



### **Focus: Forms of Crime Control**

**Dossier particulier: Les formes de lutte contre la criminalité**

**Schwerpunktthema: Formen der Kriminalitätskontrolle**

Editorial

Prof. Dr. Dr. h.c. mult. *Ulrich Sieber*,

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Are EU Administrative Penalties Reshaping the Estonian System of Sanctions?

*Andreas Kangur*, PhD, *Alexander Lott*, PhD, and *Anneli Soo*, PhD

Limits to European Harmonisation of Criminal Law

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European Implementation Assessment 2004–2020 on the European Arrest Warrant

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Human Rights-Based Approach to Combat Transnational Crime

*Varun VM*

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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# Editorial

The special coronavirus recovery fund of the EU is to provide €750 billion for the years 2021–2023. In addition, the new EU multi-annual financial framework will amount to €1074 billion, including significant amounts earmarked for corona aid and other subsidies. Considering additionally that national and regional budgets also provide for similar aid, there will ultimately be an unprecedented increase in subsidies and thus a huge potential booty for criminals. A considerable number of corona subsidy fraud cases have already shown up in the Member States, including fake websites and phishing mails redirecting corona aid to criminals' accounts, multiple applications, claims filed for non-existing companies or false data provided by applicants. Clearly, the respective public funds must be protected against such fraud and abuse. For this to be achieved, we have to understand the reasons for these abuses (I.), in order to develop specific countermeasures (II.) and to generally improve our basic concepts of criminal policy (III).

## I.

Subsidies are prone to fraud and corruption for a number of particular reasons:

- First, the granting of subsidies is especially susceptible to fraud since money is provided without a *quid pro quo*. Thus, this procedure lacks the natural *control element of compensation*, as was already described in the pioneering empirical studies by Prof. Klaus Tiedemann in the 1970s.
- Second, this “criminogenic factor” of subsidies is even stronger if they are administered by *national authorities*, but paid from *European coffers*, or similarly if funds of the central state are administered by regional institutions. This is especially the case if restitution of wrongful payments or flat rate financial corrections might have to be reimbursed to the EU by the administering national authorities.
- Third, new financial regulations created during *system changes and crises*, as today, can be particularly vulnerable to fraud when they are drafted and applied in haste, often without previous relevant experience. This effect can be aggravated by the political desire for “speed over thoroughness” in order to demonstrate political leadership and decisive action.
- Fourth, for decades, highly paid lawyers, tax consultants, economists and bankers have been *systematically analyzing new financial regulations* with respect to possible loopholes

and weaknesses to be exploited. The recent “cum/ex” banking scandals are a case in point.

■ Fifth, EU subsidy rules can be especially prone to such legal loopholes since they are often developed as *political compromises*: As a former EU Commissioner responsible for budget control once explained to me: “If parties do not find a compromise after nightlong EU negotiations, they agree on terms which each party can interpret in their own sense”.

■ Sixth, the huge volume of subsidies will create additional incentives for *corruption*, both on the political level and on the levels of specifying the technical details of regulations and their application, thus leading to additional loopholes, a greater risk of misappropriations and tolerated fraudulence.

■ Seventh, in many areas, our current control system against crime relies too much on (repressive) criminal law and *neglects (preventive) control measures*. According to police sources, the German coronavirus emergency aid program in the federal state of Berlin was at first implemented with almost no controls, which has already led to more than one thousand investigations. Freedom from bureaucracy was confused with freedom from controls, thus creating invitations and “rallies” to fraud. The above-mentioned cum/ex banking scandal and the recent Wirecard case (both with damages of far above a billion Euros) are also perfect examples for the disastrous consequences of a “symbolic” and ineffective policy lacking effective preventive controls.

## II.

In order to avoid widespread coronavirus aid fraud, criminal policy must not only focus on penal law, but must also comprise measures based on a variety of pillars and legal regimes. Relying instead only on criminal law would be comparable to a soccer team playing with only one player and dispensing



Ulrich Sieber

with the other ten. The consequences of this insight for the prevention of subsidy fraud must include:

- First, *raising awareness* of politicians, administrators, law enforcement officers, auditors and the judiciary with respect to the new threats and preventive needs, including knowledge exchange on common fraud typologies and on special detection tools. This could be coordinated on all levels by OLAF (with its long experience and substantial knowledge on subsidy fraud and with its Irregularities Management System) and by Europol (with the new European Financial and Economic Crime Center).

- Second, *drafting subsidy laws only in cooperation with anti-fraud specialists or committees* in order to ensure basic anti-fraud requirements in the relevant regulations, such as clear definitions of the subsidy aims, abuse of law clauses and reliable identification measures for the recipients of financial aid. Just increasing some general figures in budget acts and establishing hastily written administrative regulations does not guarantee the achievement of the intended aims and is also questionable with respect to the requirement of parliamentary approval. European subsidies also cannot be entrusted to Member States lacking an independent judiciary capable of preventing an abusive diversion of subsidies.

- Third, *applying effective and proportional preventive control measures and audits*, which should not require a suspicion (as is indispensable for interventions of criminal law) but be primarily based on risk analyses, data mining and – possibly – artificial intelligence. This should be accompanied by leniency programs, which are highly successful in the field of European and national cartel law; remunerations for whistleblowers should also be discussed; sufficient funds for effective supervision must already be provided for in the programs.

- Fourth, *developing an effective system of money laundering controls*, focusing on intelligence gathering for the analysis of illegal money flows by using an overarching analysis of national and international suspicious money flows and additional data.

- Fifth, *establishing specific restitution procedures for subsidies as well as general non-criminal (“civil”) confiscation schemes*, in which non-explanation of the origin of certain proceeds can be used as part of the necessary evidence. Together with the afore-mentioned intelligence-based money laundering control systems, these (non criminal) confiscation schemes are needed as a general instrument against complex organized crime, but can also be helpful in the field of subsidy fraud for identifying and investigating the respective perpetrators and financial profiteers.

- Sixth, *using a comprehensive and bilateral sanction regime* that includes both: national *core criminal law* with effective transnational cooperation procedures as well as national and supranational *administrative sanction law* with special preventive powers, such as exclusion from future funding.

Administrative sanction laws can indeed be more flexible than core criminal law, yet the various EU laws with administrative sanctions – for example in subsidy law, cartel law and banking law – require a codified body of general rules and human rights safeguards.

- Seventh, *combining and strengthening all these measures under a coherent security architecture*, especially by defining the information flows between the various actors, such as OLAF (applying an administrative regime), the EPPO (dealing with the repressive criminal law systems), Europol (as a criminal intelligence hub) and the various national authorities. Using again the above soccer simile: The eleven players must not only be present on the field, but they must also act as a unit.

### III.

This rudimentary compilation of anti-fraud measures illustrates the following not only for subsidy fraud but also in general and for other fields of crime: An effective protection against complex crimes cannot only rely on penal law, but requires a variety of measures and regulations from different legal regimes forming a coherent security architecture in combination with tailored legal safeguards. As already mentioned: This general insight of modern legal policy is today not only valid in the field of subsidy fraud, but is at least equally important in other fields of complex crimes, such as economic crime, corruption, organized crime and terrorism.

This general change in criminal policy must also be considered in academia and future research. As a consequence, the traditional Max Planck Institute for Foreign and International Criminal Law has expanded: In addition to its two departments of criminology and of criminal law, it now has a new third department of public law, and from this year onwards is called the Max Planck Institute for the Study of Crime, Security and Law. In the future, *eu crim* will also increasingly reflect this fundamental shift of modern criminal policy by increasingly paying attention to alternative (non-criminal) measures of crime control with the resulting new architecture of security law and correspondingly tailored human rights. This new policy should change *eu crim* from a periodical on “*European Criminal Law*” to a broader journal on “*European Crime Control*”, which will encompass in a wider sense prevention, detection, restitution, intelligence gathering and prosecution of transnational and especially European crime. The articles of this issue show that the present issue represents a first step on this new path.

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## European Union

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

### Foundations

#### Fundamental Rights

##### COVID-19: Lawyers' Organisations Voice Concerns Over Impact on Individuals Rights

During the confinement period to curb the COVID-19 pandemic, the right of any person to due process has been severely threatened. In a [statement of 20 May 2020](#), the CCBE urged European institutions and all Member States to overcome the current paralysis of judicial systems by:

- Facilitating the complete reactivation of justice systems in Europe, while promoting health and safety measures;
- Investing in justice (e.g., IT court case management systems) and legal aid;
- Providing support to lawyers;
- Promoting access to justice.

The statement concludes that an increase in legal aid funds and the (temporary) possibility to make advance payments to legal aid lawyers may already help lawyers overcome liquidity problems and survive the crisis while still providing legal aid services to clients.

Fair Trials International established a website – [the COVID-19 Justice Project](#) – that collects news on how the rights of suspects and prisoners have been affected in times of crisis. The website aims at highlighting unjustified curtailment of rights and share global lessons on how states can pursue fair, workable responses to the many challenges that justice systems are facing during the crisis. The website includes updates; users can report on new developments in their countries. By means of an interactive map, the public can select countries and view updates on different topics. (TW)

##### EP Resolution on COVID-19 Pandemic and its Consequences

On 17 April 2020, the [EP adopted a resolution](#) that deals with a wide range of topics on how the EU can overcome the current COVID-19 pandemic and what the follow-up could look like. MEPs call, *inter alia*, for a massive recovery and reconstruction package to be financed by an increased long-term budget (MFF), existing EU funds, and financial instruments as well as “recovery bonds” guaranteed by the EU budget. In addition, an EU coronavirus solidarity

fund (with at least €50 billion) should be established. It should be designed to make healthcare systems more resilient and focus on those most in need. Other demands include:

- Joint European Action – which is considered indispensable – to combat the COVID-19 pandemic;
- Greater powers for the EU to act in cases of cross-border health threats;
- Borders being kept open for essential goods;
- A coordinated post-lockdown approach in the EU in order to avoid a resurgence of the virus;
- A European information source to ensure that all citizens have access to accurate and verified information, which should help stop disinformation.

The resolution also contains strong concerns over the threat to the rule of law and other EU values through recent governmental measures in Hungary and Poland on emergence of the corona crisis. The Commission and Council are now called on to make use of the available EU tools and sanctions to address the serious and persisting breaches by these two EU Member States. (TW)

##### FRA: Fundamental Rights Implications of the Coronavirus Pandemic

The European Union Agency for Fundamental Rights compiled a [bulletin](#) on the fundamental rights implications of the coronavirus pandemic in the EU. The bulletin, which covers the period from

\* If not stated otherwise, the news in the following sections cover the period 1 April – 31 July 2020. Have also a look at the eucrim homepage (<https://eucrim.eu>) where all news have been published beforehand.

1 February to 20 March 2020, scrutinizes the measures taken by the EU Member States to address the coronavirus outbreak. It includes topics such as the restrictions on freedom of movement and their impact on daily life. Furthermore, it analyses the impact of the outbreak on specific groups in society, identifies discriminating and xenophobic incidents, and describes the fight against disinformation. The bulletin is the first of a series of three-monthly reports on the impact of the coronavirus (COVID-19) across the 27 EU Member States (for the second report, see separate news item) (CR)

### Poland: Recent Rule-of-Law Developments

This news item continues the overview provided in eucrim 1/2020, p. 2 on actions/regulations that triggered controversies on maintenance of the rule of law in Poland.

■ May/June 2020: The ECtHR informs the public of the [state of play of various applications](#) by Polish judges, lawyers, and citizens against the judicial reform in Poland. The cases are:

■ [Grzęda v. Poland](#) (application no. 43572/18): premature termination of the mandate of a Supreme Administrative Court judge elected to the National Council of the Judiciary (NCL);

■ [Xero Flor w Polsce sp. z o.o. v. Poland](#) (application no. 4907/18): company complaint over the Polish courts' refusals to refer legal questions to the Constitutional Court on the constitutionality of Polish acts and regulations. The complaint also targets the unlawful composition of the bench of judges at the Constitutional Court, which ruled on the inadmissibility of the company's constitutional complaint;

■ [Broda v. Poland](#) and [Bojara v. Poland](#) (application nos. 26691/18 and 27367/18): dismissal of two judges before the end of their regular term of office by the Polish Minister of Justice on the basis of the new law on the organisation of the ordinary courts;

■ [Żurek v. Poland](#) (application no. 39650/18): complaint about premature termination of a judge's mandate as a member of the NCL, his removal as spokesman of that organ, and the alleged campaign to silence him;

■ [Sobczyńska and Others v. Poland](#) (applications nos. 62765/14, 62769/14, 62772/14 and 11708/18): refusal to appoint judges and a public prosecutor to fill vacant judicial posts; complaint about the administrative courts' and the Constitutional Court's refusals to examine their appeals, declining jurisdiction in that sphere;

■ [Reczkowicz & others v. Poland](#) (application nos. 43447/19, 49868/19, and 57511/19): complaint about the constitution of the Polish Supreme Court, which decided on the cases of the applicants, as not being an "independent and impartial tribunal established by law". The applicants in this case refer in particular to the CJEU judgment of 19 November 2019 in Joined Cases [C-585/18](#), [C-624/18](#) and [C-625/18](#) (see eucrim 3/2019, p. 155) and subsequent rulings by the Polish Supreme Court, which found that the appointment procedure of judges of the Supreme Court involving the NCJ was illegal.

■ 2 June 2020: The Chamber of Extraordinary Verification and Public Affairs (IKNiSP) [revokes a decision](#) by the NCJ that recommended a government-friendly judge become a Supreme Court judge. The IKNiSP, inter alia, argued using EU law whose full effectiveness must be ensured. It points out that the appointment procedure, which does not allow appeals, is contrary to Art. 47 CFR. In addition, the Chamber believes that the recommendation of the candidate is not in line with the reasoning of the CJEU's judgment of 19 November 2019 (see above).

■ 3 June 2020: The European Commission threatens that the EU will [no longer provide EU cohesion funds](#) if Polish provinces do not respect EU values, in particular the principle of non-discrimination. In a letter to the heads of five

Polish administrative provinces, two top officials of the [Commission identify local authorities that declared themselves "free from LGBT ideology"](#) or adopted "charters of family rights." The letter clarifies that discriminatory actions against any citizens may negatively influence the amount of EU funds to Poland in the future. Beneficiaries must uphold common EU values. The Commission's intervention comes alongside an [EP resolution](#) of December 2019 that condemned the discriminatory actions of Polish local authorities against LGBT persons.

■ 9 June 2020: The Disciplinary Chamber of the Polish Supreme Court [deliberates on the lifting of the immunity](#) of judge [Igor Tuleya](#) who is a critical voice of the ruling PiS party. Although the chamber decided to uphold the judge's immunity, the meeting is criticized by judges and human rights associations. They found a clear breach of the CJEU's injunction of 8 April 2020 (see eucrim 1/2020, p. 4), which ordered Poland to suspend the work of the new disciplinary board.

■ 16 July 2020: The majority of MEPs in the LIBE Committee votes in favour of an [amended text](#) to the draft [interim report](#) by their chair Juan Fernando López Aguilar (S&D, ES) on how to proceed with the [Article 7\(1\) procedure](#) against Poland (for the interim report, see also eucrim 1/2020, p. 4). MEPs found "overwhelming evidence" of rule-of-law breaches in Poland and ask the Council and Commission to also keep an eye on fundamental rights. The motion for an EP resolution reiterates that Poland has systemically threatened the values of Art. 2 TEU, and the facts and trends constitute a clear risk of a serious breach thereof. Noting that the last hearing within the Article 7 procedure (which, in the end, may lead to sanctions against Poland) took place in December 2018, MEPs urge the Council to resume the Article 7 procedure and to finally act by finding that there is a clear risk of a serious breach by the Republic of

Poland, so that the procedure can continue. In addition, the Council and the Commission are called on to interpret the principle of the rule of law within the procedure under Article 7(1) TEU in a broader sense and to include all EU core principles. The motion for the EP resolution is forwarded to the plenary, which is to vote on it in September 2020. (TW)

### Hungary: Latest Rule-of-Law Developments

This news item continues the overview given in [eucrim 1/2020](#), pp. 4 et seq. of recent events causing Hungary to struggle with European institutions as regards the country's move away from the EU rule-of-law values.

■ 18 May 2020: The Chair of the European Data Protection Board (EDPB), *Andrea Jelinek*, voices concern over the move on the part of the [Hungarian government to suspend certain obligations under the GDPR](#). The suspension includes the rights to access and erasure of personal data, the obligation of authorities to notify individuals, and judicial remedies. It is part of the powers conferred by the state-of-emergency law – passed following the coronavirus outbreak in the country (see [eucrim 1/2020](#), p. 5). In a subsequent [statement of 3 June 2020](#), the EDPB clarifies that the rights of data subjects can be restricted by legislative measures only under strict conditions (Art. 23 GDPR). The EDPB reiterates that, “even in these exceptional times, the protection of personal data must be upheld in all emergency measures, thus contributing to the respect of the overarching values of democracy, rule of law and fundamental rights on which the Union is founded.”

■ 18 June 2020: the Grand Chamber of the CJEU rules that restrictions imposed by Hungary on the financing of civil organisations by persons established outside Hungary do not comply with EU law ([Case C-78/18](#)). The Hungarian “Transparency Law” (passed in 2017) imposed obligations of registration, declaration, and publication on certain

categories of civil society organisations directly or indirectly receiving support from abroad and exceeding a certain threshold; it also provided for the possibility to apply penalties to organisations that do not comply with those obligations. Critics considered the law a piece of knee-jerk legislation, passed in order to curb donations to NGOs by *George Soros*. The law was made subject to infringement proceedings by the Commission. The judges in Luxembourg conclude that the restrictions run counter to the obligations on Member States in respect of the free movement of capital laid down in Art. 63 TFEU. In addition, both the organisations at issue and the person who granted them support were treated in a discriminatory way and infringed in their rights to respect for private and family life, to the protection of personal data, and to freedom of association. In a [statement of 18 June 2020](#), Commissioner for Justice, *Didier Reynders*, welcomes the judgement. The CJEU follows the opinion of the Advocate General of 14 January 2020 in this case (see [eucrim 1/2020](#), p. 5). Regarding measures known as the “Stop Soros” Law, another infringement proceeding is currently pending ([Case C-821/19](#)).

■ 17 June 2020: The Hungarian Parliament votes in favour of the [termination of the nation's state of emergency](#). The state-of-emergency law, which was passed at the end of March in reaction to the coronavirus pandemic ([eucrim 1/2020](#), p. 5), generated criticism because it allowed Prime Minister *Viktor Orbán's* government to rule by decree without a predefined end date. The law also allowed to clamp down on “fake news.” Following the vote by the Hungarian parliament, critics are still ringing the alarm bell. In a [joint statement of 27 May 2020](#), human rights groups argue that the bill terminating the “state of danger” still makes it easier for the Hungarian government to rule by decree. It leaves open the possibility for the government to declare another state of emergency, granting it extra powers to

handle an epidemic. In addition, some changes (e.g., extra powers for security authorities) will remain since they have already been passed into law. (TW)

### MEPs Discuss Proposal for Better EU Rule-of-Law Supervision

On 1 July 2020, rapporteur MEP *Michael Šimečka* (Renew, SK) published a [draft report](#) on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights (DRF). The DRF, which strives for a stronger EU enforcement of breaches of the EU's fundamental values, is a long-standing request by the EP that dates back to 2016 (see [eucrim 4/2016](#), p. 154). However, the Commission and the Council have been reluctant so far to take up the idea (see also [eucrim 3/2018](#), p. 144 and [eucrim 1/2019](#), p. 3).

