist financing and in which case the traceability of the transfer is ensured otherwise. Furthermore, Member States are allowed to discharge payment service providers from their obligations for charity purposes under the condition that the transfer of the fund does not exceed 150 €.
The Regulation distinguishes between obligations towards the payment service provider of the payer, the payment service provider of the payee, and intermediary payment service providers. Payment service providers of the payer must especially provide complete information on the payer, including his/her name, address, and account number. Payment service providers of the payee have the duty to check missing or incomplete information on the payer. If necessary, they must reject the transfer or ask for complete information on the payer. Both the payment service providers of the payer and payee must keep records of all information for five years and fully cooperate with the national authorities responsible for money laundering and terrorist financing. By 14 December 2007, Member States are obliged to introduce effective, proportionate, and dissuasive penalties for failure to comply with the provisions of the Regulation.
The Regulation complements the third anti-money laundering directive (see eucrim 1-2/2006, p. 11) and adapts

Community law to the special recommendations against terrorist financing which were made by the Financial Action Task Force (FATF) in the aftermath of the 9/11 terrorist attacks. The FATF is an intergovernmental body which was established in 1989 by the G7 and whose purpose is the development and promotion of national and international policies to combat money laundering and terrorist financing.
➤ eucrim ID=0603061

Money Counterfeiting

Euro Counterfeiting in 2006

Following the numbers on counterfeit Euro coins in 2005 (see eucrim 1-2/2006, p. 12), the Commission recently revealed the statistics for 2006. There has been a considerable increase in counterfeit money and more sophisticated ways to counterfeit coins. However, there is also better cooperation between competent authorities, and law enforcement continued successful actions. Approximately 164,000 fake coins were taken out of circulation (2005: around 100,500), 86 % of which were 2-Euro coins. The German national side remains the most reproduced side of any coin. Since 2002, 12 illegal mints have been dismantled. Around 565,000 counterfeit Euro banknotes were withdrawn from circulation, the European Central Bank reported.
➤ eucrim ID=0603062

Non-Cash Means of Payment

High-Level Conference on Identity Theft and Payment Fraud

The EU attaches great importance to increasing confidence in non-cash means of payment, for example those payments carried out by credit cards or bank transfers. As a consequence, cross-border purchases would be encouraged and e-commerce boosted. However, fraud in this sector undermines these efforts. The 2004–2007 action plan to prevent fraud in non-cash means of payment (see COM(2004) 679) tries to reinforce measures of prevention against criminal activities in this sector. Within this framework, a conference on 22 and 23 November 2006 particularly tackled the increasing threats of identity theft and other modern forms of payment fraud, especially online fraud. The conference brought together experts from governments, the private sector, and the public sector. The aim was to raise awareness on the problem of maintaining the integrity of identities and payments and to explore possible future actions, such as a new EU criminal legislation on identity theft. A study in this respect shall be commissioned in 2007. The following link leads to the webpage of the conference:
➤ eucrim ID=0603063

Counterfeiting and Piracy

Germany Uses EU and G8 Presidency for Protection of Intellectual Property

In eucrim 1-2/2006, p. 13, the huge economic damage which results from product and trademark piracy and other infringements of property rights was pointed out. Germany will use its EU and G8 presidencies in 2007 to put the protection of intellectual property rights (IPR) high on its agenda. Continued progress on several initiatives is envisaged, as well as launching new initiatives within the group of the G8 States. The subject of intellectual property protection will be a topic on the agenda of the G8 Justice and Interior Ministers meeting which will take place in Munich in May 2007 at which the enforcement of intellectual property rights by means of criminal law provisions of the G8 States and better international cooperation in the field of criminal prosecution will be addressed in particular.
Germany will also make an effort to improve the protection of IPR at the EU level. In this context, Directive 2004/48/EC already ensures a harmonization of enforcement measures by civil and administrative means. The German government endorsed a bill on 24 January 2007 which would implement this Directive into German law.
Germany will lay further emphasis on closer cooperation with China since China remains the "hot spot" for intellectual property theft. Germany will also support actions by private economic operators with the Chinese government or Chinese counterparts in order to avoid IPR infringements.
➤ eucrim ID=0603064

Council Pursues Directive on Criminal Measures Further

At its formal meeting in October 2006, the Council tackled the proposed Directive on criminal measures aimed at ensuring the enforcement of intellectual property rights (see eucrim 1-2/2006, p. 13). The debate focused on the need for such an instrument, Community competence and the scope of the Directive. Bearing in mind the principle of subsidiarity and the fact that the use of criminal law is considered a means of last resort, the Ministers concluded that further scrutiny is needed regarding the need for criminal law measures at the EU level. Nonetheless, they agreed to continue discussion on the text by the Working Party even though an evaluation of Directive 2004/48 on the protection of intellectual property rights through civil law measures is outstanding and the Court's judgment on the Framework Decision on ship-source pollution (Case C-440/05; see eucrim 1-2/2006, p. 3) could entail further clarifications on the competence in the first and third pillar regarding criminal matters. The Council added that the scope of the Directive should be limited to those intellectual property rights which have been harmonised in Community legislation and leave aside rights which are regulated in national laws of the Member States.
In the context of the discussion on these measures, it should be mentioned that the Council keeps a close eye on its general guidelines regarding how criminal law issues should be handled in the first pillar following the Court's judgement in case C-176/03 (see conclusions of the informal JHA Council meeting in Vienna on 13-14 January 2006, eucrim 1-2/2006, p. 3).
➤ eucrim ID=0603065

Latest Customs Statistics on Counterfeiting and Piracy

The Member States are obliged to provide quarterly customs statistics on counterfeit or pirated goods originating in or coming from third countries to the Commission; the Commission then communicates this information to all

Member States at the end of every year (Art. 8 of Commission Regulation No. 1891/2004 laying down provisions for the implementation of Council Regulation No. 1383/2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights). The latest Community-wide figures for the year 2005 were published in November 2006. These statistics show that Customs seized more than 75 million counterfeited and pirated goods. The number of customs cases involving fakes increased to more than 26,000, which is an increase of 20 % over the 2004 figure. However, there has been a drop of about 25 % in the actual number of articles seized. China remains, by far, the major country where counterfeit goods come from (64 % of seized goods). Current fake products which can seriously harm the consumer's health, such as counterfeit foodstuff, drinks, and alcohol (more than 5 million seizures) as well as counterfeit medicines (more than 500,000 seizures in 2005) are key challenge for the EU. Changes in the routes of fraud, a very high quality of fakes and an increasing use of the Internet to sell counterfeit goods (mainly medicines) are the main reasons which make customs actions against infringements of intellectual property rights increasingly difficult.
➤ eucrim ID=0603066

Customs Action Plan to Combat Counterfeiting and Piracy

The Commission also published some interim results relating to its Customs Action Plan to combat counterfeiting and piracy from October 2005 (see eucrim 1-2/2006, p. 13). Since then, several actions have been initiated, e.g., targeted time-limited Operational Customs Actions against Counterfeit at major ports and airports in Europe (see also "Operation DAN" below), the establishment of an Anti-Counterfeit Task Force consisting of top EU Customs Experts to improve, inter alia, cooperation with the private industry (especially right holders), the formation of a joint Business Customs Working Group to streamline the exchange of intelligence, particularly from right holders to EU ports and airports, preparations for better risk management by adapting the Community Customs law (see also "Customs Cooperation" below), and operational cooperation with third-country players, especially China and the USA.
➤ eucrim ID=0603067

Joint Customs Operation "DAN"

After the successful landmark operation "FAKE" (see eucrim 1-2/2006, p. 13), another successful joint customs operation was reported. The "DAN" operation against counterfeiting targeted ports in 13 Member States in autumn 2006. It led to the seizure of 92 containers in total. The customs authorities were able to confiscate a large number of fake toys and sunglasses, counterfeit shoes, imitated car parts, DVD players, knives, clothes, games, lighters, and cigarettes.
➤ eucrim ID=0603068

Resolution on Counterfeiting of Medicinal Products

In eucrim 1-2/2006, p. 13, the alarming growth of counterfeit, dangerous medicine was pointed out. The European Parliament adopted a non-binding resolution on this topic in September 2006. The MEPs demand fast and strong action from the EU to combat this trendy type of counterfeiting. In particular, the EU is urged to equip itself with the appropriate means to effectively combat illicit practices. Moreover, the EU is called upon to take steps to strengthen the regulatory and quality-control capacity for medicinal products and medical equipment put on the market in countries with inadequate resources and to improve access to affordable medicines. The EP also wants the EU to promote an international convention to fight the counterfeiting of medicines, in which the national legislations make the counterfeiting or receiving and distribution of counterfeit medicines a specific criminal offence.
➤ eucrim ID=0603069

Insider Trading

Court Clarifies Ban on Disclosure of Insider Information

The European Court of Justice renders more precisely the insider trading directive 89/592/EEC and touches upon issues related to the approximation of penal law provisions. Reference has been made by a Danish court in the course of criminal proceedings brought against two people charged with unlawfully disclosing insider information relating to a merger between two financial institutions (Case C-384/02 "Grøngaard & Bang"). The Værdipapirhandelslov (law on dealings in transferable securities), which transposed Directive 89/592 into Danish law, provides that the infringement of the prohibition on disclosure of insider information is punishable. However, the Danish law as well as Art. 3 lit. a) of the Directive provide an exception: Disclosure is possible in the normal course of the exercise of the employment, profession, or duties of the person in possession of the insider information. The Court provides criteria for the interpretation of this exception. It holds, inter alia, that the exception must be interpreted strictly. The criminal structure of the proceedings and the principle nulla poena sine lege do not affect this strict interpretation. This is in line with the opinion of Advocate General Maduro who argued that the interpretation of a directive's scope cannot be conditioned by the civil, administrative, or criminal nature of the proceedings.
➤ eucrim ID=0603070

Racism and Xenophobia

New Attempt for Consensus on Common Criminal Liability for Racism and Xenophobia

Germany has put the proposal for a Framework Decision on combating racism and xenophobia back on the political agenda of its Presidency. The aim is to attain a minimum harmonisation in order to ensure that the same behaviour relating to anti-semitism, racism, and xenophobia constitutes an offence in all Member States and that effective, proportionate, and dissuasive penalties and sanctions are provided for natural and legal persons having committed or being liable for such offences. They include, for instance, incitement to violence and hatred or the condoning, denying, or grossly trivialising of crimes of genocide, crimes against humanity, and war crimes

out of racist or xenophobic motives as defined in the Statute of the International Criminal Court. The prohibition of specific symbols, such as swastikas, will not be covered. The Framework Decision was initially proposed in November 2001 by the Commission. The proposal was last discussed under the Luxemburg Presidency in 2005 and then put on hold. Different attitudes towards the freedom of expression in the constitutional orders of the Member States were the main reason for the failure of the proposal. On 20 February 2007, Commission Vice-President Franco Frattini supported the German push to seek a consensus. Germany tabled a new text on the basis of the discussions at the JHA Council meeting on 15 February 2007.
➤ eucrim ID=0603071

Procedural Criminal Law

Procedural Safeguards

Framework Decision on Procedural Rights – State of Play

The Finnish Presidency was also not able to manage an agreement on the hotly debated proposal on a Framework Decision on certain procedural rights in criminal proceedings. The main outstanding issues are whether to adopt a framework decision or a non-binding instrument, and the risk of developing conflicting jurisdictions with the European Court of Human Rights. As agreed at the JHA Council meeting in June 2006, the scope would be limited to the right to information, the right to legal assistance, the right to legal assistance free of charge, the right to interpretation, and the right to translation of documents of the procedure (see also eucrim 1-2/2006, p. 15).
➤ eucrim ID=0603072

Germany considers the issue a priority during its Presidency in the first half of 2007. On 22 December 2006, it put forward a compromise proposal which reflects the results of the meetings of the Working Party and takes into account the suggestions made by the Council of Europe. The proposal clarifies that the EU instrument takes up certain minimum standards, as enshrined in Art. 5 and 6 of the ECHR, and must be interpreted in full compliance with the ECHR and the case law of the European Court of Human Rights. Two aspects go over and above the ECHR and would characterise the added value of the FD: The FD would additionally confer the right to obtain information concerning fundamental procedural rights and it would also apply to proceedings for the execution of a European Arrest Warrant or for the extradition or transfer of an arrested person to an international court. An annex lists practical measures to guarantee the above-mentioned rights in the Member States.
➤ eucrim ID=0603073

On 17 January 2007, the national delegations from Cyprus, the Czech Republic, Ireland, Malta, Slovakia, and the United Kingdom tabled the text of a non-binding resolution. It sets out "action points" which EU Member States should act upon through national action plans in order to enhance the minimum standards of Art. 5 and 6 of the ECHR in practice.
➤ eucrim ID=0603074

Lawyer's Resolution Tries to Convince Member States on Minimum Guarantees

A forum organised by the Deutscher Anwaltsverein (German Bar Association), held on 16 September 2006 in Frankfurt/Oder, was dedicated to fundamental rights in criminal proceedings. Speakers from different EU Member States discussed the presumption of innocence, the right to be heard, defence/consultation rights, the right to remain silent, and the procedural implementation of minimum standards. In the end, a resolution was adopted which is addressed to the Council. The resolution contains proposals on how the above-mentioned procedural rights could be formulated and implemented as minimum procedural guarantees throughout the EU. The following link leads to the press release of the DAV. It includes the link to the resolution.
➤ eucrim ID=0603075

Programme for European Criminal Justice

Another impulse to achieve a better anchoring of individual guarantees in the EU legislation in the area of freedom, security and justice might emanate from the "Programme for European Criminal Justice" which was recently published by a working group of 14 European criminal law scholars from 11 Member States. The Programme is considered an alternative concept to current methods of Europeanisation of criminal law which are primarily based on the principle of mutual recognition and the abolishment of the requirement of double criminality. The scholars counter with a proposal on a regulation of trans-national criminal law and procedure based on the idea of a better consideration of the democratic and rule-of-law requirements of criminal law. It attempts to strike a fairer balance between effective criminal prosecution and the defendant's safeguards.

With respect to transnational criminal proceedings, the proposal first deals with guiding principles of transnational criminal proceedings which relate to the early allocation of proceedings to one Member State, the way of conducting investigations, and legal remedies against the determination of the investigating state and against coercive measures. Second, alternative options are shown as to the European Arrest Warrant and court orders directed that a defendant participate in a trial, serve a sentence or sanction in the investigating/sentencing Member State. Third, detailed provisions specify the conditions under which persons can be sent back to their home country where custodial sentences of the sentencing state are enforced and how these sentences are possibly adjusted (see also the "Framework Decision on the transfer of sentenced persons" below). Fourth, it is made clear that direct communication between the authorities and the ne bis in idem principle govern the overall concept of transnational criminal proceedings. Furthermore, the Programme regulates the "Eurodefensor" (see below) and composes theses on substantive criminal law in Europe.

The publication includes the proposed regulation (in German, English, Spanish, and Slovak), together with statements of reasons (in German and English), as well as the lectures held at a conference in Thessaloniki/Greece on 26 and 27 May 2006 where the programme was discussed with experts from various EU states.
➤ eucrim ID=0603076

Institutional Aspect of Procedural Safeguards

In the context of safeguarding procedural rights, two major conferences took place in 2006 to promote an institutionalisation of defence in cross-border cases.

European Criminal Law Ombudsman

A conference in Trier, Germany on 7 April 2006, organised by the Academy of European Law in cooperation with the Council of Bars and Law Societies of Europe (CCBE) and the European Criminal Bar Association (ECBA), examined the idea of creating a European Criminal Law Ombudsman (ECLO). The discussion was based on a proposal from the CCBE dated December 2004. The Ombudsman should be a criminal defence lawyer in independent practice, supported by a team of defence lawyers, one drawn from each Member State. He should act as a counterpart to the institutions on a European level, responsible for facilitating cross-border prosecution of crimes, such as Europol, Eurojust, and the EJN. The conference, however, revealed the different concepts of an Ombudsman, particularly as regards his function and competences. Furthermore, questions on financing the Ombudsman and whether he should be attached to a European institution remain open.

➤ eucrim ID=0603077

Eurodefensor

At a conference in Thessaloniki/Greece on 26-27 May 2006, a group of criminal law scholars presented the institution of the "Eurodefensor". It suggests the creation of an independent institution with the task of preserving procedural balance in transnational criminal proceedings. This institution would be strictly separated into the sections "proto defence" and "support". The proto defence section would safeguard the defendant's interests as long as the investigations are conducted in secret by the investigation state. The support section would provide services to the defence in cases which are investigated Europe-wide. These services would comprise, for instance, establishing and arranging contacts, coordinating the defence, or delivering financial support. The proposal on the "Eurodefensor" is contained in the publication "A Programme for European Criminal Justice" (see above).

➤ eucrim ID=0603078

Data Protection

Data Protection in the Third Pillar

A comprehensive and consistent data protection framework in cases of judicial and police cross-border operations is considered one of the current legislative priorities. This was also stressed by Finland and the future holders of the EU Presidency at a meeting in Tampere on 20 September 2006. At present, there are no common data protection provisions in the EU justice and home affairs cooperation. The EC's data protection directive does not cover the third pillar (Art. 3 para 2 Dir. 95/46/EC). The issue will become much more important when the principle of availability is applied, which is expected for 2008. The principle of availability would mean that a law enforcement authority of a Member State must have immediate and swift access to relevant criminal information in another Member State in the same way than the information is provided to authorities in that state. In this context, the Commission tabled a proposal for a Council Framework Decision on the protection of personal data processed within the framework of police and judicial cooperation in criminal matters (COM(2005) 475 – hereinafter: FD DPPJCC), which is currently being debated in the Council. The aim is to ensure that the different levels of data protection in the Member States do not hamper the exchange of information. It also aims at ensuring that the fundamental rights of EU citizens, above all the right to privacy, are respected in the consideration of personal data related to law enforcement. The proposal could not be adopted under the Finnish Presidency. The most controversial issue is whether the framework decision should only apply to cross-border data processing or also to processing which is carried out purely in domestic contexts.

It also turned out that full consistency between the data protection Directive 95/46 and a similar instrument for the third pillar is hardly achievable, contrary to the initial intention of the Commission. A lot of Member States feared drawbacks because differences in data processing with private companies and law enforcement authorities have not been taken into account. Hence, Germany has undertaken a new effort to seek a compromise on the proposal at the beginning of its presidency. Germany's approach is to simplify and revise the present tabled text. The elimination is envisaged of all detailed rules from the FD DPPJCC which are contained in sector-specific data protection provisions, e.g., governing the Europol Computer System, the Schengen Information System, or the exchange of information and intelligence between law enforcement authorities (on this latter issue, see respective Framework Decision below). The FD DPPJCC should therefore only consist of general principles in order to achieve a quick compromise. The following link refers to the latest publicly available Council document and the original Commission proposal.

➤ eucrim ID=0603079

EP Position on the JHA Data Protection Framework

The Commission proposal on a data protection regime for justice and police cooperation was also subject to discussions in the European Parliament (EP) several times. The EP, at its session on 27 September 2006, approved 60 amendments tabled by French rapporteur MEP Martine Roure. In general, the amendments include stronger provisions on the necessity of data processing and the purpose of processing. The EP is in favour of a different treatment of various groups of persons (suspects, convicted people, victims, witnesses, etc.) and special safeguards with regard to biometric data and DNA profiles. The MEPs also strongly recommend that all data are covered when personal data are transmitted or made available and not to limit the framework decision only to data exchanged between Member States (Council is currently divided on this issue). Lastly, the EP suggests reviewing the data protection rules for Europol, Europol, and the Customs Information System within two years in order

to make them fully consistent with the framework decision. The opinion of the Parliament is not binding on the Council.
➤ eucrim ID=0603080

EP Recommendation Tries to Influence Debate on JHA Data Protection in the Council

In a recommendation of 14 December 2006 the EP complains that the Council did not take into account the opinions of the EP, the European Data Protection Supervisor, and the Conference of European Data Protection Authorities. It recommends not watering down the draft on the Framework Decision on data protection as regards transfer of information in police and judicial cooperation.
➤ eucrim ID=0603081

EDPS Concerned about Development of Negotiations on Data Protection in Third Pillar

After having given a detailed analysis in a first opinion of 2005 on the Commission proposal for a Council Framework Decision on the protection of personal data processed within the framework of police and judicial cooperation in criminal matters, the European Data Protection Supervisor (EDPS) recently reacted to the direction that the negotiations have taken within the Council. In line with the European Parliament, the EDPS urges not lowering the standards of protection. He stresses his view that consistency of the framework decision with the data protection directive and the Council of Europe Convention No. 108 on data protection is absolutely essential. As regards the applicability to domestic processing (see above), the EDPS deems it unworkable if the scope of the framework decision is limited only to cross-border exchanges between Member States. The following link contains both the first and second opinion of the EDPS.
➤ eucrim ID=0603082

Statement on the Balance between Whistleblowing and EU Data Protection Rules

The Article 29 Data Protection Working Party (hereinafter: WP) examined the compliance between whistleblowing schemes and the rules enshrined in the data protection directive 95/46/EC. Whistleblowing schemes are designed to provide a mechanism for employees to report misconduct within companies through a specific channel. With special regard to corporate governance in the field of accounting, internal accounting controls, auditing matters, the fight against bribery, banking and financial crime, companies increasingly face the dilemma of bringing in line whistleblowing schemes – particularly as required by US rules – with EU data protection rules. The opinion of the WP tries to provide guidance on how to best implement the said schemes in this sector. It scrutinizes the compliance of whistleblowing with the criteria for making data processing legitimate, the principles of data quality and proportionality, the provision of clear and complete information, the rights of the incriminated person as to information rights and the rights of access, rectification and erasure, the security of processing operations, the requirements for the management of whistleblowing schemes, the provisions on the transfer of personal data, and the notification requirements. Emphasis is put by data protection rules on the protection of the person incriminated through a whistleblowing scheme rather than the whistleblower. In conclusion, the WP advocates that any restriction on the rights of the accused person should be applied in a restrictive manner to the extent that they are necessary to meet the objectives of the whistleblowing scheme.
The Article 29 Working Party was set up under Art. 29 of Dir. 95/46. It is an independent European advisory body on data protection and privacy.
➤ eucrim ID=0603083

Ne bis in idem

Judgment in "Van Straaten"

After the Advocate General delivered his opinion in the "Van Straaten" case (see eucrim 1-2/2006, p. 17), the European Court of Justice (ECJ) rendered the judgement in September 2006. With reference to the case law of "Van Esbroeck" (see eucrim 1-2/2006, p. 17) and in line with the Advocate General, the ECJ first holds that punishable acts consisting of exporting and importing the same narcotic drugs and which are prosecuted in different Contracting States are, in principle, to be regarded as "the same acts" in the sense of Art. 54 CISA. The divergent legal classification of the acts in two different Contracting States is irrelevant. Likewise, it does not matter whether the quantities of the drug at issue in the two Contracting States concerned and the persons alleged to have been party to the acts in the two States are identical or not.
Secondly, the ECJ agrees with the Advocate General in that Art. 54 CISA also applies to final decisions which acquit the accused for lack of evidence. Not applying this article to those decisions would contradict the spirit of Art. 54 CISA as a guarantee of the right to freedom of movement.
➤ eucrim ID=0603084

Ne bis in idem and Acquittal Because Proceedings Were Time-Barred: Judgement in "Gasparini"

The European Court of Justice (ECJ) developed its case law on Art. 54 CISA further in "Gasparini". In this case, the ECJ had to answer several questions on a smuggling case. The defendants were alleged to have imported olive oil from Tunisia and Turkey into Portugal without declaring it to the customs authorities. Then, they sold the oil on the Spanish market. While a Portuguese court acquitted two defendants on the ground that their prosecution because of smuggling was time-barred, the Spanish authorities wondered whether they are banned from further prosecuting the defendants because of the marketing of the goods in Spain.
The Court first stated that the ne bis in idem principle, enshrined in Art. 54 CISA, also applies in respect of an acquittal on the ground that prosecution of the offence is time-barred. This is the first case at the ECJ in which a final decision is not based on a determination as to the merits of the case. The ECJ clarifies that this is not a requirement for the application of Art. 54 CISA ("procedure-based approach") and therefore disagrees with the opinion of Advocate General Sharpston who concluded that a person may not benefit from Art. 54 CISA if pro-

ceedings have been discontinued in one Member State without consideration of the merits of the case ("substance-based approach").
As to the question of whether the import and subsequent sale of goods constitute "the same acts", the ECJ reiterates its statement in "Van Esbroeck" (see eucrim 1-2/2006, p. 17) that "the only relevant criterion is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together". It concludes that the conduct in question may fulfil these conditions. The Advocate General, by contrast, tended to be more restrictive in this point.
➤ eucrim ID=0603085

Opinion of Advocate General in "Kraaijenbrink" Case

Advocate General Sharpston gave her opinion in the case "Kraaijenbrink" (see eucrim 1-2/2006, p. 17). Belgian courts, on the one hand, took the view that offences of receiving and handling proceeds of drug trafficking committed in The Netherlands and offences committed in Belgium relating to the exchange of sums received from trading narcotics in The Netherlands must be regarded as separate acts, so that Art. 54 CISA does not apply. The defendant, on the other hand, shared a common intention during the commission of the acts in the two Member States, which legally constitutes a single act under Belgium criminal law. However, it was not clear from the reference whether the sums which were laundered in both countries derived from the same drug trafficking operations or formed part of the same criminal proceeds.
The Advocate General repeats the Court's findings in "Van Esbroeck" in that the assessment of "the same acts" depends on the identity of the material acts. The national court must determine whether the material acts at issue constitute a set of facts which are inextricably linked together in time, in space, and by their subject matter. The Advocate General concludes that the common intention may be a factor for this determination. However, it is crucial for the Belgium court in this case to determine whether the laundering operations are also linked in time and space, which would be the case, for instance, if the money laundered in Belgium formed part of the original proceeds of illicit drug trafficking in the Netherlands. The Advocate General adds that, in the affirmative (acts inextricably linked in time, in space, and by their subject matter), Art. 54 CISA would also cover acts which are ancillary or additional to the offence penalised in the first judgment, even though these acts were unknown to the prosecuting authorities or the adjudicating court at that time.
➤ eucrim ID=0603086

Advocate General Replies to Reference of the German Federal Supreme Court

Advocate General Sharpston replied to several interesting question on the interpretation of Art. 54 CISA which were brought before the European Court of Justice in the German case "Kretzinger" (see eucrim 1-2/2006, p. 17). She suggests that the reasoning in "Van Esbroeck" may apply by analogy to the present case. This would mean that the defendant's operation to transport smuggled goods from their point of entry to a final destination in the Community can, in principle, be regarded as a single act and therefore Art. 54 CISA would apply (first question of the German Federal Supreme Court).
With regard to the second question, the Advocate General considers a suspended custodial sentence to also somehow penalise the offender and therefore be regarded as a penalty which has been enforced or is actually being enforced according to Art. 54 CISA. Periods spent on remand pending trial or in police custody are, by contrast, no penalties that would principally fulfil the enforcement condition of Art. 54 CISA. The reason given by the Advocate General was that the aim and purpose of such pre-trial detention differ from convictions for punishment.
The third question referred to the influence of the European Arrest Warrant (EAW) on the application of the ne bis in idem principle. Ms. Sharpston found that the issue of a EAW for the surrender of the defendant has no implications for the "enforcement condition" of Art. 54 CISA. Nevertheless, she examines in more depth whether judgements after a trial in absentia (which was the case for the conviction of Mr. Kretzinger in Italy) may be considered as a trial which has been "finally disposed of" according to Art. 54 CISA. The Advocate General concludes that the domestic legal order of the sentencing state determines whether a decision finally disposes of a trial. However, one important proviso is made: The trial in absentia must comply with the requirements laid down in Art. 6 ECHR and by the relevant case law of the European Court of Human Rights which find their expression in Art. 5(1) of the Framework Decision on the EAW.
➤ eucrim ID=0603087

Taking Account of Convictions

Political Agreement on Framework Decision on Taking Account of Convictions

At its meeting in December 2006, the JHA Council reached a political agreement on the Framework Decision (FD) on taking account of convictions. The idea of developing an area of freedom, security and justice is not only to swiftly transmit information on previous convictions on an offender, but also to make use of the information transmitted by considering convictions handed down in another Member State. Therefore, the FD will lay down the conditions under which a conviction against a person handed down in one Member State can be taken into account in new criminal proceedings against the same person in another Member State. The FD concerns proceedings on different facts. It neither addresses the ne bis in idem rule nor questions the execution of a conviction in a Member State other than the convicting state. Likewise, the FD does not seek to harmonise the effects attached to previous foreign convictions by the different national legal systems.
The FD contains the minimum obligation for Member States to attach to previous convictions handed down in another Member State effects equivalent to those attached to national convictions. This obligation shall apply to the various stages of new criminal proceedings (pre-trial stage, trial stage, and time of execution). The FD, which was proposed by

the Commission, would replace Art. 56 of the Convention on the International Validity of Criminal Judgments of 1970 (Council of Europe ETS No. 70) within the EU. The FD has yet to be adopted formally.

