European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils de la Justice (RECJ)

Working Group of the European Network of Councils for the Judiciary (ENCJ)

Criminal Justice in the EU

I. Analysis of Replies to the questionnaire

Replies to the questionnaire were received from the Councils of Justice (or similar bodies) of the following countries: Bulgaria, Denmark, France, England and Wales, Italy, Lithuania, Malta, Netherlands, Poland, Portugal, Czech Republic, Romania, Scotland, Hungary.

The complexity of the replies makes it necessary to sum up the information at issue. Therefore, the individual replies to each question were grouped together to highlight subsets of countries in which either the regulatory framework or the organisational arrangements shared similar features.

To facilitate interpretation, the text of each question is reported and followed by the summary of the respective contributions.

QUESTIONNAIRE

Section A - Terrorism

A. The Phenomenon of Terrorism

After a brief definition of terrorist act in accordance with domestic law, please answer the following questions:

Only in 2004 did Poland introduce the general definition of "terrorist crime" into its criminal code. Conversely, the following countries - i.e. Bulgaria, Denmark, France, England and Wales, Italy, Lithuania, Malta, Netherlands, Portugal, Czech Republic, Romania, Scotland, Hungary - have developed ad-hoc legislation to counter terrorism in a stepwise fashion. In particular, the Netherlands have expressly transposed, to that end, the Framework Decision dated 13 June 2002 of the European Council on combating terrorism (2002/475/JHA). In Italy's legal system, a distinction is drawn between domestic terrorism, which is usually regarded as a fighting method based on intimidating the population with the help of indiscriminate violence, and acts of international terrorism, which entail by necessity the reference to supranational sources of law.

A.1 Is the commission of acts of terrorism established as a criminal offence in your domestic law? If so, please provide information on the legal definition of the offence(s) and the relevant punishment(s), or which other rules of domestic criminal law are applied to punish the terrorist acts.

All the respondent countries have established terrorism as a criminal offence in the respective domestic laws, albeit with different features - including participating in and supporting (also financially) terrorist organisations; more specific details can be found in the questionnaire.

A.2 Are specific procedural measures, special courts and/or limitations on the rights of defence provided for in connection with proceedings against individuals

charged with acts of terrorism? If so, please describe the individual provisions set out in domestic law.

Bulgaria, Italy, Lithuania, Malta, Netherlands, Portugal, Czech Republic, Romania, and Hungary do not envisage specific procedural measures, special courts and/or limitations on the rights of defence with regard to proceedings against individuals charged with acts of terrorism.

Certain limitations on the rights of defence are envisaged in Denmark as for proceedings instituted for acts of terrorism.

In the French legal system, specific procedural arrangements are set out in connection with acts of terrorism; under certain respects, such arrangements are the same as those applying to organised crime offences. In particular, specific police detention provisions are set forth along with longer terms for pre-trial custody, the limitation period, and punishments. Additional peculiarities apply to the tools that can be applied for taking evidence and to the rules on jurisdiction.

In England and Wales, the only specific provision of interest concerns the length of pre-trial custody - i.e. post arrest and prior to charge.

In Poland, harsher punishments are envisaged in respect of acts of terrorism.

As for Scotland, there are limitations on the right to access the evidence relied upon by the prosecution in proceedings related to terrorist offences. The new counter-terrorism bill includes a provision for the freezing of assets without the presence of the accused. In such proceedings, a special representative or counsel may be appointed to represent the interests of the accused; however, that person may not consult with the accused and/or his solicitor.

It needs to be specified that Lithuania has some specific procedural measures with proceedings against individuals charged with acts of terrorism. In accordance with the article 225 of the Criminal Code of Lithuania criminal cases when persons are accused of committing serious and grave crimes are within the jurisdiction of the regional courts. Also, such cases are heard by the chamber of three judges from the regional court. The act of terrorism belongs to the category of grave crimes, therefore the sentence of which may be the life imprisonment.

A.3 Are derogations from the principle of the State's national jurisdiction provided for in respect of acts of terrorism in order to prosecute the offence (for

instance, is it possible to prosecute in your own State a national who commits terrorist acts in another State)?

No derogations from the principle of the State's national jurisdiction are provided for in Bulgaria with a view to prosecuting acts of terrorism. The only derogation - as per section 6 of the Criminal Code - relates to crimes against peace and mankind. However, section 6(2) provides that the criminal code also applies to other offences committed by foreigners abroad, where this is specified in international agreements to which the Republic of Bulgaria is a party.

In Denmark, France, England and Wales - partly in connection with the amendments made by the Terrorism Act 2000, the Crime International Co-operation Act 2003, and the Terrorism Act 2006 -, Lithuania, Malta, Poland, Portugal, Scotland, and Hungary there are derogations from the territorial jurisdiction principle in connection with terrorist acts.

In compliance with framework decision 2002/475/JHA, the Dutch law envisages agreements with Member States to determine which country is to prosecute the offenders in order to centralise proceedings, where possible, in a single Member State.

As to Italy, no derogations from the general principles of territorial jurisdiction are envisaged in respect of acts of terrorism.

The law of the Czech Republic recognises territorial, personal or universal jurisdiction. Based on "personal" jurisdiction, the Czech Republic will prosecute the criminal offences committed either by Czech nationals or by individuals domiciled in the Czech Republic - regardless of whether the offences are committed in another country.

Based on the principle of universality of criminal law, the Romanian legal system provides that criminal law applies to offences committed outside the Romanian territory by foreigners and/or stateless persons who are not domiciled in Romania - on condition the facts at issue are established as a criminal offence in the country where the offence was committed (dual criminality principle) and the offender is in the Romanian territory.

