

# Newsletter

Issue no. 1, November 2008 – April 2009

## News from the EU

### Legislative Instruments

#### ***Adopted:***

##### ***Europol***

Council Decision establishing the European Police Office (EUROPOL) (8706/08 EUROPOL 47, adopted on 6 April 2009, not yet published)

This Decision will replace the Europol Convention. Apart from the change of the legal nature, differences between the new decision and the Europol Convention are limited. They include an extension of the competence of Europol (abolition of the requirement of the existence of a criminal organisation involved in the case concerned). A major change is also that Europol will be funded by the EU and not by Member States as in the Europol Convention. Europol's staff will be submitted to the EU staff regulations.

##### ***Criminal Records – Exchange of Information between Member States***

Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States (OJ L 93, 7 April 2009, p. 23)

The FD aims at improving the exchange of information on criminal convictions handed down against nationals of the Member States. It lays the ground rules for the mandatory transmission of information on convictions to the country of the person's nationality as well as for the storage of such information by that country and for the retransmission, upon request, to other Member States.

Council Decision 2009/316/JHA of 6 April 2009 on the establishment of the European Criminal Records Information System (ECRIS) in application of Article 11 of Framework Decision 2009/315/JHA (OJ L 93, 7 April 2009, p. 33)

The ECRIS decision implements FD 2009/315/JHA. It defines the general features of the information system which will allow automated exchange of data between central criminal records and creates an obligation for Member States to use correlation tables (offences and sanctions) to transmit information on convictions. The information system will not allow direct access to the criminal records but will speed up the transmission of requests and replies.

##### ***Decisions rendered in the absence of the person concerned at the trial***

Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial (OJ L 81, 27 March 2009, p. 24)

The FD modifies the existing FDs on mutual recognition with regard to the ground for non recognition related to cases where the decision to be executed was rendered in the absence of the person concerned at the trial. It harmonises and brings more details to these grounds for non recognition as well as to the exceptions (cases where the decision shall be executed even though it was rendered in the absence of the person concerned at the trial).

##### ***European Evidence Warrant***

Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters (OJ L 350, 30 December 2008, p. 72)

The aim of this FD is to establish a mechanism facilitating the obtaining of evidence in cross-border cases based on mutual recognition principles. It is however limited to existing evidence and will mainly cover seizures, searches of premises and production orders. Finalised in June 2006 (general approach reached in the Council),

this FD is adopted amid criticism on its practicability, especially with regard to its limited scope which may lead magistrates to favour the use of mutual legal assistance.

### ***Strengthening Eurojust***

Council Decision on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime (5347/09 COPEN 9 EUROJUST 3 EJN 2, adopted on 16 December 2008, not yet published)

The main changes brought by this Decision include: (1) harmonisation and increase of the powers of Eurojust's national members acting as national authorities, (2) strengthening the link with the national level by the creation of national Eurojust coordination systems and by providing direct access to the Eurojust's Case Management System at national level, (3) creating obligations in terms of systematic transmission of information to Eurojust, (4) clarifying the relationship with the European Judicial Network and (5) providing for the possibility for Eurojust to second liaison magistrates to third States.

### ***European Judicial Network***

Council Decision 2008/976/JHA of 16 December 2008 on the European Judicial Network (OJ L 348, 24 December 2008, p. 130)

This Decision replaces the Joint Action of 29 June 1998 on the creation of EJN. It is more detailed than the Joint Action but mainly confirms the current functioning of the EJN. It also clarifies the relationship with Eurojust.

### ***Combating Terrorism***

Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism (OJ L 330, 9 December 2008, p. 21)

This FD inserts the offences of "public provocation to commit a terrorist offence", "training for terrorism" and "recruitment for terrorism", as well as provided by the Council of Europe Convention on the Prevention of Terrorism.

### ***Combating Racism***

Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, 6 December 2008, p. 55)

Under this FD, each Member State shall take the measures necessary to ensure that some intentional conducts are punishable, like publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.