➤ eucrim ID=0603088

EP Opinion on Taking Account of Convictions

In September 2006, the European Parliament (EP) delivered its opinion on the aforementioned proposal of the Commission on taking account of convictions (COM(2005) 91). In line with the political agreement of the Council, the EP found that entries in the national criminal records of convictions handed down in another Member State (Art. 6 of COM(2005) 91) should be considered in the proposal on the exchange of information extracted from criminal records (see above). With regard to the definition of "conviction", the EP suggests that it should not include decisions of administrative authorities imposing criminal sanctions. The Council decided that decisions passed by judicial authorities other than a court or by administrative authorities are not covered by the FD; however, Member States whose legal systems are familiar with such convictions may take them into account.

➤ eucrim ID=0603089

Freezing of Assets

By Frank Meyer

Blacklisting and Actions against Freezing of Assets – Background

The recent months were marked by several significant judgments by the European Court of First Instance (CFI) on the development of procedural safeguards in the EU. These judgments were handed down in the context of actions which were brought before the Court by persons and entities seeking removal from EU lists which allow the freezing of their assets. Other related cases are pending before the Court. Before the main judgments are presented in more detail, the background of the listing is explained:

To deny terrorists access to finances and financial networks, the United Nations Security Council has imposed a scheme of smart sanctions targeting individuals or private organizations which engage in or support terrorist activities. Resolutions 1267 (1999) and 1333 (2000) order UN member states to freeze without delay funds and other financial assets or economic resources of the Taliban, Usama Bin Laden, Al Qaida and their affiliates. A special subcommittee was established to identify and blacklist individuals and private organizations to be subjected to this sanctions regime. Acting on behalf of their Member States based on common position 2002/402/CFSP, the European Union transposed the UN resolutions and enacted Regulation (EC) 881/2002 that is based on Articles 60, 301, 308 TEC and mirrors these resolutions in content.

Immediately after 9/11, the United Nations Security Council issued Resolution 1373 (2001) to further enhance international cooperation against terrorism. It expanded the scope of prior resolutions and obligated UN member states to extend freezing orders to all persons and entities that entertain or support terrorist activities. The final determination of appropriate objects was left to the resolution's addressees. Again taking action pursuant to a Common Position (2001/931/CFSP), the EU adopted Regulation (EC) 2580/2001 to implement the new resolution. It concomitantly authorised the Council to administrate an EU blacklist specifying the targets of the smart sanctions. This is an autonomous procedure carried out by the EU. the Council, constrained by procedural and material requirements laid down in Article 1 of Common Position 2001/931/CFSP, is entitled to decide on inclusions and update the list periodically.

Cases Kadi & Yusuf – EU Has Power to Freeze Terrorist Assets

On 21 September 2005, the CFI dismissed two actions brought by listed EU citizens and a foundation requesting the annulment of Regulation 881/2002. The CFI, for the first time, had to determine the scope and standard of review of the EC Regulations implementing Security Council resolutions one-to-one (Cases T-306/01, "Ahmed Ali Yusuf and Al Barakaat International Foundation" and T-315/01, "Yassin Abdullah Kadi").

The CFI held that, although the regulation is an independent decision of an EC organ, the Court has to refrain from further review under EC law. Obligations under the UN Charter take precedence over primary EC law. Deriving this conclusion from Article 103 UN Charter, the CFI took the view that the EC is bound by obligations from the UN Charter to the same extent as its Member States were if it acts in lieu of them within the realm of the UN Charter. In the exercise of its powers, the Community is bound to adopt all the measures necessary to enable its Member States to fulfil those obligations.

The Court thus limited its review authority primarily to observance by the institutions of the rules of jurisdiction and external lawfulness and the essential procedural requirements which bind their actions. Due to this judicial restraint, compliance with European human rights standards was not scrutinised. The CFI merely reviewed the regulation for its compatibility with mandatory rules of international public law. In Yusuf and Kadi the CFI could not detect a violation of such fundamental principles that fall within the ambit of jus cogens. In particular, the Court concluded that the opportunity to petition the Sanctions Committee of the UN Security Council satisfied the mandatory minimum requirements of the right to a fair trial. The applicants appealed against the judgment before the European Court of Justice (Cases C-415/05 P and 402/05 P).

➤ eucrim ID=0603090

Cases Ayadi & Hassan: CFI Clarifies Individual's Rights

On 12 July 2006 the Court of First Instance upheld these standards but seized the chance to clarify human rights obligations under the ECHR. The Court recognizes that freezing of funds constitutes a particularly drastic measure and notes that it is for the respective home countries to scrutinize allegations against their citizens and petition the UN sanctions committee for a delisting if inclusion turns out to be unjustified (Cases T-253/02 and T-49/04, "Chafiq Ayadi" and "Faraj Hassan"). In this case, the applicants also brought an appeal against the judg-

ment before the European Court of Justice (Cases C-403/06 P and 399/06 P).
➤ eucrim ID=0603091

Case Segi and Others: EU Blacklisting without Direct Adverse Effects Does Not Infringe Law

In a different strand of actions, the partial annulment of Regulation 2580/2001 along with Council Decisions to insert and/or keep applicants' names on the EU black list, was requested. In the Segi case, the European Court of First Instance rejected the claim for applicants which, although included in the blacklist, had not been designated for freezing of assets by the Council but as objects of intensified cooperation in the area of JHA under Article 4 of Common 2001/931/CFSP only. In absence of additional implementing measures, the Court could not find any infringement on primary Community law (Case T–338/02 "Segi, Araitz Zubimendi Izaga, Galarraga").
➤ eucrim ID=0603092

On appeal, Advocate General Mengozzi concurred with stressing that national courts are the competent fora to provide effective remedy against adverse consequences of the inclusion.
➤ eucrim ID=0603093

In the same vein, the European Court of Human Rights dismissed a complaint filed by the same applicants. In the opinion of the ECtHR, inclusion in the list alone does not violate European human rights as long as it does not have direct legal effects or results in specific enforcement measures (ECtHR, Appl. No. 6422/02; No. 9916/02 – Segi, Gestoras Pro Amnistia and others v. 15 EU States).
➤ eucrim ID=0603094

Case OMPI: Fair Trial Guarantees Applicable to Decision to Freeze Assets

The European Court of First Instance, consequently, decided differently where listed persons suffered immediate adverse effects. On 12 December 2006, the CFI annulled a Council Decision updating and keeping the name of an Iranian resistance group − established and situated in France with the objective of replacing the current Iranian regime by a democracy − on the list of persons and entities whose funds were to be frozen (Case T–228/02, "Organisation des Modjahedins du peuple d'Iran [hereinafter: OMPI]). The OMPI had brought actions seeking annulment of common positions and decisions including and maintaining OMPI in an autonomous EU blacklist. The CFI held that such a scenario is distinguishable from the Kadi and Yusuf line of cases. The sanctions regime left discretionary powers as to the appropriateness and well-foundedness of smart sanctions against potential targets to the EC organs. The applicant's inclusion, hence, involved the exercise of the EC's own powers which entails full applicability of primary Community law, namely the obligation to state reasons and the right to effective judicial protection.

In particular, the observance of the right to a fair hearing requires that the parties concerned must be informed of the specific information or material on the file which indicate that national authorities suspect applicants of terrorist activities. A decision to freeze assets must likewise indicate how the Council exercised its discretion to subject applicants to the sanctions regime, in particular, why targeting the applicant was deemed appropriate.

In the present case, there was no notification of said considerations or the evidence adduced to corroborate accusations, neither before nor after the decisions. The applicant was neither placed in a situation to submit his view to the Council nor to avail itself of its right of action before the CFI. The Court therefore found that the challenged decision did not contain sufficient statement of reasons and was adopted in a way that violated the applicant's right to a fair hearing.

The Council reacted in so far as it sends, from December 2006 on, a "statement of motivation" to the suspects setting out the evidence against him and instructions on how to lodge a legal challenge. The concerned persons or organisations can present its views, together with any supporting documentation within a certain time limit.
➤ eucrim ID=0603095

Subsequent to this decision the Council has decided to provide OMPI with a sufficient statement of reasons setting out the evidence against them. Moreover, the Council has started to issue statements of motivation to those groups and individuals who were newly included in the list on 21 December 2006. With particular regard to persons, groups and entities who were kept on the list by the same decision a notice for attention was published to inform about the possibility to submit a request to obtain the Council's statement of reasons for their inclusion. Additionally, the persons, groups and entities concerned may submit a request to the Council, together with any supporting documentation, that their case should be reconsidered.
➤ eucrim ID=0603096

Case Sison: No Rights of Access to Information

The ruling in OMPI is particularly crucial in context with a decision on the access to confidential documents in 2005. The Court of First Instance is responsible for dealing with the petitions of José Maria Sison. The applicant, a consultant of the National Democratic Front for the Philippines and Dutch resident was also listed based on a Council Decision adopted in 2002. He subsequently brought action for annulment of these measures. This action is still pending (Case T-47/03). The applicant is also seeking access to documents that served as a basis for said Council decisions to include and keep his name in the EU blacklist. The applicant also sought information as to the identities of the states that bear responsibility for the allegations against him.

The applicant requested disclosure pursuant to Regulation 1049/2001 but the Council refused to grant even partial access, arguing that documents, which had led to the adoption of the decisions, had been classified as "Confidentiel UE". The applicant brought an action for annulment against this decision but the CFI, on 26 April 2005, rejected applicant's claim (Joint Cases T-110/03, T-150/03 and T-405/03). The CFI recalls that, as a rule, the public is to have access to the documents of the EC institutions but the power to refuse access rests with the competent organs, in accordance with exemptions spelled out in the Regulation. In the applicant's case, the denial was mandatory under Article 4 of

Regulation 1049/2001 since disclosure of their contents imperilled pivotal security interests. Additional rules concerning the handling of classified documents are laid down in Article 9. They prohibit handover without the originator's consent which was lacking in the present case.
On appeal, the ECJ followed this line of argumentation and upheld the judgment (Case C-266/05 P). The judges found that the Council enjoys broad discretion when determining the applicability of an exception clause. Given the wording of Article 4 of Regulation 1049/2001, the Council was, in particular, not obliged to take appellant's individual interests into account. Due to the scope of discretion the Court may only review respective decision for compliance with procedural rules and the duty to state reasons or the absence of manifest error of assessment of the facts and misuse of powers. In his opinion Advocate General Geelhoed had recommended a rejection of the appellant's case on the same grounds. The Advocate General also had taken the view that the European Courts may only carry out a review for manifest errors in the Council's determination.
➤ eucrim ID=0603097

Cooperation

Funding

Hercule Programme 2007

The first calls of the annual Hercule work programme for proposals in 2007 have been published. Proposals can be submitted on "training in the area of the fight against fraud" or co-financing of "seminars, comparative studies, measures to disseminate expertise and an annual meeting of the presidents of the associations in connection with the protection of the Communities' financial interests". The Hercule programme is the Community action programme to promote activities in the field of protection of the EC's financial interests. After adoption by the European Parliament and the Council, the new Hercule programme will cover the period from 2007 to 2013, the period of the new financial perspective (Hercule II).
For further information on the conditions of the calls, please refer to the following OLAF website.
➤ eucrim ID=0603098

Pericles Programme 2007–2013

In November 2006, the Council extended the Community programme, which establishes an exchange, assistance, and training programme for the protection of the Euro against counterfeiting ("Pericles" programme), to the next financial period ranging from 2007 to 2013. The financial envelope for this period will be € 7 million Co-financing of projects for the protection of Euro banknotes and coins under the Pericles programme is one of the responsibilities of OLAF in the area of the protection of the Euro against fraud and counterfeiting.
➤ eucrim ID=0603099

AGIS and Successor Programmes for the Area of Freedom, Security and Justice

AGIS, the framework programme to help police, the judiciary, and professionals from the EU Member States, as well as candidate countries, co-operate in criminal matters and in the fight against crime, has been terminated. Although originally intended to run until 2007, the programme ended a year early in 2006. It will be succeeded by three new programmes in the area of freedom, security and justice.
These new programmes are due to run over the period 2007–2013. Two of them are part of the proposed framework programmes "Security and Safeguarding Liberties" and the third belongs to "Fundamental Rights and Justice". Under the framework programme "Security and Safeguarding Liberties", the new specific programmes "Prevention, Preparedness and Consequence Management of Terrorism and Other Security-Related Risks" and "Prevention of and Fight against Crime" will be carried out. Under the framework programme "Fundamental Rights and Justice", the new specific programme "Criminal Justice" shall be set up. These programmes are likely to cover the entire scope and objectives of the AGIS programme and the current pilot projects and preparatory actions in the area of internal security and criminal justice. The procedures for funding actions will include mechanisms similar to those under AGIS so that there will be general calls for proposals, possibly as early as March 2007.
On 14 December 2006, the European Parliament laid down its position in a first reading and made several amendments to the proposed programmes. On 15 February 2007, the Council approved these programmes at the JHA meeting in Brussels. Please also refer to the website of the European Commission, DG JLS, for up-to-date information.
➤ eucrim ID=0603100

Community Strategic Guidelines for Cohesion Policy Adopted

In eucrim 1-2/2006, p. 18 it was reported that an EU decision was due on the Community strategic guidelines for cohesion policy, a condition for the allocation of the money from the structural fund to the next budget period from 2007 to 2013. The Council adopted these guidelines in October 2006, so that the relevant programmes could be launched immediately in 2007. The guidelines define the priorities to which resources should be targeted. They are the basis for the national authorities to draft their national strategic priorities and planning for 2007–2013 (so-called National Strategic Reference Frameworks). The resources of cohesion policy account for about one third of the EU budget for the period covering 2007–2013.
➤ eucrim ID=0603101

Law Enforcement Cooperation

Framework Decision on the Exchange of Information

The Council adopted a Framework Decision (FD) on simplifying the exchange of information and intelligence between law enforcement authorities of the Member States of the European Union. The objective of the FD, based on a Swedish initiative and published in December 2006, is to overcome current obstacles to mutual assistance in criminal matters and speed up the information exchange as established by the Schengen Convention. Hence, the FD provides a legally binding framework to ensure that information vital for law enforcement author-

ities (i.e. police, customs, and any other authority authorised by national law to detect, prevent, and investigate offences or criminal activities and to exercise authority and take coercive measures in the context of such activities) is exchanged expeditiously and effectively throughout the bloc for the purpose of conducting criminal investigations or criminal intelligence operations.

The main content of the FD is as follows:

• With regard to its scope: The FD is not limited to specific types of information, but applies to any information or data which is held by law enforcement authorities, including data which is held by public authorities or private entities and which is available to law enforcement authorities without coercive measures having to be taken. The FD states that Member States are neither obliged to gather and store information and intelligence for the purpose of providing it to the competent law enforcement authorities of other Member States, nor do they have to use coercive measures to fulfil a request. Furthermore it is made clear that national authorities require the consent of the requested Member State if they would like to use the information or intelligence as evidence before a judicial authority.

• Discrimination in the exchange within one Member State and cross-border exchange is abolished. This means, for instance, that a Member State may not subject the exchange of information between its national law enforcement authority and the foreign one to a judicial agreement or authorisation if such an agreement or authorisation is not necessary in an internal domestic procedure.

• Time limits to answer requests for information are set. In urgent cases, for example, the response may not take more than 8 hours if the information or intelligence is held in a database directly accessible by a law enforcement authority.

• The procedure by which to request and collect information is standardized. Authorities must fill out a standard form, which is set out in the annex of the FD when requesting information or intelligence.

• The reasons for withholding information or intelligence are limited, e.g., if the provision of information or intelligence would harm essential national security interests, jeopardize the success of a current investigation or a criminal intelligence operation or the safety of individuals, or if it is clearly disproportionate or irrelevant with regard to the purposes for which it has been requested. Furthermore, refusal is possible if the offence to which the request is related is punishable by a term of imprisonment of one year or less. The requested Member State must refuse the provision if a competent judicial authority has not authorised the access and exchange of the information requested.

Member States now have until 19 December 2008 in order to comply with the provisions of the FD. The Commission shall submit a report on the operation of the FD before 19 December 2010.

➤ eucrim ID=0603102

Council Recommendation on Enhancing Operational Cooperation

Against the background of Art. 30 TEU, which provides for operational cooperation between the competent authorities − including the police, customs, and other specialised law enforcement services of the Member States involved in the prevention, detection, and investigation of criminal offences −, the Council made a recommendation to achieve this objective at the national level. The recommendation encourages Member States to draw up agreements or arrangements at the national level between police forces, customs authorities, and other specialised law enforcement services. It is recommended that these instruments contain, inter alia, the exchange and sharing of information or data, procedures for joint actions, or the exchange of liaison officers. The aim is to avoid duplication of efforts and to use resources in an optimal way. The recommendation replaces Council Resolution of 29 November 1996 on the drawing up of police/customs agreements in the fight against drugs (OJ 1996 C 375, 1) and extends it to all other relevant areas of crime. Member States must inform the Council within three years of the measures taken following the recommendation.

➤ eucrim ID=0603103

Asset Recovery Offices

On 12 December 2006, the European Parliament adopted a legislative resolution on the proposal for a Council Decision concerning cooperation between the Asset Recovery Offices of the Member States in the field of tracing and identification of proceeds from or other property related to crime. This legal instrument would complete the Framework Decision of 24 February 2005 on confiscation of crime-related proceeds, instrumentalities and property and the Framework Decision of 22 July 2003 on the execution in the European Union of orders freezing property or evidence at an organisational level. The proposal was launched by Austria, Belgium, and Finland in March 2006 with the aim of making the cooperation between national authorities involved in the tracing of illicit proceeds and other property quicker and more efficient. Therefore, a network of contact points at the EU level should be created. Member States will be obliged to set up or designate a national Asset Recovery Office which will have the task of exchanging information and best practices, both upon request or spontaneously.

The Council Decision would formalize and put in place at the EU level the structure of informal and voluntary cooperation in the so-called Camden Assets Recovery Inter-Agency Network (CARIN). This network, established in 2004, is currently operating beyond the EU level and convenes practitioners and experts in the cross-border identification, freezing, seizure, and confiscation of the proceeds of crime. It seeks to enhance the knowledge of methods and techniques in this field. The network comprises nearly all Member States, plus OLAF and Eurojust. Europol acts as the secretariat of the CARIN network.

➤ eucrim ID=0603104

Green Paper on Detection Technologies

Detection technologies are increasingly used in the daily work of law enforcement authorities, customs and other security authorities to fight terrorism and other forms of crime. Detection tools are, for instance, used by customs to protect borders or check goods entering the EU. The Commission's Green Paper

on "Detection technologies in the work of law enforcement, customs and other security authorities" adopted in September 2006 (COM(2006) 474) would like to streamline the approaches, practices, and efforts in the field of detection technologies. The Green Paper aims at further enhancing dialogue between the public and private sector in an effort to focus investment on standardisation, research, certification and interoperability of detection systems and to better transform research results into useful and applicable tools. This should help to develop an advanced market in detection products and security solutions which, in turn, should lead to greater availability of products and services at lower cost. The Commission stresses that the use of detection technologies is very intrusive into the individual's freedoms and rights and therefore all measures must comply with fundamental rights as provided for in the EU Charter and the ECHR.

➤ eucrim ID=0603105

Customs Cooperation

Commission Proposes Amendment to First-Pillar Mutual Legal Assistance Scheme

On 22 December 2006, the Commission put forward a proposal for a Regulation that would amend Regulation No. 515/1997 (COM(2006) 866). Regulation 515/1997 is the basic legal framework which draws up rules whereby the Member States assist each other and cooperate with the Commission in order to prevent and investigate irregularities in Community customs and agriculture law that may be detrimental to the EC's financial interests. In addition, the Regulation establishes the Customs Information System which enables customs authorities to rapidly disseminate and exchange information on breaches of customs and agriculture legislation and make requests for action (CIS I).

The proposed amendments are intended to broaden the framework and integrate more modern mechanisms as to customs cooperation. The principal issues are:

• Extending the possibilities of exchanging VAT-related information.

• Supplementing the current case-by-case exchange mechanism with an automatic and/or structured information exchange mechanism without a prior request from the receiving Member State.

• Establishing a European Central Data Directory: Against the background of the modernisation of the EC's customs system − which will lead to all traders being able to provide all necessary information on goods and carriers to customs services in advance and being electronically connected to customs authorities (see below) − it is felt that information should be in the hands of law enforcement authorities at the earliest possible moment in time. It is argued that this will allow better risk analysis of operations which may involve irregularities in relation to customs or agriculture law. Thus, the Community (OLAF) shall have the possibility to access data from a pool which is fed by the principal service suppliers, public or private, that are active in the international carriage of goods and containers.

• Introducing the possibility for the Commission or Member States to forward information to third countries after prior consent of the Member State which supplied the information.

• Extending the use of CIS data for analysis purposes. Currently, data can be included in the CIS only for the purposes of sighting and reporting, discreet surveillance, or specific checks.

• Creating the legal basis for the Customs Files Identification Database (FIDE). The FIDE records any references to past or current investigations in each Member State, thus enabling customs officers to find out whether and which other authorities have conducted investigations on a similar person or business.

➤ eucrim ID=0603106

Action Plan to Implement the Strategy for Customs Cooperation

On 2 October 2003, the Council approved a resolution on a strategy for customs cooperation (OJ 2003 C 247, p. 1). The Council therein invited the customs administrations and other authorities of the Member States with responsibility for the implementation of customs legislation to execute a strategy within the framework of the creation of an area of freedom, security and justice, to enable the better protection of society and the economy against smuggling and fraud, cross-border organised crime and money laundering, threats to the environment and cultural heritage, and any other threats within their competencies. In this context, the Council also set four aims: (1) considering new forms of cooperation; (2) taking practical steps towards implementing these new forms of cooperation; (3) improving and making more flexible the existing cooperation process; (4) enhancing public confidence in customs.

A Customs Cooperation Working Party (CCWP) – a project group which convenes representatives from the Member States on a voluntarily basis − is responsible for the implementation of this resolution. This is done by work plans which formulate concrete actions while pinpointing their objectives. The CCWP recently submitted a report on the implementation of the first action plan which ran from 2004 to 2006. The work plan contained 44 actions/activities in eleven work areas.

➤ eucrim ID=0603107

Furthermore, the subsequent action plan to implement the strategy for customs cooperation in the third pillar was worked out. It covers the period from 1 January 2007 till 30 June 2008 and tackles four work areas: border management and security, intelligence, operational cooperation, and information exchange. The proposed actions are listed in the annex.

➤ eucrim ID=0603108

Introduction: New Customs Environment

One of the most extensive objectives of the Community is the crucial rationalisation and simplification of the current customs system. This process shall entail facilitation of trade as much as possible, on the one side, and react to the growing security and safety threats to the interests of the Community and its citizens, on the other. The Commission put forward several proposals to achieve this aim. Some of the proposals have already been adopted as legislation, others are still in the pipeline of the legislative procedure. The recent months brought some progress which will be presented in the following. They

concern the EU customs security programme, the modernization of the customs court, the creation of an electronic customs environment (e-customs), and the establishment of a new funding of customs actions from 2008 onwards. For further information on the Communities customs strategy and customs reform, a visit to the following homepage of the European Commission's Taxation and Customs Union Directorate-General is recommended:
➤ eucrim ID=0603109

Commission Implementation Regulation to Secure Supply Chain

Since the terrorist attacks in New York, Madrid, and London, the Community pays special attention to securing the international supply chain of goods. This should be achieved by improved customs controls at the EU border. The concept of achieving a good balance between a smooth functioning of trade and efficient security controls is to reward traders who demonstrate their compliance with the criteria for a secure supply chain with benefits, such as fewer controls. Regulation No. 648/2005 of the European Parliament and the Council of April 2005 introduce these security- and safety-related aspects into the present Community Customs Code of 1992 as follows:
• Traders are required to provide customs authorities with information on goods prior to their import into or export from the EU in the form of electronic summary declarations (pre-arrival / pre-departure declarations).
• The exchange and sharing of information among customs authorities is provided for.
• The concept of the Authorized Economic Operator (AEO) is introduced: If traders meet certain security criteria, they can be recognised as reliable. They can then benefit from facilitation in terms of security controls and simplification of customs procedures.
• Uniform risk selection criteria for controls are introduced, supported by computerised systems. This shall ensure better management of risk assessments and more target-orientated controls by customs services.
Now, a Commission Regulation of 18 December 2006 (Regulation 1875/2006) implements the described security amendments to the Customs Code by Regulation 648/2005. It foresees the following:
• entering into force of the provision for the AEO programme by 1 January 2008,
• making it mandatory for traders to provide customs authorities with advance information on goods brought into or out of the customs territory of the EC as from 1 July 2009,
• fully computerizing the risk management system by 2009.
The regulation also requires customs authorities to electronically exchange information on exports in order to speed up export procedures. It is expected that all Member States will be ready by 1 July 2007. This will be the first step of the electronic customs project (see below).
➤ eucrim ID=0603110

New System Allows Better Control of Container Routes

The European Commission, in collaboration with OLAF, has developed a technology through its in-house research service, the Joint Research Centre, which allows automatic gathering and analyzing of data on global maritime container movements in order to enable the identification of potentially suspicious consignments (project ConTraffic). In doing so, customs will be able to control and monitor more of the world's cargo as well as check whether false declarations of origin were made. The system is expected to better identify circumventions of anti-dumping duties and increasingly detect the smuggling of prohibited or counterfeit goods.
➤ eucrim ID=0603111

Modernized Customs Code

The major piece of future legislation for costums procedure and administration may be a modernized Customs Code. A proposal from the Commission dated 30 November 2005 for a respective regulation (COM(2005) 608) suggests a complete overhaul of the current Customs Code which was conceived in the Eighties, entered into force in the Nineties, and is considered to be out of date. The present Customs Code of 1992 is the basic common legal framework for common application of the rules governing the Customs Union. It consolidates all common customs legislation in a single text and provides a framework for the Community's import and export procedure. The major drawback of this code is that it was developed for a paper-based environment which turned out to be a factor for increased risk of fraud and compromised security and safety. The proposed new Customs Code is based on the idea of an electronic customs environment, turning electronic declarations and electronic data exchange into a fundamental principle. The modernization would streamline customs procedures, introduce an efficient centralized customs clearance, and lay the foundations for risk-based controls in the internal market. The Council of Competitiveness held a political debate on the proposal for modernizing the Customs Code at a meeting on 4 December 2006. On 12 December 2006, the European Parliament adopted some amendments to the proposed regulation. It made some general observations on individual points of the proposal.
The revision of the customs procedures must be viewed against the background of the Lisbon Strategy to stimulate economic growth and employment within the bloc and the EU's e-government initiative which aims at allowing businesses to benefit from modern IT technology in order to facilitate trade.
➤ eucrim ID=0603112

Paperless Environment for Customs and Trade

A Commission proposal for a Decision to introduce an electronic, paper-free customs environment in the EU (COM(2005) 609 final) is closely linked to the above-mentioned proposal for a modernized Customs Code. This proposal was already tabled on 30 November 2005. It was approved by the European Parliament on 12 December 2006 without amendments; the Council has not yet reached a decision.
The instrument would implement the electronic customs environment concept as laid down in the future modernized Customs Code. Therefore, the draft requires that customs systems operated by

the customs administration and by the Commission must be accessible to economic operators and be interoperable, both with each other and with systems operated by other authorities involved in the international movement of goods. The aim is to improve and facilitate supply chain logistics and customs processes for the import and export of goods, as well as the reduce risks related to threats to the safety and security of citizens, by abolishing the differences between the existing systems among the Member States. Member States' electronic customs systems would be made compatible with each other and a single, shared computer portal created. The Commission proposes staggered deadlines to ensure simultaneous implementation of the pan-European electronic customs system.