A.4 How many trials have been held in connection with acts of terrorism? Please describe the types of conduct at issue, the indictment(s) against specific individuals, and the outcome of such judicial proceedings. You are kindly

requested to send the decisions, or part of the decisions, of judicial relevance concerning proceedings in connection with terrorist acts, also the decisions of first instance, pronounced in your country.

In Bulgaria there have not been trials related to terrorist acts since terrorism was established as a criminal offence (2002).
In France, at least 648 individuals were sentenced on account of various types of terrorist offence from 1996 to 2006. As an example, 375 individuals were in prison in France as of 29 February 2008 (either because serving time or pending the relevant investigations) on account of terrorist acts.
Few cases were mentioned by Denmark, which only related to attempted terrorist acts.
As for the relatively recent past, England and Wales referred to the acts of terrorism perpetrated by IRA ever since the 1970s. From 11 September 2001 to 31 March 2007, statistics show that 1228 arrests were performed; to date, there are 41 convictions under the Terrorism Act.
Italy provided summaries of twenty-one convictions issued recently on account of international terrorism offences.
Two convictions were issued in Lithuania in connection with terrorist acts.
Malta and Poland do not have any proceedings related to terrorism. Portugal only mentioned one case along with some activities by ETA, which however have never resulted into the commission of offences in Portugal. Two proceedings were reported by the Czech Republic, of which no additional details could be provided because of security reasons. Two indictments were issued in Romania after passing of Act no. 535/2004 for the prevention and suppression of terrorism.
Eighteen sentences were passed in the Netherlands because of terrorist acts.
In Scotland, about 80 indictments relate to terrorist acts under the 2001 terrorism laws, plus one based on the Terrorism Act 2006.
Hungary reported eight criminal proceedings in the 2004-2007 period, however most of them were no "classical" terrorism cases.

A.5 Has your country entered into conventions or agreements and/or developed a specific *modus operandi* with other countries in view of countering terrorism?

All countries have stipulated bilateral and/or multilateral legal co-operation agreements and are parties to several international conventions for the suppression of terrorism - also outside the EU. Additional details can be found in the individual replies.

A.5b Which are the relationships with the international and supranational organisations (for example Eurojust, UNODC) involved in the co-ordination of matters concerning the suppression of terrorist acts?

A.6 Are there national practices in place to finetune data collection, intelligence activities and - as a consequence - investigations into acts of terrorism? Please specify if it is about statistical data or data provided by international organisations.

The replies to the two above questions have been grouped together.
All of them point to the need for jointly gathering intelligence and co-ordinating the investigations in the individual countries as well as in respect of supranational bodies (e.g. Eurojust) to effectively counter international terrorism.
A National Security Agency was set up by a 2007 law in Bulgaria. The Agency is in charge of preventing attacks on national security as also related to international terrorism. The practices to be followed by the Agency have yet to be set out.
In Italy there are co-ordination arrangements between the individual district anti-terrorism prosecuting offices, however there is as yet no body modelled after the National Anti-Mafia Prosecuting Office as regards co-ordination of terrorism-related investigations.
In the Netherlands there is a National Anti-Terrorism Prosecutor.
In France, intelligence services collect information on terrorism secretly. Only after being de-classified may such information be brought to the attention of judicial authorities. In 1984, a Counter-Terrorism Co-ordination Unit (UCLAT) was set up, to ensure the required operational co-ordination between the individual services. A magistrate from the Criminal Matters Directorate at the Ministry of Justice takes part in the meetings organised within the UCLAT.
No information on intelligence gathering was made available by England and Wales and Poland on account of security concerns. Denmark and Romania also clarified that

they could not report on the practices related to information/intelligence gathering; however, Romania specified that co-operation takes place within the framework of the National System for the Prevention and Suppression of Terrorism (NSPST).

In Hungary, it is the police that carry out investigations related to terrorism - on the basis of judicial authorisations. Police are authorised to access the personal data handled by other organisations.

CONCLUSIONS

Sector A – Terrorism

An analysis of the data collected through the questionnaire highlights the great attention paid to the phenomenon of terrorism and the identification of suitable law-enforcement instruments by all the States that answered the questionnaire developed by the working group.

All the different national legislations, in fact, identify specific offences in the matter of terrorism. In addition, States are commonly available for international cooperation.

The answers to the questionnaire show that recourse to special proceedings or measures departing from the general standards of protection of the rights of defense are normally excluded. However, prevention and suppression efforts are for the most part made by fully implementing the ordinary investigation and procedural instruments.

Furthermore, the problem of reaching a common definition of international terror act has emerged: a fruitful judicial cooperation in this matter seems to imply uniform criminal thresholds of the conducts of terror attempts. That is especially true with regard to acts "anticipating" or "organizing" the actual physical attack to life and individual safety.

With reference to the notion of international terrorism, on the one hand we have some States, such as the Netherlands and Italy, that have chosen to regulate international terrorism basically by referring to the content of the European Council Framework Decision of 13 June 2002 on the fight against terrorism (2002/475/JHA); the said Decision, on the use of firearms and explosives for the purpose of severely intimidating the population, as is well known, enunciates that the typical implications of terror acts are the "depersonalization of the victim" and the "anonymity of the victim" of the violent acts, and that the true objective of these acts is to disseminate indiscriminate fear in society and force a government or an international organization to act or abstain from acting. On the other hand, we have the position of many other States that, although nurtured by the clear intent of stepping up approximation and cooperation among national judges and prosecutors in the fight against terrorism, claim full autonomy when defining the notion of terror attack under their national law. In particular, in common law countries the need to develop a common concept of international terrorism is less strongly felt in the sense that,

although recognizing objective importance to rules on terrorism and normally to the European Council Framework Decision of 13 June 2002, these countries do not believe in working out a uniform definition. That could also be due to their different way of situating the principle of legality.