The Šimečka report reiterates the urgent need for the Union to develop a robust and positive agenda to protect and reinforce democracy, the rule of law, and fundamental rights for all its citizens. It also issues a warning that the Union is facing an unprecedented and escalating crisis affecting its founding values, which is threatening its long-term survival as a democratic peace project. The report voices grave concern over the rise and entrenchment of autocratic and illiberal tendencies (further compounded by the COVID-19 pandemic and economic recession).

Against this background, the report pushes the other institutions by making a concrete legislative proposal for an interinstitutional agreement between the Parliament, the Council, and the Commission, consisting of an Annual Monitoring Cycle on Union values. The Annual Monitoring Cycle is to prevent violations of and non-compliance with Union values, while providing a shared basis for other actions by the three institutions. The main features of the Cycle will:

- Cover all aspects of Article 2 TEU;
- Apply equally, objectively, and fairly to all Member States;

- Consist of a preparatory stage, the publication of an annual monitoring report on Union values including country-specific recommendations, and a follow-up stage;
- Consolidate and supersede existing instruments, in particular the Annual Rule of Law Report, the Commission’s Rule of Law Framework, the Council’s Rule of Law Dialogue, and the Cooperation and Verification Mechanism (CVM);
- Simultaneously increase complementarity and coherence with other available tools – the three institutions, in particular, commit to using the findings of the annual monitoring reports in their assessment of whether there is a clear risk of a serious breach or existence of a serious and persistent breach by a Member State of Union; values in the context of Article 7 TEU;
- Establish strong role for civil society, national human rights institutions, and other relevant actors in all stages of the Cycle.

The report was discussed in a [hearing in the LIBE Committee](#) on 29 June 2020. MEPs agreed that the DRF is urgently needed, however, there is still a need for discussion with regard to the scope and design of the mechanism. Many MEPs called for external expert opinions in order to guarantee an objective and unpolitical assessment and control. In this way, it would be ensured that evidenced infringements of the EU’s fundamental values are discovered and adequately sanctioned.

Justice Commissioner *Didier Reyniers* damped down expectations. He pointed out difficulties in the transparency of contributions and accountability. There is, however, agreement that an inter-institutional mechanism must be established, which would require increased cooperation between the institutions. He appealed to the parliamentarians to above all also become active at the national level. Only in cooperation with civil society can a clear picture of the situation in the individual Member States be created. (TW)

### Commission Prepares European Democracy Action Plan

As announced in the [political guidelines](#) by Commission President *Ursula von der Leyen* and in the Commission Work Programme, the current Commission is stepping up its efforts to protect the EU’s democratic systems and institutions. *Ursula von der Leyen* promised to put forward a European Democracy Action Plan under the headline “A new push for European democracy.” Preparations for this Action Plan started in mid-July 2020. The Commission presented a [roadmap](#) and launched a public consultation in this context. The [public consultation](#) runs until 15 September 2020 and seeks to gather input from a broad range of stakeholders on the following three key themes:

- Election integrity and how to ensure electoral systems are free and fair;
- Strengthening media freedom and media pluralism;
- Tackling disinformation.

In addition, the consultation also covers the crosscutting issue of supporting civil society and active citizenship. The major aim of the European Democracy Action Plan is to ensure that citizens are able to participate in the democratic system through informed decision-making – free from interference and manipulation affecting elections and the democratic debate. It will particularly address threats of external intervention in European elections. Lessons learnt from the Covid-19 crisis will also be considered. (TW)

### AG Opinion on Right to Judicial Review in Tax Cooperation

Orders to provide information made in the context of the cross-border data exchange between tax authorities must be subject to judicial reviews. In addition, the requesting authority has the duty to state reasons in its request for information. These are the main conclusions by AG *Juliane Kokott* in her [opinion](#) in the [cases C-245/19 and C-246/19](#). They refer to questions for a preliminary ruling

put forward by the Higher Administrative Court of Luxembourg.

#### ► *Facts of the cases*

In the cases at issue, the Spanish tax authority requested information from the Luxembourg tax authority concerning an artist residing in Spain. In order to comply with the requests, the Luxembourg tax authority first issued an order against a Luxembourg company to provide it with copies of the contracts concluded between said company and other companies concerning the artist’s rights and with other documents, in particular copies of related invoices and bank account details. In a second order, a Luxembourg bank was requested to provide information concerning accounts, account balances, and other assets of the taxpayer herself and concerning assets which she held for other companies controlled by her. The Luxembourg law in force at that time (2016/2017) precluded legal challenges against both orders.

The orders were challenged before the Luxembourg courts by the Luxembourg company to which the first order was addressed (C-245/19), the Luxembourg bank to which the second order was addressed (C-246/19), the companies mentioned in it, and by the artist (the concerned taxpayer).

#### ► *Questions by the referring court*

The referring court asked the CJEU:

- Whether national legislation that does not foresee legal challenges against the requirements to provide information in the context of administrative tax cooperation within the framework of [Directive 2011/16](#) runs counter to the fundamental rights enshrined in the Charter;
- How specifically and precisely a request must be drafted in order to allow the requested tax authority to assess whether the information sought is “foreseeably relevant” to the administration and enforcement of the domestic tax laws of the Member States, because only foreseeably relevant information is covered by administrative cooperation under Directive 2011/16.



► *The Advocate General's conclusions*

Regarding the first question, AG *Ko-kott* concluded that, under Art. 47 CFR (the right to an effective remedy) not only the addressee of an order to provide information, but also the taxpayer concerned and third parties (in the cases at issue: several companies) must be able to obtain judicial review of such orders. The transmission of data interferes with the fundamental rights of the natural and legal persons concerned.

Regarding the second question, the AG concluded that the requesting authority must justify the request for information so that the requested authority can examine whether the information sought does not clearly lack foreseeable relevance for the requesting authority's tax assessment. The request must contain specific indications of the facts and transactions that are relevant for tax purposes, so that impermissible "fishing expeditions" can be ruled out. The requirements imposed by the duty to state reasons increase with the extent and sensitivity of the information sought.

► *Put in focus*

The case at issue follows up [case C-682/15, \*Berlioz Investment Fund\*](#). In this case, the CJEU had already ruled that a person who is obliged to provide information in the context of an exchange between national tax authorities under Directive 2011/16 has the right to review the legality of the information request in the requested Member State indirectly by challenging the decision by which the requested authority has imposed a pecuniary penalty on account of his refusal to provide information (see [eucrim 2/2017, pp. 55–56](#)).

The reference for a preliminary ruling in the present cases C-245/19 and 246/19 now deals with the appeal directly against the information order issued by the national tax authority, which intends or is required to provide information to the requesting tax authority of another Member State. Not only the party obliged to provide information, but also the taxpayer and other third par-

ties concerned are defending themselves here. (TW)

## Security Union

### Commission: New EU Security Union Strategy

**spot light** On 24 July 2020, the Commission presented its [new EU Security Union Strategy for the period 2020–2025](#). It lays out the tools and measures to be developed over the next five years to ensure security in both the physical and the digital environment. The Strategy was presented in form of a [Communication](#) to the European Parliament, the European Council, the Council, the European Social and Economic Committee, and the Committee of the Regions. It substantiates the [political guidelines](#) of Commission President *Ursula von der Leyen*, who stressed improvements in cross-border cooperation to tackle gaps in the fight against serious crime and terrorism in Europe as one of the main goals during her term of office. The new Strategy follows up the EU Agenda on Security as set out by the previous Commission under President *Jean-Claude Juncker* (see also [eucrim 3/2016, p. 123](#)). It takes up proposals provided in European Parliament resolutions, Council conclusions, and Commission evaluations in the internal security field (see, for instance, the latest Commission Staff Working Paper on the Implementation of Home Affairs legislation in the field of internal security 2017–2020 – [SWD\(2020\) 135](#) – not public yet).

The EU Security Union Strategy 2020–2025 first explains the security threat landscape in Europe which is in flux. Rapid changes include:

- Increase in malicious attacks on European services, e.g. energy, transport, finance, and health, which has become particularly evident during the COVID-19 crisis;
- Increased affectedness of homes, banks, financial services, and enterpris-

es by cybersecurity, as well as new risks due to the developments in the Internet of things and artificial intelligence;

- Development of an underground cybercriminal economy due to the online dependency of the society;
- Accentuation of the threats by the global environment, which concerns, for instance, theft of intellectual property and industrial espionage;
- Remaining high risks of terrorism, with a current trend towards "low-tech" attacks by radicalised individuals;
- Evolvement of organised crime under new circumstances, e.g. trafficking in human beings and trade in illicit pharmaceutical products.

Against this background, the Security Strategy emphasises the need for an EU-coordinated response for the whole of society and defines the following common objectives:

- Building capabilities and capacities for early detection, prevention and rapid response to crises;
- Focusing on results, including threat and risk assessments, strategic reliable intelligence, and effective implementation;
- Linking all players in the public and private sectors in a common effort.

The following four strategic priorities will guide future EU action to countering the new global threats and challenges:

- *A future-proof security environment:* Actions in this area concern particularly a more robust, consistent and coherent framework for the protection and resilience of critical infrastructure. In the field of cybersecurity, the EU must make sure that its 2017 cybersecurity approach on resilience-building keeps pace with reality. In this context, the Commission emphasises the needs to ensure cybersecurity of the 5G networks, to develop a culture of cybersecurity by design, to establish a Joint Cyber Unit as a platform for a structured and coordinated operational cooperation, and to build up more robust international partnerships against cyberattacks. Ultimately, another focus will be on the protection of public

spaces (including places of worship and transport hubs), e.g. through enhanced public-private cooperation and measures against the misuse of drones.

■ *Tackling evolving threats:* The Commission will ensure that existing EU rules against cybercrime are implemented and are fit for purpose. In particular, measures against identity theft will be explored. Law enforcement capacities in digital investigations will be increased. The establishment of adequate tools and techniques will include AI, big data and high-performance computing. Focuses will also be placed on quick access to digital evidence and on addressing the challenges of encryption. The fight against illegal content online will play a key role. This includes tackling child sexual abuse (for this, see the new Commission strategy COM(2020) 607, reported in a separate news item). Finally, key measures will be taken against hybrid threats, including a review of the EU playbooks for countering hybrid threats.

■ *Protecting European from terrorism and organised crime:* As regards terrorism, a focus will be placed on anti-radicalisation, effective prosecution of terrorists (including foreign terrorist fighters), and cooperation with non-EU countries, e.g. in order to cut off the sources of terrorist financing. As regards organised crime, the Commission announces an agenda for tackling organised crime next year. It will respond to the need for reinforced cooperation with all stakeholders and provide a response to the recent organised crime developments in the course of the COVID-19 pandemic. High concerns remain in the field of drug trafficking and trade of illegal firearms – in both areas, the Commission presented concrete agendas and action plans (see separate news item). Furthermore, new approaches are announced as regards trafficking in human beings and migrant smuggling, where the poor record in identifying, prosecuting and convicting these crimes requires reinforced action. Ultimately, the Com-

mission will look into responses in the fields of environmental crime, trafficking in cultural goods, economic and financial crimes, money laundering, confiscation and asset recovery, and corruption.

■ *A strong European society ecosystem:* The Commission intends to build preparedness and resilience among governments, law enforcement authorities, private entities, and citizens. Measures in this field include strengthening security research and innovation, where the Commission, for instance, will look into the creation of a European innovation hub for internal security. Raising skills and awareness as regards both law enforcement officers and citizens will also play a key role. Here, the Commission points out the [European Skills Agenda](#) adopted on 1 July 2020, which supports skills-building throughout life, including in the field of security. Ultimately, the envisaged priority area of the security ecosystem includes a plethora of possible initiatives to foster cooperation and information exchange, e.g.:

- Improving and streamlining the framework and instruments for operational law enforcement cooperation (e.g. the SIS);
- Strengthening Europol's mandate by lifting current constraints (such as the prohibition of direct exchange of personal data with private parties);
- Further developing Eurojust to better interlink judicial and law enforcement cooperation;
- Simplifying EMPACT – the EU policy cycle for serious and international organised crime;
- Revising the Prüm legislation of 2008 and the existing EU PNR rules;
- Stepping up judicial cooperation, e.g. through the use of digital technologies;
- Reinforcing cooperation with Interpol and security partnerships between the EU and third countries;
- Exploring ways towards an EU-level coordination mechanism for police forces in case of force-majeure events, such as pandemics.

In conclusion, the Commission stresses that the presented EU Security Union Strategy 2020–2025 has reacted to a wide range of emerging security needs. It focuses on the areas most critical to EU security in the years to come. Security needs to be viewed from a broader perspective than in the past. This includes that needs involve both the physical and the digital world. Issues of internal and external security are increasingly interconnected, which is why cooperation with international partners and close coordination with the EU's external actions (under the responsibility of the High Representative of the Union for Foreign Affairs and Security Policy) in the implementation of the Strategy are key in the years to come. In addition, the EU must follow a real whole-of-society approach, with EU institutions, agencies and bodies, Member States, industry, academia, and individuals giving their input to make societies secure. (TW) ■

### Commission Presents Three Deliverables of its New Security Strategy

Alongside with its new Union Security Strategy of 24 July 2020, the Commission has tabled more concrete policy goals in three priority areas:

- Fight against child sexual abuse;
- Fight against illicit drugs;
- Fight against firearms trafficking.

The Commission points out that threats in these areas have been worsened by the coronavirus pandemic, particularly child sexual abuse, demonstrably exacerbated by physical isolation and increased online activities. Fighting drug and firearms trafficking is key to action against organised crime, a top internal security priority across Europe.

[The new EU strategy for a more effective fight against child sexual abuse](#) presents a framework to respond in a comprehensive way to the increasing threat of child sexual abuse, both in its online and offline forms. The strategy will be the reference framework for EU

action in the fight against these crimes over the next five years. It sets out concrete initiatives under the following eight headings:

- Ensuring the complete implementation of current legislation (i.e. Directive 2011/93/EU on combating the sexual abuse and sexual exploitation of children and child pornography);
- Ensuring that EU legislation enables an effective response;
- Identifying legislative gaps, best practices and priority actions;
- Strengthening law enforcement efforts at the national and EU levels;
- Enabling Member States to better protect children through prevention;
- A European centre to prevent and counter child sexual abuse;
- Galvanising industry efforts to ensure the protection of children in their products; and
- Improving the protection of children globally through multi-stakeholder co-operation.

One of the key elements of the strategy is the plan to create a new European centre on child sexual abuse. It is designed to support law enforcement (e.g. by sharing reports in relation to child sexual abuse from companies with police authorities) in the EU and its Member States in the prevention of child sexual abuse, as well as to ensure that victims receive appropriate assistance. The Commission will also work on setting up a prevention network, which is to overcome the current problems that research into the motivation of offenders is scarce and fragmented, and that the communication between research and practitioners is low. The network would follow a scientific approach towards the prevention of child sexual abuse. Reputed practitioners and researchers are to support Member States in putting in place usable, evaluated and effective prevention measures to decrease the prevalence of child sexual abuse in the EU and to facilitate the exchange of best practices. Another focus of the strategy will be a strengthened law enforcement

response. This includes setting up an Innovation Hub and Lab at Europol, which is to facilitate Member State access to technological tools and knowledge developed at the EU level.

[The new EU Drugs Agenda and Action Plan 2021–2025](#) sets out the political framework for the EU's drugs policy over the next five years. It aims at guiding Member States in achieving improved protection for citizens in the face of the complex challenges posed by illicit drugs. The Agenda identifies eight strategic priorities related to security, prevention and health:

- Disrupting and dismantling major high-risk drug-related organised crime groups operating in EU Member States;
- Increasing the detection of illicit trafficking of drugs and drug precursors at EU points of entry and exit;
- Increasing the effective monitoring of logistical and digital channels exploited for small- and medium-volume drug distribution, as well as increasing seizures of illicit substances smuggled through these channels in close cooperation with the private sector;
- Dismantling drug production and processing, preventing the diversion and trafficking of drug precursors for illicit drug production, as well as eradicating illegal cultivation;
- Preventing the uptake of drugs, enhancing crime prevention and raising awareness of the adverse effects of drugs on citizens and communities;
- Enhancing access to treatment options for people who experience harm from substance use;
- Increasing the efficiency of risk-and-harm reduction interventions so as to protect the health of drug users and the public; and
- Developing a balanced intervention on drug use in prisons (reducing demand and restricting supply).

The Action Plan accompanying the Agenda sets out concrete measures for implementing these priorities. The Commission highlights that the EU Agenda on drugs addresses several new aspects

compared to previous policy initiatives, such as the increased poly-criminality of organised crime groups, the role of the EU as a producer and exporter of drugs, as well as technological enablers (e.g. darknet marketplaces, cryptocurrencies and encryption technologies for buying/selling drugs).

[The 2020–2025 Action Plan on Firearms Trafficking](#) addresses remaining legal loopholes and inconsistencies in firearms controls that hinder police co-operation. It sets out four priorities:

- Safeguarding the licit market and limiting diversion;
- Building a better intelligence picture;
- Increasing pressure on criminal markets; and
- Stepping up international co-operation.

Since the Action Plan on firearms trafficking builds upon previous experiences with the Southeast Europe region, it also lays down the common way forward with the Western Balkans, Ukraine and Moldova. To this end, the Action Plan includes tailor-made activities for the Southeast Europe region. The Commission highlights that fighting the illicit access to firearms is a cross-cutting security issue. It not only affects the EU, its Member States and neighbouring countries, but it is also interconnected with other forms of criminal activities, such as terrorism, illicit drugs trafficking, trafficking of human beings, maritime piracy, counterfeiting, environmental crime, or organised property crime. Therefore, there is an urgent need to step up actions in this area at the national, EU and international levels. (TW)

### Commission Fights against Disinformation about COVID-19 Pandemic

The Commission has undertaken steps to fight disinformation related to the outbreak of COVID-19. On 30 March 2020, the Commission [launched a new website](#) that provides material and information on fact checks. The website also warns citizens about online scams re-

lated to products that can allegedly cure or prevent COVID-19 infections. Learners, educators, and teachers are provided with a selection of online resources and tools that they can use during the COVID-19 pandemic.

Furthermore, the Commission is closely cooperating with online platforms. Commission Vice-President for Values and Transparency, *Věra Jourová*, held [conference calls with online platforms](#) such as Google, Facebook, Twitter, Microsoft, Mozilla, and the trade association EDiMA. The platforms informed her of their efforts to promote access to authoritative information and to tackle harmful content as well as misleading/exploitative ads. *Jourová* noted, however, that there are still gaps in the enforcement policy. She urged the companies to share relevant data with the research and fact-checking community, to work together with authorities in all Member States, and to share samples of removed content.