### ***Data Protection***

Framework Decision 2008/977/JHA of 27 November 2008 on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters (OJ L 350, 30 December 2008, p. 60)

This FD creates a general regime for data protection in the framework of Title VI of the EU Treaty (third pillar). It is limited to the processing of data in cross-border cases. It confirms the applicability of general data protection principles (legality, proportionality, right to access, erasure and rectification, judicial remedies...) to the sector of police and judicial cooperation in criminal matters. The FD does not affect more specific regime provided for example for Eurojust, Europol, the Schengen Information System or the Customs Information System.

### ***Probation Measures and Alternative Sanctions***

Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions (OJ L 337, 16 December 2008, p. 102)

This FD aims at facilitating the application of probation measures and alternative sanctions in case of offenders not living in the State of conviction. It sets rules under which a Member State, other than the Member State in which the person concerned has been sentenced, recognises judgments and, where applicable, probation decisions and supervises probation measures imposed on the basis of a judgment, or alternative sanctions contained in such a judgment.

### ***Transfer of Sentenced Persons***

Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union (OJ L 327, 5 December 2008, p. 27)

This new legal instrument applies the principle of mutual recognition to the transfer of sentenced persons to another Member State than the State of conviction. One of the main changes brought by the FD is the extension, compared to the existing Council of Europe instruments, of the possibilities to impose the transfer without the agreement of the person concerned. It also provides for limited situations where the transfer may be imposed to the State of nationality or residence. This FD will also apply to cases referred to in the FD on the European Arrest Warrant where the person concerned is a national or a resident of the executing State which either decides (in pre-trial cases) to surrender the person under the condition that he/she will be returned for the enforcement of the sentence or decides (in post-trial cases) to execute

the sentence instead of surrendering the person to the issuing State.

### *Environmental Criminal law*

Directive 2008/99/EC of 19 November 2008 on the protection of the environment through criminal law (OJ L 328, 6 December 2008, p. 28)

The new legislative act, which follows annulment of FD 2003/80/JHA by the European Court of Justice, obliges Member States to provide for effective, proportionate and dissuasive criminal penalties in their national legislation in case of serious infringements of EC law on the protection of the environment. These infringements include, for example: emission of materials or ionising radiation into air, soil or water, shipment of waste, destruction or taking of specimens of protected wild fauna or flora species and placing on the market of ozone-depleting substances.

### **Agreed (not yet adopted):**

#### *European Supervision Order*

Proposal for a Council Framework Decision on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention (17506/08 COPEN 261)

This draft text – on which the Council reached a general approach (political agreement) on 27 November 2008 – lays down rules according to which one Member State recognises a decision on supervision measures issued in another Member State as an alternative to provisional detention. Compared to the similar FD applicable to probation measures (FD 2008/947/JHA), this FD creates a regime where the issuing authority remains to a larger extent in control of the measure. However, surrender of the person concerned to the issuing State in case of breach of those measures will require the issuing of an EAW and the executing authority will be able to use all grounds for non recognition provided for in the FD on the EAW to refuse the surrender.

#### *Conflicts of Jurisdiction*

Proposal for a Council Framework Decision on prevention and settlement of conflicts of jurisdiction in criminal proceedings (5208/09 COPEN 7, last version 20 January 2009)

The proposal – on which the Council reached a general approach on 6 April 2009 – deals with situations of parallel investigations in two different Member State on the same person and for the same facts, thereby creating a risk of *ne bis in idem* situation. In such cases, the FD provides for the obligation for the concerned authorities to enter into consultation. It does not however lay down binding rules on the resolution of the possible conflict of jurisdiction.

### **In Discussion:**

#### *Trafficking in Human Beings*

Proposal for a Council Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA (COM(2009) 136 final, 25 March 2009)

The main objective of this proposal is to incorporate into EU legislation some provisions of the Council of Europe Convention n° 197 on Action against Trafficking in Human Beings. The FD would abrogate Framework Decision 2002/629/JHA.

