

eucrim

2019 / **2**

THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM



Focus: Sanctions in European Criminal Law

Dossier particulier: Sanctions dans le droit pénal européen

Schwerpunktthema: Sanktionen im Europäischen Strafrecht

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

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Imprint

* The news contain Internet links referring to more detailed information. These links are being embedded into the news text. They can be easily accessed by clicking on the underlined text in the online version of the journal. If an external website features multiple languages, the Internet links generally refer to the English version. For other language versions, please navigate using the external website.

Guest Editorial

Dear Readers,

Developing criminal law and judicial cooperation in criminal matters has been a key component of Union policies for the last 20 years. The Union's common area of freedom, security and justice (AFSJ) provides citizens and companies with both security and rights, in particular by ensuring an ever-increasing coordination between judicial authorities, the progressive mutual recognition of judgments and judicial decisions in criminal matters, and the necessary approximation of criminal laws.

Soon, Union institutions must take stock of what has been achieved and what remains to be done. Our future priorities must follow the wake of our achievements but also deliver innovations capable of addressing new challenges. Indeed, much progress has been achieved since the 1999 Tampere Programme: there is a robust Union *acquis* on cooperation between judicial authorities, covering the recognition and execution of a range of judgements and decisions, e.g., arrest warrants, investigation and supervision orders, prison sentences and financial penalties. This progress is facilitated by the progressive harmonisation of certain aspects of national substantive criminal and procedural laws, including minimum standards to protect the rights of suspects and victims, and it is enforced through the forward-looking case law of the CJEU. The Union's efforts to establish a common area of justice (AFSJ) are thus visible, both in the progress of judicial cooperation and in the protection of the rights of persons involved in justice-related issues. Going forward, however, some challenges remain in making this existing *acquis* work efficiently throughout the Union, at the heart of which is ensuring effective implementation of the adopted legal instruments in all Member States.

As the world becomes more fractured and unsettled, the Union's core task remains to protect and further Europe's achievements, including its open democratic societies and liberal economies, while keeping terrorism and cross-border organised crime effectively under control. Judging by the relevant indicators, it seems that the terrorist threat in the Union will remain high and new attempts to carry out attacks likely. While the number of fatalities has decreased since 2015 (from 151 to 62 in 2017), the number of jihadist-inspired attacks (33) in 2017 more than doubled, with the number of arrests in relation to jihadist terrorist activities reaching high levels (705 in 2017). Similarly, organised crime remains a challenge for the

authorities: Europol's current Serious and Organised Crime Threat Assessment (SOCTA 2017) records more than 5000 organised crime groups (OCGs) operating on an international level and currently under investigation in the EU. Overall, this number highlights the substantial scope and potential impact of serious and organised crime on the EU. More than one third of these groups active in the EU are involved in the production, trafficking, or distribution of illicit drugs. Other major criminal activities for organised crime groups in the EU include organised property crime, migrant smuggling, trafficking in human beings, and excise fraud. 45% of the groups mentioned in the SOCTA 2017 are involved in more than one criminal activity. It is estimated that the economic loss due to organised crime and corruption remains high in the Union, between €218 and €282 billion annually. In addition, organised crime and corruption have significant social and political costs, such as infiltration of the legal economy through the investment of laundered criminal proceeds.

Faced with the evolution of crime, globalisation, and technological innovations, there is a clear need to adapt the Union's *acquis* to the actual needs of practitioners and citizens and thus enable appropriate responses to new developments, including those linked to digitalisation and the use of Artificial Intelligence (AI). A primary challenge is the establishment of a solid EU criminal law framework capable of coherently tackling serious and/or cross-border crime ("euro-crimes") and other areas of crime in which the approximation of offences or sanctions is essential for the enforcement of EU law ("accessory crimes") in full respect of Member States' legal traditions. It is important to strike the right balance between EU action and respect for Member States' legal traditions, in particular in the area of sanctions. This particular issue of *eu crim* is dedicated to helping the reader understand how or in what specific areas of sanctions, whether criminal or administrative, financial, or otherwise, the Union can achieve better results.



Peter Csonka

Another high priority in the area of justice is to strengthen mutual trust based on democracy, the rule of law, and fundamental rights, to increase fairness and sustainability in society, and to ensure the smooth functioning of the single market. It is now clear that further efforts are required to consolidate the system of mutual recognition of judgments and judicial decisions in criminal matters, including by ensuring minimum harmonisation of criminal procedural rules. One major issue here is to address the growing lack of mutual trust due to problems in the functioning of criminal justice systems or poor prison conditions in some Member States and the ensuing refusals of European Arrest Warrants. As the Union's institutional landscape for judicial cooperation gains maturity through the reform of Eurojust and the necessary integration of various judicial networks, it will also grow in complexity owing to their future interaction with the European Public Prosecutor's Office (EPPO) and its direct criminal enforcement. The Union will need to ensure coherence of action and adequate funding for all actors in this chain, including *vis-à-vis* the Union's law enforcement and administrative agencies.

Besides finalising pending legislative files, such as those on e-evidence, and ensuring the implementation of the *acquis*, reflection should also begin on possible initiatives that could help the Union complete its criminal justice arsenal. Issues worth exploring in the medium or long term could include:

- The transfer of criminal proceedings, perhaps in the broader context of rules on conflicts of jurisdiction and the principle of *ne bis in idem*;
- Cross-border use and admissibility of certain types of evidence;
- Protecting vulnerable suspects and accused persons;
- Updating Union law on corruption and environmental crime;
- Extending the material competence of the EPPO;
- Developing minimum standards on pre-trial detention and on compensation for unlawful detention;
- Continuing work on victims' rights, including access to justice and compensation;
- Enhancing convergence and cooperation between Eurojust, the European Judicial Network (EJN), and the EPPO;
- Issuing or revising handbooks on mutual recognition instruments to help practitioners implement CJEU case law;
- Use of Artificial Intelligence (AI) in criminal proceedings;
- Enhancing the digitalisation and interoperability of criminal justice authorities and EU bodies.

Of course, before becoming Union law any initiative in these areas of evolution will be subject to political validation and practitioners' scrutiny: for both the Commission will need to demonstrate their added value and compliance with principles such as subsidiarity and proportionality. We may be looking for feedback from you as well, dear Readers, on many of them.

Peter Csonka

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Commission



European Union*

Reported by Thomas Wahl (TW) and Cornelia Riehle (CR)

Foundations

Fundamental Rights

Commission Presents New Concept to Strengthen Rule of Law

spot light On 17 July 2019, the European Commission adopted a set of actions to further strengthen the rule of law in Europe. Key aspects are increased awareness, an annual monitoring cycle, and more effective enforcement. Concrete initiatives are included in the Communication to the European Parliament, the European Council, the Council, the European Social and Economic Committee, and the Committee of the Regions “Strengthening the rule of law within the Union. A blueprint for action” (COM(2019) 343 final). The Communication is linked to a Communication of April 2019 (COM(2019) 163 final, see eucrim 1/2019, p. 3), which set out the existing toolbox to encourage and enforce the rule of law in the EU, inviting all stakeholders to reflect on the next steps. The July Communication takes up the input given during this public consultation. Future avenues will rest on the following three pillars:

- Promotion: Building knowledge and a common rule of law culture;
- Prevention: Cooperation and support to strengthen the rule of law at national level;
- Response: Enforcement at EU level when national mechanisms falter.

When promoting a *rule of law culture*, the Commission will intensify its dialogue with civil society, e.g., by means of an annual event dedicated to rule-of-law principles and by making full use of funding possibilities for civil society and academia in support of their promotion efforts. The Commission is also committed to strengthening cooperation with the Council of Europe (including the Venice Commission and GRECO).

As regards *prevention*, the Commission decided to set up a Rule of Law Review Cycle, including an annual Rule of Law Report summarising the situation in all EU Member States. This is/will be accompanied by a mutual exchange of information and by dialogue, also through a network of national contact persons. The European Parliament and the Council are invited to a dedicated follow-up to the annual Rule of Law

Report. The Commission also proposed further developing the EU Justice Scoreboard (see eucrim 1/2019, p. 7), including improved coverage of relevant rule-of-law related areas, such as criminal and administrative justice. In addition, the Commission envisages strengthened dialogue with other EU institutions, Member States, and stakeholders and cooperation with European political parties to ensure that their national members effectively respect the rule of law.

Regarding an effective, common *response* to rule-of-law breaches, the Commission announced that it will continue to make full use of its powers as guardian of the Treaties – it can ensure respect for EU law requirements relating to the rule of law by way of infringement proceedings and the Art. 7 TEU procedure. The Commission will develop and pursue a better strategic approach to infringement proceedings, however, which includes requests for expedited proceedings and interim measures whenever necessary. On Art. 7 TEU, the institutions are invited to work together to intensify the collective nature of decision-making among them. The Commission supports the idea of reforming the procedures of the Art. 7 hearing. Building on the Commission Anti-Fraud Strategy (see eucrim 1/2019, p. 15), it will also explore the possibility of a data analysis function to help identify problems when managing risks related to the protection of EU’s financial interests.

The Commission established a [website](#) which contains all information on

* If not stated otherwise, the news reported in the following sections cover the period 1 June – 31 July 2019.

the initiative to strengthen the rule of law in the EU. Besides the Communications of April and July 2019, it also includes stakeholder contributions and a summary thereof. According to a recently published [Eurobarometer survey](#) on the rule of law, the vast majority of respondents (over 85% in each case) thinks that each of the 17 main principles of the rule of law (e.g., acting on corruption, the independence of judges, the proper investigation of crimes) are essential or important. Over 80% of respondents believes that the situation in their country needs at least some improvement with regard to the respect of these principles. (TW) ■

Council: Debate on Rule of Law from Justice Perspective

In light of a [discussion paper](#) by the Finnish Council Presidency, the Ministers of Justice of the EU Member States held a policy debate on strengthening the rule of law – from the perspective of the justice sector – at their [informal meeting in Helsinki on 19 July 2019](#). Strengthening the rule of law has regularly been on the agenda of the General Affairs Council, but it also has particular importance for judicial cooperation in criminal matters. As Justice Ministers also have a valuable role in strengthening the rule of law, the Finnish Presidency aims to promote regular thematic discussions among Justice Ministers on developments at the EU and national levels, as well as in the case law of the Court of Justice of the EU.

The discussion paper also reflects on the importance of the rule of law for access to justice and sustainable development. It summarises the EU tools supporting a common judicial culture, among them the annual EU Justice Scoreboard (see [eucrim 1/2019](#), p. 7), which is considered “a useful tool for providing comparable information that can support national projects aiming at improving the justice systems.” The EU acquis on the procedural rights of suspects and accused persons is highlighted. Against this background, the minis-

ters were invited to discuss, *inter alia*, the following issues:

- Contribution of Justice Ministers to strengthening the rule of law in the EU in the field of justice affairs;
- Regular issues of rule-of-law debates in the JHA Council;
- EU tools considered most effective in supporting a common European judicial culture;
- Further development of EU tools;
- Best practices as regards the rule of law in the field of justice affairs.

Strengthening the rule of law is one of the top priorities of Finland’s Council Presidency. The Presidency promotes a comprehensive approach, meaning that the EU’s rule-of-law instruments will be regarded as mutually complementary. (TW)

CJEU: Polish Supreme Court Reform Infringes EU Law

On 24 June 2019, the CJEU ruled that the Polish reform lowering the retirement age of the Supreme Court judges is contrary to EU law ([Case C-619/18](#)).

The CJEU reviewed the Polish reform law in light of Art. 19(1) subpara. 2 TEU, which obliges Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. This entails that judges be free from all external intervention or pressure and therefore requires certain guarantees appropriate for protecting those entrusted with the task of adjudicating in a dispute, including the guarantee against removal from office. The principle of irremovability of judges is essential for judicial independence, as required by Union law.

The CJEU rejected the argument brought forth by the Polish government that the reform is intended to standardise the judges’ retirement age with the general retirement age applicable to all workers in Poland. The Court points to the explanatory memorandum of the draft law, which casts doubt as to the real aims of said reform. As a result, lowering the retirement age from 67 to 65 for

the Supreme Court judges in post was not justified by a legitimate objective and thus undermined the principle of irremovability of judges.

Furthermore, the CJEU held that the conditions and procedures for a potential extension beyond the normal retirement age impair the independence of judges, because the President of the Polish Republic is given unlimited discretion that is not governed by any objective and verifiable criterion.

It is the first final judgment of the CJEU regarding allegations by the EU institutions vis-à-vis EU Member States for not upholding the rule of law. The CJEU’s judgment of 24 June 2019 includes fundamental explanations on the Union’s principles of the irremovability of judges and of judicial independence. It therefore also serves as a point of reference for discussions on the future strengthening of the EU’s rule-of-law monitoring mechanism. This is also one of the priorities of the Finnish Council Presidency in the second half of 2019. The CJEU’s decision also influenced the Commission’s communication of 17 July 2019 in which it presented a new concept for strengthening the rule of law in the EU. In a [statement of 24 June 2019](#), the Commission highlighted the importance of the judgment.

In the case at issue, the CJEU, by decision of 17 December 2018, already granted interim measures that, *inter alia*, obliged Poland to suspend application of the legislation. A provisional order was issued by the Vice-President of the CJEU on 19 October 2018 in this case. For these decisions, see [eucrim 4/2018](#), p. 191 and [3/2018](#), p. 144. For the opinion of the Advocate General in the present case C-619/18, see [eucrim 1/2019](#), p. 4. (TW)

AG: Polish Reform Introducing New Retirement Rules for Judges Incompatible with EU Law

On 20 June 2019, Advocate General *Tanchev* presented his [opinion](#) on whether the new retirement rules for

Polish judges and prosecutors violate EU law. The case ([C-192/18](#)) is an action for failure to fulfil obligations (Art. 258 TFEU), which was brought by the European Commission. The Commission brought forward two complaints against the Polish reform, which introduces new retirement rules in the justice sector:

- The retirement age for judges of common law courts, public prosecutors, and judges of the Supreme Court was lowered to 60 for women and 65 for men, when it was previously 67 for both sexes;
- The Minister of Justice was vested with discretion to prolong the period of active service of individual common law court judges beyond the new retirement ages, when that power was previously exercised by the National Council of the Judiciary.

The AG first concluded that the introduction of different retirement ages for female and male judges is not in line with the EU's secondary law prohibiting discrimination on the grounds of sex. In particular, Poland cannot rely on the discretionary provisions of EU law to set different retirement ages for men and women in public social security schemes.

Second, AG *Tanchev* found that the legislative lowering of the retirement age of judges, together with the discretionary power for the Minister of Justice to extend the active period of judges, does not give the necessary guarantees for judicial independence. In particular, this package is considered to be inconsistent with the objective element of impartiality as protected under the ECtHR case law. Therefore, Poland has also breached its obligations in this regard. (TW)

AG: Poland's New Disciplinary Chamber of the Supreme Court Incompatible with EU Law

On 27 June 2019, Advocate General *Tanchev* delivered his opinion on a reference for a preliminary ruling brought by the Polish Supreme Court ([Joined Cases](#)

[C-585/18, C-624/18 and C-625/18](#)). The referring court casts doubt as to whether the newly created Disciplinary Chamber of the Supreme Court meets the requirements of independence under EU law. The Polish Supreme Court has had to deal with several complaints by Supreme Court judges against their retirement following the new Polish legislation lowering the retirement age of judges.

The case concerns another aspect of the judicial reform in Poland, the Polish legislator having newly created the Disciplinary Chamber of the Supreme Court designated to hear such actions, which were heard prior to the reform before the Chamber of Labour Law and Social Security of the Supreme Court. The Supreme Court questions, however, whether the Disciplinary Chamber offers sufficient guarantees of independence under EU law to hear such claims and whether it can eventually disapply national legislation that transferred jurisdiction to the Disciplinary Chamber. As it stands, the group of judges eligible for appointment by the President of the Republic to the Disciplinary Chamber are selected by the *Krajowa Rada Sądownictwa* (National Council of the Judiciary, 'NCJ') which is the body charged with safeguarding judicial independence in Poland. The independence of the NCJ has been rendered doubtful, however, by Polish legislation modifying the manner in which its judicial members are appointed. Its composition is now primarily determined by the legislative and executive authorities.

In its opinion, AG *Tanchev* first argues that disciplinary regimes governing judges are important aspects of the guarantees of judicial independence under EU law, thus the composition and functioning of a judicial council that itself is not a court must also be assessed in view of the guarantee of judicial independence. The AG admits that there is no uniform model for judicial councils; however, there are common attributes in relation to mission, composition, mandate, and functions that safeguard judi-

cial independence, and the requirements of these attributes must be met under EU law.

After examining the various aspects of the NCJ, the AG concludes that the newly created Disciplinary Chamber does not satisfy the requirement of judicial independence established by EU law. In particular, the manner of appointment of the members of the NCJ compromise its independence from the legislative and executive authorities.

Ultimately, the AG considers that another chamber of a national last-instance court is entitled – of its own initiative – to disapply national provisions that are incompatible with the principle of judicial independence, i.e., in the present case, the law conferring powers to the new disciplinary chamber.

The case is closely connected to other procedures before the CJEU that concern the comprehensive justice reform initiated by the Polish government in 2017. This reform triggered much international criticism and led the Commission to open several infringement procedures against Poland as well as to carry out the so-called Art. 7 TEU procedure by which Poland is put under rule-of-law monitoring. On 24 June 2019, the CJEU held that lowering the retirement age of Supreme Court judges is incompatible with EU law (Case C-619/18). On 20 June 2019, AG *Tanchev* concluded that the reform of altering the retirement age of judges in lower courts and of prosecutors is in breach of EU law (Case C-192/18). The Commission is conducting further infringement procedures against Poland. (TW)

Commission Advances Infringement Procedure Against New Disciplinary Regime for Polish Judges

On 17 July 2019, the [Commission took the next step in the infringement procedure against Poland](#), eyeing the Polish law that introduced a new disciplinary regime for ordinary court judges. The Commission has now sent a reasoned opinion to Poland after dissatisfaction

with the Polish government's response to a letter of formal notice launched in April 2019.

The Commission is concerned that Poland has introduced the possibility to initiate disciplinary investigations and sanctions against ordinary court judges on the basis of the content of their judicial decisions, including exercise of their right under Art. 267 TFEU to request preliminary rulings from the CJEU. Other critical arguments put forward by the Commission are:

- Due to its composition and selection process, the new Disciplinary Chamber of the Polish Supreme Court is not independent and impartial as required by EU law and CJEU case law;
- The President of Poland's Disciplinary Chamber has such excessive discretionary powers that it is not ensured that a court "established by law" will decide on disciplinary proceedings against ordinary court judges in the first instance;
- It is not guaranteed that disciplinary proceedings against judges are processed within a reasonable timeframe, which undermines the judges' defence rights.

Poland now has two months to react to the arguments of the Commission. If, afterwards, the Commission still considers Poland not to have remedied the complaints, it can bring an action before the CJEU for Poland's failure to fulfil the obligations under EU law.

The question of independence of the Disciplinary Chamber of the Supreme Court is also the subject of a reference for a preliminary ruling ([Joined Cases C-585/18, C-624/18 and C-625/18](#)). On 27 June 2019, the Advocate General recommended that the CJEU find incompatibility with EU law in this case, since the Disciplinary Chamber is not sufficiently independent. (TW)

Commission: Rule-of-Law-Related Infringement Actions Against Hungary

On 25 July 2019, [the Commission decided to launch an action before the CJEU against Hungary](#) for not fulfilling its

obligations under EU law, because Hungary has not changed its so-called "Stop Soros" legislation. The law criminalises activities in support of asylum applications and further restricts the right to request asylum. After having examined Hungary's replies to a reasoned opinion, the Commission found that Hungary has not sufficiently addressed the concerns raised, in particular the incompatibility with the EU's asylum law.

In addition, the Commission filed an action against Hungary at the CJEU for excluding non-EU nationals with long-term resident status from exercising the veterinary profession. This is considered an incorrect implementation of the Long-Term Residents Directive.

In another case, the Commission initiated the infringement procedure by sending a letter of formal notice to Hungary. It criticizes that the detention conditions of returnees in the Hungarian transit zones violate the EU's Return Directive and the Charter of Fundamental Rights of the European Union.

The measures taken by the Commission can be seen in the wider context of the EU's push for Hungary to uphold the value of rule of law. In September 2018, [the European Parliament voted to trigger the Art. 7 TEU](#) process, which may ultimately lead to disciplinary sanctions. It was the first time that the Parliament called on the Council of the EU to act against a Member State to prevent a systemic threat to the Union's founding values. (TW)

Fundamental Rights Report 2019

In June 2019, [FRA published its fundamental rights Report 2019](#). The 2019 report places special emphasis on the interrelationship between human rights and the UN's Sustainable Development Goals (SDGs) in an EU context. The 17 SDGs are at the heart of the 2030 Agenda for Sustainable Development, adopted by all United Nations Member States in 2015. They serve as an urgent call for action by all countries in a global partnership to end poverty and other

deprivation. This goes hand-in-hand with strategies to improve health and education, reduce inequality, and spur economic growth, while simultaneously tackling climate change and working to preserve oceans and forests.

In the remaining chapters, the report reviews and outlines FRA's opinions on the main developments in 2018:

- Use of the EU Charter of Fundamental Rights;
- Equality and non-discrimination;
- Racism, xenophobia, and related intolerance;
- Roma integration;
- Asylum, borders and migration;
- Information society, privacy, and data protection;
- Rights of the child;
- Access to justice, including the rights of crime victims;
- Implementation of the Convention on the Rights of Persons with Disabilities.

FRA's opinions are available in all EU languages and are additionally compiled in a [separate document](#). They are designed to give advice on possible policy considerations by the EU actors. (CR)

Security Union

19th Progress Report on Security Union

On 24 July 2019, the European Commission presented its [19th "progress report towards an effective and genuine Security Union"](#). The previous report was published on 20 March 2019 (see eucrim 1/2019, pp. 5–6). Within the framework of this series (see also eucrim 3/2016, p. 123), the 19th progress report focuses, in particular, on the following:

- The need for the Union's co-legislators to deliver on pending legislative proposals;
- Enhancement of digital infrastructure security in connection with the fifth generation (5G) networks;
- Analysis of the current risks and vulnerabilities of the EU's anti-money laundering framework (with a package of four reports presented on the same day,

see “Money Laundering” in this issue);

- Areas needing further implementation by the EU Member States;
- Stocktaking of ongoing work to counter disinformation and to protect parliamentary elections against cyber-enabled threats, efforts to enhance preparedness and protection against security threats, and cooperation with international partners on security issues.

The report, *inter alia*, highlights progress made as regards the *prevention of radicalisation online*. Following the “Christchurch call to action” of 15 May 2019, the Commission and Europol initiated the development of an EU crises protocol that will allow governments and Internet platforms to respond rapidly and in a coordinated manner to the dissemination of terrorist content online. The Commission also points out its support of Member States and local actors in preventing and countering radicalisation on the ground in local communities, e.g., the EU-funded Radicalisation Awareness Network (RAN). However, there is an urgent need for the Council and the European Parliament to swiftly conclude the proposed Regulation on preventing the dissemination of terrorist content online (see eucrim 2/2018, pp. 97–98 and the article by G. Robinson, eucrim 4/2018, p. 234).

Likewise, the EU co-legislators are called on to reach swift agreement on the legislative proposals for a European Cybersecurity Industrial, Technology and Research Competence Centre and Network of National Coordination Centres as well as cross-border access to electronic evidence. Ensuring *cybersecurity* remains one of the key challenges for the EU. Although a lot still needs to be done, the Commission underlines the progress made during the past two years, including – most recently – efforts by the Commission to address sector-specific requirements and recent actions to tackle hybrid threats. In this context, the report also refers to the adopted sanctions regime, which allow the EU to impose targeted, restrictive measures to

deter and respond to cyberattacks constituting an external threat to the EU and its Member States.

Another field of EU action is the *strengthening of the EU information systems for security*, border, and migration management. The European Parliament and Council are also called on here to accelerate their efforts in adopting new rules on Eurodac and the Visa Information System as well as the technical amendments necessary to establish the European Travel Information and Authorisation System (ETIAS, see also eucrim 2/2018, pp. 82/84).

A further critical point is the *resilience of digital infrastructure*. In this context, the report refers to the Recommendation on cybersecurity of 5G networks, setting out actions to assess the cybersecurity risks of 5G networks and to strengthen preventive measures (presented in March 2019). As initiated by this Recommendation, Member States completed national risk assessments, on the basis of which a joint review of risks at the EU level will be carried out by October 2019. A common toolbox of mitigating measures is planned for the end of 2019.

As regards the *implementation of other priority files on security*, the report lists a series of legislative acts that have not been fully transposed by the EU Member States; they are called on to take the necessary measures as a matter of urgency. These acts include:

- The EU Passenger Name Record Directive;
- The Directive on combating terrorism;
- The Directive on security of network information systems;
- The 4th Anti-Money Laundering Directive.

The *fight against disinformation* and related interference remains a major challenge for the EU’s democratic societies. The EU has put a robust framework in place for coordinated action against disinformation and it took up several measures in the last months. These include:

- The Joint Communication of 14 June 2019 on the implementation of the Action Plan against Disinformation;
- The Rapid Alert System set up in March 2019, which is to facilitate the sharing of insights related to disinformation campaigns and help coordinate appropriate responses;
- The European Cooperation Network on Elections, which held its first meeting on 7 June 2019;
- The envisaged in-depth evaluation of the implementation of commitments undertaken by online platforms and other signatories under the Code of Practice against Disinformation, which was endorsed by the European Council in its conclusions of 21 June 2019.

Ultimately, the report provides updates on the *external dimension* of the EU’s security policy. It stresses that leveraging the benefits of multilateral cooperation is an integral part of the EU’s efforts towards an effective and genuine Security Union. On 24 April 2019, the EU strengthened cooperation with the UN by signing the framework on counter-terrorism. It identifies areas for UN-EU cooperation and sets priorities until 2020. Several security cooperation measures have also been undertaken with the following partners:

- Western Balkans, e.g., the European Border and Coast Guard Status Agreement between the EU and Albania that entered into force on 1 May 2019;
- Middle Eastern and North African countries with which, for instance, negotiations were launched in view of an international agreement on the exchange of personal data by Europol and the competent national authorities;
- The United States, in relation of which the high-level workshop on battlefield information on 10 July 2019 and the evaluation of the Terrorist Financing Tracking Programme agreement between the EU and the United States (published on 22 July 2019) are highlighted.

In addition, the EU has concluded negotiations on the EU-Canada PNR

Agreement with a view to finalising the Agreement as soon as possible. It will also soon begin joint evaluations of its existing PNR Agreements with Australia and the United States. (TW)

Reflections on Future EU Internal Security

At its meeting on 7 June 2019, the home affairs ministers of the EU Member States began discussing the [future of EU policy in the area of internal security](#), especially law enforcement cooperation. The ministers concurred on the following fields of action:

- Effectively implementing existing legislation, particularly the recently agreed interoperability framework;
- Improving data connection and analysis;
- Pooling resources in research and innovation and building a technology hub;
- Working on a stronger framework for operational cooperation;
- Ensuring a sustainable financial outlook and investing in innovation for internal security, in particular providing Europol with the necessary resources.

The discussion will be continued in more detail during the upcoming Finnish Presidency of the Council. (TW)

Council Calls for New Knowledge-Sharing Platform to Support Law Enforcement

To better connect experts, tools, initiatives, and services in the area of digital data, Europol has been called on to develop a knowledge-sharing platform – the “Novel Actionable Information” (NAI). This is the main outcome of the [Council conclusions](#) adopted at the JHA Council meeting on 7 June 2019. The conclusions tackle the problem of the steadily increasing volume of digital data, which have a major impact on criminal investigations by law enforcement authorities. This is why data analysis capacities must be strengthened across Europe and resources, people skills, organisational experience, and services better pooled. Therefore, the

EU needs to develop tools that centralise structured knowledge exchange.

The new NAI platform is designed to support Member States and other relevant stakeholders, e.g., agencies, practitioners’ networks, etc. in order to:

- Share knowledge on how to conduct (criminal) analysis between law enforcement authorities across the EU;
- Design, update, and use procedures, methodologies, guidelines, manuals, and software programmes on handling digital data;
- Share lessons learned, best practices, and working scenarios involving digital data handling;
- Store applications, algorithms, or other software tools;
- Maintain an overview of relevant initiatives (actions, projects related to knowledge development) to facilitate prioritisation, avoiding duplication and optimising the use of resources.

The NAI platform can include practitioner’s competences, e-library capabilities, a toolbox platform, and ongoing or envisaged initiatives.

The Council conclusions also call upon Europol to “set up an Expert Working Group on Criminal Analysis with the objective of aligning standards of criminal analysis.” The Member States, agencies, and networks, CEPOL, Eurojust, and the Commission are all called upon to contribute to and support the NAI platform. (TW)

European Preventive Policing: Council Calls for Enhanced Use of Joint Patrols and Joint Operations

In its [conclusions on “certain aspects of European preventive policing”](#) of 6 June 2019, the JHA Council invites EU Member States “to make more efficient use of the existing legal framework at national and European level regarding the deployment of officers involved in joint patrols and other joint operations in order to ensure public security in relation to EU nationals on the territory of other Member States.”

Member States, EU institutions, and

JHA agencies are called on to actively contribute to the implementation of joint patrols and operations. In addition, the Commission should identify suitable financial instruments, and CEPOL should develop targeted training curricula and promote the sharing of best practices in this context. The conclusions also underline “the need for an enhanced, preventive approach to policing methods, striving to contribute to the development of a safer area for all European citizens.” (TW)

Security Union: Progress Report on Countering Hybrid Threats

On 29 May 2019, the European Commission and the European External Action Service tabled a [report on the EU’s progress in tackling hybrid threats](#).

Hybrid threats are methods or activities that are multidimensional, combine coercive and subversive measures, use both conventional and unconventional tools and tactics, and are coordinated by state or non-state actors. Hybrid threats are characterised by the difficulty in detecting or attributing them to any individual or group. Their aim is to influence different forms of decision-making by a variety of means:

- Influencing information;
- Weakening logistics like energy supply pipelines;
- Economic and trade-related blackmailing;
- Undermining international institutions by rendering rules ineffective;
- Acts of terrorism or to increase (public) insecurity.

The present progress report assesses the implementation of the [2016 Joint Framework](#) on Countering Hybrid Threats – a European Union response and the [2018 Joint Communication](#) Increasing Resilience and Bolstering Capabilities to Address Hybrid Threats. The EU response to hybrid threats is mainly based on 22 countermeasures, ranging from improving information exchange and strengthening the protection of critical infrastructure and cybersecu-

riety to building resilience in the society against radicalisation and extremism.

The report details the progress made in the different areas. It particularly highlights the following advancements:

- Strengthening strategic communications to tackle disinformation;
- Boosting cybersecurity and cyber defence (see also below under “cyber-crime”);
- Curbing CBRN related risks;
- Protecting critical infrastructure.

Among the key achievements are a large number of legislative measures at the EU level, e.g., the Regulation on the screening of foreign direct investments in the EU and the establishment of autonomous sanctioning regimes against the use of chemical weapons and cyber-attacks.

In conclusion, the report highlights enhanced cooperation and coordination as one of the main achievements compared to previous progress reports. This includes not only improved cooperation within and between EU entities – institutions, services and agencies – but also with international partners like the North Atlantic Treaty Organisation and third countries within the framework of multilateral formats, notably the G7. Closer cooperation was also stepped up with partner countries neighbouring the EU.

The report concludes that a “whole-of-society approach” involving government, civil society, and the private sector and including, *inter alia*, media and online platforms is essential for the EU’s counter-hybrid policy. (TW)

Countering Hybrid Threats on Agenda of Finnish Council Presidency

Finland, which took up the Council Presidency on 1 July 2019, plans to increase awareness of hybrid threats and to reinforce the EU’s common response to them. At the [informal meeting of the home affairs ministers](#) of the EU Member States in Helsinki on 18 July 2019, the Finnish Presidency presented a fictitious scenario involving hybrid threats and invited the ministers to hold a policy

debate about how capacities for the mutual assistance of EU Member States can be strengthened.

Hybrid threats are methods or activities that are multidimensional, combine coercive and subversive measures, use both conventional and unconventional tools and tactics, and are coordinated by state or non-state actors. They include cyberattacks, election interference, and disinformation campaigns. Nowadays, social media platforms are often used for such manipulations.

In a [background paper](#), the Finnish Presidency states that “rapidly evolving hybrid threats are a challenge to security in Europe. They often target wider areas than a single member state and can undermine the unity of the EU.”

In this context, Finland would like to strengthen resilience, build up awareness, foster coordination and comprehensive responses across administrative boundaries, and increase cooperation with partners (e.g., the NATO). The goal is also to integrate the various actions and cooperation mechanisms that the EU institutions and the Member States have already started in different policy fields over the last several years. Therefore, further scenario-based debates are planned during the Presidency, involving other policy fields, such as finance, defence, and external relations, besides home affairs. (TW)

Area of Freedom, Security and Justice

Future of EU Substantive Criminal Law

At their meeting on 6 June 2019, the Justice Ministers of the EU Member States debated about a [report by the Romanian Council Presidency](#) on the future of EU substantive criminal law. During the Presidency in the first half of 2019, Romania sent a questionnaire to the EU Member States to find out their views on the need to introduce additional harmonising criminal law provisions in new areas within the EU’s competence pur-

suant to Art. 83 TFEU. Issues related to the transposition and implementation of the EU’s current regulatory framework were also taken into account.

The [Ministers of Justice supported the conclusions](#) of the Presidency Report. They mainly stressed that emphasis should be placed on the effectiveness and quality of implementation of *existing* legislation. They also pronounced that further “Lisbonisation“ is currently unnecessary, i.e., Framework Decisions that were adopted under the Amsterdam/Nice Treaty should not be transposed and updated by Directives under the Lisbon Treaty. In this context, ministers currently see no need to develop a common definition of certain legal notions, e.g., “serious crime” or “minor offences.”

However, the door to the establishment of more minimum rules on criminal offences and sanctions has not yet been completely shut. Instead, the reflection process is to continue. Some Member States and the Commission mentioned *inter alia* the following specific areas where EU legislation would be advisable in the future:

- Environmental crimes, including maritime, soil, and air pollution;
- Trafficking in cultural goods;
- Counterfeiting, falsification, and illegal export of medical products;
- Trafficking in human organs;
- Manipulation of elections;
- Identity theft;
- Unauthorised entry, transit, and residence;
- Crimes relating to artificial intelligence.

In addition, the Presidency report concluded that the EU should improve its dialogue with other international organisations, e.g., the Council of Europe, if the EU envisages legislation in an area that is already covered by an international instrument. The EU should also strive for a high quality of legislation, which is why sufficient time for consultations at the national level should be allotted for. Ultimately, delegations of the EU Mem-

ber States stressed the need for enough time to transpose EU directives, i.e., no less than 24 months. (TW)

Schengen

Group of Schengen States Discusses Challenges for External Land Border Management

At the JHA Council meeting of 7 June 2019, Norway provided information on the [joint statement](#) by “the Ministerial Forum for Member States of the Schengen Area with External Land Borders.” The Forum met in Kirkenes, Norway on 20–22 May 2019.

The Forum was established and had its first meeting in 2013 at Finland’s initiative. It is currently comprised of nine Schengen Member States – Estonia, Latvia, Lithuania, Poland, Norway, Romania, Slovakia, Finland, and Hungary. Ministerial meetings are organised once a year by a different Member State. The aim is to discuss common challenges that the countries are facing as Schengen members responsible for securing and managing the external land border of the entire Schengen area.

The ministers concluded in the joint statement, *inter alia*, that “[f]urther strengthened cooperation among national authorities carrying out tasks related to freedom, security and justice, and between the relevant EU Agencies, is of decisive importance. This will enhance returns, prevention of illegal immigration and cross border crime, improve third country cooperation and will further develop a comprehensive and cost-efficient European Integrated Border Management.”

Implementation of the new European Border and Coast Guard regulation will be challenging for the Member States and Frontex, which is why realistic priorities and coordinated timelines must be set. The increased capacities of the European Border and Coast Guard raises challenges for coordination, i.e., the proper balance between use of the ca-

pacities at the national level and those required by Frontex.

Common standards for external border surveillance must be developed in an effective and cost-efficient way and in close cooperation between the Member States, the European Commission, and Frontex.

Next year’s group ministerial meeting will be held in Romania. (TW)

Legislation

Romanian Presidency: Overview of Legislative JHA Items

On 4 June 2019, the Romanian Council Presidency published an [overview of the state of play of legislative proposals in the area of justice and home affairs](#). Among them:

- The [directive on the protection of whistleblowers](#);
- The [multiannual financial framework regarding the Justice Programme and the Rights and Values Programme 2021–2027](#);
- The [“e-evidence package” consisting of the proposed Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and the directive on legal representatives for gathering evidence in criminal proceedings](#);
- Law enforcement access to financial information;
- Removal of terrorist content online.

Eucrim has regularly reported on these matters. (TW)

Institutions

Council

Finnish Presidency Programme

On 1 July 2019, Finland took over the Presidency of the Council of the European Union. [In its programme](#), the Finnish Presidency underlines the need to comprehensively protect the security of EU

citizens through, *inter alia*, cooperation in security and defence. The key issues to be addressed are:

- Combating cross-border crime and terrorism;
- Efficient border management;
- Countering hybrid and cyber threats.

Another major issue is the comprehensive management of migration. Some of the measures Finland will strive for during its presidency are:

- Proposals to strengthen the EU’s asylum system;
- An EU-wide resettlement system;
- A temporary relocation mechanism for migrants rescued at sea;
- Monitoring of migration routes and maintaining situational awareness;
- Reintegration of returned migrants;
- Strengthening of the European Border and Coast Guard Agency.

The Finnish Presidency is the second in the current trio Presidency after Romania (January – June 2019), followed by Croatia (January – June 2020). (CR)

European Council: Security Remains Priority Area in the Next Five Years

On 20 June 2019, the European Council of the European Union adopted a [new strategic agenda for the next five years \(2019–2024\)](#). Security – which had already been made one of the main priorities by Commission President *Jean-Claude Juncker* during his term of office – remains high on the agenda.

The new agenda focuses on four main priorities:

- Protecting citizens and freedoms;
- Developing a strong and vibrant economic base;
- Building a climate-neutral, green, fair, and social Europe;
- Promoting European interests and values on the global stage.

Regarding the priority area “Protecting citizens and freedoms,” the agenda calls to mind that “Europe must be a place where people feel free and safe.” In this context, the European Council outlines more specifically political commitments to the following issues:

- Rule of law as a key guarantor for European values; it must be respected by all Member States and the Union;
- Effective control of the EU's external borders;
- Development of a fully functioning comprehensive migration policy, which includes (1) – externally – deepened cooperation with countries of origin and transit in order to fight illegal migration and human trafficking and to ensure effective returns, and (2) – internally – agreement on an effective migration and asylum policy (especially reform of the Dublin regulation);
- Proper functioning of Schengen;
- Strengthened fight against terrorism and cross-border crime, improved cooperation and information sharing, further development of the EU's common instruments;
- Increase in the EU's resilience against both natural and man-made disasters;
- Protection from malicious cyber activities, hybrid threats, and disinformation originating from hostile state and non-state actors; this requires a comprehensive approach with more cooperation, more coordination, more resources, and more technological capacities.

The Strategic Agenda 2019–2024 provides an overall political framework and direction. It is designed to guide the work of the European institutions in the next five years. It will therefore also influence the work of new Commission President *Ursula von der Leyen*. (TW)

European Court of Justice (ECJ)

Judge Egils Levits Resigns

Egils Levits [resigned as Judge](#) at the Court of Justice of the EU following his election as President of the Republic of Latvia on 29 May 2019. He had served as Judge at the CJEU since 11 May 2004. (CR)

Death of Advocate General Yves Bot
[Advocate General Yves Bot passed away on 9 June 2019](#). He served as Public Prosecutor at the Regional Court of Par-

is and later as Principal State Prosecutor at the Court of Appeal of Paris. He had been Advocate General at the CJEU since 7 October 2006. Yves Bot was a staunch defender of the values of the European Union and worked throughout his career both to make the justice system more humane and to bring it closer to the people whom it serves. (CR)

OLAF

General Court: No Unlawful Conduct by OLAF vis-à-vis Former European Commissioner

On 6 June 2019, the General Court dismissed the action brought by former Maltese European Commissioner *John Dalli* in which he claimed compensation for non-material damage caused to him by alleged unlawful conduct against him by OLAF and the Commission ([case T-399/17](#)).