The European External Action Service also compiles reliable information on fake news and disinformation related to the corona pandemic at the following website: <https://euvsdisinfo.eu/>.

On 10 June 2020, the Commission and the High Representative [outlined](#) the way forward as regards the fight against disinformation surrounding the coronavirus pandemic. In their [joint communication “Tackling COVID-19 disinformation – Getting the facts right,”](#) they list numerous immediate measures against disinformation that can be taken using existing resources. The actions focus on the following:

- Strengthening strategic coordination within and outside the EU;
- Better cooperation within the EU;
- Intensifying cooperation with third countries and international partners;
- Greater transparency on the part of online platforms and support for fact-checkers and researchers;
- Ensuring freedom of expression and pluralistic democracy debate;
- Raising citizens’ awareness;

- Protecting public health and consumers’ rights.

The Communication concludes that the COVID-19 crisis has become a test case showing how the EU and its democratic societies deal with threats posed by disinformation, misinformation, and foreign influence operations. It is expected that the proposed short-term solutions will make the EU more resilient in the longer term. The proposed actions will also feed into the European Democracy Action Plan (announced by Commission President *Ursula von der Leyen*) and the Digital Services Act. (TW)

## Area of Freedom, Security and Justice

### 2020 EU Justice Scoreboard: Improvements in Efficiency, but Decline in Perceived Judicial Independence

**spot light** On 10 July 2020, the Commission published the eighth edition of the [EU Justice Scoreboard](#). The Scoreboard presents an annual comparative overview of indicators relevant for the independence, quality, and efficiency of justice systems in all EU Member States. The scoreboards mainly focus on civil, commercial, and administrative cases to pave the way for a more investment-friendly, business-friendly, and citizen-friendly environment. They are an established tool by which to analyse trends in the EU justice systems and are also part of the EU’s [Rule of Law toolbox](#), which is used by the Commission to monitor justice reforms undertaken by Member States. Comparative information assists the EU and Member States in improving the effectiveness of national justice systems. For the Scoreboards of previous years, see *eucri* 1/2019, p. 7; *eucri* 2/2018, pp. 80–81; and *eucri* 2/2017, p. 56.

For the first time, [the 2020 Scoreboard](#) presents charts on child-friendly justice and on court fees/legal fees in commercial cases. In general, the 2020 Scoreboard acknowledges positive

trends in the efficiency and accessibility of EU justice systems, but persistent challenges remain regarding the perception of judicial independence:

#### ► *Efficiency:*

- Looking at the available data since 2012 in civil, commercial, and administrative cases, efficiency has improved or remained stable in 11 Member States, while it decreased in eight Member States (albeit often only marginally);

- Most of the Member States that have been identified in the context of the European Semester as facing specific challenges have shown positive developments, e.g., the length of first instance court proceedings has decreased or remained stable since 2012;

- Nearly all Member States (including those facing challenges) reported a high clearance rate (more than 97%) in the broad “all cases” category and in litigious civil and commercial cases, meaning that courts are generally able to keep up with incoming cases, while making progress on backlogs;

- As regards proceedings dealing with money laundering offences, the trend of previous years has been confirmed: in around half of Member States, the first instance court proceedings take up to one year on average; these proceedings take around two years on average in several Member States facing challenges regarding prosecution of money laundering offences.

#### ► *Quality in terms of accessibility:*

- Although almost all Member States provide access to certain online information about their judicial system, including a centralised web portal with online forms and interactive education on legal rights, differences are still apparent as regards the content of the information and how adequately it responds to people’s needs;

- Compared to 2018, the accessibility of legal aid remained stable in 2019; at the same time, legal aid has become less accessible in some Member States over the years;

- In more than half of the Member

States, electronic submission of claims and transmission of summons are still not in place or possible only to a limited extent, as was already seen in the 2019 EU Justice Scoreboard. Large gaps remain especially as regards the possibility to follow court proceedings online;

- All Member States have put in place at least some arrangements for machine-readable judgments, albeit with considerable variance among Member States in terms of how advanced these arrangements are;

- Almost all Member States make at least some arrangements for children, e.g., measures for child-friendly hearings. However, child-friendly websites with information about the justice system exist in less than half the Member States.

➤ *Quality in terms of resources:*

- There are major differences in the spending patterns among Member States if one looks at the breakdown of total expenditure into different categories, e.g., salaries of judges/court staff and investments in fixed assets;

- Improvements have been made as regards trainings on handling impaired or vulnerable persons, including asylum seekers, as well as on awareness raising of and dealing with disinformation;

- Training of judges on judgecraft, IT skills, and judicial ethics remains low in most countries.

➤ *Quality in terms of assessment tools:*

- While most Member States have fully implemented ICT case management systems, gaps still remain in conjunction with tools by which to produce court activity statistics. Some Member States are not able to collect nationwide data across all justice areas;

- As in previous years, the use of surveys among court users and legal professionals has again decreased.

The 2020 Scoreboard presents the developments in perceived *judicial independence* from [surveys of the general public \(Eurobarometer\)](#) and [companies \(Eurobarometer\)](#) and [World Economic Forum](#). Compared to 2018, the pub-

lic's perception of independence has decreased in about two-fifths of all Member States in 2019 and in about half of the Member States facing specific challenges. The interference/pressure from government and politicians was the most frequently stated reason for the perceived lack of independence of courts and judges, followed by the pressure due to economic or other specific interests. The 2020 Justice Scoreboard also presents an updated overview of the disciplinary regimes in the various national systems. The overview includes the following:

- Which authorities are in charge of disciplinary proceedings against judges and prosecutors;

- Which investigators are in charge of disciplinary investigations against judges;

- How the judiciary is involved in the appointment of judges/members of the Council for the Judiciary and the composition of the Councils for the Judiciary;

- Which bodies can give instructions to prosecutors in individual cases and which safeguards are in place, if such instructions are given in a concrete case.

The EU Justice Scoreboard is one of the sources in the upcoming Rule of Law Report, which the Commission plans to present later this year. As announced in the Communication “on further strengthening the rule of law within the Union –A blueprint for action” (see [eucrim 2/2019](#), p. 79), the EU Justice Scoreboard will be developed further in the relevant rule-of-law related areas. As the 2020 Scoreboard covers the period from 2012 to 2019, it does not reflect the consequences of the COVID-19 crisis. (TW)

### **Brexit: Commission Advises Stakeholders to Be Ready on 1 January 2021**

On 9 July 2020, the [Commission published](#) a Communication that aims at preparing public administrations, businesses, and citizens to the inevitable

changes in the wake of Brexit, which will occur after the end of the current transition period on 1 January 2021. The Communication provides advice on what all stakeholders must consider and know if the transition period ends, irrespective of whether an agreement on a future EU-UK partnership has been concluded or not. The [Communication “Getting ready for changes”](#) (COM(2020) 324 final) sets out a sector-by-sector overview of the main areas in which there will be unavoidable changes caused by the UK's decision to leave the EU and to end the transition period by the end of 2020. The measures proposed by the Commission are to complement actions taken at the national level. The Commission calls to mind that on 1 January 2021, the UK will no longer benefit from the EU's Single Market and Customs Union, Union policies and programmes, and international agreements to which the Union is a party. There will be no room for adaptations by national public administrations, businesses, and citizens after that date, and the changes must be prepared in any event. The Communication sets out advice in the following areas:

- Trade in goods, including customs formalities, checks and controls; customs and taxation rules for the import and export of goods; certificates and authorisations of products;

- Trade in financial, transport, and audiovisual services;

- Recognition of professional qualifications;

- Energy;

- Travelling and tourism, including checks on persons, driving licences, and passenger rights;

- Mobility and social security coordination;

- Company law and civil law;

- Data, digital, and intellectual property rights.

In parallel to the Communication, the Commission is reviewing all 102 stakeholder notices published during the phase of withdrawal negotiations. Most of them continue to be relevant for the

end of the transition period. More than the half of readiness notices have been updated (cf. annexed list to the Communication). They are available on the Commission's dedicated [webpage](#). (TW)

## Schengen

### EP Requests Swift Return to Fully Functioning Schengen Area

Reopening borders, a Schengen recovery plan, and a revision of the Schengen rules to ensure a truly European governance – these are the three main demands in a [European Parliament resolution on the situation in the Schengen area](#) following the COVID19 outbreak.

In the resolution adopted on 19 June 2020, the EP calls to mind that the Schengen area is a tangible and cherished achievement at the very heart of the EU project, allowing unrestricted travel for more than 400 million people and having immeasurable value for citizens and businesses alike. It expresses concern over how Member States handled the Schengen Borders Code and the Free Movement Directive when they reintroduced internal border controls to curb the COVID-19 pandemic. The EP calls for a swift return to a fully functional Schengen area, while the Commission should take the lead in coordinating the actions at the European level. Any uncoordinated, bilateral action by individual EU countries and non-respect for the non-discrimination principle in the reopening of borders is rejected. Member States should reduce restrictions on the freedom of movement to the same extent that COVID-19 containment measures are relaxed. MEPs advocate a more regional approach instead of national border controls.

They also urgently call for a discussion on a recovery plan for Schengen in order to prevent any temporary internal border controls from becoming semi-permanent. In the medium term, reflection is necessary on how to enhance mutual trust between Member States and

how to ensure that the Union's legislative tools provide for a truly European governance of the Schengen area. This would allow for an effective European coordinated response to challenges such as the COVID-19 pandemic. The Commission is called on to table legislative proposals to this end.

In their resolution, MEPs ultimately ask for the Council and Member States to increase their efforts in Schengen integration and to take the necessary steps to admit Bulgaria, Romania, and Croatia into Schengen.

After introducing [internal border checks](#) to contain the COVID-19 pandemic, EU countries have started to lift controls and associated travel restrictions. On 11 June 2020, [the Commission recommended](#) to Schengen countries that they should lift internal border controls by 15 June 2020; temporary restrictions on non-essential travel into the EU can be prolonged until 30 June 2020. In turn, the Commission set up an [online platform](#) (called Re-open EU) with up-to-date information for travellers. (TW)

## Legislation

### State of Play of Current Legislative JHA Proposals

At the video conference meeting of the ministers of justice of the EU Member States on 4 June 2020, the Croatian Council Presidency informed the ministers about the state of play of current legislative proposals in the areas of justice and home affairs. The overview includes:

- Regulation on preventing the dissemination of terrorist content online (TCO): trilogue with the EP has advanced, several articles have been agreed on;
- Consequential amendments in relation to ETIAS: trilogues are yet to start;
- Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (e-Evidence Regulation): the EP's final position is still awaited;

- JHA funds: Asylum and Migration Fund, Internal Security Fund, Border Management and Visa Instrument Fund: Croatian Presidency prepared the ground for a Council position;

- EU Justice, Rights and Values Fund: Justice Programme and Rights and Values Programme: agreement on these funds by the EP and Council is subject to their overall agreement on the EU's next long-term budget.

Eucrim regularly reports on these legislative proposals. (TW)

### AI Reports Discussed in EP Committees

In May/June 2020, committees of the European Parliament discussed several reports on artificial intelligence. These reports include:

- Draft report with recommendations to the Commission on a [civil liability regime for artificial intelligence](#) (rapporteur *Axel Voss* (DE/EPP));
- Draft report on [intellectual property rights](#) for the development of artificial intelligence technologies (rapporteur *Stéphane Séjourné* (FR/ALDE));
- Working document on questions of interpretation and application of international law in so far as the EU is affected in the areas of [civil and military uses](#) and state authority outside the scope of criminal justice (rapporteur *Gilles Lebreton*, (FR/Identity and Democracy Group));
- Draft report with recommendations to the Commission on a [framework of ethical aspects](#) of artificial intelligence, robotics, and related technologies (rapporteur *Ibán García del Blanco* (ES/S&D));
- Draft report on artificial intelligence in [criminal law and its use by the police and judicial authorities](#) in criminal matters (rapporteur *Tudor Ciuhodaru* (RO/S&D)).

The last two documents are of interest within the framework of eucrim. Rapporteur *Ibán García del Blanco* suggests that aspects related to the ethical dimension of artificial intelligence, robotics, and related technologies should be framed as a series of principles resulting in a comprehensive and future-proof

legal framework at the Union level. He proposes a concrete text for a corresponding EU regulation on ethical principles for the development, deployment, and use of these technologies.

In addition, he proposes the establishment of a European Agency for Artificial Intelligence and a European certification of ethical compliance. The proposed regulation should be built on the following principles:

- Risk assessment of artificial intelligence, robotics, and related technologies;
- Safety features, transparency, and accountability;
- Safeguards against bias and discrimination;
- Social responsibility and gender balance;
- Environmentally friendly and sustainable artificial intelligence;
- Respect for privacy and limitations to the use of biometric recognition;
- Governance.

A main feature of the proposal is that the development, deployment, and use of artificial intelligence, robotics, and related technologies should always respect human agency and oversight as well as allow the retrieval of human control at any time (“human-centric and human-made approach”).

Rapporteur *Tudor Ciuhodaru* prepared a motion for an EP resolution on the use of AI in criminal matters. He stressed that AI offers great opportunities in law enforcement and criminal justice, in particular by improving working methods to combat certain types of crime. At the same time, he highlights the potential risks of AI in this area, because the use of AI considerably affects fundamental rights to liberty and security of the individual. Therefore, several core principles must be implemented in the life cycle of AI, such as:

- Algorithmic explainability and transparency;
- Traceability;
- The carrying out of compulsory fundamental rights impact assessments pri-

or to the implementation or deployment of any AI system;

- Mandatory audits.

The rapporteur underlines that, in judicial and law enforcement contexts, the final decision always needs to be taken by a human who can be held accountable for the decisions made; the possibility of recourse to a remedy needs to be included. Facial recognition systems for law enforcement purposes are viewed critically. The rapporteur calls for a moratorium on the deployment of such systems. (TW)

### EDPS Opinion on AI White Paper

On 29 June 2020, the EDPS presented his [opinion on the European Commission’s White Paper on Artificial Intelligence](#). The White Paper was released in February 2019 and outlines policy options on how to achieve the dual objectives of promoting the uptake of artificial intelligence (AI) and addressing the risks associated with certain uses of this new technology (see eucrim 1/2020, pp. 8–9). The EDPS’ opinion includes views both on the general objectives and vision of the White Paper and on certain specific aspects, such as the proposed risk-based approach, the enforcement of AI regulation, or the specific requirements for remote biometric identification.

The EDPS welcomes that the White Paper favours a European approach to AI, grounded in EU values and fundamental rights. He points out, however, that AI is not a “silver bullet” that will solve all problems, but benefits, costs, and risks must be carefully weighed.

The EDPS recommends that a potential future regulatory framework for AI should be:

- Applicable both to EU Member States and to EU institutions, offices, bodies and agencies;
- Designed to protect from any negative impact not only on individuals, but also on communities and society as a whole;
- Include a robust and nuanced risk classification scheme;

- Ensure that any significant potential harm posed by AI applications is matched by appropriate mitigating measures;

- Carry out an impact assessment clearly defining the regulatory gaps that it intends to fill;

- Avoid overlap of different supervisory authorities and include a cooperation mechanism.

Regarding remote biometric identification, the EDPS supports the idea of an EU moratorium on the deployment of automated recognition of human features in public spaces. These features should not only be confined to faces, but additionally be confined to gait, fingerprints, DNA, voice, keystrokes, and other biometric or behavioural signals. It is important that an informed and democratic debate take place first. Deployment should be considered only once the EU and Member States have all the appropriate safeguards in place, including a comprehensive legal framework to guarantee the proportionality of the respective technologies and systems for the specific use case.

In addition to the opinion on the Commission’s White Paper, the EDPS also presented his [opinion on the closely related European Strategy for Data](#) (see eucrim 1/2020, p. 24). The EDPS acknowledges the growing importance of data for the economy and society, such as the development of a Digital Single Market and the EU’s digital sovereignty, but he also stresses that “big data comes with big responsibilities.” Appropriate data protection safeguards should be put in place. (TW)

### German Bar Association: AI in the Justice Sector Needs Clear Boundaries

Judicial and similarly invasive binding decisions of state bodies may never be fully automated. This is one of the statements by the German Bar Association ([DAV](#)) in its [position](#) within the framework of the Commission’s consultation on its White Paper on Artificial Intelligence (see eucrim 1/2020, pp. 8–9).

Aware of the increasing importance of artificial intelligence in modern society and the possible advantages that this technology can also create for the justice system, the DAV recommends that the Commission, when working out a new framework for artificial intelligence, take into account the particularly high fundamental rights risks associated with the introduction of AI into the justice system. It should be subject to strict requirements, and comprehensive and meaningful transparency obligations must be respected. Furthermore, liability rules must be extended to AI at the EU level. Similarly, effective redress and control mechanisms for the use of AI in the field of justice and public administration must be established. In order to ensure the EU's human-centric approach to digitalisation, the EU and its Member States must ensure that the increasing automation of services does not lead to job losses in the justice sector. Instead, additional training and knowledge sharing should be provided to legal professionals in the field of AI. (TW)

### AI High-Level Expert Group Publishes Ethics Checklist

On 17 July 2020, the High-Level Expert Group on Artificial Intelligence ([AI HLEG](#)) presented its final Assessment List for Trustworthy Artificial Intelligence ([ALTAI](#)). ALTAI provides a checklist for self-assessment that guides developers and users of AI when implementing the seven key EU requirements for trustworthy AI in practice. These requirements are:

- Human agency and oversight;
- Technical robustness and safety;
- Privacy and data governance;
- Transparency;
- Diversity, non-discrimination, and fairness;
- Environmental and societal well-being;
- Accountability.

ALTAI aims to help businesses and organisations become aware of the risks an AI system might generate and how

these risks can be minimised while maximising the benefit of AI. The AI HLEG emphasises that ALTAI is best completed with a multidisciplinary team of people. The team members can be from within and/or outside the organisation of an entity, with specific competences or expertise on each of the seven requirements and related questions. Possible stakeholders could be:

- AI designers and AI developers of the AI system;
- Data scientists;
- Procurement officers or specialists;
- Front-end staff who will use or work with the AI system;
- Legal/compliance officers;
- Management.

ALTAI is available both as a [documentation version](#) and as a [prototype of a web-based tool](#).

ALTAI was developed over a period of two years, from June 2018 to June 2020. Following a pilot phase (second half of 2019), the assessment list was revised and further developed on the basis of interviews, surveys, and best practice feedback. (TW)

## Institutions

### Council

#### German EU Presidency Programme

Since 1 July 2020, Germany holds the Presidency of the Council of the EU until 31 December 2020. Guided by the motto "Together for Europe's recovery", the [Presidency's programme](#) focuses on Europe's response to the COVID-19 pandemic and looks at solutions to create a stronger and more innovative, fair, and sustainable Europe of security and common values, as well as for effective European external actions.