Nonetheless, all the States participating in the initiative have advocated enhancing data banks concerning cross-border criminal phenomena such as international terrorism, so as to foster information exchange, also through the computer, and a fruitful intelligence activity. It is commonly believed, in fact, that we need to hit every form of support, also financial, provided by terror organizations engaged in acts of violence for the purposes of terrorism; the high mobility of terror groups imposes that law-enforcement efforts be started by the national authority holding territorial jurisdiction, even when the said acts of violence are addressed against a State other than the one where the organization has set up its operational base. Only by so doing will the different state bodies in charge of security accomplish an effective general prevention action against the actual perpetration of terror attacks.

I. Analysis of Replies to the questionnaire

QUESTIONNAIRE

Section B - Impartiality

B. Impartiality of Investigation

After a brief outline of the relations between the police and public prosecutors, of their respective competences and the compulsory or discretionary prosecution, please answer the following questions.

Bulgaria: Investigating bodies work under the public prosecutor's guidance and control; prosecution is compulsory.

Denmark: Public prosecutors report to the Minister of Justice; investigating bodies are subject to strict controls by regional Public Prosecutors. Prosecution is on a discretionary basis.

France, England and Wales: Public prosecutors have discretion as to instituting criminal proceedings.

Italy: The public prosecutor can avail himself/herself of judicial police to carry out investigations; public prosecutors are members of the judiciary and are entitled to the same safeguards as for their independence; prosecution is compulsory. Also in Portugal and Romania public prosecutors co-ordinate judicial police and prosecution is compulsory.

Lithuania: Pre-trial investigations are started and co-ordinated by public prosecutors; judges for pre-trial investigations may, in turn, carry out investigations.

Netherlands: Public prosecutors supervise over the police in investigating criminal offences. Prosecution is discretionary, also under the expediency principle.

Czech Republic: Role and competences of public prosecutors are regulated by the Public Prosecution Act; police co-operate with public prosecutor's offices in pre-trial investigations according to the rules set out in the Criminal Procedure Code. Prosecution is compulsory, however there are several exceptions to this rule.

In Scotland, the Crown Office and Procurator Fiscal Service (COPFS) is responsible for the prosecution of crime, and has discretion in prosecuting offences. Police carry out initial investigations and inform the geographically competent PF in writing.

b.1 How is impartiality in investigation ensured within the framework of domestic law, the judicial system, and the criminal procedure system? Please provide information on the following:

Bulgaria: The police decide autonomously on the basis of the objective, thorough, and complete assessment of all the circumstances of the case. Higher-rank officials may not issue instructions on the performance of investigations and the relevant conclusions.

Denmark: Impartiality is ensured by the authority exercised by the Courts under specific circumstances.

England and Wales: Investigations are basically under the control of the police; public prosecutors neither control nor direct investigations. It is quite unlikely for the judicial power to request the investigating bodies to undertake additional investigations as regards the evidence in a given case, where investigations appear to be incomplete and/or superficial.

Italy: In Italy's legal system, the judicial police are subordinate to judicial authorities. Public prosecutors, who are independent, are empowered to avail themselves of the judicial police. Where the judicial police become apprised of a crime, they must report without delay directly to the public prosecutor on the basic elements at issue.

Lithuania: Impartiality of pre-trial investigations is ensured by the principle of competition between the prosecuting bodies and the defence, which is the foundation of the criminal procedural system. The Court may not, of its own motion, perform investigations or gather information. Any interference with the activities of judges, the bodies in charge of pre-trial investigations, public prosecutors, legal counsel and/or bailiffs carries criminal punishments. It should be mentioned more precisely, that the Court may not, on its own motion, perform investigations or gather information, but only Court may acknowledge the data of the pre-trial investigation as the evidence.

Poland: The prosecutor is the dominus eminens of pre-trial investigations and initiates and conducts such investigations; alternatively, the prosecutor may delegate initiation and/or management of investigations to another authorised body. The prosecutor is empowered to initiate an investigation and conclude it. The role of other bodies is limited usually to establishing certain facts and evidence and handling organisational and/or investigational tasks.

Romania: Under the Constitution of Romania, "public prosecutors work according to the principles of legality, impartiality, and hierarchical control, under the authority of the Minister of justice." The Act on judicial organisation has taken up and developed the provisions set forth in the Constitution, by providing that "public prosecutors are independent and subject to the law as for the decisions they make." Public prosecutors issue instructions to the judicial police in view of performing investigations.
Scotland: Under the law, it is up to the police to carry out investigations and report to the prosecutor on the relevant outcome; as for criminal investigations, the chief constable complies with such lawful instructions as he may receive from the competent prosecutor.

b1.1 Who are the police to report to in the course of investigations? (Please describe their administrative and functional subordination)

Bulgaria: During investigations, police investigators report to the prosecutor that is competent for supervision.
France: The public prosecutor and his alternates are the only authorities empowered to instruct officials and agents from the judicial police.
Italy: The judicial police can be said to be functionally subordinate to judicial authorities if one takes account of the investigational activities performed by the judicial police and the authority to direct investigations that is vested in public prosecutors. Therefore, judicial police report to public prosecutors on the outcome of their investigations.
Lithuania: Police officers and other officers from institutions in charge of pre-trial investigations are required to inform the prosecutor about having started an investigation. Police are required to only abide by the instructions issued by the prosecutor leading and co-ordinating the relevant investigations.
Malta: Investigations are carried out exclusively by the police; the police are under the supervision of the inquiring magistrate and subject to any instructions issued by the latter.
Netherlands: The public prosecution service supervises over the criminal investigations performed by the police.
Poland: The police report to the prosecutor, who supervises and approves the actions undertaken by the police in the course of pre-trial investigations.
Portugal: Police report to the public prosecutor to whom the relevant file was sent.