OLAF opened investigations against Dalli in 2012, alleging him of being involved in an attempt of bribery. Dalli was appointed European Commissioner in 2010 for the portfolio health and consumer protection. It was claimed that Dalli knew about the behaviour of a Maltese entrepreneur who sought to obtain pecuniary advantage from a Swedish tobacco company in return for a more lenient legislative proposal on tobacco products by Dalli's department. The final OLAF report prompted *José Manuel Barroso*, President of the Commission at that time, to urge Mr Dalli to resign from office.

In 2015, the General Court dismissed Dalli's first action in which he sought annulment of the "oral decision of 16 October 2012 of termination of his office" and compensation for damage suffered from that decision ([case T-562/12](#)). Dalli addressed the General Court again in 2017 and applied that the Commission be ordered to compensate for the damage, in particular the non-material damage, estimated (on a provisional basis) at €1,000,000.

The Court first rejected the argumentation by the Commission that the present action of 2017 is inadmissible as the matter is *res judicata* following the judgment of 2015. The Court held that the present action has a different cause of action. Whereas the first action related to the decision of the President of the Commission terminating the office of the applicant, the new action mainly related to OLAF's wrongful conduct, which had not actually and necessarily been settled by the first judgment.

As regards the substance of the case, the Court, however, did not find any unlawful conduct on the part of OLAF and the Commission. The Court emphasised that non-contractual liability of the European Union can only be established if the following conditions are fulfilled:

- The unlawfulness of the conduct of which the institutions are accused;
- The fact of damage; and
- The existence of a causal link between that conduct and the damage complained of.

According to case law, the first condition – unlawfulness of the conduct of the institutions – requires a sufficiently serious breach of a rule of law intended to confer rights on individuals to be established. The breach must be one that implies that the institution concerned manifestly and gravely disregarded the limits set on its discretion.

In this context, the Court rejected each of the seven complaints put forward by Mr Dalli concerning the unlawfulness of OLAF's conduct. Those complaints, *inter alia*, concerned the following:

- Unlawfulness of the decision to open an investigation;
- Flaws in the characterisation of the investigation and its unlawful extension;
- Breach of the principles governing the gathering of evidence and distortion and falsification of the evidence;
- Infringement of the rights of the defence, of the principle of presumption of innocence, and of the right to the protection of personal data.

The Court also dismissed two com-

plaints claiming unlawful conduct by the Commission. They concerned:

- Violation of the principle of sound administration and of the duty to behave in a loyal, impartial, and objective manner and to respect the principle of independence;
- Violation of OLAF’s independence.

By way of a complementary remark, the Court ultimately held that the applicant did not establish the existence of a sufficiently direct causal link between the conduct complained of and the damage alleged, or even the existence of the latter. Therefore, the third condition of non-contractual liability was not fulfilled either. (TW)

Eurojust & OLAF Increase Cooperation

At a high-level meeting between OLAF and Eurojust on 11 July 2019, both bodies agreed to [reinforce cooperation](#) in tackling crimes against the EU budget. Eurojust and OLAF committed to contacting each other at an early stage in order to form joint investigation teams. In addition, the number of coordination meetings between Eurojust national members and OLAF investigators will be increased.

Ladislav Hamran, President of Eurojust, highlighted that Eurojust’s and OLAF’s mandates are complementary; however, stepping up cooperation is in the interest of both bodies. *Ville Itälä*, Director-General of OLAF, pointed out that the institutional landscape when fighting fraud will change considerably once the European Public Prosecutor’s Office starts its operational work. Therefore, adaptations governing the cooperation between OLAF and Eurojust may be necessary.

Currently, the cooperation between OLAF and Eurojust is formally based on an [agreement concluded in 2008](#). (TW)

OLAF and German Prosecutor Trace Misuse of EU Research Money

With the support of OLAF, German authorities (spearheaded by the Mannheim’s prosecution service) seized huge

amounts of documents and data which are to prove embezzlement and subsidy fraud allegedly committed by four persons between 51 and 56 years of age. They are alleged of having misused several million euros in EU research funds, since they did not pay partners in the research project contrary to contractual obligations.

The prosecution service of Mannheim let the business and private premises of the person concerned be searched in several locations in Germany. On the basis of a mutual legal assistance request and coordination by Eurojust, the French police simultaneously searched premises in the region Provence-Alpes-Côte d’Azur.

The Director-General of OLAF, *Ville Itälä*, commended the teamwork in this joint cooperation. German investigators are currently examining the material. Criminal investigations are ongoing. (TW)

Operation “Postbox II”: First Customs-Led Cyber Patrol in Europe

OLAF reported on a significant strike against online criminals trafficking drugs, counterfeit goods, and endangered animal and plant species. Led by OLAF and the Belgian customs service, the [operation codenamed “Postbox II”](#) involved customs services from 22 Member States and Europol. It was the first cyber patrol in Europe that was carried out mainly by customs services. The results of the operation were presented by OLAF Director *Ernesto Bianchi* at a [press conference at Brussels Airport](#) on 21 May 2019.

The joint customs operation led to 2320 seizures, the opening of 50 case files, and the identification of 30 suspects in Member States. OLAF provided, *inter alia*, assistance by means of its Virtual Operation Coordination Unit, a secure communication system facilitating intelligence exchange in real-time.

Experts raided the cyberspace, i.e., open web, dark net and social media sites, in search of the perpetrators of

crime. They used special software and techniques to unveil the sellers’ anonymity.

The operation revealed that most counterfeit goods sold had been processed via Asian e-commerce platforms. Drug trafficking mainly takes place through the Dark Web, which allows buyers and sellers to retain their anonymity. (TW)

Action against Illegal and Counterfeit Pesticides

The [joint operation “Silver Axe IV”](#) enabled authorities to seize 550 tons of illegal/counterfeit pesticides in 2019. The total amount of this seizure would cover a surface of up to 50,000 km² – approximately equivalent to the territory of Estonia.

The operation involved national police, customs and plant protection authorities from nearly all EU Member States plus Switzerland and the Ukraine as well as private organisations, and other EU bodies, Interpol, and the Food and Agriculture Organization of the United Nations.

OLAF supported the operation by providing information on the movement of smuggled goods. This enabled the identification of suspicious shipments of pesticides (mainly from China) that were not declared correctly. National authorities carried out checks at major seaports, airports, and land borders and in production and repackaging facilities in participating countries.

In the meantime, Operation Silver Axe is in its fourth year. In total, the operations have led to the seizure of 1222 tons of illegal and counterfeit pesticides. (TW)

European Public Prosecutor’s Office

Setting up the EPPO – State of Play

The Commission informed the Justice Ministers about the [state of play of setting up the European Public Prosecutor’s Office \(EPPO\)](#) at their meeting in Luxembourg on 6 June 2019:

■ Under the Romanian Presidency, the Council adopted [Implementing Decision \(EU\) 2019/598 on the transitional rules](#) for the appointment of European Prosecutors for and during the first mandate period, as provided for in Art. 16(4) of Regulation (EU) 2017/1939. Some European Prosecutors will have a reduced term of office during the first mandate period (three instead of six years). This ensures proper application of the principle of periodical replacement of the European Prosecutors appointed to the EPPO for the first time. According to the Implementing Decision, lots are drawn to select a group comprising one third of the 22 participating Member States – the European Prosecutors in this group will have a reduced mandate. The lots were drawn on 20 May 2019, and the Member States affected are: Austria, Cyprus, Greece, Italy, Lithuania, the Netherlands, Portugal, and Spain.

■ The European Chief Prosecutor has still not been selected and appointed, because negotiations between the European Parliament and the Council came to a deadlock. The Commission calls on the two institutions to quickly resume negotiations after constitution of the new Parliament in order to ensure the timely appointment of the European Chief Prosecutor who plays a key role in setting up the EPPO.

■ Some Member States have not yet submitted their nominations for the position of European Prosecutor.

■ The Commission services prepared a draft for the EPPO's internal rules of procedure. The draft was discussed by the EPPO Expert Group at its meeting on 27–28 May 2019. The internal rules must actually be proposed by the European Chief Prosecutor and, once set up, adopted by the EPPO College by a two-thirds majority (Art. 21(2) Regulation 2017/1939). The Commission stressed, however, that its draft is only a contribution towards facilitating the task of the European Chief Prosecutor and does not prejudice the independence and autonomy of the EPPO.

■ The EPPO's budget for 2019 was adopted and work is ongoing to ensure timely adoption of the draft budget for 2020.

■ As regards the conditions of employment of European Delegated Prosecutors, a preparatory document is currently under discussion.

The Commission is sticking to the timetable that the EPPO can be operational by 2020. However, the swift appointment of the European Chief Prosecutor is essential in order to achieve this aim.

For the Regulation establishing the EPPO under enhanced cooperation, see eucrim 3/2017, pp. 102–104 and the article by *Csonka/Juszczak/Sason* in the same issue on pp. 125–135. (TW)

Europol

Europol 20th Anniversary Website

On 1 July 2019, [Europol celebrated its 20th anniversary](#). On 1 July 1999, German *Jürgen Storbeck*, the former Director of the Europol Drugs Unit (EDU), was appointed as first Europol Director, and Europol commenced its full activities. In view of the 20th anniversary, Europol created a dedicated subpage on its website offering information on its history in an interactive way. It also includes a summary of its twenty most noteworthy operations and a compilation of twenty questions “you always wanted to ask about Europol.” While the 20 most noteworthy operations mainly give an overview on Europol's operational development in the last 20 years, the 20 questions give answers to Europol's current operational capabilities and investigative powers. (CR)

Liaison Office Opened in Tirana

[On 11 July 2019, Europol officially opened its first liaison office in the Western Balkans, namely in Tirana, Albania](#). The Europol liaison officer in Tirana will be the counterpart to the Albanian Police liaison officer stationed at Eu-

ropol's headquarters in The Hague. In order to tackle serious organised crime, the plan is to set up another two Europol liaison offices in the Western Balkans, i.e., in Bosnia and Herzegovina and in Serbia. (CR)

Cooperation with New Zealand

On 11 June 2019, Europol and the New Zealand Police signed a [Working Arrangement and Memorandum of Understanding](#) with the aim of strengthening their fight against serious crime, especially online child sexual exploitation, organised motorcycle gangs, drug trafficking, and terrorism. Under the agreement, the New Zealand Police will deploy a permanent liaison officer to Europol's headquarters in The Hague and will be able to use the Secure Information Exchange Network Application (SIENA) managed by Europol. (CR)

Cooperation with NTT Security

On 13 June 2019, [Europol and NTT Security signed a Memorandum of Understanding](#) to strengthen their efforts against cybercrime. Under the MoU, parties can exchange threat data and information on cyber security trends and industry best practices. NTT Security is a specialised security company delivering cyber resilience by enabling organizations to build high-performing and effective security, risk and compliance management programmes. (CR)

New Task Force to Combat Migrant Smuggling and Trafficking in Human Beings

On 2 July 2019, Europol [launched a new task force](#) to strengthen its fight against criminal networks involved in migrant smuggling and trafficking of human beings. The Joint Liaison Task Force Migrant Smuggling and Trafficking in Human Beings (JLT-MS) will focus on intelligence-led coordinated action with liaison officers from all EU Member States and other partners that are part of this operational platform. It will also support the development of stronger

operational strategies to disrupt international criminal networks. Financial investigations and, ultimately, the gathering of proceeds of crime are expected to become more efficient through the task force. (CR)

Europol Report on Disruptive Technologies and Future Crime

On 18 July 2019, Europol published a report entitled [“Do Criminals Dream of Electric Sheep? – How technology shapes the future of crime and law enforcement.”](#) The report aims at identifying security threats in relation to new emerging technologies, which can have disruptive effects. The report is also designed to give answers to the challenge of proactive policing and to develop Europol’s foresight analysis capacities.

The report looks at key technological developments that are assumed to have a severe impact on the criminal landscape such as Artificial Intelligence (AI), quantum computing, 5G, Dark web networks and cryptocurrencies, the Internet of All Things, 3D printing, molecular biology and genetics. It sets out necessary steps for the law enforcement authorities.

In its conclusions, the report underlines that the opportunities for law enforcement to make use of these technologies are as great as the challenges they pose. Hence, the report stresses the need for law enforcement authorities to invest in understanding these new technologies, to adapt their organisational cultures, to engage with providers, and to take part in scientific discussions. Key factors to maximise effectiveness are seen in resource sharing, joint approaches at national and European level, international cooperation and a robust legal framework. (CR)

Operation OPSON Seizes Fake Food and Drink Products

From December 2018 to April 2019, Europol’s Intellectual Property Crime Coordinated Coalition and INTERPOL coordinated [Operation OPSON](#), which resulted in the seizure of some 16,000

tonnes and 33 million litres of potentially dangerous fake food and drink products worth more than €100 million. The operation was supported by police, customs, national food regulatory authorities, and private sector partners from 78 countries. The majority of the seized items consisted of illicit alcohol, cereals and grains, condiments, and even sweets.

OPSON actions were especially targeted at organic food products, 2,4-Dinitrophenol (DNP) – a toxic chemical sold as a fat burner, and fraudulently labelled coffee. (CR)

Operation Against Illicit Fire Arms Trafficking

On 17 July 2018, Europol reported on the [Joint Operation “ORION”](#) which was carried out in three operational phases from September 2018 until January 2019. The Joint Operation was conducted by Moldovan and Ukrainian law enforcement agencies, which seized about 300 pieces of small arms, almost 1500 pieces of light weapons, more than 140,000 pieces ammunition and over 200 kg explosives. Furthermore, public awareness campaigns made Moldovan and Ukrainian citizens voluntarily hand over about 2027 light weapons, 54 small arms and 2025 ammunitions with different calibres, as well as 67 pneumatic and gas pistols.

The operation was coordinated by the European Union Border Assistance Mission to Moldova and Ukraine (EU-BAM) in cooperation with Europol and supported by the border agencies from Slovakia, Romania and Poland as well as by Frontex and the Southeast European Law Enforcement Center (SELEC). (CR)

Eurojust

New National Member for Finland

On 1 August 2019, Eurojust’s [new National Member for Finland](#), *Lilja Limingoja*, took office in The Hague. Ms *Li-*

mingoja had started her career in 1995 as District Prosecutor and since then, has specialized in the area of economic crime. Prior to her appointment as National Member, she has already served as Seconded National Expert at Eurojust, contact point for the European Judicial Network (EJN), and last, as Assistant to the National Member for Finland at Eurojust. (CR)

New Newsletter Available

[Eurojust has published its second quarterly newsletter for the year 2019.](#) The newsletter compiles casework highlights for this period, latest publications, key events and other information on Eurojust’s support. (CR)

Council Conclusions on Synergies between Eurojust and Judicial EU Networks

At its meeting on 6 June 2019, the JHA Council adopted [conclusions “on the synergies between Eurojust and the networks established by the Council in the area of judicial cooperation in criminal matters.”](#) The Council acknowledged the vital role played, in the area of cooperation in criminal matters in the European Union, by Eurojust and by four networks established by the Council, namely:

- The European Judicial Network (EJN);
- The Network of Contact Points for persons responsible for genocide, crimes against humanity and war crimes (the Genocide Network);
- The Network of Experts on Joint Investigation Teams (the JITs Network);
- The European Judicial Cybercrime Network (EJCN).

The conclusions mainly endorsed the lines of action proposed in a [joint paper](#) by Eurojust and the four networks. The joint paper takes stock of the existing synergies between these networks and between the networks and Eurojust, and it explores areas in which further synergies should be developed. The Council stressed that synergies and coordination

can be further improved in order to combat serious crime and facilitate cooperation in criminal matters more effectively.

Eurojust and the EJM should, in particular, continue efforts to appropriately allocate cases between these two actors in judicial cooperation. The conclusions also acknowledged that Eurojust and the networks must have enough resources at their disposal.

Ultimately, the conclusions support the possibility of establishing a lean secretariat for the EJM within Eurojust. (TW)

German Prosecutors Call for More Money for Eurojust

On 10 June 2019, the Public Prosecutors General and the Chief Federal Prosecutor of Germany published a [resolution](#) expressing their concerns about the European Commission's proposal for the multi-annual financial framework (2021–2027) as far as the funding of Eurojust in this period is concerned. The prosecutors feel that the funding foreseen under the proposal is not efficient enough to allow Eurojust the maintenance of its sound and professional work. The resolution points out that the workload of Eurojust has considerably increased in the last years and will further increase as a result of the operational activities of the European Public Prosecutor's Office in 2020. German public prosecutors relied particularly heavily on Eurojust. In 2018, the number of German cases handled rose by more than 80%. Hence, the Public Prosecutors General and the Chief Federal Prosecutor call on the German Federal Government to plead for an increased funding of Eurojust in the upcoming negotiations on the multi-annual financial framework. (CR)

Eurojust Supports Strike Against Drug Mafia

At the end of July, cooperation among Eurojust, Colombia, the USA, France, Spain and Italy led to the [seizure of 369kg of pure cocaine](#), with a street

value of €100 million. Three Italians were arrested, one is suspected of having links to the “Ndrangheta ‘Alvaro’ di Sinopoli”. Due to the support of Eurojust, it was possible to track the drugs throughout their journey from Columbia to Italy through France and Spain. (CR)

Eurojust Supports Strike Against Online Fraudsters

Cooperation between the Irish and Finnish authorities with the support of Eurojust led to a successful strike [against an organised crime group \(OCG\) involved in extended online fraud and money laundering](#).

Several persons were brought to justice and criminal instruments/assets seized (e.g. fake documentation, equipment for document forgery, laptops and cash). Irish and Finnish authorities agreed at Eurojust on a coordinated investigative and prosecutorial strategy, so that the countries could quickly execute mutual legal assistance requests and collect/exchange evidence in a reliable way. The OCG used fabricated online platforms to offer to unknowing customers non-existent goods exceeding €3 million. (CR)

European Judicial Network (EJM)

52nd Plenary Meeting of the EJM

On 26–28 June 2019, [the EJM held its 52nd plenary meeting](#) in Bucharest with the support of the Romanian Council Presidency. The meeting was attended by 135 EJM Contact Points from the EU Member States, candidate, associated and third countries, members of the EJM Romanian Judicial Network in criminal matters, EJM partners, as well as representatives from Eurojust, the European Commission and the General Secretariat of the Council of the EU. The core topics of this plenary meeting were current developments regarding the European Investigation Order, the European Arrest Warrant, and future relations of the EJM with the European Public Prosecutor's Office. (CR)

Frontex

Cooperation Plan with EASO Signed

On 18 July 2019, Frontex and the European Asylum Support Office (EASO) signed [an updated Cooperation Plan](#) to further strengthen their cooperation in the fields of asylum, border control and migration management. Under the Cooperation Plan, the Agencies will further work together in the areas of operational and horizontal cooperation, information and analysis, and capacity building. Furthermore, the two bodies will jointly conduct various projects such as the establishment and implementation of the Migration Management Support Teams (MMST), and the delivery of a Common Situational Picture on irregular migration and persons in need of international protection. The Cooperation Plan covers the period from 2019–2021. (CR)

Aerostat Pilot Project Launched

At the end of July 2019, Frontex has launched its [aerostat pilot project](#) in cooperation with the Hellenic Coast Guard. The project wants to assess the capacity and cost efficiency of aerostat for operating sea surveillance such as detecting unauthorised border crossings, supporting sea rescue operations and combating cross-border crime. The one-month test period is conducted on the Greek island of Samos. (CR)

Risk Analysis Cell Opened in Dakar

On 12 June 2019, [Frontex opened a Risk Analysis Cell in Dakar, Senegal](#). The cell will collect and analyse strategic data on cross-border crime and support relevant authorities involved in border management. Cells collect information on various types of cross-border crime, e.g. illegal border crossings and document fraud. It is run by local analysts trained by Frontex. The measure is part of the Africa-Frontex Intelligence Community (AFIC) that was launched in 2010 to provide a framework for regular information sharing on migrant smuggling and border security threats. (CR)

Joint Action Plan with Europol Signed

On 7 June 2019, [Frontex and Europol signed a new joint Action Plan](#). The Action Plan foresees a more structured exchange of information between the two agencies, closer coordination in the fields of research into and development of new technologies (e.g., the European Travel Information and Authorisation System (ETIAS)), the exchange of liaison officers, and annual meetings by executive management. (CR)

Liaison Officer Deployed to the Baltic States

At the beginning of May 2019, [Frontex' new Liaison Officer to the Baltic States took up his duties](#). The deployment of liaison officers is part of the creation of a new network of 11 liaison officers to EU Member States and Schengen-associated countries. It enhances cooperation between the agency and the national authorities responsible for border management, returns, and coast guard functions. (CR)

Cooperation with Ukraine Extended

At the end of May 2019, [Frontex and the State Border Guard Service of Ukraine extended their cooperation](#) for another three years by signing a new cooperation plan for 2019–2021. Cooperation between Frontex and the State Border Guard Service of Ukraine began in 2007 already, with operational activities, situational awareness, monitoring, and risk analysis as well as joint training. (CR)

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

Time Limit for Transposing PIF Directive Expired

The EU Member States had to adopt and publish regulations and administrative provisions necessary to comply with [Directive \(EU\) 2017/1371](#) on the

fight against fraud to the Union's financial interests by means of criminal law (in short: the "PIF Directive") by 6 July 2019. 16 Member States had communicated their implementation measures to the Commission by the transposition deadline, as foreseen in Art. 17(1) of the Directive (10 complete transpositions, 6 partial transpositions). The UK and Denmark are not bound by the Directive.

The Directive, *inter alia*, provides for a common definition of fraud and other criminal offences affecting the EU's financial interests and also for certain types and levels of sanctions when the criminal offences defined in this Directive have been committed. For the Directive, see [eucrim 2/2017](#), pp. 63–64, and the article by *A. Juszcak* and *E. Sason* in the same issue on pp. 80–87.

The Directive is also important for the work of the European Public Prosecutor's Office (EPPO). The catalogue of criminal offences defined in Arts. 3 and 4 of the Directive determines the material competence of the EPPO under Regulation (EU) 2017/1939.

The Directive also applies to VAT fraud if it is considered serious, i.e., when intentional acts or omissions defined in point (d) of Art. 3(2) of the Directive are connected with the territory of two or more Member States of the Union and involve a total damage of at least €10 million. (TW)

ECA Indicates Tax Vulnerabilities of E-Commerce

The EU's and Member States' efforts to collect the correct amount of VAT and customs duties in conjunction with the trade of goods and services via the Internet are not sufficient, as concluded by the [Special Report no. 12/2019](#) by the European Court of Auditors (ECA). The report, which was made public on 12 July 2019, pointed out that e-commerce is growing steadily; however, it is also prone to the evasion of VAT and customs duties. Incorrect levies affect not only the budget of the Member States but also that of the EU, because

Member States need to compensate the proportion due to the EU budget.

The audit examined several items in relation to irregularities in the context of e-commerce:

- The system for taxation of VAT and customs duties on cross-border supplies of goods traded over the internet, as set out in the VAT and customs legislation;
- The new system for taxation of VAT on cross-border supplies of e-commerce services that entered into force at the beginning of 2015;
- The new e-commerce legislative reform that was adopted in 2017 and mainly takes effect as of 2021;
- Assessment of whether a sound regulatory and control framework on e-commerce with regard to the collection of VAT and customs duties was put in place by the European Commission;
- Assessment of Member States' control measures intended to help ensure the complete collection of VAT and customs duties in respect of e-commerce.

The ECA acknowledged recent positive developments; however, many challenges have not been satisfactorily addressed to date. Some of the weaknesses are as follows:

- Administrative cooperation instruments in place between EU Member States and with non-EU countries are not being fully exploited;
- The cross-border exchange of information is insufficient;
- Controls carried out by national tax authorities are weak, and the Commission's monitoring activities are insufficient;
- Current customs clearance systems do not function well, and there is a risk that the EU cannot prevent abuse by the intermediaries involved;
- The current system cannot prevent abuse in that goods are deliberately undervalued, so that they do not fall under exemption clauses;
- Enforcement of the collection of VAT and customs duties is ineffective.

In order to address these shortcomings, the ECA's report makes a number

of recommendations to the Commission and the Member States. Notably, they have been asked to do the following:

- Check traders' compliance thresholds for VAT/customs;
- Develop a method to produce estimates of the VAT gap, i.e., the difference between what should be collected in accordance with the current legislative framework and what is actually collected by Member States' tax authorities;
- Explore the use of suitable "technology-based" collection systems to tackle VAT fraud involving e-commerce.

Fortunately, the ECA found that some of the identified weaknesses can be solved by the new e-commerce reform, e.g., the liability of VAT intermediaries. However, some challenges remain, e.g., the problem of undervalued goods.

The ECA special report also includes the Commission's response to the findings. It is available in 23 EU languages. (TW)

ECA: Fighting Fraud in the Cohesion Sector is Unsatisfactory

Member States made improvements in identifying fraud risks and in designing preventive measures, but detection, response, and coordination efforts must be considerably strengthened when it comes to tackling fraud in cohesion spending.

This is the main conclusion drawn by the European Court of Auditor's (ECA) [Special Report no. 06/2019](#). Although the Commission and Member States share the responsibility to counter fraud and any other illegal activities affecting the EU's financial interests, in the field of EU cohesion policy, the managing authorities in the Member States are primarily responsible for setting up proportionate and effective anti-fraud measures. It is especially apparent that incidences of reported fraud are significantly higher in EU cohesion spending compared to other areas of EU spending: around 40% of reported fraud cases and almost three quarters of the total amount (€1.5 billion) of irregularities relate to

EU cohesion policy. Cohesion policy includes the European Regional Development Fund, the Cohesion Fund, and the European Social Fund.

Against this background, the ECA carried out an audit assessing whether managing authorities have properly met their responsibilities at each stage of the anti-fraud management process: fraud prevention, fraud detection, and fraud response.

The ECA found that managing authorities have improved their fraud risk assessment as regards cohesion funding for the 2014–2020 programming period. However, the ECA detected a number of flaws:

- Some Member States' analyses were not sufficiently thorough, and Member States generally have no specific anti-fraud policy;
- No significant progress towards proactive fraud detection and use of data analytics tools;
- Procedures for monitoring and evaluating the impact of prevention and detection measures often insufficiently monitored;
- As regards fraud response, managing authorities, in coordination with other anti-fraud bodies, not sufficiently responsive to all detected cases of fraud;
- Limited deterrent effect of correction measures;
- Insufficient coordination of anti-fraud activities;
- Suspicions of fraud not systematically communicated to investigation or prosecution bodies;
- Fraud cases underreported, affecting the reliability of figures in Commission PIF reports.

The ECA made a number of recommendations as a result of the audit. They are addressed to the Member States, the Commission, and the EU legislator. Member States are called upon to do the following:

- Develop formal strategies and policies to combat fraud against EU funds;
- Involve external actors in the process of fraud risk assessments;

- Improve the use of data analytics tools.

The Commission should monitor fraud response mechanisms in order to ensure consistency and encourage Member States to expand the functions of their Anti-Fraud Coordination Services (AFCOS).

For cohesion spending in the period 2021–2027, the Union legislator should make compulsory the adoption of national strategies or anti-fraud policies and the use of proper data analytics tools. Furthermore, it should introduce sanctions and penalties for those responsible for fraud against the EU's financial interests. Ultimately the EU should lay down minimum rules for AFCOS to ensure effective coordination.

For the 2021–2027 programme, the ECA also made recommendations for more performance-orientated cohesion spending in a [Briefing Paper](#) issued on 20 June 2019.

The Special Report is available in 23 EU languages. It also contains a response by the Commission to the findings of the ECA. (TW)

Tax Evasion

New Data Mining Tool to Combat VAT Fraud

Since mid-May 2019, EU Member States are able to use a new electronic tool that is expected to detect VAT fraud at an early stage. The [Transaction Network Analysis \(TNA\)](#) is an automated data mining tool that interconnects Member States' tax IT platforms. In this way, cross-border transaction information can be quickly and easily accessed, and suspicious VAT fraud can be reported nearly in real time.

Besides closer cooperation between the EU's network of anti-fraud experts ("Eurofisc"), when analysing information on carousel VAT fraud, TNA also boosts cooperation and information exchange between national tax officials. Eurofisc officials can now cross-check

information against criminal records, databases, and information held by Europol and OLAF.

TNA is another EU tool to make the collection of VAT more fraudproof. In the midterm, the Commission hopes to reach consensus on a more fundamental overhaul of the EU's VAT legislation (see eucrim 4/2017, pp. 168–169). (TW)

Money Laundering

Commission: Better Implementation of the EU's AML Framework Needed

spot light On 24 July 2019, the Commission published a [Communication](#) and four reports that assess the risks of money laundering and the implementation of the EU's anti-money laundering/countering terrorist financing (AML/CFT) framework. The package is designed to support European and national bodies so that they may better counter the risks of money laundering. It also contributes to the debate on potential future policy measures to further strengthen the EU's AML/CFT rules.

The Communication summarises the development of the legal framework to date and gives an overview of the four reports:

- [Supranational Risk Assessment Report](#);
- [Report assessing recent alleged money laundering cases](#) involving EU credit institutions;
- Report assessing the framework for cooperation between [Financial Intelligence Units](#);
- Report on the [interconnection of national centralised automated mechanisms](#) (central registries or central electronic data retrieval systems) of the Member States on bank accounts.

The four reports are analysed in more detail in separate news items.

In general, the Commission concludes that the EU has established a solid AML/CFT regulatory framework; however, divergencies in the application of the framework were clearly revealed

by the reports. The Union must make an effort to avoid fragmentation and failures in the application of the legislation.

In this context, the full implementation of the fourth and fifth AML Directives is indispensable. A number of structural problems in the Union's capacities to prevent AML/CFT must be addressed.

The Commission puts forward three main issues for policy discussions:

- Further harmonisation of the AML/CFT rulebook by transforming the AML Directive into a Regulation, thus creating directly applicable Union-wide rules;
- Conferral of specific anti-money laundering supervisory tasks to a Union body in order to achieve the aim of high-quality and consistent supervision of the financial sector;
- Establishment of a stronger mechanism to coordinate and support cross-border cooperation of and analysis by Financial Intelligence Units.

As a result, the Communication and the reports of 24 July 2019 outline policy options that may be taken up by the new incoming Commission under *Ursula von der Leyen*. (TW)

2019 Risk Assessment Report on Money Laundering

[The Supranational Risk Assessment \(SNRA\) report](#) of 24 July 2019 systematically analyses the money laundering or terrorist financing risks of specific products and services. It focuses on vulnerabilities identified at the EU level, both in terms of legal framework and in terms of effective application, and provides recommendations for addressing them. The report is published biannually as required by Art. 6 of the 4th AML Directive. The 2019 SNRA updates the first SNRA report published on 26 June 2017 (see eucrim 2/2017, pp. 65–66) and follows up on recommendations made to actors involved in the fight against money laundering/terrorist financing.

The SNRA assesses the risks in various sectors, e.g. cash/cash-like assets, the financial and gambling sector, and

the collection and transfers of funds through non-profit organisations. Compared to the 2017 report, the 2019 report identified additional products and services that are potentially vulnerable to money laundering and terrorist financing, including privately owned automated teller machines (ATMs), professional football, free ports, and investor citizenship and residence schemes (“golden passports/visas”).

The report found that most recommendations of the first report have been implemented by the various actors; however, several horizontal vulnerabilities common to all sectors were identified. The major snags are:

- Anonymity in financial transactions, which is particularly the case for some e-money products, virtual currencies, and unregulated crowdfunding platforms;
- Difficulties with identification of and access to beneficial ownership information;
- Weaknesses in supervision within the internal market in terms of controls, guidance, and the level of reporting by legal professionals;
- Gaps in cooperation between Financial Intelligence Units (see also FIU report).

The 2019 SNRA also makes a number of recommendations that are addressed to the European Supervisory Authorities, non-financial supervisors, and the Member States. Sector-specific recommendations are included. The Commission will follow up these recommendations in the next report in 2021. (TW)

Commission Brings AML Regulation Into Play

spot light On 24 July 2019, the Commission published a report on recent alleged money laundering cases involving EU credit institutions ([COM\(2019\) 373 final](#)). This report is the Commission's response to requests from the European Parliament and the Council to carry out a thorough review of whether there are structural flaws in the regulatory and supervisory frame-

work – against the background of a number of recent money laundering incidents involving European banks.

The report analyses possible shortcomings in relation to the credit institutions' AML/CFT defence systems and the reaction of public authorities to the events. As regards credit institutions, the report identified four broad categories into which shortcomings may be grouped:

- Ineffective or lack of compliance with the legal requirements for anti-money laundering/countering the financing of terrorism systems and controls;
- Governance failures in relation to anti-money laundering/countering the financing of terrorism;
- Misalignments between risk appetite and risk management;
- Negligence of anti-money laundering/countering the financing of terrorism group policies.

The analysis of the reactions of bank institutions led to the following main results:

- Substantial failures to comply with core requirements of the Anti-Money Laundering Directive, such as risk assessment, customer due diligence, and reporting of suspicious transactions/ activities to FIUs;
- AML/CFT compliance deficiencies;
- Risky businesses pursued without establishing commensurate controls and risk management;
- Lack of consistent compliance and control process policies.

On the positive side, thanks to the gradual development of the AML/CFT legal framework in the past several years, many of the credit institutions reviewed have taken substantial measures to improve their compliance systems.

As regards the public side, the report found that supervisory reaction varied greatly in terms of timing, intensity, and measures taken. Major factors that hampered an effective reaction include:

- Attribution of different degrees of priority and resource allocation to AML-/CFT-related activities; often, supervision

was not carried out frequently enough;

- Sometimes, lack of relevant experience and available tools;
- Too much focus on the AML framework of the host Member State, without paying requisite attention to cross-border dimensions, particularly when bank groups were supervised;
- The division of responsibilities led to ineffective cooperation between anti-money laundering authorities, prudential authorities, Financial Intelligence Units, and law enforcement authorities;
- Cooperation with third-country AML/CFT authorities and enforcement authorities proved difficult in some cases.

Notwithstanding, the report stresses that several improvements were made, especially during the last two years. They include targeted amendments of the relevant legal framework, particularly with respect to the prudential framework and enforcement through the European Banking Authority. Many authorities have been or are being reorganised and are acquiring additional resources and new expertise.

The Commission concludes that some of the shortcomings have been or will shortly be addressed by changes in the regulatory framework. Many structural problems remain, however, and the EU needs to address them. These problems are mainly based on regulatory and supervisory fragmentation in the AML/CFT area. Therefore, the Commission recommends the following:

- Appropriately attributing the tasks of the various relevant authorities involved in the fight against money laundering and terrorist financing;
- Cooperating with key third countries in a more structure and systematic way, ensuring concerted positions in said cooperation;
- Considering further harmonisation of the AML/CFT rules, in particular turning the AML Directive into a Regulation that would create directly applicable rules in the entire Union;
- Conferring specific anti-money laundering supervisory tasks to a Union

body in order to ensure high-quality and consistent anti-money laundering supervision, seamless information exchange, and optimal cooperation between all relevant authorities in the Union.

The incoming Commission is expected to take up these rather long-term options and enhance future discussions with the relevant stakeholders and political institutions. (TW) ■

Commission: Need for Reinforced FIU Cooperation

In a series of anti-money laundering reports (all published on 24 July 2019), the Commission assessed [the framework for cooperation between Financial Intelligence Units](#) (FIUs), as required, for instance, by Art. 65(2) of the 5th AML Directive.

FIUs were established under the EU's AML/CFT legal framework; their main tasks are regulated by the AML Directive 2015/849. FIUs are central national units in each Member State. They act independently and autonomously. Their main tasks are to receive and analyse suspicious transaction reports and information relevant in the fight against money laundering, associated predicate offences, and the financing of terrorism. They disseminate the results of their analysis and any other information to the competent national authorities and to other FIUs. At the EU level, FIUs cooperate via their own platform, an informal expert group composed of representatives from the Member States' FIUs and FIU. Net, an information system connecting decentralised databases enabling FIUs to exchange information. The FIUs are considered to be a central player in the EU's AML/CFT framework, positioned between the private sector and competent law enforcement authorities (police, prosecutors, courts).

The different types of cooperation in relation to FIUs were the subject of the assessment, i.e.:

- Cooperation between FIUs and with reporting entities;
- Cooperation between FIUs in the

EU, including exchange of information, matching of data sets, joint analyses, and FIU.Net;

- Cooperation between FIUs and supervisors;
- Cooperation of FIUs with third countries.

The Commission concludes that cooperation has improved greatly over the past few years. However, several shortcomings remain, e.g.:

- Remaining uneven status of FIUs in Member States, which affects their ability to access/share relevant financial, administrative, and law-enforcement information;
- Lack of regular feedback by FIUs to the private sector on the quality of their reports and lack of a structured dialogue between them in order to share typologies/trends and give general guidance;
- Lack of a common approach when dealing with threats common to all Member States;
- Development of more efficient IT tools; common tools based on artificial intelligence and machine learning are needed;
- Technical difficulties in the functioning of FIU.Net, which are one reason for the continued insufficient cooperation between the Member States' FIUs;
- Slow dissemination of information;
- Limited scope of the FIUs' Platform, e.g., it cannot produce legally binding templates.

The Commission also notes that some elements were addressed by the most recent Directive 2019/1153, adopted on 20 June 2019, on access to financial and other information. The Directive does not solve all issues, however, since it does not, for instance, include rules on precise deadlines and IT channels for the exchange of information between FIUs from different Member States. Moreover, the scope of the Directive has been limited to cases of terrorism and organised crime associated with terrorism, as a result of which it does not cover other forms of serious crime (contrary to the initial proposal by the Commission).

Ultimately, the Commission suggests some concrete changes, such as a new support mechanism for cross-border cooperation and analysis. The EU finally needs to think about building up more centralised structures. (TW)

Commission Prepares Interconnection of Central Bank Account Registries

In parallel with other reports in the area of anti-money laundering, on 24 July 2019, the Commission published a report on the interconnection of national centralised automated mechanisms (central registries or central electronic data retrieval systems) of the Member States on bank accounts ([COM\(2019\) 372 final](#)).

The report relates to Art. 32a of the 5th AML Directive (Directive (EU) 2018/843 amending Directive (EU) 2015/849), which obliges Member States to put in place national centralised automated mechanisms by 10 September 2020. These mechanisms should enable the identification of any natural or legal persons holding or controlling payment accounts, bank accounts, and safe deposit boxes. The Directive also lays down the minimum set of information that should be accessible and searchable through the centralised mechanisms; Financial Intelligence Units (FIUs) should have immediate and unfiltered access to them, while other competent authorities should be granted access in order to fulfil their tasks/obligations under the AML Directive. Directive 2019/1153 on facilitating access to financial and other information further obliges Member States to designate the national authorities competent for the prevention, detection, investigation, and prosecution of criminal offences; they should have direct, immediate, and unfiltered access to the minimum set of information of such centralised mechanisms. At the least, these competent authorities should include the Asset Recovery Offices.

The present report helps build up the interconnection of the centralised automated mechanism, as required by Art. 32a (5) of the 5th AML Directive. It

looks at the various IT solutions ensuring the EU-wide, decentralised interconnection of national electronic databases (already existing or currently under development). The available technical options are analysed and benefits and drawbacks explored.

As regards future steps, the Commission concludes that the envisaged system could possibly be a decentralised system with a common platform at EU level. Already developed technology could be used. The Commission intends to further consult with the relevant stakeholders, governments, as well as the FIUs, law enforcement authorities, and Asset Recovery Offices as potential “end-users” of such a potential interconnection system. To this end, the Commission must prepare a legislative proposal for the establishment of the interconnection. (TW)

New Directive on Law Enforcement Access to Financial Information

spot light The European Parliament and the Council adopted new legislation that improves the access of law enforcement authorities to financial information. Directive (EU) 2019/1153 “laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences, and repealing Council Decision 2000/642/JHA” was published in the [Official Journal L 186 of 11 July 2019, p. 122](#). The Commission initiated the Directive in April 2018 (for the proposal, see [eucrim 1/2018, pp. 13–14](#)).