In the area of Justice and Home Affairs, the German Presidency intends to focus on the fight against hate crime and racism. The fight against terrorism shall be further optimised by introducing a

common analysis of the various national personal risk assessment systems and national threat lists as well as the rapid adoption of the regulation on preventing the dissemination of terrorist content online. Cross-border cooperation between police authorities shall be improved through a European police partnership allowing police officers in the EU to get access to necessary information from other Member States. Europol's capabilities to support the operative work of the national security forces in their fight against cross-border crime, terrorist and extremist threats shall be strengthened and its role as the central agency for the European police be expanded. Furthermore, measures shall be taken to improve cooperation between the police, customs and the judiciary. Judicial cooperation on combating cross-border crime shall be strengthened, for instance with regard to gathering electronic evidence across borders. Further issues include measures to bolster security in cyberspace.

Looking at the EU's migration and asylum policy, the German Presidency calls for an ambitious reform of the Common European Asylum System to create a fair, operational, efficient and crisis-proof system. With regard to the protection of the EU's external borders, it suggests, for instance, to introduce mandatory procedures enabling authorities to categorise and assess asylum applications in preliminary proceedings at an early stage and to refuse entry into the EU where it is evident that no need for protection exists. Furthermore, the EU's capacities for resettlement shall be strengthened and expanded. (CR)

#### Justice Ministers' Council Meeting: Democracy and Rule of Law in COVID-19 Crisis

At the first (informal) Council meeting of the EU ministers of justice under Germany's Presidency on 6 July 2020, the management of the COVID-19 crisis guided the agenda. [The ministers discussed](#) how to manage the corona pan-



demic in liberal democracies governed by the rule of law and how disinformation and hate speech could be countered.

Ministers discussed, *inter alia*, the question of how policymakers have reacted to criticism, scientific findings, and decisions by the judiciary. The goal is to better equip democracies and states governed by the rule of law to cope with crises such as the COVID-19 pandemic.

There was agreement that the right balance between health protection and fundamental rights is important and that restricted fundamental freedoms such as freedom of movement and assembly, freedom of religion, and entrepreneurial freedom must be restored as soon as circumstances permit. Federal Minister of Justice *Christine Lambrecht* stressed the importance of the rule of law, which is the focus of the German Council Presidency.

On the subject of disinformation and hate speech, Commission Vice-President *Věra Jourová* and Justice Commissioner *Didier Reynders* explained that a voluntary code of conduct and cooperation with Internet platforms are important. This will be addressed in the framework of the Action Plan for Democracy planned for the end of 2020 and in corresponding legislative proposals pertaining to the Digital Services Act. The strengthening of victim protection is to be taken up and further developed during the German Council Presidency in accordance with the strategy for victims' rights, which has already been adopted (see news in the section "Victim Protection"). (TW)

### **EU-Police Partnership on Agenda at First Council Home Affairs Meeting under Germany's Presidency**

At the [first meeting of the EU home affairs ministers under Germany's Council Presidency on 7 July 2020](#), discussions focused on the European police partnership and on search and rescue at sea/combating human smuggling activity.

Federal Minister of the Interior *Horst Seehofer* stressed the importance of stronger European cooperation among

security authorities in response to criminal networks acting across borders. The ministers approved the development of a new EU-police partnership. It should primarily focus on making more effective use of the existing possibilities for the exchange of information. Funding for EU agencies in the area of home affairs (especially Europol and Frontex) should be boosted considerably. As a result, the agencies will be enabled above all to make use of new data analysis technologies such as artificial intelligence.

In order to address the challenges of migration to Europe, the ministers agreed to enhance cooperation with third countries, which is seen as a key part of fighting human smuggling and enabling an effective return policy. A conference hosted by Italy on 13 July 2020 marked the start of closer cooperation with North African countries in this area. (TW)

## **European Court of Justice (ECJ)**

### **CJEU – Annual Report 2019**

According to its newly released [Annual Report 2019](#), the highest-ever number of new cases (1905) were brought before the European Court of Justice and the General Court. 1,739 cases were decided by the CJEU in 2019, and 2,500 cases were pending. The average length of proceedings was approx. 15.6 months (14.4 months at the Court of Justice and 16.9 months at the General Court). Urgent preliminary ruling procedures dealt with at the Court of Justice took 3.1 months on average. 1,245,000 pages were translated by the Courts' language departments, while simultaneous interpretation was used in 617 hearings and meetings. The Courts received 23,000 visitors, with 2,824 judges coming to the Courts in the context of seminars, training courses, visits, and traineeships. Furthermore, the Courts received around 28,000 requests for information.

Moreover, the report outlines the CJEU's judicial activities in 2019, look-

ing back at the most important judgements of the year. In 2019, important judgements were taken in the areas of health and environment, rights and obligations of migrants, rule of law, protection of personal data and the internet, protection of worker's rights, consumers, intellectual property, and state aid. Out of the 966 cases brought before the Court of Justice in 2019, 641 concerned preliminary ruling proceedings and 266 appeals against decisions of the Court of Justice. With 114 cases, the highest number of requests for preliminary ruling proceedings originated from Germany.

Out of the 939 cases brought before the General Court, 848 concerned direct actions, out of which the majority (270 cases) concerned intellectual and industrial property.

In 2019, the CJEU also inaugurated its third tower completing its premises in Luxembourg. A symposium was held to mark the 30<sup>th</sup> anniversary of the General Court that was established on 25 September 1989.

In 2019, further efforts were taken to increase its efficiency, broaden its presence on social networks, and to strive for an environmentally friendly institution.

Next to the summary given in the Annual [Review](#), the Annual Report 2020 also contains more detailed versions reporting on the CJEU's [Judicial activity](#) and [Management](#) outlining the main results of the institution's administrative activity in 2019. (CR)

### **Resumption of Hearings**

Since 25 May 2020, the Court of Justice of the EU has [resumed holding hearings](#) at its premises in Luxembourg. The hearings are subject to strict hygiene and social distancing protocols. (CR)

## **OLAF**

### **OLAF and WCO Step Up Cooperation**

In April 2020, OLAF and the World Customs Organization (WCO) improved the

sharing of information. Both anti-fraud bodies [interconnected their databases](#) with regard to tobacco smuggling. By linking the WCO's Customs Enforcement Network (CEN) database and the Customs Information System (CIS+) managed by OLAF, customs administrations worldwide now have access to non-personal data on tobacco smuggling within 24 hours.

Data on tobacco seizures carried out within the EU are automatically transferred to the WCO's database. The CEN assists customs enforcement authorities in gathering data and information for intelligence purposes. It is a central depository for enforcement-related information that helps define strategies, prepare risk indicators, and identify illicit trafficking trends.

The CIS assists EU Member States' administrative authorities in preventing, investigating, and prosecuting operations that are in breach of customs or agricultural legislation by making information available more rapidly and thereby increasing the effectiveness of cooperation and control procedures.

Interconnecting CEN and CIS is a further step in stepping up cooperation between the WCO and OLAF – under the motto “one seizure, one report.” (TW)

### Operation OPSON IX: Dangerous Food and Drinks Taken Off the Market

On 22 July 2020, [OLAF reported](#) on its support for the operation OPSON IX, which was carried out on an international scale from December 2019 to June 2020. The operation was run by Europol and Interpol, and it targeted counterfeit and substandard food and beverages, food fraud, and economically motivated adulteration. OLAF coordinated actions in 17 EU and two non-EU countries, which lead to the seizure of 1.2 million litres of counterfeit wine and alcoholic beverages.

In total, the entire operation involved law enforcement authorities in 83 countries worldwide. [Europol reported](#) the

successful dismantling of 19 organised crime groups involved in food fraud and also arresting over 400 suspects. This year's operation OPSON focused on dairy products, resulting in the seizure of 320 tonnes of smuggled or substandard goods, e.g., rotten milk and cheese. Besides alcohol and wine, actions also targeted the sale of olive oil and illegal horse meat. Europol concluded that the operational activities of OPSON IX revealed a disturbing new trend: the infiltration of low-quality products into the supply chain, a development possibly [linked to the COVID-19 pandemic](#). See the separate news item under “Counterfeiting” for the Europol report of 17 April 2020 on how counterfeiters are benefiting from the COVID-19 pandemic. For the eighth edition of the operation Opson, see [eucrim 2/2019, p. 90](#). For the recent successful strike against trade in fake spirits in Spain, an operation also supported by OLAF, [see eucrim 1/2020, p. 12](#). (TW)

### OLAF Supports Detection of Money Laundering Scheme in Romania and Belgium

On 2 July 2020, OLAF [reported on the successful conclusion of investigations](#) into a complex money laundering scheme in Romania and Belgium. Criminal investigations were initially opened by the Belgian judicial authorities in 2016 and by the Direcția Națională Anticorupție (DNA) in Romania in 2017. A joint investigation team (JIT), which was established in 2019 and supported by OLAF and Eurojust, brought together the Romanian and Belgian authorities and leveraged the investigations. As a result, simultaneous operations were carried out by the JIT members in Belgium and Romania in April 2019. They resulted in the seizure of a substantial amount of evidence, and several persons came under judicial control for corruption and money laundering offences.

Investigations revealed that a counsellor for the Romanian Ministry of

Transport and her Italian husband had set up a complex scheme whereby – with the help of others – they received a total of €2 million for an EU-funded railway infrastructure project in Romania. By establishing fictitious contracts, part of the money flowed into the bank accounts of two Belgian companies that were *de facto* controlled by the offenders. Some money was used to pay for political advertising during the campaign for the Romanian national parliamentary elections in 2012, and more than €600,000 was transferred to private bank accounts.

Following the closure of the investigation, OLAF recommended that Romania and Belgium initiate judicial proceedings for corruption and money laundering. In July 2020, the [Romanian DNA indicted](#) five individuals and companies. (TW)

### OLAF Helps Unravel Illegal Gas Import

With OLAF's support in collecting intelligence on a suspicious cargo shipment from China, Dutch authorities were able to [seize 14 tonnes of illicit refrigerant gases](#) bound for the EU. The successful operation involved the Netherlands, Lithuania, and Poland. It was coordinated by OLAF and ultimately carried out in the port of Rotterdam at the end of June 2020.

The import of gases into the EU is subject to strict quotas and regulations. The cargo from China was destined for a Lithuanian company that was not registered or even allowed to receive such imports under EU rules. The potential environmental impact would have been huge. The gases would have had a high global warming potential, equivalent to 38 return flights from Amsterdam to Sydney.

OLAF Director-General *Ville Itälä* highlighted the following: the operation shows that OLAF's operational priorities in the environmental field are becoming increasingly important, thus contributing to the new European Commission's ambition to make Europe the

first climate-neutral continent by 2050 with its European Green Deal. Preventing illegal imports, which can have devastating effects, from entering into the EU protects citizens, the environment, and legitimate trade. (TW)

### **OLAF & Europol Foil Smuggling of Dangerous Counterfeit Pesticides**

On 5 June 2020, OLAF reported on the meanwhile “fifth edition” of the [operation Silver Axe](#). It led to the seizure of 1346 tons of illicit and counterfeit pesticides. The operation was coordinated by Europol and OLAF and involved police, customs, and plant protection authorities from 32 countries, including, e.g., China, Columbia, Russia, and Ukraine. OLAF’s role was to share operational intelligence with EU Member States and third countries’ authorities and to alert customs authorities to suspicious shipments of pesticides that were recently deauthorised for use in the EU. The shipments of illegal pesticides were declared as being in transit through the EU or destined for re-export from the EU; in fact, however, the intention was illegal sale in the EU.

The Silver Axe operations have led to seizures of 2568 tons of illegal pesticides so far. OLAF stressed that the operations show the importance of the coordinating role of central authorities, such as OLAF and Europol, because it is impossible for national authorities in a single state to detect and decrypt the smuggling schemes. OLAF’s rapid alert system is particularly helpful in this respect, as it allows intelligence to be shared in real time with non-EU countries. (TW)

### **OLAF Supports Seizure of Smuggled Cigarettes**

The Italian Guardia di Finanza caught a consignment of nearly 55,000 cigarettes destined for entry into the EU black market in a seizure [coordinated by OLAF](#). OLAF received information from Turkish Customs about a suspicious convoy with a significant quantity of cigarettes, which was to be delivered to a Spanish

company in the Canary Islands. With the support of the Spanish authorities, OLAF collected evidence that a criminal organisation was behind the company; it operated using fictitious companies in Italy and other countries so that moves of the consignment were hidden. The real purpose was to smuggle cigarettes into the EU without paying customs duties and taxes. On 8 May 2020, the Guardia di Finanza seized the cigarettes at the port of Trieste. It is estimated that the EU would have lost a total of around €11 million in unpaid customs duties. OLAF Director-General, *Ville Itälä*, highlighted that the operation is a concrete example of how important cooperation among Member States and OLAF’s established partnerships with third countries are in order to successfully protect the EU’s financial interests. (TW)

### **OLAF Supports Strike against Cigarette Smuggling in Ukraine**

On 9 July 2020, OLAF reported on its role in the [successful strike against cigarette smuggling in the Ukraine](#). Having been alerted of a suspicious shipment from the Arab United Emirates via Ukrainian Black Sea ports with a final destination in Transnistria/Moldova, OLAF provided intelligence analyses and asked the Ukraine customs authorities to take action with regard to the shipment. The Ukrainian authorities seized over 1.7 million packets of cigarettes (totaling 34,550,000 cigarettes) that were to be smuggled into the EU via the Transnistrian region. The revenue loss is estimated at around €7 million. It was also revealed that the cigarettes were missing all requirements for legal sale in the EU, such as excise labels and health warnings with texts/pictures. (TW)

### **Italy: Successful Strike against Tobacco Smuggling**

Italy’s Guardia di Finanza successfully [broke up a tobacco smuggling ring in May 2020](#). After OLAF’s tip-off, the Italian authorities raided the port of Salerno and led an investigation against

69 persons. They uncovered two consignments of smuggled tobacco that were being shipped from the United Arab Emirates. The operation resulted in the arrest of 39 persons, including officials, customs brokers, and company employees. These persons are now being prosecuted for a variety of crimes, including corruption, embezzlement, illegal access to databases, receiving stolen goods, smuggling, and international waste trafficking. (TW)

### **OLAF Unveils Fraud by Greek Researcher**

On 5 May 2020, OLAF reported the [successful discovery of a fraud scheme set up by a Greek researcher](#). The researcher pretended to involve over 40 international researchers in a research project funded by the European Research Council Executive Agency (ERCEA) with a grant of approx. €1.1 million. OLAF found evidence that the researchers were, in fact, not involved and that the Greek researcher had set up banking accounts – actually meant to pay the individual researchers – making herself the co-beneficiary, so that she was able to access the money. The investigation was concluded in November 2019. OLAF recommended that the ERCEA recover approximately €190,000 (the share of the €1.1m grant allegedly paid to the international researcher). The Greek authorities recommended initiating judicial proceedings against the persons involved.

OLAF Director General *Ville Itälä* stated that the case demonstrated yet again the importance of being able to access banking records in order to fight fraud successfully. (TW)

### **OLAF: Fraud Detected in Environmental Research**

OLAF investigations dismantled a [fraud scheme by a consortium that had received EU money to carry out environmental research](#). After a tip-off by the European Commission’s Research Executive Agency (REA), which had

discovered irregularities in claims for personal costs, OLAF carried out on-the-spot checks and digital forensic operations, assisted by the competent national authorities. Apparently, the beneficiaries (a consortium of five small and medium-sized companies in France, Ireland, Romania, and Spain) had neither the capacity nor the intention to carry out the environmental research project. Instead, the major share of the EU grant (€400,000) was pumped into a casino/hotel in Cyprus. The investigation was already concluded in November 2019 but only reported on 17 April 2020. OLAF recommended that the REA recover €410,000 from the consortium. The national judicial authorities recommended initiating judicial proceedings against the individuals involved.

OLAF Director General *Ville Itälä* stressed that OLAF's work is becoming increasingly important in the area of environmental research, because a great deal of EU money was spent after the new Commission set its ambitious goal of the European Green Deal. (TW)

### OLAF Investigations against MEPs

On 30 April 2020, OLAF informed the public that it had successfully [concluded two internal investigations against MEPs](#) and their staff. The investigations were launched in 2017/2018 after allegations that money from salaries was being transferred to the national political parties. This is not allowed under the rules of the EP.

In the first investigation, OLAF found that MEPs and staff working for the party delegation at the EP had made contributions of over €640,000 to the national headquarters of the party between 2014 and 2019. The payments had been made on the basis of party rules that do not comply with Union law.

In the second investigation, OLAF revealed that certain MEPs had paid €3000–4000 per month to their national party (in total more than €540,000) between 2014 and 2019. Moreover, the party had asked parliamentary assistants

to contribute to the party; the MEPs were aware of this and made arrangements for higher salaries to be paid in order to allow for contributions to be made to the national party.

OLAF called on the EP to effectively sanction such breaches of its rules; sanctioning measures are not in place at the moment. OLAF recommended initiating disciplinary proceedings against the staff involved. In the second investigation, OLAF also recommended the recovery of the money from the MEPs in question. (TW)

### European Public Prosecutor's Office

#### European Prosecutors Appointed

On 27 July 2020, the [Council appointed the European prosecutors](#) for the European Public Prosecutor's Office (EPPO) of all 22 participating EU Member States. The appointments were delayed since Malta had failed to deliver a sufficient shortlist of its candidates in line with the nomination rules.

The European prosecutors will supervise investigations and prosecutions and will constitute the EPPO College, together with the European Chief Prosecutor. European prosecutors are appointed for a non-renewable term of six years. The Council may decide to extend the mandate for a maximum of three years at the end of this period. As part of the transitional rules for the first mandate following the creation of the EPPO, European prosecutors from one third of the Member States, determined by drawing lots, will hold a three-year non-renewable mandate. This is the case for the prosecutors from Greece, Spain, Italy, Cyprus, Lithuania, Netherlands, Austria, and Portugal.

The EPPO is expected to take up its operational work at the end of 2020. It will be based in Luxembourg. In October 2019, the Council already appointed the Romanian prosecutor *Laura Kövesi* as head of the office (see [eucrim 3/2016, p. 164](#)). (TW)

### Europol

#### Working Arrangement with Mexico

On 1 July 2020, a [formal Working Arrangement](#) to expand and deepen collaboration between Europol and the Mexican Ministry of Security and Citizen Protection (SSPC) was signed. Under the Working Arrangement, a secure system will be introduced to exchange information between the parties so as to link Mexico with law enforcement authorities of the EU Member States, third countries and other organisations associated with Europol. Furthermore, Mexico may deploy a liaison officer to the Europol headquarters. (CR)

#### Working Arrangement with Kosovo

On 9 and 10 June 2020, the Management Board of Europol pathed the way for signing a [Working Arrangement](#) with the law enforcement authorities of Kosovo to combat serious and organised crime. Under the arrangement, Kosovo will, for instance, establish a central office for cooperation with Europol, obtain access to Europol's communication channel, and have the possibility to second a liaison officer to Europol headquarters in The Hague. Kosovo was the last country of the Western Balkans to conclude a cooperation agreement with Europol. (CR)

#### Capacity-Strengthening in the EU Eastern Neighbourhood

At the end of June 2020, a [four-year-long initiative](#) was kicked off between Europol and six Eastern Partnership countries to fight organised crime. Funded by the European Commission, this Europol-led project will support the law enforcement authorities of Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine to participate in operational activities against some of the most significant threats to the EU security listed under the EU Policy Cycle. (CR)

#### Cooperation with CENTRIC

On 13 May 2020, Europol and the Centre of Excellence in Terrorism, Resil-

ience, Intelligence and Organised Crime Research (CENTRIC) signed a [Memorandum of Understanding \(MoU\)](#). Europol and CENTRIC will now be able to assist law enforcement authorities with joint activities such as applied research and tool development to improve their capabilities in reacting, mitigating, and recovering from criminal threats as well as serious gaming for training and capacity-building purposes.