If the electronic customs environment is established, traders will fully benefit from the so-called "single window" and "one-stop shop" concept. This means that economic operators need only provide information required by customs and other agencies involved in frontier control (e.g. police, border guards, veterinary and environmental authorities) once to a single electronic entrance point ("single window") and that the goods are controlled by all authorities at the same time and at the same place ("one-stop shop").

➤ eucrim ID=0603113

Customs 2013 Programme

The EU institutions are preparing the extension of the Customs 2007 programme which lays down the legal and financial basis needed to support several actions to help the facilitation of trade and to combat fraud. It runs from 1 January 2003 to 31 December 2007. The Commission proposed a new action programme for the period of 1 January 2008 till 31 December 2013 (proposal of 17 May 2006, COM(2006) 201). The proposal was discussed in the European Parliament on 12 December 2006 in a first and single reading procedure. The amendments made are in line with the Council approach. The Council has not yet taken a decision. The programme is a further element in the creation of a paperless electronic customs environment and implementation of the modernized Customs Code. Furthermore, it will pursue further expansion of international customs cooperation, support the further development and implementation of the authorised economic operator concept, ensure the maintenance of the current operational trans-European IT systems, and help exchange information and implement best practices with the customs administrations of third countries, particularly the candidate countries, the potential candidate countries, and the partner countries of the European neighbourhood policy. Customs 2013 foresees a budget of € 323.8 million over six years (compared to approximately € 157 million for the previous programme).

➤ eucrim ID=0603114

Police Cooperation

New German-Dutch Police and Justice Cooperation Treaty

A new treaty between Germany and the Netherlands on cross-border police cooperation and cooperation in criminal matters entered into force on 1 September 2006. After similar agreements with Austria and Switzerland, the new treaty modernizes the bilateral relations of Germany with its third neighbour. The treaty supersedes a German-Dutch agreement on police cooperation from 1996. The new framework brings about, for instance, an intensified exchange of information between police authorities, closer cooperation regarding the comparison of DNA profiles, rules on the cross-border deployment of undercover officers, extended possibilities for cross-border surveillance, and less rigid provisions on hot pursuit of persons who are escaping. The treaty is published in: BGBl. II 2006, p. 194.

➤ eucrim ID=0603115

Prüm Treaty Set to Be Integrated into EU Legal Order

On 27 May 2005, Austria, Belgium, France, Germany, Luxembourg, the Netherlands, and Spain signed the Treaty of Prüm which provides for closer cross-border cooperation of police and judicial authorities in order to better combat terrorism, cross-border crime, and illegal immigration. The Prüm Treaty is a multilateral agreement concluded outside the legal framework of the EU. Its main feature is the increased possibility of sharing information: National law enforcement authorities from the participating states are granted automated access to DNA and fingerprint databases as well as vehicle registration data. The treaty provides specific rules for each type of data (so-called data-field-by-data-field approach). In cases involving DNA and fingerprints, only reference data are available. Further information, e.g., personal data, may be communicated within the usual framework of mutual legal assistance ("hit/no hit system"). Furthermore, the exchange of data concerning the prevention of threats in the occurrence of mass events with a cross-border dimension (e.g., the exchange of personal data on hooligans), as well as data concerning potential terrorists, is regulated. The treaty also makes it possible to increase cross-border police operations, such as joint patrols.

At the Council meeting on 15 February 2007, the Justice and Home Affairs Ministers agreed on integrating the "third pillar activities" of the Prüm Treaty into the EU's legal framework after several Member States have notified their interest in joining the agreement. This interest also arose because the treaty between Austria and Germany, which already apply the Prüm provisions, has proven effective. The legal framework for the integration of the Prüm Treaty shall be a Council Decision on the stepping up of cross-border cooperation − a draft of which was tabled by the German Presidency. The German Presidency has the ambitious goal of completing the process of transposition by the end of its Presidency in June 2007. Excluded from the draft are cooperation mechanisms which relate to the first pillar, particularly measures against illegal immigration, such as document advisors and mutual support in cases of repatriation. The Ministers were also unable to agree on taking over a provision relating to cross-border police intervention in the event of imminent danger (Art. 25 of the Prüm Treaty and Art. 18 of the draft Council Decision) after the UK and Ireland were reluctant to give foreign police officers sovereign powers on a Member State's territory. This issue shall be further de-

bated in one of the forthcoming Council meetings.
The procedure of transposing the given provision from outside the EU order is criticised because it would bypass the proper European legislation process. It is also criticised that the joining Member States have no alternative but to accept already existing solutions in relation to the implementation of the Prüm Treaty. A further question concerns the risk that the data protection provisions in the draft Council Decision transposing the Prüm Treaty overlap with the Framework Decision on the protection of personal data in police and judicial cooperation (see above).
➤ eucrim ID=0603116

European Parliament Hosted Conference on Prüm Treaty

The Prüm Treaty was also subject of a public seminar at the European Parliament, organised by the Committee on Civil Liberties, Justice and Home Affairs (LIBE) in June 2006. The following link contains a document which summarises the presentations at the meeting.
➤ eucrim ID=0603117

Police Cooperation Seminar in the European Parliament

On 18 December 2006, the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament organised a public seminar entitled "An Efficient and Accountable Police Cooperation in the EU – The Way Forward". Speakers addressed the following questions: What are the main obstacles to police cooperation in the EU? Data protection – Are current standards in the police cooperation field satisfactory? What are the solutions found so far to common operational problems and would it be interesting to extend some of the best practices to all the Member States? What should be done at the strategic and operational level in order to enhance police cooperation? How is it possible to improve parliamentary control in the field of police cooperation, particularly in cases regarding the absence of the (European) Constitution? Background notes and contributions of the speakers can be downloaded via the following homepage.
➤ eucrim ID=0603118

Judicial Cooperation

Conclusions after Ten Years of the Geneva Appeal

On 3 October 2006, at a meeting in the European Parliament, experts took stock of the judicial cooperation achieved in criminal matters during the 10 years since the so-called Geneva appeal. The "appel de Genève" was launched by seven anti-corruption magistrates from different European countries on 1 October 1996. Therein, they particularly denounced the powerlessness of the judges faced with the illegal circulation of finances and argued for the free circulation of information among judges in a (single) European judicial area. Furthermore, they demanded that banking secrecy should not prevail with regard to mutual legal assistance and that letters rogatory could be transmitted directly, without interference of the executive. They also advocated the reinforcement of mutual administrative assistance in financial matters and the incrimination of fiscal fraud ("escroquerie fiscale").
The participants agreed that progress since the appeal is still unsatisfactory and formulated nine proposals to better tackle the fight against serious transnational crime. Regarding the enhancement of the effectiveness of existing European judicial cooperation arrangements, it was proposed: (1) to speed up the process of ratification of conventions on cooperation in criminal matters; (2) to re-examine the restrictions on the application of the European Arrest Warrant, in particular in view of an abolishment of the "speciality" rule and the reservations concerning the surrender of nationals; (3) to abolish appeals in investigations with an international dimension; (4) to control more closely front companies and delimit banking secrecy; (5) to support judicial training and exchanges; (6) to set up a standard form by which to request the execution of international letters rogatory.
With respect to the establishment of a genuine European area of judicial cooperation in criminal matters, the following suggestions were made: (7) to enable majority voting by make use of the passerelle clause of Art. 42 TEU; (8) to gradually create the proposed European Public Prosecutor's Office, and (9) to secure uniform protection for fundamental rights.
➤ eucrim ID=0603119

Communication from the Commission on Judicial Training

Against the background of the Hague programme, which emphasizes the necessity of strengthening mutual reliance between the Member States and which requires "an explicit effort to improve mutual understanding among judicial authorities and different legal systems", and Art. III-269 and Art. III-270 of the Constitution for Europe, which call for the establishment of European measures to support the training of the judiciary and judicial staff in civil and criminal matters, the Commission adopted a communication pointing out the importance of judicial training in the European Union. Even though responsibility in this area lies primarily with the Member States, the aim is to increase funds to the already existing various programmes on training judicial practitioners in European issues, for instance the "Fundamental rights and justice" programme, and to strive for a harmonization of standards concerning judicial training in the European Union. According to the communication, judicial training should focus on three main areas:
• increasing the familiarity of legal practitioners with the Union's legal instruments;
• improving mutual knowledge of the judicial systems in the Member States;
• improving language training.
To serve this purpose, the Commission will continue the exchange programme between practitioners and intends to assist in building up a European Judicial Training Network.
➤ eucrim ID=0603120

European Arrest Warrant (EAW)

Quantitative Information on the Practical Implementation of the EAW

The following Council document sets out figures on the practical implementation of the European Arrest Warrant in the year 2005. They are based on the replies of Member States to an annual questionnaire.
➤ eucrim ID=0603121

Quick Execution of an EAW with Support of Eurojust

Eurojust reported on a very successful and speedy execution of a European Arrest Warrant which led to the arrest of a banker who was the key figure in a big banking scandal in Austria. Eurojust enabled the quick transmission of an EAW from Austria to France so that the wanted person could be taken by surprise in his hideout in the south of France.

➤ eucrim ID=0603122

Framework Decision on EAW Complies with EU Law, Advocate General Says

Advocate General Ruiz-Jarabo Colomer proposed to dismiss concerns against the Framework Decision (FD) on the European Arrest Warrant (EAW) which were brought before the ECJ by the Belgian Arbitragehof (see Weyembergh, eucrim 1-2/2006, p. 26). The reference for the preliminary ruling contained two questions: First, the legal basis was contested by claiming that a framework decision was not the suitable instrument to use. In particular, it was argued that the EAW ought to have been established by an international convention. Second, doubt was expressed as to whether the non-verification of double criminality for 32 offences is compatible with fundamental rights as to the principles of legality and the principle of equality and non-discrimination, and, accordingly, whether it complies with Art. 6 (2) TEU.

After having examined the differences between the EAW scheme and traditional extradition procedures, as well as having worked out the essence of framework decisions, the Advocate General concludes that the Community legislator has a wide discretion as to which instrument he would like to choose. In view of the effectiveness of Community law, the Council was not only entitled, but obliged to establish the EAW in a framework decision. He points out that framework decisions are an appropriate measure by which to avert the difficulties arising from the ratification of international treaties.

As regards fundamental rights, the Advocate General sees neither a breach of the principle of equality nor the principle of legality. By considering that the two different regimes of double criminality are not comparable, and by arguing that differences which may arise from the execution of EAWs are objective and proportionate, he denies a breach of the principle of equality. In the view of the Advocate General, the principle of legality is not infringed because it must be observed by the national legislator when assessing criminal acts or imposing penalties and, therefore, is not a matter of the FD which only tries to establish a mechanism for assistance.

➤ eucrim ID=0603123

Poland Amended Constitution

After the Polish Constitutional Tribunal declared that the extradition of Polish citizens through the surrender procedures of the European Arrest Warrant is unconstitutional (judgment of 27 April 2005), the Polish parliament agreed on a controversially discussed amendment of the constitution (new Article 55). Extradition of Polish citizens is allowed if the offence was committed outside the territory of the Republic of Poland and the act on which the extradition is based constitutes an offence under Polish law, at the time of commission as well as at the time of extradition. Furthermore, the legislator stipulated that extradition of a person is prohibited if the execution of the extradition would infringe the rights and freedoms of human beings and citizens. The amendments are not considered as being fully in line with the requirements of the Framework Decision on the European Arrest Warrant. Amendments to the Polish Procedural Criminal Code were implemented by a law from 27 October 2006 (Dziennik Ustaw 2006, No. 226, Pos. 1647).

➤ eucrim ID=0603124

Confiscation Orders

New Framework Decision Applies Mutual Recognition Principle to Confiscation Orders

On 24 November 2006, the Council Framework Decision (FD) on the application of the principle of mutual recognition to confiscation orders entered into force. The FD facilitates the cooperation between Member States as regards mutual recognition and execution of orders to confiscate property, which, for instance, stems from organised crime. The competent authorities of the executing state will, without further formality, be obliged to recognise a confiscation order which has been transmitted in accordance with the rules laid down in the FD and take the necessary measures for its execution. Similar to the scheme of the European arrest warrant, double criminality will not be verified if the act giving rise to the confiscation order constitutes one or more listed offences. Reasons for non-recognition or non-execution are limited.

The FD does not deal with the restitution of the property to its rightful owner nor does it prejudice the end to which the Member States apply the amounts obtained as a consequence of its application. Member States now have two years to implement the FD. It complements the Framework Decision on confiscation of crime-related proceeds, instrumentalities and property of 2005, which approximates the laws of the Member States with the view to confiscating the proceeds of crime from a wide range of offences and lays down provisions on the onus of proof regarding the source of assets held by a person convicted of an offence related to organised crime. The latter must be implemented by 15 March 2007. Both instruments aim at meeting the demand of the 1999 Tampere conclusions to root out the financial gain of organised crime by taking measures in order to trace, seize, freeze, and confiscate proceeds from crime.

➤ eucrim ID=0603125

European Supervision Order

Commission's Push to Diminish Pre-Trial Detention

After having consulted the public through the Green Paper on mutual recognition of a non-custodial pre-trial supervision measure (COM(2004) 562) and after an expert meeting in June 2006, the Commission tabled a proposal for a Framework Decision on the European supervision order in pre-trial procedures (COM(2006) 468). The Commission is reacting to statistical data which show that non-resident EU citizens awaiting trial are more often remanded in pre-trial detention than resident EU citizens.

The instrument would allow suspects to go back to their state of normal residence and be subject to supervision measures there. To this end, the trial state may (not must!) issue a so-called European supervision order to set pre-trial supervision measures and must, in principle, be recognised by the state of normal residence ("executing state"). The trial state would impose one or more obligations on the suspect aimed at reducing the three "classical" dangers that allow pre-trial detention. The executing Member State would be responsible for the supervision of the suspect and is obliged to report any breaches of the suspect's obligations to the issuing judicial authority which can decide on the arrest and return of the suspect to the issuing state.

The supervision order would allow suspects to be the subject of supervision measures in their normal environment, reduce discrimination against non-resident subjects, and save Member States money spent on foreign prisoners in the penitentiary system. The objective is to reinforce the right to liberty and the presumption of innocence in an area of freedom, security and justice. It would fulfil the requirement of the ECHR that the states should make the widest use of non-custodial supervision measures. However, the Commission clarifies that the FD would not confer a suspect's right to receive a supervision order.

➤ eucrim ID=0603126

Transfer of Sentenced Persons

Compromise Reached on Framework Decision on Enforcement of Sentences

At its meeting on 15 February 2006, the Justice and Home Affairs Ministers reached a general consensus on a Framework Decision on the application of the principle of mutual recognition of judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union. The instrument stems from an initiative submitted by Austria, Finland, and Sweden in January 2005 and was also discussed under the short term "European enforcement order". This Framework Decision would replace the current system on the transfer of sentenced persons which is mainly governed by the legal framework of the Council of Europe (CoE). Under the CoE Convention on the Transfer of Sentenced Persons of 1983 (ETS No. 112), sentenced persons may be transferred to their state of nationality to serve the remainder of a sentence only with the person's consent and that of the states involved. The Additional Protocol to the Convention of 1997 (ETS No. 167) allows transfer without the consent of the sentenced person only in specific cases, i.e. if the person has fled to his state of nationality or if the person is subject to an expulsion or deportation order.

The EU Framework Decision would further reduce the involvement of the sentenced persons in the proceedings. The consent of the home country to enforcement of the judgement in that country would also be dispensed with. The home country (executing Member State) would have the duty to recognise and enforce judgements handed down in other Member States on the executing Member State's nationals, its permanent residents, or persons with other close links to it, subject to certain grounds of refusal. Double criminality – currently a further requirement for the transfer – is removed according to a list of offences corresponding to the system of the European Arrest Warrant. The instrument is based on the idea of providing optimum social rehabilitation by sending convicts back to the State where they understand the language and have close personal links. Poland still blocked the Framework Decision in December 2006, again giving rise to discussion on the reasonability of the requirement of reaching an unanimous decision on "third pillar actions". Poland feared that the prisoner's opposition to being transferred or his family location is not sufficiently taken into account; cost implications were also thought to be a reason for Poland's veto. Taking into account Poland's concerns – especially in the light of the increased mobility of Polish citizens, which leads to practical and material consequences in the transfer of Polish citizens convicted in other Member States –, the Council granted Poland a five-year derogation from the scheme.

The following documentation contains the latest publicly available Council document of the draft Framework Decision as well as the original proposal.

➤ eucrim ID=0603127

The European Parliament gave its opinion on the proposal on 14 June 2006, suggesting several amendments, including more information rights for victims.

➤ eucrim ID=0603128

Supervision of Suspended Sentences – Initiative by Germany and France

Another bid to enhance the social rehabilitation of perpetrators in an area of freedom, security and justice was made by Germany and France which initiated a proposal for a Framework Decision on the recognition and supervision of suspended sentences and alternative sanctions. Cross-border supervision of probation is one of the priorities of the German Presidency. This instrument would replace throughout the EU a Council of Europe convention of 1964 (ETS No. 51) which to date regulates the supervision of conditionally sentenced or conditionally released offenders in their state of ordinary residence. However, this convention has only been ratified by 12 EU Member States so far and its application has proven cumbersome.

The present initiative would close a gap which has been left open by the above-mentioned Framework Decision on the enforcement of sentences. This Framework Decision only applies to the execution of judgements which impose a custodial sentence or any measure involving deprivation of liberty. Although it contains a provision under which conditions the executing state is entitled to release early or conditionally a transferred person from imprisonment, it does not cover the following cases: (1) if the judgement imposed an alternative sanction on a natural person; (2) if the judgement imposed a suspended sentence from the outset; (3) if the offender served a part of the punishment in the sentencing state and is then released on probation (conditional release). The initiative by Germany and France applies the principle of mutual recognition to this kind of judgement and the Member State, in which the sentenced person is legally and ordinar-

ily resident, is, in principle, obliged to supervise suspensory measures and alternative sanctions.
The proposal is drafted in a similar way to the Framework Decision on the enforcement of custodial sentences. In this context, the proposal contains, for instance, the waiver of the verification of double criminality for the list of offences parallel to the EAW, the fundamental competence of the executing state for all other decisions relating to a suspended sentence or alternative sanctions, time limits and limited grounds for refusing recognition and supervision, and obligations to allow consultation.
In the run-up to the initiative, Germany asked the Member States to reply to a questionnaire. A summary of the answers is published in Council doc. 5968/07 of 5 February 2007. It gives a good comparative insight into the different legal systems of the Member States as to the suspension of sentences. The Council Working Party on cooperation in criminal matters already undertook a first examination of the proposal in February 2007 and the German Presidency made some refinements to the text after these first discussions. The following link contains the original draft by Germany and France as well as an explanatory memorandum.
➤ eucrim ID=0603129

Exchange of Information on Criminal Records

By Julia Macke

The question of the more well-organised exchange of information extracted from national criminal records is actually being intensely discussed throughout the whole EU. There are different approaches on how to improve the current situation. They are presented in the following.

Special Project Involving Six European Countries – Example for e-Justice

On 6 June 2006 in Bonn, Germany, the Ministers of Justice of Germany, France, Spain, Belgium, the Czech Republic, and Luxembourg – together with the Vice-President of the European Commission, Franco Frattini – presented their common project of a Europe-wide criminal records network. Germany, France, and Spain already agreed in 2003 that they would speed up plans to share data on convicted criminals by electronically linking their national registers. Until now, Belgium, the Czech Republic, and Luxembourg have cooperated. After a successful pilot phase, which began in 2005, the project has recently gone into operation. The goal of the project is to build up a secure electronic communication among the national criminal records and to much more easily facilitate the data exchange. Its aim is to rapidly enable legal authorities to obtain full information on the legal histories of people convicted in other states. The countries involved hope that their network could serve as a model for a future system linking all criminal registers in the EU. The German Minister of Justice promised to make a special effort in this respect during the German Presidency.
This network of national registers is a prominent example of the promotion of e-Justice in Europe, i.e., the increased cross-border use of information and communication technology in the justice sector in order to intensify cooperation in the area of freedom, security and justice. The further development of e-Justice is one of the top priorities of the German Presidency and the subsequent presidencies of Portugal and Slovenia. The main idea is to facilitate and expedite access to justice by coordinating and networking already existing electronic systems in the various Member States rather than creating a new centralised infrastructure at the European level. The possibilities for further use of the information technology in the justice sector in the future will be addressed at a conference in Bremen/Germany from 29 to 31 May 2007.
➤ eucrim ID=0603130

Developments in the EU – White Paper Identified Shortcomings

The need to improve the quality of information exchanged on criminal records has also become a priority for the entire EU. The Hague Programme of November 2004 called on the Commission to put forward proposals in this regard and these objectives are set out in the joint action plan which was adopted by the Commission and the Council on 2 and 3 June 2005, with a view to implementing the Hague Programme.
Exchanges of information on convictions are currently governed by Articles 13 and 22 of the 1959 Council of Europe (CoE) Convention on Mutual Assistance in Criminal Matters. However, this system presents certain shortcomings. To evaluate the shortcomings of the existing mechanism, the Commission published a White Paper on exchanges of information on convictions and the effect of such convictions in the European Union in January 2005 (COM(2005) 10 final). The Commission identified three main problem areas: First, the difficulty in rapidly identifying the Member States in which individuals have already been convicted; second, the difficulty in obtaining information quickly and by means of a simple procedure; and, third, the difficulty in understanding the information provided. It therefore proposed the improvement of the circulation of information through computerisation in a two-stage approach: In stage one, a system for identifying the Member States in which an individual has previous convictions is to be set up and a technical and electronic infrastructure enabling the rapid, secure exchange of information on convictions put in place; in stage two, a "standard European format" is to be established for exchanges enabling final users to obtain readily understandable and useable information.
➤ eucrim ID=0603131

November 2005: Council Decision – Preliminary Changes Only

On 21 November 2005, the Council adopted a Decision on the exchange of information extracted from the criminal record (2005/876/JHA). It entered into force on 9 December 2005. The Decision shall only supplement and facilitate the 1959 CoE Convention on Mutual Assistance in Criminal Matters. Pursuant to this Decision, each Member State shall designate a central authority which shall inform the central authorities of other Member States of criminal convictions and subsequent measures in respect of nationals of those Member States entered

in the criminal record (Art. 1 and 2). All future information requests shall be forwarded on the basis of a special request form which is set out in the Annex of the Decision (Art. 3 par. 1). Both the request form and the reply shall be sent in the official language of the requesting or requested Member State (Art. 5).
The main purpose of the Decision is to reduce the time needed for the procedure of obtaining information: The reply shall be sent immediately and, in any event, within a period not exceeding ten working days from the receipt of the request (Art. 3 par. 2). Of further importance is the provision of Art. 4 on the purpose limitation principle: Personal data may be used by the requesting Member State only for the purpose of the criminal proceedings for which it has been requested, whereas personal data communicated under Art. 3 for purposes other than criminal proceedings may be used by the requesting Member State in accordance with its national law only for the purpose for which it has been requested and within the limits specified by the requested Member State in the form.
➤ eucrim ID=0603132

December 2005: New Commission Proposal on FD – Fundamental Changes Planned

Shortly after the above-mentioned Council Decision entered into force, the Commission transmitted a new proposal for a Framework Decision (FD) on the organisation and content of the exchange of information extracted from criminal records between Member States in late December 2005 (COM(2005) 690). The Commission argued that this new proposal was necessary because the Council Decision of 21 November 2005 did not make any fundamental changes to the old system and was only a first step towards addressing its shortcomings in the short term. In contrast, the aim of the new proposal is a thorough reform of the old system. Therefore, it shall replace Art. 22 of the 1959 CoE Convention on Mutual Assistance in Criminal Matters.
The new proposal assimilates the improvements achieved through the Council Decision and would repeal it. At the same time, however, the proposal exceeds the Decision. The purpose of the planned FD is to comprehensively define the ways that a Member State, in which a conviction is handed down against a national of another Member State ("convicting Member State"), may transmit such a conviction to the Member State of the convicted person's nationality ("Member State of the person's nationality"). In the long term, the Commission aims at creating a "standardised European format" allowing information to be exchanged in a uniform, electronic, and easily machine-translatable way. Therefore, the Commission would like to set up a committee to assist the Commission in defining and developing this exchange system. In contrast to Art. 4 of the Council Decision, the Commission proposal also allows for personal data to be used by the requesting Member State to prevent an immediate and serious threat to public security (Art. 9 par. 3).
The Council is currently considering the proposal, whereas the European Parliament has not yet delivered its opinion.
➤ eucrim ID=0603133

January 2007: Manual of Procedure

In January 2007, the Council issued a Manual of Procedure concerning the aforementioned Council Decision. This Manual aims at being a factual document to assist practitioners when making requests for information extracted from the criminal records of another Member State and when using the standardised form. It therefore contains practical information on each Member State and on how to complete the requests, such as the postal address of the central authority designated to receive such requests or the necessary information on the person's name, sex, nationality, and date and place of birth.
➤ eucrim ID=0603134

Exchange of Information on Convictions of Third-Country Nationals

The aforementioned Commission Proposal only applies to EU citizens and not to third-country nationals or to persons of unknown nationality who have been convicted within the EU. To close this gap, on 4 July 2006, the Commission published a working document on the feasibility of an index of third-country nationals convicted in the European Union (COM(2006) 359). As already proposed in the above-mentioned White Paper, the Commission plans to create an index of convicted persons limited to third-country nationals which would enable a Member State requiring information on a person's criminal record to receive immediate notification of which other Member State holds information on this person. Only the elements enabling the identification of the convicted person shall be transferred to the index, not the content of the criminal record itself. The Commission examines how to ensure efficient functioning of this planned limited index and which existing IT systems at the EU level could be of relevance in this context.
➤ eucrim ID=0603135

Criticism of the European Data Protection Supervisor

The European Data Protection Supervisor (EDPS) produced two detailed opinions concerning the Proposal for the Council Decision of November 2005, on the one hand, and the Commission Proposal of December 2005, on the other.
In his first opinion of March 2004, the EDPS criticised the proposal for the 2005 Council Decision on the exchange of information from criminal records. His suggestions were widely rejected by the Member States. The EDPS pointed out that Art. 4 on data protection did not apply to own-initiative information on convictions and that there were no thorough guarantees on the safeguards of data protection. He further recommended that the scope of the proposal be limited to serious criminal offences in view of the principle of proportionality.
➤ eucrim ID=0603136
The EDPS published a second detailed opinion on the Commission Proposal for a Framework Decision in May 2006 containing recommendations for major changes in the draft measure. He recommended, for instance, that the measure should not enter into force before the proposal for the over-arching Council Framework Decision on the protection of personal data in police and judicial matters (see above) also enters into force and that the transfer of data in instances not concerning criminal proceedings should only be allowed "under excep-

tional circumstances". He also reiterated the argument that the FD should be limited to serious criminal offences.
➤ eucrim ID=0603137

Member States Object EDPS Suggestions

One month later, on 28 June 2006, the Council Working Party on cooperation in criminal matters considered the last opinion of the EDPS. The participants disagreed with the suggestion that the Framework Decision on the organisation and content of the exchange of information extracted from criminal records should not enter into force before the entry into force of the Framework Decision on the protection of personal data in police and judicial matters. There was also no support for limiting the measure to serious offences. The question of the limited transfer of data not concerning criminal proceedings was not discussed.
Furthermore, the Council Working Party stressed in this meeting that it was important to reduce existing difficulties in the comprehension of conviction information. It therefore referred to the proposals of the above-mentioned White Paper, approved them, and pointed out that the Commission had commissioned a study in April 2005 to review the national criminal records systems in the EU. This format will be based on the work already done by the above-mentioned six European countries to interconnect their systems.
➤ eucrim ID=0603138