Czech Republic: As a rule, investigations are carried out by the Criminal and Investigation Police. Public prosecutors may lead investigations in person as for certain specific offences.
Romania: From an administrative standpoint, judicial police agents are subordinate to their higher-rank officers; operationally they report to the public prosecutor who supervises over criminal investigations.
Scotland: The police report to the Procurator Fiscal, who is in charge of investigations and can instruct the police in the course of investigations. In practice, however, the chief police officer conducts the investigations on a daily basis.
Hungary: As for the relationships between police and public prosecutors, the investigating body carries out investigations both under the prosecutor's authority and autonomously. The investigating bodies carry out the investigations autonomously if they have received the relevant complaint and/or have become apprised of the crime otherwise.

b1.2: May public prosecutors control and direct investigations?

In all the legal systems of the countries participating in this initiative, public prosecutors control and direct investigations. In Malta the Police conducts investigations into terrorism offences and cases falling under the jurisdiction of lower courts.

b1.3: Are public prosecutors under the authority of the executive power, and can constraints be imposed in concrete on criminal prosecution by the executive power?

Bulgaria: The public prosecutor is an independent body of the judiciary and is not under the authority of the executive power. The latter cannot impose constraints on prosecutions.
France: Judicial authorities are independent pursuant to the principle of separation of powers. Under Article 30 of the code of criminal procedure the Minister of Justice can give general indications on prosecutions to the public prosecutors.
Italy: Under the Constitution, the Judiciary is autonomous and independent of the other powers (Article 104, Constitution). Furthermore, the Constitution itself provides for Public Prosecutors to have the guarantees set forth by the judicial system (Article

107, paragraph 4, of the Constitution). The judicial system is made up of judges of every instance, and public prosecutors. Consequently, under the Italian Judicial system, public prosecutors have the same guarantees of autonomy and independence as judges. Any form of dependence of public prosecutors on the executive power is excluded.

Lithuania: Public Prosecutors are completely independent of the bodies of the executive power, as envisaged by Article 118 of the Constitution and relevant legislation on the Office of the Public Prosecutor.

Malta: The Attorney General, a body of the executive power, is independent when discharging his functions of Public Prosecutor. In fact, Article 91 (c)(3) of the Constitution prescribes that when exercising the power to start, carry out and conclude prosecutions, as well as any authority conferred to exercise such power, the Attorney General's conviction is not subject to any provisions or control of other individuals or authorities.

The Netherlands: Public Prosecutors discharge their functions under the authority of the Minister of Justice, although they are not incardinated in either this or other Ministries. The Minister of Justice may give directives with regard to investigations and the charges in specific cases, although examples in this respect are extremely rare.

Poland: Public Prosecutors, as representatives of the Judiciary, conduct prosecutions autonomously vis à vis other governmental bodies.

Portugal: Public Prosecutors are conferred autonomy by the law and are not under the authority of the executive power. They cannot be imposed constraints or given directives.

Czech Republic: Public Prosecutors are not subordinated to the Ministry of Justice and discharge their authority impartially. However, the Constitution of the Czech Republic embodies rules on the Public Prosecutor in the Chapter dealing with the executive power. From the point of view of its administration, the Office of the Public Prosecutor is partly under the authority of the Minister of Justice, which causes indirect dependence.

Romania: under Article 131 of the Romanian Constitution, the Public Prosecutor is not under the authority of the Executive power since it is a body of the Judicial power. Consequently, the executive power cannot impose any constraints or conditions on criminal proceedings The Superior Council of the Judiciary, the custodian of the

independence of the Judicial power, supervises the carreers of the members of the Judiciary (both judges and prosecutors).

Scotland: the Lord Advocate is the head of prosecution and investigation of deaths. The Lord Advocate is a member of the Scottish executive: however, neither the Government nor the Judiciary can impose obligations or influence the Lord Advocate in the exercise of his functions of dominus of prosecutions and investigations.

Hungary: The Public Prosecutor is not under the authority of the executive power; the latter cannot impose any type of constraints on prosecutions. Under the Constitution, the Office of the Public Prosecutor is headed and coordinated by the Prosecutor General. Prosecutors discharge their functions in compliance with the directives of the Prosecutor General.

b.1.4: Is it provided for that a judicial authority may take steps autonomously in order to ensure that facts amounting to criminal offences are investigated in greater depth, in case there is inaction, superficiality and/or unwillingness in probing deeper into an investigation?

Bulgaria: in case of inaction or superficiality that causes serious infringement of the procedural rules during the preliminary investigations and a compression of the procedural rights recognized to the suspect and his lawyers, the drafting judge, under Article 249 (2) of the code of criminal procedure, refers the case back to the public prosecutor to conduct further investigations, setting out the said infringements in the order.

Denmark: Danish criminal procedure is based on the accusatorial and not inquisitorial principle. A judge is not in charge of investigations into criminal offences. The dominant principle is that Public Prosecutors and the Police are both in charge of conducting investigations. The Public Prosecutor then has to inform the Judge on the facts in issue, including defense evidence.

France: an Investigating Judge cannot in any way start a prosecution on his own motion. Once seized by the request of the Prosecutor, drawn up after a complaint has been filed and a civil case instituted, the Investigating Judge can order the necessary investigations to be conducted. When a criminal offence is committed it is mandatory for the Investigating Judge to be seized by the Public Prosecutor.

Italy: the Prosecutor General attached to the Court of Appeal has the authority to advoke to itself investigations with a view to guaranteeing the principle of obligatory

criminal prosecutions set forth by Article 112 of the Constitution; if a pre-trial investigation judge does not grant the request to set aside a case filed by the public prosecutor, the law provides for the judge (article 409, paragraph 4, of the code of criminal procedure), to indicate to the Public Prosecutor the additional investigations needed and set a term for conducting them.