#### *Sexual Exploitation and Child Pornography*

Proposal for a Council Framework Decision on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA (COM(2009) 135 final, 25 March 2009)

The main objective of this proposal is to incorporate into EU legislation some provisions of the Council of Europe convention n° 201 on the Protection of Children against Sexual Exploitation and Sexual Abuse. It would abrogate Framework Decision 2004/68/JHA.

### **Case Law**

#### *Data Retention Directive*

ECJ, 10 February 2009, judgment C-301/06 *Ireland v. Parliament and Council*

The Court finds that the Directive was adopted on an appropriate legal basis.

The Court observes that data retention measures imposed by Member States on service providers differed substantially and these differences produce a distortion on the functioning of the internal market. The scope of the Directive is limited to the activities of service providers. Its provisions do not regulate the access to data or the use thereof by the police or judicial authorities of the Member States. Those issues, which fall in principle within the domain covered by police and judicial cooperation in criminal matters, have been excluded from the provisions of the Directive. Accordingly, it was necessary to adopt the Directive on the basis of Article 95 EC.

#### *Ne Bis in Idem*

ECJ, 22 December 2008, judgment C-491/07 *Turansky*

The ECJ ruled that the *ne bis in idem* principle enshrined in Art. 54 of the CISA is not applicable when the decision by the authority of a Contracting State, after examining the merits of the case brought before it, is not charging the suspected person of a crime but it is only suspending

the criminal proceedings. So, this decision can not preclude any other new criminal proceedings for the same acts.

ECJ, 11 December 2008, judgment C-297-07  
*Bourquain*

The Court specifies that the 'enforcement condition' of Art. 54 of the CISA is fulfilled also in a case where the penalty can no longer be enforced when the new criminal proceedings are begun. Moreover, the sentence pronounced *in absentia* of Mr Bourquain is to be considered as a 'final judgment' even though the penalty could not be directly enforced because of the obligation to open new proceedings in case the person reappears.

***EU Terrorist Blacklist***

CFI, 4 December 2008, judgment T-287/08 *People's Mojahedin Organization of Iran* (PMOI)

The Court annuls, for the third time, a Council Decision ordering the freezing of PMOI's funds. The Council has violated the rights of defence of the PMOI by not communicating to it the new information which justified maintaining it on the EU terrorist blacklist. In addition, the ECJ notes that the French authorities and the Council refused to communicate to it certain information about the case. Consequently, the ECJ can not review the lawfulness of the contested decision and in this way the Council has equally infringed the fundamental right of the PMOI to an effective judicial review.

***European Arrest Warrant***

ECJ, 1 December 2008, judgment C-388/08 PPU  
*Leymann*

The Court explains the scope and the exceptions to the application of the specialty rule under a European Arrest Warrant regime.

Alterations may be made to the description of the facts in the course of the procedure and may describe more precisely or amend the ingredients (time and place) of

the offence. However, those alterations can not change the nature of the offence.

The Court rules that the exception applies as long as no measure restricting personal liberty is taken against the person for the 'other offence'. If that person is ultimately sentenced to imprisonment for the 'other offence', consent must be sought and obtained before the sentence is enforced. Nevertheless, the FD does not prevent the person surrendered from being subjected to a measure restricting personal liberty before consent is obtained, where that restriction is justified in law by other charges mentioned in the European Arrest Warrant.

***Other News***

***New Multi-Annual Programme for Justice and Home Affairs***

The Hague Programme coming to an end, a new multi-annual programme (the so-called "Stockholm Programme") should be adopted in the second half of 2009. It is supposed to reflect the existing and future problems in the field of Justice and Home Affairs, the new situation coming up from the EU enlargement to 27 Member States and the possibly enter into force of the Lisbon Treaty.