Crime Statistics

Commission Wishes Harmonised Rules on Statistics in JHA

The Commission has undertaken efforts to make statistical data on crime and criminal justice more comparable throughout the EU. The Communication on "Developing a comprehensive and coherent EU strategy to measure crime and criminal justice" of August 2006 (COM(2006) 437) tackles the problem that, due to the differing systems of the EU Member States, reliable and comparable information on criminal trends, levels and structures, and measures taken to prevent and fight crime, etc. is lacking, although high-quality data are needed, e.g., for legislative instruments or the evaluation of measures as regards the prevention of and fight against crime.
The Communication contains an action plan covering the period from 2006 – 2010 to solve this problem. A short-term goal is the collection of the first Community statistics on crime and criminal justice by gathering and assessing available national data. In the long term, the plan is to harmonise methodologies and data collection for EU statistics on crime and criminal justice, including the establishment of a respective legal instrument. The paper also mentions that "whenever legal instruments designed to prevent or fight crime are drafted, the Commission will therefore, as a mainstreaming initiative, introduce a requirement to provide appropriate statistics in a form adapted to the practices of the European Statistical System".
Furthermore, the Commission is setting up an expert group which has the task of assisting the Commission in implementing the action plan and giving advice on the development of the EU's criminal statistics framework. The expert group will consist of four categories. It will comprise representatives of Member State, Candidate and Acceding country administrations in the field of JHA; representatives from European and international bodies; networks and organisations with expertise in the area of crime and criminal justice; and members drawn from the academic and private sectors.
➤ eucrim ID=0603139

External Dimension

Strategy for the External Dimension of JHA: Two Progress Reports

Both the Commission and the Council submitted progress reports on the implementation of the strategy for the External Dimension of JHA (see Council doc. 15446/05). The strategy, approved by the JHA Council on 1 December 2005, aims at elaborating partnerships with third countries in the field of justice and home affairs which includes strengthening the rule of law and promoting the respect for human rights and international obligations. This should be achieved through an enhanced cooperation in specific thematic areas and with specific priority regions.
The Commission report first outlines the recent developments in specific criminal areas such as organised crime. The report states that organised and serious crime remains a threat to the economic and social fabric of democratic societies. Second, the report deals with EU activities in priority regions and countries, such as the accession countries Romania and Bulgaria, the candidate countries Croatia, Turkey and FYROM, other Western Balkan countries, Russia, U.S., and Canada, etc. The report concludes that overall progress has been positive and steady across topics and regions.
➤ eucrim ID=0603140
The Council report focuses on an overall assessment of the activities foreseen by the External Strategy and cooperation with third countries in the fields of JHA, specific suggestions for geographical and/or thematic priorities for future action, and options for measures to improve cooperation with specific countries and regions.
➤ eucrim ID=0603141

Vienna Declaration on Security Partnership

The Austrian Presidency fostered cooperation with non-EU countries in justice and home affairs, continuing the implementation of the Strategy for the External Dimension of Justice and Home Affairs (Council doc. 15446/05). This process culminated in a Conference in Vienna, bringing together ministers and representatives from more than 50 countries and international organisations. The conference approved the Vienna Declaration on Security Partnerships of 5 May 2006 which reflects the importance of internal security in external relations. Part I of the Declaration subscribes itself to general principles of cooperation with third countries within the area of justice and home affairs. It therefore defines key principles for a future security partnership between the EU and interested third countries. Part II of the Declaration focuses on three priority areas for future cooperation, namely combating terrorism, organised

crime and corruption, and migration/asylum. Concrete measures and actions have been identified and agreed upon along the lines of principles identified under Part I.
➤ eucrim ID=0603142

Start of Tripartite Security Cooperation EU/Russian Federation/USA

During the Austrian Presidency, the EU, represented by Commission Vice-President Franco Frattini and the Interior Ministers of Austria, Finland, Germany, Slovenia, and Portugal, and their colleagues from the Russian Federation and the United States, held a joint meeting for the first time. The outcome of the meeting was a declaration, in which the participants set out the key principles for a possible future "Tripartite Co-operative Relationship" in the field of justice and home affairs, including the willingness to work together in order to tackle common threats and problems, to make JHA a priority in external relations, to promote the implementation of principles and norms of international law, and to mobilise joint resources to achieve common goals in internal and homeland security issues. Additionally, specific areas for the tripartite co-operation were identified. In the fight against organised crime and corruption, measures are planned to combat money laundering, drug trafficking, trafficking in human beings, and cybercrime. It is intended to intensify the "trialogue" during the forthcoming Presidencies. A further formal meeting is planned during the German Presidency.
➤ eucrim ID=0603143

Justice and Security Relations with the USA in 2006

Partnership with the USA is an integral part of the EU's strategy for the external dimension of justice, freedom and security. To this end, several informal and formal meetings took place in 2006 between the EU and the US on bilateral level. Meetings covered, for instance, data protection and sharing information, cooperation between Europol/Eurojust and US authorities, as well as closer co-operation to combat organised crime and human trafficking.
➤ eucrim ID=0603144

Common Space of Freedom, Security and Justice with Russia

While the Austrian Presidency tackled closer cooperation in South East Europe, the Finnish Presidency focused on intensified cooperation with Russia. The EU relationship with Russia in justice and home affairs (JHA) is primarily based on the Road Map for the Common Space of Freedom, Security and Justice, adopted at the EU-Russia Summit in May 2005. This road map propounds the principles underlying the EU-Russia cooperation in JHA and sets out a number of agreed objectives and areas for cooperation for the short and medium terms. It contains, for instance, a fostered cooperation to combat transnational organised crime, including intensified law enforcement cooperation with OLAF, Europol, and Eurojust, promotion of a comprehensive anti-money laundering regime, and combating corruption.
➤ eucrim ID=0603145

Action-Oriented Paper on Russia in JHA

The Finnish Presidency made headway by drafting an action-oriented paper on Russia. It aims at implementing certain aspects of the EU-Russia road map in compliance with the Strategy for the External Dimension of JHA of December 2005 (see above). According to this Strategy, action-oriented papers cover specific priority countries, regions, and themes. These papers should include (1) an analysis of the issue and the EU's objectives, drawing on relevant information from the EU's institutions and from the Member States; (2) a summary of current action being carried out by both the Commission and the Member States; and (3) identification of what needs to be done at the political, technical, and operational levels in order to meet EU objectives.

The action-oriented paper on Russia gives first an overview on the situation as regards the cooperation between the EU and Russia in the area of freedom, security and justice. Then, concrete actions are listed which ought to be taken to meet the objectives as set out in the aforementioned road map. In the annex of the latest Council document on this issue (available through the following link), an instructive list of bilateral agreements between the EU Member States and Russia is presented.
➤ eucrim ID=0603146

EU Meetings with Russia on JHA

Discussions on the further establishment of a Common Space of Freedom, Security and Justice between the EU and Russia (see above) took place at two meetings of the Permanent Partnership Council (PPC) in March and October 2006. The PPC is the institutional framework for regular consultations between the EU and Russia at the ministerial level (here Ministers of the Interior and Justice). In the meeting of October, discussions dealt, inter alia, with the Russian legal system and the development of the Russian judiciary, and strengthened criminal law cooperation, in particular in view of finalising an operational agreement between Europol and Russia, as well as concluding a cooperation agreement between Eurojust and Russia. Additionally, the EU-Russia liaison officers network should be enhanced in the future. Another important issue was corruption. Joint training of law enforcement staff in issues related to corruption prevention is to be organised. The EU welcomed the fact that Russia has approved the UN Convention against Corruption and the Criminal Law Convention on Corruption by the Council of Europe in 2006.
➤ eucrim ID=0603147

The Northern Dimension – New Arrangements

A facet of the relations between the EU and Russia is the so-called Northern Dimension. The Northern Dimension (ND) refers to a particular external policy which addresses the special challenges of the Baltic sea region and the Arctic sea region. It aims at strengthening dialogue and cooperation from North-West Russia in the East to Iceland and Greenland in the West. Partners are the EU and its Member States, Norway and Iceland, and the Russian Federation. An aspect of the ND policy is the implementation of the four EU-Russia Common Spaces. In addition to justice and home affairs (see above) these are Common Spaces on Economy, External Security, and Research, Education & Culture. However, special questions and challenges of the

Northern region are also taken into account in the ND. Iceland and Norway associate themselves with the objectives of the Common Spaces.
At a summit in November 2006, the partners agreed on a new basis for the policy of the ND, i.e. the Northern Dimension Framework Document and a Political Declaration. As regards justice and home affairs, the emphasis is generally put on facilitation of people-to-people contacts (e.g. by visa-free travel in the long term), efficiency of the judicial system and judicial cooperation in criminal and civil matters.
➤ eucrim ID=0603148

Western Balkans – Action Plan

In connection with the implementation of the above-mentioned Strategy on the External Dimension of JHA and based on the findings of the Vienna Declaration on Security Partnerships, an "Action-Oriented Paper on Improving Cooperation, on Organised Crime, Corruption, Illegal Immigration and Counter-terrorism, between the EU, Western Balkans and relevant ENP [European Neighbourhood Policy] countries" was compiled (re: action-oriented papers, see above the news on Russia). This paper is practically a road map for EU action on JHA in the Western Balkans for the next few years. First, the paper gives a situation overview, stating that "organised crime originating from or linked to the Western Balkans endangers long-term political, economical and social development in the region and undermines the concept of the rule of law. This problem increases due to corruption, which is also significant for the region and closely connected to organised crime. Corruption in the Western Balkans risk to divert EU aid intended for revitalizing the region." The main part of the paper itemizes seven recommendations, each followed by proposals for immediate action. A first annex lists the activities of the EU Member States: agreements with Western Balkans countries, liaison officers stationed there, and training and support activities of the EU states. A second annex lists the existing financial support from the EU for the recommended actions.
➤ eucrim ID=0603149

EU-Western Balkans Summit on JHA Issues

Within the framework of the EU Stability Pact for the Western Balkans, the Ministers of Interior and Justice of the EU Presidencies and Balkans countries (Albania, Bosnia and Herzegovina, Croatia, FYROM, Montenegro, and Serbia) have been meeting annually since 2003. The fourth EU-Western Balkans forum on Justice and Home Affairs (JHA) was held in Tirana, Albania, on 17 November 2006. Based on the Commission's Western Balkan progress reports, the progress made in each Western Balkans country in combating organised crime, corruption, and human trafficking was reviewed and specific priorities for future work were set. The meeting also highlighted the regional dimension of organised crime, particularly since organised crime in the Western Balkans is closely connected to the organised crime in the EU Member States. It was concluded that bilateral and regional cooperation between the police and judicial authorities and the proper implementation of existing bilateral and regional agreements, e.g., the Police Cooperation Convention for South East Europe (see below), should be further reinforced. Another spotlight was the strengthening of cooperation between EU institutions, such as Europol and Eurojust, and regional law enforcement institutions, such as the SECI Center (see below).
➤ eucrim ID=0603150

Police Cooperation Convention for South East Europe

On May 5, the Ministers of the Interior of Albania, Bosnia and Herzegovina, Moldova, Romania, Serbia and Montenegro, and The former Republic of Macedonia signed a "Police Cooperation Convention for South East Europe" (SEE PCC) in Vienna. The SEE PCC aims at applying Schengen standards for police cooperation in the EU to the Balkans countries. The Schengen Convention and other bilateral police cooperation agreements were taken as a model. On this basis, the SEE PCC leads to (1) an improvement of information exchange, including the secondment of liaison officers, (2) the introduction and reinforcement of cross-border forms of cooperation, such as hot pursuit, cross-border surveillance, controlled delivery, and covert investigations, and (3) further measures enhancing the fight against crime, such as the establishment of joint investigation teams, and the transmission and comparison of DNA-profiles and other identification material. The project for establishing a mutual police cooperation agreement for the Balkans countries was initiated in 2005 by the Austrian Ministry of the Interior's Federal Criminal Intelligence Service. Austria, together with Germany, Europol, and the Stability Pact for South East Europe, acted as midwives in the development of the SEE PCC.
➤ eucrim ID=0603151

Western Balkans – SECI Center

The Council adopted conclusions on the further development of the SECI centre at its meeting on 4-5 December 2006 (pp. 36-38 of the linked press release). The SECI Center is a platform for the close cooperation of law enforcement authorities in South-East Europe, designed as a reaction to increasing transborder crime after the painful wars and conflicts in the region. The SECI Center became operational in 2000 and is located in Bucharest, Romania. Police and Customs Liaison Officers from 12 South-Eastern countries cooperate there, supported by national focal points. Several EU Member States are permanent observers for the SECI Center. The main activities are speedy exchange of crime-related information through the Liaison Officers, on the one hand, and the establishment of task forces, on the other hand. The task forces focus on joint operations regarding a specific criminal topic, including anti-fraud and anti-smuggling, and financial and computer crime. The Council stressed in its conclusions the enhancment of close cooperation between the SECI Center and Europol (see also above-mentioned action-oriented paper) since the centre could eventually become a Europol Regional Office. Moreover, the SECI participating states were encouraged to adopt a new legal framework for the centre which is in compliance with the EU standards.
➤ eucrim ID=0603152

JHA Cooperation with Ukraine

As regards the external relations between the EU and the Ukraine, the revision of the Justice and Home Affairs Action Plan of 2001 is currently on the agenda. This Action Plan and a related scoreboard constitute the common basis for cooperation measures in criminal and civil matters. At a meeting between the Ministers of Justice and Home Affairs of the Ukraine and the EU "troika" (JHA Minister of Finland and Germany plus Commissioner Frattini) in October 2006 in Luxemburg, the parties took stock of the implementation of the JHA Action Plan and agreed on items to which attention should be paid in the near future. Among these items are the reform of the Ukrainian judiciary system, the conclusion of a strategic cooperation agreement between Europol and the Ukraine, the implementation of the Ukraine's new anti-corruption strategy, and strengthening cooperation between Eurojust and the Ukraine.

➤ eucrim ID=0603153

Council of Europe

Reported by Julia Macke

Foundations

Relations between the Council of Europe and the European Union

Because of the general importance of the relations between the Council of Europe (hereinafter CoE) and the European Union, the latest developments in this area are presented chronologically in the following:

Start-Up for New Framework

At the 3rd Summit of Heads of State and Government in November 2004, the decision was taken to create a new framework for enhanced cooperation and interaction between the Council of Europe and the European Union in areas of common concern, including human rights, democracy, and the rule of law. In particular, the participants decided to draft a Memorandum of Understanding between the CoE and the EU and to entrust the Luxembourg Prime Minister Jean-Claude Juncker with the preparation of a report on the relationship between the two institutions.

➤ eucrim ID=0603154

Juncker Report

At the Plenary Session of the Council of Europe Parliamentary Assembly (PACE) from 10 to 13 April 2006 in Strasbourg Jean-Claude Juncker issued his report entitled "Council of Europe – European Union: A sole ambition for the European continent". This report includes different proposals on how to improve the relationship between the CoE and the EU, suggesting that the Union could become a Member of the Council by 2010, that EU Member States should immediately open the door to EU accession to the European Convention on Human Rights (ECHR), and that the Commissioner for Human Rights should become an institution to which the EU could refer all human rights problems not covered by its existing machinery. The report shall further contribute to the work on the planned Memorandum of Understanding.

➤ eucrim ID=0603155

PACE Recommendation 1743

After the publication of the Juncker Report, the Parliamentary Assembly adopted Recommendation 1743 on 13 April 2006 concerning the planned Memorandum of Understanding between the Council of Europe and the European Union. It points out that PACE supports, in particular, the intensification of cooperation and political dialogue with the EU. The Assembly further recommends to the Committee of Ministers ensuring that the Assembly is fully involved in the decision-making process concerning the planned Memorandum of Understanding. It also stresses that the EU should avoid any duplication, particularly when considering the setting-up of agencies, and that it should acknowledge that the Council of Europe must remain the benchmark for human rights, the rule of law, and democracy and accede to the ECHR, thus contributing to the creation of a single legal mechanism for the protection of human rights.

➤ eucrim ID=0603156

Re-launching the European project: needs of protection of EC interests and new strategies for penal integration, waiting for the European Constitution

Catania (Italy), 24-26 May 2007

On the occasion of the 10th Anniversary of its creation, the Centro di Diritto Penale Europeo in Catania organises an international seminar which will take place at the eve of the European Council meeting in June 2007 that will decide the future of the European Constitution. In this perspective, it aims to take stock of the existing EC and EU Law adopted to implement an effective protection of EC interests, and to identify those new instruments and strategies to be adopted so as to improve this protection within the legal framework of the current EC/EU Treaties.

Co-financed by OLAF in the framework of the Hercule Programme, this seminar is opened to all Associations of European Lawyers for the protection of the European Community Financial Interests. At the event, the meeting of the Presidents of the Associations will also be hosted. It will take place on Saturday, 26 May 2007, at 3 p.m.

More information via the website: http://www.lex.unict.it/10yearsconference/default.asp

4th European Jurists' Forum

Vienna, 3-5 May 2007

The 4th European Jurists' Forum (EJF) will take place from 3-5 May 2007 in Vienna. The focus of the EJF is to discuss the development of European law with practising lawyers, judges, and academics within the context of the following highly topical themes: (1) European Contract Law; (2) Towards a European Criminal Law; (3) Migration in and to Europe. The European Criminal Law section will address the following three topics: "Tendencies and Perspectives of a European Criminal Policy", "Basic Models of a European Penal Law – Mutual Recognition, Cooperation, Harmonisation", and "Common Principles of Criminal Procedure as a Basis of Transnational Criminal Prosecution". The European Jurists' Forum has been convening at two-year intervals since 2001. The first meeting took place in Nuremberg/Germany in 2001.

More information and registration details under: http://www.eujurist2007.at

Draft of the Memorandum of Understanding

Meanwhile, the Committee of Ministers is also working on the planned Memorandum of Understanding. In fact, a preliminary draft of the Memorandum of Understanding is already under consideration by the Committee. At two quadripartite meetings in March 2006 and November 2006, representatives of the Council of Europe and the European Union primarily discussed the draft of the Memorandum of Understanding. Both parties stressed that they wished to finalise the Memorandum of Understanding as soon as possible. However, they also pointed out that, due to the remaining difficulties and legal implications of some of the elements of the draft, the adoption of the text would overrun its time.

➤ eucrim ID=0603157

Committee of Ministers Set Up High-Level Follow-Up Group

In order to overcome existing difficulties in finding an acceptable compromise to drafting a Memorandum of Understanding, at the 116th session in May 2006, the Foreign Ministers from the 46 CoE Member States decided to set up a high-level follow-up group to intensify the work concerning the relations between the Council of Europe and the EU. They invited the EU to participate in this process and asked the group to report on its work in good time so that appropriate decisions could be taken at the next Ministers' session in May 2007. They also encouraged member states and the relevant bodies of both organisations to continue the discussions in order to finalize the text of the intended Memorandum of Understanding as soon as possible.

➤ eucrim ID=0603158

Reform of the European Court of Human Rights

Newest Reform Proposals

In the past few years, the Council of Europe has made several efforts to improve and consolidate the Council of Europe's human rights protection system. The newest reform proposals contain, inter alia, Protocol No. 14 which will achieve a more effective operation of the European Court of Human Rights (ECtHR) and has been open for signature by the CoE Member States since May 2004. Of further importance are the reports from Lord Woolf, the former Lord Chief Justice of England and Wales, concerning the simplification of administrative measures, and the Group of Wise Persons, both of which shall secure the effectiveness of the European Convention on Human Rights (ECHR) and its control mechanisms. Because of the relevance of these discussions and developments for all of Europe, they will be presented in more detail in the following:

Protocol No. 14

Protocol No. 14 makes no radical changes to the judicial control system established by the Convention. The changes relate more to the functioning than to the structure of the system. It is aimed at improving the system, giving the Court the procedural means and flexibility it needs to process all applications in a timely fashion, while allowing it to concentrate on the most important cases which require in-depth examination. The major changes are:

- Decisions in clearly inadmissible cases, currently taken by a committee of three judges, will be taken by a single judge, assisted by non-judicial rapporteurs, in the future.
- Repetitive cases which belong to a series deriving from the same structural defect at the national level will be declared admissible and decided by a committee of three judges, instead of a seven-judge chamber, under a simplified summary procedure.
- An additional admissibility criterion is foreseen so that the Court can declare applications inadmissible in which the applicant has not suffered a significant disadvantage.
- The Committee of Ministers will be empowered to bring proceedings before the Court when a state refuses to comply with a judgment. It will also have a new power to ask the Court for an interpretation of the judgment.

➤ eucrim ID=0603159

Russia Blocks Entry into Force of 14th Protocol

Protocol No. 14 had been signed by all Member States and 45 ratifications had taken place. However, the Protocol will only enter into force when all 46 parties to the Convention have ratified it. At present, Russia is the only Member State which has not yet ratified the Protocol. In December 2006, Russia even voted against the ratification of Protocol No. 14 so that "essential and long-overdue changes to the European Court of Human Rights must be put on hold," as Council of Europe Secretary General Terry Davis stated. Additionally, the European Court of Human Right's new President, Jean-Paul Costa, expressed in January 2007 his concern that the long-awaited Protocol No. 14 was still not in place at the beginning of 2007, as had been hoped. According to him, the Protocol is indispensable and would enable the Court to increase its productivity by at least 25 %. In its reply to Recommendation 1756 (2006) of the Parliamentary Assembly, the Committee of Ministers also stressed in late January 2007 that it was deeply regrettable and a source of serious concern that the Russian Duma has yet not ratified Protocol No. 14, even though all Member States at the Warsaw Summit expressed their determination to ensure that it would. Nevertheless, the Committee of Ministers will continue to give top priority to consolidating the system for the protection of human rights provided by the Convention.

➤ eucrim ID=0603160

Report by Lord Woolf

In December 2005, Lord Woolf, the former Lord Chief Justice of England and Wales, published a report entitled "Review of the Working Methods of the European Court of Human Rights". The review, which was drawn up with the assistance of a small group of experts, seeks to identify administrative measures which could help the Court deal with its increasing workload: 44.100 new applications were lodged in 2004 and the number of cases currently pending before the Court stands at 82.100. The review recommends, among other things, that the Court deal only with properly completed application forms. It further suggests that satellite offices should be established in key countries which produce high numbers of inadmissible applications, that greater use

should be made of national ombudsmen, and that other methods of alternative dispute resolution be encouraged. The review also proposes that the Court should deliver more pilot judgments and then deal summarily with repetitive cases.
➤ eucrim ID=0603161

Report of the Group of Wise Persons

In its final report of November 2006, the Group of Wise Persons proposes making the judicial system of the Convention more flexible by authorising the Committee of Ministers to carry out reforms by way of unanimously adopted resolutions without an amendment to the Convention. It further urges setting up a special judicial filtering body in order to guarantee that the Court is relieved of a large number of cases, enabling it to focus on its essential role. The Group of Wise Persons also paid close attention to the relations between the Court and the national courts and suggests, inter alia, allowing constitutional courts or courts of last instance to submit a request for an opinion on legal questions relating to interpretation of the Convention and the protocols thereto. According to the above-mentioned review by Lord Woolf, it also encouraged the Court to use the "pilot judgment" procedure as much as possible in the future. It additionally analysed which alternative non-judicial or complementary means of resolving disputes existed, such as friendly settlement, mediation, or the extension of the duties of the Commissioner for Human Rights.

The Group of Wise Persons was set up by the Third Council of Europe Summit in Warsaw in May 2005 to draw up a comprehensive strategy for securing the long-term effectiveness of the European Convention on Human Rights and its control mechanisms. After an interim report on its work had already been published in May 2006, the final report was published in November 2006. In March 2007, a colloquy will provide an opportunity to launch a multilateral debate on the Court's future development in the light of the report. Lastly, the 117th ministerial session in May 2007 will seek to agree on the initial outlines of a lasting reform that will enable the system to operate effectively. The entry into force of the above-mentioned Protocol No. 14 is problematic because it is a prerequisite for the reforms proposed by the Group of Wise Persons, meaning that the Russian non-ratification will also constrain the implementation of these reform proposals.
➤ eucrim ID=0603162

Specific Areas of Crime

Corruption

Parliamentary Assembly: New Resolution on Corruption

At its Plenary Session in April 2006, the Parliamentary Assembly adopted the Resolution "Poverty and the fight against corruption in Council of Europe member states" (Res. 1492). It points out that corruption is still very present in certain European countries and a major obstacle to economic and social development as well to the eradication of poverty. Thus, it attaches importance to the rapid drawing up of practical plans of action, not only for managing public finances but also for the administration of accounts in the private sector. It further recommends, inter alia, that the governments of CoE Member States ask their public, local, and regional authorities to simplify bureaucratic procedures, make public authorities more accountable by publishing information concerning public funds and budgets, make it compulsory for them to produce annual accounts, and guarantee the independence of the media. The governments should also introduce efficient systems for processing complaints concerning corruption and increase the independence and transparency of the judicial system.
➤ eucrim ID=0603163

Octopus: Annual Conference 2006

At Octopus Interface 2006, the annual conference of the Octopus programme, entitled "Corruption and Democracy", more than 120 public and private sector experts from 45 countries, international organisations, non-governmental organisations, research institutions, and the media met in Strasbourg, France, from 20 to 21 November 2006 to identify the risks that corruption poses to the future of democracy in Europe, share good practices aimed at preventing corruption from undermining democracy, and determine further efforts that should be undertaken to meet the challenges ahead. At the end of the conference, the participants stressed that political corruption risked posing a serious threat to the future of democracy in Europe. They also pointed out that, in European democracies today, political finances, conflicts of interest, lobbying, and the political influence on the justice systems seemed to carry the greatest risk of corrupting principles and processes of democracy. They feared that the risks of political corruption were likely to increase in the future. Additional information about the Octopus Interface 2005 can be found in eucrim 1-2/2006, p. 21.
➤ eucrim ID=0603164

Octopus: Speech Given by Siim Kallas

Siim Kallas, the Vice-President of the European Commission responsible for Administrative Affairs, Audit and Anti-Fraud, delivered a speech at Octopus Interface 2006 on 21 November 2006 entitled "Transparency against corruption and the perception of corruption", in which he reported on the high level of suspicion of corruption in the EU and especially in the European Commission. He pointed out that this high level of suspicion was not surprising but, to a large extent, related to the unique governance structure and complexity of the EU and to regrettable corruption/fraud cases from the past. However, since 1999, the fight against corruption and fraud within EU institutions and bodies has become an absolute priority for the EU. In this context, Kallas stressed the "European Transparency Initiative" which the Commission initiated in Spring 2005 and which contained a package of many activities ranging from more complete information on the use of EU money to better consultation, from professional ethics in the European Institutions to the framework within which the lobbyists operate. He left no doubt about his conviction that increased transparency would be the key tool in fighting both corruption and the suspicion of corruption.
➤ eucrim ID=0603165

GRECO: New Member States

In the second half of 2006, three states became new members of the Group of States against Corruption (GRECO): Austria on 1 December 2006, Switzerland on 1 July 2006 and the Republic of Montenegro on 6 June 2006. As Secretary General Terry Davis stressed in his speech at the 31st GRECO plenary session in December 2006, the Russian Federation has become GRECO's 44th member on 1 February 2007. As already mentioned in eucrim 1-2/2006, the Ukraine became a member of GRECO on 1 January 2006.

➤ eucrim ID=0603166

GRECO: New Evaluation Country Reports

GRECO has carried out two evaluation rounds so far in which it assesses the compliance of CoE Member States with the anti-corruption framework of the Council of Europe. Evaluation reports, by country, are drafted by gathering information through questionnaires and on-site country visits. The evaluation team then makes recommendations and observations to improve anti-corruption standards in the respective country. In the second half of 2006, six evaluation country reports were published (on Turkey, Moldova, the USA, the Republic of Serbia, Azerbaijan and Cyprus). In January and February 2007, reports on the Republic of Montenegro, Georgia , Bosnia and Herzegovina, and Andorra followed. GRECO also launched the third evaluation round in January 2007.