Lithuania: a Pre-trial Investigation Judge cannot act on his own motion (Article 173, paragraph 4, of the code of criminal procedure). Should he see that investigations are conducted with delay, superficiality or inaction, then the prosecutor has to give directives to the body in charge of the preliminary investigations for the purpose of annulling any invalid or illegal orders, and the Pre-trial Investigation Judge is then seized with the relevant appeals. Measures adopted by a Prosecutor can be opposed before a hierarchical superior, whose decisions may in turn be challenged before the Pre-trial Investigation Judge. Furthermore, a suspect and his lawyer, the victim and the parties of the relevant civil action and their lawyer and their representatives have the faculty to ask the Prosecutor to carry out specific activities within the investigations. Should the Prosecutor deny their requests, then an appeal can be lodged with the Pre-trial Investigation Judge (Article 178, paragraphs 2, 3, 4 and 5 of the code of criminal procedure). Once the preliminary investigations have been concluded, the parties are entitled to see the case file and ask for additional investigations. In the said case, individual initiatives undertaken by the body in charge of the preliminary investigations and the Judge are vetted by the parties to the proceedings and the Pre-trial investigation Judge. Furthermore, in given cases set forth by the law, the parties are also entitled to lodge an appeal against the decision made by the Prosecutor to end the investigations, a decision subject to the approval of the Pre-trial Investigation Judge. A Prosecutor can also decide to reopen investigations both on his own motion and at the request of the parties (Articles 214 and 217 of the code of criminal procedure).

The Netherlands: The Office of the Public Prosecutor can instruct the Police to start, continue or conduct more thorough investigations.

Poland: A Court seized with a case is authorized to assess the activities conducted by the Prosecutor within the preliminary investigations. At first the Court sees whether the indictment is in compliance with the law; should flaws be identified, the Court refers the case to the Prosecutor, who has to review the indictment and correct it within 7 days (Article 337, paragraph 1, of the code of criminal procedure). If the Court considers that there are serious shortcomings in the preliminary investigations,

and in particular, if it deems it necessary to collect further evidence, then it refers the case back to the Prosecutor to conduct further investigations (Article 345, paragraph 1, of the code of criminal procedure). Should the delay caused by such additional investigations to the judgment be unacceptable, then the Court can ask the Prosecutor to complete the evidence also after the trial has started (Article 397, paragraph 1, code of criminal procedure).

Portugal: should a judicial authority learn that an offence has not been investigated thoroughly, then it can say so in the judgment so that other Prosecutors, where necessary a hierarchical superior, can adopt appropriate measures.

Czech Republic: under the Czech legal system a judge cannot ask for additional investigations.

Romania: Under Article 218, paragraph 3, of the code of criminal procedure, a Public Prosecutor may conduct investigations personally, carry out any activities or examine any procedures carried out by the body in charge of the prosecution. Measures adopted by a Public Prosecutor can be annulled by a hierarchical superior, by grounded decision, exclusively on points of law. It is also possible to lodge an appeal with the Court against a measure issued by a hierarchical superior, if the criminal proceedings have been conducted superficially and the issued measure is unsubstantiated or illegitimate.

Scotland: as in other jurisdictions of the United Kingdom, criminal proceedings are accusatorial. Courts make a decision solely on the basis of prosecution and defense evidence and submissions, and cannot investigate directly. There is, however, an exception for offences concerning the administration of justice. In that case, a Court can ask for the collaboration of a public prosecutor to consider the circumstances of the offence.

Hungary: a Judicial authority can decide on its own motion that the facts of a criminal offence have to be investigated further in case of inaction, superficiality and/or omissions with regard to investigations.

Taking into account the brief outline described in b1), please explain

b2. If the judicial authorities dealing with criminal proceedings to discharge their jurisdictional functions in full where several facts can not to be brought to their attention as a matter of discretion?

Bulgaria: under Article 13 of the code of criminal procedure, Judicial authorities, Public Prosecutors and investigative bodies, each within their respective competence, shall adopt every possible measure to ensure the ascertainment of objective truth.

England and Wales: proceedings concerning terror offences always fall under the jurisdiction of a Judge assisted by a Jury. The Judge establishes the admissibility of the case and ensures that only relevant and admissible material is brought to the attention of the jurors. Considering that only irrelevant and inadmissible evidence is excluded, jurors can "discharge their functions fully".

Italy: our procedural and judicial systems set forth instruments, as mentioned in answer B.1.4. that aim at guaranteeing the impartiality and thoroughness of investigations.

Lithuania: Article 2 of the code of criminal procedure provides that the Public Prosecutor and the authority in charge of preliminary investigations apply all the law provisions when they learn about a *notizia criminis*, for the purpose of conducting the investigations and ascertaining the criminal activities within a reasonable time. That means that the law requires that all the circumstances necessary to resolve the case be ascertained. Article 220, paragraph 2, of the code of criminal procedure, provides that a Prosecutor is entitled to transmit to the Court only the evidence he deems important for the case. However, at the request of the parties, the Public Prosecutor has to transmit all the evidence so that the seized Court can have all the necessary material to assess the circumstances and make a decision.

Poland: a Court can acquire evidence also ex officio. Under given circumstances set forth in answer B..1.4., a Court is authorized to refer the indictment back to the Public Prosecutor, ordering him to obtain fresh evidence.