One example of the already existing cooperation between Europol and CENTRIC is the joint development of CRYPTOPOL, a cryptocurrency-tracing training game for law enforcement cryptocurrency investigators that simulates an investigation using real-life scenarios. Based on the newly established MoU, this training concept shall be applied to further capacity-building tools in other areas of crime.

CENTRIC is a centre of excellence in terrorism, resilience, intelligence and organised crime research. (CR)

### European Financial and Economic Crime Centre Launched

With the aim to enhance the operational support provided to the EU Member States and EU bodies in the fields of financial and economic crime, on 5 June 2020, Europol launched its new European Financial and Economic Crime Centre (EFECC). The EFECC is part of Europol's organisational structure, with 65 international experts and analysts working for the Centre. The new Centre strives to give an adequate and coordinated European response, since financial and economic crime has exponentially increased in recent years and involves organised crime on a large scale. The increase in the number of requests for operational support from EU Member States is another reason for the establishment of the Centre.

Together with the launch of the EFECC, Europol published a [strategic report](#), which provides an overview of the most threatening phenomena in the area of economic and financial crime. It

includes information on various types of fraud, the production and distribution of counterfeit goods, money laundering, and other relevant crimes. (CR)

### Europol Report on Migrant Smuggling

Europol published the [4th Annual Report on its European Migrant Smuggling Centre \(EMSC\)](#), looking at its 2019 activities to counter facilitated illegal immigration and trafficking in human beings. Key findings of the report in the area of migrant smuggling underline that border control measures taken due to the COVID-19 pandemic have had a strong impact on smuggling activities. Smugglers adapted quickly to new modalities, for instance, shifting smuggling routes from air to sea and land routes. Furthermore, there has been an increase in migrant smuggling activities involving secondary movements, mostly in the Western Balkans region and across the English Channel. Lastly, the report sees an even stronger vulnerability of unaccompanied minors than before the pandemic. Looking ahead, the report expects a resurgence in the movement of irregular migrants, an increased demand for cheap labour, and an increase of visa fraud cases in 2020.

As regards trafficking in human beings, the report anticipates that ongoing travel restrictions may enhance the demand for trafficked third-country migrants for the purpose of labour exploitation, mainly in the agriculture sector. Sexual exploitation may also rise for various reasons caused by the pandemic, for instance the closure of establishments offering legal sex work. Furthermore, the report also points out an emerging trend towards illegal adoptions across EU Member States as well as stronger involvement of underage victims of THB in forced criminality related to property crimes and drug-related crimes. According to the report, an increase in labour exploitation and further misuse of the Internet as a key crime-enabling factor in the trafficking chain is expected this year. (CR)

## Eurojust

### JIT Evaluation Report

In March 2020, Eurojust published the [third Evaluation Report](#) on Joint Investigation Teams (JITs). It covers the period from November 2017 to November 2019. In its two main chapters, the report presents the experiences of JIT practitioners with the evaluation of JITs and Eurojust's experience with JITs as regards third states. The report identifies specific challenges as well as best practices during the phase when a JIT is set up, the operational phase, and the prosecution phase.

Challenges with regard to the setting up of a JIT include, for instance, problems identifying relevant JIT partners in cases with more than two countries and diverging operational priorities. Challenges in the operational phase include, for example, language issues, refusal to execute EAWs due to prison conditions, and differences in legal requirements regarding the hearing of victims and witnesses.

After analysing its experience with JITs as regards third States, Eurojust found that the many challenges identified by the JIT practitioners are similar to those identified by Eurojust. (CR)

### New Factsheet on JIT Cooperation

In June 2020, Eurojust published a new [factsheet on Joint Investigations Teams](#) (JITs) cooperation summarizing its operational, legal and financial possibilities to support judicial authorities with the use of JITs. Options for support include, for instance, the JIT Funding Portal, practical guides and model agreements as well as the JITs Network comprising relevant national experts and its secretariat hosted by Eurojust. (CR)

### Eurojust Annual Report 2019

On 14 April 2020, Eurojust published its [Annual Report for the year 2019](#). In 2019, Eurojust once again saw an increase in its casework, with 3892 new cases and 3912 ongoing cases from

previous years. The majority of new cases in 2019 dealt with swindling and fraud (1111), money laundering (527), and drug trafficking (461). 545 of these cases also involved third states. In total, Eurojust dealt with over 8000 cases in 2019, the largest number in its history. Nearly 1100 Eurojust cases were solved through a rapid response, providing support within hours if necessary. Furthermore, 103 new agreements for Joint Investigation Teams (JITs) were signed in 2019 compared to 85 new JITs in 2018.

Looking at crime priority areas, in 2019, Eurojust worked on new cases of drug trafficking (461), migrant smuggling (187), THB (183), cybercrime (125), terrorism (94), and 12 new cases concerning environmental crime. In the area of counter-terrorism, the Judicial Counter-Terrorism Register was established at Eurojust on 1 September 2019 to detect possible links between ongoing investigations conducted in different Member States and to identify the coordination needs between all judicial authorities concerned.

Developments with regard to Eurojust's cooperation with third States included new cooperation agreements with Serbia and Georgia. The USA and Switzerland each posted second Liaison Officers to Eurojust.

Eurojust's support in the area of mutual recognition and the use of judicial cooperation tools in 2019 featured assistance in over 2146 cases involving European Investigation Orders and 1277 cases involving European Arrest Warrants. Furthermore, Eurojust published several guidelines and handbooks such as the Guidelines for deciding on competing requests for surrender and extradition.

Lastly, the report outlines Eurojust's transition to becoming the European Union Agency for Criminal Justice Cooperation, which is based on the new Eurojust Regulation that entered into force in 2019. Looking ahead, Eurojust will continue to contribute to the discussions on the need for Digital Criminal Justice. (CR)

### YouTube Channel Launched

Eurojust has launched its own [channel on YouTube](#), offering information on the Agency and its work in videos and messages. Subscription to the channel can be made [here](#). (CR)

### Frontex

#### Operation in Montenegro Launched

On 15 July 2020, Frontex launched an [operation in Montenegro](#) so as to tackle cross-border crime, including migrant smuggling, trafficking in human beings, document fraud, stolen vehicles and boats, smuggling of drugs and weapons, and terrorism. Measures include, for instance, the deployment of officers to support Montenegro's border guards at the border with Croatia. The operation is the second one launched by Frontex outside the EU. (CR)

#### Frontex and FRA Sign Agreement to Establish Fundamental Rights Monitors

On 10 June 2020, Frontex and FRA signed a [Service-Level Agreement](#) to establish a team of about 40 fundamental rights monitors. They shall make sure that all operational activities are in line with the fundamental rights framework, are to monitor all types of operations and contribute to Frontex training activities. They will be integrated with the Fundamental Rights Office of Frontex and overseen by its Fundamental Rights Officer. As a next step, Frontex will publish vacancy notices in order to deploy the monitors. (CR)

#### Recruitment: European Border and Coast Guard Standing Corps

In mid-May 2020, the first 280 selected candidates were offered jobs by Frontex to form the EU's [first uniformed law enforcement service](#). This newly established European Border and Coast Guard standing corps will consist of Frontex border guards and national officers from EU Member States and Schengen-associated countries. It will

carry out border control and migration management tasks in order to assist EU Member States, e.g., identity and document checks, border surveillance, and the return of persons illegally staying in the EU. The newly recruited officers will begin their jobs in June 2020 with an online training programme followed by a physical training programme later this year. (CR)

#### Operation of False and Authentic Document Online System

At the end of April 2020, Frontex' Centre of Excellence for Combatting Document Fraud became [responsible for the operation of the False and Authentic Documents Online system \(FADO\)](#). FADO is an EU Internet-based image-archiving system set up to support the rapid sharing of images of genuine, false, and forged documents between EU Member States. It also provides information on forgery techniques used by criminals. The system was established by Joint Action in 1998 and, since then, it has been administrated by the General Secretariat of the Council of the EU. (CR)

#### Risk Analysis 2020

On 28 April 2020, Frontex published its [Risk Analysis for the year 2020](#). In its three main chapters, the analysis assesses the situation with regard to migratory flows, several border management challenges, and it features analysis.

According to the report, the year 2019 saw the lowest number in detections of illegal border-crossings since the year 2013. Other indicators increased from the previous year, however, such as refusal of entry and detections of persons staying illegally.

The report also addresses concerns about current border management challenges such as the impact of the COVID-19 pandemic on border control and increasing cross-border crimes such as trafficking in drugs and firearms. The featured 2019 Risk Analysis looks at the application of the newly introduced European Border and Coast Guard Agency

Regulation (EU) 2019/1896, security risks to the EU's ports caused by black-listed flag vessels (BLVs), and secondary movements at sea in 2019.

Regarding the possible evolution of the situation at the EU external borders, the report deems it likely that upheavals in key regions of origin will bring the number of illegal border-crossings back to the level that existed prior to 2019. Rallies with migrants organised through social media, having the aim of overwhelming border authorities in order to enter the EU, may also become more likely. Lastly, cross-border crimes at the EU's external borders may continue to increase. The report does, however, see a distinct possibility for reduced passenger flows across the EU's external borders for reasons such as the COVID-19 outbreak and measures to counter climate change. Brexit is seen as a further challenge to EU border management and to countering cross-border crime.

Ultimately, the report touches upon a number of unknown scenarios that may challenge European border management such as new migratory flows caused by the COVID-19 outbreak. (CR)

## Agency for Fundamental Rights (FRA)

### Practical Guidance on Border Controls

At the end of July 2020, FRA published a [practical guidance](#) looking at border controls and fundamental rights at external land borders. The guidance aims at supporting border-management staff in the EU Member States in implementing the fundamental rights safeguards of the Schengen Borders Code (Regulation (EU) No. 2016/399) and related EU law instruments in their daily work. By outlining 'dos' and 'don'ts' in five core areas, the guidance intends to facilitate adherence with fundamental rights in the daily operational work of border-management staff conducting checks at border-crossing points and controls during border surveillance. It focuses on

external EU land borders as well as land borders with non-Schengen EU Member States.

Advice and recommendations are given on how to treat every person with dignity as well as in a professional and respectful manner; how to identify and refer to vulnerable people; how to respect the legal basis, necessity, and proportionality principles when using force; how to apply safeguards when holding people at borders; and how to respect procedural safeguards and protect personal data. (CR)

### FRA Paper on People's Security Concerns

On 22 July 2020, FRA published [a paper presenting people's concerns and experiences relating to security](#). For this survey, approximately 35,000 persons aged 16 years and older were interviewed in all EU Member States, plus North Macedonia and the United Kingdom.

Looking at the degree to which people worry about terrorism, the report finds that one in five persons in the EU (19%) are very worried about experiencing a terrorist attack in the 12 months following the survey. One in four persons in the EU (24%) are very worried about unauthorised use of their online bank account or credit or debit card details in the 12 months following the survey. 8% have experienced an incident where their online bank account or details of their credit or debit card were used without permission to defraud or steal from them in the five years before the survey. About 55% are concerned about their online data (i.e. the information they share on the internet/social media) being accessed by criminals and fraudsters. About 14% experienced cyber harassment in the five years before the survey. Nevertheless, experiencing harassment in person remains more common than cyber harassment.

The report also outlines socio-demographic characteristics associated with those people being more or less worried about experiencing a certain crime. (CR)

### FRA: Fundamental Rights Report 2020

On 11 June 2020, FRA published its [Fundamental Rights Report 2020](#). In nine chapters, it reviews the main developments of 2019 regarding:

- Equality and non-discrimination;
- Racism, xenophobia and related intolerance;
- Roma equality and inclusion;
- Asylum, visa, migration, borders, and integration;
- Information society, privacy and data protection;
- Rights of children;
- Access to justice;
- Developments in the implementation of the Convention on the rights of persons with disabilities.

The main focus of this year's report is on the tenth anniversary of the Charter of Fundamental Rights of the EU, outlining past decade's achievements as well as persisting hurdles such as its continuing limited use on the national level. Other key challenges of 2019 included the respect for fundamental rights at borders, child poverty in the EU, and ensuring ethics and fundamental rights considerations when using artificial intelligence. The report is accompanied by [FRA's opinions](#) on these developments, recommending a range of actions for consideration by EU bodies and national governments. (CR)

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### European Council Agrees on Future EU Budget – EP's Criticism

On 21 July 2020, the Heads of State and Government found a compromise on the 2021–2027 Multi-annual Financial Framework (MFF) and the extraordinary recovery budget destined to tackle the effects of the unprecedented coronavirus crisis. The EU leaders decided to support a budget of €1,074 billion for the next seven years as well as to mobilise €750

billion to support economic recovery. The final [conclusions of the European Council](#) with regard to the intensive negotiations on the future EU budget also include some political guidance on how the EU budget and the specific recovery effort (dubbed as Next Generation EU – NGEU) should be protected:

- The European Council expresses its commitment to the Union’s financial interests, which shall be protected in accordance with the general principles embedded in the Union Treaties, in particular the values of Art. 2 TEU. It underlines the importance of the protection of the Union’s financial interests as well as of the respect for the rule of law;

- A regime of conditionality to protect the budget and the NGEU will be introduced. In this context, in case of breaches, the Commission will propose measures for adoption by the Council through a qualified majority;

- The Commission is invited to present further measures to protect the EU budget and NGEU against fraud and irregularities. This will include measures to ensure the collection and comparability of information on the final beneficiaries of EU funding for the purposes of control and audit to be included in the relevant basic acts. Combatting fraud requires a strong involvement of the European Court of Auditors, OLAF, Eurojust, Europol and, where relevant, the European Public Prosecutor’s Office (EPPO), as well as of the Member States’ competent authorities;

- Adequate resources will be ensured for the EPPO and the OLAF in order to ensure the protection of the Union’s financial interests.

In a [resolution of 23 July 2020](#), the European Parliament (EP) reacted with a critical stance to the European Council conclusions. The majority of MEPs welcomed EU leaders’ acceptance of the recovery fund as proposed by Parliament in May, calling it a “historic move for the EU”. However, they deplore the “massive cuts to the grant components”. As regards the long-term budget, MEPs

disapprove the cuts made to future-oriented programmes, such as the Green Deal or the Digital Agenda, which jeopardise the EU’s commitments and priorities. A strong point of criticism is that the European Council significantly weakened the efforts of the Commission and the EP to uphold the rule of law, fundamental rights, and democracy in the framework of the MFF and the recovery plan, leaving open what will happen with the proposed Regulation. The Regulation would protect the Union’s budget if generalised deficiencies regarding the rule of law in a specific Member State cause the risk of financial loss (see [eucrim 1/2018, pp. 12–13](#) and the article by *L. Bachmaier*, [eucrim 2/2019, pp. 120–126](#)).

The EP clarified that it will not rubber-stamp the compromise found by the EU leaders. MEPs reiterated that Parliament will not give its consent for the MFF without an agreement on the reform of the EU’s own resources system. They warned that they will withhold their consent for the MFF until a satisfactory agreement is reached in the upcoming negotiations between the EP and the Council, preferably by the end of October 2020 at the latest so as to ensure a smooth start of the EU programmes from 2021. (TW)

### EP Calls for Greater Efforts to Protect Financial Interests

On 10 July 2020, the European Parliament adopted a [resolution on the Commission’s annual fraud report 2018](#) (see [eucrim 3/2019, pp. 168–169](#)). The EP has taken a position on several topics of the PIF report, including:

- Detection and reporting of irregularities;
- Revenue – own resources;
- Expenditure;
- The new Commission’s Anti-Fraud Strategy;
- OLAF;
- The establishment of progress of the EPPO;
- Public procurement;

- Digitalisation;

- Transparency.

MEPs are very concerned about the permanent modification of fraud methods, new patterns of fraud with a strong transnational dimension, and cross-border fraud schemes, i.e.:

- Fraud in the promotion of agricultural products;

- Shell companies;

- Evasion of custom duties via the undervaluation of textiles and footwear entering the Union and going through customs clearance in several Member States;

- e-commerce;

- The increasing cross-border dimension of fraud on the expenditure side;

- Counterfeiting.

These trends negatively affect the revenue side of the EU budget and require a new, coordinated response at the EU and national levels. The real scale of fraud is unclear because many fraudulent irregularities remain unreported by the Commission and especially by the Member States every year. Therefore, stronger efforts are needed in the future to collect comparable data on irregularities and cases of fraud in a more reliable and accurate way. Other issues of concern are the misuse of European structural and investment funds by high-level government officials in several EU countries and the misuse of Cohesion Funds.

The EP resolution identifies a number of areas for improvement, among them:

- Fraud risk assessment and fraud risk management, where the Commission and Member States are called on to strengthen their analytical capacity to better identify data on fraud patterns, fraudsters’ profiles, and vulnerabilities in internal EU control systems;

- Stronger coordination and monitoring of the assessment and management of fraud risks;

- Greater focus on the connection between corruption and fraud in the EU: the Commission is urged to resume its anti-corruption reports and to engage in



a more comprehensive and coherent EU anti-corruption policy, including an in-depth evaluation of the anti-corruption policies in each Member State;

- Adaptation of customs controls to new fraud risks and to the rapid expansion of cross-border trade facilitated by e-commerce and by paperless business;
- Facilitation of cross-checking of accounting records for transactions between two or more Member States in order to prevent cross-border fraud by means of better information exchange and by establishing legislation on mutual assistance in the areas of expenditure of EU funds;
- Stronger Eurofisc network, including a strengthened role of the Commission having access to Eurofisc data and a control function;
- Improvements in investigations related to e-commerce, in particular through close monitoring of e-commerce transactions involving sellers based outside the EU and detecting fraud in relation to the underestimation of goods.

Furthermore, MEPs recommend better use of the existing IT systems to combat fraud. Member States are called on to promptly report fraudulent irregularities in the “Irregularity Management System” (IMS) managed by OLAF and to make the best use of the Early Detection and Exclusion System. Member States should also make effective use of the fraud prevention tool offered by the ARACHNE database, whose use could be made legally mandatory in the future (for the use of these systems, see also the contribution by *L. Kuhl*, in this issue). (TW)

### ECA Examined Costs and Cost Savings in EU's Cohesion Policy Funds

On 16 April 2020, the European Court of Auditors (ECA) published the results of an audit on implementation of the EU's Cohesion Policy Funds ([Special Report No 07/2020](#)). The audit aimed at finding out the following:

- Whether administrative costs are comparable to other similar schemes;

- Whether the underlying cost information is complete, coherent, and consistent;

- Whether this information is suitable for analysis and decision making with regard to legislation, e.g., simplifying the rules.