While the EU has built up a robust anti-money laundering framework (providing for several obligations on the part of private entities), rules to date do not set out the precise conditions under which national authorities can use financial information for the prevention, detection, investigation or prosecution of certain criminal offences. In particular, the EU wants to give national authorities direct access to bank account information contained in national centralised

bank account registries, which all Member States must set up under the 4th and 5th AML Directives.

Against this background, the Directive pursues several aims:

- To facilitate access to and the use of financial information and bank account information by competent law enforcement authorities, including Asset Recovery Offices and anti-corruption authorities;
- To facilitate access to law enforcement information by Financial Intelligence Units (FIUs) for the prevention and combating of money laundering, associate predicate offences, and terrorist financing;
- To facilitate cooperation between FIUs;
- To ensure information exchange with Europol.

As a result, the new Directive entails the following obligations for the EU Member States:

- To designate which competent authorities can have direct and immediate access to bank account information for the prevention, detection, investigation or prosecution of certain criminal offences, and which authorities can request information or analysis from the FIUs;
- To ensure that FIUs are required to cooperate with the competent authorities and are able to reply to requests for financial information or analysis from those authorities in a timely manner;
- To ensure that the designated competent authorities reply to requests for law enforcement information from the national FIU in a timely manner;
- To ensure that FIUs from different Member States are entitled to exchange information in exceptional and urgent cases related to terrorism or organised crime associated with terrorism;
- To ensure that the competent authorities and the FIUs are entitled to reply (either directly or through the Europol national unit) to duly justified requests related to bank account and financial information made by Europol.

Beyond the EU's general data protection framework (in particular, Directive 2015/680), the Directive provides for specific and additional safeguards and conditions for ensuring the protection of personal data, e.g., as regards the processing of sensitive personal data and the records of information requests.

EU Member States must now implement the Directive into their national laws by 1 August 2021. (TW) ■

Counterfeiting & Piracy

Commission: Directive on Protecting the Euro by Criminal Law Must Be Transposed More Efficiently

The Commission is not fully satisfied as to how Member States have transposed [Directive 2014/62/EU](#) on the protection of the euro and other currencies against counterfeiting by criminal law. In a [report published on 9 May 2019 \(COM\(2019\) 311\)](#), the Commission concluded: “the majority of the Directive’s provisions have been transposed by the majority of the Member States. However, almost all Member States have transposition issues with one or several provisions, [...]”

The Directive updates a previous Framework Decision on the same subject by introducing a reinforced system on the level of sanctions, investigative tools, and the analysis, identification, and detection of counterfeit euro notes and coins during judicial proceedings.

Examples for recurrent flaws in the transposition of the Directive are:

- Some Member States established separate categories of minor/petty/or non-aggravated forms of the offences defined under Arts. 3 and 4 of the Directive, where penalties remained below the level required by the Directive (see the provision on minimum/maximum sanctions in Art. 5 of the Directive);
- Many Member States did not transpose Art. 8(2) lit. b), which requires the establishment of jurisdiction over offences committed outside the territory of the Member States whose currency

is the euro and on the territory of which the counterfeit euro or coins have been detected;

- A large majority of Member States did not adequately transpose Art. 10 of the Directive on the transmission of seized counterfeit currency to the National Analysis Centre (NAC)/Coin National Analysis Centre (CNAC);
- The provision on statistics (Art. 11) has not been transposed by almost all Member States.

In conclusion, the Commission report stresses that there is currently no need to revise the Directive, but Member States must take the appropriate measures to ensure full conformity with the provisions of Directive 2014/62. If necessary, the Commission will launch infringement proceedings. (TW)

Intellectual Property Crime Threat Assessment

For the first time, Europol and the European Union Intellectual Property Office published a joint EU-wide [intellectual property \(IP\) crime threat assessment](#) analysing the emerging threats and impact of IP crime in the EU. It focuses on counterfeiting and piracy affecting the EU.

One of the key concerns outlined in the report is the growing discrepancy between the increasing number of counterfeit and pirated goods in overall world trade and the decreasing number of seizures of counterfeit items by customs authorities in the EU. The report concludes that this development is influenced by the fact that IP crime is not a top law enforcement priority, as it is often perceived as a victimless crime. At the EU level, counterfeiting was also removed as a priority from the EU Policy Cycle on Serious and Organised Crime 2017–2021.

In addition, counterfeiters no longer produce only fake luxury items but deal in a wide range of everyday goods, e.g., car parts, cosmetics, electronic components, food and drink, toys, etc. According to the report, today any product with

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a name brand can become a counterfeiting target, with significant consequences for both the economy and the health and safety of consumers.

Key product sectors for piracy are electronics, food and drink, luxury products, clothes and accessories, pesticides, pharmaceuticals, tobacco products, and vehicle parts, with China being the main source of counterfeit items for almost every type of counterfeit good. Another catalyst in the growth of counterfeit goods is the continued growth of e-commerce and global distribution possibilities offered by online marketplaces and social media marketplaces, which facilitate the trade of counterfeit items.

As regards the perpetrators, the report outlines that most criminal activity involving counterfeiting is performed by organised criminal groups that are usually also involved in other criminal activities. Lastly, the report also notes a (still very small) growing production of counterfeit goods in the EU. (CR) ■

Cybercrime

Report on Cybercrime Challenges

Eurojust and Europol published [a joint report on common challenges when combating cybercrime](#). The challenges are analysed from two perspectives: law enforcement and the judicial.

The report analyses five main areas:

- Loss of data;
- Loss of location;
- Challenges associated with national legal frameworks;
- Obstacles to international cooperation;
- Challenges of public-private partnerships.

For each of these areas, the report also discusses ongoing activities and open issues.

Open issues identified in the report with regard to *loss of data* include, for instance, the need for a new legislative framework regulating data retention for law enforcement purposes at the EU

level. Furthermore, law enforcement no longer has access to non-public information from WHOIS (a database of registration and contact information on the owners of domain names) due to a new GDPR compliance model. Other open issues are the need to identify solutions for crypto-currency investigations and to provide law enforcement with adequate tools, techniques, and expertise in order to counter the criminal abuse of encryption.

With regard to *loss of location*, the report emphasises the need for an international legal framework for direct cross-border access to data. In order to overcome the *challenges associated with national legal frameworks*, the report recommends developing an EU-wide legal framework within which to conduct online investigations, specifically in the Deep Web and Dark Web. To improve *international cooperation*, the international legal framework should be rounded out to allow for consistent and efficient cross-border cooperation.

Finally, legislative measures to improve *public-private partnerships* are needed to facilitate cooperation with private partners and to balance privacy-related needs with the need to support law enforcement in the fight against cybercrime. The report also calls for clear and transparent rules on the involvement of private parties in the gathering of evidence. (CR)

Cybersecurity Act Introduces Cybersecurity Certification and Strengthens EU's Cybersecurity Agency

On 7 June 2019, the EU added another piece of cybersecurity legislation: the “[Cybersecurity Act](#)” (= Regulation (EU) 2019/881); it was published in the Official Journal L 151, p. 15. It introduces a framework for European Cybersecurity Certificates and reinforces the mandate of the EU Agency for Cybersecurity (ENISA). The Regulation had been proposed by the Commission as part of the “cybersecurity package” following the State of the Union Address by Commis-

sion President *Jean-Claude Juncker* in 2017 (see eucrim 3/2017, pp. 110–111).

It is clarified that this Regulation is without prejudice to the competences of the Member States regarding activities concerning public security, defence, national security, and the activities of the State in areas of criminal law.

The EU *Cybersecurity Certification Framework* is an internal market measure that lays down the main horizontal requirements for the development of European cybersecurity certification schemes. The mechanism attests that ICT products, ICT services, and ICT processes that have been evaluated in accordance with such schemes comply with specified security requirements for the purpose of, e.g., protecting the availability, authenticity, integrity or confidentiality of stored or transmitted or processed data.

Several advantages are expected from the new certification framework:

- Citizens/end users: increase in trust in digital products, because they can be sure that everyday devices/services are cyber-secure;
- Vendors and providers of products/services (including SMEs and start-ups): first, cost and time savings, because they must undergo the certification process only once, and the certificate is valid throughout the entire EU; second, the label can be used to make products/services more attractive for buyers/users, as they are labelled “cyber secure”;
- Governments: better equipped to make informed purchase decisions.

Certification schemes established under the new EU framework are voluntary, i.e., vendors/providers can themselves decide whether they want their products/services to be certified. The Cybersecurity Act foresees, however, that the Commission will assess the mechanism and reflect on whether specific European cybersecurity certification schemes should become mandatory.

The Cybersecurity Act changes ENISA's mandate from a temporary one into a permanent one. ENISA will also

receive more staff and money in order to fulfil its tasks. Current tasks, such as supporting policy development and the implementation of cybersecurity acts (e.g., the NIS Directive) and capacity building will be strengthened. New tasks have been added; ENISA will play a key role in implementing the Union's policy on cybersecurity certification. ENISA will also play a greater role in promoting cooperation and coordination on matters related to cybersecurity. Ultimately, it will be an independent centre of expertise on cybersecurity. (TW)

New Sanctioning Regime Against External Cyber-Attacks

The Council has established a framework that allows the EU to impose restrictive sanctions against external cyber-attacks threatening the Union or its Member States. The framework consists of:

- Council Regulation (EU) 2019, 796 (which is based on Art. 215 TFEU);
- Council Decision (CFSP) 2019, 797 (which is based on Art. 29 TEU).

The acts were published in the [Official Journal L 129 I, 17.5.2019, 1](#). They entered into force on 18 May 2019.

The framework comes in response to recent malicious cyberattacks that originated or were carried out outside the EU and affected the EU Member States' critical infrastructure, competitiveness, and/or state functions. It is a measure within the EU's Common Foreign and Security Policy (CFSP) and part of the "cyber diplomacy toolbox."

The framework applies to cyber-attacks with a "significant effect," including attempted cyber-attacks with a potentially significant effect. Cyber-attacks that constitute an external threat to the Union or its Member States include those which:

- Originate, or are carried out, from outside the Union;
- Use infrastructure outside the Union;
- Are carried out by any natural or legal person, entity, or body established or operating outside the Union;

- Are carried out with the support, at the direction of, or under the control of any natural or legal person, entity, or body operating outside the Union.

The Regulation allows the Council to list natural or legal persons, entities or bodies who/which are responsible for such cyber-attacks, who/which provide financial, technical or material support, or who/which are associated with the responsible or supporting persons. Targeted sanctions against these listed persons include:

- Entry ban into or transit ban through the EU;
- Freezing of all funds and economic resources;
- Prohibition of EU citizens and entities from making funds available to those persons listed.

According to the recitals of the Decision, the new sanctioning regime may also be applied in case of cyber attacks with a significant effect against third countries or international organisations if this is necessary to achieve CFSP objectives.

It is also clarified, that the targeted restrictive measures must be differentiated from the attribution of responsibility for cyber-attacks to a third State. The application of targeted restrictive measures does not amount to such attribution, which is a sovereign political decision taken on a case-by-case basis. Every Member State is free to make its own determination with respect to the attribution of cyber-attacks to a third State. (TW)

No More Ransom Initiative Turns Three

On 26 July 2019, [the No More Ransom initiative](#) celebrated its third anniversary. Today, the portal offers decryption to 109 different types of ransomware infections and is available in 35 languages. 150 partners, consisting of 42 law enforcement agencies, 5 EU Agencies and 101 public and private entities, have joined the initiative since its start in July 2016 (see eucrim 3/2016, p. 128). (CR)

Law Enforcement Cracks Down on GrandGrab

On 17 June 2019, several European and international law enforcement agencies, together with Europol, released a [decryption tool for the latest version of the most prolific ransomware family GrandCrab](#). With the tool, victims of ransomware can regain access to the electronic files encrypted by hackers on their computers or mobile devices without having to pay a ransom. The tool is available free of charge on www.nomoreransom.org. (CR)

Terrorism

EU Terrorism Situation and Trend Report 2019

Europol published the [EU Terrorism Situation and Trend Report 2019 \(TE-SAT 2019\)](#). It outlines the latest developments with regard to jihadist terrorism, ethno-nationalist and separatist terrorism, left-wing and anarchist terrorism, right-wing terrorism, and single-issue terrorism.

Looking at jihadist terrorism, key observations from the year 2018 indicate that all fatalities from terrorism in 2018 were the results of jihadist attacks committed by terrorist acting alone and targeted at civilians as well as symbols of authority. The number of fatalities dropped from 62 people in 2017 to 13 in 2018. While completed jihadist attacks were carried out using firearms and unsophisticated, readily available weapons, several disrupted terrorist plots included the attempted production and use of explosives and chemical/biological materials. A general increase in chemical, biological, radiological and nuclear (CBRN) terrorist propaganda, tutorials, and threats was also observed. Although activities by the Islamic State (IS) decreased in 2018, IS still intends to carry out attacks outside of conflict zones. Both IS and al-Qaida keep up a strong online presence, seeking new multipliers for their propaganda. Still, no terror-

ist group demonstrated the capacity to carry out effective cyberattacks in 2018. The number of European foreign terrorist fighters travelling, or attempting to travel, to the Iraqi and Syrian conflict zones, was very low in 2018 but a shift in focus can be seen towards carrying out attacks in the EU. In addition, the number of returnees to the EU remained very low in 2018. According to the report, there seems to be no systematic abuse of migration flows by terrorists entering the EU. In particular, minors returning to the EU are at the heart of Member States' concerns, as these persons are victims, on the one hand, but have been exposed to indoctrination and training, on the other.

Looking at ethno-nationalist and separatist terrorism, the report reveals that these attacks greatly outnumber other types of terrorist attacks in 2018. Although the number of attacks linked to left-wing and right-wing terrorism was still relatively low, the number of arrests linked to right-wing terrorism continued to markedly increase. Terrorism financing is still intensively being conducted via the Hawala banking instrument (transfer or remittance of values from one party to another, without use of a formal financial institution such as a bank or money exchange).

In total, 129 foiled, failed, and completed attacks were reported by EU Member States in 2018, with the highest number of attacks having been experienced by the UK (60). 1056 individuals were arrested in the EU on suspicion of terrorism-related offences, with the highest number of arrests in France (310). 17 EU Member States reported convicting or acquitting 653 persons of terrorist offences in 2018, the average prison sentence being seven years. (CR)

Judicial Counter-Terrorism Register at Eurojust

During the annual meeting on counter-terrorism at Eurojust from 20 to 21 June 2019, national experts agreed on further practical steps to implement [a judicial](#)

[counter-terrorism register](#). The register will centralise judicial information on counter-terrorism proceedings from all EU Member States. It establishes links between judicial proceedings against suspects of terrorist offences and helps Eurojust offer better coordination.

The register was initiated by France, Germany, Spain, Belgium, Italy, Luxembourg and the Netherlands following the terrorist attacks in Paris and Saint-Denis in November 2015. They showed the need for the judicial authorities to get a quick overview of judicial proceedings in other EU Member States against terrorists who increasingly operate across borders.

The Counter-Terrorism Register (CTR) focuses on judicial proceedings and convictions only, and therefore will not overlap with the criminal analysis carried out by Europol. The new EU database does not include only jihadist terrorism, but also terrorist offences from extreme right and left-wing groups in Europe. The CTR was [launched on 1 September 2019](#). (CR)

New Reporting Series Kicked Off with ECTC Report on Women in IS Propaganda

In mid-June 2019, [Europol published its first report in a new series called "Europol Specialist Reporting"](#) – a collection of reports on priority crime areas published by Europol's in-house experts.

[The first report](#), published by Europol's European Counter Terrorism Centre, looks at women in Islamic State (IS) propaganda. It analyses how the IS appeals to women, the doctrinal dialectics put forward by IS with regard to women, their expected role(s) in jihad, and how the organisation uses Islamic jurisprudence to mould the role of women within jihad.

Its key findings include a noticeable increase in women featured in IS propaganda as well as a broader scope in the nature and extent of their roles within the organisation. Nevertheless, the preferred nature of women remains that of

the traditional stay-at-home mother and wife. According to the report, the motivation of female jihadists is similar to that of their male counterparts: they are driven by the wish to join a cause and to contribute to building an Islamic state.

Remarkably, the report finds IS propaganda to be filled with disparaging and condescending descriptions of women. This, however, seems to be perceived differently by women who subscribe to IS ideology, as their roles are seen as unnegotiable and emanating from a divinely authoritative source. (CR)

Evaluation of the EU-US Agreement on Tracing Terrorist Financing

On 22 July 2019, the Commission presented the "joint review of the implementation of the Agreement between the European Union and the United States of America on the processing and transfer of Financial Messaging Data from the European Union to the United States for the purposes of the Terrorist Finance Tracking Program." It is the [fifth evaluation report](#) on the agreement which entered into force on 1 August 2010.

The agreement enables law enforcement authorities to get timely, accurate, and reliable information about activities associated with suspected acts of terrorist planning and financing. It helps identify and track terrorists and their support networks worldwide.

The EU and USA agreed on regular joint reviews of the safeguards, controls, and reciprocity provisions to be conducted by review teams from the European Union and the USA (Art. 13 of the Agreement). The fifth evaluation report covers the period from 1 January 2016 to 30 November 2018. It is limited to the description of procedural aspects and a summary of the recommendations and conclusions. A more detailed [Commission staff working document accompanies the report](#).

In general, the Commission is satisfied that the Agreement and its safeguards and controls (e.g., data protection) are being properly implemented. During

the evaluated period, over 70,000 leads were generated, some of which brought forward investigations into terrorist attacks on EU territory, such as those in Stockholm, Barcelona, and Turku. The number of leads increased considerably compared to almost 9000 in the previous reporting period (1 March 2014 to 31 December 2015). EU Member States and Europol are increasingly using the mechanism.

The report also includes a number of recommendations for further improvement, *inter alia*:

- Better cooperation between EU Member States' authorities and U.S. counterparts with regard to the necessity of retaining so-called "extracted data";
- Regular feedback from Member States to Europol on the added value of leads received from the U.S. authorities;
- Continuation of Europol's efforts to raise awareness of the TFTP and to support Member States seeking advice and experience when making requests;
- Improved verification by the U.S. Treasury with respect to data protection rights.

The next joint review will be carried out at the beginning of 2021. (TW)

Council Conclusions on Radicalisation in Prisons

At its meeting on 7 June 2019, the home affairs ministers/ministers of the interior of the EU Member States adopted [Council conclusions on preventing and combatting radicalisation in prisons](#) and on dealing with terrorist and violent extremist offenders after release. The Council pointed out that effective measures in this area must urgently be taken, because of the growing number of terrorist offenders and offenders radicalised in prison and because a number of them will be released in the next two years.

The conclusions were based on Member States' responses to a questionnaire on policies for the prevention and countering of radicalisation in prisons, discussions at the working level of the

Council, and Member States' written comments. Member States have been, *inter alia*, invited to further develop specialised interventions for dealing with terrorist and violent extremist offenders as well as with offenders assessed as in risk of being radicalised while serving time in prison.

The Commission has, in particular, been invited to support several activities in the Member States, such as the development of tools and practices for risk management, the implementation of training programmes for relevant professionals and practitioners (prison staff, probation officers, the judiciary, etc.), de-radicalisation, disengagement and rehabilitation programmes for terrorist and violent extremist offenders, etc. Support may also include the work of third countries and partners, especially neighbouring regions, such as the Western Balkans, the MENA-region (Middle East and North Africa), and the Sahel in order to prevent radicalisation in prisons.

Good practices on addressing radicalisation in prisons and dealing with terrorist and violent extremist offenders after release have been annexed to the conclusions. Good practices include, for instance:

- Swift information exchange among relevant stakeholders and development of dedicated strategies;
- Setting up of specialised and multi-disciplinary units responsible for countering violent extremism and radicalisation in prisons;
- Comprehensive training programmes for prison and probation staff;
- Implementation, if necessary, of special measures for individuals convicted of terrorist offences, based on a risk assessment;
- Measures encouraging inmates to disengage from violent extremist activities on a case-by-case basis and support for religious representatives to provide alternative narratives;
- Education, training, and psychological support after release as well as

further monitoring of radicalised individuals who are considered to pose a continued threat. (TW)

Illegal Employment

Workers' Perspective on Severe Labour Exploitation

In June 2019, FRA published its [fourth report on the topic of severe labour exploitation, focusing on the perspective of the workers](#). The report is based on interviews with 237 exploited workers. It outlines the following:

- Pathways into severe labour exploitation;
- Working and living conditions of employees;
- Employers' strategies to keep the workers working;
- The interviewees' perception of risk factors for severe labour exploitation;
- Employees' access to justice.

In its conclusions, the report recommends acting on recruitment, i.e., by setting minimum EU standards for employment and recruitment agencies and their subcontractors. Another suggestion is to enforce the legal framework for labour law, i.e., by reinforcing workplace inspections with the support of the planned European Labour Authority and by the adoption of the EU Directive on transparent and predictable working conditions. Another key issue is to inform workers of their rights and the existence of labour exploitation. Migrants should avoid irregular residence status, as it strengthens the employers' position of power.

In this context, the report asks EU Member States to increase legal avenues for migration and to create targeted labour migration programmes. The power of employers is also strengthened by policies that tie the residence permit to the existence of an employment contract. Residence permits and visas should give migrants the possibility to quickly switch employers. Residence status also permits many victims of la-

bour exploitation to report to the police. Therefore, the report sees the need to shift the authorities' focus from immigration enforcement to the protection of workers and labour rights. Lastly, the report recommends taking measures to develop a culture of rights among relevant stakeholders in the labour market as well as among the general population. (CR)

Procedural Criminal Law

Procedural Safeguards

All Procedural Rights Directives Now Apply

The [transposition period](#) for the directive on special safeguards for children in criminal proceedings (Directive 2016/800) ended on 11 June 2019. Together with the directive guaranteeing access to legal aid (Directive 2016/1919), which had to be transposed by 25 May 2019, it is the last piece of legislation that had to be implemented according to the 2009 Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings.

The acts complement the other rights that already apply, i.e.:

- The right to be presumed innocent and to be present at trial (Directive 2016/343);
- The right of access to a lawyer (Directive 2013/48);
- The right to information (Directive 2012/13);
- The right to interpretation and translation (Directive 2010/64).

The Commission advised the Member States to implement the recent Directives as soon as possible if they have not done so yet. The Commission provides support through workshops or expert meetings.

For an introduction to the various Directives, see the contributions of *Steven Cras* (partly with co-authors), all available at the eucrim website. (TW)

CJEU: Italian Law Differentiating Applicability of Negotiated Settlements in Line with EU Law

In its [judgement of 13 June 2019 in case C-646/17](#) (criminal proceedings against *Gianluca Moro*), the CJEU followed the conclusions of Advocate General (AG) *Bobek* of 5 February 2019 (for the AG's opinion, see eucrim 1/2019, pp. 24–25). It confirmed that the following legal situation is in line with the provisions of Directive 2012/13 on the right to information in criminal proceedings and Art. 48(2) CFR: under Italian law, an accused can apply for a negotiated penalty – known as *patteggiamento* – after the start of the trial if the facts of the criminal charge are modified, but not if the charge is legally reclassified.

The CJEU first rejected the position of the Italian government that the request for a preliminary ruling is inadmissible, because Directive 2012/13 is only applicable if there is a cross-border element in the main proceedings. Like the AG, the CJEU argued that the Directive contains minimum rules for criminal procedures in also purely domestic cases that do not have a cross-border constellation.

As regards the material question, the CJEU focused on the interpretation of Art. 6(4) of Directive 2012/13, which regulates the accused person's right to be informed of any changes in the accusation, "where this is necessary to safeguard the fairness of the proceedings." According to the CJEU, the Directive stipulates how the right to fair trial can be guaranteed as far as the information of the suspect or accused person is concerned. This right encompasses the obligation to inform the accused person if the charge has been modified, be the modification of a factual or a legal nature. The accused person must be in a position to effectively react to a possible change in the nature of the accusation. By contrast, the Directive does not entail any legal obligation to guarantee the accused person's right to apply for a negotiated penalty during the trial.

Art. 48 CFR does not change this re-

sult. Its guarantee to respect the rights of the defence of anyone who has been charged does not include any obligation that goes beyond what already exists in Directive 2012/13.

In sum, Union law does not preclude domestic procedural rules that allow the accused person to request a negotiated penalty after the beginning of the trial only if there is a change in the accusation that is of a factual nature and not when the change is of a legal nature. (TW)

Fair Trials: Study on Threats to Presumption of Innocence Regarding Presentation of Suspects in Criminal Proceedings

On 3 June 2019, Fair Trials – a NGO that stands for improving respect for a fair trial in accordance with international standards – released a [report on key threats to the presumption of innocence](#) if suspects are presented in public environment. The report focuses on:

- Prejudicial statements by public authorities;
- Press coverage;
- Presentations in courtroom and public settings.

The report is based on the evaluation of a wealth of data, i.e.:

- Global survey of law and practice on the presentation of suspects;
- Sociological study on the impact of images of arrest and different measures of restraint on public perceptions of guilt;
- Content analysis of crime-related news stories in newspapers, the online press, and broadcast television news programmes in seven countries;
- Comparative research on the presentation of suspects before the courts in five countries (Hungary, France, Croatia, Malta, and Spain).

The report does not make a comparative analysis by presenting reports on a country-by-country basis but by exploring key issues and themes as well as useful examples of good practice from the provided data.

Fair Trials makes a number of recommendations on how compliance with the international standards on the presumption of innocence can be improved in the situations studied. As an overall recommendation, the report states:

“a. The EU Directive [2016/343] is an important first step in making the presumption of innocence a reality in Europe but the EU will have to invest considerable time and political will to ensure its effective implementation. Member States’ courts will also have to refer questions to the CJEU where it is unclear what EU law requires.

b. Meaningful reform will require profound changes of law, practice and culture. Robust laws are important, but a formalistic legal approach will not suffice. Long-term engagement of law enforcement, legal professionals (including judges, prosecutors and the defence) and the media will be crucial, alongside broader public education.”

The report also annexes a checklist for journalists reporting on criminal suspects; it was developed by the University of Vienna. (TW)

Data Protection

Works on Interoperability of EU Information Systems Can Start – Legal Framework Established

spot light On 22 May 2019, the new rules establishing a framework for interoperability between EU information systems in the field of borders and visa (Regulation (EU) 2019/817) and in the field of police and judicial cooperation, asylum and migration (Regulation (EU) 2019/818) were [published in the Official Journal of the European Union \(O.J. L 135\)](#). The Regulations that had been initiated by the Commission on 12 December 2017 (see [eucrim 4/2017](#), pp. 174–175) were adopted by the Council on 14 May 2019. After publication in the Official Journal, the Regulations entered into force on 11 June 2019. The various interoperability components

need technical implementation, however, which is why the date of the operational start of the components is determined by the Commission. It is expected that they can be applied by 2023.

The two sets of Regulations had become necessary, because the legal bases of the information systems were different and the levels of EU Member States’ involvement in the various databases varied. Nonetheless, both Regulations largely contain identical provisions.

The interoperability framework solves the problem that, to date, data are separately stored in various large-scale IT systems at the EU level, but the systems can principally not communicate with each other. This may lead to information gaps, e.g., information could get lost or criminals with several or false identities may remain undetected. The Regulations therefore pursue several different objectives (defined in Art. 2(1) of the Regulations):

- Improve effectiveness and efficiency of border checks at external borders;
- Contribute to prevention and combating of illegal immigration;
- Contribute to a high level of security within the area of freedom, security and justice of the Union, including the maintenance of public security and public policy and safeguarding security in the territories of the Member States;
- Improve implementation of the common visa policy;
- Assist in examination of applications for international protection;
- Contribute to prevention, detection, and investigation of terrorist offences and other serious criminal offences;
- Facilitate identification of unknown persons who are unable to identify themselves or unidentified human remains in cases of a natural disaster, accident, or terrorist attack.

Hence, the interoperability framework focuses on the correct identification of persons and on combating identity fraud. At the same time, it will, *inter alia*, improve data quality and harmonise the quality requirements for

data stored in EU information systems (cf. Art. 2(2)).

In order to achieve the objectives, the Regulations establish the following interoperability components and specify their purposes, use, queries, access possibilities, etc.:

- European search portal (ESP): it enables the competent authorities of the Member States and the Union agencies to gain “fast, seamless, efficient, systematic and controlled access” to the EU information systems, to Europol data, and to Interpol databases. The ESP can be used to search data related to persons or their travel documents. The ESP does not change the access rights of the authorities/Union agencies. After having launched a query to the ESP (by submitting biographic or biometric data), the system indicates which EU information system or database the data belongs to. The ESP will not provide information regarding data in EU information systems, Europol data, and Interpol databases that the user has no access to under applicable Union and national law.
- Shared biometric matching service (shared BMS): it is a technological tool to match the individual’s biometric data across different systems; it will regroup and store all biometric templates in one single location that are currently being separately used in the EU information systems. In this way, it will enable the searching and comparing of biometric data (fingerprints and facial images) from several systems;
- Common identity repository (CIR): it contains biographical and biometric data of third-country nationals available in several EU information systems. It aims to increase the accuracy of identification through automated comparison and matching of data.
- Multiple-identity detector (MID): it checks whether the biographical identity data contained in the search exist in other systems covered in order to enable the detection of multiple identities linked to the same set of biometric data.

An [infographic provided for at the](#)

[Council website](#) illustrates how the tools work.

The Regulations apply to the following EU information systems:

- The Entry/Exit System (EES);
- The Visa Information System (VIS);
- The European Travel Information and Authorisation System (ETIAS);
- Eurodac;
- The Schengen Information System (SIS);
- The European Criminal Records Information System for Third-Country Nationals (ECRIS-TCN).

Regulation 2019/818 also applies to Europol data to the extent of enabling them to be queried simultaneously alongside the EU information systems referred to. As regards personal scope, the Regulations apply to persons whose personal data may be processed in the EU information systems referred to and/or in the Europol database.

In order to mitigate interference into the rights and freedoms of the persons concerned, the Regulations include several safeguards, e.g.:

- Full access to data contained in the EU information systems that is necessary for the purposes of preventing, detecting or investigating terrorist offences or other serious criminal offences, beyond access to identity data or travel document data held in the CIR, will continue to be governed by the applicable legal instruments;
- Authorised end-users cannot make adverse decisions for the individual concerned solely on the basis of the simple occurrence of a match-flag;
- Provisions regulate the log-keeping of queries, the obligations to (principally) inform individuals whether links to their person have been established, penalties for misuse of data, and liability;
- A web portal will be established for the purpose of facilitating the exercise of the rights of access to, rectification, erasure, and restriction of processing of personal data.

The web portal will be developed by the European Union Agency for the Op-

erational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA). The Agency will also be responsible for the development of the interoperability components, the technical management of the central infrastructure of the interoperability components, data quality standards, etc.

The establishment of interoperability was hotly debated in the runup to the legal framework. In particular, data protection experts took a critical stance (see eucrim 1/2019, pp. 26–27). Despite this criticism and before the adopted legal framework becomes operational, Statewatch has reported that the EU is already thinking of [making customs information systems interoperable with EU Information Systems in Justice and Home Affairs](#), e.g., the SIS. The working groups at the EU level will further explore the potential added value of cross-checking relevant goods and persons' data between customs and JHA databases. (TW) ■

Infringement Proceedings for Not Having Transposed EU Data Protection Directive

On 25 July 2019, the Commission [lodged an infringement action against Greece and Spain](#) before the CJEU for having failed to transpose [Directive 2016/680](#) regarding the protection of personal data by law enforcement authorities (for the Directive, see eucrim 2/2016, p. 78). The deadline for transposing the rules of the Directive into national law ended on 6 May 2018. The Commission also called on the CJEU to impose financial sanctions in the form of a lump sum against the two countries in accordance with Art. 260(3) TFEU.

The Commission stressed that failure to transpose the directive leads not only to problems in the exchange of law enforcement information but also to an unequal treatment of persons as regards the protection of their fundamental rights. To date, Greece and Spain have not notified their laws, regulations, and administrative measures that would comply with

Directive 2016/680, as a result of which the two countries breached their obligations under EU law.

On the same day, the Commission started an [infringement procedure against Germany](#) for not having completely transposed Directive 2016/680. The Commission observed that only 10 of the 16 federal states (*Länder*) had adopted measures implementing the Data Protection Law Enforcement Directive by the end of the transposition period on 6 May 2018. The Commission sent a letter of formal notice to Germany, which is the first step in the infringement procedure. Germany now has two months to reply to the arguments raised by the Commission. Otherwise, the Commission may decide to send a reasoned opinion, i.e., to start the second phase of the infringement procedure.

Directive 2016/680 was part of the EU data protection reform along with the General Data Protection Regulation (GDPR). It pursues a twofold aim: better protection of the individual's personal data processed by law enforcement authorities in the EU Member States (both in purely domestic processing as well as in the cross-border exchanges of data); at the same time, a more efficient and effective exchange of data due to the harmonisation. The directive replaces [Framework Decision 2008/977/JHA](#) on the protection of personal data processed in the framework of police and judicial cooperation in criminal matters with effect from 6 May 2018. (TW)

Implementation of the GDPR: Commission Generally Satisfied

Over a year after the application of the General Data Protection Regulation (GDPR), the European Commission makes an overall positive assessment. In a [report, published on 24 July 2019](#), the Commission concludes that most Member States have set up the necessary legal framework and that the new governance system is falling into place. Individuals increasingly make use of their rights, and businesses are developing a compli-

ance culture. EU data protection rules are increasingly being used as a point of reference at the international level. The report also includes a number of issues that need to be further improved, e.g.:

- Ensuring that all Member States comply with EU data protection rules;
- Strengthening the role of data protection authorities;
- Supporting and involving stakeholders from civil society and business;
- Making sure that individuals and businesses, including SMEs, can enjoy the benefits brought about by the GDPR;
- Integrating data protection into all relevant policies;
- Further promoting international convergence towards a high level of data protection rules.

The GDPR has been applicable since 25 May 2018. Their rules are directly applicable in all EU Member States. It does not apply, however, to the processing of personal data for national security activities or law enforcement. For the latter, Directive 2016/680 forms the legal basis for data processings.

The national Data Protection Authorities are in charge of enforcing the new rules and are better coordinating their actions through new cooperation mechanisms and the European Data Protection Board. They are issuing guidelines on key aspects of the GDPR in order to support the implementation of the new rules in the private and public sectors.

The Commission will report on the progress made in the implementation of the GDPR in 2020 again. (TW)

Draft Data Protection Guidelines on Video Surveillance

On 10 July 2019, the European Data Protection Board (EDPB) published draft [guidelines on processing of personal data through video devices](#). The aim of the guidelines is to ensure the correct, consistent application of the EU's General Data Protection Regulation (GDPR) in cases of video surveillance. The guidelines cover both traditional video devices and smart video devices. They

were subjected to a [public consultation](#).

The guidelines first clarify the scope of application. In this context, the GDPR does not apply to processing of data that has no reference to a person, e.g., in cases involving fake cameras, and also not to the processing of data by the competent authorities for law enforcement purposes (where the data protection Directive 2016/680 applies).

Other items addressed by the guidelines include:

- Lawfulness of processing;
- Disclosure of video footage to third parties;
- Rights of the data subject;
- Transparency and information obligations;
- Storage periods and obligations to erasure;
- Technical and organizational measures.

The guidelines may be further refined after the public consultation which ended on 9 September 2019. Guidelines for other GDPR-related areas will follow. (TW)

Reference for Preliminary Ruling on Data Protection and Judicial Independence

The Administrative Court of Wiesbaden, Germany referred two questions for a preliminary ruling to the CJEU that deal with Regulation 2016/679 – the General Data Protection Regulation (GDPR) – and the independence of the judiciary in the federal state of Hesse. The reference by the administrative court of Wiesbaden is registered as [case C-272/19](#) at the CJEU. The full text of the reference (in German) is [available at OpenJur](#).

In the case at issue, the complainant sought information about his personal data, which is stored at the Petitions Committee of the Hesse Land Parliament. The president of the parliament rejected the claim, arguing that the petition process is a parliamentary task exempt from the rights of data subjects as established by the federal state's data

protection law implementing the European data protection regulation.

The administrative court doubts that this exclusion is in conformity with the EU's GDPR. It believes that the Petitions Committee functions as a public authority, which is why a natural person has also the right to access to information in accordance with Art. 15 and Art. 4 No. 7 GDPR.

In addition, the administrative court poses a more fundamental question: is the court actually allowed to make references to the CJEU, because it may not be an independent and impartial tribunal as required by Art. 267 TFEU read in conjunction with Art. 47(2) of the Charter of Fundamental Rights of the European Union. In essence, the referring court argues that the German legal order only establishes the independence of judges, whereas the "court" as institution is "conducted" by the justice ministry of the federal state. The ministry manages personnel files, is responsible for recruiting the judges, and participates in lawsuits among applicants or judges.

Put in focus: The second question, on the independence of German judges, is surprising. However, it interpolates with the general debate in Germany as to the extent to which institutions of the judiciary are really independent in the sense of international and European standards. It relates to the recent CJEU judgment that declared German public prosecution services not having sufficient independence to issue European Arrest Warrants (see *eucri* 1/2019, pp. 31–33). If the CJEU follows the argumentation of the German court, it will have to make fundamental reflections on the admissibility of references for preliminary rulings by German courts. (TW)

PNR Collection also for Maritime and Railway Traffic?

The Finnish Council Presidency intensifies discussion on whether the scope of the EU's Directive on the use of passenger name record (PNR) data for the prevention, detection, investigation, and

prosecution of terrorist offences and serious crime (Directive (EU) 2016/681) should be broadened. In a [discussion paper, tabled on 25 June 2019](#), the Finnish Presidency invites the other Member States to discuss the usefulness and benefits of gathering PNR on other travelling forms.

The EU Directive (see eucrim 2/2016, p. 78) only applies to air carriers operating extra-EU flights; Member States can, however, decide to apply the same obligation to intra-EU flights, which most Member States do. PNR data may contain different types of information, such as travel dates, travel itinerary, ticket information, contact details, means of payment used, seat number, and baggage information. Law enforcement authorities consider the data useful for investigating and preventing crime.

The discussion paper points out that the travel volume inside and outside the Schengen area are both increasing. All forms of cross-border travelling pose risks to security, e.g., migrant smuggling, drug smuggling, terrorism, etc. Therefore, uniform EU rules on the use of PNR data on other forms of transportation, such as sea traffic and international high-speed trains, may offer added value. In this context, the discussion paper points out that some Member States already collect PNR data from other travelling forms than those used for air traffic.

The discussion paper is the outcome of a questionnaire on progress made in implementing Directive 2016/681, [the results of which were presented during the Romanian Council Presidency](#) in the first half of 2019. Accordingly, the majority of Member States favoured broadening the scope of data collection to other types of transportation (87% to maritime, 76% to railway, 67% to road traffic) but also stressed that the EU Directive on air traffic must be implemented first. Furthermore, any extension must ensure that the Passenger Information Units responsible for the PNR data base and data exchange can manage the additional data volume. (TW)

Council: The Way Forward in Data Retention

The Council remains committed to establishing a European regime on the retention of electronic communication data for the purpose of fighting crime. Following the conclusions on data retention drawn under the Austrian Council Presidency in December 2018 (see eucrim 4/2018, p. 201), the [JHA Council again adopted conclusions](#) in the matter at the end of the Romanian Council Presidency at its meeting on 6 June 2019.

The ministers restressed that “data retention constitutes an essential tool for law enforcement, judicial and other competent authorities to effectively investigate serious crime, [...] including terrorism or cyber crime.”