Romania: a specific characteristic of criminal proceedings is that it is irrevocable and irrepeatable. Thus, once it is started, criminal proceedings cannot be stopped, limited and revoked or withdrawn and, once seized, a judicial authority cannot relinquish its Office. Criminal actions have to be pursued until their conclusion. It is impossible to leave aside any prosecution or defense evidence, given that the defendant's lawyer is authorized to be present at every initiative undertaken by the prosecution. Furthermore, a defendant is present at the trial through his lawyer, through whom he learns about the evidence. At the end of this phase, under Article 250 of the code of criminal procedure and in the presence of his lawyer, a defendant is presented with all the evidence acquired and is granted a reasonable time to examine it and submit any requests. After the defendant has had knowledge of the evidence, a report is

drawn up, signed by the defendant himself and the Public Prosecutor, as well as his lawyer of choice or lawyer appointed by the Court.

b3. Is impartiality of investigation, which should be ensured via the autonomy of police and/or public prosecutors, an issue debated in the State by the public opinion at large?

Bulgaria: the impartiality of investigations is currently being debated by public opinion in this country. The topic has been at the centre of a recent judicial case concerning an alleged attempt by the Executive to unduly influence investigations conducted by the Judiciary.

Denmark: generally this topic is not debated by public opinion. However the Danish system has undergone some changes due to the fact that the earlier system was not satisfactory.

England and Wales: there in currently no debate on this topic going on in the United Kingdom: in fact, the Police and Crown Prosecution Service operate in an autonomous way, without any interference by the executive.

Italy: the impartiality of investigations - finally implemented in 1988 by a reform of the code of criminal procedure meant to introduce an accusatorial system that changed the relationship between public prosecutor and judicial police and implemented judicial control on investigations - is an element generally recognized by public opinion. Furthermore, in relation to the great stir caused by specific investigations concerning public executives or politicians, the topic of the actual impartiality of Public Prosecutors is still today discussed by opinion makers and commentators

Lithuania: the safeguard of the impartiality of preliminary investigations in view of the autonomy of the Police (the body in charge of conducting the preliminary investigations) and the Office of the Public Prosecutor is not a topic debated by public opinion as there have been no interferences in investigations.

Malta: the impartiality of investigations and prosecutions in general are not commonly debated.

The Netherlands: yes, since a recent case where a person charged with having killed a child was found innocent after having served part of the sentence.

Poland: under the Polish system the Minister of Justice is also the General Prosecuting Attorney. That means that one official belongs to the executive and the judicial powers at the same time. For many years a debate has been under way on whether the functions of the Minister of Justice should be separated from those of the General Prosecuting Attorney. There are contrasting opinions on this and no final conclusion has yet been reached.

Portugal: this topic is currently being debated since nine bills regulating carriers, the organization of criminal investigations and national security are under study and could give rise to issues in this respect.

Czech Republic: the attention paid by public opinion to the impartiality of investigations is increasingly more and more due to recent political high-profile cases.

Romania: the impartiality of investigations is guaranteed by the independence of the Public Prosecutor. The independence of Judges and Prosecutors is safeguarded by the Constitution and the Codes that regulate the status of magistrates. The impartiality of investigations, together with the autonomy of the Public Prosecutor and the Police, is a topic debated by public opinion, in particular at the level of the media. The adverse perception of the public is nurtured by the media which presents isolated cases, interpreting them subjectively, and not reflecting the reality as a whole.

Scotland: in 2007 the position of the Lord Advocate as a member of the Cabinet of the Scottish Government was widely debated. On 23 May 2007, the Prime Minister announced that the Lord Advocate would no longer be part of the Cabinet. However, this is not a topic that is often publicly debated.

Hungary: the impartiality of investigations is a problem widely debated by public opinion. A typical case concerns the so-called white collar offences (this does not apply to the phenomenon of terrorism).

CONCLUSIONS

Sector B – Impartiality

With regard to the question of impartiality when conducting investigations it is more difficult to recap the answers provided by the members of the working group as there are huge differences in the specific solutions adopted by the legal and procedural systems to ensure real impartiality of investigations. All the same, we have identified the objectives common to all the States.

Although the States have different procedural systems (accusatorial to various degrees), legal and administrative systems, as well as legal cultures, all the members of the working group consider that it is essential for the autonomy of investigations to be guaranteed and for the outcome of investigations to be monitored by independent entities: a public prosecutor or a judge, depending on the choices made by the legal systems, also in relation to the different phases of the proceedings.

All the information provided on this matter highlights that participants mostly feel the need to strengthen and enhance safeguards with regard to the autonomy and independence of the bodies in charge of investigations so as to ensure enquiries into every offence, especially into cases that generate greater social alarm, such as offences committed by politically and/or economically strong individuals.

In numerous countries, public opinion exercises a form of democratic control (although necessarily an indirect form of democracy) over the work of the investigating authorities that promotes the power of supervision with regard to the activities of the investigating authorities and can also nurture discussions on the validity and operational capacity of individual procedural systems.

The need for the judicial power (which basically also embodies investigations), to operate in conditions of real autonomy and independence while fully complying with the separation of State powers, is also strongly felt.

It is by identifying such common objectives, within the framework of a work in progress, that we can lay the foundation for developing instruments of agreement aimed at drafting a future protocol in the matter.

CONCLUSIONS

Sector C - The impact of forthcoming EU criminal justice legislation on national judiciaries

Introduction and the Past

1. Prior to the Lisbon Treaty changes were afoot which, we believe, should be of concern to all criminal judges and prosecutors across the EU. As part of a process of harmonisation, integration and standardisation of significant aspects of the administration of criminal law across the EU, two particular important shifts had been occurring. The first was the growth in the number of **Framework Decisions** emanating from the EU that tended to have a profound impact on the criminal law as administered in member states (most usually via national legislation but also – it seems likely – through the jurisprudence of the Court of Justice and the individual decisions of the domestic courts). Second, the **Court of Justice** appeared to be testing the limits of its authority in the sphere of criminal law, and it appeared that it was not going to be restrictive or minimalist in its approach.