The ECA concluded that the overall cost of implementing the Cohesion policy funds presented by the Commission is relatively low compared to other EU funds and internationally funded programmes. There are, however, deficiencies in the completeness, coherence, and consistency of the collected data; for instance, the impact of simplified EU rules on implementation of the cohesion policy could not be assessed. The ECA acknowledges that the Commission introduced several simplification measures in the 2014–2020 and 2021–2027 Regulations.

The ECA believes that administrative costs will increase during the current funding period 2014–2020, which conflicts with estimates by the Commission. It anticipates that expected costs savings may not be achieved because the estimates did not take into account the complexity of the Member States' administrative practices. The ECA recommends that the Commission identify further potential savings by examining administrative practices in the Member States. The Commission should also follow up on whether the estimated costs savings have materialised.

Expenditure related to the EU's cohesion policy, which is structured around the European Regional Development Fund (ERDF), the Cohesion Fund (CF) and the European Social Fund (ESF), accounts for approximately one third of the overall EU budget. It amounts to €352 billion in the 2014–2020 period. The aim of the cohesion policy is to reduce development disparities between regions, restructure declining industrial areas, and encourage cross-border, transnational, and interregional cooperation in the European Union. The ECA's Special Report No 07/2020 provides in-

put for the 2021–2027 MFF period. It is also relevant with respect to increasing the effectiveness of the management and control systems in the Member States for the 2021–2027 period. The ECA regularly carries out audits in the area of the EU's cohesion policy (e.g. [Review No 03/2019: Allocation of Cohesion policy funding to Member States for 2021–2027](#) and [Review No 08/2019: Delivering performance in Cohesion](#)). (TW)

## Money Laundering

### Commission Tables Measures to Enhance AML/CFT

Following its [roadmap “towards a new comprehensive approach to preventing and combating money laundering and terrorism financing”](#) of February 2020 (see separate news item), the European Commission put forward a series of further measures on 7 May 2020. They are designed to step up the EU's anti-money laundering (AML) and countering the financing of terrorism (CFT) framework. The [Commission tabled](#):

- An Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing;
- A refined and more transparent methodology for identifying high-risk third countries under Directive (EU) 2015/849;
- An updated list of third-country jurisdictions with strategic deficiencies in their AML/CFT regimes (high-risk third countries).

These measures are analysed in more detail in separate news items. (TW)

### Action Plan on Preventing Money Laundering: Six Pillars

EU action against money laundering and terrorist financing must be ambitious and multifaceted. This is the main line of argumentation in the Commission Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing ([Communication C\(2020\)](#)



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[2800 final](#)). The Action Plan was tabled on 7 May 2020.

The Action Plan is based on six pillars. Each is aimed at bolstering the EU's defences when fighting money laundering and terrorist financing. The pillars should also strengthen the EU's global role in this area. The future system will be mainly based on a harmonised rulebook and an EU-level supervisor who is to ensure high-quality and consistent supervision of AML/CFT measures across the Single Market. This will be coupled with reinforcing the effectiveness of the Financial Intelligence Units (FIUs) through an EU-coordinated mechanism and by interconnecting the national centralised bank account registries. In detail, the six pillars are as follows:

■ *Ensuring the effective implementation of the existing EU AML/CFT framework:* Next to the Commission's additional efforts to closely monitor implementation of the current EU rules, in particular the fourth and fifth AML Directives, the Commission will propose country-specific recommendations on AML/CFT during the second quarter of 2020; in addition, the European Banking Authority is encouraged to make full use of its strengthened powers as regards AML/CFT.

■ *Establishing a single EU rulebook on AML/CFT:* The Action Plan outlines the Commission's ideas on how AML/CFT legislation can be further developed at the EU level. New measures should increasingly address implications of technological innovation and developments in international standards; administrative freezing by FIUs could be facilitated. Nevertheless, the Commission mainly envisages turning certain parts of the current AML Directives into directly applicable provisions set out in a Regulation. This would avoid the persistent problem of diverging interpretation and application of the rules. It has been proposed that, at a minimum, provisions laying down the list of obliged entities, customer due diligence requirements, internal controls, reporting obligations

as well as the provisions on beneficial ownership registers and central bank account mechanisms should be integrated into the Regulation. The more harmonized set of rules will be proposed in the first quarter of 2021.

■ *Bringing about EU level AML/CFT supervision:* In the first quarter of 2021, the Commission also plans to table proposals for the establishment of an EU-level AML/CFT supervisor, based on a thorough impact assessment of options regarding its functions, scope, and structure. The Commission believes that it is imperative to have an integrated AML/CFT supervisory system in place at the EU level. The system will supplement the national one. The EU-level AML/CFT supervisory system would address supervisory fragmentation, ensure harmonized application of AML/CFT rules in the EU and their effective enforcement, offer support for on-the-spot supervisory activities, and ensure a constant flow of information regarding ongoing measures and significant identified shortcomings. The Action Plan outlines the functions of this EU supervisor. The task may either be granted to an existing EU agency (e.g., European Banking Authority) or to a new, dedicated body.

■ *Establishing a support and cooperation mechanism for FIUs:* Although FIUs play an essential role in identifying money laundering and terrorist financing transactions and activities, past evaluations have identified weaknesses in the application of the rules and FIUs' cooperation. The network of national FIUs should work with an EU centre in the future. The Commission plans an EU coordination and support mechanism at the EU level, which will remedy the current weaknesses. The mechanism is intended, inter alia, to identify suspicious transactions with a cross-border dimension, carry out joint analysis of cross-border cases, and identify trends and factors relevant to assessing the risks of money laundering. Respective legislative proposals will be tabled in the

first quarter of 2021. In the second half of 2020, the Commission will take over the management of the FIU.net from Europol.

■ *Enforcing Union-level criminal law provisions and information exchange:* The Commission is considering options on how the information exchange among all competent authorities (FIUs, supervisors, police and judicial and customs and tax authorities) can be enhanced and promoted. An essential element for data sharing will be the enhancement of the role of public-private partnerships (PPPs) as much as possible. The Commission will issue guidance on PPPs in the first quarter of 2021.

■ *Strengthening the international dimension of the EU AML/CFT framework:* The EU needs to play a stronger role in setting international AML/CFT standards, in particular at the FATF. EU representatives should voice coordinated positions at the FATF: in the longer term, the Commission could get the mandate to represent the EU in the FATF and speak with one voice. FATF evaluations should increasingly take into account the EU's AML/CFT rules. The EU will adjust its approach to high-risk third countries. A new methodology on the assessment of high-risk third countries is to be published along with this Action Plan.

The Action Plan comes in response to conclusions by the European Parliament and the Council calling for new initiatives to reinforce EU actions at the EU level. The European Parliament and Council took their view following the "AML/CFT package" of July 2019. The package included the Commission Communication "Towards better implementation of the EU's AML/CFT framework and accompanying reports", in which the Commission set out the measures needed to ensure a comprehensive EU policy on preventing money laundering and countering the financing of terrorism (see eucrim 2/2019, pp. 94–96).

To ensure inclusive discussions on the development of these policies, the

Commission started a [public consultation](#) on the Action Plan. Stakeholders were invited to provide their feedback by 29 July 2020. (TW)

### Commission's Refined Methodology for Identifying High-Risk Third Countries

By means of the [Staff Working Paper SWD\(2020\) 99 final](#) of 7 May 2020, the Commission presented a refined and more transparent methodological approach by which to identify high-risk third countries with strategic deficiencies in their regime on anti-money laundering and countering terrorist financing. The paper is intended to replace the methodology developed in June 2018. The list of high-risk third countries is important because banks and other financial institutions will be obliged to carry out extra checks (enhanced customer due diligence requirements) for transactions involving these countries.

The Commission's reaction comes in response to Council objections to the list presented by the Commission in February 2019 (see also eucrim 1/2019, p. 18). The Council expressed concerns over the transparency of the process, the need to incentivise third countries and to respect their right to be heard.

The three main elements of the revised methodology are:

- *Interaction between the EU and Financial Action Task Force (FATF) listing process:* Third countries are also listed by the FATF. The Commission Staff Working Paper sets out the consequences of a listing/delisting by the FATF and the autonomous listing by the EU.

- *Enhanced engagement with third countries:* The Commission describes the process for the EU's autonomous assessment. The Commission will increasingly interact with third countries, encouraging them to effectively address concerns identified on a preliminary basis. This includes fact-finding and information on preliminary findings by the Commission and definition of mitigating measures.

- *Reinforced consultation of Member*

*States experts:* Member State experts will be consulted at every stage of the process regarding assessments of third countries' regimes, the definition of mitigating measures, third countries' implementation of EU benchmarks, etc. This consultation will include specific Member States' competent authorities (law enforcement, intelligence services, Financial Intelligence Units).

The European Parliament and the Council will have access to all relevant information at the different stages (subject to appropriate handling requirements). The Commission will also ensure appropriate reporting to the EP and the Council. (TW)

### Commission Issues New List of High-Risk Third Countries

Alongside a refined methodology for identifying third countries with strategic deficiencies in their AML/CFT frameworks (high-risk third countries, see separate news item), the Commission adopted a new list of these countries on 7 May 2020. The list is a last resort for the EU, but required by the 4th and 5th AML Directives. It ensures protection of the EU's internal market by obliging financial entities to carry out extra checks if transactions from listed countries are involved. The list is based on the previous 2018 methodology and takes into account recent developments at the international level. The new list is now better aligned with the lists published by the FATF. The amendment took the form of a [Delegated Regulation \(C\(2020\) 2801 final\)](#).

The Commission listed 12 new countries. Based on the FATF "Compliance documents," the Commission added The Bahamas, Barbados, Botswana, Cambodia, Ghana, Jamaica, Mauritius, Mongolia, Myanmar, Nicaragua, Panama, and Zimbabwe. Bosnia-Herzegovina, Guyana, Lao People's Democratic Republic, Ethiopia, Sri Lanka, and Tunisia were removed from the list.

As regards the newly listed countries, the Regulation will only apply as of 1

October 2020 in consideration of the coronavirus crisis. The delisting of countries, however, is not affected by this. It will enter into force 20 days after publication in the Official Journal. The European Parliament and the Council have a one-month scrutiny period (extendable by one more month). The Regulation can only enter into force if there has been no objection during this scrutiny period. In February 2019, the Council objected to the proposed list of the Commission (see also eucrim 1/2019, p. 18). (TW)

### MEPs Propose Far-Reaching Measures to Stop Money Laundering

High-quality, interconnected registers of beneficial ownership, a preventive blacklisting policy, effective sanctions and beefed-up EU supervision – these are the main requests from MEPs as set out in the [resolution "A comprehensive Union policy on preventing money laundering and terrorist financing."](#) The resolution was adopted in the plenary session on 10 July 2020. It comes in reaction to the Commission Action Plan on AML/CFT of 7 May 2020 (see separate news item), the Commission's AML package as adopted in July 2019 (see eucrim 2/2019, pp. 94 et seq.), and other recent developments.

The vast majority of MEPs welcomed the Commission's Action Plan on how to effectively fight money laundering and terrorist financing, in particular the Commission's intention to deliver a single rule book in the field of AML/CTF and to present a new EU institutional architecture for AML/CTF, built on an EU-level AML/CTF supervisor and an EU coordination and support mechanism for FIUs. The EP even proposes widening the scope of obliged entities in a potential single rule book, which should address new and disruptive market sectors (such as crypto-assets). They also advocate the establishment of an EU FIU. The resolution highlights the most pressing changes needed to achieve an efficient EU AML/CFT framework. These include:

- Correct and homogenous implementation of the EU's AML/CFT rules in the Member States, a zero-tolerance approach, and infringement procedures against EU countries that lag behind in transposing the rules into national law;
- Action by the Commission against general lack of enforcement of high-level corruption and money laundering cases in Member States;
- Quick blacklisting of non-cooperative jurisdictions and high-risk third countries, while creating clear benchmarks and cooperating with those undertaking reforms;
- Denying entities based in tax havens access to EU funding;
- Empowering the European Central Bank to withdraw the licences of any banks operating in the euro area that breach AML/CTF obligations, independently of the assessment of national AML authorities;
- Changing the European Banking Authority's governance structure, so that it is able to carry out independent assessments;
- Strengthening inquiries into recent ML/TF scandals, e.g., Luanda Leaks, both at the EU and national levels;
- Adopting further initiatives that could enforce actions at the EU and national levels in AML/CTF, e.g., widening the competences of the EPPO and OLAF and strengthening existing agencies such as Europol and Eurojust;
- Considering a proposal on a European framework for cross-border tax investigations and other cross-border financial crimes.

MEPs have also taken position on several aspects related to AML/CFT. They highlight, for instance, the valuable contribution of international investigative journalism and whistle-blowers in exposing possible crimes. They call on Member State authorities to fully and transparently investigate money laundering and related crimes, including a thorough investigation into recent cases of concern, such as the assassination of journalist *Daphne Caruana Galizia*

in Malta, the Danske Bank scandal in Denmark and Estonia, and the Wirecard scandal in Germany. (TW)

#### ECA Announces AML Audit

On 11 June 2020, the European Court of Auditors (ECA) provided information on an [upcoming audit](#) on the effectiveness of the EU's anti-money laundering policy in the banking sector. The audit follows plans by the Commission, the Council, and the European Parliament to review and consolidate the EU's AML/CFT policy and practice. The issued [preview document](#) gives information on the preparatory work undertaken before the start of the audit. The audit will focus on:

- The transposition of EU legislation in Member State law;
- The management of risks to the internal market, including the communication of AML risks to banks and national authorities;
- The coordination and sharing of information among national and EU supervisory bodies;
- The EU's action to remedy breaches of its AML law at the national level.

The AML audit was included as a high-priority task in the ECA's work programme for 2020. The audit report is expected in the first half of 2021. (TW)

#### Romania and Ireland Must Pay for Not Having Implemented 4th AML Directive

On 16 July 2020, the CJEU upheld the Commission's application that [Romania and Ireland had infringed their obligation](#) under the EU Treaties by not having transposed the fourth Anti-Money Laundering Directive (Directive 2015/849) in time. Romania and Ireland neither adopted the national measures transposing the Directive nor notified such measures to the Commission and, consequently, they failed to fulfil their obligations under that directive.

The judgments also ordered Romania and Ireland to pay a lump sum of €3 million and €2 million, respectively, for their non-compliance. The CJEU reject-

ed counter-arguments brought forward by Romania and Ireland that they have meanwhile transposed the Directive and that the application for a lump sum is unjustified and disproportionate. The judges in Luxembourg took the cases as an opportunity to clarify certain aspects of the sanctioning mechanism in the context of infringement proceedings in Art. 260(3) TFEU. These aspects concerned the following:

- Scope of Art. 260(3) TFEU in the context of failure to fulfill obligations thus declared;
- Requirements on the part of the Commission to state reasons for its decision to seek the imposition of financial penalties, their nature, and their amount under Art. 260(3) TFEU;
- Objectives pursued by the system of lump sums in Art. 260(3) TFEU and their proportionality;
- Calculation of the lump sums.

Concluding that the failure to fulfil obligations by Romania and Ireland had persisted for somewhat more than two years and with regard to all circumstances in the present case – including the Court's discretion under Art. 260(3) TFEU – the lump sum was considered justified as ordered. The two judgments against Romania and Ireland were handed down by the CJEU's Grand Chamber and are referred to as cases [C-549/18](#) and [C-550/18](#). (TW)

## Tax Evasion

### Improving Fight against Tax Fraud – Commission Presents Tax Package

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As part of the EU's general aim of economic recovery and long-term growth, the [Commission presented a new tax package](#) on 15 July 2020. The Commission intends to achieve fairer and simpler taxation throughout the EU. The package puts the fight against tax abuse at the forefront. It simultaneously aims to help tax administrations reduce administrative burdens, improve the environment for businesses

across the EU, and keep pace with an increasingly globalised economy. In addition, better cooperation with non-EU member states is to be strengthened. The package consists of three separate but related initiatives:

- The [Tax Action Plan](#) and its [annex](#) with 25 different measures to be implemented between now and 2024 is to make taxation fairer, simpler, and better adapted to modern technologies. It sets out measures that will reduce tax obstacles, help Member States enforce existing tax rules and improve tax compliance, help tax authorities better exploit existing data and share new data more efficiently, and promote taxpayers' rights.

- A [proposal to amend Directive 2011/16/EU](#) on administrative cooperation in the field of taxation (DAC 7) will extend EU tax transparency rules to digital platforms, so that those who make money through selling goods or services on platforms can also contribute to tax revenues. This new proposal, together with [an annex on the reporting rules](#) for platform operators, will ensure that Member States automatically exchange information on revenues generated by sellers on online platforms. It will also strengthen and clarify the rules in other areas in which Member States cooperate to fight tax abuse, e.g. through joint tax audits.

- The [Communication on Tax Good Governance](#) focuses on promoting fair taxation and combating unfair tax competition in the EU and internationally. To this end, the Commission suggests a reform of the Code of Conduct, which addresses tax competition and tackles harmful tax practices within the EU. It also proposes improvements to the EU list of non-cooperative jurisdictions, which deals with non-EU countries that refuse to follow internationally agreed standards. Ultimately, the Communication outlines the EU's approach to assisting developing countries in the area of taxation.

The Tax Package is the first part of

a comprehensive and ambitious EU tax agenda for the coming years. Other planned initiatives concern business taxation, the digital economy, energy taxation, tobacco taxation, and improvement of the rules for cross-border acquisitions of excise goods. Detailed information on the present Commission tax package is available on a [dedicated website](#). (TW)

### Commission: Companies with Links to Tax Havens Should Not Receive Public Money

On 14 July 2020, the Commission made recommendations for a coordinated approach by all EU Member States not to grant State aids to companies that have links to countries that are featured on the list of non-cooperative tax jurisdictions. Restrictions should also apply to companies that have been convicted of serious financial crimes, including, among others, financial fraud, corruption, and non-payment of tax and social security obligations. [The recommendation](#) aims to provide guidance to Member States on how to set conditions for financial support that prevent the misuse of public funds and how to strengthen safeguards against tax abuse throughout the EU. The recommendation is also prompted by the current COVID-19 related funding at the expense of taxpayers and social security systems.

The Commission has set out a template, by means of which Member States can exclude “undertakings” with links to tax havens from public funding. Exceptions to these restrictions – to be applied under strict conditions – are also foreseen, in order to protect honest taxpayers. This could be the case, for example, if a company can prove that it has paid adequate tax in the Member State for a given period of time or if it has a genuine economic presence in the listed country. Member States are advised to introduce appropriate sanctions to discourage applicants from providing false or inaccurate information and to establish reasonable requirements for companies

to prove that there is no link with a jurisdiction on the EU list of non-cooperative tax jurisdictions.