The ministers also acknowledged, however, that it is difficult to cut the Gordian knot, i.e. to bring up legislation that is in line with the EU’s Charter on Fundamental Rights as interpreted by the European Court of Justice in the cases *Digital Rights Ireland* and *Tele 2 Sverige*. Despite further pending references for preliminary rulings against data retention rules (see eucrim 1/2019, p. 26), the Council feels that the legal possibility for data retention schemes at the EU and national levels should be maintained.

The Commission is invited to support the DAPIX-Friends of Presidency Working Party by gathering relevant information in the Member States and by means of targeted consultations of stakeholders. In particular, the Commission has been requested to get a comprehensive study off the ground to explore possible solutions for retaining data. The study may also serve as a basis for a future new legislative initiative on an EU data retention scheme. The conclusions stressed that the study must take into account the following issues:

- The evolving case-law of the Court of Justice and of national courts relevant for data retention;
- The outcomes of the common reflection process in the Council;

- Concepts of general, targeted and restricted data retention (first level of interference) and the concept of targeted access to retained data (second level of interference);

- Exploration of the extent to which the cumulative effect of strong safeguards and possible limitations at both interference levels could assist in mitigating the overall impact of retaining those data to protect the fundamental rights of the Charter, while ensuring the effectiveness of the investigations.

The Commission is further invited to report on the state of play of its work by the end of 2019. (TW)

Ne bis in idem

Art. 54 CISA and Red Notices: German Administrative Court Casts Doubt on Reliability of Interpol

Whether the maintenance of Red Notices by Interpol is in line with a person’s right to free movement within the European Union is the subject of a [reference for preliminary ruling by the Administrative Court of Wiesbaden, Germany](#), launched on 27 June 2019.

In the case at issue, a former manager of a large German company had been prosecuted for bribery acts allegedly committed between 2002 and 2007 in Argentina. While, in 2009, the public prosecutor in Munich discontinued proceedings once the defendant paid a certain sum of money determined by the prosecutor, parallel prosecutions were upheld in the USA. In particular, the U.S. prosecutor issued a Red Notice via Interpol seeking the arrest of the defendant and his surrender to the USA. In line with the CJEU’s judgment in *Gözütok/Brügge* (Joined Cases C-187/01 and C-385/01), the German Federal Police Office (*Bundeskriminalamt*) informed Interpol that the defendant can no longer be prosecuted twice within the Schengen area pursuant to Art. 54 CISA, Art. 50 CFR. Interpol denied erasure of the Red Notice, however, because this can only

be carried out by the USA, which is not bound by Art. 54 CISA.

The defendant sued the Federal Police Office before the administrative court of Wiesbaden, seeking erasure of the Red Notice against him in the Interpol system. He argued that the decision of the public prosecutor in Munich unequivocally triggers application of the *ne bis in idem* rule pursuant to Art. 54 CISA/Art. 50 CFR, which is why he enjoys the right to free movement within the European Union and the Schengen area. However, he cannot exercise this right as long as the Red Notice is upheld in the Interpol system, because he must fear arrest and extradition to the USA by any other EU Member State if he leaves Germany. According to the defendant, compliance with the Red Notice by other EU Member States is illegal and unduly restricts his right to free movement.

Against this background, the administrative court of Wiesbaden referred several questions to the CJEU about the lawfulness of national law enforcement authorities processing Interpol Red Notices. The CJEU should, *inter alia*, clarify whether the right to free movement prohibits the person's provisional arrest in any other EU Member State if the country of origin (here: Germany) informed the states about the application of the Union-wide ban not to be prosecuted twice.

The court also casts doubt on whether Interpol has an adequate level of data protection or, at least, provides appropriate safeguards, so that the data transfer between Interpol and the EU Member States is legally possible in accordance with Arts. 36 and 37 of the EU's data protection Directive 2016/680. In general, the court questioned whether searches for arrest via Interpol can be processed by the EU Member States if they violate fundamental principles of Union law (here: free movement of person and *ne bis in idem* rule).

Put in focus: The reference is very interesting, since it tackles the more fun-

damental problem of the extent to which mutual recognition of Member States' judicial decisions are applied in favour of citizens ("reverse mutual recognition"). The CJEU must, however, also take into account international obligations of the EU Member States in this particular case. In addition, it must assess which legal consequences can be drawn from the fact that the US as a third state is not bound by the European *ne bis in idem* rule in Art. 54 CISA and Art. 50 CFR. (TW)

Victim Protection

Victims' Rights Directive: Commission Initiates Infringement Proceedings Against Nine Member States

On 25 July 2019, the Commission decided to open [infringement proceedings against nine EU Member States](#) for not having completely transposed Directive 2012/29/EU on the rights, support and protection of victims of crime. The so-called Victims' Rights Directive establishes EU-wide minimum standards for victims of crime as regards access to information, participation in criminal proceedings, and support and protection adapted to their needs. The Commission blames the Member States for not having implemented several provisions of this Directive, such as the right to be informed about both the victims' rights and the case, or the right to support and protection.

The Commission launched the first phase of the infringement procedure by sending a letter of formal notice to the Czech Republic, Estonia, Germany, Hungary, Italy, Malta, Poland, Portugal, and Sweden. The Member States must now answer the request within two months. If the Commission is not satisfied with the information and concludes that the Member States in question are failing to fulfil their obligations under EU law, the Commission may then send a formal request to comply with EU law (a "reasoned opinion"). (TW)

Cooperation

Police Cooperation

Prüm Cooperation: Agreements with Switzerland and Liechtenstein

On 27 June 2019, the EU signed agreements with Switzerland and Liechtenstein allowing the two countries to participate in the police cooperation scheme established by the so-called Prüm decisions. The agreement with Switzerland was published in the [Official Journal L 187 of 12 July 2019](#), p. 3; the agreement with Liechtenstein was published in the [Official Journal L 184 of 10 July 2019](#), p. 3.

The core of the Prüm legal framework is the speedy and efficient exchange of police information, especially as regards DNA profiles, dactyloscopic data (fingerprints), and data on vehicles and their owners. Police authorities from the participating countries are able to swiftly check whether data on any person or item is already stored in the database of another Prüm state. The Prüm legal framework consists of the following:

- [Council Decision 2008/615/JHA](#) ("the Prüm Decision"), which was adopted in order to incorporate into the EU legal framework the substance of the provisions of the previous Prüm Treaty on the stepping up of cross-border cooperation, particularly on combating terrorism, cross-border crime and illegal migration (the Treaty had been agreed upon by seven European countries in 2005);
- [Council Decision 2008/616/JHA](#) ("the Prüm Implementing Decision") laying down the necessary technical provisions for the implementation of Decision 2008/615/JHA;
- [Council Framework Decision 2009/905/JHA](#) laying down requirements for the exchange of DNA and fingerprint data in order to ensure that the results of laboratory activities carried out by accredited forensic service providers in one Member State are recog-

Report

Europäisches Strafrecht nach der österreichischen Ratspräsidentschaft

Konferenz der Österreichischen Vereinigung für Europäisches Strafrecht

On 7 March 2019, the Austrian Association of European Criminal Law together with the Vienna University of Economics and Business and the Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice organized a one-day conference on “European Criminal law after the 2018 Austrian Presidency of the Council of the European Union”. The event raised great interest by many scholars and practitioners and covered three main topics:

- The exchange of electronic evidence with regard to the Proposal for a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters;
- Mutual trust or mistrust among the EU Member States under consideration of the protection of fundamental rights;
- Current developments in substantive European criminal law.

Am 7. März 2019 veranstaltete die Österreichische Vereinigung für Europäisches Strafrecht gemeinsam mit dem Institut für Österreichisches und Europäisches Wirtschaftsstrafrecht der Wirtschaftsuniversität Wien und dem Bundesministerium für Verfassung, Reformen, Deregulierung und Justiz (BMVRDJ) eine Konferenz zum Thema „Europäisches Strafrecht nach der österreichischen Ratspräsidentschaft“. Die Veranstaltung wurde von zahlreichen nationalen und internationalen Strafrechtsexperten aus Wissenschaft und Praxis besucht.

Die Moderatoren Univ.-Prof. Dr. *Robert Kert*, Univ.-Ass. Dr. *Andrea Lehner* sowie Staatsanwältin Dr. *Madalena Pampalk-Lorbeer* führten durch einen Tag voller spannender Vorträge, angefangen mit dem Themenblock „E-Evidence: Grenzüberschreitende Ermittlungen von elektronischen Beweismitteln: Gegenseitige Anerkennung auf neuen Wegen oder Abwegen?“. Eingeleitet wurde dieses Themengebiet mit einer lebhaften Eröffnungsrede des Generalsekretärs im BMVRDJ Sektionschef Mag. *Christian Pilnacek*, der insbesondere auf die Erfolge verwies, die während der österreichischen Ratspräsidentschaft auf dem Feld der E-Evidence erzielt werden konnten. Die besonders große praktische Bedeutung von elektronischen Beweismitteln in der Zukunft sowie das Bedürfnis der Strafverfolgungsbehörden auf solche Beweismittel, die etwa in Clouds gespeichert sind, zugreifen zu können, wurden von Staatsanwältin Dr. *Judith Herrfeld* (BMVRDJ) und Professor Dr. *Martin Böse* (Universität Bonn) analysiert. Dr. *Herrfeld* stellte den Vorschlag für eine Verordnung über Europäische Herausgabeanordnungen und Sicherungsanordnungen für elektronische Beweismittel in Strafsachen und die während der österreichischen Präsidentschaft erzielten Verhandlungsergebnisse vor. Prof. Böse nahm den Entwurf aus kompetenz- und grundrechtlicher Sicht kritisch unter die Lupe. Dr. *Christof Tschohl* setzte sich in seinem Vortrag vor allem mit möglichen Grundrechtseingriffen durch die Erlangung von E-Evidence auseinander. Abgerundet wurde der

erste Themenblock durch die Darstellung der Sicht der Diensteanbieter von Dr. *Maximilian Schubert* (Internet Service Providers Austria).

Im zweiten Themenblock ging es um das gegenseitige Vertrauen oder Misstrauen zwischen den Mitgliedsstaaten im Rahmen der justiziellen Zusammenarbeit und die Wahrung der Grundrechte durch die Mitgliedsstaaten der Europäischen Union. Dr. *Albin Dearing* (Europäische Agentur für Grundrechte) erläuterte das Spannungsverhältnis zwischen wechselseitigem Vertrauen und nationaler Souveränität in der grenzüberschreitenden Zusammenarbeit von Justizbehörden, während Oberstaatsanwalt Mag. *Wolfgang Pekel* (BMVRDJ) über die Förderung der gegenseitigen Anerkennung durch die Stärkung des gegenseitigen Vertrauens im Rahmen der justiziellen Zusammenarbeit sprach. Schließlich präsentierte Dr. *Roland Kier*, Strafverteidiger und Vorstandsmitglied der European Criminal Bar Association, die Vorstellungen von Grundrechtsschutz aus Sicht der Verteidigung.

Im dritten Themenblock zu aktuellen europäischen Entwicklungen im materiellen Strafrecht gab zunächst der leitende Staatsanwalt Dr. *Christian Manquet* (BMVRDJ) ein Update zur Bekämpfung des Missbrauchs unbarer Zahlungsmittel. Schließlich präsentierten er und Mag. *Stefanie Judmaier* (BMF) die im österreichischen Recht geplanten Änderungen aufgrund der Richtlinie über die strafrechtliche Bekämpfung von EU-Betrug.

Intensive und auch emotionale Diskussionen zeigten, dass europäische Einflüsse auf das Strafrecht nicht nur für den Gesetzgeber, sondern auch für die Praxis große Herausforderungen und vielfältige Problemstellungen mit sich bringen. Die Tagung bot ein Podium, um gemeinsam Lösungen zu überlegen und zu diskutieren.

Carmen Kaudela & Lena Radl, Wirtschaftsuniversität Wien

nised by the relevant authorities as being equally reliable as the results of laboratory activities carried out by forensic service providers accredited in any other Member State.

The agreements with Switzerland and Liechtenstein specifically regulate which provisions of the above-mentioned decisions are applicable in bilateral relations

between the Swiss Confederation/the Principality of Liechtenstein and each of the EU Member States. The agreements also provide for rules on the uniform application and interpretation of the referred provisions, dispute settlement, consequences of amendments to the Prüm legal framework, and the relationship with other cross-border cooperation

agreements. Before the agreements enter into force, the EU, on the one hand, and Switzerland and Liechtenstein respectively, on the other, must notify each other of completion of the procedures required to express their consent to be bound by the agreements.

Although often called “Schengen III,” the “Prüm cooperation” is not part of the

Schengen Acquis, which is why Schengen-associated countries can only join on the basis of separate agreements with the EU. The Schengen states Norway and Iceland already concluded similar agreements in 2009 (not ratified yet) that would allow them to participate in data exchange under Prüm. (TW)

Judicial Cooperation

Finnish Council Presidency: Alternatives to Detention as Partial Solution for More Effective Mutual Recognition

The Finnish Council Presidency, which began on 1 July 2019, continued discussions initiated by previous presidencies on how more effective judicial cooperation in criminal matters can be ensured and how current obstacles to the implementation of the principle of mutual recognition can be overcome. One particular focus is on alternatives to detention, which could solve the problem of poor prison conditions and prison overcrowding – a persisting problem that undermines mutual trust and hampers mutual recognition.

The Finnish Council Presidency tabled the [discussion paper “Future of Justice. Detention and its Alternatives”](#), which aims at launching a debate on how decisive steps can be taken at the EU level in order to eliminate the problem of prison conditions. The paper emphasises that detention should be used as a last resort and that criminal sanctions must be both effective and proportionate. Legal acts, e.g., Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgements and probation decisions with a view to the supervision of probation measures and alternative sanctions, EU policy programmes, resolutions by the European Parliament, and Council conclusions acknowledge the importance of alternatives to detention, but shortcomings still exist. The paper further stresses that a sustainable solu-

tion must be found, and synergies should be strived for with the Council of Europe and other organisations.

The Justice Ministers of the EU Member States held a first policy debate on the issues mentioned in the paper of the Finnish Presidency at their [informal meeting in Helsinki on 19 July 2019](#). Points of discussion were as follows:

- Role of alternative sanctions in the countries’ criminal policy;
- Best practices worth being shared among the EU Member States;
- Potential policy agreement on a long-term commitment by the EU Member States, the Commission, and the Council of Europe to tackle all obstacles to judicial cooperation in criminal matters;
- Potential policy agreement on the use of alternative sanctions as a partial solution to the problems of mutual recognition and prison overcrowding;
- Role of the EU in supporting efforts by the Member States to reduce prison overcrowding.

The discussions will continue at subsequent JHA Council meetings. (TW)

Council: The Way Forward in the Field of Mutual Recognition in Criminal Matters

The [Austrian Council Presidency triggered a debate in 2018](#) on how mutual trust – as underlying element of mutual recognition – can be put back on a solid basis. The Romanian Council Presidency continued the debate on the future of mutual recognition in criminal matters. Following the Council conclusions on mutual recognition in December 2018 (see [eucrim 4/2018](#), pp. 202–203), it compiled a [report giving an overview of the current challenges](#) in EU judicial cooperation in criminal matters. In the light of this report, a policy debate was held at the [JHA Council meeting on 6 June 2019](#).

The report summarises the answers provided by the EU Member States in response to the [discussion paper](#) “the way forward in the field of mutual recognition of judicial decisions in criminal matters, responding to the necessity of

avoiding impunity and observing procedural safeguards,” which was launched in February 2019. The discussion paper and report deal with the following four points of discussion:

- Challenges encountered in application of the criteria set out in the *Aranyosi* judgment or when applying grounds for non-recognition in mutual recognition instruments;
- Training and guidance on mutual recognition instruments;
- Identification of gaps in the application of mutual recognition instruments and possible ways to fill these gaps;
- Enhancing the institutional framework, allowing for proper functioning of judicial cooperation in criminal matters at the EU level and making comprehensive use of this institutional framework.

The Romanian Presidency included several recommendations on each discussion issue. Regarding challenges, for instance, the creation of a common working methodology/common guidelines is suggested that looks at the application of the two-step approach established by the *Aranyosi* judgment in practice, and, in particular, the request for information about prison conditions.

As regards the identification of gaps in the application of mutual recognition instruments, the report concludes that most practitioners are of the view that the EU’s judicial cooperation instruments are comprehensive enough, but it is necessary to enhance the application of existing instruments and to improve practitioners’ knowledge through continuous training and awareness raising. (TW)

Infringement Proceedings Against Ireland for Failure to Transpose Several Mutual Recognition Instruments

On 25 July 2019, the Commission sent [reasoned opinions to Ireland](#) for having failed to transpose a number of framework decisions strengthening judicial cooperation in criminal matters and implementing the principle of mutual recognition. The instruments concerned are:

- Recognition of judgments imposing custodial sentences ([Framework Decision 2008/909/JHA](#));
- Probation measures and alternative sanctions ([Framework Decision 2008/947/JHA](#));
- Supervision measures ([Framework Decision 2009/829/JHA](#));
- Financial penalties ([Framework Decision 2005/214/JHA](#));
- The exchange of criminal records information ([Framework Decision 2009/315/JHA](#));

The Commission noted that Irish authorities have not provided satisfactory answers on completion of the ongoing legislative implementation procedures. Ireland now has two months to comply with the concerns raised by the Commission. Otherwise, the Commission may refer the case to the European Court of Justice.

As regards the Framework Decision 2008/909 on the recognition of judgments imposing custodial sentences, the Commission also sent a [reasoned opinion to Bulgaria](#) for not having adopted the necessary legislation transposing the FD. (TW)

European Arrest Warrant

Clarifying the Concept of 'Issuing Judicial Authority' under the EAW

In reaction to the judgments of the CJEU in joined cases C-508/18 (OG) and C-82/19 PPU (PI) and case C-509/18 (PF) on the interpretation of the concept of „an issuing judicial authority“ within the meaning of Art. 6(1) Framework Decision 2002/584/JHA on the European Arrest Warrant and the surrender procedures between the Member States (FD EAW), Eurojust has set-up [a questionnaire to assess the situation in the Member States](#). The compilation of replies with a country-by-country overview was now published in order to support national authorities in the Member States with the execution of EAWs.

Member States give further information with regard to five questions, namely:

- Whether public prosecutors can issue an EAW in their countries?
- Which entity ultimately takes the decision to issue an EAW?
- Whether public prosecutors under their national law afford a guarantee of independence from the executive so that they are not exposed to the risk of being subject, directly or indirectly, to directions or instructions in a specific case from the executive, e.g. a Minister for Justice, in connection with the adoption of a decision to issue an EAW?
- Is the Member State affected by the CJEU's judgments and which legal and/or practical measures has been taken or will be taken in order to prevent and address this issue?
- Are there any other additional comments to be shared with the other Member States in view of the judgment?

All EU Member States provided replies to the questionnaire that may further be updated in the future. (CR)

Follow-up to the CJEU's Judgments on the Concept of "Issuing Judicial Authority"

On 27 May 2019, the CJEU delivered its landmark judgments in the case C-509/18 (PF) and Joined Cases C-508/18 (O.G.) & C-82/19 PPU (P.I.), clarifying the criteria as to when public prosecution offices can be regarded as judicial authority within the meaning of Art. 6(1) FD EAW, meaning that they are entitled to issue EAWs (see eucrim 1/2019, pp. 31–34). In the Joined Cases C-508/18 & C-82/19 PPU, the CJEU denied the necessary independence of German public prosecution offices and cancelled their judicial authority status in the sense of the FD. As for the “Lithuanian case” (C-508/18), the CJEU left the final assessment to the referring Irish court.

Following the judgments, Austria, Denmark, Italy, and Sweden issued notes clarifying the status of their public prosecution offices, which are to be re-

garded as judicial authorities in the opinion of these Member States. The notes are [available on the EJN website](#).

[Germany](#), which is directly and most greatly affected by the judgments, also issued a note It, *inter alia*, states: “[...] Germany will adjust the proceedings to issue a European Arrest Warrant. From now on, European Arrest Warrants will only be issued by the courts. This can be achieved without changing the existing laws. We have already informed the courts and public prosecutors about the ECJ judgement.” Germany will also review its notification on Art. 6(1) FD EAW.

Nonetheless, practice in Germany remains confused at the moment. Some local and regional courts have rejected public prosecutors' applications to issue EAWs for lack of a legal basis. Other courts broadly interpret the provisions on arrest notices in the German Code of Criminal Procedure and affirm the court's competence to issue EAWs.

For the possible impact of the CJEU's judgments on the hotly debated e-evidence proposals, see the CCBE statement of 29 May 2019 under “Law Enforcement Cooperation”. (TW)

CJEU: Executing MS Must Ensure Enforcement of Foreign Custodial Sentences Against Residents – *Poplawski II*

In a judgement delivered on 24 June 2019 [in case C-573/19](#), the CJEU made fundamental statements on consequences of the primacy of Union law, the importance of interpretation in conformity with Union law, and the extent of limits to these principles. The legal background was shaped by Framework Decision 2002/584 on the European Arrest Warrant (FD EAW). The case concerned the enforcement of a custodial sentence imposed by a Polish court in the Netherlands that denied the surrender of Polish citizen *Daniel Adam Poplawski* to Poland, because he is considered a resident in the Netherlands (refusal ground of Art. 4 No. 6 of the FD EAW)

The case at issue follows a first judgment of the CJEU in the same case ([judgment of 29 June 2017, C-579/15 – Poplawski I](#)), in which the Court held that Dutch legislation establishing only a “willingness” to take over the sentence, if the optional refusal ground of Art. 4 No. 6 FD EAW is applied, is contrary to EU law. Furthermore, the 2017 judgment called to mind the obligation of national courts to interpret domestic law, so far as possible, in accordance with that framework decision (for details, see [eucrim 2/2017](#), pp. 74–75).

By its second reference for a preliminary ruling, the *Rechtbank Amsterdam* essentially enquired whether it must disapply the national provisions in conflict with the FD EAW if it is unable to fulfil the obligation to interpret its domestic law in compliance with EU law.

In its answer of 24 June 2019, the CJEU first reestablishes the fundamental principle of the primacy of Union law over national law. It also reiterates the duties of national courts to give full effect to the provisions of EU law. However, a provision of EU law that has no direct effect cannot be the basis for disapplying a national law that conflicts with it. This is the case for framework decisions adopted on the basis of the former third pillar (Art. 34(2)(b) EU). Therefore, the referring court “is not required, solely on the basis of EU law, to disapply a provision of its national law which is contrary to those framework decisions.”

The CJEU stresses, however, that the binding character of framework decisions places on national authorities/courts an obligation to interpret national law in conformity with EU law “to the greatest extent possible.” Such interpretation in conformity with EU law has (only) two limits:

- The principles of legal certainty and non-retroactivity preclude the establishment of criminal liability of individuals being determined or aggravated, on the basis of a framework decision alone;
- Conforming interpretation would

lead to an interpretation of national law *contra legem*, i.e., the obligation to interpret national law in conformity with EU law ceases when the former cannot be applied in a way that leads to a result compatible with that envisaged by the framework decision concerned.

In the present case, the CJEU believes that both limits do not apply. In particular, the Dutch court would be able to treat the FD EAW as a formal basis for applying the Dutch law allowing the execution of a foreign sentence to be taken over.

Furthermore, the FD EAW stipulates that the executing authority may only refuse surrender on the basis of Art. 4 No. 6 FD EAW if assurance is given that the custodial sentence passed in the issuing State against the person concerned can actually be enforced in the executing Member State. In this context, the CJEU emphasizes the paramount importance of avoiding all risk of impunity for the requested person.

As a result, the referring court is required to interpret its national law to the greatest extent possible, in conformity with EU law, which enables it to ensure an outcome that is compatible with the objective pursued by the FD EAW. (TW)

European Investigation Order

Guidance on Application of the EIO

The EJM and Eurojust published a [joint note on the practical application of the EIO](#). The document aims at providing guidance to practitioners on the practical application of the EIO by looking at the issuing phase, the transmission phase, the recognition phase, and the execution phase. The note provides additional information on the scope of the Directive, its use in comparison to other co-existing legal instruments, on competent authorities, the use of a number of specific investigative measures. It also addresses the content, form, and language of the EIO. The note is based on information gathered by Eurojust and the EJM from meetings, documents, and casework. For

a recent meeting report on the EIO by Eurojust, see [eucrim 1/2019](#), p. 37 and the article by *Guerra/Janssens* in the same issue at pp. 46–53. (CR)

Criminal Records

EU Creates New Central Database for Convicted Third Country Nationals

spot light The European Parliament and the Council have established the legal framework that will facilitate the exchange of information on past convictions of third-country nationals (TCNs). The framework consists of the following legal acts:

- [Regulation \(EU\) 2019/816](#) establishing a centralised system for the identification of Member States holding conviction information on third-country nationals and stateless persons (ECRIS-TCN) to supplement the European Criminal Records Information System and amending Regulation (EU) 2018/1726, published in the Official Journal L 135, 22.5.2019, p. 1;
- [Directive \(EU\) 2019/884](#) amending Council Framework Decision 2009/315/JHA as regards the exchange of information on third-country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA, published in the Official Journal L 157, 7.6.2019, p. 143.

The new legislation responds to the problem that the current legal framework on the European Criminal Records Information Exchange System (ECRIS), which was put in place in 2012, does not sufficiently address the particularities of requests concerning third-country nationals. Since conviction information on TCNs are currently not stored in the single repository of ECRIS, Member States are obliged to send “blanket requests” to all other Member States in order to determine whether and in which Member State a particular TCN was convicted. According to the Commission, this administrative burden deters Member

States from requesting information on non-EU citizens via the network. For background information on the legislative proposal launched by the Commission in 2017, see [eucrim 3/2017](#), p. 120.

Regulation 2019/816 now establishes a centralised system at the Union level containing the personal data of convicted third-country nationals (“ECRIS-TCN”). ECRIS-TCN will allow the central authority of a Member State to promptly and efficiently find out in which other Member States criminal records information on a third-country national is stored so that the existing ECRIS framework can be used to request the criminal records information from those Member States in accordance with [Framework Decision 2009/315/JHA](#).

ECRIS-TCN works on a “hit/no hit” basis, i.e., the system consists of the identity data (alphanumeric and biometric data) of all TCNs convicted in the Member States. A search mechanism allows Member States to search the index online. A “hit” identifies the Member State(s) that have convicted a particular TCN. The identified Member State(s) can then be requested to provide full criminal records information through the established ECRIS.

The main features of the ECRIS-TCN Regulation are:

- Personal data related to citizens of the Union who also hold the nationality of a third country and who were subject to a conviction will be included into ECRIS-TCN. The conditions for the inclusion of fingerprint data of Union citizens is different than those for persons who have only the nationality of a non-EU country;
- ECRIS-TCN allows for the processing of fingerprint data and facial images for the purpose of identification;
- The Regulation provides for minimum rules according to which fingerprint data must be collected and entered into the system;
- In a first phase, facial images may be used only to confirm the identity of

a third-country national who has been identified as a result of an alphanumeric search or a search using fingerprint data. After technical readiness, facial images can also be used for automated biometric matching.

■ The use of ECRIS-TCN is not only limited to getting criminal record information for the purpose of criminal proceedings against the person concerned, but also the following purposes (if provided for under and in accordance with national law) are covered by the Regulation:

- Checking a person’s own criminal record on his/her request;
- Security clearance;
- Obtaining a licence or permit;
- Employment vetting;
- Vetting for voluntary activities involving direct and regular contacts with children or vulnerable persons;
- Visa, acquisition of citizenship and migration procedures, including asylum procedures;
- Checks related to public contracts and public examinations;
- Other purposes decided by the Member States (which must be notified to the Commission and published in the *Official Journal*).

■ Eurojust, Europol, and the EPPO are allowed direct access to ECRIS-TCN in order to fulfill their tasks and to identify those Member States holding information on previous convictions of third-country nationals. If there is a “hit” indicating the Member States holding criminal records information on a third-country national, Eurojust, Europol, and the EPPO may use their respective contacts to the national authorities of those Member States to request the criminal records information (in the manner provided for in their respective founding legislative acts).

■ Eurojust will additionally function as a central hub for information requests, addressed by third countries and international organisations, as to which Member States, if any, hold criminal records information on a third-country national.

■ Retention period: Each data record will be stored in the central system for as long as the data related to the convictions of the person concerned are stored in the criminal records.

■ ECRIS-TCN records can be made for convictions both after and prior to the start date for data entry;

■ The Regulation establishes strict rules on access to ECRIS-TCN and the necessary safeguards, including the responsibility of Member States when collecting and using the data. It also specifies how individuals may exercise their rights to compensation, access, rectification, erasure, and redress, in particular the right to an effective remedy and the supervision of processing operations by independent public authorities.

The European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) has been mandated with the development and operation of ECRIS-TCN. After the technical and legal arrangements have been made, the Commission will set the date for the operational start of the system.

Directive 2019/884 effects the Regulation and introduces necessary modifications to the basic ECRIS act, i.e., [Framework Decision 2009/315/JHA](#). The Directive obliges Member States to take necessary measures to ensure that convictions are accompanied by information on the nationality/nationalities of the convicted person if they have such information at their disposal. It also introduces procedures for replying to requests for information, ensures that a criminal records extract requested by a third-country national is supplemented by information from other Member States, and provides for the technical changes that are necessary to make the information exchange system work.

The Directive also incorporates into said [Framework Decision](#) the principles of [Decision 2009/316/JHA](#) which, to date, contains the regulatory framework for building and developing the computerised system for the exchange of infor-

mation on convictions between Member States.

The establishment of the new, central EU database ECRIS-TCN also raised criticism. Some stakeholders, such as the [Meijers Committee](#) and [Statewatch](#), voiced concern as to whether the inclusion of persons holding both EU and non-EU citizenship (dual nationals) is in line with the principle of non-discrimination. Another question was whether the inclusion is proportional, because a factual basis is lacking that Member State authorities really become aware of the person's dual citizenship. The possibility to enter facial image data was also seen critically, since the actual ECRIS framework does not provide for this. Initially, [MEPs took a critical stance](#) on these issues but later gave up their opposition. (TW) ■

Law Enforcement Cooperation

E-Evidence: Commission Obtains Mandates for EU-US Agreement and Negotiations in Council of Europe

After the respective recommendations put forward by the Commission (see eucrim 1/2019, p. 41), the [Council gave two mandates](#) to the Commission to negotiate on behalf of the EU agreements on access to e-evidence. The mandates endorsed on 6 June 2019 refer to:

- Conclusion of an agreement between the Union and the United States of America on cross-border access by judicial authorities in criminal proceedings to electronic evidence held by a service provider;
- Participation in the negotiations in the Council of Europe on a second additional protocol to the Cybercrime Convention.

The Council also set up negotiation directives to guide the Commission when conducting the negotiations. These directives are set out in addenda documents to the Council decision on the mandate and, *inter alia*, include the safeguards that the Council wishes to

be included in the international rules on e-evidence. The Council particularly emphasised that the agreements must be compatible with the envisaged EU legal framework on e-evidence, which is currently being fiercely discussed in the Council and European Parliament (see eucrim 1/2019, pp. 38 ff.; eucrim 4/2018, pp. 206 f.).

The future EU-US agreement aims above all at setting common rules guaranteeing speedy access to content and non-content data, particularly those data stored in clouds on the servers of telecommunication service providers. It also aims at avoiding conflicts of law. To date, US-based service providers, who are the main addressee of the new regulations, only cooperate with EU law enforcement authorities on a voluntary basis and regularly limit access to non-content data. The new mandate will include rules that allow law enforcement orders to be sent directly to the service providers and short deadlines within which the requested data must be supplied. Realtime telecommunications data are not mentioned in the Council negotiating directives.

Likewise, the second additional protocol to the Budapest Convention on Cybercrime (CETS 185) aims at laying down provisions for a more effective and simplified mutual legal assistance (MLA) regime in cybercrime and e-evidence matters. The additional protocol is currently under discussion in the Council of Europe working parties. It will also include direct cooperation with service providers in other state parties to the Convention, and searches are to be extended across borders.

Both mandates underline that the Council must be closely involved in the preparation and conduct of negotiations by the Commission. To this end, it will be especially for the Finnish Council Presidency to fulfil these monitoring tasks in the second half of 2019.

Before an agreement can be signed and concluded, the Commission will have to obtain separate authorisation

from Member States. The European Parliament must also be informed and will have to consent before an agreement can be signed and concluded. (TW)

Data Protection Authorities and EDPS Assess Impact of US CLOUD Act

Following a request to the European Parliament Committee on Civil Liberties, Justice and Home Affairs (LIBE), the European Data Protection Board (EDPB), and the European Data Protection Supervisor (EDPS) adopted a [joint initial legal assessment of the impact of the US CLOUD Act on the EU legal data protection framework](#) and the mandate for negotiating an EU-US agreement on cross-border access to electronic evidence for judicial cooperation in criminal matters. The legal assessment focuses on compliance of the US CLOUD Act with the requirements of Arts. 6, 48, and 49 of the GDPR.

The CLOUD Act allows US law enforcement authorities to request the disclosure of data by service providers in the USA, regardless of where the data is stored (for details, see eucrim 1/2018, p. 36; eucrim 4/18 p. 207 and the article by *J. Daskal*, eucrim 4/2018, pp. 220–225).

In their [reply to the LIBE Committee](#), the EDPB/EDPS stress that a future international agreement between the EU and the USA, for which the Commission recently obtained a negotiation mandate, must contain the following guarantees:

- Strong procedural and substantive fundamental rights safeguards;
- The necessary level of protection for EU data subjects;
- Legal certainty for businesses operating in both jurisdictions.

Furthermore, an “EU-level approach” is needed, which, *inter alia*, requires that U.S. law enforcement authorities be put on an equal footing with EU law enforcement authorities to obtain e-evidence.

Ultimately, the EDPB/EDPS also emphasise that there is an urgent need for a new generation of mutual legal assistance treaties that contain strong data

protection provisions, such as guarantees based on the principles of proportionality and data minimisation or the “criminality principle.”

The legal assessment also summarises the replies of the EDPS of 2 April 2019 to the Commission regarding the planned EU-US e-evidence agreement (see eucrim 1/2019, p. 41). (TW)

CCBE: Legality of E-Evidence Proposal Even More Questionable After CJEU’s Judgements on “Judicial Authorities”

In a [statement of 29 May 2019](#), the Council of Bars and Law Societies of Europe (CCBE) looks into the impact of the CJEU’s judgements of 27 May 2019 on the concept of judicial authority (case C-509/18 (PF) and Joined Cases C-508/18 (O.G.) & C-82/19 PPU (P.I.); see eucrim 1/2019, pp. 31–34) on the [debated proposal for a Regulation on European Production and Preservation Orders](#) for e-evidence in criminal matters. The CCBE argues that the exclusion of public prosecution offices not possessing the necessary independence (such as the German prosecution services) to be a judicial authority in the sense of the Framework Decision on the European Arrest Warrant underpins the arguments against the legality of the e-evidence proposal.

As outlined in the CCBE [position paper of October 2018](#), it is highly questionable whether the proposed e-evidence Regulation can be based on Art. 82(1) TFEU. Art. 82 TFEU applies to cooperation between judicial authorities only. Now, however, nobody can be sure that a prosecutor who issues e-evidence production orders is consid-

ered a “judicial authority.” For the ongoing debate on the e-evidence proposal, see the previous eucrim issues 1/2019 and 4/2018. (TW)

EU CTC: Influence of 5G Technology on Law Enforcement

At the [JHA Council meeting of 7 June 2019](#), the EU Counter Terrorism Coordinator (EU CTC) updated ministers on the implications of the new generation of wireless technology 5G on law enforcement and judicial operations. In a paper [drafted on 6 May 2019](#), the EU CTC highlighted that 5G is not a simple evolution of the previous 4G standard but it will change the telecommunications landscape and the life of citizens considerably (e.g., in view of interconnected or autonomous driving, telemedicine, smart cities, etc.). In addition to competitiveness, cybersecurity, technology, economic and geo-political issues, law enforcement, and judicial concerns must also be brought into the debate.

The EU CTC lists a number of challenges in connection with the 5G standard for law enforcement and judicial authorities, e.g.:

- Lawful interceptions of telecommunications will become more difficult, due to 5G’s high security standards and a fragmented and virtualised architecture;
- Difficulties for the judiciary in establishing the authenticity of the evidence and distinguishing fake from real evidence, because multiple actors are involved in providing the 5G networks;
- Availability of the 5G-based networks in crisis situations.

The EU CTC also stressed that lawful interception in a 5G environment must

be maintained, which necessitates urgent action, *inter alia*:

- Taking law enforcement concerns seriously, so that standardisation processes must be influenced by this perspective;
- Entering into dialogue with operators, so that configurations of the network can be designed specifically for law enforcement purposes;
- Member States and potentially the EU must reflect on appropriate legislation addressing the above-mentioned concerns.

Regarding the latter point, the EU CTC recommends, in particular, thinking of EU legislation to deal with cross-border aspects of lawful/real-time interception within the EU, because the new technology will increase the cross-border dimension of interception.

Ultimately, the EU CTC reflects on steps to be taken by the EU institutions, agencies, and bodies. He considers it important that heads of telecommunications interception units continue to meet regularly at Europol to exchange views on the law enforcement challenges related to 5G and to develop suggestions for solutions. National operators may be associated with this working group. In addition, law enforcement and judicial authorities must communicate with authorities responsible for cybersecurity, because their respective interests may be in conflict with each other. This could be accomplished within the framework of the meetings of the Heads of the Cyber Security Authorities of the Member States. The Commission could be invited to develop guidelines and explore legislative measures in order to avoid fragmentation. (TW)

Fil Rouge

This issue of eucrim is dedicated to the topic of sanctioning in the EU. This topic can be addressed from different angles which is illustrated by the diversity of articles. Harmonisation of sanctions – or rather, punitive responses to an offence – is a crucial topic from the perspective of a true integration of legal systems in the EU. As far as criminal sanctions in the strict sense are concerned, the technique of establishing minimum maximum penalties at EU level having been proven to be not really suitable for the goal, it is highly desirable to investigate possible alternative solutions. In doing so, one must also consider the (still) burning issue of the compatibility with fundamental rights recognised by the ECHR and the Charter of Fundamental Rights of the European Union of the double-track enforcement system, whenever both criminal law and administrative law sanctions are provided for the same facts. The recent revision by the two European Courts (European Court of Human Rights and Court of Justice of the European Union) of their respective jurisprudence, recognising in fact a nar-

rower scope to the principle of *ne bis in idem*, continues to provoke strong reactions. Sanctioning the infringement of fundamental values also must comply with and respect the fundamental rights, in the sense of guaranteeing a correct balance between the protected values. In particular this becomes an issue with respect to the proposed Regulation on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States, allowing to activate a system of blocking access to EU funds to protect the Union's financial interests from the risk of financial loss in the event that "generalised deficiencies" as regards the rule of law are detected. The EU's legal framework on the mutual recognition of financial penalties has become a well-established feature in cross-border assistance. Its relevance in practice cannot be underestimated and is illustrated in this issue as well.

Prof. Dr. Rosaria Sicurella, University of Catania, Member of the Editorial Board

The Harmonisation of Criminal Sanctions in the European Union

A New Approach

Prof. Dr. Helmut Satzger

The use of minimum maximum penalties in order to harmonise criminal sanctions under Art. 83 TFEU has proven little effective so far. A project by the European Criminal Policy Initiative (ECPI), which was concluded recently, demonstrates that a reasonable harmonisation of sanctions must be preferably based on a system of relative comparability. Such a system would allow for an internal consistency of each national model, while simultaneously granting the European Union the possibility to classify the harmonised offences into a predetermined number of categories and by this means create a systematic and hierarchic rapport between the offences harmonised under EU law. This "category model" is ready for further development, and could theoretically even be a first step towards a system of supranational penalties.

I. The Idea behind the New “Category Model”

Criminal sanctions are the harshest weapons in the arsenal of a state when reacting to misconduct. The existing national regimes of sanctions and the means of their imposition and execution still differ considerably from country to country as they are closely tied to national cultural, social and historical roots. Indeed, the coherence of the national sanctioning systems and the values and ideas on which they are based should not be destroyed by EU harmonisation directives. The fundamental principles of the criminal law sanctioning systems form part of the “national identities” of the Member States, which shall – according to Art. 4 (2) of the Treaty on European Union (TEU) – be respected by the Union. Nevertheless, the Treaty on the Functioning of the European Union (TFEU) confers on the EU a competence to harmonise the national sanctioning systems. Art. 83 (1) and (2) TFEU, in particular, empower the EU to establish “minimum rules concerning the definition of criminal offences and sanctions”.