Framework Decisions

2. First, **Framework Decisions**. These, in outline, were a law-making device created in the Amsterdam Treaty of 1999 on the European Union (Article 34 (2)) which addressed the ways in which the European Union (through the Council) can legislate in the area of criminal law. Framework Decisions, some argue, have equal force (though not the same effect) as EC Directives: unlike Directives, they *do not have direct effect* nationally, although *they have to be implemented* and, as such, they are instruments that are binding on the member states. They are, therefore, the product of EU rather than EC law, and their aim is harmonisation.

3. Because Framework Decisions cannot have direct effect nationally, they are not in themselves binding on a national judge and they do not supplant domestic legislation. However, they are, according to the Court of Justice, necessary tools of interpretation (see ***Pupino*: Case C – 105/03,** analysed between [14] – [22] below). The court explained it thus:

> 43. *"In the light of all the above considerations, the Court concludes that the principle of conforming interpretation is binding in relation to framework decisions adopted in the context of Title VI of the Treaty on European Union. When applying national law, the national court that is called upon to interpret it must do so as far as possible in the light of the wording and purpose of the framework decision in order to attain the result which it pursues and thus comply with Article 34 (2) (b) EU."*

4. This was affirmed in ***Dell'Orto: Case C-467/05***:

28. "*In accordance with the case-law of the Court (*Pupino*), the national judge is obliged, insofar as possible, to interpret the provisions of the CPP concerning the extent of the decision-making powers of the judge responsible for enforcement, with regard to the return of property seized in the course of criminal proceedings, in conformity with Article 9(3) of the Framework Decision…".*

5. Framework Decisions (extant or proposed) cover issues as diverse as the standing of victims; freezing orders; confiscation orders; arrest warrants; evidence warrants; certain procedural rights in criminal proceedings; non-custodial pre-trial supervision measures; the use of previous convictions; the mutual recognition of financial penalties; ne bis in idem (double jeopardy); the transfer of prisoners; and the mutual recognition of sanctions that are alternatives to prison.

6. Given the wide-ranging subject matter of the existing and proposed Framework Decisions and the effect of the decision of the Court of Justice in ***Pupino***, prior to the Lisbon Treaty it was becoming apparent that there may be a need for greater awareness and training in this area.

The Court of Justice

7. Second, the expanding influence of the **Court of Justice**. With criminal law increasingly and firmly on the European agenda, the Court of Justice has been establishing and defining its own role. In ***Pupino***, the Court of Justice seemingly "trumped" the Italian Constitutional Court by reaching a decision on certain minimum protections for victims that the Italian Constitutional Court had decided should be left to legislation. In so doing, the Court of Justice arguably set itself above domestic courts at all levels. The Court stated that the relevant Framework Decision "must be interpreted as meaning that the national court must be able to authorize young children, who, as in this case, claim to have been victims of maltreatment, to give their testimony in accordance with arrangements allowing these children to be guaranteed an appropriate level of protection, for example outside the trial and before it takes place."

8. Maria Pupino had been charged in an Italian court with various offences releting to the abuse of pre-school children. The prosecutor requested the court to use special procedures when taking testimony from the children. The defence objected on the grounds that Italian law did not explicitly permit special procedures to be used with victims of crime for which Pupino was charged. The Italian courts dismissed the prosecution's application but referred the matter to the Court of Justice. When ***Pupino*** when went back to the local Florentine court following the decision of the Court of Justice, the local judge (controversially) decided he was able, in the exercise of his discretion, to follow the Court of Justice, viz. to provide the victims with various special arrangements for giving evidence as indicated by the Court of Justice (whereas, as set out above, the domestic Constitutional Court had indicated that the protections sought for the victims were a matter for the legislature).

9. Furthermore, in ***Case C-176/03***, the Court of Justice seemingly carved out for itself the first stage of a general role of deciding which areas of the criminal

law are so serious, within a European context, that they are more suitable for EC-wide directives for the purposes of harmonisation and integration. This heralded directly enforceable EC Directives in the sphere of the criminal law that were the product, in the first instance, of a Court of Justice decision on the importance of the area. The result in this case was met with some consternation by many governments, and the court has been accused of demonstrating a certain *federalisme judiciare.* Indeed, some elements within the Commission have indicated that it is high time to end this *gouvernement des juges.*

10. Historically, common standards attracting punitive administrative sanctions have been limited to such areas as farming, fishing and transport. Enforcement generally of regulations has always been something of a blank sheet (save for competition) and the Court of Justice has filled the gap and has established the clear obligation to "enforce", when there were irregularities, by mandatory sanctions. Therefore, the Community achieved the ability to impose certain punitive sanctions (essentially) via the Court. Some countries challenged the competence of the EC to set these punitive enforcement obligations but they lost a vital challenge on this issue before the court (see ***Case C-240/90*** when the Court of Justice recognised that the EC is functionally competent to harmonize measures, including in the field of punitive sanctions).

11. What was unknown was whether criminal procedure and criminal sanctions **generally** could be the subject of the "same treatment", leading to greater harmonisation Europe-wide. At the time of Maastricht in the early 1990s this was unclear and the approach then taken was to leave harmonisation of the criminal law to the Third Pillar (which is additional and complementary to the First Pillar). Between the Maastricht and Amsterdam Treaties there was a great deal of activity aimed at specific areas of harmonisation between criminal systems in areas such as fraud; this was the work principally of the individual member states rather than the Commission. In the Treaty of Amsterdam in 1999 one finds the real basis, relevant to the criminal law, for mutual recognition and harmonisation, and including the approximation of minimum standards. The trend was being developed of building common standards and avoiding conflicts of jurisdiction.