➤ eucrim ID=0603167

GRECO: New General Activity Report

On 27 June 2006, the 6th General Activity Report of GRECO on the activities in 2005 was published. This report provides details on GRECO's operation during 2005 and cooperation with other international players. In the report, GRECO also presents a number of conclusions emanating from its ongoing Second Evaluation Round and focussing on the organisation, functioning, and supervision of public administration and the status and conduct of public officials. In this context, it is worth mentioning the publication of Eser/Kubiciel entitled "Institutions against Corruption – A Comparative Study of the National Anti-Corruption Strategies reflected by GRECO's First Evaluation Round" which was published in 2005 by the Nomos-Verlag, Baden-Baden, Germany.

➤ eucrim ID=0603168

Ukraine: Project against Corruption

In September 2006, the Ukrainian Minister of Justice officially launched operations of the Ukrainian Project against Corruption (UPAC) in Kyiv, which was already reported in eucrim 1-2/2006. The Council of Europe will enter a partnership with Ukraine's Ministry of Justice and other Ukrainian stakeholder institutions until May 2009 in order to battle corruption by introducing anti-corruption measures and harmonizing the Ukrainian legislation to bring it in line with international standards in the fight against corruption. Therefore, UPAC will provide its Ukrainian counterparts with assistance in the implementation of the recently adopted National Anti-Corruption Concept.

➤ eucrim ID=0603169

The Ukraine: Two Round Table Discussions

In this context, it is also worth noting that, on 18 and 19 October 2006, two round table discussions on the Draft Law on the Judiciary and the Draft Law on the Status of Judges were organised in Kyiv, Ukraine. Corruption-related aspects of the current drafts were discussed in detail.

➤ eucrim ID=0603170

Russia: RUCOLA-2

On 17 October 2006 in Moscow, the State Duma Anti-Corruption Commission, the Council of Europe, and the European Commission presented the joint project called RUCOLA-2, aimed at supporting the State Duma Anti-Corruption Commission in the development of legislative and other measures for the prevention of corruption (see also eucrim 1-2/2006).

➤ eucrim ID=0603171

Money Laundering

Moldova: MOLICO

The start-up conference on the new Project against Corruption, Money Laundering and Terrorist Financing in the Republic of Moldova, named MOLICO, took place on 31 October 2006 in Chisinau, Moldova. As published by the Council of Europe, this co-financed three-year project is one of the most important initiatives ever allocated to the Republic of Moldova by the European Institutions with regard to support, substance, and budget. It will cover a broad range of activities, including strengthening the capacity of law-enforcement bodies and the criminal justice system and the financing of political parties and electoral campaigns (see also eucrim 1-2/2006).

➤ eucrim ID=0603172

Ukraine: MOLI-UA-2

A round table of the MOLI-UA-2 project entitled "Presentation of the legal opinion on the compliance of the draft Ukrainian AML legislation with the 3rd EU Directive and the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism" took place on 12 December 2006 in Kyiv, Ukraine. The main objective was to present and discuss the draft law of the Ukraine on prevention and counteraction to the legalization of the proceeds from crime as well as related laws.

➤ eucrim ID=0603173

Counterfeiting

Conference on Fight against Counterfeit Medicines

The participants at the conference "Europe against Counterfeit Medicines", which took place on 23 and 24 October 2006 in Moscow, Russia, proposed the drafting of a legal instrument to combat "pharmaceutical crime", counterfeit medicines, and other medical products. The conference was organised as part of the Programme of the Chairmanship of the Russian Federation in the Committee of Ministers of the Council of Europe. In the so-called Moscow Declaration, the conference participants stressed that counterfeit medicines represented a serious threat to general health in Council of Europe Member States and worldwide. They regretted that there was no internationally recognized, harmonised legal definition for counterfeit medicines and that they were not covered by a unified international enforcement practice to

fight against them. They expressed their concern with regard to the fact that there was no integrated European instrument to counteract all aspects of international pharmaceutical crime, including the counterfeiting of medicines and other medical products, and to encourage public health protection and safety. Therefore, the participants recommended that an international legal instrument should be developed under the aegis of the Council of Europe which should contain legal definitions of key terms in the field of combating the counterfeiting of medicines and their distribution. This legal instrument should further contain the recognition that acts of counterfeiting medicines and distribution thereof, as well as involvement in such acts, are criminal acts, the establishment of the Convention of respective punishments for these crimes as well as new cooperation between healthcare authorities and law enforcement agencies of the CoE Member States.

➤ eucrim ID=0603174

Procedural Criminal Law

Procedural Safeguards

New Recommendation on the Use of Remand in Custody

At the 947th meeting of the Ministers' Deputies on 27 September 2006, the Committee of Ministers adopted the Recommendation on the use of remand in custody, the conditions under which it takes place, and the provision of safeguards against abuse (Rec(2006)13). It stresses the fundamental importance of the presumption of innocence and the right to the liberty of the person and thus requests that strict limits on the use of remand in custody be set and the use of alternative measures, such as undertakings to appear before a judicial authority as/when required, be encouraged wherever possible. The Committee of Ministers also points out that the remand in custody of persons suspected of an offence should be the exception rather than the norm and specifies in detail the conditions which have to be fulfilled before a person may be remanded in custody. It further recommends that the responsibility for remanding a person in custody, authorising continuation of the measure, and imposing alternative measures be discharged by a judicial authority. The Recommendation makes further detailed requirements, including the assistance of a lawyer, the physical presence of the person concerned, informing the family, etc. It also governs the conditions of remand in custody and recommends, for example, that arrangements be made to enable remand prisoners to continue with necessary medical or dental treatment, that remand prisoners be able to vote in public elections and referendums, and that remand in custody not unduly disrupt the education of children or young persons.

➤ eucrim ID=0603175

Assistance to Crime Victims

In the context of better assistance to crime victims, the Committee of Ministers in June 2006 adopted a new recommendation to the CoE Member States which reflects the specific needs of crime victims (Rec(2006)8). States are urged to ensure the effective recognition of the rights of victims and to assist them. The assistance available should include the provision of medical care, material support, and psychological health services as well as social care and counselling. The Recommendation therefore reflects the role of public service and victim support services and encourages, for instance, states to set up or support free national telephone help lines for victims. It further recommends that states should ensure that victims have access to information which is of relevance to their case and which is necessary for the protection of their interests and the exercise of their rights and that states should ensure that victims have effective access to all civil remedies. Another section is dedicated to state compensation and the question of which compensation should be provided by the state.

➤ eucrim ID=0603176

Ministers of Justice of the CoE Member States addressed the importance of implementing modern measures on victims' assistance at a conference in Yerevan, Armenia, in October 2006. They identified new ways to promote and develop support and assistance to crime victims and to facilitate their access to justice and compensation. Many country reports were presented to enable the exchange of views on the existing standards and practices as well as to identify possible gaps.

➤ eucrim ID=0603177

New Rules for the Supervision of the Execution of Judgments

At the 964th meeting of the Ministers' Deputies on 10 May 2006, the Committee of Ministers adopted new rules for the supervision of the execution of judgments and terms of friendly settlements to govern the exercise of the powers of the Committee of Ministers under Article 46, paragraphs 2 to 5, and Article 39, paragraph 4 of the ECHR. In principle, the Committee of Ministers' supervision shall take place at special human rights meetings where priority shall be given to supervision of the execution of judgments in which the Court has identified a systemic problem. Detailed supervision rules, such as control intervals, are additionally defined. The Committee of Ministers shall further adopt an annual report on its activities which shall be made public.

➤ eucrim ID=0603178

Consultative Council of European Prosecutors – 1st Meeting

The first meeting of the Consultative Council of European Prosecutors to discuss the role of the Public Prosecutor in protecting individuals took place on 6 July 2006 in Moscow, Russia, during the 7th session of the Conference of Prosecutors General in Europe. The participants mainly discussed the duties of the public prosecutor in the criminal justice field towards victims and witnesses and, in particular, towards juveniles, as well as the duties of the public prosecutor towards persons deprived of their liberty.

➤ eucrim ID=0603179

Justice Organisation

Report on European Judicial Systems

On 5 October 2006, the Council of Europe's Commission for the Efficiency of Justice (CEPEJ) brought out its report on the evaluation of European judicial

systems. It gives a comparative description of public spending on the judicial system, the relationship between judicial systems and their users, and the organisation of courts and judicial staff. The report contains detailed information about the budgets affected to the legal systems, the allocation of legal aid, the number of courts in the Member States, the judicial staff, the number of lawyers, the users of the courts, the information technology equipment of the courts, the treatment of criminal and civil cases, the length of proceedings, and the enforcement of court decisions. The report, which was adopted by the CEPEJ in July 2006, presents data from the year 2004.
➤ eucrim ID=0603180

Call for Projects

An in-depth analysis of the report's findings will be carried out in the months ahead. By making its unique database available for use to researchers wishing to benefit from its official scientific support, the CEPEJ invites the European scientific community to work on six specific studies. The CEPEJ will also study other proposals of projects aiming at analysing the results presented in its report.
➤ eucrim ID=0603181

Cooperation

Ministers' Conference: Improving European Cooperation in the Criminal Justice Field

On 9 and 10 November 2006, a high-level conference of the Ministries of Justice and the Interior on the topic of "Improving European Cooperation in the Criminal Justice Field" took place in Moscow, Russia. The participants stressed that they supported the simplification of the workings of the main European Conventions regulating international cooperation in criminal matters and the development of a network of national contact points to facilitate relations between those responsible for international cooperation relating to the fight against terrorism, corruption, and organised crime, the trafficking of human beings, and cybercrime. They also recommended the creation of a database making it easier to access information on the forms that cooperation takes between Member States.
➤ eucrim ID=0603182

South-Eastern Europe: Regional High-Level Meeting

A regional meeting of heads of police and senior officials from south-eastern Europe took place on 21 September 2006 in Sarajevo. It was organised by the Council of Europe within the framework of the CARDS Regional Police Project (CARPO) and, at the same time, the final conference of the CARPO project which was due to finish on 30 September 2006. The meeting reviewed the progress made in implementing the Brijuni Strategy which was adopted by the Ministers of the Interior and Security of south-eastern Europe on 23 September 2005 in Croatia. For more information on this strategy against organised and economic crime and the CARPO project on the whole, please refer to eucrim 1-2/2006, p. 22.
➤ eucrim ID=0603183

South-Eastern Europe: Situation Report on Organised and Economic Crime

On the occasion of the above-mentioned conference, a detailed "Situation Report on Organised and Economic Crime in South-Eastern Europe", which is an update of a 2005 situation report, was also published. It aims at pointing out new developments, threats, analytical gaps, and other organised crime-related issues of concern in south-eastern Europe to help policy-makers in Europe and the region make better informed anti-crime decisions, address measures still outstanding, and enhance public awareness and public participation in strategies against organised and economic crime. Therefore, the report reflects the current situation in all project areas.
➤ eucrim ID=0603184

Ukraine: International Cooperation in Criminal Matters

From 7 to 8 December 2006, an "International Conference on the Implementation of the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters" took place in Kyiv, Ukraine, to support Member States' efforts to ratify and implement the above-mentioned protocol. From 12 to 13 October 2006, a "Conference on Mutual Legal Assistance and Extradition" took place in Sudak, Ukraine. Both events were organised within the UPIC project, which was already presented in eucrim 1-2/2006 (p. 22). The new working plan and calendar of activities for 2007 is now also available on the UPIC homepage.
➤ eucrim ID=0603185

Legislation

Ratifications (Selection)

On 6 February Albania ratified the Money Laundering Convention (ETS No. 198). In January 2007 Moldova ratified the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73); Luxembourg and Portugal ratified the 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). In addition, Portugal ratified the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182). In the second half of 2006, the Netherlands (16 November 2006) and Armenia (12 October 2006) ratified the Convention on Cybercrime (ETS No. 185). The Ukraine (21 December 2006), Armenia (12 October 2006), and Lithuania (12 October 2006) also ratified the Additional Protocol to the Convention on Cybercrime (ETS No. 189). Russia (4 October 2006) ratified the Criminal Law Convention on Corruption (ETS No. 173). Cyprus (21 November 2006) and Latvia (27 July 2006) ratified the Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191).
➤ eucrim ID=0603186

The European Community and Harmonization of the Criminal Law Enforcement of Community Policy

Professor John A.E. Vervaele

I. Introduction

In the spring of 2006, the alarm was sounded in several Member States concerning the (further) European erosion of national criminal law. The direct cause was the judgment of the Grand Chamber of the European Court of Justice in Case C-176/03[1] concerning the harmonization of criminal law penalties in environmental cases, in which the European Community (EC) was, for the first time, considered functionally competent to harmonize the criminal law enforcement of Community policy.[2] The Europeanization of criminal law has been developing steadily since the entry into force of the Maastricht Treaty. Where does this fear of harmonization of criminal law through the first pillar originate? Does it matter that much whether national criminal law is harmonized through Directives or Framework Decisions? Is that not no more than just a Bruxellian institutional issue? The central question addressed in this contribution is: what legal and political consequences may be expected from the Court's judgment?[3]

II. European Integration and Criminal Law – A History of Developments[4]

It is no secret that the EC's founding fathers indeed overlooked the importance of the enforcement of Community law. The EC Treaty does not provide for clear legal basis or assign powers of either direct enforcement by the EC (with the exception of the enforcement of European competition rules), or indirect enforcement of Community law by the Member States. It is mainly thanks to the Court that this autonomy has been somewhat conditioned. Because of this, Member States are bound by the Court's interpretation of the requirements of Article 10 EC (Community loyalty). The Court has established that the Member States have a duty to enforce Community law, whereby they must provide for procedures and penalties that are effective, proportionate, and dissuasive and that offer a degree of protection which is analogous to that offered by the enforcement of provisions of national law having a similar nature and importance (assimilation principle). It is not only the task of legislation to fulfill these requirements; they must also be put into practice in the course of enforcement.[5] In 1992 the Court in its judgment in Case C-240/90[6] recognized that the EC was functionally competent to harmonize measures, including those in the field of punitive sanctions which, without a doubt, fall within the scope of application of the criminal law guarantees of Article 6 ECHR. This landmark judgment finally resolved the controversy surrounding the EC's competence to harmonize administrative (punitive) sanctions. Some 14 years after the ruling, it can be said that the EC has not made considerable use of this power. Quite the contrary is, in fact, the case: it is remarkable that, in many areas of Community law, no initiatives have been taken whatsoever in this direction.

The EC's competence to harmonize national criminal law is obviously a more complex and sensitive issue. From the case law of the ECJ it is abundantly clear that criminal (procedural) law belongs within the sphere of competence of the Member States,[7] but that Community law may impose requirements as to the fulfilment and interpretation of this competence within the framework of the enforcement of Community law. Criminal law must not only be left aside when the rules to be enforced prove to be contrary to Community law (negative integration). Community law also unmistakably establishes requirements which national criminal law enforcement must fulfil if it is applied with the aim of compliance with Community law (positive integration) This duty to enforce in accordance with certain requirements also applies to criminal law if the Member States decide that this is the tool which they will use to enforce Community law.[8]

A foolproof separation of the criminal law policy of the Member States and that of the EC has never existed. Both de iure and de facto, a process of indirect EC harmonization of national criminal law, mainly of special criminal law, has been taking place for decades now. The Community legal order and integration also include the criminal (procedural) law of the Member States, as a result of which the Member States' autonomy is restricted. A model of European integration is not compatible with the restriction of criminal law to national confines, where it would remain out of reach of any Community law influence whatsoever. The key question is, however, whether the EC's competence to harmonize extends far enough to enable the EC to directly oblige the Member States to criminalize violations of Community rules. Is it within the EC's competence to impose requirements as to the nature and severity of the penalty? Does this possible competence also extend to the scope of application *ratione materiae*, *ratione personae* and *rationi loci*, to procedural aspects, to the modalities of application (statute of limitation, dismissal or dropping of charges, etc.)?

For decades now, the Commission and the European Parliament have been attempting to convince the Council to impose a Community obligation on the Member States to enforce EC policy. The Council usually approved the proposals, but only after amending them in such a way that the obligations

were stripped of their criminal law packaging. Any and all references to the criminal law nature of the obligations were systematically deleted. Criminal law prohibitory or mandatory provisions were changed into mere prohibitory or mandatory provisions. Obligations to impose criminal law sanctions were replaced, simply, by sanctions.

During the intergovernmental conference in preparation for the Maastricht Treaty, The Netherlands' attempts to integrate aspects of criminal justice into EC law, including the power of direct harmonization, were doomed to failure. The Luxembourg compromise, now known as the three pillar structure, has organized criminal law cooperation and harmonization into a separate semi-intergovernmental pillar which entered into force as part of the Maastricht Treaty in 1993. With the entry into force of the Treaty of Amsterdam in 1999, the third pillar shed its semi-intergovernmental character and thereby became a full-fledged EU policy area.

III. Criminal Law Cooperation and Criminal Law Harmonization in the EU – A Political Statement

Structuring the third pillar to include the direct legislative competence of the EU in the field of cooperation in criminal matters and criminal law harmonization[9] has not caused the controversy to subside, quite the contrary in fact. After all, the third pillar is a supplementary power that cannot undermine or interfere with the array of EC powers. Both Article 2 and Article 47, in conjunction with Article 29 EU, are clear on this. Whether or not this power exists also does not depend on whether, prior to the EU Treaty's entry into force, any regulation or directive was ever created which imposes a duty to harmonize criminal law. Disuse of a power does not lead to its demise, nor does the entry into force of the EU Treaty. It is not political will which determines legal competence, at least not without amendment of the Treaty. Nevertheless the third criminal law pillar has been defined by many as exclusive, i.e., excluding any criminal law competence within the first pillar.

It is my belief that it was clear from the outset that the political-legal division between the first and the third pillar would culminate in an institutional battle of competence concerning the position of criminal law within the EU. In the case of many of the legislative initiatives in the period between 1993 and 2005, the Commission came to diametrically oppose the Council. Two factors are relevant for the present analysis.

First of all, neither the Commission nor the Member States submitted legislative proposals based on a well thought-out enforcement and criminal law policy. In this sense, the Tampere programme[10] provided insufficient direction. Even in policy areas of far-reaching integration, such as the internal market, the customs union, or the monetary union, there is no final enforcement element. In none of the institutions has a policy plan unfolded to present an integrated vision to address the need for harmonization, to attune prevention and punishment and, regarding the latter issue, to improve the relationship between administrative and criminal law enforcement. The approach has been predominantly ad hoc and eclectic, both in the Council and in the Commission. The lack of any well-considered criminal law policy is also reflected in current initiatives to harmonize criminal law. Why, for instance, does the Commission press for the criminal law harmonization of environmental law and criminal law protection of the financial interests of the EC,[11] but fail to do the same in the field of competition, or fisheries, or the financing of terrorism? Why do the Member States urge for the criminal law harmonization of terrorism, xenophobia, the protection of victims of crime, but not the criminal law harmonization of serious violations of food safety rules, intellectual property infringements, or the financial management of businesses?

Secondly, it is important to form a clearer picture of the institutional legislative skirmishes between the EC and the EU concerning criminal law harmonization. Altogether, three types of legislative conflicts can be distinguished in the period between 1993 and 2005.

The first type may be described as 'warding off'. The Commission submits proposals for criminal law harmonization of Community law which the Council subsequently rejects. At best, the proposal is neutralized and stripped of its criminal law packaging. Here, the Council is applying an old legislative tactic that was also used in the period before the entry into force of the Treaty on European Union.

The second type may be described as 'hijacking', whereby the content of a proposal for a regulation or directive is copied into a proposal for a framework decision or vice versa. The Commission and the Member States take turns to hijack the content of each other's proposals and subsequently package them in a different legal instrument. The clash concerning the harmonization of environmental criminal law is a point in case (framework decision versus directive).[12]

The third type may be termed "cohabitation forcée", whereby two proposals are elaborated alongside each other and in harmony with each other. The substantive provisions and, as the case may be, provisions concerning administrative harmonization are included in a proposal for a directive or a regulation, while the criminal law harmonization aspects are incorporated into a framework decision. A good example, of what is known as the double text approach, concerns environmental pollution from ships, where both proposals[13] were developed by the Commission.[14]

The political stalemate could only be broken by a ruling on the principle from the Court. It had already been evident to the Commission for some time that the Council would continue to claim the third pillar's exclusive rights to criminal law harmonization, even contrary to the opinion of its own Legal Service.[15] The judgment in case C-176/03 is a second landmark ruling concerning the enforcement of Community law as

the Court in this ruling recognized the functional competence of the EC to harmonize the enforcement of Community law by means of criminal law. No less than eleven Member States intervened in the proceedings. Ten Member States[16] supported the position of the Council. The Netherlands was the only Member State to argue in favour of a variegated criminal harmonization competence under EC law.

IV. A Closer Inspection of the ECJ Judgment and Future Criminal Law Harmonization Policy

1. The Commission's View on the Harmonization of Criminal Law Enforcement after Case C-176/03

Commissioner Frattini, responsible for the European Area of Freedom, Security and Justice, is aware that the judgment obliges the Commission – as the driving force behind legislative policy in the EC – to present a consistent, horizontal vision for all policy areas. After consultations between the various Directorate-Generals, the Commission in November 2005 submitted a specific communication[17] to the European Parliament and the Council concerning the implications of the Court's judgment in case C-176/03.

The Commission starts off by analyzing the content and scope of the Court's decision. Article 47 EU provides that EC law has priority over Title VI EU, i.e., the first pillar prevails over the third. The Court further holds that Article 175 EC constitutes a proper legal basis for the matters regulated in Articles 1–7 of the Framework Decision. The Commission subtly points out that Articles 1–7 are criminal law provisions dealing with the definition of offences, the principle of the obligation to impose penalties, the level of penalties, accompanying penalties, and the rules on participation and instigation. The Court goes further than the Advocate General in his Opinion by not only accepting that the EC may oblige the Member States to enforce by means of criminal law, but may also lay down in detail what the arrangements should be. The Commission then turns to the scope of the Court's judgment. The Commission emphasizes that the judgment does not mean that the Court has hereby recognized criminal law enforcement as an area of Community policy. Criminal law enforcement is merely the tailpiece of a substantive policy area. However, the Commission does find that the Court's judgment may potentially impact all policy areas of negative integration (the four freedoms) and positive integration, which might require criminal law to ensure effective enforcement. This test of necessity must be defined functionally, on an area-by-area basis. The necessity test also determines the nature of the criminal law measures to be taken. The Court does not impose any restrictions there. Here, too, the approach is functional. The Commission does not elaborate further, but we may conclude from this that the Commission obviously wishes to leave the door open for the harmonization of aspects of the general part of criminal law or criminal procedural law where necessary. The Commission further indicates its preference for horizontal measures where possible, i.e., transcending specific policy areas. Here, we might think of horizontal criminal law measures in the agricultural sector and the structural funds in connection with fighting EC fraud, or terrorism, or organized crime. The Commission also believes that the judgment puts an end to the double-text approach. From now on, all this can be laid down in one single directive or regulation.

In the second part of the communication, the Commission discusses the consequences of the judgment more specifically. First of all, the Commission indicates that criminal law provisions concerning police and judicial cooperation, including measures on the mutual recognition of judicial decisions and measures based on the principle of availability, fall within the area of competence of the third pillar. This is also true for the harmonization per se of the general part of criminal law or criminal procedural law within the framework of cooperation and mutual recognition. The criminal law harmonization of policy areas that are not part of the EC Treaty, but are nevertheless necessary for the objectives of the Area for Freedom, Security and Justice, must also take place within the third pillar. An interesting point is that, in this second part, the Commission further defines the conditions for criminal law harmonization through the Community under the heading "Consistency of the Union's criminal law policy". The Commission clearly indicates that criminal law harmonization in the EC is only possible if there is a clear need to make the policy in question effective. Furthermore, the requirements of the principles of subsidiarity and proportionality must be met. This means that there is a strict obligation to motivate the necessity. The harmonization may concern the definition of offences, criminal penalties, and also what is termed "other criminal-law measures appropriate to the area concerned".

In the third part of the communication, the Commission discusses the consequences of the Court's judgment for current legislative practice. Here, the Commission distinguishes between secondary legislation, that has already been approved in the Council, and pending files. The Commission considers it necessary to correct legislation in which it has become apparent, after this judgment, that it was adopted or proposed on the wrong legal basis. For the pending files, it is clear that the ordinary legislative procedure applies, allowing the Commission to amend its proposals where necessary. Finally, the Commission annexes a list of adopted secondary legislation and pending proposals which need to be amended in its opinion. The adopted secondary legislation concerns the criminal enforcement of the environment;[18] of the Euro[19] and non-cash means of payment;[20] money laundering, freezing, seizing and confiscation;[21] unauthorized entry, transit and residence;[22] corruption in the private sector;[23] attacks against information systems,[24] and serious ship-source pollution.[25]

In this analysis, the Commission has not yet put all its cards on the table. Notably, no insight is provided into possible proposals for the harmonization of policy. One could imagine, for example, a common agricultural or fisheries policy or finan-

cial services. Moreover, a number of failed proposals, such as that on feed and food controls, are not mentioned. With this communication, the Commission has taken a clear stance and provided an outline for the future. It has also opted to adopt a selective approach, which it also consistently follows in its legislative agenda.[26] However, whether the green light has been given to an avalanche of proposals for Community criminal law remains to be seen. Both the Member States and the Council are still working out their strategies.

2. The Judgment in Case C-176/03: Reception in the Member States and in the JHA Council

Despite the unanimous opinions of the various legal services in the EU organs, including that of the Council itself, the Court judgment has been greeted with amazement and disbelief by many governments. It is hardly surprising that the Court decision was not be embraced by the Member States, given their numerous interventions in the proceedings in favour of the Council. However, the governments have mainly focused their criticism on the Communication of the Commission and introduced this in the JHA Council. In Denmark, the Minister of Justice wasted no time in informing Parliament of the judgment and submitting a reservation.[27] The Minister maintained the view that no legal basis could be found in the EC Treaty, but expressed awareness that the Court judgment is not limited to environmental law. In France, the initiative came from Parliament itself. On 25 January 2006, the European Affairs Commission of the French *Assemblée Nationale* informed the Speaker of the Assemblée.[28] The commission is of the opinion that the Court acted beyond its competence and demonstrated a certain *fédéralisme judiciaire*. The commission also states that it is high time to end the *gouvernement des juges* and restore power to the entities where it belongs, namely the governments of the Member States. The commission therefore proposes applying the bridging provision of Article 42 EU and thereby also install an emergency brake procedure into the European Council.[29]

In the Netherlands, the Interdepartemental Commission on European Law (ICER) has examined the judgment. The ICER[30] considers its 2002 opinion[31] in favor of functional EC competence in criminal matters to be in no need of substantial amendment. The ICER stresses that the judgment impacts all policy areas referred to in Articles 2 and/or 3 EC, i.e., not the areas of employment, social policy, culture and public health, or sensitive issues such as drugs, euthanasia, abortion, and prostitution. The ICER also finds that the answer to the question of the competence to harmonize criminal sanctions has been made insufficiently clear. It remains unclear whether the Community is competent to prescribe specific criminal sanctions and their level. The ICER's opinion was taken over in its entirety in the Cabinet position of April 2006[32] as presented to Parliament.

In January 2006 in Vienna, the JHA Council, during informal consultations, examined the Commission's communication for the first time. The Council is of the opinion that there is no urgency to enact rectifying legislation. Many adopted framework decisions have, by now, been implemented in national law. It also emerged that the Council is not prepared to conclude a transfer agreement in favour of the first pillar. The Commission indicated on the spot that it was prepared to run through the legislative process on a case-by-case basis. The Ministers determined their position during the formal JHA Council of February 2006.[33] It is clear to them that the harmonization of criminal (procedural) law is in principle not a Community competence. Exceptions must be interpreted restrictively. Such exceptions should, moreover, be no more than the tailpiece of detailed Community policy.