A thorough study conducted by the members of the European Criminal Policy Initiative (ECPI) – a research group of 20 academics¹ from 12 Member States of the European Union – leads to the finding that previous attempts to harmonise criminal sanctions on the basis of Art. 83 TFEU, especially by using “minimum maximum penalties”, could not achieve their aim of an efficient approximation of the law on sanctions. They even resulted in implementational difficulties in many of the national legal orders.² The study furthermore revealed that, as minimum maximum penalties rely on numeric values which are identical for all states (e.g. a minimum maximum of two years of imprisonment), their use generally leads to an increase in punitivity, tends to destroy the coherence of national systems and affects the proportionality of national penal concepts.

The newly developed model should be thought of as an alternative. On the one hand, it guarantees the protection of proportionality and coherence of national sanctioning systems. On the other hand, the interest of the EU in harmonising national criminal sanctions can be satisfied to the utmost in order to enable an efficient judicial cooperation within the EU in accordance with the principle of mutual recognition. The point of departure is the gradation of criminal sanctions pursuant to their severity, as common in all EU Member States. The new model uses national grades of severity as a “bridge” between the interests of the EU and the interests of the Member States: The EU legislator shall be put in a position to develop a coherent sanctioning system on EU level, tiered only by the degree of severity – the category – with regard to the offences being harmonised, whereas the Member States specify the concrete penalties by assigning sanctions from their own national sys-

tems to the categories used by the EU. In this way, a genuine balance of interests can be achieved: The EU can determine the seriousness of harmonised offences by classifying them into categories, while the Member States only “fill” these categories with sanctions familiar to their national systems, thus ensuring the coherence of their own legal order.

II. The Background: Unsatisfactory Status Quo

1. Minimum triad

The legal acts in force so far aiming at the harmonisation of criminal sanctions apply different methods: The traditional formula, introduced by the European Court of Justice (ECJ) itself in its “*Greek Maize Scandal*” jurisprudence,³ requires the Member States to take “effective, proportionate and deterrent sanctions” and is often referred to as the “minimum triad”. Although these specifications are rather vague, in respect to some fields of crime it may indeed be sufficient that the EU restricts itself to require the Member States to provide for these only imprecisely outlined sanctions by their own.

In accordance with such understanding, the new model seeks to retain the “traditional” and minimally invasive approach. But as far as most offences, and above all the most severe of them, are concerned, the EU will understandably and rightly want to go further and deploy additional requirements, a tendency also observable in previous attempts at harmonisation of national laws as to sanctions.⁴

2. Minimum maximum penalties and minimum maximum penalty ranges

a) The most detailed provisions of the EU so far, which concern consequences of criminal misconduct, stipulate so-called “minimum maximum penalties” which obligate the Member States not to fall below a certain *maximum* penalty (e.g. “Member States shall take the necessary measures to ensure that an offence referred to in [...] is punishable by a maximum penalty of at least five years of imprisonment.”). A less precise stipulation is the so-called “minimum maximum penalty range” which does not prescribe a specific value in relation to the lowest maximum penalty allowed, but instead grants Member States a scope within which the maximum penalty to be imposed may range (e.g. “[...] is punishable by a maximum penalty of at least one to three years of imprisonment.”). As both instruments only provide minimum rules, they do not hinder Member States from choosing sanctions, which exceed the (minimum) maximum penalty, hence going further than the (minimum) maximum penalty range contained in the har-

monisation directive. Thus, in the end, a “minimum maximum penalty range” essentially is nothing but a minimum maximum penalty, as it only obligates the Member States to impose not less than the bottom threshold of the given range as a maximum penalty.

b) According to the thorough comparative study of the ECPI, which provides the basis for the hereinafter-presented new model, the use of minimum maximum penalties as well as minimum maximum penalty ranges is far from being efficient in terms of bringing about effective harmonisation. Minimum harmonisation concerning only the *maximum* penalty has proven to be disappointing. One reason is that in most countries, the maximum penalty is much less relevant for the individual punishment than the minimum threshold. Furthermore, the legal comparison revealed a large discrepancy between Member States as far as the dimension of statutory maximum penalties is concerned. They are, for example, limited to twelve years by the Finnish constitution, whereas in France and Italy, maximum penalties of up to thirty years are possible.

c) By stipulating minimum maximum penalties, the EU intends to reflect the different degrees of severity inherent to the criminal behaviours the Member States wish to penalise. These efforts for a greater systemisation of the sanctioning requirements peaked in the Council document from 27th May 2002,⁵ which stated that one of four minimum maximum penalty ranges needed to be chosen in every act of harmonisation to come, depending on the severity of the crime. Although this approach clearly demonstrates the EU legislator’s large interest in classifying the severity of the offences both at EU level and in a coherent manner, a convincing systematic classification could not be achieved.

d) The analysis of relevant legislation enacted so far (agreements, framework decisions and directives) concerning requirements of criminal sanctions revealed eight different minimum maximum penalties – 1, 2, 3, 4, 5, 8, 10 and 15 years – and three minimum maximum penalty ranges – 1–3, 2–5 and 5–10 years.⁶ But the use of these penalties and penalty ranges varies greatly. Whereas the highest and lowest minimum maximum penalties were only used once each (1 year stipulated in the directive on “child abuse”⁷ and 15 years in the framework decision and directive “on combating terrorism”⁸), the minimum maximum penalty of 8 years⁹ and the range of 1–3 years have already been used five times, and the minimum maximum penalty of 5 years was used four times in total. Notably, the threshold ranges were not used in the last years;¹⁰ the most recent acts dominantly apply the minimum maximum penalties of 2, 3, 5 and 8 years. In case of legal acts being substituted after the en-

try into force of the Lisbon Treaty, a double tendency can clearly be observed: The requirements in the replacing acts become more specific and the minimum maximum penalties tend to be more severe.

e) The comparative study also showed that not only do the maximum sanctions differ greatly among the Member States (cf. above, b)),¹¹ but also the minimum maximum penalties stipulated by the EU do not find a numerical equivalent in the national legal systems. Most Member States basically apply a system of gradation of maximum punishments, but the grades used do differ considerably. As a result, not all of the “maximum penalty” values referred to by European minimum maximum penalties are familiar to all European Member States, thus resulting in implementational problems.

If Member States want to stick to “their system”, they select levels (values) that are already known to their legal system. As harmonisation *de lege lata* always is a minimum harmonisation, Member States are forced to choose the next higher level; they cannot, however, go back to a lower level. This effectively means that states that – for legitimate reasons – do not want to give up the coherence of their sanctioning system have to follow the deplorable trend of increasing punitivity!¹²

3. Specific EU penalty ranges

But, if minimum maximum penalties in harmonisation directives are inefficient, what could be done? The stipulation of specific penalty ranges by the EU or at least minimum penalties can, of course, be discussed:

- Specific EU penalty ranges which consist in prescribing a combination of a minimum and a maximum penalty (e.g. “between 3 to 5 years imprisonment”), are politically unenforceable at this point in time and – *de lege lata* – not covered by Art. 83 TFEU. The competence in the treaties only allows minimum harmonisation and therefore does not empower the EU to introduce binding penalty ranges, which necessarily imply an upper limit (in the example: 5 years imprisonment as the maximum penalty allowed).
- Although the introduction of “minimum penalties” is not excluded by the wording of Art. 83 TFEU, the accompanying effect of limitation of judicial discretion is either completely unknown or at least totally contrary to the legal system of many countries (especially Denmark and France). In order to avoid grave conflicts with those legal systems, their peculiarities, which can even be considered to be part of the identity of the state (“national identities”) in the sense of Art. 4 (2) TEU, must be taken seriously.

III. The New Approach: Relative Comparability

The principal innovation of the new model is to depart from concrete figures and values and render superfluous the use of minimum maximum penalties, which have proven to be unsatisfactory. It instead relies on the idea of “relative comparability”. The aim is to achieve an adequate balance between the interests of the EU legislator as to effective harmonisation on the one hand and the interests of the Member States with regard to maintaining the internal coherence of their law on sanctions on the other hand, hereby respecting the fundamental principles of subsidiarity and proportionality.

1. Imposition of categories of severity by the EU

When describing the legal consequences of a harmonised offence, the EU legislator has a legitimate interest in expressing the gravity of the offence also in relation to other offences, which have already been harmonised. The result is a hierarchy of offences, expressed by a classification of sanctions in a number of categories (hence: “category model”).

Thus, the EU legislator is in the position to create a “nucleus of an EU sanctioning system”. The stipulation of further, more detailed specifications in relation to the sanctions in each category is – for that purpose and at least for the time being – not necessary. This step is left to the Member States, which have a legitimate interest in not losing their basically conclusive and coherent law on sanctions and their sanctioning traditions. Moreover, it is only by this means that all further national provisions on specification, adaptation and enforcement of sanctions, which differ considerably from state to state and which cannot realistically be approximated, are able to effectively survive and apply coherently. As all legal systems of the Member States are familiar with a hierarchy, or graduation of criminal sanctions due to their severity, it should in principle be possible for them to classify the sanctions which already exist in their national systems in such a manner that they can be assigned to a specific, EU-stipulated number of severity categories.

2. Main features of the category model

Broken roughly down to the core, it can be said that the model consists in a two-step process. In a first step, the EU legislator stipulates categories that – according to the EU – express the (also in relation to other harmonised offences) relative severity of the criminal misconduct. In accordance with the underlying division of responsibilities between the EU and the Member States, it is the EU legislator who finally decides on the number of categories to be used. According to the ECPI’s study,

a number of 5 categories will be necessary (to differentiate sufficiently between the gravity of offences actually or potentially subject to harmonisation under the TFEU), but also sufficient (to reflect adequately the gravity steps as they can be ascertained in all Member States according to their character and severity – using a number of criteria). Choosing Roman numerals for the individual categories, “category I” shall designate the relatively mildest and “category V” the relatively most severe sanctions.

Example: In the harmonising directive the EU could provide that the basic act of trafficking human beings (as defined in Art. 2 of the Directive on Human Trafficking¹³) is a category II offence. If the perpetrator deliberately or by gross negligence (cf. Art. 4 [2] [c] of the Directive on Human Trafficking) endangered the life of the victim, the EU could consider the act a category IV offence.

In a second step, it is the task of the Member States to provide for a sanction specific to their own national legal order, which – in relation to severity – corresponds to the chosen EU category. It could prove useful if the EU provided some guidance as to the criteria to apply when categorising the national sanctions, e.g. in the form of setting up a “manual”. In its study, the ECPI exemplifies some of the useful criteria, which could appear in such a manual – they are the result of the underlying comparative study. However, apart from this “soft guidance”, the EU must not interfere in the process of categorisation itself.

Example: Each Member State classifies its own sanctions into five categories and chooses from its toolbox of sanctions a penalty which, in its view, corresponds to category II (for the basic offence of trafficking in human beings) or category IV (for qualified trafficking in human beings). A state such as Germany could – on the basis of a number of factors (e.g. character of the offence as a crime or misdemeanour, limitation period, possibility of conditional sentence) – decide from the 18 penalty ranges known in German law to assign e.g. the penalty range of imprisonment for up to 3 years to the European category II and to provide for this penalty range when implementing the Directive on the harmonisation of sanctions with regard to the basic offence of trafficking in human beings. All internal legal consequences linked to this type and amount of penalty remain applicable. For example, the penalty framework chosen here in our example constitutes a misdemeanour (and not a felony) under the German Criminal Code, which in turn has substantive and procedural consequences: The attempt is basically non-punishable, as is the attempted instigation. A discontinuation of the criminal proceedings is possible on the basis of opportunity grounds according to Sec. 153, 153a German Code of Criminal Procedure.

Although the Member States are granted a wide “filling discretion”, their leeway is not without limits. Whenever a specific legal act aiming at the harmonisation of criminal sanctions is implemented, the Court of Justice of the EU retains a certain degree of control power if the European Commission triggers infringement proceedings according to Art. 258 TFEU. If this happens, the Member State in question has to demonstrate transparently the reasonableness and coherence of its categorisation. Because of this control mechanism, it makes sense from the point of view of the Member States to follow a consistent

strategy of categorisation right from the start which – and this is obviously another advantage of the model – requires critical self-reflection on their own law on sanctions.

In a nutshell: With regard to harmonisation purposes, it is not the denomination and quantification of the criminal sanction that is important, but its effect and consequences for the person affected, which can only be inferred from the overall context with the national law (on sanctions etc.) as a whole. It is therefore essential to maintain the coherence of the Member States' systems; the formal comparability of penalties, by contrast, is not conclusive from the outset.

IV. An Outlook into the Future

Apart from reconciling national and EU interests in an approach that attaches great importance to national identities and to the principle of subsidiarity, the category model is obviously “fit” for further advancements – dependent on the political climate between the Member States, of course.

It seems conceivable that – beyond the basic model presented here – the Member States' filling discretion may be reduced by increasing the category requirements set out by the EU. In particular, it seems feasible that the EU may introduce certain characteristics the sanctions of a specific category must fulfil (e.g. “Category IV sanctions [...] must be sanctions which are regularly no longer subject to suspension.”).

Should the EU in the long run be granted wider competences not only to harmonise national criminal sanctions but also to create supranational penalties for supranational offences,¹⁴ the use of the category model may be considered as a constructive interim model as it may be an interesting and promising point of departure for the development of a coherent supranational sanctioning system. Figuratively speaking, it is the EU that then fills its own (future) arsenal of supranational sanctions into the abstract categories that are otherwise filled by the states with their own national sanctions. The experience gained from applying the category model will make it easier to develop a basic structure for coherent supranational criminal law.

1 Members of the ECPI are Petter Asp (Sweden), Nikolaos Bitzilekis (Greece), Sergiu Bogdan (Romania), Pedro Caeiro (Portugal), Luigi Foffani (Italy), Thomas Elholm (Denmark), Dan Frände (Finland), Helmut Fuchs (Austria), Dan Helenius (Finland), Maria Kaiafa-Gbandi (Greece), Jocelyne Leblois-Happe (France), Laura Neumann (Germany), Adán Nieto-Martín (Spain), Helmut Satzger (Germany), Sławomir Steinborn (Poland), Annika Suominen (Sweden), Elisavet Symeonidou-Kastanidou (Greece), Francesco Viganò (Italy), Ingeborg Zerbes (Austria) and Frank Zimmermann (Germany); the present project was developed with the significant collaboration of Benedikt Linder and Sarah Pohlmann (LMU Munich).

2 The research project is in the process of being published: H. Satzger (ed.), *Harmonisation of Criminal Sanctions in the European Union* (forthcoming 2019). It consists of a thorough comparative study of the sanctioning systems of EU Member States and the establishment of detailed guidelines for the future harmonisation of criminal sanctions in the EU.

3 Cf. CJEU, judgment of 21.9.1989 – case 68/88 (Greek Maize Scandal).

4 Cf., e.g., the attempt at introducing minimum penalties (“minimum sanctions”) in Art. 8 of the Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final, which was largely resisted in the Council (see page 2 of Council document 9836/13 dated 28 May 2013 as well as Council document 10729/13 dated 10 June 2013) as well as the Parliament (see amendment 27 of the legislative resolution from 29 April 2014, P7_TA-PROV(2014)0427). Finally, the Commission's attempt was therefore abandoned.

5 Council document 9141/02 dated 27 May 2002.

6 Cf. F. Zimmermann, “Strafrechtliche Sanktionen und das Recht der Europäischen Union: eine Bestandsaufnahme”, in: Satzger (ed.), *Harmonisation of Criminal Sanctions in the European Union* (forthcoming 2019) [see note 2].

7 Cf. Art. 3 (2) of Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *O.J.* L 335, 17.12.2011, 1.

8 Cf. Art. 15 (3) of Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing

Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *O.J.* L 88, 31.3.2017, 6, and before Art. 5 (3) of Council Framework Decision 2002/475/JHA on combating terrorism, *O.J.* L 164, 22.6.2002, 3.

9 The duplicate usage in the acts concerning counterfeiting and terrorism was only counted singly.

10 The latest application of the 1–3 year range is to be found in Art. 3 (2) of 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, *O.J.* L 328, 6.12.2008, 55. The 2–5 years and the 5–10 years ranges were each used only in two Framework Decisions. They were last used in Art. 3 Nr. 1 of Council Framework Decision 2008/841/JHA of 24 October 2008 on the fight against organised crime (2–5 years) and Art. 4 Nr. 2 and 4 of Council Framework Decision 2004/757/JHA of 25 October 2004 laying down minimum provisions on the constituent elements of criminal acts and penalties in the field of illicit drug trafficking (5–10 years).

11 Cf. also the study on minimum sanctions in the EU Member States, p. 187 (available on <https://publications.europa.eu/en/publication-detail/-/publication/1226bed2-be78-11e5-9e54-01aa75ed71a1/language-en>).

12 In Greece, for example, the requirement of a minimum maximum penalty (MMP) of six years leads to problems. If the Greek legislator were to adopt this maximum, it would result in a narrow penalty scale of one year (five to six years of imprisonment) due to the fact that misdemeanours do

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not in principle provide for a maximum penalty of more than five years and that felonies in Greece are punishable by a statutory minimum of five years of imprisonment. In these cases, the Greek legislator therefore normally provides for a ten-year maximum. The use of MMP might also lead to discrepancies between the different Member States if, for example, a MMP of 4 years is implemented in more than half of the countries by a maximum penalty of 5 years, but by a maximum penalty of 4 years in all the other countries.

13 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, OJ L 101, 15.4.2011, p. 1.

14 *De lege lata* it is contested whether Art. 325 (4) TFEU confers such a competence to the EU, see Satzger, *International and European Criminal Law*, 2nd ed. 2018, § 6 marginal number 10 ss.

Compliance with the Rule of Law in the EU and the Protection of the Union's Budget

Further Reflections on the Proposal for the Regulation of 18 May 2018

Prof. Dr. Lorena Bachmaier

Strengthening the rule of law – and in particular judicial independence – has been on the EU agenda for several years and it is still a high priority. The situation in Poland and Hungary has confirmed that the measures provided in the Treaties are not sufficient to effectively counteract certain risks or infringements of the rule of law that may occur in the Member States. On May 2018, the Commission presented the Proposal for a Regulation on the protection of the Union's budget in cases of generalised deficiencies as regards the rule of law in the Member States. In general, the proposed Regulation allows activation of a system to block access to EU funds in order to protect the Union's financial interests from the risk of financial loss in the event of "generalised deficiencies" as regards the rule of law are detected.

This paper will discuss the justification of this proposed Regulation and highlight the difficulties in assessing risks for the rule-of-law affecting the financial interests of the Union and the perils that the proposed monitoring procedure could entail. The issue is not whether the rule of law needs to be protected more effectively, the question is how to do it, without endangering other equally important values in the European Union.

I. Introduction

On 24 June 2019, the ECJ rendered its judgment on the infringement procedure launched against Poland in October 2018, holding that Poland has failed to comply with EU obligations as regards Art. 2 TEU and Art. 47 of the Charter.¹ This judgment confirms the jurisdiction of the ECJ to check compliance with judicial independence by national courts under Art. 19(1) TEU, as done previously in the benchmark judgment *Associação Sindical dos Juizes Portugueses*.² In the present judgment, the Court underlines the significance of respecting the common values upon which the EU is founded – to respect the rule-of-law principles in order to maintain mutual trust. And the Court will continue to play a decisive role in ensuring compliance with the rule of law. However, there is still the question whether the existing mechanisms at the EU level are sufficiently effective to protect the rule of law and, in particular, to protect the financial interests of the EU.

In 2012, former President of the European Commission, *José Manuel Barroso* already said: "We need a better developed set of instruments not just the alternative between the 'soft power' of political persuasion and the 'nuclear option' of Art. 7 TEU."³

Strengthening the rule of law – and in particular judicial independence – has already been on the EU agenda for several years⁴ and it is still a high priority.⁵ The situation in Poland and Hungary has confirmed that the measures provided in the Treaties are not sufficient to effectively counteract certain risks or infringements of the rule of law that may occur in the Member States.⁶ On 2 May 2018, the Commission presented the Proposal for a Regulation on the protection of the Union's budget in cases of generalised deficiencies as regards the rule of law in the Member States (hereinafter "the Proposal" or PR RoL).⁷ In general, the proposed Regulation allows activation of a system to block access to EU funds⁸ in

order to protect the Union's financial interests from the risk of financial loss in the event of "generalised deficiencies" as regards the rule of law.

The EU has realised that the extensive control and conditionality undertaken at the accession stage as to compliance with the rule of law is, if not completely absent, quite inefficient at a later stage. Bearing in mind the crucial value of the principle of the rule of law set out in Art. 2 TEU – as the backbone of modern constitutional democracy –⁹ and its significance for the EU, the Commission endeavours to avoid future cases when it would again face the lack of sufficient means to uphold respect for the rules of the game.¹⁰ Although there are already different checks in place to ensure that the EU funding is being implemented effectively and correctly, the Proposal seeks to interlink sound management of the long-term budget with respect for the rule of law.¹¹

I do not intend here to analyse the actual and historical meaning of the concept of the rule of law, as there is certain consensus on the main elements of the rule of law, which are explicitly listed in the Proposal, following – with slight differences – the elements already set out in the leading international documents and guidelines.¹² It is also not my intention to address the deficiencies of the present mechanisms – namely the Art. 7 TEU procedure, the infringement procedure before the ECJ, or the RoL Framework – when dealing with systemic risks detected in certain Member States.¹³ There is no doubt that the rule of law in the EU needs to be further strengthened, the risks better assessed, and that an integral monitoring system might be necessary. The question is how to do it and which mechanism should be adopted.

This paper will discuss some aspects of the proposed Regulation, in particular its justification and the system provided for assessing the rule-of-law risks affecting the financial interests of the Union. Using the example of judicial independence, which is one of the core elements of the separation of powers and the rule of law, I will attempt to show how difficult it is in practice to assess the level of judicial independence in a country and thus how risky it could be to link financial sanctions to those deficiencies. Unless otherwise indicated, the text analysed here is the amended text of the Proposal for a Regulation of 17 December 2018 after the first reading at the European Parliament.

II. Financial Sanctions for Non-Compliance with the Rule of Law: The Main Features of the Proposal

Financially sanctioning EU Member States for non-compliance with the rule of law is an approach that has been very

much contested, as it implies a risk of loss of cohesion among the States. Moreover, the mechanism would only be efficient with those poorer countries that are net recipients of European funds and might "cement economic disparities between Member States."¹⁴ It could also be argued that these types of sanctions would have counterproductive effects in relation to populism and anti-European feelings in the countries affected by these measures.¹⁵ Ultimately, by targeting certain non-compliant governments, the consequences of the sanctions could end being supported by the citizens and by the EU itself. Contrary to these arguments, it can be said that the conditionality system is not new in the EU: it applies to the EU enlargement process (Copenhagen criteria)¹⁶ with regard to compliance with the excessive deficit prescriptions and also with regard to the major EU spending programmes, where the payments can be cut if the required conditions are not met. And there is no evidence that such a conditionality system has produced adverse effects for EU integration or cohesion.¹⁷

To monitor the situation as regards the rule of law, the Proposal foresees the setting up of a panel of independent experts to assist the Commission in identifying generalised deficiencies. This panel is to be made of experts in constitutional law and financial matters who are appointed by the national parliaments and five experts by the EU Parliament to assess the situation in all Member States – on the basis of quantitative and qualitative criteria and taking into account all available information mentioned under Art. 5 PR RoL. The panel shall publish a summary of its findings every year.

The procedure for adopting financial measures – mainly the suspension of payments – shall follow the principles of transparency and proportionality set out in Art. 5 PR RoL: upon finding a possible situation of generalised deficiencies as regards the rule of law in a Member State – taking into account the assessment of the panel of experts and all other sources of information –, the Commission shall notify the relevant Member State, the Council, and the European Parliament of the existence of a possible risk for the financial interests of the EU.

After having heard the observations of the relevant country and having analysed all the information received if the Commission considers a generalised deficiency to exist, it will adopt a decision proposing "to transfer to a budgetary reserve an amount equivalent to the value of the measures adopted" (Art. 6a PR RoL). The EU Parliament and the Council shall deliberate on this proposal within four weeks of receipt, and the decision will be considered approved if neither the European Parliament (by majority of votes cast) nor the Council (by qualified majority) amend or reject it. After adoption, the financial measures will be lifted as soon as the deficiencies cease to exist in the Member State concerned.

This mechanism targets the authorities and should not affect the citizens as ultimate beneficiaries of the EU funds. It seeks to provide for a swift and quick response in case of violations of the rule of law as defined in the Proposal. It avoids requirements of unanimity and lengthy proceedings, providing for adoption unless there is a reverse majority on the part of the EP and the Council. Although a major involvement of the Parliament by requiring a majority vote for adopting the sanctions would be more in line with the principle of democratic legitimation, it is also logical that the proposed Regulation opts for the adoption upon a reversed majority, as such system certainly promotes the swiftness of the whole procedure. This procedure can run in parallel to the other EU mechanisms provided to ensure the rule of law.

III. Strengthening the Rule of Law or Protecting Union's Budget?

The Proposal is justified not so much as a mechanism to ensure compliance with the rule of law through the possible adoption of financial measures but instead the other way round, as a system to protect the Union's financial interests in a swift and effective way, namely when they are endangered by generalised deficiencies of the rule of law affecting, in particular, institutions dealing with the Union's budget, its spending, and the investigation of fraud.¹⁸

If the rule of law conditionality seeks primarily to protect the financial interests of the Union, some kind of link should be present between the deficit detected and any risks for the sound financial management of the EU budget. It goes without saying that any institutional weakness – e.g., the institutional setting of the justice system – can have an adverse impact on implementation of the law and thus also on the protection of the EU's financial interests. In abstract, any deficit in the proper functioning of the States' institutions poses a risk for the Union's budget, be it because spending is not adequately controlled, because fraud occurs, or because fraud is not investigated or sanctioned.

The proposed Regulation establishes such an automatic link, so that economic measures could eventually be adopted, even if, in practice, deficiencies in the rule of law have had no impact on the Union's budget or there is no evidence of an actual risk to the financial interests of the EU. The Proposal's approach suggests that the aim is to monitor compliance with the rule of law, even if there is no direct link on the financial interests of the EU, just because the rule of law is defined as a precondition for the sound management of the Union's budget.

This objective approach indeed allows for broad monitoring of the public administration or the justice system of any Member

State. A closer look at Art. 2a PR RoL (generalised deficiencies) and Art. 3 PR RoL (risks for the financial interests of the Union), reveals that they confirm the breadth of the control the Commission may exercise upon the Member State's institutional setting. For example, the following shall, in particular, be considered “generalised deficiencies” as regards the rule of law (Art. 3.2 PR RoL, text of 17.12.2018):

- “(a) endangering the independence of judiciary;
- (b) failing to prevent, correct and sanction arbitrary or unlawful decisions by public authorities, including by law enforcement authorities, withholding financial and human resources affecting their proper functioning or failing to ensure the absence of conflicts of interests;”

Under Art. 3.1 PR RoL, the risks to the financial interests are, *inter alia*:¹⁹

- “(a) the proper functioning of the authorities of that Member State implementing the Union budget, in particular in the context of public procurement or grant procedures;
- (aa) the proper functioning of the market economy, thereby respecting competition and market forces in the Union as well as implementing effectively the obligations of membership, including adherence to the aim of political, economic and monetary union;
- (ab) the proper functioning of the authorities carrying out financial control, monitoring and internal and external audits, and the proper functioning of effective and transparent financial management and accountability systems;
- (b) the proper functioning of investigation and public prosecution services in relation to the prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget;
- (c) the effective judicial review by independent courts of actions or omissions by the authorities referred to in points (a), (a b) and (b).”

Ultimately, the ample concept of “generalised deficiency” under Art. 2a PR RoL coupled with the risks to the Union's budget identified in Art. 3.1 PR RoL gives the EU Commission full-scale power to assess the functioning of almost every institution in a given country. In other words, the type of generalised deficiencies that are to be prevented – and that can eventually lead to sanctions – allow compliance with the rule of law to be controlled, even when there is no clear connection with a risk to the financial interests of the EU for the simple reason that the proper functioning of the public administration and the justice system is a pre-requisite for sound financial management of the Union's budget.

In view of these monitoring/sanctioning powers, it appears that the general aim of the proposed Regulation is to control compliance with rule of law standards, regardless of their actual impact on financial management, upon the assumption that any improper functioning of the institutions may theoretically affect the protection of the EU's financial interests. Therefore, even if the detected deficiencies do not clearly fit into the traditional understanding of generalised infringement of rule of law principles, sanctions could be adopted under this instrument.

This discussion could be considered irrelevant and it could be argued that, in the end, it does not matter what the primary aim of the proposed Regulation is, as long as the two objectives –strengthening the rule of law and protecting the financial interests of the EU – are ensured. However, to my mind, this question is not completely irrelevant, as the task of the panel of experts and the scope of the assessment of the EU Commission will necessarily be determined by the objective pursued. Should the panel of experts focus their evaluations and possible opinions (recommendations) on general breaches of the rule of law principles or only on those that may affect the sound financial management of the Union's budget, as listed under Art. 3 PR RoL? Should the EU trigger the sanctioning procedure, even if the infringements found may hardly have any impact on the financial management of EU funds?

The problems of the broad scope of application of the sanctioning system in the proposed Regulation might be better illustrated with one example. Let us say that in a certain Member State the self-governing body of the judiciary (e.g., the council for the judiciary) is considered to be politicised, because its composition is not compliant with the European standards for ensuring judicial independence, due to the fact that the majority of its members are appointed by the executive. Such a system would clearly not be in compliance with the rule of law requirements as regards to the judicial independence.²⁰ But, at the same time, the same country neither presents problems with the public administration handling EU funds, nor does it present problems of corruption, and the fraud offences are investigated and sanctioned effectively. According to the Proposal, could the Commission trigger the procedure to suspend payments to this country? If the aim is to protect the rule of law – in general –, the answer is clearly yes; but, if the objective is to protect the Union's budget, in our example there would not be a risk for the "proper functioning" of sound financial management but only a remote or indirect risk for the financial interests of the EU.

Clarification on what the primary aims of this mechanism are is also relevant for the activities of the panel of experts set out under Art. 3 PR RoL.²¹ As their findings will be published on an annual basis, it can happen that, even before any mechanism is triggered by the EU Commission, there is already a "blame and shame" action damaging the reputation of a Member State for issues unrelated to the sound financial management of the Union's budget.

While the impact of some deficiencies in the sound management of the EU's financial interests appears to be only hypothetical or diffuse, this is not the case with regard to the risk defined under Art. 3.1 (f) PR RoL:

"(f) the effective and timely cooperation with the European Anti-fraud Office and, subject to the participation of the Member State concerned, with the European Public Prosecutor's Office in their investigations or prosecutions pursuant to their respective legal acts and to the principle of loyal cooperation;"

Following this provision of the proposed Regulation, the lack of cooperation with the EPPO or OLAF – when widespread and recurrent – should/could lead to the adoption of financial cuts to a relevant country, even if this infringement would traditionally not be considered a generalised breach of the rule of law (but only a dysfunction in an investigative body). The same would apply to the risk described under Art. 2a PR RoL.²²

IV. The Difficulties in Assessing "Generalised Deficiencies": The Example of the Judicial Independence

As already seen, the concept of "generalised deficiencies" as regards the rule of law (Art. 2 in connection with 3 PR RoL) is so broad that it gives a wide margin for action to the EU Commission in assessing the proper functioning of the institutions in a Member State. The methodology in making such an assessment together with the process for adopting the decision to impose financial measures on a Member State shall ensure that sanctions be imposed only when strictly necessary.

Assessment on the existence of generalised deficiencies with regard to the rule of law is to be objective, impartial, and transparent, constituting a thorough qualitative and quantitative evaluation.²³ The EU Commission shall take into account all relevant information and also apply the Copenhagen criteria used in the context of Union accession negotiations – which, it goes without saying, should continue to apply after accession. Art. 5.2 PR RoL attempts to ensure the adequate procedure and methodology, by listing the opinions, reports, and other criteria that are at least to be considered by the EU Commission. These are:

"opinions of the Panel, decisions of the Court of Justice of the European Union, resolutions of the European Parliament, reports of the Court of Auditors, and conclusions and recommendations of relevant international organisations and networks."²⁴

While this approach is positive, it still leaves a wide margin of discretionary power to resort to this sanctioning scheme, as certain deficiencies of the rule of law are not only difficult to assess but can also be assessed quite differently by different bodies and international organisations.

To highlight the complexity this assessment entails, I will focus on the judicial independence of national courts, due to its relevance for the rule of law as well as for EU law, as they are the first guardians who ensure that the rights and obligations

provided under EU law are enforced effectively.²⁵ In this context, it can be said that checking whether a given legal framework complies with the principle of judicial independence and provides for the necessary safeguards is usually not very difficult: there is general agreement on the standards that are to be applied, as set out in the Council of Europe Recommendation (2010)12 entitled “Judges: independence, efficiency and responsibilities” adopted by the Committee of Ministers of the Council of Europe on 17 November 2010. If the law is not in conformity with these standards, the rule of law deficit can be directly identified at the legislative level.

However, it is more complicated to establish to what extent judicial independence is safeguarded in practice: legislation is one thing and implementation is another. And it is at this point that the assessment leaves a lot of space for uncertainties, because collecting reliable data is not easy.²⁶

Most assessments on the judiciary focus more on the quality and efficiency of the justice system, where the indicators are more clearly defined and more objectively applied. This is the case, for example, for the CEPEJ reports elaborated within the Council of Europe.²⁷

Within the EU, the Justice Scoreboard²⁸ provides for a comparison tool that seeks to assist the EU and the Member States in improving the effectiveness of their national justice systems by providing objective, reliable, and comparable data on a number of indicators relevant for the assessment of the quality, independence, and efficiency of justice systems in all Member States.²⁹ The Justice Scoreboard uses CEPEJ data and perception indicators (of citizens, court users, and of the judges themselves) and, following this assessment, recommendations are sent to the Member States for improvement of their justice systems. Even if these assessments provide useful statistical data, they are not in themselves conclusive as to compliance with the rule of law principles and need to be interpreted correctly.³⁰ Analysing, for example, the EU Justice Scoreboard’s comparative table for 2017 “On the perceived independence of courts and judges among the general public,” it can be seen that Poland scores better than Spain (one position) and much better than Belgium. And this does not necessarily mean that Spain or Belgium present “generalised deficiencies” as to judicial independence but that the citizens show such perception – which may be influenced by many factors, the media, or their understanding of the required separation of powers.

This example shows that assessing compliance with the rule of law or the generalised deficiencies affecting the financial interests of the EU is extremely difficult – save when the shortcoming is at the legislative level. The panel of experts and the EU Commission will have to be careful in this regard, because such

assessments are not immune to political interests and majorities. The risk that certain countries may be put under stronger scrutiny than others presenting similar risks undoubtedly exists in the mechanism set out in this Proposal for a Regulation. And the risk that the focus is put on the legal framework rather than on actual implementation is also present.

V. Concluding Remarks

I fully share the opinion that it is necessary not only to strengthen compliance with the rule of law in all Member States but also to establish mechanisms that allow EU institutions to correctly assess the possible risks or actual infringements of the rule of law – preferably at a preventive stage – and to be able to reinforce the EU’s most important values.

The proposed Regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States was developed in response to the acknowledgement that no swift, effective response is currently coming from the Union institutions, in particular to ensure sound financial management (Recital 10a). But when dealing with infringements of or risks for the rule of law detected in a certain Member State, it is important that the steps taken and the decisions adopted under this new mechanism do not cause an even greater detriment to the EU’s values.

The broad definition of the concept of “generalised deficiencies” of the rule of law related to the sound financial management of the Union’s budget, practically opens the door for an assessment on the functioning of all public institutions, as most of them have an impact on the administration of financial funds and thus on the EU budget.

The proposed Regulation not only induces a reactive response – in case of risks detected – but a preventive monitoring system to assess compliance with the rule of law in every Member State. This relevant task – carrying out an integral monitoring system – is entrusted to a panel of experts. While an extensive monitoring action might be necessary to take stock of the situation or risks and provide an objective assessment, there is also the risk that such a generalised monitoring mechanism may end up undermining the principle of mutual trust among the Member States. If the EU is trying – by way of an amendment, to Art. 3 PR RoL – to introduce its own “EU Venice Commission,” a clear mandate should be agreed upon for this new EU body. As the proposed panel of experts will publish the results of their monitoring activity, and its opinions shall be taken into account by the EU Commission in the adoption of any sanctions – although not binding –, this panel needs to meet the highest standards in integrity, independence, and capacity.

Lastly, the peril that sanctions could be applied in a selective, politicised way, according to political majorities existing in the panel of experts or the other bodies involved in the decision, needs to be avoided: targeting certain Member States for risks that are also present in other Member States may ultimately lead to the undermining of essential values within the European Union, e.g., loyal cooperation, solidarity, and the mutual trust. Lack of respect for the rule of law can undermine the EU's values, but enforcing the rule of law with a financial sanctioning system can have even more damaging effects.

The introduction of a financial sanctioning system, such as the one foreseen in this Proposal, although it can undoubtedly be very effective and have a strong deterrent effect in preventing infringements of rule of law principles, can also lead to a polarisation within the EU. In the end, this could have a negative impact on the cohesion and integration needed. "Only by acting together and defending our common values the EU can tackle the major challenges of our time while promoting the well-being and prosperity of its citizens."³¹ In opting for strong responses to non-compliant Member States, the risk of dividing the European Union should not be overlooked.³²

1 ECJ of 24 June 2019, C-619/18 *Commission v Poland*, in which the Court finds that the measure lowering the retirement age of the Polish Supreme Court judges and applying that measure to the judges in post appointed to that court, is not justified by a legitimate objective and goes against judicial independence.

2 ECJ of 27 February 2018, C-64/16 *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*.

3 See Annual State of the Union speech to the European Parliament, September 2012, http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm and http://europa.eu/rapid/press-release_SPEECH-13-684_en.htm

4 See the Communication from the Commission to the European Parliament and the Council "A new Framework to strengthen the rule of law", COM(2014) 158 final/2, 19 March 2014.

5 As seen on the agenda of the recent informal meeting of Justice and Home Affairs Ministers, 18–19 July 2019, Helsinki on "Future of Justice: strengthening the Rule of Law. Independence, quality and efficiency of national justice systems and the importance of a fair trial".

6 Problems already highlighted in the EP Report of 23 June 2013 (rapporteur Rui Tavares) "On the situation of fundamental rights: standards and practices in Hungary" (pursuant to the European Parliament resolution of 16 February 2012, (2012/2130(INI)).

7 Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union's budget in case of generalised deficiencies as regards the rule of law in the Member States of 2 May 2018, COM/2018/324 final – 2018/0136 (COD), adopted under Art. 322(1) (a) TFEU and Art. 106 a Treaty Euratom. As often happens in EU legislation, the text of the proposed Regulation is very brief, comprising only eight short provisions, while the initial 18 Recitals and the Explanatory Memorandum contain the more detailed approach.

8 The Proposal avoids using the term "sanction" and uses the term "financial measures" (Art. 4 PR RoL), although they amount to economic sanctions in the final analysis.


9 See the *Explanatory Memorandum* of the Proposal.

10 D. Lilkov, "A step too far? The Commission's proposal to tie EU budget payments to compliance with the rule of law", in *London School of Economics: EUROPP Blog*, 2.10.18, accessible at <http://blogs.lse.ac.uk/europpblog/2018/10/02/a-step-too-far-the-commissions-proposal-to-tie-eu-budget-payments-to-compliance-with-the-rule-of-law/>.