The recommendation is not binding for the Member States. The Commission acknowledges, however, that several Member States have indicated their intention to create a strong link between financial support and a fair share of tax paid by the beneficiary. The Commission will publish a report on the impact of this recommendation within three years. (TW)

### EP Sets Up Permanent Subcommittee on Tax Matters

On 18 June 2020, the plenary of the European Parliament [set up a standing subcommittee on tax matters](#). It is a subcommittee to the Committee on Economic and Monetary Affairs. It will focus particularly on the fight against tax fraud, tax evasion, and tax avoidance as well as on financial transparency for taxation purposes. Money laundering affairs are not included in the mandate. The subcommittee will have 30 members.

Following several tax evasion scandals, such as LuxLeaks and the Panama Papers, the EP set up various ad hoc inquiry committees (PANA and TAXE, see also [eucrim 1/2018](#), pp. 15–16). The now permanently established subcommittee on tax matters continues the work of these special committees, with permanent dedicated resources against tax dumping and tax fraud. Plans to establish a permanent committee on matters related to tax evasion and tax fraud have existed for a long time. In September 2019, the coordinators of the Economic and Monetary Affairs Committee (ECON) in the European Parliament officially decided to create a permanent subcommittee on tax and financial crime (see [eucrim 3/2019](#), p. 171). (TW)

### Council Conclusions on Future of Administrative Cooperation in Taxation

On 2 June 2020, the Council approved [conclusions on the future evolution of](#)

[administrative cooperation in the field of taxation](#) in the EU. The Council calls on the Commission to propose an update on the current legal basis, which is framed by Directive 2011/16/EU. A reform is, *inter alia*, considered necessary in view of the need for recovery from the coronavirus crisis. Although the scope of the Directive had been expanded from 2014–2019, the update should take into account the following:

- Need for tax authorities to get comprehensive and high-quality information on tax matters;
- Reduction of the compliance burden for taxpayers;
- Tax challenges resulting from new business models and digital platform economy.

It has been requested that the EU establish a common standard on the reporting and tax information exchange as regards income generated through digital platforms. Improvements in the field of information exchange should particularly include better identification of relevant taxpayers. In addition, Member State authorities should obtain simplified and targeted information on cross-border tax fraud and usable information on financial or technological patterns relating to cross-border tax fraud, tax evasion, and tax avoidance. The update of the Directive should improve data protection, including rules that ensure better protection and security of information exchange. The Commission is finally called on to explore ways towards better interoperability and convergence with other legislative instruments in this field of administrative cooperation. (TW)

### Council Conclusions on Excise Duties on Tobacco

On 2 June 2020, the Council adopted [conclusions on the structure and rates of excise duty applied to manufactured tobacco](#). The Council recognises that the current provisions of the legal framework, i.e., Directive 2011/64/EU, have become less effective, as they are either no longer sufficient or too narrow to ad-

dress current and future challenges. The Directive does not fully take account of some products, such as liquids for e-cigarettes, heated tobacco products, and other types of next-generation products, which are entering the EU market. Therefore, the Council calls on the Commission to come forward with a revision of the EU regulatory framework. Definitions and tax treatment of novel products should be harmonised. Furthermore, the revision should increase the coherence and synergy of the tax and fiscal objectives of Directive 2011/64/EU with other EU policies and legislation. It should take on board all relevant aspects of tobacco control, including public health, customs regulations, the fight against illicit trade, tax evasion, and protection of the environment.

The conclusions also underline that the EU must invest effort to curb the illicit trade in tobacco products, which remains a substantial and persistent problem in most EU Member States. Synergies with and strengthening of law enforcement policies are necessary. (TW)

### Coronavirus Impact on Taxation Rules

On 8 May 2020, the Commission [proposed the postponement](#) of the entry into force of two EU taxation measures that are also designed to fight tax evasion/avoidance. This move comes in the wake of the difficulties that businesses and Member States' administrations are currently facing due to the coronavirus crisis. The two affected measures are:

- [New EU rules on VAT in the e-commerce sector](#): The 2017 legislation that included new rules for distance sales of goods and for any type of service supplied to final customers in the EU will apply as of 1 July 2021 instead of 1 January 2021 (under the condition that the Council adopt the proposal);
- [Directive on Administrative Cooperation \(DAC\)](#): The proposal includes deferring certain deadlines for filing and exchanging information under the Di-

rective. On 24 June 2020, the Council [amended Directive 2011/16/EU](#), deferring certain deadlines for filing and exchanging information under the DAC. Member States now have three additional months to exchange information on the financial accounts of beneficiaries who are tax residents in another Member State. Similarly, Member States have six additional months to exchange information on certain cross-border tax planning arrangements. (TW)

### VAT Carousel Fraud Unravalled

In June 2020, an operation in Hungary, Austria, the Czech Republic, Slovakia, and Serbia, coordinated by Eurojust and supported by Europol, unravalled [a VAT fraud carousel](#) that has caused a loss of approximately €10 M to the Hungarian budget. The organised crime group (OCG) imported and resold huge quantities of sugar and cooking oil from the EU through domestic companies without paying VAT. Two leaders of the OCG were arrested in the course of the action days. (CR)

### Counterfeiting & Piracy

#### New Report on Intellectual Property Crime

On 10 June 2020, Europol and the European Union Intellectual Property Office (EUIPO) published a new [report on Intellectual Property \(IP\) crime](#) and its links to other serious crimes such as pharmaceutical crime, drug trafficking, manslaughter, illegal weapons possession, forced labour, food fraud, excise fraud, VAT fraud, bribery and corruption, money laundering, as well as outlaw paramilitary activities. By means of 29 case examples, the report intends to inform law enforcement officials and policy makers about the various ways in which IP crime is linked to other forms of criminal activity. As far as possible, each case example describes which countries, law enforcement authorities, and Organised Crime Groups (OCGs)

were involved, as well as the modus operandi of the OCGs, including transportation routes and other relevant information, the nature of the counterfeits, and goods seized during the operation, as well as the links with other criminal activities. (CR)

### Counterfeiting during the COVID-19 Crisis

On 17 April 2020, Europol published [a report on the activities of counterfeiters during the COVID-19 crisis](#). The report provides an overview on counterfeits, substandard goods, and intellectual property crime during the crisis.

According to the report, Organised Crime Groups producing and distributing counterfeit goods have rapidly adapted their modus operandi to offering products such as counterfeit medical equipment and pharmaceutical/healthcare products that are sometimes even provided with CE markings and certifications. Other types of products include fake COVID-19 home-test kits. The production countries, modus operandi, routes, and nationalities of suspects seem to have remained the same. Profits from the trade of these goods are deemed substantial. Since these goods are primarily offered online on the web, the report strongly recommends investing in prevention and awareness campaigns to disrupt these business models. (CR)

### Major Strike at Euro-Counterfeiting Network

After more than two years of preliminary investigations, law enforcement authorities from Italy, Belgium and France, supported by Europol, dismantled the [possibly largest organised crime network involved in euro counterfeiting](#). Over the years, the criminal network has presumably produced and distributed more than three million counterfeit banknotes for a total face value of over €233 million, representing one quarter of all counterfeit euro banknotes detected in circulation since the introduction of the euro. On the action day on 15 July

2020, 44 suspects were arrested and criminal assets worth €8 million were frozen. (CR)

## Organised Crime

### Council Conclusions on Financial Investigations to Fight Organised Crime

Financial investigations should become a horizontal, cross-cutting priority in order to combat all forms of organised crime. This is one of key points of [Council conclusions on the enhancement of financial investigations](#), which were approved on 17 June 2020.

Considering that the proceeds of organised crime within the EU are estimated at €110 billion a year and that confiscation rates remain very low, the Council underscores the utmost importance of financial investigations for the European Union in preventing and combatting organised crime and terrorism. The Member States should, *inter alia*, enhance cooperation and synergy in conducting financial investigations and exchanging financial information between all relevant authorities. The future interconnection of national bank account registries is considered a key factor for an accelerated and facilitated cross-border cooperation.

Several conclusions have been proposed to the Commission. The Commission is, *inter alia*, called on:

- To consider strengthening the legal framework on the management of property frozen with a view to possible subsequent confiscation;
- To strengthen FIU.net in order to ensure effective cooperation between the Financial Intelligence Units (FIUs) and between the FIUs and Europol;
- To explore – to a certain extent – harmonisation of the work of FIUs in view of a more efficient information exchange;
- To evaluate the need for an enhanced legal framework for the establishment of relevant public-private partnerships;
- To re-engage in a discussion with

Member States regarding the need for a legislative limitation on cash payments at the EU level;

- To consider the need to further improve the legal framework for virtual assets.

Europol is particularly called on to fully use the potential of the newly created European Financial and Economic Crime Center. Europol should also start preparing the conclusion of a working arrangement for cooperation with the European Public Prosecutor Office in order to support its activities in investigating and prosecuting crimes affecting the financial interests of the EU.

Lastly, CEPOL is to further develop and implement a comprehensive training portfolio for financial investigators in order to achieve a more coherent understanding of cross-border investigation tactics and techniques applied by law enforcement officers in the EU. (TW)

### Europol: How COVID-19 Shapes Serious and Organised Crime Landscape in the EU

**spot light** On 30 April 2020, Europol published a [report to assess the impact of the COVID-19 pandemic on serious and organised crime](#). The report expects the impact of the pandemic to unfold in three phases:

- The current and immediate short-term outlook;
- A mid-term phase, which will become apparent over the upcoming weeks and months;
- A long-term perspective.

According to the report, the short-term phase will entail developments in the areas of cybercrime, trade in counterfeit and substandard goods as well as different types of fraud and schemes linked to organised property crime. While only a limited impact has been observed in the area of terrorist threats to the EU so far, the pandemic is nevertheless widely being used as a propaganda tool. Regarding cybercrime, the report states that phishing and malware

attacks have become more sophisticated and complex and are also being conducted on a larger scale. An increase in activities involving child abuse material online is also apparent.

For the second, mid-term phase, the report predicts a return to previous levels of criminal activity featuring the same type of criminal acts as those committed before the pandemic, in addition to the continuation of new criminal activities created during the crisis. In the area of cybercrime, the report sees cybercriminals shifting back to exploiting legal businesses. Child sexual exploitation online will largely depend on whether or not lockdowns continue. Organised Crime Groups (OCGs) producing counterfeit and substandard goods will continue to adapt and attempt to fill gaps in product shortages. Furthermore, the report states that the emergence of an increased number of scammers offering a vaccine against COVID-19 is likely. Once a genuine vaccine has been found, counterfeit products are expected to be heavily offered on the online market. Another threat to be expected is more cases of trafficking and inadequate disposal of medical and sanitary waste. The economic fallout caused by the pandemic may also lead to an increase in money laundering. With regard to the drug market, in the mid-term, the report predicts a drop in the demand for certain types of drugs due to lockdowns; however, the report sees no long-term effect occurring. With respect to migrant smuggling, the report expects further changes to the *modi operandi* used to smuggle migrants and higher prices for facilitation services. The fear also exists that prolonged economic instability may trigger new waves of irregular migration towards the EU and that the EU may have a higher demand for cheap labour.

In the long term, the report estimates that economic hardship and recession may lead to an increased receptiveness to offers of organised crime, an increase in corruption levels, enhanced migratory flows, an increased demand for labour

and sexual exploitation, and an increased demand for counterfeit and substandard goods. Organised property crime may reappear with new forms of tricks tailored to the pandemic. Cybercriminals are also likely to continue exploiting the enhanced online lifestyle. Furthermore, the report expects the overall shift towards non-cash payment options to have an impact on criminal businesses and to lead to increased money laundering. Ultimately, the distribution of disinformation is a worrying trend observed in the report. The report is part of a series of Europol reports on the impact of COVID-19 on crime and security. On 27 March 2020, Europol published a report on “[Pandemic profiteering: how criminals exploit the COVID-19 crisis](#)” (see [eucrim 1/2020](#), p. 19). (CR) ■

### Report on the COVID-19 Impact on EU Drug Markets Published

In late May 2020, Europol and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) published a [joint report looking at the impact of COVID-19 on drug markets in the EU](#).

In its key findings, the report underlines the resilience of organised crime groups and their capabilities to adapt their *modi operandi* to current situations. According to the report, the surface web and darknet markets, social media and secure encrypted communication applications now appear to be playing an increasing role in the sourcing of drugs at the user level.

Shortages with the availability of cannabis, cocaine, and heroin in some areas have resulted in higher prices and the use of substitutes such as synthetic opioids. Cocaine trafficking using maritime shipping containers has continued at levels that are comparable to or even possibly higher than those seen in 2019. Overall, the movement of bulk quantities of drugs between EU Member States has continued despite the introduction of border controls due to the continued commercial transportation of goods throughout the EU. (CR)

## Cybercrime

### EU Condemns Malicious Cyber Activities in the Context of the COVID-19 Pandemic

In a [declaration of 30 April 2020](#), the High Representative of the Union for Foreign Affairs and Security Policy, *Josep Borell*, condemned malicious cyber activities targeting essential operators in Member States and their international partners, including those in the healthcare sector: Borell states: “Since the beginning of the pandemic, significant phishing and malware distribution campaigns, scanning activities and distributed denial-of-service (DDoS) attacks have been detected, some affecting critical infrastructures that are essential to managing this crisis.” Any attempt to thwart critical infrastructures is unacceptable. The declaration requests all perpetrators to immediately refrain from conducting destabilising actions, which can put people’s lives at risk. The EU and its Member States will further reinforce their cooperation at all technical, operational, judicial, and diplomatic levels, including cooperation with their international partners. All countries in the world are called on to exercise due diligence in the areas of information and technology within the context of international security. They should also take appropriate measures against actors carrying out cyber activities. The EU candidate countries, EFTA and EEA countries as well as Ukraine, the Republic of Moldova, and Armenia have aligned themselves with the declaration that was issued on behalf of the EU. (TW)

### Cybercrime and Disinformation during the COVID-19 Pandemic

On 3 April 2020, Europol published a [report on cybercrime and disinformation during the COVID-19 pandemic](#). Forms of cybercrime include ransomware, DDoS, child sexual exploitation, the darknet, and hybrid threats such as disinformation and interference campaigns.

According to the report’s key findings, the COVID-19 pandemic has had



a visible and striking impact on cyber-crime activities compared to other criminal activities. Cybercriminals seem to have adapted quickly to the new situation and capitalise on the anxieties and fears of their victims.

Phishing and ransomware campaigns are being launched by criminals to exploit the current crisis and are expected to continue to increase in scope and scale. Activities revolving around the online distribution of child sexual exploitation material also appear to be on the rise. Reflecting on the darknet, the initial fluctuation in sales seems to have stabilised, with various platforms distributing illicit goods and services. In order to make profit or advance geopolitical interests, criminal organisations as well as states and state-backed actors also seem to be exploiting the public health crisis. The report concludes that disinformation and misinformation surrounding COVID-19 is also being increasingly spread around the world, affecting public health and effective crisis communication. (CR)

## Terrorism

### Europol: TE-SAT 2020

On 23 June 2020, Europol published its new [Terrorism Situation and Trend Report \(TE-SAT\) 2020](#). It outlines the latest developments with regard to jihadist, ethno-nationalist and separatist, left-wing and anarchist, right-wing, and single-issue terrorism.

Unfortunately, the year 2019 has seen a fairly new security threat caused by individuals imprisoned for terrorist offences and inmates who radicalised in prison, both during their imprisonment and after release. Several attacks within prisons that occurred in 2019 seem to demonstrate this threat.

Looking at jihadist terrorism, the number of incidents dropped from 24 in 2018 to 21 in 2019, out of which the majority (14) were foiled incidents.

In the area of ethno-nationalist and separatist terrorism, the report reveals

that the attacks specified as ethno-nationalist and separatist terrorism represented the largest proportion (57 of 119) of all terrorist attacks in 2019, with all but one incident related to Dissident Republican (DR) groups in Northern Ireland. The separatist terrorist group Euskadi ta Askatasuna (ETA) in Spain continued to be inactive in 2019.

111 arrests on suspicion of left-wing and anarchist terrorism as well as 21 arrests on suspicion of right-wing terrorism were conducted, with Italy being most affected.

In total, 119 foiled, failed and completed attacks were reported by 13 EU Member States in 2019, compared to 129 in 2018. 1,004 individuals were arrested in 19 EU Member States on suspicion of terrorism-related offences, with Belgium, France, Italy, Spain and the UK reporting the highest numbers.

Ten people died as a result of terrorist attacks in the EU and 27 people were injured. (CR)

## Racism and Xenophobia

### Commission Satisfaction with Application of Code of Conduct to Counter Illegal Hate Speech Online

On 22 June 2020, the Commission [released the results](#) of its meanwhile fifth evaluation of the Code of Conduct on Countering Illegal Hate Speech Online. The Code of Conduct was agreed on 31 May 2016 to ensure that requests to remove racist and xenophobic Internet content are dealt with quickly by the major IT companies (see [eucrim 2/2016, p. 76](#)). Currently, nine companies adhere to the Code: Facebook, YouTube, Twitter, Microsoft, Instagram, Google+, Dailymotion, Snapchat, and Jeuxvideo.com.

The platforms agreed to assess the majority of user notifications in 24h (respecting EU and national legislation on hate speech) and committed to remove, if necessary, those messages assessed as being illegal.

The evaluation is carried out on the basis of a common methodology involving a network of civil society organisations located in the different EU countries. These organisations test how the IT companies are implementing the commitments outlined in the Code.

The [fifth evaluation report](#) confirms the positive results of previous evaluation rounds (for recent evaluations, see [eucrim 1/2019, pp. 22–23](#) and [eucrim 1/2018, p. 18](#)):

- On average 90% of the notifications are reviewed within 24 hours (compared to 40% in the first year of the evaluation, 2016);
- 71% of hateful content is removed (in comparison to 28% in 2016);
- On average, 83.5% of content calling for murder or violence against specific groups is removed, while content using defamatory words or pictures to offend certain groups is removed in 57.8% of cases;
- Platforms respond to and give feedback on approx. 67% of the notifications received. This is higher than in the previous monitoring exercise (65%).

As in last year's evaluation, the Commission concludes that the platforms need to further improve transparency for and feedback to users. Only Facebook informs users systematically. Divergences also exist in the consistent evaluation of flagged content.

The evaluation results will feed into the future Digital Services Act Package on which the Commission recently launched a [public consultation](#). The Commission is considering ways to prompt all platforms dealing with illegal hate speech to set up effective notice-and-action systems.

The Commission also announced that it will continue to facilitate the dialogue between IT companies and civil society organisations working on the ground to tackle illegal hate speech in 2020 and 2021. This includes content moderation teams, and a mutual understanding of local legal specificities of hate speech. (TW)

## Procedural Criminal Law

### Procedural Safeguards

#### CJEU Imposes Further Restrictions to German Penal Order System

**spot light** In its [judgment of 14 May 2020](#) (Case C-615/18, *UY/Staatsanwaltschaft Offenburg*), the CJEU had to deal with the German rules on the service of penal orders (*Strafbefehle*) to persons living abroad and with their interpretation in conformity with EU law, in particular Directive 2012/13/EU on the right to information in criminal proceedings – for the third time.