The Ministers were also of the opinion that, in the harmonization of criminal law sanctions, the Community must leave room for the Member States to define the requirements of effectiveness and proportionality and thus should not regulate everything in detail and exclusively. Procedurally, it was decided that, in the case of Community proposals with a (partial) criminal law content, the Commission should expressly indicate this to the COREPER. In this way, consultations could be held between the JHA Council and the Community Councils in the areas concerned and the JHA Ministers could ensure the consistency of the Union's criminal law system.[34] The position of the JHA Council is clearly more moderate than the views of some of the national Ministers of Justice. The competence to harmonize, including the harmonization of criminal sanctions and, possibly, aspects of criminal procedural law, is recognized. Reference is also made to a procedure of consultations between the Councils, in the various policy areas, and the JHA Council, rather than a power for the JHA Council, to co-decide.[35]

V. Conclusion

The judgment of the Court in case C-176/03 has formally done away with the legal basis for implementation in national law. It seems highly unlikely that the Member States will shortly have to launch a major legislative operation within the framework of a voluntary transfer from the third to the first pillar. This does not mean that the Court's judgment will not have far-reaching consequences for the Europeanization of criminal law and, therefore, also for the criminal law dimension of European integration. The fact that the obligation for the Member State to achieve criminal law harmonization is not imposed through a directive or a regulation is not a neutral conclusion. Framework decisions require unanimity. Directives and regulations are usually adopted by means of co-decision and qualified majority. This means that the European Parliament is competent to co-decide, resulting in greater democratic legitimacy. Furthermore, as opposed to framework decisions, regulations and unconditional and clear provisions of directives have a direct effect. In the first pillar, the Commission also has many more trumps up its sleeve in order to oblige the Member States to comply with criminal law harmonization. The Commission may start infringement proceedings against a Member State. The Member State may be held financially responsible for non-compliance with enforcement duties and the Member State can

even be fined for failing to comply with Court rulings. The Community approach therefore has many advantages, both in terms of legitimacy and in terms of efficiency.
Is the reproach that the Court has exceeded its competence justified? Is this really an example of a *gouvernement des juges*? Where have we heard this before? The Member States were also united in their outrage when, in 1963 and 1964, the Court, in *Van Gend en Loos* and *Costa Enel*, established the priority and direct effect of Community law as constitutional principles. Since then, however, these principles have been considered the basic pillars upon which European integration rests and it is furthermore generally accepted that European integration would have failed without the autonomy of the Court.

The Court has also taken painstaking care in this recent judgment. It has opted to sit in full chamber and taken its time with the case. In my view, the judgment is consistent with the Court's approach in the past. The Court has never subscribed to the exclusive powers of the Member States or the third pillar in the field of criminal law. The Court does indeed apply an extensive interpretation of the EU Treaty, but has been doing so for decades and by taking the functional approach, namely realizing the objectives of European integration. This approach is not only visible in this judgment, but also, for example, in the field of the financing of terrorism.[36] However, I agree with those who are critical of the judgment that the Court would have done well to provide more extensive reasoning for its decision, which would have prevented a number of present doubts from arising.

First of all, the Court does not expressly discuss the material scope of the judgment. Of course, the Commission will have to provide grounds to demonstrate that the objective in question is essential to European integration and that the harmonization of criminal law is effective and necessary, for instance by guaranteeing food safety, tackling EC fraud, or protecting the Euro. A second problem in connection with the material scope concerns the way in which Articles 135 and 280 EC are worded as regards the exclusion of *the application of national criminal law and the national administration of justice* from the power to take measures. The Court limits itself to observing that these provisions do not stand in the way of criminal law harmonization in environmental matters. However, this has not clarified what the scope of these provisions actually is for possible criminal law harmonization.

It is interesting that the Dutch Council of State in its opinion[37] considers criminal law harmonization to be inherent in Article 280 and that the restrictions mentioned do not stand in the way of Community obligations to criminalize and harmonize definitions of the offence. The principles on which the national criminal justice systems are based, such as the choice whether to prosecute, discretion in sentencing, etc., are excluded. It is also to be hoped that the judgment of the Court in case C-440/05 will shed more light on the harmonization of criminal sanctions. In this case, the Commission, after all, expressly states that the provisions from the challenged framework decision on combating ship-source pollution which concern the type and level of criminal sanctions also fall within the Community's competence.
The discussion concerning the legal interpretation of the judgment is one thing; converting this legal competence into political reality in the Council is another. The Commission has to be careful and spell out very well its criminal policy. Communitarization of criminal law thus does thus not mean the end of administrative enforcement law. The European Commission also attaches great importance to administrative enforcement. Moreover, the duty of criminal law enforcement based on a regulation or a directive does not automatically mean that all cases must also be criminally investigated and prosecuted. The Member States are and remain competent to determine – after thorough consideration – which enforcement system (private law, administrative law, or criminal law) is best used in a given case. The national legislator can thus continue to use models, whereby certain actions can be curtailed both administratively and under criminal law (mix of instruments). Even in the case of a duty to enforce through criminal law, the Member States still retain the power to decide whether to prosecute or not. However, this choice must be based on thorough considerations, including those involving the European interests at stake.

More than ever, the Member States are also required to think about a European criminal policy, both as concerns the enforcement of Community policy and the further definition of the area of freedom, security, and justice. Discussion will have to take place within the Member States concerning the common interest in effective enforcement of Community policy and the internal market, the realization of the common area, and, in turn, the common rule of law guarantees. Criminal law undeniably reflects a part of national legal culture and is therefore a symbol of state sovereignty. In the development of a European integration model based on shared sovereignty, it is only logical that the Member States cooperate in the creation of a common legal culture, including the area of criminal law. The Member States and the European Union need a commonly supported criminal law policy. The Hague programme is too heavily focused on the area of freedom, security, and justice. This programme must be recalibrated as a result of the Court's judgment regarding the insertion of the enforcement of Community law. The Court's judgment also offers a perfect opportunity to re-examine the section on criminal law harmonization in the Constitutional Treaty. Article III-271, for example, offers the perfect basis for an integrated enforcement policy in the EU.[38]

The Court's judgment transcends the institutional debate and forces us to take up the discussion of the position of criminal law within European integration. Instead of exclusively focusing on the *national* protection of criminal law values, it is high time to focus on a *European* agenda of criminal law values. Only in this way can we give substance to mutual trust between the Member Sates and the enforcement bodies and instil faith in the citizen as regards criminal justice in Europe. The object of the debate is no longer whether we want European criminal law, but what we want it for and under which conditions.

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http://www.uu.nl/uupublish/homerechtsgeleer/defaculteit/discipline-groepe/strafrechtwillem/medewerkers/johnvervaele/39964main.html
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[1] Case C-176/03, *Commission v. Council*, judgment of 13 September 2005.
[2] Point 48 of the judgment reads as follows: 'As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (…) However, the last-mentioned finding does not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective'.
[3] For a thorough analysis of the judgment itself, see *S. White*, 'Harmonisation of criminal law under the First Pillar', European Law Review, 31 (2006), pp. 81–92, and *P.-Y. Monjal*, 'Reconnaissance d'une compétence pénale communautaire pour la CJCE', Recueil Dalloz 2005, no. 44, 3064–3067.
[4] For a more detailed analysis, see *J.A.E. Vervaele*, The Europeanisation of Criminal Law and the Criminal Law Dimension of European Integration, in: P. Demaret, I. Govaere & D. Hanf (eds.), 30 Years of European Legal Studies at the College of Europe, Liber Professorum, P.I.E.-Peter Lang, Brussels, 2005, pp. 277–298 and *N. Haekkerup*, Controls & Sanctions in the EU Law, Djoef Publishing, Copenhagen, 2001.
[5] See Case 66/88, *Commission v. Greece*, [1989] ECR 2965 and the Communication from the Commission as a result of this case, OJ C 147/3, 1990.
[6] Case C-240/90, *Germany v. Council and Commission*, [1992] ECR I-5383. For a detailed analysis of the EC harmonization of administrative enforcement, see *J.A.E.Vervaele*, Administrative Sanctioning Powers of and in the Community. Towards a System of European Administrative Sanctions?, in: J.A.E. Vervaele (eds.), Administrative Law Application and Enforcement of Community Law in the Netherlands, Kluwer, Deventer-Boston, 1994, pp. 161–202, http://igitur-archive.library.uu.nl/law/2005-0622-155517/4371.pdf; *J. Schwarze*, 'Rechtsstaatliche Grenzen der gesetzlichen und richterlichen Qualifikation von Verwaltungssanktionen im europäischen Gemeinschaftsrecht', EuZW 2003, 261–269 and *M. Poelemans*, La sanction dans l'ordre juridique communautaire, Bruylant, Bruxelles, 2004.
[7] Case 203/80, Casati, [1981] ECR 2595.
[8] Case 68/88, *Commission v. Greece*, [1989] ECR 2965 and Case C-226/97, Lemmens, [1999] ECR 195.
[9] See Special Issue of Delikt en Delinkwent, 2002, September, Special Issue Panopticon, 2004, no. 1; *G. Corstens/J. Pradel*, European Criminal Law, Dalloz, 2002 and *B. Hecker*, Europäisches Strafrecht, Berlin 2005; *M.S. Groenhuijsen,* 'Criminal Law in the European Union: a Giant Leap or a Small Step?' in: A. Moore (ed.), Police and Judicial Co-operation in the European Union, Cambridge, 2004, pp. 221–243.
[10] Most recently updated by COM(2004) 401.
[11] COM(2001) 272final, OJ C 240 E, 2001.
[12] Framework Decision 2003/80 of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 2003) which was annulled by the Court of Justice and the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, COM(2001), 139 of 13 March 2001, OJ C 180, 2001, as amended by COM(2002) 544, OJ C 020 E, 2003.
[13] Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, OJ L 255/11, 2005 and Council Framework Decision 2005/667 of 12 July 2005 to strengthen the criminal law framework for the enforcement of the law against ship-source pollution, OJ L 255/164, 2005.
[14] Often this involves inter-institutional cooperation between a directorate-general responsible for the specific subject and the directorate-general for the third pillar.
[15] In a number of opinions, amongst other things concerning the criminal enforcement of environmental law, the Council's Legal Service has made clear that EC law provides a legal basis for a limited harmonization of criminal law, restricted to the obligation to criminalize infringements of mandatory and prohibitory provisions and to provide for criminal sanctions. The modalities of the criminal sanctions and other aspects should, according to the Legal Service, be regulated in third-pillar framework decisions. With respect to the proposal for a framework decision on the retention of the traffic data of service providers, the Legal Service of the Council was of the opinion that these matters could only be regulated by an EC instrument. The opinions are confidential.
[16] Denmark, Germany, Geece, Spain, France, Ireland, Portugal, Finland, Sweden and the United Kingdom.
[17] COM(2005) 583 final.
[18] Framework Decision 2003/80 of 27 January 2003 on the protection of the environment through criminal law (OJ L 29, 2003) which was annulled by the Court of Justice and the Proposal for a Directive of the European Parliament and of the Council on the Protection of the Environment through Criminal Law, COM(2001), 139 of 13 March 2001, OJ C 180, 2001, as amended by COM(2002) 544, OJ C 020 E, 2003.
[19] Framework Decision on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the Euro, OJ L 140/1, 2000 as amended by Framework Decision OJ L 329/3, 2001.
[20] Framework Decision combating fraud and counterfeiting of non-cash means of payment, OJ L 149/1, 2001.
[21] Directive 91/308 on prevention of the use of the financial system for the purpose of money laundering, OJ L 166, 1991, meanwhile replaced by Regulation 2005/60 and the Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime, OJ L 182/1, 2001.
[22] Directive 2002/90 defining the facilitation of unauthorized entry, transit and residence, OJ L 328, 2002 and Framework Decision 2002/946 on the strengthening of the penal framework to prevent the facilitation of unauthorized entry, transit and residence, OJ L 328/17, 2002.
[23] Framework Decision 2003/568 on combating corruption in the private sector, OJ L 192/54, 2003.
[24] Framework Decision 2005/222 on attacks against information systems, OJ L 69/67, 2005.
[25] Directive 2005/35 on ship-source pollution and on the introduction of penalties for infringements, OJ L 255, 2005 and Framework Decision 2005/667 to strengthen the criminal-law framework for the enforcement of the law against ship-source pollution, OJ L 255/11.
[26] See the Commission's legislative schedule for 2006 for JHA matters, http://www.statewatch.org/news/index.html.
[27] Memorandum of 13 October 2005, http://www.euo.dk/upload/application/pdf/a16a3e79/2005_sv21.pdf
[28] http://europapoort.eerstekamer.nl/9345000/1/j9vvgy6i0ydh7th/vgbwr4k8ocw2/f=/vh7rdrlf7yxv.pdf
[29] This is the emergency brake procedure provided for in the European Constitutional Treaty in case of criminal law harmonization which poses a threat to essential interests of a Member State.

[30] Report on criminal law and the first pillar II, 2006, end of March 2006, http://europapoort.eerstekamer.nl/9345000/1f/j9vvgy6i0ydh7th/vh61mh1tt9ua.
[31] See section 4 of this contribution.
[32] DIE-402/06, http://europapoort.eerstekamer.nl/9345000/1f/j9vvgy6i0ydh7th/vh61mh1tt9ua.
[33] See document 6466/06 of the Presidency, Procedural consequences of the judgment of the Court of Justice in case C-176/03, 16 February 2006.
[34] Point 3.3.2 of the Hague Programme of 24 November 2005.
[35] Several Ministers had defended this view.
[36] In case T-306/01, Ahmed Ali Yusuf Al Bakaraat – T-315/01, Abdullah Kadi, the Court construes a legal basis in the EC Treaty for the lists of sanctions against organizations and persons who are suspected of being involved in the financing of terrorism, by combining provisions from the EC Treaty with Article 2 EU, the objective of realizing a common foreign and security policy.
[37] Opinion of the Council of State, 31 August 2001, reference no. W03.01.0420/I/A, annex to TK II 2001-2002, 22 112, no. 207. The Cabinet increasingly ánd rightly asks the Council of State for its opinion on European legislative proposals.
[38] *J. Vogel*, 'The European integrated criminal justice system and its constitutional framework', Maastricht Journal of European and Comparative Law, 2005, 125–147.

Case C-176/03 and Options for the Development of a Community Criminal Law

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In case C-176/03[2], the Court tackles the issue of the adoption of criminal law through the first pillar, which should be of particular interest to eucrim readers.
In this dispute, the Commission was supported by the European Parliament, whilst the Council was supported by eleven of the fifteen Member States, in an inter-institutional clash of unprecedented character. There is no doubt that the case is of constitutional importance.
In November 2005, only two months after the judgment, the European Commission issued a Communication on the implications of the Court's judgment.[3] Since then, the French National Assembly has published an Information Report".[4] Meanwhile, the European Commission has made a fresh proposal in its Communication of 10 May 2006 on delivering results for Europe.[5]
By May 2006 at the time of writing, *European Voice* had caught up with the development: "Don't blame ECJ for filling Treaty void".[6] It pointed out that another case was pending before the Court, in which the Commission sought the annulment of a 2004 Common Foreign and Security Policy (CFSP) Council Decision on the spread of small arms in Africa. More disputes over pillar competencies were to be expected. It suggested that the Court, lacking the Constitutional Treaty, would redraw the institutional boundaries.
The following summarises and extends a case note published earlier in 2006 in *European Law Review* on the harmonisation of criminal law under the first pillar.[7] It covers the issues raised by the judgment, the European Commission's reaction to the judgment, the possibilities of applying Article 42 EU, and the possible "spread" of pillar disputes.

I. The Case

The arguments of the two parties and the findings of the Court are summarised below.

1. The Commission's and the European Parliament's Challenge to the Council

The European Commission challenged the Council's choice of Article 34 EU, in conjunction with Articles 29 and 31(e) EU, as the legal basis for Articles 1–7 of Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law (the Framework Decision henceforth).

The Commission argued that, under Article 175 EC, the legislature was competent to require the Member States to prescribe criminal penalties for infringements of Community environmental protection legislation if this was a necessary means of ensuring that the legislation was effective.[8] In support of its argument, it relied on the case law of the Court concerning the duty of loyal cooperation and the principles of effectiveness and equivalence, but also on the fact that first pillar legislation already requires the Member States to bring criminal proceedings or impose restrictions on the types of penalties that those states may impose.[9]

Furthermore, the Commission argued that the Framework Decision should be annulled because it required the Member States to adopt penalties other than criminal penalties, even to choose between criminal and other penalties, which fall within the Community's competence. It also alleged abuse of process, since the Framework Decision had been adopted for reasons of expediency, a majority of Member States having failed to recognise that the Community had the necessary powers to require the Member States to prescribe criminal penalties for environmental offences.[10]
The European Parliament concurred with the Commission's arguments.[11]

2. Main Arguments of the Council and Supporting Member States

The Council and the eleven Member States[12] intervening in the proceedings argued that the Community did not have power to require the Member States to impose criminal penalties in respect of the conduct covered by the Framework Decision. Articles 135 and 280 EC, which expressly reserve to the Member States the application of national criminal law and the administration of justice, confirm this interpretation.[13] It was supported by the observation that the Treaty on European Union devotes a specific title to judicial cooperation in criminal matters. The Commission's position was described as contradictory because it amounted, on the one hand, to claiming that the authors of the EU Treaty and the EC Treaty intended to confer – by implication – competence in criminal matters on the Community and, on the other, to disregarding the fact that the same authors expressly attributed such a competence to the EU.[14]

The Council also argued that the Court has never obliged the Member States to adopt criminal penalties.[15] The principle of assimilation in Commission v Greece[16] requires violations of Community law to be punished in a manner analogous to comparable violations of national law. This means that it is for the Member States to apply whatever sanctions already exist in national law. The Court has not held, either expressly or by implication, that the Community was competent to harmonise the criminal laws applicable in the Member States.

Furthermore, the Council argued that, as far as sanctions were concerned, EU legislation tended to re-state 'effective, proportionate and dissuasive' as found in Commission v Greece. Thus, the Council did not call into question the freedom of Member States to choose between administrative and criminal law.[17]

Whenever the Commission has proposed to the Council that a Community measure having implications for criminal matters should be adopted, the Council has detached the criminal part of that measure so that it may be dealt with in a Framework Decision. Thus, according to the Council, measures combating environmental offences do not fall within Community competence.

3. Findings of the Court

The Court based its findings on Article 47 EU and Article 29 EU. Article 47 EU requires that nothing in the EU Treaty may affect the treaties establishing the European Communities or the subsequent Treaties and Acts modifying or supplementing them. The first paragraph of Article 29 EU also states that a high degree of safety within an area of freedom, security and justice must be attained without prejudice to the powers of the European Community.

It fell within the task of the Court, therefore, to ensure that acts falling within the scope of Title VI of the Treaty on European Union did not encroach upon the powers conferred on the Community by the EC Treaty. In this case, the Court had to ascertain whether Articles 1–7 of the Framework Decision affected the powers of the Community under Article 175 EC, given that the Commission maintained that Articles 1–7 of the Framework Decision could have been adopted under Article 175 EC.[18]

The Court ruled that the protection of the environment constituted one of the essential objectives of the Community, by reference to Article 3(1)(l) EC, Article 6 EC and settled case law[19] and that Articles 174–176 EC contained the framework within which Community environmental policy must be carried out.

Furthermore, measures referred to in Article 175(2) EC implied the involvement of the Community institutions in such diverse areas as fiscal policy, energy policy, or town and country planning policy, where the Community did not always have legislative powers.[20]

The Court found that the choice of a legal basis for a Community measure must rest on objective factors amenable to judicial review, in accordance with settled case law (in particular, the aim and the content of the measure).[21] The Framework Decision clearly had the protection of the environment as its aim. This is due to the fact that the Council was concerned at the rise of environmental offences and their effects, which had been increasingly extending beyond the borders of the States in which the offences were committed, and found that a tough response and concerted actions to protect the environment under criminal law were called for.[22]

The Court recognised that, as a general rule, neither criminal law nor the rules of criminal procedure fell within the Community's competence. However, this did not prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities was an *essential measure*[23] for combating serious environmental offences, from taking measures relating to the criminal law of the Member States, if considered *necessary*[24]in order to ensure that EC rules on environmental protection were fully effective.[25] The Court also found that the Framework Decision left to the Member States the choice of penalties to be applied, as long as they were effective, proportionate and dissuasive. However, from its recitals, it is apparent that the Council had criminal law in mind.

II. The European Commission's Initial Reaction to the Judgment in Case C-176/03

The European Commission responded to the judgment with a Communication in November 2005.[26] It considered that, as a result of the Court's judgment, certain framework decisions were either entirely or partly incorrect, since all or some of their provisions were adopted on an incorrect legal basis. It listed acts adopted and pending proposals requiring amendment.

The list contains instruments relating to the protection of the environment, protection of the EC's financial interests, financial crime (money laundering and corruption), intellectual property, information systems and immigration. It is not clear from the Commission's Communication on what basis the list was compiled and how these policy areas constitute priorities in criminal law terms for the European Union. These issues are briefly reviewed below.

1. Protection of the Environment

The legal instruments listed by the Commission included the Council Framework Decision 2003/80/JHA on the protection of the environment through criminal law (annulled); the Directive on ship source pollution and on the introduction of penalties for infringements; and the Council Framework Decision to strengthen the criminal law framework for the enforcement of the law against ship source pollution. The Commission suggests that the correct legal basis for these instruments is, in fact, Article 175(1) EC and Article 80(2) EC for ship source pollution.

Article 175(1) EC in Title XIX on the Environment provides that the Council – acting in accordance with the procedure referred to in Article 251 and after consulting with the Economic and Social Committee and with the Committee of the Regions – shall decide what action is to be taken by the Community in order to achieve the objectives referred to in Article 174 EC (which relates to the objectives of Community environmental policy). Article 80(2) in Title V of the EC Treaty on transport policy states that the Council may, by a qualified majority, decide whether, to what extent and by what procedure appropriate provisions may be laid down for sea and air transport.

2. Protection of the EC's Financial Interests

The legal instruments listed by the Commission include the Council Framework Decisions on increasing protection by criminal penalties and other sanctions against counterfeiting of the Euro and on combating fraud and counterfeiting of non-cash means of payment; the Proposal for a Directive on the criminal law protection of the Community's financial interests ("PIF Directive"). The European Commission suggests that the correct legal basis for these instruments is, in fact, either Article 123(4) for the protection of the Euro or Article 280(4) EC for the horizontal directive on the protection of the EC's financial interests.

In accordance with Article 123(4) EC, the Council, acting by a qualified majority, may take measures necessary for rapid introduction of the single currency. Article 280(4) EC states that the Council, in accordance with the procedure referred to in Article 251 EC, after consulting the Court of Auditors, shall adopt the necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests of the Community, with a view to affording effective and equivalent protection in the Member States. These measures shall not concern the application of national criminal law or the national administration of justice. In this area, if the Convention and the three protocols were to be annulled, the previously rejected "PIF" Directive could be resurrected, although it must be borne in mind that the last sentence of Article 280(4) EC will continue to place restrictions, notwithstanding the judgment of the Court in case C-176/03.

In several instances, the European Commission has suggested Article 95 EC as a legal basis (see below). Article 95 EC makes it possible to approximate provisions which have as their object the establishment and functioning of the internal market. This article excludes from its ambit fiscal provisions, those relating to the free movement of persons and those relating to the rights and interests of employed persons. However, its ambit is very wide.

3. Financial Crime

The legal instruments on the Commission's list include the Council Directive on prevention of the use of the financial system for the purpose of money laundering; the Council Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime and the Council Framework Decision on combating corruption in the private sector.

The European Commission suggests that the correct legal bases for these instruments are, in fact, Articles 47(2) (for money laundering) and 95 EC (for all). Article 47(2) EC of Title III on free movement of persons, services and capital and its chapter 2 on right of establishment states that

> The Council shall, acting in accordance with the procedure referred to in Article 251, issue directives for the coordination of the provisions laid down by law, regulation or administrative action in the Member States concerning the taking up and pursuit of activities as self employed persons. The Council, acting unanimously throughout the procedure referred to in Article 251, shall decide on directives the implementation of which involves in at least one Member State amendment of the existing principles laid down by laws governing the professions with respect to training and conditions of access for natural persons. In other cases the Council shall act by qualified majority.

4. Intellectual Property

The Commission's list includes Proposals for a Directive on criminal law measures aimed at ensuring the enforcement of intellectual property rights; and for a Council Framework Decision to strengthen the criminal law framework to combat intellectual property offences.

The European Commission suggests that the correct legal basis should be Article 95 EC.

5. Information Systems

As far as the Council Framework Decision on attacks against information systems is concerned, the Commission suggests that the correct legal basis should be Article 95 EC.

6. Immigration Control

The Commission's list includes the Directive defining the facilitation of unauthorised entry, transit and residence and Council Framework Decision on the strengthening of the penal framework to prevent the facilitation of unauthorised entry, transit and residence. The European Commission suggests that the correct legal bases for these instruments are, in fact, Articles 61(a) and 63(3)(b) E C, within Title IV of the E C Treaty on Visas, Asylum, Immigration and other policies related to the free movement of persons.

Article 61(1)(a) EC provides that, in order to progressively establish an area of freedom, security, and justice, the Council shall adopt measures aimed at ensuring the free movement of persons […] in conjunction with directly related flanking measures with respect to external border controls, asylum, and immigration […] and measures to prevent and combat crime in accordance with the provisions of Article 31(e) EU. Article 63(3)(b) E C provides for the adoption of measures concerning illegal immigration and illegal residence, including repatriation of illegal residents.

At this stage, two comments are in order on the proposed legal bases. They all attract qualified majority voting and co-decision. None of the proposed legal bases make direct reference to criminal law, except for Article 61(1)(a) EC, which foresees three types of measures, including measures to prevent and combat crime in accordance with Article 31(2) EU. It is the only first pillar legal basis with an explicit cross-reference to the third pillar.

III. The Process of Communitarisation Under the "Case-by-Case" Option

It seems that the European Commission envisages a process of communitarisation, which would include the following steps:

- Proceedings for annulment of existing third pillar instruments. It is not clear at this stage whether any interim measures should be taken to ensure continuity and to safeguard legitimate expectations.
- Recasting of third pillar instruments into first pillar instruments; or amendment of existing first pillar proposals so as to incorporate third pillar aspects; resurrection of previous first pillar proposals; fusing of existing third pillar and first pillar instruments into one first pillar instrument.
- Presentation of recast first pillar instruments through the legislative procedure.

This seems a lengthy process, without guarantee of success. The "passerelle" (Article 42 EU) is not mentioned in the first Commission document of November 2005, which only deals with the implications of the Court judgment.

Third pillar instruments adopted in the areas mentioned above may already have entered into force in some cases. The issue then arises of whether the Member States should repeal any already existing implementing measure, pending the possible (but by no means certain) adoption of a first pillar instrument. This desire for the right legal basis may possibly produce adverse effects. The situation arguably thwarts legitimate expectations by creating legal uncertainty (or even chaos) in that it lacks a procedure to ensure a smooth transition pending Court proceedings for annulment and recasting into first pillar instruments. However the practical aspects of multiple recasting should not be underestimated.

For example, in the area concerning the protection of the EC's financial interests, the Convention on the Protection of the Financial Interests, its three protocols and all framework decisions relating to the protection of the Euro might be annulled and recast as first pillar instruments. Given that the fifteen "old" Member States have already ratified the so-called PIF Convention, one wonders whether they would be eager to see it annulled and go through a process of recasting, which at best may take several years and at worst may leave the European Union with a legal void in this area should a Directive not have been adopted at the end of the process.

There is no guarantee that, at the end of this long process, a qualified majority of Member States would agree that a first pillar instrument is justified, judging by the fact that eleven Member States supported the Council in case C-176/03 by arguing against the European Commission. The European Commission might seek a bridging mechanism as part of its plan to ensure the continuity of legal effects in the member States.

IV. The French Assembly and "Delivering Results for Europe": Application of Article 42 EU

The French Assembly clearly had reservations about the Commission's proposed approach. First, it argued that it was by no means clear that the Court intended the principle to extend beyond the area of protection of the environment so that it could apply to the four freedoms.