11 As T. Wahl puts it: "This new legal framework would go beyond the current rules by which the EU Member States and its beneficiaries must already show that their rules and procedures for financial management of EU money are robust and that funding is efficiently protected from abuse or fraud." *eucri* 1/2018, 13. On the main features of this Proposal, see also B. Ward and T. Gardos, "EU Looks to Rein in Funding to Abusive EU Governments", *Human Rights Watch: News*, 3.5.18, at <https://www.hrw.org/news/2018/05/03/eu-looks-rein-funding-abusive-eu-governments>.

12 See, for example, the 2016 *Venice Commission Check List*, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016), or the UN Rule of Law Indicators of 2011 (focused on criminal justice institutions). For a comprehensive approach to the rule of law

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"ingredients," see T. Bingham, "The Rule of Law", *Cambridge Law Rev.* 67 (2007), pp. 67–85.

13 The problems detected in Poland and Hungary have already been described in detail, and it is neither my intention to recall the steps taken by the EU institutions and the Council of Europe in this regard nor to analyse the deficiencies of the Art. 7 TEU procedure or the limits of the infringement procedure before the ECJ. The results of all these efforts are known, as is the lack of progress in the dialogue established within the RoL Framework. For a detailed description, see of D. López Garrido and A. López Castillo for the European Parliament's AFCO Committee, "The EU Framework for enforcing the respect of the rule of law and the Union's fundamental principles and values", Policy Department for Citizen's Rights and Constitutional Affairs, January 2019, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608856/IPOL_STU\(2019\)608856_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608856/IPOL_STU(2019)608856_EN.pdf)

14 See J. Selih, I. Bond, C. Dolan, "Can EU Funds Promote the Rule of Law in Europe?", Centre for European Reform, November 2017, p. 12, available at https://cer.eu/sites/default/files/pbrief_structural_funds_nov17.pdf.

15 For F. Heinemann, the arguments against this conditionality system do not necessarily hold true; see "Going for the Wallet? Rule-of-Law Conditionality in the Next EU Multiannual Financial Framework", *Inter-economics*, Vol. 53, No. 6 (Nov.–Dec. 2018), pp. 297–298, accessible at: <https://archive.intereconomics.eu/year/2018/6/going-for-the-wallet-rule-of-law-conditionality-in-the-next-eu-multiannual-financial-framework/>.

16 See F. Schimmelfennig and U. Sedelmeier, "Governance by Conditionality: EU Rule Transfer to the Candidate Countries of Central and Eastern Europe", (2004) 11 *Journal of European Public Policy*, 661–679.

17 In this sense, F. Heinemann, *op. cit.*, p. 6.

18 See *Recital* 10 (a), Art. 3 PR RoL, and *Recital* 11. Also, *Recital* 4 of the PR RoL, where it is stated that the rule of law is "an essential precondition" to complying with the principles of sound management of the Union's budget. *Recital* 10 establishes the clear relationship between the rule of law and the efficient implementation of the Union's budget.

19 According to the text after the amendments adopted by the EU Parliament as of 17 January 2019, available at http://www.europarl.europa.eu/doceo/document/TA-8-2019-0038_EN.html. On the decision of the EU Parliament, see T. Wahl, *eucri* 1/2019, p. 16.

20 See Council of Europe Recommendation CM Rec(2010)12, para. 27.

21 This panel of experts was not foreseen in the initial text of the Pro-

posal for a Regulation. While being useful in assisting the EU Commission in assessing the situation in a relevant country with regard to compliance with the rule of law and to the risks for the EU's financial interests, the EU ultimately seems to be creating a sort of monitoring system through the back door to control and "blame and shame" the Member States; this is something that will have an impact far beyond the protection of the Union's budget.

22 Art. 2.a (e) PR RoL, after the amendments adopted by the European Parliament as of 17 January 2019: "*measures that weaken the protection of the confidential communication between lawyer and client.*" I fully agree that this is a serious violation of the fundamental right to defence, but it is unclear why this infringement is introduced here and not other severe violations of human rights. The Explanatory Memorandum does not give any further indication on the reason for specifically mentioning this safeguard here and not others.

23 Recital 12 E.M.

24 See also Recital 12 PR RoL, which includes a more comprehensive list of sources to be taken into account, expressly mentioning the judgments of the ECtHR and the Venice Commission opinions as well as the resolutions of the EU Parliament and the reports of the Court of Auditors. Recital 8 (a) advocates integrating the diverse monitoring mechanisms already existing in the EU, such as the Cooperation and Verification Mechanism, the Justice Scoreboard, and the Anti-Corruption Reports.

25 As underlined by the ECJ (Grand Chamber) in its judgment of 27 February 2018, C-64/16, *Associação Sindical dos Juizes Portugueses v Tribunal de Contas*.

26 See L. Bachmaier, "Judicial Independence in the Member States of the Council of Europe and the EU: Evaluation and Action", (2019) *ERA Forum*, 113–127.

27 Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ). It undertakes annual evaluations of the judicial systems of the 47 Member States, focusing not only on their efficiency but also on their quality and effectiveness. Certainly, specific questions, e.g., those related to the recruitment or transfer of judges, have an impact on judicial independence, but CEPEJ does not aim to provide an assessment on judicial independence.

28 For the 2019 Justice Scoreboard, see T. Wahl, "2019 EU Justice Scoreboard: Downward Trend for Judicial Independence", *eu crim* 1/2019, 7.

29 For a detailed analysis on the methodology used when elaborating the EU Justice Scoreboard, see E. Mak and S. Taekema, "The European Union's Rule of Law Agenda: Identifying Its Core and Contextualizing Its Application", (2016) 8 *Hague Journal Rule Law*, 25, 31 *et seq.*

30 L. Bachmaier, *op. cit.* (n. 26), 118. In the same sense, E. Mak and S. Taekema, *op. cit.* (n. 29), 40, who are critical as to the use of the EU Justice Scoreboard to assess constitutional values and compliance with the rule of law.

31 Discussion paper for the informal meeting of Justice and Home Affairs Ministers of 18–19 July 2019, Helsinki, p. 1, available at <https://eu2019.fi/en/events/2019-07-18/informal-meeting-of-ministers-for-justice-and-home-affairs>.

32 As Commission President Juncker said with regard to the German proposal to link budgetary transfers to the rule of law "but I believe it won't be helpful divide the European Union [...] that would be poison for the Continent", as quoted by F. Eder, "Juncker: German plan to link funds and rules would be 'poison'", *Politico*, 6 January 2017, at www.politico.eu/article/juncker-german-plan-to-link-funds-and-rules-would-be-poison/.

The European *ne bis in idem* at the Crossroads of Administrative and Criminal Law

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This article discusses the recent developments in the case laws of the European Courts on the principle of *ne bis in idem* at the interface between criminal and administrative law, in particular with regard to the legitimacy of double-track enforcement systems. It is argued that both, the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU), have aligned not only in lowering their previously more protective standards, but also in laying down new rules that, though partially converging, remain highly unclear. Through an analysis of the case law following the ECtHR's judgment in *A and B v Norway* and the three CJEU 2018 decisions in *Menci*, *Garlsson* and *Di Puma and Zecca*, it is demonstrated that the uncertainty generated as to the precise conditions under which dual criminal and administrative proceedings are permissible leads to unforeseeable outcomes. The potential consequences, most importantly, also tend to put pressure on other aspects of this fundamental guarantee, as well as on the standard of protection of other fundamental rights that to date are considered as given. Against this background, we will discuss at last whether the slight differences in the approach adopted by the CJEU to that of the ECtHR could reveal a silent effort on its part to take a more right-friendly stance.

I. Common Trends in the Protection of *ne bis in idem* at the Supranational Level

The right not to be prosecuted or punished twice for the same offence is a fundamental principle of criminal law¹ and has a twofold rationale. On the one hand, it is a key guarantee for

the individual against abuses of the *ius puniendi*, and, on the other hand, a means to ensure legal certainty and the stability of the *res iudicata*.²

At the European level, the *ne bis in idem* principle is enshrined in Art. 4 of Protocol No. 7 to the European Convention on Hu-

man Rights (ECHR), in Art. 50 of the EU Charter of Fundamental Rights (CFR), and in Art. 54 of the Convention implementing the Schengen Agreement (CISA).³ Despite their different wording and the wider scope of the principle at the EU level - where it is applicable also to transnational settings - the scope of protection offered by the ECHR and CFR provisions is the same with respect to the national dimension of the *ne bis in idem*,⁴ namely when it is applied within the same jurisdiction.

Under both legal texts, the following four elements are necessary to trigger its application: 1) two sets of proceedings of criminal nature (*bis*), 2) concerning the same facts (*idem*), 3) against the same offender, and 4) a final decision. The *ne bis in idem* principle therefore represents an ideal lens through which one can observe how the relationship between the Convention and the Charter and the judicial dialogue between the respective courts is evolving in the construction of a European system of fundamental rights.⁵ Cross-fertilization between the case laws of the two courts on the different elements of *ne bis in idem* could consequently result in a virtuous circle or, quite the opposite, in “a vicious circle of troublesome jurisprudence multiplied through mutual encouragement.”⁶

Until 2016, the jurisprudence of the Courts of Strasbourg and Luxembourg on the prohibition of double jeopardy aligned towards a higher level of protection.⁷ This defendant-friendly approach can be observed in relation to the notion of *idem*: The Court of Justice of the European Union (CJEU) first, soon followed by the European Court of Human Rights (ECtHR), defined it as the same set of factual circumstances, regardless of the legal classification of the offence or the legal interest protected.⁸ The persisting relevance of the legal interest in the CJEU case law in competition matters represents an exception,⁹ which will yet not last much longer as a recent decision suggests.¹⁰ This convergence of the case law to the benefit of the individual touched also on the material scope of the principle, which has been widened under both the ECHR and the CFR to cover not only formally criminal proceedings but also administrative punitive proceedings with a criminal nature in light of the so-called *Engel criteria*.¹¹ As a result, also the imposition of an administrative penalty à coloration *pénale* triggers the prohibition of *bis in idem*.

The winds, however, have changed ever since, and a more rigid trend towards limiting the automatism in the application of *ne bis in idem* now seems to draw the two courts closer together. The notion of ‘final decision’ was the first to be affected: In *Kossowski*,¹² the CJEU considered that a detailed investigation of the case is necessary for a decision to be given after a determination of the merits of the case. Very recently, in *Mihalache v Romania*,¹³ this requirement of a detailed investigation has

been taken up by the ECtHR as well for determining whether a decision to discontinue the proceedings constitutes an “acquittal” for the purposes of Art. 4 of Protocol No. 7 ECHR.

Yet the most remarkable illustration of this new course is the case law on the first condition, i.e. the *bis*. The course started with the ECtHR’s landmark decision in *A and B v Norway*,¹⁴ followed by the three CJEU 2018 decisions in *Menci*, *Garlsson* and *Di Puma and Zecca*,¹⁵ all dealing with the so-called double-track enforcement regimes, a widespread reality in several Member States especially in the field of economic and financial crime.¹⁶ In an attempt to justify such practice, which allows a joint imposition of administrative and criminal sanctions in respect of the same conduct, the two courts revisited their approach on the notion of *bis* and significantly reduced the protection afforded by the *ne bis in idem* principle.

The present article focuses on the dialogue between the European courts in this grey area between administrative and criminal law and aims at assessing the limits under which double-track enforcement systems are currently compatible with the principle of *ne bis in idem* in Europe. It will be illustrated that the respective case laws of the ECtHR and CJEU have aligned in lowering their previously more protective standards and in allowing such duplication of punitive proceedings to a certain extent. It is further argued that this acquiescence towards double-track enforcement systems draws on rules that – despite certain differences – substantially converge and, what is of more concern, in both case laws are highly unclear. The uncertainty generated by these rules arguably not only involves the risk to lead to unpredictable results, but, most importantly, also tends to put pressure on other aspects of the guarantee that to date are considered as given, such as the notion of *idem* itself.

II. The Downgrade of *ne bis in idem* for Administrative Punitive Proceedings by the ECtHR

1. The ECtHR’s judgment in *A and B v Norway*

In 2016, the ECtHR deviated from its previous case law and substantially reduced the scope of protection of the *ne bis in idem* principle with regard to dual criminal and administrative punitive proceedings in respect of the same offence. Under intense pressure of the contracting States defending their practice of double-track enforcement systems, in *A and B v Norway* the Grand Chamber redefined the notion of *bis* and admitted that under certain circumstances a combination of criminal and administrative procedures does not constitute a duplication of proceedings as proscribed by Art. 4 of Protocol No. 7 ECHR.¹⁷ To the contrary, it found that where dual proceedings represent “complementary responses to socially

offensive conducts” and are combined in an integrated manner so as to form a “coherent whole” in order to address the different aspects of the offence, they should rather be considered as parts of one single procedure, and not as an infringement of the *ne bis in idem* principle.¹⁸ To this end, the Court requires that the two sets of proceedings be “sufficiently closely connected in substance and time” and lists the factors that determine whether there is such a close connection between them.¹⁹

As to the connection in substance, it is necessary that the dual proceedings satisfy the following four conditions:²⁰

- They pursue complementary purposes and thus address, not only *in abstracto* but also *in concreto*, different aspects of the social misconduct involved;
- They are a foreseeable consequence, both in law and in practice, of the same impugned conduct;
- They avoid, as far as possible, any duplication in the collection and assessment of the evidence;
- They “above all” put in place an offsetting mechanism designed to ensure that the sanction imposed in the first proceedings is taken into account in the second proceedings, so that the overall amount of any penalties imposed is proportionate.

In addition to the connection in substance, a connection in time must also be present, though it is not necessary for the proceedings to be conducted simultaneously and the order in which the proceedings take place is irrelevant. Nevertheless, the Court did not provide any further guidance in this regard, apart from stressing that the individual should not be subjected to uncertainty and lengthy proceedings.²¹

2. Subsequent case law and criticism – the lack of clarification

The decision in *A and B* sparked harsh criticism, starting from the flaming one of the dissenting judge *Pinto de Albuquerque*.²² The decision not only downgraded the protection offered at the conventional level by the *ne bis in idem* principle, but also – and more critically – laid down criteria to determine the compatibility of dual criminal and administrative proceedings, which are either “empty shells” or very ambiguous and difficult to apply in practice, and could possibly lead to arbitrary results.²³ Unfortunately, the subsequent Strasbourg case law barely offered any clarification, and such dangers were proven true.

First, some uncertainty exists as to what elements should be taken into account to determine the complementarity of the proceedings. While the ECtHR in *A and B* drew on the distinction introduced in *Jussila v Finland*²⁴ and stressed that the

complementarity condition would be more likely met if the proceedings are not formally classified as criminal and do not carry any significant degree of stigma,²⁵ it never embarked on such assessment in the subsequent cases.²⁶

Second, whereas in *A and B* the Court referred to the different purpose of the sanctions and to the additional constitutive elements of the offence, namely its culpable character,²⁷ in *Nodet v France* it also considered the legal interest protected by the offence as element to assess the complementarity of the proceedings.²⁸ Furthermore, in other cases involving tax proceedings,²⁹ the assessment was performed in a merely perfunctory manner and the Court simply accepted, without any analysis whatsoever, that the two proceedings pursued complementary purposes. Such approach not only undoubtedly risks turning “complementarity” into a void condition, but also has a more subtle effect. By attaching relevance to the legal interest protected and to the constitutive elements of the offence, it reintroduces through the back door elements that were previously expressly excluded from those necessary to determine the “*idem*” precisely with the purpose of enhancing the individual guarantee. The more liberal stance in *Zolotukhin*³⁰ is thereby indirectly affected: a difference in the legal interest or in the constitutive elements of the offence allows once again to elude the protection of the *ne bis in idem* principle, albeit under the different label of the complementarity of the proceedings.³¹

Third, the way in which the condition of the foreseeability of dual proceedings is applied also turns it into an almost meaningless guarantee. The Court here simply ascertains whether the possibility of imposing both an administrative and a criminal sanction is provided by law, without engaging in any further analysis.³² If construed in such a way, this condition becomes tautological and simply overlaps with the legality requirement that criminal sanctions should meet to be compatible with Art. 7 ECHR in the first place.³³

Furthermore, the requirement that the sanctions imposed first are offset against those applicable in the second set of proceedings, so as to ensure the proportionality of the overall punishment inflicted, seems to play a less decisive role than initially assumed.³⁴ In *Matthildur Ingvarsdottir v Iceland*, the Court in fact concluded that the proceedings were sufficiently closely connected in substance despite the absence of such an offsetting mechanism.³⁵ Hence, just like in other matters,³⁶ the Court’s scrutiny seems to take the form of a global assessment. Although it does verify the observance of each specific condition, neither of them is a *conditio sine qua non*: It is only their combination that decides whether the proceedings are sufficiently connected as a whole or not. Not to mention that such a condition becomes wholly irrelevant where the first procedure has resulted in an acquittal. In this latter case, there will not

only be no sanction to offset, but a subsequent finding of guilt in the second set of proceedings will risk violating the presumption of innocence under Art. 6(2) ECHR.³⁷

The most problematic condition, however, is the non-duplication in the gathering and assessment of the evidence. Though it initially appeared to be a “soft prohibition” that could be satisfied where the establishment of facts in the first set of proceedings is relied upon also in the second,³⁸ in the cases that followed *A and B*, it has been applied in a much stricter manner. In spite of the presence of a common establishment of the facts and of other forms of coordination among the authorities, such as the sharing of the evidence gathered, the Court attached decisive weight to the subsequent and independent investigation carried out in the second set of proceedings.³⁹ The Court thus seems to require that evidence be gathered within only one procedure, and rules out completely any possibility for the authorities intervening in the second place to carry out additional autonomous investigations. This approach represents an unreasonable restriction, since for several legitimate reasons the adoption of new additional and autonomous investigating measures in the second set of proceedings may be required.

But what is even more worrying are the possible consequences of such reasoning. Since criminal investigations often start after the administrative ones and usually last longer, the Court is substantially endorsing the transfer and use of evidence gathered in the administrative proceedings in the criminal ones. Yet, it fails to consider the complexity of the issues underlying the transfer of evidence from administrative to criminal proceedings, which inevitably ensue from the different rules and procedural safeguards to which such activity is subject in the two frameworks (among them the presumption of innocence and the right to remain silent). Such an automatic transfer of evidence, viewed as a guarantee in respect of the *ne bis in idem* principle, could therefore risk running counter to the right to a fair trial under Art. 6 ECHR and therefore ultimately be equally (or even more) detrimental to the defendant.⁴⁰

Aside from the concerns raised with regard to the conditions for determining a connection in substance, the additional requirement of a temporal connection between the proceedings is also problematic as no precise parameter is set in this regard. The Court considers, on the one hand, the overall length of the combined proceedings, and, on the other, the time during which these were conducted in parallel. Yet, the key aspect seems to be for how long the second set of proceedings has continued on its own after a final decision has been taken in the first one.⁴¹ Admittedly, this criterion is too casuistic and leads to arbitrary results,⁴² not to mention that it risks turning the *ne bis in idem* principle into a mere remedy against an excessive length of proceedings.⁴³

Against this background, the new course inaugurated by *A and B* reveals several shortcomings. Driven by efficiency-oriented interests, it causes nevertheless great uncertainty to the detriment not only of the defendant, but also of the national authorities and legislators who need clear and predictable indications as to when a double-track enforcement system is compatible with the Convention requirements.⁴⁴

III. *Ne bis in idem* and Double-Track Systems in the Case Law of the CJEU

1. The fundamental rights background of Union law and the approach by the CJEU

At the Union level, the prohibition of *bis in idem* is not considered as an absolute right. The possibility to limit the right not to be prosecuted or punished twice under Art. 50 CFR was accepted by the CJEU for the first time in *Spasic*, with regard to the transnational dimension of *ne bis in idem*.⁴⁵ Such limitation was considered legitimate as long as it complied with the requirements set forth in Art. 52(1) CFR, according to which limitations to the rights contained in the Charter shall (i) be provided for by law; (ii) respect the essence of such rights; (iii) be necessary in light of the proportionality principle, and (iv) genuinely meet the objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

In interpreting these criteria, the Court of Justice takes into account the jurisprudence of the ECtHR, which determines the minimum safeguarding content of the rights laid down in the Charter, including Art. 50. That does not mean, however, that the ECtHR case law is automatically and systematically adopted by the judges in Luxembourg. In the last decade, actually, the CJEU has repeatedly affirmed the need to develop an autonomous notion of the rights enshrined in the Charter.⁴⁶ This thesis had been recently reaffirmed in the three aforementioned 2018 decisions – *Menci*, *Garlsson* and *Di Puma and Zecca* – with specific regard to the *ne bis in idem* principle. There, again, the Court explicitly recalled that the ECHR does not constitute, “as long as the European Union has not acceded to it, a legal instrument which has been formally incorporated into EU law,” although Art. 6(3) TEU recognises the fundamental rights of the Convention as “general principles of EU law”, and regardless of the equivalence clause contained in Art. 52(3) CFR.⁴⁷ Accordingly, questions concerning the status of fundamental rights in the EU shall be examined, if not exclusively, largely “in the light of the fundamental rights guaranteed by the Charter.”⁴⁸ The convergence between the interpretation of the Courts of Luxembourg and Strasbourg shall therefore, at least in the perspective of the CJEU, be certainly welcomed, but not be taken for granted. Indeed, certain

interpretative divergences between the two European courts can be observed precisely with regard to the interpretation of *bis* with reference to dual criminal and administrative punitive proceedings.

2. The CJEU's judgments on double-track systems

A relevant exception in the scope of Art. 50 was introduced by the Court of Justice already in 2013. In *Fransson*, in fact, the Court specified that double-track systems could not be considered in violation of *ne bis in idem* “as long as the remaining penalties are effective, proportionate and dissuasive.”⁴⁹ Well before the ECtHR *revirement* in *A and B*, therefore, the CJEU had already opened the door to potential limitations of the double jeopardy clause in the name of the principle of effectiveness, leaving a rather high degree of uncertainty on whether, and if so, under which conditions, double-track systems were to be considered legitimate under EU law.⁵⁰

In the three cases – *Menci*, *Garlsson* and *Di Puma and Zecca* – concerning the fields of tax law and market abuse, the Court then transposed this general clause as established in *Fransson* into the above-mentioned parameters of Art. 52(1) CFR, thereby explicitly considering double-track systems as a limitation to the protection from *bis in idem*.⁵¹

In the absence of EU law for the harmonization of the penalties to be applied to a specific conduct, the CJEU considered that Member States have the right to provide for double-track systems to pursue “objective, complementary aims relating, as the case may be, to different aspects of the same unlawful conduct at issue.”⁵² Therefore, the Court of Luxembourg indirectly abandoned, as Strasbourg before, the stricter (and more safeguarding) test of *Zolotukhin* on the element of *bis*.

With reference to the test under Art. 52(1), the Court then considered that the protection of the integrity of financial markets (in *Garlsson* and *Di Puma and Zecca*) and the correct collection of VAT (in *Menci*) represent objectives of general interest for the Union, that could justify limitations to Art. 50 CFR (criterion (iv)).⁵³ The existence of a legal basis (criterion (i)) was not considered especially critical in such cases, since all the examined systems were clearly provided for by national law (and, in the case of market abuse, also by EU legislation⁵⁴). The considerations of the Court with regard to the second criterion (ii), concerning the respect of the essence of the right at stake, appear in contrast rather more controversial for the value of the double jeopardy clause in EU law. Under this perspective, in fact, the CJEU seemed to deduce from the mere circumstance that national legislation allows for a duplication of proceedings and penalties “only under certain

conditions which are exhaustively defined,” the consequence that “the right guaranteed by Art. 50 is not called into question as such” and therefore is respected in its essential content.⁵⁵ The Court thus appeared to overlook the fact that even limitations provided only upon specific conditions can transform the nature of the double jeopardy clause from an individual fundamental right to a mere organizational rule, and that this does represent a violation to the essence of the original scope of Art. 50 CFR.⁵⁶

3. The CJEU's proportionality test

Especially interesting, in a comparative perspective with ECtHR jurisprudence, is the third criterion (iii) that describes the proportionality requirement. The Court considered that “the proportionality of national legislation [...] cannot be called into question by the mere fact that the Member State concerned chose to provide for the possibility of such a duplication, without which that Member State would be deprived of that freedom of choice.”⁵⁷ Duplication of proceedings and penalties for the same conduct shall instead not “exceed what is appropriate and necessary in order to attain the objectives legitimately pursued by that legislation,” meaning that “when there is a choice between several appropriate measures, recourse must be had to the least onerous and the disadvantages caused must not be disproportionate to the aims pursued.”⁵⁸

Against this background, the Court interpreted the strict necessity requirement inherent to the proportionality principle as obliging national legislation: *a*) to be foreseeable, i.e. it should provide for clear and precise rules that allow individuals to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties, and *b*) to ensure that the disadvantages resulting, for the persons concerned, from such a duplication are limited to what is strictly necessary to achieve the objective(s) of general interest.

In particular, in order to assess the latter condition, national legislation shall: *b1*) under a procedural perspective, ensure coordination rules so as to reduce to what is strictly necessary the additional disadvantage caused to the persons concerned by such a duplication; and *b2*) under a substantive perspective, guarantee that the severity of all the penalties imposed does not exceed the seriousness of the offence concerned, i.e. that the severity of the second penalty applied takes into account that of the penalty already imposed.⁵⁹

The definition of coordination rules, and their relationship with the proportionality of the sanction imposed appear at the same time crucial and problematic in terms of fairness and foreseeability.

In *Menci*, for instance, the CJEU positively assessed the existence of coordination rules, favourably considering the national law mechanism according to which not only the enforcement of administrative punitive penalties had to be suspended during criminal proceedings on the same VAT fraud conduct, but that was also definitely prevented after the latter had been terminated with a conviction.⁶⁰ The CJEU then pointed out that criminal penalties were to be limited to particularly serious offences (unpaid VAT exceeding EUR 50 000), and that voluntary payment of the tax debt covering also the imposed administrative penalty constituted a special mitigating factor to be taken into account in the criminal proceedings.⁶¹

In *Garlsson*, on the other hand, the Court underlined the importance of the obligation for cooperation and coordination between the Italian prosecution service and the national market supervisory authority, according to which the latter is under a duty to share with the prosecution service by means of a reasoned report, the documents collected during the monitoring activity where suspicions of a crime are discovered, and both the administrative and judicial authorities shall cooperate with each other, including by means of information exchange.⁶² However, the CJEU found the safeguards against an excessive severity of the cumulated penalties to be insufficient in this case, because the offsetting mechanism was applied only to the pecuniary penalties but not between punitive administrative fines and imprisonment. Even more importantly, the Court considered, that the bringing of administrative punitive proceedings following a criminal conviction “exceeds what is strictly necessary in order to achieve the objective [of general interest], in so far as that criminal conviction is such as to punish the offence committed in an effective, proportionate and dissuasive manner.”⁶³ The CJEU did not define in which cases a criminal conviction can fulfil these conditions. Nevertheless, in the specific case, it considered the criminal sanction imposed to be effective, despite the fact that it was never enforced, because the accused could benefit from a pardon.

At first glance, it may thus seem that in *Garlsson* the CJEU introduced a stricter proportionality requirement than that promoted by the ECtHR, with a sort of primacy of the criminal proceedings over the administrative (punitive) one. The initiation of criminal proceedings after the imposition of an administrative (punitive) sanction, as in *Menci*, on the contrary, was not considered problematic as such by the Court.

Nonetheless, it appears at least peculiar that the CJEU explicitly highlighted this more demanding meaning of the proportionality requirement precisely in *Garlsson*, that is in the field of market abuse, where the duplication of punitive proceedings is a choice that does not find its legal basis in purely national law (as in the case of VAT examined in *Menci*), but derives

from the transposition of Directive 2003/6/EC (the validity of which was not questioned by the Court).

Negative conclusions concerning the proportionality requirement were drawn by the CJEU also in *Di Puma and Zecca* (again in the field of market abuse), where the possibility to bring proceedings for an administrative punitive fine following an acquittal in the criminal trial for the same conduct was also considered exceeding the necessity required by the principle of proportionality.⁶⁴ Given the specific circumstances of the case, and the heavy reliance on national law as for the definition of *res judicata* though, it is not clear from this case whether the latter should be considered as a confirmation of the “primacy” rule stressed in *Garlsson* (thereby considering predominant the fact that the acquittal was issued in the criminal proceedings) or whether it implied a much broader interpretation (that is, considering fundamental the acquittal in itself, while the set of criminal proceedings it derived from could be seen only as a circumstance of the specific case). So, we can extrapolate from the three 2018 decisions that the CJEU provided for some criteria on the matter of *ne bis in idem*, but did not openly opt for an explicit, and therefore clearly foreseeable, rule on how to deal with double-track systems. Indeed, the two European courts seem to share a similar approach on this uncertainty.

4. Divergences between CJEU and ECtHR

On the contrary, with regard to other profiles of the tests carried out by the European courts, the degree of divergence between the interpretation of the latter appears more pronounced, although uncertainties remain in both case laws.

First, the parameters identified by the CJEU do not explicitly mention the criterion of “substantial connection in time” – perhaps the most arbitrary condition of the ECtHR’s “*A and B test*”. Thus, the CJEU leaves open the question on whether or not this parameter should also be applied under EU law. In his Opinion AG *Campos Sánchez-Bordona* has, for his part, strongly advocated abandoning this parameter.⁶⁵ Therefore, although in lack of explicit indications, the silence of the Court on the matter could be positively interpreted as an attempt to set aside one of the most unforeseeable criteria developed by the ECtHR.

Much more critical is a second, apparent divergence: The circumstances of the cases examined in 2018 do not provide an answer as to whether the CJEU would also include the need to concentrate the evidence gathering either in the administrative or criminal proceedings in the parameters of the “coordination rules”. This factor was specifically requested by the Court in Strasbourg to avoid a violation of *ne bis in idem*. From the

wording of the CJEU's judgments, it is indeed not possible to rule out this condition, included in the *A and B* test, with all the critical issues previously discussed. Therefore, this silence risks instead bringing into EU law further critical considerations for the effectivity of defence rights of the individual(s) affected by double proceedings or penalties as well.

In sum, the proportionality parameter developed by the CJEU, does not necessarily seem much more foreseeable in its application, although it might be a bit more safeguarding than the approach adopted by the ECtHR.

IV. A Shadowy Green Light to Double-Track Enforcement Systems?

In the last decade, the principle of *ne bis in idem*, especially in respect of administrative punitive sanctions, has become a real test bench for the affirmation of fundamental rights in the field of criminal law that once belonged almost exclusively to the realm of national law. But this shift did (and still does) not come without a price.

The path undertaken by the CJEU to define its own role as a court of human rights, in a constant dialogue with the ECtHR, may indeed succeed only if it leads to a substantial strengthening of fundamental rights. However, by striving to avoid conflicting rulings while underlying their respective autonomy,⁶⁶ the case law of both European courts on the legitimacy of double-track punitive systems seems instead to glide towards a downward competition.

Ruling in favour of the admissibility of double-track systems (under certain conditions), both courts have lowered the level of protection previously granted to individuals, and shown that the equivalence clause is in itself insufficient to ensure an adequate level of fundamental rights safeguards. The clause is, indeed, effective only as long as the Court in Strasbourg sets a higher threshold.⁶⁷ Admittedly, the CJEU in *Menci* could truly state that the new (lower) standard on *ne bis in idem* was compliant with the Convention,⁶⁸ though this was only the case because the ECtHR had also previously watered down the content of this right.

But this is not the only problem: even more critically, both European courts chose to anchor the protection from *bis in idem* at the interface between administrative and criminal law to multiple and often practically unforeseeable criteria. They are not only hard to apply *ex ante* in the respective jurisdictions. They are also partially diverging from one court to the other, and contribute to the general confusion about the effective scope of this principle for individuals and national authorities.

While the debate over the best criteria to be applied (*una-via* model, primacy of criminal law) could in this respect remain open, what is certainly necessary is for both European courts, and especially for the CJEU, to choose a clear and foreseeable rule in the definition of the scope of the principle of *ne bis in idem*. In this regard, however, the lack of a total alignment between Luxembourg and Strasbourg also allows to catch a first glimpse of the potential for the CJEU to take the lead towards a more rights-friendly and pro-active approach.

In fact, the non-application of the (arbitrary) criterion of “connection in time” in EU law could be seen as a positive step towards the impoundment of the draining of the double jeopardy clause launched with *A* and *B*. Similar conclusions may be drawn also with regard to the maintenance of the several-step test of Art. 52 CFR in this matter, compared to the overall approach of the ECtHR, in which the *ex ante* identification of potential violations is always scarcely feasible. Equally, the rule according to which no administrative punitive proceedings seem to be allowed after a final criminal decision on the same facts could be interpreted as a way to better preserve the defendant's rights, although the scope of application of this rule remains unclear. The lack of the criterion requesting a single acquisition of evidence could also be welcomed, although again it is not certain whether the CJEU explicitly avoided to mention it or not.

Lastly, against the implicit but relevant attempt by the judges in Strasbourg to bring back the parameter of the legal interest through the definition of *bis*,⁶⁹ it is not clear what role this complementarity requirement will play in the CJEU decisions. Actually, before the Luxembourg Court, the latter is not a separate condition as in the ECtHR case law, but it is referred to within the assessment of the general objectives to be pursued. On one side, only the CJEU requests the objective of general interest to be “such as to justify” the existence of a double-track system.⁷⁰ On the other side, however, the need for each of these proceedings to pursue “complementary aims” seems also to be necessary for the legitimacy of double proceedings, therefore conferring to the parameter of “legal interest” a value similar to that attached to it by the ECtHR.⁷¹ But this conclusion seems to have been recently contradicted by the (implicit) step by the CJEU towards a uniform notion of *idem* also in competition law,⁷² which may be seen as a silent effort to achieve a higher level of protection within the EU.

V. Which Way Forward?

All these optimistic considerations, however, hang by a thread, and will need a much more courageous and explicit affirmation to help the CJEU become the protector of fundamental rights it ought to be in the post-Lisbon Union.

In this sense, new institutional developments are likely to play a relevant and decisive role and indirectly impact the relationship between the courts. To date, part of the divergences between the two European courts could also be explained by the fact that, while the CJEU intervenes via preliminary rulings, the ECtHR has instead always judged *ex post* and *in concreto*.⁷³ Things may now change: On the one hand, the new interlocutory procedure introduced by Protocol No. 16 to the Convention will enable the Court in Strasbourg to rule in the course of domestic proceedings, and potentially bring it closer to the role of the CJEU (despite the non-binding force of ECtHR decisions).⁷⁴ In this regard, alignment between the two courts may become even more necessary, considering that national judges could decide to request a preliminary interpretation on the same cause to both European courts.

On the other hand, and perhaps even more relevant, the power of newly strengthened European bodies, such as the European Central Bank or the European Securities and Markets Authority,⁷⁵ to impose punitive sanctions, could soon bring before the CJEU cases to be adjudicated *ex post*, thus also requiring the Luxembourg Court to act much more like the ECtHR. As a result, these proceedings may add a further level for potential *ne bis in idem* violations.⁷⁶

In all cases, both European courts will be required to choose between lowballing fundamental rights or finally entering into (and possibly remaining in) a game of one-upmanship against each other, from which all of us could greatly benefit. This would ultimately require clearer rules that end the current uncertainty and can thereby encourage coherent legislative solutions.

* The article has been drafted together; Sofia Mirandola is the main author of sections I and II, and Giulia Lasagni of sections III, IV and V.

1 J. Vervaele, "Ne Bis in Idem: Towards a Transnational Constitutional Principle in the EU?", (2013) 9 *Utrecht Law Review*, 211, 212; C. Amalfitano, in: R. Mastroianni, O. Pollicino, S. Allegrezza, F. Pappalardo, O. Razzolini (eds.), *Carta dei diritti fondamentali dell'Unione europea*, 2017, Art. 50, 1016-1017; B. Nascimbene, "Ne bis in idem, diritto internazionale e diritto europeo", (2 May 2018), *Diritto penale contemporaneo*, <<https://www.penalecontemporaneo.it/d/5993-ne-bis-in-idem-diritto-internazionale-e-diritto-europeo>> accessed 30 August 2019.

2 It thus has both a human right and a rule of law function. See V. Mitsilegas, F. Giuffrida, "Ne Bis in Idem", in: R. Sicurella, V. Mitsilegas, R. Parizot, A. Lucifora (eds.), *General principles for a common criminal law framework in the EU. A guide for legal practitioners*, 2017, 209, 210; K. Ligeti, "Rules on the application of ne bis in idem in the EU. Is further legislative action required?", (2009) 1–2 *eucri*, 37; C. Amalfitano, *op. cit.* (n. 1), 1016–1017; J. Vervaele, *op. cit.* (n. 1), p. 212–213.

3 On the multiple notions of *ne bis in idem* at the European level, see J. Vervaele, *op. cit.* (n. 1), p. 211–229.

4 By virtue of the homogeneity clause under Art. 52(3) CFR, Art. 54 CISA will not be taken into account as such in this paper as it protects only the transnational dimension of *ne bis in idem*.

5 M. Simonato, "Two instruments but a difficult relationship? Some upcoming decisions of the CJEU on the ne bis in idem", (15 November 2017) *European Law Blog* <<https://europeanlawblog.eu/2017/11/15/two-instruments-but-a-difficult-relationship-some-upcoming-decisions-of-the-cjeu-on-the-ne-bis-in-idem/>> accessed 30 August 2019.

6 P. Pinto de Albuquerque/H.S. Lim, "The Cross-fertilisation between the Court of Justice of the European Union and the European Court of Human Rights: Reframing the Discussion on Brexit", (2018) 6 *European Human Rights Law Review*, 571.

7 M. Simonato, *op. cit.* (n. 5).

8 ECJ, 9 March 2006, case C-436/04, *Van Esbroeck*, para. 42; and ECtHR [GC], 10 February 2009, *Sergey Zolotukhin v Russia*, Appl. No. 14939/03, para. 84. See J. Tomkin, in: S. Peers, T. Hervey, J. Kenner, A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, 2014, Art. 50, 1398; C. Amalfitano, *op. cit.* (n. 1), 1021.

9 ECJ, 14 February 2012, case C-17/10, *Toshiba*, para. 97. See also M. Luchtman, "The ECJ's recent case law on ne bis in idem: Implications for law enforcement in a shared legal order", (2018) 55 *Common Market Law Review*, 1724–1725; J. Tomkin, *op. cit.* (n. 8), 1411–1412; C. Amalfitano, *op. cit.* (n. 1), 1019–1021.

10 ECJ, 3 April 2019, case C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A.*, para. 32. See G. Lasagni, "La Corte di giustizia e la definizione

di idem nel diritto della concorrenza: verso la creazione di una nozione uniforme?", *Giurisprudenza commerciale* (forthcoming publication).

11 ECtHR, *Sergey Zolotukhin v Russia*, *op. cit.* (n. 8); and ECJ, 26 February 2013, case C-617/10, *Åkerberg Fransson*, para. 37.

12 ECJ, 26 June 2016, case C-486/14, *Kossowski*, para. 48. See A. Marletta, "A new course for mutual trust in the AFSJ? Transnational ne bis in idem and the determination of the merits of the case in *Kossowski*", (2017) 8 *NJEC*, 108–115; C. Amalfitano, *op. cit.* (n. 1), 1026.

13 ECtHR, 8 July 2019, *Mihalache v Romania* [GC], Appl. No. 54012/10, paras. 97–98.

14 ECtHR, 15 November 2016, *A and B v Norway* [GC], Appl. No. 24130/11 et al.

15 ECJ, 20 March 2018, case C-524/15, *Menci*; ECJ, 20 March 2018, case C-537/16, *Garlsson Real Estate SA*; ECJ, 20 March 2018, cases C-596/16 and C-597/16, *Di Puma and Zecca*.