12. Against that background, ***Case C-176/03*** was heard before the Grand Chamber of the Court of Justice. In this case the Commission of the European Community sought an annulment of a Council Framework Decision on the protection of the environment. The Framework Decision required member states to criminalize and impose penalties on certain conduct that harmed the environment and it dealt with serious environmental violations which the Commission decided was an area which required harmonisation between the member states. The Council did not accept a proposed Directive under EC law; however, the Commission (supported by the Parliament) argued the alternative instrument – a Framework Decision – was wrong in principle, and submitted before the Court of Justice that this should have been legislated in EC as opposed to EU law, and that as a result a Directive and not a Framework Decision should have been promulgated. The Court decided that in serious areas such as this there could be harmonisation of criminal law via Directives, together with the imposition of sanctions, and struck down the Framework Decision. The core part of the decision of the Court is as follows:

" 46 As regards the aim of the framework decision, it is clear both from its title and from its first three recitals that its objective is the protection of the environment. The Council was concerned 'at the rise in environmental offences and their effects which are increasingly extending beyond the borders of the States in which the offences are committed', and, having found that those offences constitute 'a threat to the environment' and 'a problem jointly faced by the Member States', concluded that 'a tough response' and 'concerted action to protect the environment under criminal law' were called for.

47 As to the content of the framework decision, Article 2 establishes a list of particularly serious environmental offences, in respect of which the Member States must impose criminal penalties. Articles 2 to 7 of the decision do indeed entail partial harmonisation of the criminal laws of the Member States, in particular as regards the constituent elements of various criminal offences committed to the detriment of the environment. As a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence (see, to that effect, Case 203/80 Casati [1981] ECR 2595, paragraph 27, and Case C-226/97 Lemmens [1998] ECR I-3711, paragraph 19).

48 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.

49 It should also be added that in this instance, although Articles 1 to 7 of the framework decision determine that certain conduct which is particularly detrimental to the environment is to be criminal, they leave to the Member States the choice of the criminal penalties to apply, although, in accordance with Article 5(1) of the decision, the penalties must be effective, proportionate and dissuasive.

50 The Council does not dispute that the acts listed in Article 2 of the framework decision include infringements of a considerable number of Community measures, which were listed in the annex to the proposed directive. Moreover, it is apparent from the first three recitals to the framework decision that the Council took the view that criminal

penalties were essential for combating serious offences against the environment.

51 It follows from the foregoing that, on account of both their aim and their content, Articles 1 to 7 of the framework decision have as their main purpose the protection of the environment and they could have been properly adopted on the basis of Article 175 EC.

52 That finding is not called into question by the fact that Articles 135 EC and 280(4) EC reserve to the Member States, in the spheres of customs cooperation and the protection of the Community's financial interests respectively, the application of national criminal law and the administration of justice. It is not possible to infer from those provisions that, for the purposes of the implementation of environmental policy, any harmonisation of criminal law, even as limited as that resulting from the framework decision, must be ruled out even where it is necessary in order to ensure the effectiveness of Community law.

53 In those circumstances, the entire framework decision, being indivisible, infringes Article 47 EU as it encroaches on the powers which Article 175 EC confers on the Community.

54 There is therefore no need to examine the Commission's argument that the framework decision should in any event be annulled in part in so far as Articles 5(2), 6 and 7 leave the Member States free also to provide for penalties other than criminal penalties, even to choose between criminal penalties and other penalties, matters allegedly falling undeniably within the Community's competence.

55 In the light of all the foregoing, the framework decision must be annulled."

13. Elements from within the Commission have indicated that the rationale underpinning this decision could apply to many important areas of the criminal law, thereby suggesting that directly enforceable Directives can and should be issued in a range of areas. As a result, there has been an urgent debate going on as to which areas should be the subject of harmonisation in this (direct) sense (i.e. which areas should become the subject of EC law and directly enforceable Directives).

14. These issues have been ongoing before the Court of Justice, and case ***C-176/03*** was affirmed in ***Case C – 440/05***, a case in which the Commission sought to annul a Framework Decision that was intended to strengthen enforcements of laws against ship-source pollution. The Court of Justice

applied the analysis used in C – 176/03 and struck down the Framework Decision.

The Lisbon Treaty

15. Under this recent Treaty, the current three pillar structure with its different decision making procedures is abolished, to be replaced by a single legal personality (after a 5 year transition). Common policies in the area of freedom, security and justice are brought inside the Community method. The hierarchy of norms will distinguish between legislative acts, delegated acts and implementing acts, although the terms "law" and "framework law" have been abandoned in favour of keeping the terminology of directives, regulations and decisions.

16. A new "ordinary legislative procedure" will now apply to all areas of European Union law and policy. This means that the European Commission will propose legislation with the European Parliament and the Council having equal power to enact legislation – so called co-decision system. Member states in Council will reach agreement by a qualified majority.

17. In the area of criminal law the Court of Justice will have full jurisdiction rather than just the power to hear preliminary references – indeed the jurisdiction of the Court is expanded to cover all the activities of the Union except for the Common Foreign and Security Policy. However, the Court has oversight in the case of a breach of procedure or a conflict over competence (in effect, patrolling the frontier between the first and second pillar). It can hear appeals against restrictive measures and give an opinion about an international treaty. Where the opinion of the Court is adverse, the agreement envisaged may not enter into force unless it is amended or the Treaties are revised.

18. By Article 69 B (2) "if the approximation of criminal laws and regulations of the Member States proves essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures, directives may establish minimum rules with regard to the definition of criminal offences and sanctions in the area concerned. Such directives shall be adopted by the same ordinary or special legislative procedure as was followed for the adoption of the harmonisation measures in question."

19. The effect of this is that we are, in our view, now entering a wholly new phase, and we need to allow for the evolution of framework decisions and the role of the Court of Justice to unfold before sending round questionnaires.

20. However, it is important to alert members of the ENCJ to the past and to the potential for a new expanded role for the Court of Justice, and we propose that a paper along these lines is distributed as a first stage in monitoring the way that these important matters evolve under the Lisbon Treaty.