Secondly, the Assembly said it was unclear when effective, proportionate and dissuasive criminal penalties by the competent national authorities would be an *essential measure* considered *necessary* in order to ensure that EC rules are fully effective.

Thirdly, it expressed reservations about limiting the choice of the Member States as to the types of sanctions to be adopted. Whereas previous jurisprudence left the Member States free

to decide on the type of sanctions to be adopted, this new approach would put an obligation on the Member States to imbue particular Community policies with a common criminal law approach.

In a more recent communication[27] to the Council on "Delivering results for Europe", the European Commission , in its chapter on freedom, security and justice stated

> Action and accountability in some areas of policy asking are hindered by the current decision making arrangements, which lead to deadlock and lack of proper democratic scrutiny. Existing Treaty provisions (Articles 42 EU and 67(2) EC) allow for changes to these arrangements, which would improve decision taking in the Council and allow proper democratic scrutiny by the European Parliament; and the enhancement of the role of the Court of Justice.

It went on to add

> The Commission will present and initiative to improve decision taking and accountability in areas such as police and judicial cooperation and legal migration, using the possibilities under the existing treaties.

In the section of the document concerned with subsidiarity, the Commission states

> The Commission wishes to transmit directly all new proposals and consultation papers to national parliaments, inviting them to react so as to improve the process of policy formulation.[28]

The French Assembly had also argued that there was no "Treaty void" and discussed the possibility of applying Article 42 EU. Article 42 EU provides that the Council, acting unanimously on the initiative of the Commission, and after consulting the European Parliament, may decide that action in areas referred to in Article 29 (Provisions on Police and Judicial Cooperation in criminal matters) must fall under Title IV of the Treaty establishing the European Community (visas, asylum, immigration, and other policies related to the free movement of persons).[29]

The French Assembly also argued that this Article 42 ("passerelle" clause) would make it possible to progress in the fight against terrorism and drug trafficking. It did not, however, comment on the practicability of the Article 42 procedure and its likelihood of success. The procedure would entail national parliaments deciding on a transfer of Member States' competence to the first pillar. In some Member States, this may involve a referendum. Should all 25 national parliaments agree, a transfer would then become possible. Several possibilities would then be opened after the entry into force of the Article 42 Decision:

(i) Title IV EC would apply to police and criminal matters
(ii) Title IV would be amended to allow for special rules on ECJ jurisdiction for criminal matters
(iii) A separate set of rules on jurisdiction of the ECJ would apply in accordance with Article 67(2) EC for visas, asylum, immigration and other policies related to the free movement of persons.

Given the outcome of the referendum on constitutional matters in France and in The Netherlands, the adoption of an Article 42 EU Decision might turn out to be a long and difficult road.

V. The (Rejected) Constitutional Alternative

The context of this remarkable and volatile situation is the "no" to a Constitutional Treaty, which would have provided for a single legal framework, adoption by qualified majority and co-decision for criminal and police matters, barring very few exceptions. It would also have provided for national parliaments to be consulted at the onset of the legislative process.

The approach proposed by the European Commission following the judgment is to introduce communitarisation of criminal law without either recourse to Article 42 EU or a formal process for the consultation of national parliaments. The application of Article 42 EU, proposed by the French Assembly and the European Commission in its Communication "Delivering results for Europe", would bring the approach closer to the proposals contained in the rejected Constitutional Treaty, with some important differences. The Constitutional Treaty provides for a qualified majority (no veto) and a consultation of national parliaments. Finally, the Constitutional Treaty proposes a "package" which includes the strengthening of Europol and Eurojust and the possibility of adopting a European Public Prosecutor.

The consultation of national parliaments presented in Article 5 of the Protocol on the application of the principles of subsidiarity and proportionality annexed to the rejected Constitutional Treaty provides that any national parliament may, within six weeks of the date of transmission of the Commission's legislative proposal, send to the President of the European Parliament, the Council of Ministers, and the Commission a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity.
The options are summarised below in tabular form.

Table: Options for Action after Case C-176/03

Options	Keep to status quo: third pillar in Treaty of Nice (House of Lords Report)	Commission proposal to implement judgment in case C-176/03 of November 2005	Implement French Assembly proposal and Commission proposal of May 2006	Constitutional Treaty (theoretical option since Constitutional Treaty has not been adopted)
Initiative and Treaty basis	Initiative shared between Commission and Member States; Title VI	Commission to take Council to ECJ; if successful, Commission to make first pillar proposal	Use of Article 42 EU in Treaty of Nice; if successful, Commission to make first pillar proposal	Use of Articles III 270 to 277; Commission proposal
Procedure	Title VI procedure	Commission to initiate annulment proceedings in ECJ for existing Third Pillar instruments	National parliaments to decide if in agreement with application of Article 42	National Parliaments to be consulted (subsidiarity and proportionality)
Adoption	Proposal for adoption under EU treaty	Proposal for adoption under EC Treaty after Court judgment favourable to Commission, such as C-176/03	Referenda and other consultation mechanisms in Member States	Proposal for adoption under single legal framework of Constitutional Treaty
Voting procedure	Unanimity; EP only consulted	Qualified Majority Co-decision procedure	Unanimity Voting conditions to be determined by national parliaments; could retain unanimity for some of the third pillar matters	Qualified Majority (ordinary procedure), except unanimity for EPP and operational cooperation Co-decision procedure; national parliaments to be consulted: more EP and ECJ involvement
Possible problems	Continuation of status quo after the Court judgment may not be possible if the Commission lodges a large number of annulment proceedings with the ECJ; spread of pillar disputes; legitimate expectations thwarted; weak roles continue for EP and ECJ; Commission and Council to continue to clash; complete polarisation of positions; "double track" approach to continue with first and third pillar instruments adopted in parallel	It might be difficult to get QM (keeping in mind that 13 Member States opposed communitarisation in case 176/03); spread of pillar disputes; legitimate expectations thwarted; no national parliamentary oversight; potentially strong roles for EP and ECJ if successful; generally too many contingencies in this approach; long intermediary period of progressive communitarisation; process can be reversed by the ECJ at any time; no guarantee of continuity	Unanimity; long delays; Existing opt-outs may create problems	There may be no real prospect for "salami slicing" of the relevant part of the Constitutional Treaty; leaving out Articles on Eurojust and Europol may break up the package; Member States may object to QM

Advantages of approach	No immediate change No direct effect Does not preclude "case-by-case" approach	Case-by-case approach until new Treaty is agreed First pillar: direct effect Case-by-case approach may have piecemeal effects	Might satisfy national parliaments wishing to keep unanimity and be consulted First Pillar: direct effect Does not preclude "case-by-case" approach pending procedure	Clear legal basis and legislative procedure; instrument enters into force quickly Direct effect Case-by-case approach not necessary

VI. Discussion: An Era of "Pillar Talk"?

"Pillar disputes" are not new. In 1996 already, the European Parliament Committee on Institutional Affairs commented on the possible overlap between the first and third pillars:

> In theory, the breakdown between first and third pillar seems clear enough. If a problem relates to the completion of the internal market, only the provisions of the EC Treaty applies. Otherwise, the provisions of Title VI are applicable. *However experience has shown that this breakdown does not work*.[30]

The judgment may well herald an era of pillar disputes brought to the European Court of Justice. On 21 February 2005, the European Commission brought an action against the Council requesting the annulment of Council Decision 2004/833/CFSP implementing Joint Action 2002/589/CFSP with a view of a European Union contribution to ECOWAS in the framework of the Moratorium on Small Arms and Light Weapons. The European Commission argued that the Common Foreign and Security Policy (CFSP) Decision was in infringement of Article 47 EU, since it affects Community powers in the field of development aid.

In addition, the European Commission sought a declaration of illegality under Article 241 EC of Council Joint Action 2002/589/CFSP on the same basis and for the same reasons. The European Commission argued that Joint Action 2002/589/CFSP was an act of a general legislative nature on which the CFSP Decision is based and which should be annulled for lack of competence. Title II thereof should be declared inapplicable. Decision 2004/833 deals with the implementation of projects, the allocation of finance from the Community budget and reporting arrangements. It expired on 31 December 2005.

Joint Action 2002/589 sets out the actions to be accomplished in order to combat the destabilising accumulation and spread of small arms and light weapons. Title II deals with the allocation of financial and technical assistance. It will be interesting to see whether the implementation of peace-keeping at the regional level might migrate to the first pillar.

VII. Conclusion

The House of Lords subsequently published a report on the subject of the criminal law competence of the European Community in July 2006. Disputes relating to legal bases are commonplace within the first pillar. These disputes do not usually create legal uncertainty. For example, in case C-178/03, the Court ruled that Regulation 304/2003 concerning the export and import of dangerous chemicals should be annulled but that the effects of that regulation should be maintained until the adoption of a new regulation founded on appropriate legal bases. In case C-176/03, the Court has not ruled that any effect should be maintained pending the adoption of a new, first pillar instrument.

It is somewhat problematic to ask the European Court of Justice to decide on the respective competence of the Member States and the European Commission. It potentially re-draws constitutional boundaries. However we should not be surprised if the European Court of Justice takes on this role. It is not the first time that it has made a judgment of constitutional importance. The involvement of national parliaments is an idea whose time has come and which cannot be overlooked in an enlarged union. Interestingly, neither subsidiarity nor proportionality were discussed in case C-176/03. In fact, the decision of the Court seems unusually noncommittal in that respect. There is a "fin de Traité" flavour to this judgment which, if we needed convincing, implies that the borders between pillars are now so permeable as to render the existing division of competences inoperable.

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[1] The author's views are not intended to reflect the Commission's position.
[2] *Commission v Council* (2005) ECR I 7879.
[3] COM(2005) 583 final.
[4] Assemblée Nationale Française: Rapport d'Information 2829 sur les conséquences de l'arrêt CE la Cour de Justice du 13 septembre 2005 sur les compétences pénales de la Communauté européenne, presented by *Christian Philip*, Deputy, 25 January 2006.
[5] COM(2006) 211.
[6] European Voice, Editorial and Opinion, p. 8, 4–10 May 2006.
[7] *S. White* (2006) 31 ELRV, pp. 81–93.
[8] Paragraph 19 of judgment.
[9] Paragraph 21 of judgment.
[10] Paragraphs 22 and 24 of judgment.
[11] Paragraph 25 of judgment.
[12] Denmark, Germany, Greece, Spain, France, Ireland, The Netherlands, Portugal, Finland, Sweden and the United Kingdom
[13] See paragraphs 26 and 28 of judgment
[14] See paragraph 29 of judgment.
[15] See paragraph 31 of judgment.
[16] Case 68/88 *Commission v Greece* [1989] ECR 2965.
[17] Paragraph 32 of judgment.
[18] Paragraphs 38–40 of judgment.
[19] Paragraphs 41–43 of judgment; also cases 240/83 ADBHU [1985] ECR 531, paragraph 13; 302/86 *Commission v Denmark* [1988] ECR 4607, paragraph 8; C-213/96 Outokumpu [1998] ECR I 1777, paragraph 32.
[20] Paragraph 44 of judgment; also case C-36/98 *Spain v Council* [2001] ECR I 779, paragraph 54.
[21] Paragraph 45 of judgment; Case C-300/89 *Commission v Council* [1991] ECR I 2867 paragraph 10; Case C-336/00 Huber [2002] ECR I 7699, paragraph 30.
[22] Paragraph 46 of judgment
[23] Author's emphasis.
[24] Ibid.
[25] Paragraph 48 of judgment.
[26] COM(2005) 583: Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (Case C-176/03 *Commission v Council*), 24 November 2005.
[27] COM(2006) 211 final, 10.5.2006, op. cit.
[28] P. 9 of COM(2006) 211 final.
[29] See also a discussion of the application of Article 42 TEU in Steve Peers (2006), Transferring the Third Pillar, STATEWATCH analysis.
[30] EP Committee on Institutional Affairs working document on cooperation in the fields of justice and home affairs, 25 January 1996, in: *N. Dorn/S. White* (1997), Beyond "pillars" and "passerelle" debates: the European Union's emerging crime prevention space, Legal Issues of European Integration 1997/1, pp. 79–93.

The Community Competence for a Directive on Criminal Law Protection of the Financial Interests

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I. Introduction and State of Play

In its judgment of 13 September 2005 in case C-176/03 *Commission v Council*[2] relating to the framework decision 2003/80/JHA,[3] the Court refers explicitly to Article 280 paragraph 4 EC Treaty stating that it is not possible to infer from this provision that any harmonisation of criminal law must be ruled out where it is necessary in order to ensure the effectiveness of Community law. Member States had argued that its wording, as that of Article 135 EC Treaty, expressly reserves "the application of national criminal law and the administration of justice" and therefore confirms the lack of any implicit conferral of power to the Community on criminal law.

Article 280 paragraph 4 EC Treaty is indeed of particular interest since the protection of the EC financial interests is at the forefront of the development of a European criminal law. Long before the Court's decision on the Community's competence, the Commission adopted a proposal for a Directive on the criminal law protection of the Community's financial interests.[4] The proposal for this so-called PFI-Directive transforms into Community law essential provisions of the PFI-Instruments[5] dating from 1995 to 1997, all adopted under the EU's third pillar. Most of them entered into force on 17 October 2002, following ratification by the then 15 Member States, except for the second protocol which still needs to be ratified by Italy. None of them has yet been ratified by all 27 Member States.

The European Parliament adopted a legislative resolution on the proposal for the PFI-Directive on 29 November 2001, putting forward 31 amendments in a first reading.[6] Following that, the Commission amended its proposal.[7] However, the Council has still not adopted a Common Position. Thus, the proposal has remained dormant for a number of years without any serious attempt being made to negotiate the proposal. The judgment of 13 September 2005 underpins the Commission's argumentation in favour of this Directive under Article 280 paragraph 4 EC Treaty. The Commission communication on the Court's judgment[8] considers the proposal for a PFI-Directive to be confirmed by the judgment. However, the PFI-Instruments are not directly called into question as a result of the judgment as they had already been adopted before the introduction of Article 280 paragraph 4 EC Treaty.

II. Criminal Law under Article 280 EC Treaty

The judgement in case C-176/03 indicates that the approach to Community competence in criminal law is functional. No distinction is made according to the nature of the criminal law measures. The basis upon which the Community legislature may provide for measures of criminal law is necessary to ensure that Community rules are fully effective.[9]

1. Ensuring the Effectiveness of a Community Anti-Fraud Policy

The objective of effectiveness is at the core of Article 280 paragraph 4 EC Treaty: The Community may adopt the "necessary" measures in the fields of the prevention of and fight against fraud affecting the financial interests of the EC. For the protection of the EC financial interests, national provisions give Community legislation its full effect. These national provisions, including those on criminal offences, must be considered a part of the system for protecting the EC financial interests.

The protection of the EC financial interests is not only an independent Community objective, but, at the same time, a Community policy that reinforces the impact of other Community policies which are implemented through financial means and measures related to the EU budget.[10] In particular, economic policies of the Community only achieve the specific aim of the related Community financing if their circumvention is effectively prevented and, where necessary, prosecuted. From the perspective of ensuring overall effective implementation of EC policies, Article 280 EC Treaty is intrinsically intertwined with other Community activities.

Back in 1993, a comparative penal law study[11] had identified specific instances of incompatibilities and argued that the lack of harmonised definitions and penalties under the various national criminal law systems for certain offences was harmful to the EC financial interests. Effectiveness therefore includes, amongst other things, approximation via Community legislation. In the specific field of combating offences, this implies more than formal legality: Conformity with a European definition of criminal conduct demands that national implementation fully meets the requirement of legal certainty. Offences must be precise, and have foreseeable consequences. The respective provisions must be interpreted strictly, particularly with regard to the prohibition of using analogy in criminal law. The stricter the level of interpretation on the national implementation law, the more explicit the approximating Community provisions need to be. The more explicit the Community provision, the less room for the national legislator. It may be that the only choice left to the national legislator is to introduce a provision which is identical to the Community one. This is the most effective form of approximation as it also allows obstacles to judicial cooperation between the Member States' authorities, which might be caused, for instance, by double criminality, to be overcome where still required.[12]

The judgement in case C-176/03 leaves open whether the Community may include a certain specification of sanctions. It annuls the framework decision in its entirety, insofar going beyond the Commission's request. Consistently applying the concept of effectiveness, in its specific form of effective, proportionate, and dissuasive sanctions,[13] leads to the conclusion that sanctions may possibly be subject to approximation, at least as regards the range and type of penalties. How far the Community legislation may specify objectives regarding sanctions related to criminal conduct due to the "indivisibility" of legal acts will be further explored in pending cases.[14]

2. Achieving Equivalence

Paragraph 4 of Article 280 EC Treaty requires as a further objective that measures must lead to equivalent protection in the Member States. Similar to effectiveness, equivalence implies that at least the incriminating elements describing criminal conduct as well as the related sanctions may be subject to approximation under Community legislation. Equivalence requires that measures at the national level are in place throughout the Community in order to ensure that similar treatment within all national jurisdictions is achieved (as opposed to equal treatment).

The combined effect of equivalence and effectiveness may considerably reduce the degree of discretion by national legislators in implementing a directive. Still, it allows the national legislator to implement Community obligations with due regard to the overall national criminal law system which is in place.[15] Due to their indirect effects, directives fall short of measures which concern "the application of national criminal law."[16]

Equivalent measures to combat fraud may also include general criminal law provisions insofar as they condition the functioning of a "working system". However, this would be the exception. According to the Commission communication, "it follows from the judgment of the Court that those aspects of criminal law and criminal procedure which require a horizontal approach do not in principle fall within the scope of Community law. This would normally be the case for questions linked to general rules of criminal law and criminal procedure as well as those related to police and judicial cooperation in criminal matters."[17] Therefore, although the request for equivalence does not seem to go so far as to allow the Community legislator to oblige Member States to abandon their fundamental system of criminal law, it may require necessary adjustments of specific features to be provided, such as the criminal responsibility of heads of business or the liability of legal entities for criminal conduct.

The Commission communication indicates further that police and judicial cooperation in the broad sense, including measures on the mutual recognition of judicial decisions, fall within the third pillar. However, aspects of what is commonly understood as procedural criminal law, particularly jurisdiction and

limitation periods, may be subject to Community law if measures are needed for an effective and equivalent protection of financial interests, notably within the context of transnational prosecutions.

III. Limits to EC Anti-Fraud Competence in Criminal Law

While effectiveness and equivalence specify the EC law-based objectives which justify Community legislation on criminal law, the necessity requirement and the exception provided for in the last sentence of Paragraph 4 of Article 280 EC Treaty may limit it.

1. Necessity for the Protection of Financial Interests

Although the judgment in case C-176/03 underlines the importance of a necessity test in order to exercise a Community competence,[18] it fails to clarify which elements are to be taken into consideration. Two approaches could be envisaged, an abstract necessity test or a concrete one:

- In the Commission's proposal for the directive, it argued primarily from an *abstract* point of view. The Council act[19] adopting the PFI-Convention confirms that the measures contained in the PFI-Instruments were "necessary […] in such a way as to improve the effectiveness of protection under criminal law of the European Communities' financial interests". Indeed, while the proposal for a PFI-Directive had a positive impact on the speed of ratification and, at present, only the second protocol needs to come into force, enlargement led to the need for accession to the PFI-Instruments by the new Member States. The current system of protection based on conventions creates de facto a situation of different speeds. This is all the more unacceptable as the successive enlargements have had as their effect to give this situation a quasi permanent status. Since entry into force depends on the accession of all of the new Member States, it creates a mixture of different legal situations amongst Member States with respect to the binding effect of the PFI-Instruments in the internal legal order. This situation does not lead to the desired effective and dissuasive penal protection.

- The *concrete necessity* test requires effectively checking whether the objective of protection of the EC financial interests has already been attained in practice by all Member States. The commitment of the Commission to put forward a concrete necessity test is demonstrated by its report on the implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols.[20] The Commission stated that the harmonisation objective had not yet been fully achieved through the PFI-Instruments, since the level of protection is not advanced enough to exclude any risk of leaving unpunished some or deterring all conduct that should be criminalised because it affects the EC financial interests. Therefore, the Commission believes that the PFI-Directive remains necessary. A concrete approach requires a comparative law study of the national systems. This is all the more relevant from the perspective of establishing a European Public Prosecutor's Office for the protection of the financial interests as foreseen in Article III-274 of the Treaty establishing a Constitution for Europe. It can only function efficiently in the context of a fully approximated set of penal law provisions.

2. The Limits Imposed on Matters of "Application of National Criminal Law or the National Administration of Justice"

Even where there is clearly an interest in Community legislation with a direct criminal law impact, the competence granted to the Community in Article 280 EC Treaty is limited in that "[Community] measures shall not concern the application of national criminal law or the national administration of justice." As any exemption needs to be interpreted strictly, it may not be construed as going so far as to concern all aspects of criminal law. At a minimum, rules on judicial cooperation, jurisdiction, and limitation periods may perfectly well be covered under the Community competence. Member States simply apply national criminal law or organise the national administration of justice under their own competence. However, the Member States still remain bound by Article 280 EC Treaty to provide for an effective protection of the EC financial interests, also in procedural and organisational terms.[21]

IV. Outlook: The Scope of the PFI-Directive

The proposal for a PFI-Directive, as submitted by the Commission in 2001, has been a very careful initiative. The proposal is based on the content of the PFI-Instruments and takes over their definitions for criminal offences, a minimum threshold for sanctions as regards fraud – in comparison to the PFI-Instruments, the impact of the proposed provisions on sanctions is reduced – as well as provisions on the liability of legal persons and heads of businesses. The proposal also provides for rules on cooperation between the Member States' authorities and the Commission.

With due regard to the judgment in case C-176/03, it may well be argued that the Community competence under Article 280 paragraph 4 EC Treaty allows everything presently contained in the PFI-Instruments to be covered. According to the Court's functional understanding of Community legislation, it seems feasible that a proposal for a directive could also include provisions on jurisdiction, a more explicit range of sanctions, and an approximation of rules on limitation periods.

It seems more likely that other pieces of Community legislation will progress easily, once the Member States agree to proceed with a proposal for a directive with regard to a key and historic criminal law competence of the Community, designed to underpin the Community's overall effectiveness.

Both the EP and the Commission consider the judgment of 13 September 2005 in case C-176/03 to be a clarification of the

competences of the Community to enact the Directive with criminal law provisions under Article 280 paragraph 4 EC Treaty. In the wake of the judgment, the European Parliament called upon the Council "to abandon its rejectionist stance on strengthened protection for the Community's financial interests through criminal law measures and to move to the first-reading stage".[21]

Following its second implementation report, the Commission will reconsider its views on how to go ahead with initiatives based on Art. 280 EC Treaty in order to increase the protection of the Communities' financial interests by means of criminal law measures.

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[1] The views expressed are purely those of the authors and may not under any circumstances be regarded as stating an official position of the European Commission or the European Anti-Fraud Office (OLAF).
[2] ECR [2005] p. I-7879 paragraph 52.
[3] Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, OJ L 29, 5.2.2003, p. 55.
[4] Proposal for a Directive of the European Parliament and of the Council on the criminal-law protection of the Communities' financial interests, COM (2001) 272 final, OJ C 240E, 28.8.2001, p. 125.
[5] The EU-Convention on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995, p. 49), the Protocol to the Convention on the protection of the European Communities' financial interests (OJ C 313, 23.10.1996, p. 2), the Protocol on the interpretation, by way of preliminary rulings, by the Court of Justice of the European Communities of the Convention on the protection of the European Communities' financial interests (OJ C 151, 20.5.1997, p. 2), and the Second Protocol to the Convention on the protection of the European Communities' financial interests (OJ C 221, 19.7.1997, p. 12).
[6] Opinion of the European Parliament of 29 November 2001, OJ C 153E, 27.6.2002.
[7] Amended proposal for a European Parliament and Council Directive on the criminal-law protection of the Communities' financial interests, COM (2002) 577 final, OJ C 71E, 25.3.2003, p. 1.
[8] Communication from the Commission to the European Parliament and the Council on the implications of the Court's judgment of 13 September 2005 (case C-176/03 *Commission v Council*), COM (2005) 583 final.
[9] Paragraph 48 of the judgment in case C-176/03.
[10] See Judgment of 18 November 1999 in case C-209/97 *Commission v Council*, ECR [1999] p. I-8067 paragraph 33.
[11] *Mireille Delmas-Marty*, Incompatibilities between legal systems and harmonisation measures: Final report of the working party on a comparative study on the protection of the financial interests of the Community, in: European Commission (ed.), The legal protection of the financial interests of the Community: Progress and prospects since the Brussels seminar of 1989, Brussels, 25 and 26 November 1993 [1993] pp. 59–93.
[12] *Anne Weyembergh*, Common Market Law Review 42 (2005) 1574: "Approximation is a condition for smooth judicial cooperation, and especially for mutual recognition."
[13] See Judgment of 21 September 1989 in case 68/88, Greek maize, ECR [1989] p. 2965 paragraph 24.
[14] See the argument of the Commission in its Action brought against the Council on 8 December 2005 as regards Framework Decision 2005/667/JHA, which constitutes criminal law measures necessary to ensure the efficacy of the common transport policy as developed by Directive 2005/35 EC (Pending case C-440/05, OJ C 22, 28.1.2006, p. 10).
[15] See Judgment of 3 May 2005 in joined case C-387/02, C-391/02 and C-403/02, criminal proceedings against *Berlusconi, Adelchi and Dell'Utri and others*, ECR [2005] p. I-3565.
[16] See point III.2 below. For more details on other reasons raised against the possibility of enacting criminal law provisions in a Community Regulation, see *Fromm* in this issue of eucrim.
[17] Paragraph 11 of Communication COM (2005) 583 final.
[18] Paragraph 50 of the Judgment in case C-176/03.
[19] Council Act of 26 July 1995, drawing up the Convention on the protection of the European Communities' financial interests (OJ C 316, 27.11.1995, p. 48).
[20] Report from the Commission – Implementation by Member States of the Convention on the Protection of the European Communities' financial interests and its protocols, Article 10 of the Convention, COM (2004) 709 and the related Commission Staff Working Paper, SEC (2004) 1299 final.
[21] Note, for instance, that Article 10, and even more so Article 280 EC Treaty, require the Member States to ensure in particular that infringements of Community law are also penalised under procedural conditions which are analogous to those applicable to infringements of national law of a similar nature and importance (Judgment of 8 July 1999 in case C-186/98, Criminal proceedings against Nunes and de Matos, ECR [1999] p. I-4883 paragraph 10).The obligations of the Member States to protect the EC financial interests extend to the initiation of any proceedings under administrative, fiscal, criminal or civil law (see Judgment of 14 July 1994 in case C-352/92, Milchwerke Köln/Wuppertal, ECR [1994] p. I-3385 paragraph 23).
[22] Report A6-0185/2006 of 16 May 2006 on protection of the financial interests of the Communities and the fight against fraud – 2004 annual report (2005/2184(INI)) paragraph 74.

Die Frage der Zulässigkeit der Einführung strafrechtlicher Verordnungen des Rates der EG zum Schutz der Finanzinteressen der Europäischen Gemeinschaft

Dr. Ingo E. Fromm

Über die Auswirkungen des Urteils des Europäischen Gerichtshofs vom 13.9.2005 – C-176/03 (Kommission/Rat) – wird derzeit kontrovers diskutiert. Vor allem Gegnern von strafrechtlichen Kompetenzen der EG scheint das Urteil ein Dorn im Auge zu sein und es wird daher von diesen Teilen der Literatur stark kritisiert.[1] Insbesondere wird von diesen Stimmen im Schrifttum befürchtet, dass die EuGH-Entscheidung im Hinblick auf die Kompetenzen der EG im Strafrecht überinterpretiert werde.[2] Es wird gar offen auf die Gefahr hingewiesen, dass sich die Organe der Europäischen Gemeinschaft nunmehr auch das Strafrecht einverleiben könnten,[3] welches seit jeher im Kernbereich der nationalen Souveränität stehe und daher durch die Europäische Gemeinschaft unantastbar sei.