16 See ECJ, 12 June 2012, case C-617/10, *Åkerberg Fransson*, Opinion of AG Cruz Villalón, para. 83.

17 ECtHR, *A and B v Norway*, *op. cit.* (n. 14), para. 139.

18 ECtHR, *A and B v Norway*, *op. cit.* (n. 14), para. 121.

19 ECtHR, *A and B v Norway*, *op. cit.* (n. 14), para. 130.

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- 20 ECtHR, *A and B v Norway*, *op. cit.* (n. 14), para. 132.
- 21 ECtHR, *A and B v Norway*, *op. cit.* (n. 14), paras. 128 and 134.
- 22 See also M. Luchtman, *op. cit.* (n. 9), 1725–1726; F. Viganò, “La Grande Camera della Corte di Strasburgo su *ne bis in idem* e doppio binario sanzionatorio”, (18 November 2016), *Diritto penale contemporaneo* <<https://www.penalecontemporaneo.it/d/5063-la-grande-camera-della-corte-di-strasburgo-su-ne-bis-in-idem-e-doppio-binario-sanzionatorio>> accessed 30 August 2019; ECJ, *Menci*, *op. cit.* (n. 15), Opinion of AG Campos Sánchez-Bordona, 12 September 2017, paras. 55–56 and 69–73.
- 23 M. Luchtman, *op. cit.* (n. 9), 1727–1728. For critical remarks on this general approach of the ECtHR, see M. Caianiello, “You can’t always counter-balance what you want”, (2017) 25(4), *European Journal of Crime, Criminal Law and Criminal Justice*, 283–298.
- 24 ECtHR, 23 November 2006, *Jussila v Finland* [GC], Appl. No. 73053/01.
- 25 ECtHR, *A and B v Norway*, *op. cit.* (n. 14), para. 133.
- 26 ECtHR, 18 May 2017, *Johannesson and others v Iceland*, Appl. No. 22007/11; ECtHR, 4 December 2018, *Matthildur Ingvarsdottir v Iceland* (dec.), Appl. No. 22779/14; ECtHR, 16 April 2019, *Bjarni Armannsson v Iceland*, Appl. No. 72098/14; ECtHR, 6 June 2019, *Nodet v France*, Appl. No. 47342/14.
- 27 ECtHR, *A and B v Norway*, *op. cit.* (n. 14), para. 144.
- 28 ECtHR, *Nodet v France*, *op. cit.* (n. 26), para. 48.
- 29 ECtHR, *Johannesson and others v Iceland*, *op. cit.* (n. 26), para. 51; ECtHR, *Matthildur Ingvarsdottir v Iceland* (dec.), *op. cit.* (n. 26), para. 58.
- 30 ECtHR, *Sergey Zolotukhin v Russia*, *op. cit.* (n. 8).
- 31 To this effect see also G. Lasagni, *Banking Supervision and Criminal Investigation. Comparing the EU and US Experiences*, 2019, pp. 46–48.
- 32 ECtHR, *Johannesson and others v Iceland*, *op. cit.* (n. 26), para. 51; ECtHR, *Matthildur Ingvarsdottir v Iceland* (dec.), *op. cit.* (n. 26), para. 58; ECtHR, *Nodet v France*, *op. cit.* (n. 26), para. 47; ECtHR, *Bjarni Armannsson v Iceland*, *op. cit.* (n. 26), para. 53.
- 33 M. Luchtman, *op. cit.* (n. 9), 1727.
- 34 To this effect see also A. Galluccio, “Non solo proporzione della pena: la Corte Edu ancora sul *ne bis in idem*”, (7 May 2019), *Diritto penale contemporaneo* <<https://www.penalecontemporaneo.it/d/6662-non-solo-proporzio-ne-della-pena-la-corte-edu-ancora-sul-bis-in-idem>> accessed 30 August 2019; Id., “La Grande Sezione della Corte di giustizia si pronuncia sulle attese questioni pregiudiziali in materia di *bis in idem*”, (21 March 2018) *Diritto penale contemporaneo* <<https://www.penalecontemporaneo.it/d/5931-la-grande-sezione-della-corte-di-justizia-si-pronuncia-sulle-attese-questioni-pregiudiziali-in-mat>> accessed 30 August 2019; M. Scoletta, “Il *ne bis in idem* preso sul serio: la Corte Edu sulla illegittimità del doppio binario francese in materia di abusi di mercato (e i possibili riflessi nell’ordinamento italiano)”, (17 June 2019), *Diritto penale contemporaneo* <<https://www.penalecontemporaneo.it/d/6733-il-ne-bis-in-idem-preso-sul-serio-la-corte-edu-sulla-illegittimita-del-doppio-binario-francese-in-m>> accessed 30 August 2019.
- 35 ECtHR, *Matthildur Ingvarsdottir v Iceland* (dec.), *op. cit.* (n. 26), paras. 60–61.
- 36 For instance, when verifying the compliance with the requirements for effectiveness of the investigation under Artt. 2 and 3 ECHR, see S. Miranda, *The Protection of Human Rights through Criminal Justice: The Right to Effective Criminal Investigations in Europe. An Integrated Analysis between the ECHR and EU Law*, 2017, available at <<http://amsdottorato.unibo.it/8219/>>, p. 47.
- 37 P. Pinto de Albuquerque, Dissenting Opinion, para. 71; M. Luchtman, *op. cit.* (n. 9), 1728.
- 38 ECtHR, *A and B v Norway*, *op. cit.* (n. 14), para. 146; P. Pinto de Albuquerque, Dissenting Opinion, para. 60.
- 39 ECtHR, *Nodet v France*, *op. cit.* (n. 26), para. 49; ECtHR, *Johannesson and others v Iceland*, *op. cit.* (n. 26), para. 53.
- 40 P. Pinto de Albuquerque, Dissenting Opinion, paras. 62–64. To this effect see also A. Galluccio, “Non solo proporzione della pena”, *op. cit.* (n. 35); G. Lasagni, *op. cit.* (n. 32), 48.
- 41 In ECtHR, *Nodet v France*, *op. cit.* (n. 26), paras. 52–53, a lack of sufficient connection in time was found on the ground that the criminal proceedings continued for more than four years after the closing of the administrative ones, even though the two sets of proceedings were conducted in parallel for a significant period (more than two years).
- 42 Although the period in which the second set of proceedings continued (after the final decision in the first one) was very similar, the ECtHR reached opposite conclusions in *Matthildur Ingvarsdottir v Iceland*, *op. cit.* (n. 26), and in *Bjarni Armannsson v Iceland*, *op. cit.* (n. 26).
- 43 See F. Viganò, “Una nuova sentenza di Strasburgo su *ne bis in idem* e reati tributari”, (22 May 2017), *Diritto penale contemporaneo* <<https://www.penalecontemporaneo.it/d/5430-una-nuova-sentenza-di-strasburgo-su-ne-bis-in-idem-e-reati-tributari>> accessed 30 August 2019; ECJ, *Menci*, *op. cit.* (n. 22), paras. 55–56.
- 44 To this effect see also M. Luchtman, *op. cit.* (n. 9), p. 55, who wonders what has been gained by this approach; G. Lasagni, *op. cit.* (n. 32), 47. See also the contribution of F. Desterbeck, in this issue.
- 45 ECJ, 27 May 2014, case C-129/14 PPU, *Criminal proceedings against Zoran Spasic*, paras. 55–59; cf., e.g., J.A.E. Vervaele, “Schengen and Charter-related *ne bis in idem* protection in the Area of Freedom, Security and Justice: M and Zoran Spasic”, (2015) 52 *Common Market Law Review*, 1339–1360; N. Recchia, “Il principio europeo del *ne bis in idem* tra dimensione interna e internazionale”, (2015) *Riv. Trim. dir. pen. cont.*, 71; M. Wasmeier, “*Ne Bis in Idem* and the Enforcement Condition: Balancing Freedom, Security and Justice?”, (2014) 5 *NJECJ*, 534–555; C. Amalfitano, *op. cit.* (n. 1), 1016 ff.
- 46 Cf. Opinion of AG Cruz Villalón, in *Åkerberg Fransson*, *op. cit.* (n. 16), paras. 81–87; ECJ, 21 December 2016, joined cases C-203/15 and C-698/15, *Tele2 Sverige AB v Post- och telestyrelsen* and *Secretary of State for the Home Department v Tom Watson and Others*, para. 127 and case law cited therein. This approach has been defined as ‘Charter-centrism’ by L.R. Glas, J. Krommendijk, “From Opinion 2/13 to Avotiniš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts”, (2017) 17 *Human Rights Law Review*, 567.
- 47 ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 24; ECJ, *Menci*, *op. cit.* (n. 15), para. 22 ff.
- 48 ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 26; ECJ, *Menci*, *op. cit.* (n. 15), para. 24; ECJ, 5 April 2017, joined Cases C-217/15 and C-350/15, *Criminal proceedings against Massimo Orsi and Luciano Baldetti*, para. 15 and case law cited there.
- 49 ECJ, 26 February 2013, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, para. 36.
- 50 See, for all, J. Tomkin, *op. cit.* (n. 8), 1387 ff.
- 51 ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), paras. 42–43; ECJ, *Menci*, *op. cit.* (n. 15), paras. 41–42; ECJ, *Di Puma and Zecca*, *op. cit.* (n. 15), para. 41.
- 52 ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), paras. 46–47; ECJ, *Menci*, *op. cit.* (n. 15), paras. 44–46.
- 53 ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), paras. 44 and 46; ECJ, *Di Puma and Zecca*, *op. cit.* (n. 15), para. 42; ECJ, *Menci*, *op. cit.* (n. 15), para. 44.
- 54 Cf. Directive 2003/6/EC on insider dealing and market manipulation (market abuse), *O.J. L 96*, 12.4.2003, 16–25, now substituted by Directive (EU) 2014/57/EU on criminal sanctions for market abuse, *O.J. L 173*, 12.6.2014, 179–189, and by Regulation (EU) 596/2014 on market abuse, *O.J. L 173*, 12.6.2014, 1–61.
- 55 ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 45; ECJ, *Menci*, *op. cit.* (n. 15), para. 43.
- 56 P. Pinto de Albuquerque, Dissenting Opinion, paras. 49 and 79.
- 57 ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 49; ECJ, *Menci*, *op. cit.* (n. 15), para. 47, cf. A. Galluccio, “La Grande sezione della Corte di giustizia si pronuncia sulle attese questioni pregiudiziali in materia di *bis in idem*”, (21 March 2018), *Diritto penale contemporaneo* <<https://www.penalecontemporaneo.it/d/5931-la-grande-sezione-della-corte-di-justizia-si-pronuncia-sulle-attese-questioni-pregiudiziali-in-mat>> accessed 30 August 2019; M. Luchtman, *op. cit.* (n. 9), 1729 ff.
- 58 ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 48; ECJ, *Menci*, *op. cit.* (n. 15), para. 46.
- 59 ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), paras. 51–63; ECJ, *Menci*, *op. cit.* (n. 15), paras. 49–64.
- 60 ECJ, *Menci*, *op. cit.* (n. 15), para. 56.
- 61 ECJ, *Menci*, *op. cit.* (n. 15), paras. 54–56.
- 62 As provided for in Art. 187i of Legislative Decree No. 58 of 24 February 1998, consolidating all provisions in the field of financial intermediation (the so-called TUF); cf. ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 57.
- 63 ECJ, *Garlsson Real Estate SA*, *op. cit.* (n. 15), para. 57.
- 64 Cf. ECJ, *Di Puma and Zecca*, *op. cit.* (n. 15), paras. 43–44.
- 65 ECJ, 12 September 2017, case C-524/15, *Menci*, Opinion of AG Campos Sánchez-Bordona, paras. 55–56.
- 66 See, V. Covolo, “Guarantees of judicial protection under the ECHR:

what interactions with EU law?”, in: S. Allegrezza, V. Covolo (eds.), *Effective defence rights in criminal proceedings. A European and comparative study on judicial remedies*, 2018, 133 ff.; A. Ruggeri, ““Dialogue” between European and national courts, in the pursuit of the strongest protection of fundamental rights (with specific regard to criminal and procedural law)”, in: S. Ruggeri (ed.), *Human Rights in European Criminal Law*, 2015, 25.

67 Cf. *M. Caianiello*, *op. cit.* (n. 23), 285 ff.

68 ECJ, *Menci*, *op. cit.* (n. 15), paras. 60–62 and in particular, para. 62.

69 Cf. above, Section II (2), and ECtHR, *Nodet v France*, *op. cit.* (n. 26), para. 48.

70 ECJ, *Menci*, *op. cit.* (n. 15), para. 63.

71 ECJ, *Menci*, *op. cit.* (n. 15), para. 44.

72 Cf. G. Lasagni, *op. cit.* (n. 10).

73 See also, G. Ravarani, “Remedies against breaches of defence rights: mutual influence and potential conflicts between the ECHR and the CJEU”, in: S. Allegrezza (ed.), *EU Fair Trial Rights*, (forthcoming publication).

74 See also V. Covolo, *op. cit.* (n. 66), 158.

75 Cf. S. Allegrezza (ed), *The Enforcement Dimension of the Single Supervisory Mechanism (SSM). The Interplay Between Administrative and Criminal Law*, (2019, forthcoming publication); G. Lasagni, *op. cit.* (n. 31).

76 Cf. S. Allegrezza (ed.), *op. cit.* (n. 75); V. Felisatti, “Sanctioning Powers of the European Central Bank and the Ne Bis In Idem Principle within the Single Supervisory Mechanism” (2018) 8 *EuCLR*, 378–403; G. Lasagni, *op. cit.* (n. 31).

Ne bis in idem and Tax Offences

How Belgium Adapted Its Legislation to the Recent Case Law of the ECtHR and the CJEU

Francis Desterbeck

For decades, Belgian fiscal criminal law was governed by the fundamental principle that there had to be an absolute separation between the administrative tax investigations by tax authorities and criminal prosecutions carried out by the public prosecutor. In the light of the recent case law of the European Court of Human Rights and the Court of Justice of the European Union on the duality of administrative and criminal proceedings, this principle could no longer be upheld. A new law passed on 5 May 2019 brought Belgian legislation in line with this supranational case law. A consultation mechanism (introduced in 2012) between the tax administration and the prosecution service to give guidance to tax investigations, has been made more efficient. In order to respect the “*ne bis in idem*” principle, criminal courts must now take into account administrative sanctions of a criminal nature when sentencing tax crimes. The competences of the tax authorities have been changed at the sentencing level, in order to facilitate the recovery of evaded taxes. Within the margin of these fundamental adaptations, some supplementary changes have been carried out to make the system of criminal prosecution more efficient and fairer. This article describes in a practical manner the shift in supranational case law concerning the juxtaposition between administrative and criminal proceedings within the framework of “*ne bis in idem*” and how this case law laid the foundation for the new Belgian law of 5 May 2019

I. Introduction

In no other field than in fiscal criminal law has the tension between criminal and administrative punitive measures caused so much controversy. The case law quickly developed in response to the definition of the criminal nature of proceedings and penalties within the framework of the *ne bis in idem* principle. Belgium adapted its legislation to this most recent supranational case law on 5 May 2019,¹ which now makes the fight against tax fraud more coherent. This article first gives an overview of the international legal basis of *ne bis in idem* and its context in the Belgium legal order (I.). In the second section, the leading cases of the ECtHR and CJEU on the duality

of administrative and criminal sanctions within the *ne bis in idem* principle are briefly explained (II.). The evolution of the Belgian legislation as regards the juxtaposition of administrative and criminal proceedings is presented in section III, and the concluding remarks (IV.) summarise the main statements of the article.

II. *Ne bis in idem* in the National Legal Order

1. General remarks

By virtue of the fundamental legal principle *ne bis in idem*, no one can be tried or punished a second time for an offence for

which he was already punished or acquitted in an earlier final judgment. In international law, this principle also holds true. Art. 14.7 of the International Covenant on Civil and Political Rights (ICCPR)² maintains that “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.”

Under the heading “Right not to be tried or punished twice,” Art. 4.1 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) reads: “No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.” According to the firmly settled case law of the Belgian Supreme Court, the fundamental principle “*ne bis in idem*” in the Belgian legal order follows the same meaning as in Art. 14.7 ICCPR and in Art. 4.1 of Protocol no. 7 to the ECHR.³

Art. 50 of the Charter of Fundamental Rights of the European Union (CFR) actually contains similar wording. Under the heading “Right not to be tried or punished twice in criminal proceedings for the same criminal offence” Art. 50 specifies as follows: “No one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law.” The Charter entered into force on 1 December 2009; it has the same legal value as the Treaties (Art. 6.1 TEU).

Art. 54 of the Convention Implementing the Schengen Agreement (CISA) provides for a transnational *ne bis in idem* clause. However, this article focuses on the application of the *ne bis in idem* rule in the national legal order, thus attaching less importance to the Schengen Agreement.

2. *Ne bis puniri* and *ne bis vexari*

On the basis of the case law of the ECtHR, *P.J. Wattel* distinguishes between two aspects of the *ne bis in idem* principle:⁴ first, the ban on a double punishment (*ne bis puniri*)⁵ and, second, the ban on a double charge (*ne bis vexari*).⁶ Both the *ne bis puniri* aspect (no double punishment) and the *ne bis vexari* aspect (no double charge) can be operationalised in two ways:

As yet, the *ne bis puniri* aspect can be operationalised either by taking account of a previous penalty already imposed for an offence when determining the second penalty for the same

offence. This is the “credit system” (*Anrechnungsprinzip*): the previous penalty is credited against the subsequent second penalty. Or the “cancellation system” (*Erledigungsprinzip*) applies: a previous penalty is cancelled if the trial for the same offence ends in a conviction or an acquittal. In practice, this is only applicable in cases involving fines. The fine is refunded as soon as the second penalty has become final.

The *ne bis vexari* aspect can first be operationalised by an *una via* system.⁷ Administrative proceedings with a view to imposing punitive fines must be discontinued as soon as a criminal indictment is issued for the same offence and criminal proceedings must be discontinued if definitive administrative sanctions are imposed. The second way to operationalise the *ne bis vexari* aspect is the *finality* system. Subsequent criminal or administrative proceedings must be discontinued once previous punitive proceedings for the same conduct have become final.

Before we further analyse how the Belgian legislator has combined a *una via* system regarding the *ne bis vexari* with a credit system as regards the *ne bis puniri* aspect, we will first examine how the case law of the ECtHR and the CJEU concerning the concurrence of administrative punitive measures and criminal indictments for the same offence has evolved.

III. The Case Law of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU)

There has been an emotional and intensive debate on the relationship between administrative punitive measures and criminal indictments in the field of penalties in tax law. Undoubtedly, this has everything to do with the level of both types of sanctions and the case law of the ECtHR, according to which both types of sanctions are criminal in nature. The ECtHR developed its doctrine in the leading case *Engel and Others v. The Netherlands* in 1976.⁸ A first starting point for the assessment of whether a punitive measure is criminal in nature is the classification of the offence in domestic law. However, this criterion is of minor importance.

More decisive criteria are the nature of the offence and the degree of severity of the penalty that the person concerned risks incurring (second and third criteria). The authority who imposes a punishment is totally irrelevant for the application of the *Engel* doctrine to the *ne bis in idem* principle. Administrative measures can be considered criminal in nature, although they are imposed by the tax authorities. Thus, a final administrative punitive measure could preclude a subsequent criminal indictment for the same offence.

The CJEU made recourse to the *Engel* criteria in its *Bonda* judgment.⁹ Interestingly, the *Bonda* judgment is closely related to the protection of the European Union's own financial interests, which the CJEU placed particular emphasis on.

The ECtHR as well as the CJEU developed case law on the concurrence of administrative punitive measures and criminal indictments for the same offence. The decisions of the ECtHR mainly concerned direct taxes and are based on Art. 4.1 of Protocol no. 7 to the ECHR. The decisions of the CJEU concerned taxes harmonised by Union law, such as customs duties, excise duties, capital duties, and especially VAT.¹⁰ The competences of the CJEU relate to the interpretation of the CFR. The relationship between administrative punitive measures and criminal indictments of tax offences was developed by leading cases as discussed in the following.

1. The case law of the ECtHR

a) The *Sergey Zolotukhin / Russia* case of 20 February 2009

The ECtHR's *Zolotukhin* judgment¹¹ did not relate specifically to fiscal criminal law, but had a more general scope. In the case at issue, Sergey Zolotukhin was a soldier who had been found guilty of a number of offences of swearing and disorderly conduct for which he was first sentenced by a court on the basis of the code of administrative offences. In subsequent proceedings, he was convicted by a criminal court for the same offences on the basis of the criminal code.

The ECtHR found that this was not permissible and constituted a breach of Art. 4 of Protocol No. 7 to the ECHR: "The Court takes the view that Art. 4 of Protocol No. 7 must be understood as prohibiting the prosecution of trial of a second 'offence' in so far as it arises from identical facts or facts which are substantially the same."¹² In my opinion, "acts which are substantially the same" are several facts, which form a whole, and which rest on the basis of two indictments, even if the description of the crimes for the two indictments is not necessarily the same. Taking the so-called *Engel* criteria (see above) into consideration, we can conclude that a criminal indictment after a final administrative punitive measure for "substantially the same facts" is simply impossible on the basis of the *Zolotukhin* judgment.

b) The *A and B / Norway* case of 15 November 2016

Unlike the *Zolotukhin* case, the *A and B / Norway* case¹³ specifically concerned fiscal criminal law. In the case at issue, tax surcharges were finally imposed on the applicants in administrative proceedings for failing to declare certain income on their tax returns. In parallel criminal proceedings for the same

omissions, they were convicted and sentenced for tax fraud. The ECtHR held that administrative punitive measures and a subsequent criminal conviction did indeed go together:¹⁴

"[...] the Court thus considers that there was a sufficiently close connection, both in substance and in time, between the decision on the tax penalties and the subsequent criminal conviction for them (= *taxable persons, later on defendants*) to be regarded as forming part of an integral scheme of sanctions under Norwegian law for failure to provide information on a tax return leading to a deficient tax assessment."

Thus, the administrative punitive measure and the criminal penalty must both be essential parts of a coherent system of punishment. In my opinion, such coherency can be clearly shown by a legal provision that allows the criminal court to take into account what was decided with regard to administrative punitive measures and vice versa.

c) The *Jóhannesson / Iceland* case of 18 May 2017

In the *Jóhannesson* case, the ECtHR further defined the meaning of the notion "sufficiently close connection, both in substance and in time."¹⁵ The facts of the case were similar to the ones in *A and B v. Norway*: tax surcharges were imposed on the applicants in administrative proceedings for failing to declare certain income on their tax returns. In subsequent criminal proceedings, they were ultimately convicted of criminal offences in respect of the same omissions and given suspended prison sentences and a fine. The tax surcharges were taken into account when fixing the level of the fine. The ECtHR, however, denied the close connection in substance because the police started its own complete investigation, in spite of the fact that it had access to the tax administration file, and this police investigation with the independently collected and assessed evidence resulted in the applicants' conviction by the Icelandic criminal court. Furthermore, the ECtHR denied a close connection in time because the tax enquiry and the police investigation were conducted simultaneously, in part, for only a short period of time as measured by the overall length of the proceedings.

d) The Belgian case law

The Belgian Supreme Court soon took up the ECtHR's new approach. In its judgment of 21 September 2017,¹⁶ the Court reasoned as follows:

"Article 4.1 of Protocol no. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, as interpreted by the European Court of Human Rights, does not prevent that different procedures to impose tax penalties against the same person for the same facts are set up before one of them is completed, are continued and, if the occasion arises, are completed by a decision to impose a sanction, providing that both procedures are sufficiently close connected, both in substance and in time."

2. The case law of the CJEU

The CJEU's viewpoint concerning the duality of administrative and criminal proceedings within the *ne bis in idem* rule was mainly developed in the judgments *Hans Åkerberg Fransson* of 26 February 2013 and *Menci* of 20 March 2018. In the *Hans Åkerberg Fransson* case, the Court applied the following reasoning:¹⁷

“The *ne bis in idem* principle laid down in Article 50 of the Charter of Fundamental Rights of the European Union does not preclude a Member State from imposing successively, for the same acts of non-compliance with declaration obligations in the field of value added tax, a tax penalty and a criminal penalty in so far as the first penalty is not criminal in nature, a matter which is for the national court to determine.”

However, in *Menci*, the CJEU's rationale was as follows:¹⁸

“Article 50 of the Charter of Fundamental Rights of the European Union must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay value added tax due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of criminal nature for the purposes of Article 50 of the Charter, on condition that that legislation :

- pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating value added tax offences, it being necessary for those proceedings and penalties to pursue additional objectives,
- contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and
- provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.”

According to the Court, it is for the national court to ensure, taking into account all of the circumstances in the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of the proceedings and penalties that that legislation authorises is not excessive in relation to the seriousness of the offence committed.

3. Interim conclusion

One can discern subtle distinctions between the case law of ECtHR and the one of the CJEU. Nevertheless, the case law of both courts have converged towards each other. In the *Menci* judgment the CJEU made repeated references to the ECtHR's *A and B / Norway* case. Both courts consider that a concurrence between an administrative penalty of a criminal nature and criminal sanctions is admissible, even though the administrative penalty of a criminal nature has become final. The concurrence of both types of sanctions must be the subject of

a coherent legal system, so that the taxable person/defendant can take it into account in advance. Furthermore, a reasonableness test must be made, in order to prevent the imposition of unreasonable punishments.

IV. Evolution of the Belgian Legislation

1. Situation before the first “*una via*” law of 20 September 2012

In 1980, Belgium introduced a scheme for an almost complete separation between administrative tax investigations and criminal investigations. Like most countries, Belgium has a legal provision that obliges any civil servant who finds signs of a criminal offence to inform prosecution service immediately. Civil servants belonging to the tax authorities who find signs of a criminal tax offence are under the same obligation, but they need the authorization of their superior for this purpose.

When the tax authorities transferred a dossier to the prosecution service, they adhered to a clear division between the two services that had been set up by law. Civil servants of the tax authorities were not allowed to take part in the criminal investigation. The only measure they were allowed to take was to ask for permission to view the dossier and they could pursue their own tax investigation on the basis of the criminal investigation.

When the dossier that was transferred to the prosecution service led to criminal prosecution, the tax authorities were informed. They could claim damages before the courts, but they were not legally obliged to do so. For the tax authorities, the possibility to claim damages as a plaintiff were rather limited, in particular when direct taxes were concerned.

A cumulation of tax penalties and criminal penalties was explicitly authorized by law. The fines that the criminal judge could inflict were rather limited, but he/she could certainly impose prison sentences, which the tax authorities of course could not.

2. The “*una via*” law of 20 September 2012

The first *una via* approach in Belgium was set up with the law of 20 September 2012.¹⁹ It established the *una via* principle in the prosecution of tax offences and in administrative penalties of a criminal nature. The date of this law is not without importance. The law became effective in the post-*Zolotukhin* but pre-*A and B / Norway* period and before the CJEU's judgments in *Åkerberg Fransson* and *Menci*. In light of the situation at the

time, everyone was convinced that the only type of sanction that could be imposed for tax offences was either an administrative sanction of a criminal nature or a criminal penalty. This point of departure allows us to explore a couple of stipulations in this law. The law of 20 September 2012 introduced a number of innovations:

First, a legal provision was introduced that made consultation between the tax authorities and the prosecution service possible in order to determine which service would continue the investigation. If the tax authorities continued the investigation, it could end with an administrative penalty of a criminal nature; if the prosecution service continued the investigation, criminal penalties could be imposed. This *una via* consultation had to be organized on the initiative and under the authority of the prosecution service, if necessary in the presence of the police. The idea was that, when a judicial investigation was opened, the case was withdrawn from the tax authorities.

Second, a subsidiarity principle was introduced. The prosecution service was entrusted with cases in which coercive measures had to be applied. Only the judicial authorities were competent for these measures, like house searches and arrests. Other cases, in which the application of coercive measures was unnecessary, had to be dealt with by the tax authorities and sanctioned with administrative sanctions of a criminal nature.

Third, and completely following the logic of *Zolotukhin*, the previously existing legal possibility to impose a cumulation of administrative sanctions and criminal penalties was abolished. The level of criminal fines was considerably increased, bringing them up to the same level as the administrative sanctions of a criminal nature.

3. The second “*una via*” law of 5 May 2019

With the recent law of 5 May 2019,²⁰ a solution was found by which to meet the requirements concerning *ne bis in idem*, as understood in supranational case law. Some of the provisions are new, others intend to improve the existing system introduced by the law of 20 September 2012.

a) The *una via* consultation (*ne bis vexari* aspect)

The existing formula of *una via* consultation has been maintained and is compulsory for cases of serious fraud. What “serious fraud” exactly means has to be determined by Royal Decree, thus ensuring a flexible response to altered circumstances if the occasion calls for it. The preliminaries of the law already indicate that the concept must be given a rather wide interpretation.

Delays have been introduced for the consultation, which is also new. The prosecution service is obliged to organise the consultation within a month after receipt of the fraud communication from the tax authorities. Three months after the communication, the counsel of the prosecution must report to the tax authorities as to which facts criminal proceedings will be instituted.

b) Taking into account administrative sanctions of a criminal nature (*ne bis puniri* aspect)

No changes were made in the level of criminal fines, which had already been considerably increased by the first *una via* law (see 2.). At the sentencing level, the new law inserted into all federal fiscal codes a provision making it mandatory for the criminal judge to take into consideration the final administrative sanctions of a criminal nature already imposed for the same facts, in order to avoid excessive penalties in relation to the seriousness of the offence committed. Conversely, in the Code of Criminal Procedure, the following provision was inserted, which clearly bears the stamp of the ECtHR’s reasoning in *A and B / Norway*:²¹

“When the tax administration levies taxes, including surcharges, tax raises and penalties of administrative or criminal nature, for criminal tax offences, this does not prevent criminal proceeding, insofar both administrative and criminal treatment of the facts are part of sufficiently close connection, both in substance and in time.”

c) New form of structural consultation

Also new is the creation of a consultative structure between the tax administration and the Board of Prosecutors General. From now on, the Prosecutor General of Brussels will meet the tax authorities and the federal police twice a year to determine which mechanisms of serious or organized tax fraud demand special attention. Here too, the aim of this new structure is to adjust to new criminal phenomena quickly.

d) The role of tax authorities at the sentencing level

Logically speaking, criminal prosecution in tax matters should lead to the simple recovery of the evaded taxes, as established by the conviction, once the judgment has become final. Up until now, this was not yet the case. However, the new law engenders a fundamental modification: it confers the status of “intervening third party” onto the tax authorities. The tax administration is now informed in a timely manner when a criminal tax case is to be dealt with by the criminal court. The involvement of the tax authorities in the criminal proceedings should allow a full and fair debate before the criminal court judge concerning the amount of payable taxes, even in case of an acquittal. The final judgment is then the document that makes recovery by the tax authorities possible.

The philosophy behind this regulation is that the tax authorities should be able to follow their own direction before the criminal court judge; the outcome of the final judgment on the criminal proceedings should not be left to the discretion of the final judgment in the criminal proceedings. The new provision will of course require changes in the minds of civil servants belonging to the tax administration and of criminal court judges alike. Nevertheless, it is expected that dispute settlement in tax matters will be considerably simplified by the new law.

e) Confiscation of proceeds of crime

In its judgment of 22 October 2003, the Belgian Supreme Court decided that the proceeds of tax fraud are to be considered proceeds of crime that qualify for confiscation.²² Although confiscation of the proceeds of crime from tax fraud is not mandatory, a problem nevertheless exists. A tax debt and proceeds of crime are two different matters. The concept “tax” indicates a general financial contribution required by tax law. The proceeds of crime are a financial benefit, obtained by a crime, which can be confiscated. According to Belgian law, confiscation is considered a punishment.

This approach led to the following problem: Because a tax demand and a confiscation of proceeds of crime have a different nature, it was widely recognised in Belgium that they could be applied together. Thus, the criminal judge’s conviction of a defendant to the forfeiture of a tax demand as a proceed of a tax crime did not prevent the tax authorities to require the payment of the same amount afterwards, this time as a tax debt. As a result, a defendant could be obliged to pay the same amount twice, once as a proceed of crime and once as a tax demand. This could have unfair consequences particularly when a defendant had been trying to settle his case with the tax authorities by paying (part of) the tax demand “voluntarily” before his case was treated by the criminal court, but this attempt had failed.

This problem has in the meantime been solved by the new law by inserting a provision into all fiscal codes, according to which the proceeds of crime from tax fraud cannot be confiscated if the claim by the tax authorities is well founded and leads to an effective payment of the full claim.

V. Concluding Remarks

For decades, Belgian tax criminal law had been governed by the fundamental principle that there has to be an absolute separation between administrative tax investigations by the tax authorities and criminal investigations by the public prosecutor. Moreover, an accumulation of administrative sanctions of a criminal nature and criminal penalties was allowed unconditionally and without restriction. This principal approach could no longer be upheld following the recent case law of the ECtHR and the CJEU since *Zolotukhin*.

Two laws have reconciled the Belgian legislation with supranational case law. The law of 20 September 2012 introduced the *una via* consultation and thus made a dialogue between the tax administration and the counsel of the prosecution possible in order to determine which of the two authorities continues a case. The second law of 5 May 2019 aims to make the *una via* consultation mechanism more efficient and obliges both the tax administration and the counsel of the prosecution to mutually take into account their sanctions/penalties. Within the discretionary margins of these adaptations, some minor changes and supplementary adaptations were carried out to make the system of criminal prosecution more efficient and fair. In my opinion, Belgian legislation in the field of tax offences now passes the test of supranational justice and no longer warrants criticism. It is now up to the national administration of justice to administer the new legislation in practice.

1 Loi portant des dispositions diverses en matière pénale et en matière de cultes, et modifiant la loi du 28 mai 2002 relative à l’euthanasie et le Code pénal social/Wet houdende diverse bepalingen in strafzaken en inzake erediensten, en tot wijziging van de wet van 28 mei 2002 betreffende de euthanasie en van het Sociaal Strafwetboek, *Official Gazette*, 24 May 2019.

2 Treaty of New York of 16 December 1966.

3 Settled case law of the Court of Cassation, a.o. Cass., 24 April 2015, AR nr. F.14.0045.N and Cass., 21 September 2017, AR nr. F.15.0081.N.

4 P.J. Wattel, “Ne bis in idem and tax offences”, in: B. Van Bockel (ed.), *Ne bis in idem in EU Law*, Cambridge University Press, 2016, pp. 172-173.

5 *Nemo debet bis puniri pro uno delicto*.

6 *Nemo debet bis vexari*.

7 *Electa una via non datur resursus ad alteram*.

8 ECtHR, 8 June 1976, *Engel and Others v. The Netherlands*, Appl. no. 5100/71 et al., paras. 82, 83.

9 CJEU (Grand Chamber), 5 June 2012, case C-489/10, *Lukasz Marcin Bonda*, para. 37.

10 Part of the Member States’ VAT receipts are own resources of the European Union.

11 ECtHR (Grand Chamber), 10 February 2009, *Sergey Zolotukhin v. Russia*, Appl. no. 14939/03.

12 ECtHR, *ibid.*, para. 82.

13 ECtHR (Grand Chamber), 15 November 2016, *A and B v. Norway*, Appl. no. 24130/11 and 29758/11.

14 ECtHR, *ibid.*, para. 153.

15 ECtHR, 18 May 2017, *Jóhannesson and Others v. Iceland*, Appl. no. 22007/11.

16 Court of Cassation, 21 September 2017, F.15.0081.N.

17 CJEU (Grand Chamber), 26 February 2013, case C-617/10, *Åklagaren v. Hans Åkerberg Fransson*.

18 CJEU (Grand Chamber), 20 March 2018, case C-524/15, *Criminal proceedings against Luca Mancini*.

19 Loi instaurant le principe « una via » dans le cadre de la poursuite des infractions à la législation fiscale et majorant les amendes pénales fiscales/Wet tot instelling van het « una via »-principe in de vervolging van overtredingen van de fiscale wetgeving en tot verhoging van de fiscale penale boete, *Official Gazette*, 22 October 2012.

20 See endnote 1.

21 Own translation.

22 Court of Cassation, 22 October 2003, AR nr. P.03.0084.F.

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Mutual Recognition of Financial Penalties

Practical Experiences with the Application of Framework Decision 2005/214/JHA in Germany

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This article seeks to demonstrate the practical challenges of enforcing financial penalties EU-wide. The instrument allowing such enforcement – Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties – has been transposed in almost all Member States but little appears to be known about its practical implementation. In Germany, quite remarkable figures have been observed both for incoming and outgoing requests.

I. Introduction

Foreign road users who travel in Germany as well as German road users in other Member States must abide by the respective national traffic regulations: “When in Rome, do as the Romans do!”¹ Road users who do not do so are likely to face prosecution and a financial penalty. Other criminal offences or infringements of the rules of law may of course entail a financial penalty, too. Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties (in the following: FD 005/214)² allows for the EU-wide recognition and execution of such a penalty. As of today, almost all Member States have transposed FD 2005/214 into their national law, and Germany has established bilateral contacts with many of these Member States in order to enhance cooperation under this instrument. Therefore, an account of this cooperation from the German perspective may be of interest. Additionally, the developments on the European level are shown.³

II. Incoming Requests

1. Figures and subject-matter

The competent authority in Germany for all incoming and outgoing requests is the Federal Office of Justice (*Bundesamt für Justiz*) in Bonn. Since October 2010, more than 76,000 decisions from other Member States have been registered (all figures as of 3.6.2019). Until 2015, the figures rose considerably from 6 in 2010 over 2,869 in 2011 to 9,395 in 2014; from 2015 onwards, the figures range between 10,000 and 12,000 decisions per year. This consolidation is mostly due to the fact that almost all decisions are Dutch ones (about 98%). Nearly all Dutch decisions concern traffic offences.⁴

Besides the Netherlands, Belgium, Bulgaria, Estonia, Finland, France, Italy, Croatia, Latvia, Lithuania, Austria, Poland, Portugal, Romania, Sweden, Slovenia, Spain, the Czech Republic, Hungary and the United Kingdom have transmitted decisions to Germany. How British decisions are dealt with in the future

– the United Kingdom transmitted 137 decisions to Germany between 2010 and 2018 – will depend upon the outcome of the Brexit process. All Member States listed above (without the Netherlands) transmitted about 1,300 decisions between October 2010 and June 2019.

Germany has made considerable efforts to promote cooperation on the basis of FD 2005/214. Since 2010, 23 meetings with other Member States have taken place, five of these meetings in 2018 with the Czech Republic, Denmark, Italy, the Netherlands and the Slovak Republic.⁵ In 2019, meetings are planned with Latvia and Lithuania.

The Netherlands and Germany are currently planning to enhance cooperation on the basis of e-CODEX/Me-CODEX so that decisions can be transmitted to Germany via a secure transmission path by 2020/2021. In general, cooperation with the competent Dutch Centraal Justitiele Incassobureau is excellent. Austria, Germany's neighbour and a holiday destination for many Germans, does not transmit many decisions under the EU instrument (FD 2005/214) simply because there is an older bilateral treaty in place between the two countries that captures most traffic offences.⁶

2. Recognition and execution in Germany

68,000 cases (= 90% of all 76,000 cases) have been processed and are closed; 39,000 decisions were successfully recognized and executed. The success ratio is about 57%. The federal budget took in nearly €5.4 million, €900,000 in 2018 alone. This figure does not reflect all the monies obtained from the enforcement of decisions as it does not cover the monies that go to the federal states' (*Länder*) budgets in (the limited number of) cases where courts are involved.

Germany had to refuse recognition and/or execution in about 19,700 cases. The grounds for refusal enlisted in Art. 7 FD 2005/214 do not play a significant role in practice. The most important ground for refusal is simply that the person does not live in Germany anymore or that his or her whereabouts cannot be established. In a limited number of cases that were about traffic offences, Germany refused recognition because decisions were based on the principle of car owner's responsibility, and the car owner objected accordingly upon being heard.

3. Challenges

FD 2005/214 is based on the principle of mutual recognition. It does not harmonize the respective national rules on how a

decision is taken, how it is served upon the person, and how it becomes final. It was never the purpose of FD 2005/214 to do so. All the mentioned items are different from Member State to Member State, but sometimes make cooperation under FD 2005/214 difficult when establishing whether, for example, the person ever received the decision or not.

Checking double criminality may turn out to be complicated and quite time-consuming when it comes to offences like tax offences or offences against weapons regulations – none of them enlisted in Art. 5 para. 1 FD 2005/214, which abolishes the verification of the double criminality of the act for 39 criminal or regulatory offences.