To this purpose, the European Commission launched a public consultation (closed on 4.12.2008) called "Freedom, Security and Justice: What will be the future?". The objective of the consultation was to look at the future and to define the EU priorities in the area of Freedom, Security and Justice for the next five years (2010-2014).

For more information and see the contributions:  
[http://ec.europa.eu/justice\\_home/news/consulting\\_public/news\\_consulting\\_0001\\_en.htm](http://ec.europa.eu/justice_home/news/consulting_public/news_consulting_0001_en.htm)

## News from ECLAN

### Research Projects

*CoPen Training-II: update and development of the standard judicial training programme on EU cooperation in criminal matters (ongoing, 2008-2009)*

Financed by the European Commission – Criminal Justice Programme and the Institut Universitaire International Luxembourg (IUIL).

Coordination team: Anne Weyembergh, Serge de Biolley, Gisèle Vernimmen-Van Tiggelen and Laura Surano.

To read more: <http://www.copen-training.eu>

*Analysis of the future of mutual recognition in criminal matters in the European Union (finalised, 2008)*

Financed by the European Commission (call for proposal). It will result in the publication of a collective book in 2009.

Coordination team: Gisèle Vernimmen-Van Tiggelen and Laura Surano.

The final report is available at the European Commission website:

[http://ec.europa.eu/justice\\_home/doc\\_centre/criminal/recognition/doc\\_criminal\\_recognition\\_en.htm](http://ec.europa.eu/justice_home/doc_centre/criminal/recognition/doc_criminal_recognition_en.htm)

To read more:

<http://www.ulb.ac.be/iee/penal/mutualrecognition>

### Publications

Christian Schwarzenegger and Sarah Summers, *The Emergence of EU Criminal Law*, Oxford, Hart Publishing\*, November 2009, 248 pp.

André Klip, *European Criminal Law*, Intersentia, January 2009, 532 pp.

Anne Weyembergh and Veronica Santamaria (eds.), *The evaluation of European criminal law: the example of the Framework Decision on combating trafficking in human beings*, Brussels, Editions de l'Université de Bruxelles, January 2009, 409 pp.

Stefan Braum and Anne Weyembergh (eds.), *Le contrôle juridictionnel dans l'espace pénal européen*, Brussels,

Editions de l'Université de Bruxelles, February 2009, 348 pp.

Valsamis Mitsilegas, *EU Criminal Law*, Oxford, Hart Publishing\*, March 2009, 366 pp.

Gisèle Vernimmen-Van Tiggelen, Laura Surano and Anne Weyembergh (eds.), *The future of mutual recognition in criminal matters in the European Union*, Brussels, Editions de l'Université de Bruxelles, forthcoming 2009.

\* Hart Publishing is pleased to offer 20% discount on their criminal law titles to ECLAN members. If you would like to place an order you can do so directly through the Hart Publishing website (please mention the reference 'ECLAN' in the special instructions field to receive the discount).

<http://www.hartpub.co.uk/books/search.asp?st=0&s=Criminal+Law>

### Participation in the Justice Forum

*Meeting on judicial training and the needs of practitioners to apply EU law* (Brussels, 11 November 2008), ECLAN represented by Anne Weyembergh [meeting report provided to ECLAN members on request].

*Meeting on European e-Justice, information and communications technologies and the European justice system* (Brussels, 5 March 2009), ECLAN represented by Gisèle Vernimmen-Van Tiggelen [meeting report provided to ECLAN members on request].

### Summer School

The 6th edition of the Summer School "The EU Area of Criminal Justice", organised by the Institute for European Studies – ULB and ECLAN, will take place in Brussels from 29 June to 3 July 2009.

The objective of the Summer School is to provide participants with an extensive knowledge of EU criminal law. All lectures will be held entirely in English.

The deadline for submitting the application is 15 June 2009.

For more information, please visit:

[www.ulb.ac.be/iee/penal/summerschool](http://www.ulb.ac.be/iee/penal/summerschool)

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