Der Europäische Gerichtshof musste in seiner viel beachteten Entscheidung vom 13.9.2005 darüber entscheiden, ob die Organe der EG derzeit befugt sind, die Mitgliedstaaten zu verpflichten, in einem Rahmenbeschluss aufgeführte Verhaltensweisen zur Bekämpfung der Umweltkriminalität strafrechtlich zu ahnden. In überraschender Klarheit hat sich der Europäische Gerichtshof eindeutig für eine umfassende Kompetenz der Organe der EG zur Harmonisierung des Strafrechts der Mitgliedstaaten ausgesprochen.

Der EuGH hat in seinem Urteil judiziert, dass die Gemeinschaft befugt sei, „Maßnahmen in Bezug auf das Strafrecht der Mitgliedstaaten zu ergreifen, die seiner Meinung nach *erforderlich*[4] sind, um die volle Wirksamkeit der von ihm zum Schutz der Umwelt erlassenen Rechtsnormen zu gewährleisten, wenn die Anwendung wirksamer, verhältnismäßiger und abschreckender Sanktionen durch die zuständigen nationalen Behörden eine zur Bekämpfung schwerer Beeinträchtigungen der Umwelt unerlässliche Maßnahme darstellt“ (EuGH, C-176/03, Rz. 48). Jedenfalls dürften Gemeinschaftsrechtsakte die Strafbarkeit besonders schwerer Beeinträchtigungen der Umwelt regeln, die den Mitgliedstaaten die Wahl der anwendbaren strafrechtlichen Sanktionen überlassen, diese müssten wirksam, angemessen und abschreckend sein.

I. Befugnis der EG zum Erlass kriminalstrafrechtlicher Vorschriften nur unter der Voraussetzung ihrer Erforderlichkeit?

Das Urteil des EuGH vom 13.9.2005 erweckt den Eindruck, als ob sogar die Einführung strafrechtlicher Verordnungen bei entsprechend starken Beeinträchtigungen von Rechtsgütern von Politikbereichen des EG-Vertrages im Einzelfall kompetenzgemäß sein könne. Offenbar steht die Befugnis der Organe der EG nur noch unter der Bedingung der „Erforderlichkeit“.

Eine stillschweigende Kompetenzübertragung über die Materie des Strafrechts hat der Gerichtshof jedenfalls nicht ausgeschlossen (Rz. 27 des Urteils des EuGH vom 13.9.2005). Damit ist das Gericht der Auffassung des Rates sowie der beigetretenen Mitgliedstaaten entgegen getreten. Der Rat hatte argumentiert, für das Strafrecht sei „angesichts der erheblichen Bedeutung des Strafrechts für die Souveränität der Mitgliedstaaten“ eine ausdrückliche Kompetenzzuweisung notwendig. Auch die Tatsache, dass das Strafrecht grundsätzlich ebenso wie das Strafprozessrecht nicht in die Zuständigkeit der Gemeinschaft fällt, spricht nach dem EuGH nicht gegen strafrechtliche Kompetenzen der Organe der EG. So führt das Gericht im darauf folgenden Satz des Urteils aus, dass dieser Umstand den Gemeinschaftsgesetzgeber nicht hindern könne, Maßnahmen in Bezug auf das Strafrecht der EG-Staaten zu ergreifen, die seiner Meinung nach erforderlich sind. Ferner trägt nach Auffassung des Europäischen Gerichtshofs das vom Rat vorgebrachte Argument, strafrechtliche Kompetenzen seien der Europäischen Union (Art. 29, 30, 31 I lit.-e EU) vorbehalten, nicht. Da sowohl die Ausführungen des Gerichts zum Verhältnis der ersten zur dritten „Säule“ als auch zur Frage, ob strafrechtliche Kompetenzen stillschweigend auf die Organe der EG übertragen werden könnten, nicht speziell die europäische Umweltpolitik betrafen, sondern seit jeher gegen strafrechtliche Kompetenzen der EG eingewendet werden, muss gefragt werden, ob die Entscheidung des EuGH auf andere Politikbereiche transferiert werden kann.

II. Transfer der Rechtsprechung des EuGH auf die finanziellen Interessen der EG

Besonders kontrovers wird die Zulässigkeit strafrechtlicher Kompetenzen der EG im Bereich der finanziellen Interessen der EG diskutiert.[5] Mit dem Amsterdamer Vertrag wurde eine eigene Ermächtigungsgrundlage zum Schutz ihres Budgets in den Vertrag zur Gründung der Europäischen Gemeinschaft eingefügt: Art. 280 IV 1 EG-Vertrag erlaubt es dem Rat, zur Gewährleistung eines effektiven und gleichwertigen Schutzes in den Mitgliedstaaten gemäß dem Verfahren des Art. 251 nach Anhörung des Rechnungshofs die erforderlichen Maßnahmen zur Verhütung und Bekämpfung von Betrügereien, die sich

gegen die finanziellen Interessen der Gemeinschaft richten, zu beschließen. Für eine Übertragung der Rechtsprechung des EuGH zu strafrechtlichen Kompetenzen der EG-Organe auf die Finanzinteressen der EG spricht schon die ausdrückliche Argumentation des Gerichts mit der Unberührtheitsklausel des Art. 280 IV 2 EG-Vertrag. In Art. 280 IV 2 des EG-Vertrages heißt es: „Die Anwendung des Strafrechts der Mitgliedstaaten und ihre Strafrechtspflege bleibt von diesen Maßnahmen unberührt." Hierzu hat das Gericht ausgeführt: „Dass die Art. 135 EG und 280 IV EG die Anwendung des Strafrechts und des Strafverfolgungsrechts in den Bereichen der Zusammenarbeit im Zollwesen und der Bekämpfung der gegen die finanziellen Interessen der Gemeinschaft gerichteten Handlungen den Mitgliedstaaten vorbehalten, steht dem nicht entgegen. Diesen Vorschriften lässt sich nämlich nicht entnehmen, dass im Rahmen der Durchführung der Umweltpolitik jede strafrechtliche Harmonisierung, und sei sie auch so begrenzt wie die des Rahmenbeschlusses, unzulässig wäre, selbst wenn sie zur Sicherstellung der Wirksamkeit des Gemeinschaftsrechts erforderlich ist."

III. Das Interesse an der heiklen Frage der Strafrechtskompetenz der EG zum Schutz des Haushalts vor Betrügereien

Das akute Interesse an strafrechtlichen Verordnungen der EG für den Schutz ihrer finanziellen Interessen beruht auf dem starken Bedarf hiernach: Will die Europäische Gemeinschaft infolge des enormen Schädigungsausmaßes nicht weiter an Glaubwürdigkeit verlieren, muss der EG-Haushalt – endlich – effektiv geschützt werden. Um Herr der Lage zu werden und die hohe kriminelle Anziehungskraft dieses Bereichs zu beenden, muss aus Abschreckungsgründen auch zu kriminalstrafrechtlichen Maßnahmen gegriffen werden.

Die Mitgliedstaaten konnten durch ihre Strafgesetzbücher den Schutz der Finanzinteressen der EG nicht effektiv gewährleisten. Daher sollte die EG dazu übergehen, ihre finanziellen Interessen selbst durch unmittelbar anwendbare Rechtsvorschriften zu schützen. Selbst wenn sich die Organe der Europäischen Gemeinschaft nämlich entschließen, vermehrt Gebrauch von ihrer Befugnis zu machen, Richtlinien zur Gewährleistung eines gleichwertigen strafrechtlichen Schutzes des Gemeinschaftshaushalts zu erlassen, so wäre dies zugegebenermaßen ein gangbarer Weg, um den fehlenden politischen Willen der Mitgliedstaaten, die Rechtsangleichung auf dem Gebiet ihres eigenen Strafrechts zu fördern, zu bekämpfen. In diesem Falle wäre es nämlich möglich, die EG-Staaten zur Durchsetzung der Gemeinschaftsrechtsordnung durch Einleitung von Vertragsverletzungsverfahren gemäß Art. 226 ff. EG dazu zu zwingen, die sekundärrechtlichen Richtlinien zur einheitlichen Strafbarkeit in ihre nationalen Gesetze zu transformieren.

Die sich am fehlenden Willen zur Umsetzung von Rechtsakten zur Betrugsbekämpfung wiederspiegelnde mangelnde Unterstützung der Mitgliedstaaten, die sich auch im Rahmen der „dritten Säule" ihrer großen Verantwortung lange nicht bewusst geworden sind,[6] ist jedoch nur *ein* Problem des effektiven Schutzes der Gemeinschaftsfinanzen. Selbst wenn es gelingen würde, einzelne Vorschriften der einzelstaatlichen Strafgesetzbücher zu vereinheitlichen, könnten punktuelle rechtsharmonisierende Maßnahmen bei realistischer Betrachtung nicht die uneinheitliche Bestrafung von Betrügern verhindern, da die Strafbarkeit einer Person immer noch von allgemeinen Regeln und den Strafverfahrensrechten, die sich höchst unterschiedlich gestalten, mit beeinflusst wird.[7] Zum anderen gerät das Ziel einer gleichmäßigen Sanktionierung dadurch in Gefahr, dass die EG-Staaten bei einem hinreichenden Umsetzungsspielraum selbst entscheiden können, wie sie der Richtlinie nachkommen.[8] Schließlich sind Richtlinien nur hinsichtlich des zu erreichenden Ziels für die Mitgliedstaaten verbindlich (Art. 249 III EG).

Da Harmonisierungsbemühungen aus diesen Gründen nicht per se erstrebenswert sind, wird die Diskussion um die Reichweite der neuen Ermächtigungsgrundlage des Art. 280 IV EG davon bestimmt, ob die dem Rat verliehene Befugnis „zur Verhütung und Bekämpfung von Betrügereien durch erforderliche Maßnahmen" künftig sogar die Kompetenz zur Statuierung unmittelbar anwendbarer strafrechtlicher Vorschriften im Verordnungswege beinhaltet.

Dass es sich hierbei keineswegs um eine Phantomfragestellung handelt, beweist der Umstand, dass momentan bereits heftig und kontrovers über die Frage diskutiert wird,[9] ob es möglich ist, rechtspolitische Vorschläge, wie das „Corpus Juris der strafrechtlichen Regelungen zum Schutz der finanziellen Interessen der Europäischen Union"[10], in geltendes Gemeinschaftsrecht umzusetzen. Zwar ist die Frage, *wie* das „Corpus Juris" in Kraft gesetzt werden kann, von den Verfassern des Projekts offen gelassen worden. Das Europäische Parlament, welches zu dieser Studie den Auftrag erteilt hatte, hat die Kommission aber bereits aufgefordert, die Möglichkeit der Umsetzung einzelner Rechtsvorschriften zu prüfen.[11] Sollte der Weg einer gemeinschaftlichen Verordnung gewählt werden, wie vom Europäischen Parlament in der „Empfehlung 1" der „Entschließung des Parlaments an die Kommission zur Einführung eines strafrechtlichen Schutzes der finanziellen Interessen der Union"[12] sowie vom Überwachungsausschuss in der „Stellungnahme 5/99 zu den Auswirkungen einer möglichen Umsetzung des Corpus Juris"[13] vorgeschlagen – wobei Art. 280 IV EG als geeignete Rechtsgrundlage angesehen wird – so würde aufgrund der darin enthaltenen echten Strafvorschriften ein supranationales Kriminalstrafrecht geschaffen.

Ferner schlug die Kommission im Rahmen der Vertragsverhandlungen des Vertrags von Nizza bereits einen neuen „Artikel 280-a" vor.[14] Auf Grundlage des geplanten Artikels 280-a sollten auch originäre Straftatbestände festgelegt werden. Dieser Vorschlag setzte sich jedoch nicht durch, und es verblieb bei der Version des Art. 280 EG-Vertrag in der Version von Amsterdam.

IV. Das kompetenzbegrenzende Argument „nulla poena sine lege parlamentaria"

Bedauerlicherweise hat sich der EuGH in seiner grundlegenden Entscheidung vom 13.9.2005 nicht mit dem gewichtigsten, gegen eine Strafrechtskompetenz vorgebrachte Argument befasst, Strafrechtsbestimmungen könnten aufgrund des Demokratiedefizits innerhalb der Europäischen Gemeinschaft nicht ausreichend demokratisch legitimiert werden.[15]

1. Bisherige Auffassung des Europäischen Gerichtshofs

Zuletzt hat der Gerichtshof der Europäischen Gemeinschaft in seiner Entscheidung in den verbundenen Rechtssachen C-164/97 und C-165/97, die nicht strafrechtliche Kompetenzen der EG betraf, ausgeführt, dass bei zwei grundsätzlich in Betracht kommenden Rechtsgrundlagen die „demokratiefreundlichste Kompetenzgrundlage" anwendbar sei, also diejenige, die das Europäische Parlament am meisten beteiligt.[16] Während der Rat zwei Änderungsverordnungen zum Schutz der Umwelt auf Art. 43 EGV gestützt hatte, plädierte das Europäische Parlament für die Heranziehung einer Ermächtigungsgrundlage, die zur Anwendung des Zusammenarbeitsverfahrens führt, also eines Rechtsetzungsverfahrens, welches das Parlament im Verhältnis zum bloßen Anhörungsrecht wesentlich stärker beteiligt.

Wenn der Europäische Gerichtshof aus rein demokratischen Erwägungen in der verbundenen Rechtssache („Parlament ./. Rat") bei sich partiell überschneidenden Kompetenznormen jeweils das Entscheidungsverfahren, das für das Volksvertretungsorgan auf europäischer Ebene günstiger ist, für einschlägig erachtet, so scheint es nach der Ansicht des EuGH in der Konsequenz des Demokratieprinzips zu liegen, dass ein bestimmtes Beteiligungsrecht dieses Rechtsetzungsorgans in einzelnen Fällen zu gewährleisten ist. Bei sich teilweise deckenden Kompetenzgrundlagen gibt sich der Gerichtshof nicht mit einem Mindestmaß demokratischer Legitimierung von Rechtsakten durch das jeweils schwächere Mitwirkungsrecht des Europäischen Parlaments zufrieden, sondern wendet stets das demokratischere Verfahren an. Für bestimmte Materien des Europarechts hält der Europäische Gerichtshof demnach die hinreichende Mitwirkung eines speziellen EG-Organs für notwendig, um der Norm die erforderliche demokratische Legitimität zu verleihen. Genau diese Sichtweise ist wesentlicher Inhalt des „nullum crimen sine lege parlamentaria"-Prinzips.

2. Der Parlamentsvorbehalt für kriminalstrafrechtliche Vorschriften

Die entscheidende kompetenzeinschränkende Auslegung des Art. 280 IV 1 EG ergibt sich demnach aus demokratischen Gesichtspunkten. Für kriminalstrafrechtliche Vorschriften ist ein Parlamentsvorbehalt („nulla poena sine lege parlamentaria") zu fordern.[17] Derartige Überlegungen resultieren aus der Tatsache, dass in einer Demokratie stets eine ununterbrochene Legitimationskette vorausgesetzt wird, bei der die politische Herrschaftsausübung auf einen Willen oder eine Entscheidung des Volkes zurückzuführen ist.[18] Es gehört zu den Grundvoraussetzungen der Demokratie, dass alle Gewalt vom Volke ausgeht. Bei Gesetzen, die mit einer hohen Belastung für den Einzelnen verbunden sind, hält man aber die Existenz einer Legitimationskette vom „Regierten auf den Regierenden"[19] nicht für ausreichend, gefordert werden darüber hinaus gehende, besonders strenge Legitimationsanforderungen.[20] Um so tiefer sich die Intensität eines hoheitlichen Eingriffs für das Volk darstellen kann, je direkter ist das Handeln des Hoheitsträgers auch durch das Volk zu legitimieren.

Gerade für die Normierung kriminalstrafrechtlicher Sanktionen, die die Spitze der Eingriffsschärfe für den Bürger darstellen und folgerichtig eine Ausnahmestellung in den einzelstaatlichen Rechtssystemen der Mitgliedstaaten für sich in Anspruch nehmen,[21] bedarf es demnach einer unmittelbaren Legitimation,[22] die nur durch ein Parlamentsgesetz gewährleistet ist,[23] vorausgesetzt das jeweils entscheidungsbefugte Parlament würde selbst den elementaren Prinzipien der Demokratie genügen. Derart hochgesteckte Anforderungen hinsichtlich der Legitimation von Strafgesetzen finden sich in den Rechtsordnungen der Mitgliedstaaten wieder. Nach Art. 6 II EU finden die allgemeinen Grundsätze des Gemeinschaftsrechts auf der Grundlage der mitgliedstaatlichen Verfassungsüberlieferungen Berücksichtigung. Nach der gängigen Praxis des Europäischen Gerichtshofes werden allgemeine Rechtsgrundsätze nicht nur zur Ausrichtung des Handelns der Organe der Gemeinschaft herangezogen, sondern auch zur Auslegung von Primärrecht selbst.[24] Es verbietet sich ein Verständnis einer Kompetenzgrundlage, die die Grundprinzipien in ihr Gegenteil verkehren würde und gar außer Kraft setzten.

Demokratische Überlegungen zwingen also dazu, von einem allgemeinen Rechtsgrundsatz des Gemeinschaftsrechts des Inhalts auszugehen, dass mit der zunehmenden Intensität eines Rechtsaktes auch das Ausmaß der demokratischen Legitimierung zuzunehmen hat. Für eine Kompetenz zur Normierung von Kriminalstrafrecht und damit von Bestimmungen, die die Spitze der Eingriffsschwere darstellen, hat dies unmittelbar zur Folge, dass nur ein die europäischen Bürger unmittelbar repräsentierendes, selbst den Grunderfordernissen der Demokratie gehorchendes Organ befugt sein kann, dahin gehende Rechtsakte zu statuieren. Es besteht also ein ungeschriebener „nulla poena sine lege parlamentaria"-Grundsatz mit dem Inhalt, dass Kriminalstrafgesetze nur durch ein Gesetz des Parlaments selbst, oder nachdem dasselbe im Vorhinein inhaltlich ausreichend darauf einwirken konnte, beschlossen werden dürfen.

Bei der genauen Beurteilung des noch ausreichenden Grades des Mitwirkungsumfangs des Europäischen Parlaments ist als Maßstab oder Hilfsmittel die Einflussmöglichkeit der nationalen Parlamente der Mitgliedstaaten bei der Strafgesetzgebung heranzuziehen, da andernfalls eine partielle Übertragung der Gesetzgebungszuständigkeit an die EG für strafrechtliche Belange zwangsläufig mit dem unerträglichen Umstand verbunden wäre, dass auf europäischer Ebene die demokratische

Legitimation im Vergleich zu gesetzgeberischen Akten der Nationalstaaten über diese Materie schwächer ausgeprägt wäre und demnach abnehmen würde. Ein deutliches Zurückbleiben hinter diesen hochgesteckten Anforderungen führte dazu, dass auf europäischer Ebene dem „nulla poena sine lege parlamentaria"-Grundsatz nicht in hinreichendem Umfang Rechnung getragen würde. Um dieses Ergebnis zu verhindern, müssen die Ermächtigungsgrundlagen des EG-Vertrages daher einschränkend ausgelegt werden.

Auch nach Inkrafttreten des Vertrags von Amsterdam liegen echte Kriminalstrafgesetze zum Schutz der EG-Finanzinteressen daher außerhalb des Kompetenzbereichs der Organe der Europäischen Gemeinschaft. Eine einschränkende Interpretation von Ermächtigungsgrundlagen hat vor diesem Hintergrund im Hinblick auf Gesetze zu erfolgen, die eine besondere Eingriffsintensität aufweisen.

3. Das „äußere Demokratiedefizit"

Den besonders hochgesteckten Legitimitätsanforderungen können jedoch weder das Europäische Parlament noch die übrigen Rechtsetzungsorgane auf EG-Ebene derzeit genügen. Zwar wurden durch den Amsterdamer Vertrag bedeutende Fortschritte zum Abbau des „äußeren Demokratiedefizits"[25] durch die Kompetenzausweitung des einzig unmittelbar vom Bürger gewählten Organs erzielt. Durch die Ausdehnung des – das Europäische Parlament am intensivsten in die Legislative einbindenden – Mitentscheidungsverfahrens auf Maßnahmen des Art. 280 IV 1 EG wäre eine Beteiligung eines Parlaments an Strafgesetzen zwar prinzipiell gegeben. Die Mindesterfordernisse in verfahrensrechtlicher Hinsicht für eine demokratische Legitimation von Strafgesetzen, die die Lehre vom „nulla poena sine lege parlamentaria" fordert, sind aber gleichwohl unterschritten: Es überwiegt weiterhin die dominierende Stellung des allenfalls mittelbar demokratisch legitimierten Rates bei der Rechtsetzung. Die Rolle des Europäischen Parlaments im Mitentscheidungsverfahren kann zum anderen noch nicht mit den Aufgaben, die Volksvertretungen üblicherweise besitzen, verglichen werden. Demnach wäre eine Strafrechtskompetenz der EG direkt damit verbunden, dass ein günstigstenfalls äußerst schwach demokratisch legitimiertes Organ, der Rat als schwerpunktmäßig zuständige Institution, die gesetzgeberische Entscheidung über diese Belange einer direkt legitimierten Volksvertretung, den nationalen Parlamenten, abnehmen könnte. Eine auch nur partielle Kompetenzübertragung hätte demnach unmittelbar eine Zuständigkeitsverschiebung der Legislative auf ein Organ der Exekutive für Materien zur Folge, die nach den Grundüberzeugungen der parlamentarischen Demokratien in den Kernbereich der Rechte des Parlaments fallen.

Auch wenn die Entscheidung der Vertragsautoren, den Rechnungshof nun bei Maßnahmen im Rahmen des Art. 280 IV 1 EG anzuhören, fachlich als Bereicherung gelobt werden muss, kann sie die Legitimation von Rechtsakten nicht stärken: Die Mitglieder dieses Organs werden vom Rat nach Anhörung des Europäischen Parlaments einstimmig nominiert (Art. 247 III UA 1 EG), womit die demokratische Legitimation des Rechnungshofes äußerst schwach und allenfalls mehrfach indirekt ist.

4. Das Demokratiedefizit struktureller Natur

Die im Vertrag von Amsterdam vorgenommene Verlagerung von Kompetenzen zu Gunsten des Europäischen Parlaments, die auch als „Legitimation durch Verfahren"[26] bezeichnet wird, kann jedoch nicht über die internen Defizite des Parlaments selbst hinwegtäuschen, die um vieles schwerer wiegen. Das Europäische Parlament genügt nämlich nicht nur wegen seines externen Demokratiedefizits den Mindestlegitimierungsanforderungen nicht, die an Strafgesetze zu stellen sind. Das Organ läuft ferner sowohl hinsichtlich seiner Zusammensetzung als auch seines Zustandekommens den Grunderfordernissen der Demokratie zuwider. Man bezeichnet dieses zusätzlich hinzutretende Demokratiedefizit als struktureller Natur.

Die Verstöße gegen die Wahlrechtsgleichheit, die die Wahlentscheidung der Bürger Europas erheblich verzerren, sowie die zunehmende Bürgerferne der Europaabgeordneten schwächen die Legitimation des Parlaments.

Einem bezüglich seiner Organisation den Grundanforderungen der Verfassungsprinzipien der Mitgliedsländer nicht gerecht werdenden Organ kann guten Gewissens keine Kompetenz für Rechtsakte zugestanden werden, die die Freiheit des Einzelnen gravierend einschränken können. Maßnahmen kriminalstrafrechtlicher Natur können aufgrund des andauernden „doppelten" Demokratiedefizits nicht im Rahmen des Art. 280 IV EG ergehen.

V. Fazit

Dass der EuGH in seinem Urteil von September 2005 das Demokratiedefizit nicht thematisiert oder gar gegen eine strafrechtliche Richtlinienkompetenz angeführt hat, mag auf den ersten Blick Verwirrung hervorgerufen haben. Im Grundsatz hat der EuGH vor allem in den Rechtssachen C-164/97 und C-165/97 nämlich das Erfordernis besonders hochgesteckter demokratischer Anforderungen, die in einer umfassenden Mitwirkungsbefugnis einer unmittelbar legitimierten europäischen Institution bei der Rechtsetzung bestehen, anerkannt.

Dass der EuGH in seinem Urteil vom 13.9.2005 keine kompetenzbegrenzende Auslegung aus demokratischen Gesichtspunkten vorgenommen hat, erklärt sich jedoch damit, dass die innerstaatliche Strafnorm bei Richtlinien der EG – rein formell – von den unmittelbar gewählten nationalen Parlamenten demokratisch legitimiert wird. Bei strafrechtlichen Verordnungen der EG zum Schutz der Finanzinteressen der EG stellt sich dies anders dar. Dahin gehende unmittelbar anwendbare Vorschriften würden gegen den Grundsatz „nulla poena sine lege parlamentaria" verstoßen.

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[2] *Satzger*, Journal for European Criminal Law, Heft 1, 2006, S. 27 ff.
[3] *Hefendehl*, ZIS 2006, S. 161 (167).
[4] Hervorhebung des Verfassers.
[5] *Fromm*, Der strafrechtliche Schutz der Finanzinteressen der EG, Diss., 2004.
[6] Betrugsbekämpfung, Jahresbericht der Kommission 1997, S. 4, 9; *Tiedemann*, AGON 1997, Nr. 17, S. 12.
[7] *Kühl*, ZStW 109 (1997), S. 777 (784); *Zieschang*, ZStW 113 (2001), S. 255 (268).
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[11] Entschließung des Europäischen Parlaments zur Schaffung eines europäischen Rechtsraums zum Schutz der finanziellen Interessen der Europäischen Union vor internationaler Kriminalität (B4-0457/97)", ABl. 1997, C 200, S. 158.
[12] EP Dok. A 5-0002/2000, S. 1 ff.
[13] Tätigkeitsbericht: Juli 1999–Juli 2000 vom 25.8.2000, S. 60 ff. (DV/420021DE.doc).
[14] Ergänzender Beitrag der Kommission zur Regierungskonferenz über die institutionellen Reformen Mitteilung der Kommission, KOM (2000) 608 endg.
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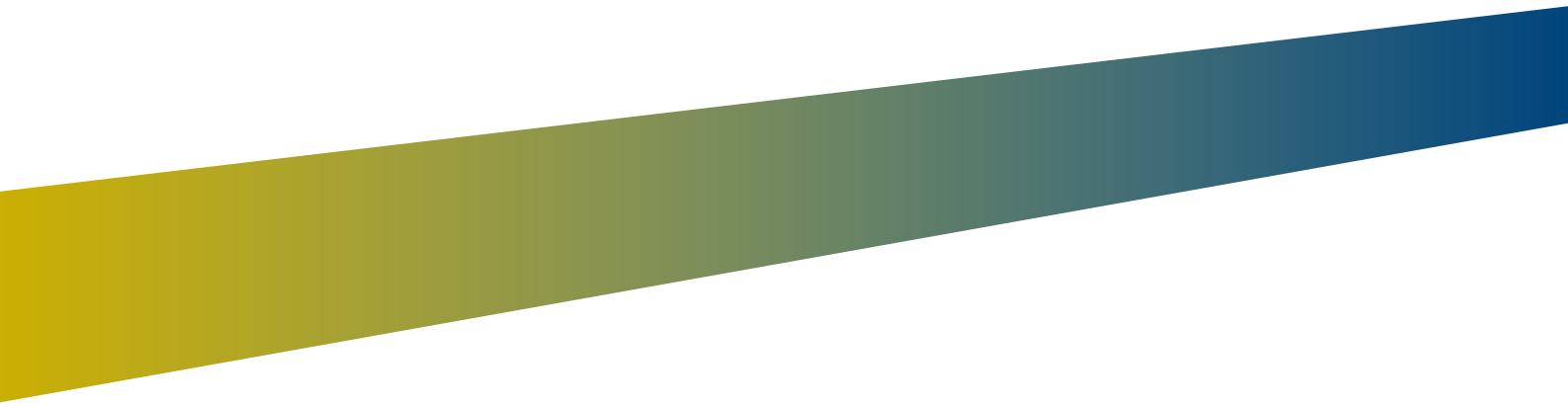

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