As regards lapse of time, different periods of limitation must be distinguished: First, there is the period of limitation under the law of the issuing State, for example usually five years for Dutch decisions. If this period is over, the issuing State is obliged to withdraw the decision in accordance with Art. 12 FD 2005/214. Additionally, there may be a period of limitation for the recognition decision taken by the executing State. Last, but not least, there is a ground for refusal in Art. 7 para. 2 (c) FD 2005/214 that captures a very specific scenario where the decision relates to acts which fall within the jurisdiction of the executing State and where the execution is statute-barred according to its law. Sometimes, lawyers misunderstand this and claim that the period of limitation that would apply in a purely national case must be applied.

III. Outgoing Requests

1. Figures and subject matter

Since 2011, the Federal Office of Justice received more than 52,000 requests from administrative authorities and public prosecutor's offices in Germany. From the very beginning, figures increased significantly from year to year. In 2018 alone, the figures rose by 16% to about 9,500 decisions (which means that translation for 8,700 certificates had to be arranged and paid for⁷). The more this volume of decisions increases, the stronger the political signal is that a place of residence outside Germany, but in another EU Member State does not protect the person from being held responsible for a traffic offence (or any other criminal offence or infringement of the rules of law) committed in Germany. Of all cases, the percentage of traffic offences amounted to 37% in 2011, but to 91% in 2018.

In 2018, most German requests were – as in the previous years – transmitted to Poland (4,616 decisions), followed by Romania (1,436) and the Netherlands (1,040). With the exception of Ireland, that has not yet transposed FD 2005/214 into its national law, and Greece, that has not yet notified its transpo-

sition, decisions have been transmitted to all other Member States. Until 2018, almost 700 decisions were transmitted to the United Kingdom. With regard to France, Germany decided in 2015 to transmit pilot cases only (since 2016, 116 pilot cases have been transmitted to the French authorities; as of today, 3 of them have been successfully executed). Italy transposed FD 2005/214 in March 2016; with regard to Italy, Germany also decided to transmit pilot cases only; in 2017 and 2018, about 70 such cases were transmitted.

2. Recognition and execution in other Member States

35,000 cases (= 67% of all 52,000 cases) were processed by other Member States and are closed. The success ratio is about 58%, i.e. very similar to incoming decisions. The executing Member States took in nearly €5 million. Again, the most prominent reasons for an unsuccessful execution were not the grounds for refusal under Art. 7 FD 2005/214, but the simple fact that the person had left the country or that his or her whereabouts could not be established or that the person simply did not have the means to pay the financial penalty. Member States' different rules on how the decision is served upon the person, whether it is accompanied by a translation into a language that he or she understands, and how a written procedure takes place and the person is informed of it also led to the refusal of recognition in a limited number of cases. The many bilateral meetings have proven to be very helpful in discussing such issues and in understanding the respective legal systems.

3. Challenges

Transmitting the decision to another Member State does not interrupt the period of limitation under German law. For example, a notice of a fine of up to €1,000 may be executed only three years after it becomes final. Some of this time is already consumed by preparing the request and particularly by translating the certificate; before that, in many cases the administrative authorities and the public prosecutor's offices that are in charge of the national execution will have tried to make the person pay the financial penalty. If the authority in charge in the executing State now decides to grant payment in instalments – fully in line with Art. 9 para. 1 FD 2005/214 according to which the enforcement of the decision shall be governed by the law of the executing State in the same way as a financial penalty of the executing State – many decisions may have to be withdrawn (Art. 12 para. 1 FD 2005/214) because they have become statute-barred in Germany. Ongoing execution in the other Member State, however, may have been successful in the end.

Art. 16 FD 2005/214 provides that the certificate must be translated into the official language of the executing State. There is, however, no language regime foreseen by FD 2005/214 for the “Information from the executing State” (Art. 14 FD 2005/214) on the outcome. Many Member States use, fair enough, their own language while others make the effort to translate this information into German or English. Often, voluminous recognition decisions are translated even though the simple information that the decision has been fully recognized would suffice. In a limited number of cases, the information provided does not correspond to Art. 14 FD 2005/214; this makes additional inquiries necessary. Therefore, a working group at EU level developed standard forms to facilitate communication between the two States involved.⁸

IV. Developments at the European Level

1. Jurisdiction of the European Court of Justice

a) Judgement of 14 November 2013 (C-60/12 – Baláž)

Upon the request by a Czech court for a preliminary ruling, the European Court of Justice had to decide whether the Austrian “Independent Administrative Tribunals” (*Unabhängige Verwaltungssenate*) met the requirement in Art. 1 (a) (ii) and (iii) FD 2005/214 of being a “court having jurisdiction in particular in criminal matters”. The European Court of Justice ruled that this term is an autonomous concept of Union law and must be interpreted as covering any court or tribunal, which applies a procedure that satisfies the essential characteristics of criminal procedure. The „Unabhängige Verwaltungssenate“ fulfil those criteria and must for that reason be regarded as coming within the scope of that term.⁹

This first ruling by the European Court of Justice on FD 2005/214 had a considerable impact on its scope of application: In many Member States, road traffic offences are not criminal offences, but only administrative offences (in Germany: *Ordnungswidrigkeiten*). In a number of these Member States administrative courts decide such cases when they are appealed by the offender. Such systems are now very likely to fall within the scope of FD 2005/214. This matches the idea behind this instrument to capture particularly road offences.¹⁰

b) Pending requests for preliminary rulings

Two more requests for a preliminary ruling by the European Court of Justice are currently pending. On 29 October 2018, the Polish Sąd Rejonowy w Chelmnie referred questions concerning the Dutch system of service of documents and the Dutch principle of car owner's responsibility (Case C-671/18). This case highlights some of the challenges mentioned above for incoming decisions.

The facts of the second case (Case C-183/18), which was also referred by a Polish court, appear to be quite similar to those of the first case at first sight: it concerns a Dutch request to enforce a financial penalty against a legal person for speeding with a car owned by this person. According to Art. 9 para. 3 FD 2005/214, a financial penalty imposed on a legal person shall be enforced even if the executing State does not recognize the principle of criminal liability of legal persons. On 9 March 2018, the Polish Sąd Rejonowy Gdańsk-Południe w Gdańsku referred the question whether the provisions of Art. 1 (a), Art. 9 para. 3 and Art. 20 paras. 1 and 2 (b) FD 2005/214 should be interpreted as meaning that a decision transmitted for execution which imposes a financial penalty on a legal person should be executed in the executing State despite the fact that the national provisions implementing that framework decision do not provide for the possibility of executing a decision which imposes such a penalty on a legal person.

2. European Commission

The European Commission's Directorate-General for Justice and Consumers (DG JUST) is currently analysing practical implementation in the Member States and has commissioned an external agency to do so by a "Questionnaire [...] on the application of Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties". This comprehensive questionnaire covers, for example, communication between the Member States, the use of the standard forms, any obstacles to mutual recognition and execution, the duration of the procedure and the success ratio. Also, an analysis of Member States' transposition of FD 2005/214 is being planned.

3. Standard forms (Art. 14 FD 2005/214)

In 2017, an expert group developed five standard forms covering particularly the information by the executing State under Art. 14 FD 2005/214 on the outcome of the case.¹¹ These standard forms were translated into all official languages and can be retrieved on the EJN website. The two forms that transmit the information on full recognition and full execution of the decision promise to facilitate communication considerably.

As of today, the executing State often enough transmits the recognition decision in its own language, and this decision then needs to be expensively translated by the issuing State, only to learn afterwards that the decision was recognized after all. Some executing States translate this recognition decision themselves before sending it to the issuing State. The idea of the standard forms is to save the effort and the costs of transla-

tion on both sides. Many Member States' authorities (among them the Netherlands, Poland, Bulgaria, Finland, the Slovak Republic, Spain, the Czech Republic and Romania) have begun to use these forms.

4. Revision of the CBE Directive

The European Commission's Directorate-General for Mobility and Transport (DG MOVE) is currently working on a proposal to revise Directive (EU) 2015/413 of the European Parliament and of the Council of 11 March 2015 facilitating cross-border exchange of information on road-safety-related traffic offences ("enforcement-" or "CBE Directive").¹² The Commission intends to facilitate the cross-border enforcement of financial penalties for traffic offences with the aim of a fair and equal treatment of all offenders EU-wide. A proposal shall be tabled in the third quarter of 2021.

In a first "Inception Impact Assessment", the Commission drew the conclusion that there are deficiencies in the current system of mutual recognition. FD 2005/214 is not designed for masses of road traffic offences, but only suitable for more severe criminal offences. The Commission speaks of a missing efficient EU-wide scheme for cross-border enforcement of financial penalties. The basis for the Inception Impact Assessment was a study by an external agency according to which FD 2005/214 is not used in a substantial number of cases concerning sanctions for road traffic offences.¹³

Based on more than 128,000 incoming and outgoing decisions that have been processed by the Federal Office of Justice, a remarkably high percentage of road traffic offences and a success ratio of 57 respectively 58%, it is difficult to share the Commission's preliminary conclusions. The obstacles and challenges when looking at the cross-border enforcement in the field of road traffic offences do not lie so much within FD 2005/214, but elsewhere: in the proceedings that precede FD 2005/214 and that lead to a final decision (or not), for example, service of the decision; safeguarding the rights of the person to be heard and to appeal the decision; its translation.

V. Conclusions

With the adoption of FD 2005/214 the European legislator has created a well-functioning instrument for the cross-border enforcement of financial penalties. The subsequent development of the five standard forms has marked a big improvement in the communication between the executing and the issuing State. There is still room for improvement when it comes to better IT support, to streamlining the communication and to avoiding

media breaks between the different national and international authorities involved. Moreover, some Member States have yet to discover what a valuable contribution to justice in general and to road safety in particular FD 2005/214 can be.

* All views expressed in the text are the personal views of the two authors only.

1 S. Trautmann, "When in Rome, do as the Romans do!", (2018) *Deutsches Autorecht*, 472.

2 O.J. L 76, 22.3.2005, 16 (in Germany transposed by the Act of 18.10.2010, BGBl. I, p. 1408, Sec. 86 et seq. of the German Act on International Cooperation in Criminal Matters), amended by Council Framework Decision 2009/299/JHA of 26 February 2009 (O.J. L 81, 27.3.2009, 24).

3 For earlier developments see C. Johnson, "First Experiences in Germany with Mutual Recognition of Financial Penalties", (2013) *eu crim*, 65.

4 In 2018, the percentage of traffic offences from other Member States than the Netherlands was about 50% of all cases from these Member States; of all Dutch cases, the percentage of traffic offences was about 99.6 %; of all decisions (EU-wide including the Netherlands) having come in between 2010 and 2018, 98.6% concerned traffic offences.

5 Some of these meetings were arranged together with the Federal Ministry of Justice and Consumer Protection (*Bundesministerium der Justiz und für Verbraucherschutz*), some of them by the Federal Office of Justice alone.

6 Treaty on Mutual Legal Assistance in Administrative Matters of 31.5.1988 (BGBl. 1990 II, p. 358). See also K. Brahms, L. Wurzel, and B. Häussermann, "Der Rahmenbeschluss Geldsanktionen – Wo stehen wir nach gut sieben Jahren?", (2018) *Neue Zeitschrift für Strafrecht (NStZ)*, 193, 194. Figures for this bilateral treaty are not available; on the German side, the competences under this treaty are not a matter for the Federation, but one for the federal states (*Länder*). According to its Art. 18, FD 2005/214 shall not preclude the application of bilateral agreements between Member States in so far as such agreements allow the prescriptions of this FD to be exceeded and help to simplify or facilitate further the procedures for the enforcement of financial penalties.

7 Certificates for decisions being transmitted to Austria, Luxembourg and Belgium do not require translation.

8 See below IV.3.

9 The „*Unabhängige Verwaltungssenate*“ were abolished in Austria by 1.1.2014 (see the *Verwaltungsgerichtsbarkeits-Novelle 2012*, Austrian Federal Law Gazette I, Nr. 51/2012).

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10 Please also refer to the judgements of the ECJ of 15 October 2015 (C-216/14 – *Covaci*) and of 22 March 2017 (C 124/16, C-188/16 and C-213/16 – *Tranca et al.*). These judgements deal with the service of German orders of summary punishment (*Strafbefehle*) and with the language regime for appealing such orders; therefore, these judgements will be of importance for the future practical implementation of FD 2005/214, e.g. when another Member State will be requested to recognize and execute such orders.

11 The working group was made up of members from the Netherlands, Poland, Finland and Germany, with coordination and valuable support provided by the European Commission. Four standard forms (Nos. 2–5) cover the communication from the executing to the issuing State while one standard form (No. 1) covers information in the opposite direction, for example the withdrawal of the decision as foreseen in Art. 12 FD 2005/214.

12 O.J. L 68, 13.03.2015, 9; available at: https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2019-1732201_en

13 "Evaluation study on the application of Directive 2011/82/EU facilitating the cross-border exchange of information on road safety related traffic offences; available at: <https://publications.europa.eu/en/publication-detail/-/publication/77b97427-3c33-11e6-a825-01aa75ed71a1/language-en>

Obtaining Records from a Foreign Bank

Note on the Decision of the Federal Court, Washington, DC, of March 18, 2019

Stefan D. Cassella

A federal court in the United States granted a motion to compel two Chinese banks to comply with subpoenas served on their US branches, demanding records of transactions occurring in China. The same court also granted a motion to compel a third Chinese bank that has no US branches to comply with a similar subpoena for foreign records, holding that, because the bank maintains a correspondent account at a US bank, it is required by law to comply with such a demand for records. Those orders have now been affirmed by a federal appellate court in Washington, DC. This article explains the background of the case, the content of the court decision, and its importance.

In the United States, the FBI is investigating a Chinese company that served as a front for a North Korean entity involved in North Korea's nuclear weapons program. The investigation concerns possible violations of the federal money laundering statute,¹ the International Emergency Economic Powers Act (IEEPA),² and the Bank Secrecy Act.³ To obtain records of the Chinese company's financial transactions, the Government served grand jury subpoenas on two Chinese banks that have branches in the United States and a third subpoena on another Chinese bank that has no branches in the U.S. but maintains a correspondent account at a US bank. All three subpoenas sought records of transactions occurring in China. After the banks resisted complying with the subpoenas, the US Government filed motion to a federal court in Washington, DC to enforce them. The following sections will explain what a subpoena is and which types of subpoenas are relevant in the case (I.), which main legal issues the federal court decided in its enforcing decision (II.), and why the decision is important, in particular in view of being an alternative to the mutual legal assistance path (III.).⁴

I. Background: Subpoenas

A grand jury subpoena is a judicial instrument by which the US Government, acting through the office of the federal prosecutor who advises the investigating grand jury, demands records from financial institutions who possess records relevant to an ongoing criminal investigation.⁵ Grand jury subpoenas are issued unilaterally by the grand jury without prior judicial approval, but if the entity on which the subpoena is served resists compliance, the Government must resort to a federal court to enforce compliance.

Such subpoenas are routinely served on domestic financial institutions in the United States. When records are sought from a foreign financial institution that has branches in the USA, the subpoena may be served on any one of the branches, demanding records that the parent bank maintains in its home country. Such grand jury subpoenas are called "*Bank of Nova Scotia* subpoenas" after the case that upheld the use of such subpoenas in criminal investigations.⁶

When records relevant to a criminal investigation are held by a foreign bank that does not maintain any branches in the United States, the Government generally must obtain the records through a bilateral agreement such as a Mutual Legal Assistance Treaty (MLAT). As will be discussed below, however, a provision of the USA Patriot Act, enacted in the wake of the terrorist attacks on September 11, 2001, authorizes the Government to serve a subpoena for foreign records on any foreign bank that maintains a correspondent account

in the United States at a US bank, even if the foreign bank has no branches in the United States. The statute is 31 U.S.C. § 5318(k) and such subpoenas are accordingly called "Section 5318(k) subpoenas."⁷

In the cases at issue, the two Chinese banks that have branches in the USA were therefore served with *Bank of Nova Scotia* subpoenas, and the third bank, which has no US branches, was served with a Section 5318(k) subpoena.

II. Enforcing Compliance with the Subpoenas

All three banks resisted the subpoenas, arguing that the proper procedure for requesting foreign bank records would be to make a request under the Mutual Legal Assistance Agreement (MLAA) between the USA and China. But after waiting nearly a year – during which time the US Department of Justice sent two delegations to China in an unsuccessful attempt to gain China's compliance with numerous outstanding MLAA requests in other cases – the US Government filed motions in a federal court in Washington, DC to compel compliance with the three subpoenas.

In ruling on the motions, the court had to determine two issues:

- whether the subpoenas were enforceable, and
- whether enforcement of the subpoenas would be proper as a matter of international comity.

1. Enforceability

Regarding the issue of enforceability, the court held that it had jurisdiction to enforce the subpoenas for two reasons: the two Chinese banks with branches in the USA had agreed to submit to the jurisdiction of the US courts as a condition of their being granted permission to open US branches; and all three banks maintained the "minimum contacts" with the United States necessary to justify the exercise of jurisdiction in terms of the Due Process Clause of the Fifth Amendment.⁸

In the context of the latter point, another question was whether the Washington court was locally competent to enforce the subpoenas. The banks objected that although the subpoenas were issued in the course of an investigation based in Washington, DC, they were served on their representatives in New York, which is where they conducted business in the United States. Thus, they argued that the Washington court had no authority to enforce the subpoenas. But the court held that the subpoenas were issued in the course of an investigation that was national in scope and thus could be enforced in any court.⁹

Beyond the question of jurisdiction, the third Chinese bank that received the Section 5318(k) subpoena had an additional objection to its enforceability: it argued that the subpoena exceeded the scope of the statute. Under Section 5318(k) any foreign bank maintaining a correspondent account in the United States must, as a condition of maintaining such an account, comply with a subpoena for records “maintained outside the United States relating to the deposit of funds into the foreign bank.”¹⁰ The bank argued that this meant it was required only to provide records of transactions occurring *in the correspondent account*. The court, however, held that a Section 5318(k) subpoena may request *any records* pertaining to the customer whose money flowed through the correspondent account.

The court reasoned that the purpose of a Section 5318(k) subpoena is to determine the source of the money that funded the later movement of money through the correspondent account in the USA. That would include ledgers, account statements, and records of cash deposits and wire transfers showing the source of the money deposited into the Chinese bank *in China*. Thus, the request that the bank produce such records fell within the scope of the statute.¹¹

2. International comity

Turning to the comity issue, the court acknowledged that just because a subpoena served on a foreign bank is enforceable does not mean that it should be enforced. On the latter point, the court referred to several criteria: among other things, a court must consider the importance of the records to the investigation, the lack of alternative means of obtaining them, the competing national interests of the two countries involved, and the potential hardship that might befall the record custodian if its compliance with the subpoena were contrary to local law.¹²

Considering all of these factors, the court determined that “international comity is not a reason to refrain from compelling compliance with the subpoenas.”¹³ Most importantly, according to the court, the investigation in question concerned the national security of the United States but involved no competing national interest of equal importance to China. Moreover, based on the Government’s past experience, the court determined that the MLAA process was unlikely to be a satisfactory alternative means of obtaining the records, and that, while the Chinese banks might suffer sanctions at home if they complied with the subpoenas, such consequences were speculative.¹⁴

Accordingly, the court granted the motions to compel, but the banks nevertheless refused to comply and stated that they intended to appeal. Thus, in a separate order,¹⁵ the court granted the Government’s motion to hold all three banks in civil con-

tempt, directing them to pay \$50,000 per day in penalties until they complied but suspending the imposition of the penalties until the conclusion of the banks’ appeals.¹⁶

Finally, on August 6, 2019, the federal court of appeals sitting in Washington, DC affirmed the orders of the lower court in all respects.¹⁷

III. Importance of the Federal Court’s Decision

As mentioned under I., a *Bank of Nova Scotia* subpoena is a subpoena for foreign bank records that is served on the US branch of a foreign bank that is holding the requested records abroad. While rarely used – because Government policy favors using mutual legal assistance agreements as a first resort – such subpoenas will be enforced if the foreign bank does enough business in the United States to satisfy the “minimum contacts” requirement or, as in this case, if the bank has consented to the jurisdiction of the US courts as a condition of being granted permission by the Federal Reserve to open branches in the USA.

Two of the subpoenas in this case were *Bank of Nova Scotia* subpoenas. Thus, the court’s order upholding the subpoenas and compelling compliance with them on pain of contempt is an important reaffirmation of the US Government’s right to use such instruments to obtain foreign bank records *even when there is a mutual legal assistance agreement between the United States and the foreign Government*. In short, the court holds that, while resorting first to such mutual agreements is favored as a matter of international comity, the fact that such agreements nominally exist on paper is not a bar to exercising alternative means of obtaining records relevant to a criminal investigation if experience shows that the agreements have been ineffective.

The third subpoena was different: contrary to the *Bank of Nova Scotia* subpoena that could be served because the Chinese banks had at least one branch in the US, the third Chinese bank had no such branches. Hence, Section 5318(k) was enacted to close that gap. The key point of the court decision is the following: the rationale for Section 5318(k) is that, even if a foreign bank does not have a US branch, it is nevertheless availing itself of access to the US financial system by maintaining a correspondent account at a US bank (what is its only business in the USA). Thus, the USA may, as a condition of allowing a foreign bank to have such access, require it to comply with a subpoena for foreign bank records. Indeed, the penalty for non-compliance includes barring the foreign bank from maintaining any such correspondent account, thus freezing the bank out of the US financial system.

Section 5318(k) subpoenas are rarely used; the Justice, Treasury, and State Departments are quite skittish about what they consider to be an option of last resort and do not readily grant requests from law enforcement agencies to issue such subpoenas. But this case illustrates that permission can be obtained in some cases.

IV. Conclusion

The United States has a strong national interest in preserving the integrity of its banking system and preventing its misuse by foreign banks and entities engaged in criminal activity. Because of the role that US banks serve in processing international financial transactions, the threat of such abuse is both constant and real. At the same time, the role that US banks play in international finance gives the USA a tool to enforce

compliance with its judicial requests for bank records that may not be available to other countries. It gives the US Government the option of telling a foreign bank, “either comply with our requests for financial records or face exclusion from the US financial system.” Because most foreign banks could not process dollar-denominated transactions without access to a correspondent account at a US bank, a US demand stated in these terms is likely to compel compliance.

Accordingly, while the US financial system is at great risk of being used to launder the proceeds of foreign crime and to finance acts of terrorism, the USA is not without tools to obtain the records it needs to bring criminal prosecutions against the perpetrators of such acts. And as the cases presented in this article illustrate, the USA is not reluctant to use these tools when other methods – such as mutual legal assistance agreements – prove to be of no avail.



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1 18 U.S.C. § 1956-57.

2 50 U.S.C. § 1705.

3 31 U.S.C. § 5311, et seq.

4 An earlier version of this article appeared in Money Laundering and Forfeiture Digest, which is available by subscription on <www.AssetForfeitureLaw.us>.

5 A grand jury is a body of 23 citizens authorized to conduct criminal investigations and issue compulsory process demanding witness testimony and the production of records. While advised by a prosecutor and

supervised by the court, it is an independent body. No criminal indictment may be returned unless approved by a grand jury.

6 *In Re Grand Jury Proceedings, United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982).

7 Section 5318(k) is part of the Bank Secrecy Act, 31 U.S.C. § 5311, et seq.

8 *In Re Grand Jury Investigation*, ___ F. Supp.3d ___, 2019 WL 2170776 (D.D.C. Mar. 18, 2019) (Order Granting Motion to Compel).

9 *Id.*

10 31 U.S.C. § 5318(k)(3)(A)(i).

11 *In Re Grand Jury Investigation*, 2019 WL 2170776.

12 *Id.*

13 *Id.*

14 *Id.*

15 *In Re Grand Jury Investigation*, 2019 WL 2182436 (D.D.C. Apr. 10, 2019) (Contempt Order).

16 The *Washington Post* published a lengthy news article on this case on June 25, 2019: “Chinese bank involved in probe on North Korean sanctions and money laundering faces financial ‘death penalty,’” https://www.washingtonpost.com/local/legal-issues/chinese-bank-involved-in-probe-on-north-korean-sanctions-and-money-laundering-faces-financial-death-penalty/2019/06/22/0ccef3ba-81be-11e9-bce7-40b4105f7ca0_story.html?utm_term=.0dee79dfc5a0.

17 *In Re: Sealed Case*, ___ F.3d ___, 2019 WL 3558735 (D.C. Cir. Aug. 6, 2019).

The HERCULE III Project “Criminal Law Protection of the Financial Interests of the EU” of the University of Miskolc, Faculty of Law *

I. Introduction – Aim of the HERCULE Project

The project “*Criminal law protection of the financial interests of the EU – Focusing on money laundering, tax fraud, corruption and on criminal compliance in the national legal systems with reference to cybercrime (HUUNI-MISKOLC PFI)*” was funded by the European Anti-Fraud Office’s (OLAF) HERCULE III programme (2014–2020) under the section “*Legal Training and Studies 2017.*” The project started in January 2018 with the University of Miskolc as the main coordinator and included academics and legal practitioners from six countries (Austria, Germany, Greece, Hungary, Italy, and Romania).

The general objective of the project was to protect the financial interests of the European Union and to prevent and combat fraud, corruption, and other illicit activities affecting the financial interests of the Union. In this context, the project focused on new practical challenges, e.g. cybercrime. Within the framework of this general objective, more specific objectives of the project were:

- Raising awareness among the branches of legal professions involved in the protection of the EU’s financial interests by organizing international conferences, workshops, and trainings;
- Improving cooperation between practitioners and academics;
- Carrying out comparative analyses of the legal regulation and practice of the Member States involved;
- Exchanging information and best practices;
- Using the results in legal education;
- Examining the relationship between countries participating in the EPPO and those not participating and fostering sensitivity in connection with this question.

II. Project Participants

The project was coordinated by the University of Miskolc, Faculty of Law. The Hungarian project team included *Prof. Dr. Ákos Farkas* (university professor, project manager, former dean of the University of Miskolc), *Dr. habil. Judit Jacsó* (associate professor, project coordinator), *Dr. Bence Udvarhelyi* (assistant professor, project coordinator), *Dr. Erika Váradi-Csema* (associate professor, project member) and *dr. László Dornfeld* (PhD student, project member).

The University of Miskolc had the following cooperation partners: National Office for the Judiciary, Office of the

Prosecutor General of Hungary, National Tax and Customs Administration of B-A-Z County, Hungarian Financial Intelligence Unit of the National Tax and Customs Administration and the tax audit advisory Leitner+Leitner Budapest. Experts from the five other Member States also participated in the project, including *Prof. Dr. Gerhard Dannecker* (University of Heidelberg, Germany), *Prof. Dr. Robert Kert* (Vienna University of Economics and Business, Austria), *Prof. Dr. Richard Soyer* (University of Linz, Austria), *Prof. Dr. Maria Kaiafa-Gbandi* (University of Thessaloniki, Greece), *Prof. Dr. Mirisan Valentin* (University of Oradea, Romania), and *Dr. Vincenzo Carbone* (University of the International Studies of Rome, Italy). Judges, public prosecutors, and other academic and legal experts from the six Member States also participated in the project.

III. Main Events

The *opening conference* of the project entitled “*The Criminal Law Protection of the Financial Interests of the European Union Manifestations with Special Issues*” was organized at the University of Miskolc on 23–24 March 2018. Its aim was to spur a practice-oriented discussion of the main questions and various special forms of criminal law protection of the financial interests of the European Union, in particular by presenting the good practices of the Member States. The conference focused on criminal offences that fall under the legal notion of EU fraud in the narrower sense and on horizontal challenges like cybercrime and compliance.

Two workshops followed the opening conference: The first workshop on corruption and money laundering took place on 2–4 July 2018 and was organised by project members of the Vienna University of Economics and Business and the University of Miskolc. The second workshop on VAT fraud was held on 29–31 October 2018 by the Universities of Oradea and Miskolc. The workshops enabled the local (Austrian and Romanian) practitioners to share their experiences.

The *closing event* of the project was the *Winter Academy “Current questions and answers relating to the criminal law protection of the financial interests of the European Union”* from 14–16 February 2019 at the Hungarian Judicial Academy. The event was organized by the Faculty of Law of the University of Miskolc, the Association of Hungarian Lawyers for the European Criminal Law, the Research Centre for European Criminal Law of the Faculty of Law of the University of Miskolc and the National Office for the Judiciary of Hungary.

IV. HERCULE Winter Academy Lectures

The Winter Academy was opened by *Dr. András Osztoivits*, Director of the Hungarian Judicial Academy; *Dr. Tünde Handó*, President of the National Office for the Judiciary; and *Prof. Dr. Ákos Farkas*, project manager and former dean of the University of Miskolc, Faculty of Law.

The lectures in the *first section* – chaired by *Prof. Dr. Gerhard Dannecker* (University of Heidelberg) – presented the most important theoretical and practical questions in connection with the collection and assessment of evidence in the light of procedural guarantees and the practice of the Court of Justice of the European Union.

Prof. Dr. Ákos Farkas (University of Miskolc) outlined differences in the regulation of evidence collection and assessment in the Member States and the main problems caused by this situation. Some problems still have not been solved, despite the efforts of the European Union in this regard. One possible solution could be to extend the principle of mutual recognition to the collection of evidence; however, this has not yet been successful, because the Member States tend to protect their national sovereignty. *Prof. Farkas* concluded that automatic recognition of the evidence obtained in another Member State is a deadlock; the adoption of common minimum standards is required instead. He added that it would be too slow and time-consuming to decide on the admissibility of evidence in each individual case and that this process could be significantly accelerated by common minimum standards, even if they could not be applied everywhere (for example in connection with experts).

Prof. Dr. Anne Schneider (University of Mannheim) talked about constitutional issues in conjunction with the collection of evidence, focusing on the “hidden” effects of EU law. She argued that decisions by the European Court of Justice in the field of competition law have a hidden, unintentional impact on fundamental rights. In connection with the 2015 *Taricco* case, she pointed out that requiring an effective sanction is contrary to the system of procedural guarantees, which could result in more preliminary rulings in the future.

Dr. Vanessa Seibel (public prosecutor, Public Prosecutor’s Office of Mannheim) dealt with the consequences of the inadmissibility of evidence and demonstrated how the strictness of the admissibility tests has changed in certain Member States over the years. The major problem in the system is the lack of clear rules; however, this can also be beneficial, since the lack could give the authorities involved more leeway. There is currently no specific test for when the acquisition of evidence has violated fundamental rights, which poses a serious problem in practice. In her view, the ideal solution could be to use the EU rules on fair trial as a benchmark.

Dr. Oliver Landwehr (Senior Legal and Policy Officer, European Commission, OLAF) analysed the changing role

of OLAF in investigations. OLAF is a “hybrid” organisation that conducts administrative investigations in criminal matters without criminal enforcement power, since it can only make recommendations. The legal status of the organization is evolving, for example in connection with the collection and admission of evidence, because there are currently no administrative procedures in many Member States according to which the evidence gathered could be taken into consideration. In the future, criminal investigations will be conducted by the European Public Prosecutor’s Office (EPPO). Lastly, he presented a proposal of the Commission on the division of competences and cooperation between OLAF and the EPPO, according to which the two organizations cannot investigate the same case but can assist each other.

Dr. Gábor Gál (Member of the Competition Commission, Hungarian Competition Authority) addressed European competition law. He presented the different types of cartels using examples and the responses of EU law, e.g., the European Competition Network, which allows cooperation between the authorities of the Member States and the EU. He mentioned methods to increase efficiency in the fight against cartels, e.g., the regulation on whistleblowers in Hungary, according to which informants receive a sum of money equivalent to 1% of the fines imposed. *Prof. Dr. Gerhard Dannecker* commented that good practices and procedures in the field of cartel law can serve as a model for future cooperation between the EPPO and Member States.

Dr. János Bóka (State Secretary responsible for EU and international judicial cooperation, Ministry of Justice, Hungary) welcomed the participants on the second day of the Winter Academy. In the *second section* – also chaired by *Prof. Dr. Gerhard Dannecker* – lectures focused on implementation of Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law (PIF Directive). *Dr. Franz Reger* (Former Head of the Department of Fiscal Penal Law, Ministry of Finance, Austria), emphasized the need for proper implementation of the PIF Directive in connection with VAT fraud. The fight against VAT fraud is in the interest of the Member States. It is an important development that the scope of the PIF Directive covers VAT fraud. This provision is also in line with the objective of the EPPO, which focuses on the cross-border commission of crimes. He further addressed the criminalization of filing a proper tax return, which may seem problematic, but may be justified if the intention is to avoid paying tax in the case of a missing trader.

Kai Sackreuther (public prosecutor, Public Prosecutor’s Office of Mannheim) tackled the issuing of bogus invoices. He stated that nowadays there is no carousel fraud without the use of bogus invoices and underlined the role of fictitious companies issuing bogus invoices, which contribute to the current system of tax fraud. In cases involving criminal organisations, this method is used as a

means to conceal bribery fees and to pay illegal workers. The fictitious companies often change their headquarters and stay undetected for years because of more lenient regulation for small businesses. In Germany, this means that more prosecutors have to be often involved in a case.

Prof. Dr. Robert Kert (Vienna University of Economics and Business) focused on the provisions of the PIF Directive and the new EU Directive 2018/1673 on combating money laundering by criminal law. One of the most important differences between the instruments is that the latter includes self-laundering as an offense. In this context, it may be problematic for Member States to decide whether tax savings could be the subject of money laundering. Prof. Kert pointed out that personal savings cannot be considered in the same way; it would violate the principle of proportionality if all tax evasions were to be considered money laundering. *Prof. Dr. Gerhard Dannecker* commented that, under German law, the entire amount could be confiscated if 10% of the assets in an account are considered "dirty;" however, this regulation is considered to be too strict and will be changed.

Prof. Dr. Maria Kaiafa-Gbandi (University of Thessaloniki) presented the CJEU's decisions in *Hans Åkerberg Fransson*, *Menci* and *Taricco I/II*. She specified the importance of these judgements for Member States' judiciaries, which serve the proper administration of justice in an institutionally multilevel and highly sensitive judicial area. By comparing the judgements in *Hans Åkerberg Fransson* and *Menci* (with regard to the enforcement of the *ne bis in idem* principle between administrative and criminal sanctions), she concluded that the Court pulled back from its initial stance in *Menci* and favored the protection of EU's financial interests. The *Taricco I* judgment may have unforeseeable consequences if the limitation period does not apply due to the requirement of effective protection of the EU's financial interests, but the Court rightly modified its decision in *Taricco II*. An overview of her presentation offered guidance to national judges as to an effective protection of fundamental rights in their national laws, but also raised awareness of the importance of vigilance in future activities in this direction in collaboration with the competent bodies of the EU legal order.

The *third section* – chaired by *Prof. Dr. Richard Soyer* (University of Linz) – focused on the theoretical and practical issues surrounding the protection of the financial interests of the European Union. *Dr. János Homonnai* (public prosecutor, Office of the Prosecutor General of Hungary) analysed the fight against corruption from the point of view of the prosecutors. After briefly describing the Hungarian rules of bribery, he turned to the problems of investigation. In this context, he highlighted the consensual nature of the criminal offence, the lack of direct evidence, and the importance of collecting and scrutinizing indirect evidence, subsequently presenting the "hidden" investigative measures. In conclusion, he proposed exemption of the co-operating defendant

from criminal liability, augmentation of the protection of whistleblowers, and easier availability of electronic and financial data.

Dr. Judit Szabó (judge, Tribunal of the Capital) and *Dr. Péter Pfeifer* (judge, Tribunal of Veszprém) discussed the topic of money laundering and corruption in judicial practice. After presenting statistical data on corruption, international surveys, and the importance of latency, Dr. Pfeifer explained the relevant domestic regulations and recounted some of the recent decisions of the Hungarian Curia. For example, according to the judicial practice of the Hungarian Curia, passive corruption is committed in every case in which the perpetrator accepts money. Active corruption can only be punished if the bribed person expressed the intent to exert influence during his/her term of office. Dr. Szabó briefly described the Hungarian regulation on money laundering and the relationship between bribery and money laundering. She presented the recommendations of MONEYVAL 2016 on Hungary and their legal transposition. She also gave statistics on improvements in both the number of cases and the length of procedures. Her presentation was rounded off by exploring problematic questions in judicial practice concerning legal regulations like the question of value limits and the legal definition of "asset" and "account money."

The *fourth section* was dedicated to the establishment of the European Public Prosecutor's Office. It was chaired by *Prof. Dr. Erika Róth* (University of Miskolc). *Prof. Dr. Péter Polt* (Prosecutor General of Hungary) presented the process of establishment of the EPPO, including its development and major changes in the draft regulation over time. According to Polt, the regulation does not achieve its most important objective, i.e., the unified fight against criminal offences threatening the EU's financial interests. The difference between minimum and maximum penalties raises the possibility of forum shopping. He also believes that the current college model, in which prosecutors are members of both national and European organizations, seriously undermines the sovereignty of the Member States. Instead of this model, a network model should have been established, because it has already been proven to be an effective, less bureaucratic alternative in many cases. From his point of view, it would not harm national sovereignty if the EPPO were to act as a private prosecutor, based on the fact that the European Union can be considered a the victim of the crimes in question – an issue which would, however, require further legislation. He also clarified the need for an agreement between the non-participating Member States and the EPPO so that the system can work well in the future.

Prof. Dr. Valentin Mirisan (Dean, University of Oradea) and *Dr. Christian Miheș* (University of Oradea) analysed the most important steps leading to the establishment of the EPPO, its purpose, and the regulations governing the functioning of this new body. They explained the reasons why they consider its establishment an important step

forward. They also discussed the position of Romania, which was the only Member State in which the opinion on respect for subsidiarity differed between the two chambers of the Parliament: whereas the lower house rejected it (and hence also the creation of the EPPO), the Senate took the opposite stance.

Dr. Stefan Schumann (University of Linz) probed the issue of the EPPO's competences in the light of the general division of competences between the European Union and the Member States. In his opinion, the determination of the scope of the EPPO is too vague. If the EPPO proves to be successful, however, its scope can be extended to additional crimes. He analysed the jurisdictional conflict of the applicable laws of Member States, forum shopping and the role of the EU law, including the practice of the ECJ and the statutes of the Charter of Fundamental Rights of the EU. He drew attention to the fact that, if these latter were the basis for cooperation, it would be necessary to include rules on guarantees beyond the minimum standards set by the EU. However, if the Member States' regulations are adjusted to the minimum, this could result in the erosion of the procedural guarantees.

V. Résumé

On the last day of the Winter Academy, participants also discussed the results of the conference. The organizers presented the final document, which contained conclusions on the various topics discussed during the above-mentioned main events.

In sum, approximately 100 Winter Academy participants attended highly informative professional lectures, which were accompanied by a lively professional discourse. The closing conference made the complexity of the topics readily apparent. Legal experts with a theoretical approach, on the one hand, and those with a practice-oriented approach, on the other, exchanged their views on the various issues brought forth during the event.

The organizers feel that the HERCULE Winter Academy achieved its goal and provided an opportunity for a theoretical and practice-oriented review of a wide range of professional issues. It also served to build collegial relationships and foster informal exchanges of information.

The written and edited versions of the presentations of the HERCULE project were published in a collective volume in English and Hungarian. The volume "Criminal Law Aspects of the Protection of the Financial Interest of the European Union with particular emphasis on the national legislation on money laundering, tax fraud, corruption and criminal compliance with reference to cybercrime" was published by Wolters Kluwer (2019). The publication can be useful both for domestic and foreign lawyers (academics and legal practitioners alike). It can also be consulted for legal training.

More information about the activities, results, and conclusions of the project as well as the lectures and articles from the international conferences and workshops can be found on the project website: <https://hercule.unimiskolc.hu/EN>

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* This publication was funded by the European Union's HERCULE III programme. The content of this publication represents the views of the authors only and is his/her sole responsibility. The European Commission does not accept any responsibility for use that may be made of the information it contains.

Imprint

Impressum

Published by:

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

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



MAX-PLANCK-GESellschaft

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

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



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