##### ► *Facts of the Case*

The case was referred by the Local Court of Kehl, Germany, which has to decide on the criminal liability of a professional Polish lorry driver with permanent residence in Poland. On 14 December 2017, the driver was subject to a roadside check. The German police detected that he was driving without a driving licence, because the Local Court of Garmisch-Partenkirchen had imposed a fine on him and a three-month driving ban for failure to stop after a road accident (by means of a penal order of 14 August 2017). At the request of the public prosecutor's office in Garmisch-Partenkirchen, he appointed a person authorised to accept service of judicial documents on his behalf in Germany. The penalty order was served on the authorised person (a judicial staff member of the competent local court), who sent it to the known address of the accused person in Poland by ordinary post. It is not known whether the driver actually received the letter or not. Since the accused person did not lodge an appeal against the order, it acquired the force of *res iudicata* on 14 September 2017, i.e., the driving ban came into effect. After the roadside check in December 2017, the competent public prosecution office of Offenburg applied to the local court in Kehl to issue a further penal order against the Polish driver for the offence

of negligently driving a vehicle without a driving licence and to impose on him a fine as well as an additional three-month driving ban.

##### ► *Questions referred*

In light of the previous judgments of the CJEU and their tenets on the compatibility of the German penal order regime with Directive 2012/13 (judgments *Covaci* and *Tranca & others*, see eucrim 2/2017, p. 20), the Local Court of Kehl had doubts as to whether the accused person was treated in a discriminatory way or suffered unjustified disadvantages only because his permanent residence is not in Germany but instead in another EU Member State. In essence, the court is unsure whether the current German criminal procedure, which operates with the possibility to serve criminal documents on intermediaries in Germany and which foresees certain conditions for restoring the position to the status *quo ante* (*Wiedereinsetzung in den vorigen Stand*), guarantees adequate protection of the individual's rights. Can the driver be held criminally liable, even though the period to oppose the penal order started to run not with the service on the accused abroad but to the authorised person in Germany? Can the driver be held criminally liable even though he was not aware of the first penal order and its *res iudicata* effect?

##### ► *Decision of the CJEU*

(1) The CJEU first examined whether Art. 6 of Directive 2012/13, which establishes the right to information about the accusation, precludes national legislation that let the two-week period start to lodge an appeal against a penal order by means of service on an authorised person, who was appointed by the accused person to receive judicial documents on his behalf. The CJEU maintains its case law on the subject matter as established in the cases *Covaci* (C-216/14) and *Tranca* (C-124/26):

■ The Directive does not regulate the procedures whereby the information about the accusation must be provided to the suspect or accused person;

■ Member States may differently regulate the service of judicial documents on persons residing within their territory and those residing abroad;

■ The appointment of an authorised person for the service of judicial documents – as foreseen in German law – is, in principle, possible;

■ The period to oppose the judicial decision may start to run from the moment when the decision is served to the authorised person;

■ Any difference in treatment, however, cannot undermine the effective exercise of the rights of the defence of the accused person;

■ Therefore, the accused person's position must be allowed to be restored to the *quo ante* status, namely when he actually becomes aware of the order;

■ The accused person must benefit from the entire two-week period for lodging an objection to the order.

The CJEU scrutinized the German application requirements for restoration of status *quo ante*. It stressed that the two-week period for lodging the appeal must, *de facto*, be guaranteed, i.e., without any restrictions. Therefore, it is deemed incompatible if national law on the restoration of the status *quo ante* imposes the obligation on the accused person to seek information from the authorised person regarding the pending proceedings. It is likewise incompatible if the national law does not provide for the possibility to suspend the measures imposed in the penal order during the period of objection.

(2) Second, the CJEU examined the question of whether the driver can be held criminally liable for not complying with the measures imposed in the penal order (here: the penal order of Garmisch-Partenkirchen), based on the fact that he did not know the existence of the order. The judges in Luxembourg stated that, if this were the case, the *effet utile* of Art. 6 of the Directive 2012/13 would be jeopardized. The accused person must be afforded the opportunity to defend himself against a penal order

from the moment he becomes aware of it. It is up to the national authorities to ensure that the person concerned actually gains knowledge of the measures imposed against him. The CJEU recommends that the referring court use the instruments of EU law, in particular the interpretation of national law in conformity with EU law and the inapplicability of national law not complying with EU law, to ensure the full effectiveness of the Directive.

► *Put in focus:*

The judgment follows the conclusion of Advocate General (AG) Bobek [in his opinion of 20 January 2020](#). The AG rightly observed that the case at issue is different from the previously decided cases *Covaci* and *Tranca*. Whereas in *Covaci* and *Tranca*, the penalty orders in question were issued in the context of the *same criminal proceedings*, during which the breach of Art. 6 of Directive 2012/13 was alleged, the present *UY* case raises questions in *two interconnected but formally distinct sets* of criminal proceedings. The first penal order from Garmisch-Partenkirchen has prejudicial effects for the second penal order pending before the Local Court of Kehl. This raises, for instance, the question of whether the *res iudicata* of the first penal order procedure is an interest that must be weighed against the accused person's individual rights.

The CJEU does not directly answer this question. It instead upholds the German provisions that regulate penal orders to persons residing abroad. However, as the AG notes, this “yes” is supplemented with “buts.” The *UY* judgement adds more “buts” to the already existing ones established in the judgments *Covaci* and *Tranca*.

Against this background, one is left to wonder whether Germany needs a revision of its law, since the restrictions posed by the CJEU are difficult to implement in practice. It would be particularly necessary to strengthen the rules for the service of judicial decisions on persons residing outside of Germany. In this

context, it is also questionable whether Germany should maintain its system of services to authorised persons (who are regularly staff members of German courts) in cross-border situations.

The EU legislator may also be required to act. The AG points out in his opinion that we currently have quite a paradoxical situation: whereas there are harmonised and strict EU rules on the cross-border service of documents in civil and commercial matters – establishing a high degree of protection –, there are close to none in criminal law.

In any case, for the referring court in Kehl, the present judgment means that the penal order against the Polish driver must be rejected. In the momentary situation, the judgment means that the defence must closely inspect how penal orders were sent abroad and whether clients actually became aware of them. (TW)

#### CJEU: Access to Lawyer despite Absence of Investigating Judge

The CJEU ruled that Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings must be interpreted in the light of Art. 47 of the EU Charter of Fundamental Rights (CFR) as meaning that the right cannot be delayed to the suspected or accused person for failing to appear before the investigating judge at the pre-trial stage of criminal proceedings. The case is referred to as [C-659/18, “VW”](#).

The Spanish case in the main proceedings concerned a person suspected of driving without a driving licence and of falsifying documents. The person, despite being summoned to appear before the investigating judge (*Juzgado de Instrucción*), did not appear, even though an arrest warrant had been issued for him. After the arrest warrant had been issued, a lawyer sent, a letter by fax in which she stated that she was entering an appearance in the proceedings on behalf of the suspect, together with signed authority to act and consent to let her take on the case. Since the suspect did

not appear when first summoned and was subject to an arrest warrant, access to legal assistance was to be suspended, in accordance with Spanish law, until such time as the warrant for his arrest had been executed. The referring court asked whether such legislation – backed by national case law – is in line with Union law.

The CJEU ruled that this provision was unlawful. Accordingly, derogations from the rights of Directive 2013/48 are only permissible under the exceptions set out in Art. 3 of the Directive. These exceptions must be interpreted strictly. If there were further exceptions, this would be contrary to the aims and the scheme of the Directive and its wording, and the law would be deprived of its *effet utile*. This interpretation is also consistent with the fundamental right to effective judicial protection deriving from Art. 47 CFR. (TW)

#### CCBE Guide to Assist EU Defence Lawyers

The CCBE published a [reference guide to assist EU defence practitioners](#). The guide aims at giving an overview of EU legislation, case law, and tools. It provides references to relevant legislation, case law and other relevant material. The publication, *inter alia*, includes information on:

- The Directives to strengthen the procedural rights of suspected or accused persons in criminal proceedings;
- The European Arrest Warrant and CJEU case law on the EAW;
- The rules on gathering evidence in criminal matters in the EU;
- ECtHR case law in the area of defence rights and links to “factsheets” summarising this case law on a variety of issues;
- The Charter of Fundamental Rights;
- The establishment and functioning of the European Public Prosecutor’s Office.

The guide also includes a link to [factsheets in the EU’s e-justice portal](#) that guide defence lawyers through the criminal process and the various steps

involved in all EU Member States. The factsheets – available in all EU languages – follow the same structure and explain defence lawyers’ rights and obligations at each stage. They include information on national criminal procedure as prepared by national defence practitioners:

- Practical rights during the investigation of a crime (preliminary charge, including questioning);
- Arrest (including European Arrest Warrant cases);
- Preliminary statutory hearing and remand in custody;
- Intrusive measures;
- Decision on whether or not to bring charges against a suspect);
- Information on preparing for trial by the defence
- Practical information on rights during the trial and rights after the trial.

Ultimately, the factsheets provide information on how minor offences, such as road traffic offences, are to be dealt with. (TW)

## Data Protection

### EU-US Data Transfers: CJEU Shatters Privacy Shield – Schrems II

In response to questions referred by the Irish High Court, the [CJEU’s Grand Chamber ruled](#) on 16 July 2020 in [case C-311/18](#) that Commission Decision 2016/1250 on the adequacy of the protection provided by the EU-US Privacy Shield was invalid. By contrast, Commission Decision 2010/87 on standard contractual clauses for the transfer of personal data to third countries is valid because it contains mechanisms to achieve the necessary level of protection for personal data.

#### ► *The standard contractual clauses*

Regarding transfers to third countries, the level of protection of personal data must be “essentially equivalent” to that guaranteed within the EU (by the General Data Protection Regulation (GDPR) in the light of the Charter of

Fundamental Rights (CFR)). User data of EU citizens can therefore continue to be transferred to the USA and other countries on the basis of so-called standard contractual clauses. The clauses are intended to ensure that there is adequate protection for the data of EU citizens when data is transferred abroad. [Decision 2010/87](#) includes effective mechanisms that make it possible, in practice, to ensure compliance with the level of protection required by EU law. Personal data transfers pursuant to such clauses are to be suspended or prohibited in the event of breach of such clauses or it being impossible to honour them. The CJEU highlights that, under Art. 58(2)(f) and (j) GDPR, the competent data protection supervisory authority is required to suspend or prohibit a data transfer if, in its view and in light of all the circumstances of this transfer, these clauses are not or cannot be complied with in the respective third country and the protection of the transferred data as required by EU law cannot be ensured by other means, where the data controller or data exporter has not itself suspended or put an end to the transfer.

#### ► *The EU-US Privacy Shield*

The CJEU justified the invalidity of [Decision 2016/1250](#) by stating that it does not sufficiently guarantee that transferred data in the USA is subject to the same level of protection as in the EU. The existing surveillance programmes in the USA have not been sufficiently limited in terms of proportionality. The provisions in Decision 2016/1250 do not indicate any limitations on the power they confer to implement these programmes or on the existence of guarantees for potentially targeted non-US citizens. In addition, the provisions do not grant data subjects actionable rights against US authorities before US courts. The CJEU also considers the requirement for judicial protection insufficient, since the established Ombudsperson mechanism is not equivalent to guarantees required by EU law. The Ombudsperson particularly lacks independence as well as the power

to adopt binding decisions for the US intelligence services. European companies therefore cannot continue to transfer personal data to other companies on the basis of existing EU law.

#### ► *Put in focus*

The case has its background in a complaint by Austrian data protection activist Maximilian Schrems. In his legal suit, he complained that Facebook in the USA was obliged to make data available to US authorities, such as the FBI, without the possibility of individuals being able to take action against their disclosure. The case is the sequel to the Schrems I case ([C-362/14](#)), which resulted in the CJEU’s judgment of October 2015, declaring the invalidation of the Safe Harbor Framework ([Commission Decision 2000/520/EC](#)), a mechanism that many companies were relying on at that time to legitimize data flows from the EU to the US (see also [eucrim 3/2015, p. 85](#)). In the aftermath, *Schrems* decided to challenge anew the transfers performed on the basis of the EU’s standard contractual clauses – the alternative mechanism Facebook has chosen to rely on to legitimize its EU-US data flows – on the basis of arguments similar to those raised in the Schrems I case. After the initiation of these proceedings in Ireland, the Commission adopted Decision 2016/1250 on the adequacy of the protection provided by the EU-US Privacy Shield.

#### ► *Statements*

*At a [press point](#) immediately following the judgment on 16 July 2020, Commission Vice-President [Věra Jourová declared](#) that the CJEU’s decision “means that the transatlantic data flows can continue, based on the broad toolbox for international transfers provided by the GDPR, for instance binding corporate rules or Standard Contractual Clauses. ... [It] once again underlined that the right of European citizens to data protection is absolutely fundamental. It confirms also what the Commission has said many times and what we have been working on: When personal*

data travels abroad from Europe, it must remain safe.”

Commissioner for Justice [Didier Reynders stressed](#) the rule-of-law aspect, which is shared by the US counterparts. He added that the Commission is committed “to putting into place all the necessary measures to implement the decision of the Court.”

In a statement of 17 July 2020, the [EDPS welcomed](#) the Schrems II decision as a landmark judgment in which the CJEU “reaffirmed the importance of maintaining a high level of protection of personal data transferred from the European Union to third countries.” The EDPS also highlighted that the CJEU confirmed the criticism of the Privacy Shield repeatedly expressed by the EDPS and the EDPB. (TW)

### **CJEU: Petitions Committees in German State Parliaments Subject to GDPR & Referring Court is Independent**

On 9 July 2020, the [CJEU ruled](#) on the reference for a preliminary ruling of the Administrative Court of Wiesbaden in Case [C-272/19](#). The reason for the referral was the question of whether a parliamentary petitions committee is subject to the General Data Protection Regulation (GDPR). The referral was noteworthy above all because the referring judge doubted his own independence and asked the CJEU whether he is at all a “court/tribunal” entitled to make a referral within the meaning of Art. 267 TFEU. (see [eucrim 3/2019](#), p. 105).

#### ► *Facts of the case*

In the case at issue, the President of the Parliament of Land Hessen rejected the application of a citizen (who had submitted a petition) for access to the personal data concerning him. The reason given was that the petition procedure is a function of parliament, and that the Parliament is not subject to the GDPR. The referring judge believed, however, that such a right might be derived from the European Data Protection Rules if the committee is categorised as a data controller.

#### ► *CJEU’s reply to the data protection question*

Regarding the actual data protection question, the CJEU replies that, insofar as the Petitions Committee of the Parliament of a Federal State of a Member State determines, alone or with others, the purposes and means of the processing of personal data, this committee must be categorised as a “controller” within the meaning of Art. 4(7) GDPR. Consequently, Art. 15 GDPR – the data subject’s right of access to information – is also applicable in this instance. The CJEU specifically found that the activities of the petitions committee do not constitute any activity excluding the scope of the GDPR as set out in its Art. 2(2).

#### ► *The CJEU’s answer to the independence question*

The doubts expressed by the Administrative Court of Wiesbaden concerning its own status as a “court or tribunal” are examined in relation to the admissibility of the request for a preliminary ruling. The doubts are mainly based on the Minister of Justice’s role in the appointment, promotion, and appraisal of judges and the integration of organisation/management of justice within the executive branch in Germany. The judges in Luxembourg stress that they take account of a number of factors when they assess whether the referring body is a “court/tribunal” within the meaning of Art. 267 TFEU. The factors that the referring court draws attention to in support of its doubts are not sufficient grounds to allow the conclusion that that court is not independent. In particular, the mere fact that the legislative or executive are involved in the appointment process of judges does not imply a relationship of subordination, as long as the judges are not subject to any pressure and do not receive any instruction during the performance of their duties in office. For this reason, the CJEU dispels the doubts of the referring judge’s own independence. (TW)

### **Commission Evaluation Report on GDPR**

On 24 June 2020, the European Commission published its first [report on the evaluation and review of the General Data Protection Regulation \(GDPR\)](#). The report comes two years after the Regulation became applicable on 25 May 2018. As stipulated by Art. 97 of the GDPR, it particularly assesses the following:

- The application and functioning of the rules on the transfer of personal data to third countries and international organisations;
- The application and functioning of the rules on cooperation and consistency;
- Issues that have been raised by various actors over the last two years.

The Commission generally draws positive conclusions. The GDPR has successfully met its objectives of strengthening the protection of the individual’s right to personal data protection and guaranteeing the free flow of personal data within the EU. Nonetheless, several issues for future improvement were identified. The main findings of the report are:

- The GDPR has empowered citizens and made them aware of their rights: Today, 69% of the population above the age of 16 in the EU have heard about the GDPR, and 71% have heard about their national data protection authority, according to results of a recent [survey by the EU Fundamental Rights Agency](#). There is, however, room for improvement to help citizens exercise their rights, notably the right to data portability;
- The GDPR has made the EU fit for the digital age: Citizens play an active role in the world of digital transition. Innovation became more trustworthy, notably through a risk-based approach, and principles such as data protection by design and by default;
- Data protection authorities are making use of their stronger corrective powers: They are making use of administrative fines ranging from a few thousand euros to several million, depending on

the gravity of the data protection infringements. Stark differences still exist in the various EU Member States, however, as regards adequately equipping the authorities with personnel, financial, and technical resources. Cooperation between the national data protection authorities, among them the EDPB, especially in cross-border cases, could be improved, including a more efficient and harmonized handling of the cases. The potential of the GDPR, e.g., joint investigations, has not been fully used;

- The Commission’s work to harness the full potential of the tools available under the GDPR to enable international data transfers has been stepped up. The EU now shares the [world’s largest area of free and safe data flows](#) with Japan. The Commission wishes to increase the number of adequacy decisions with third countries and modernize the standard contractual clause. As cases are pending before the CJEU (in particular the Schrems II case), the Commission will report on the adequacy decisions at a later stage;

- The Commission has stepped up (and will continue to do so) bilateral, regional, and multilateral dialogue in order to foster a global culture of respect for privacy and convergence between different privacy systems for the benefit of citizens and businesses alike. International cooperation between data protection enforcers will be enhanced, e.g., by means of mutual assistance and enforcement cooperation agreements with third countries.

Lastly, the Commission lists a number of actions that are to be taken in order to remedy difficulties in the application of the GDPR as identified in the evaluation report. The evaluation report is accompanied by a [staff working document](#) (available only in English) that describes the findings in detail.

When [presenting the report](#), *Věra Jourová*, Vice-President for Values and Transparency, said: “Europe’s data protection regime has become a compass to guide us through the human-centric digi-

tal transition and is an important pillar on which we are building other polices, such as data strategy or our approach to AI.”

*Didier Reynders*, Commissioner for Justice, added: “The GDPR has successfully met its objectives and has become a reference point across the world for countries that want to grant to their citizens a high level of protection. ... We need also to ensure that citizens can make full use of their rights. The Commission will monitor progress, in close cooperation with the European Data Protection Board and in its regular exchanges with Member States, so that the GDPR can deliver its full potential.” (TW)

#### **EDPS Statement on GDPR Evaluation: Stronger European Solidarity Needed for Enforcement**

The European Data Protection Supervisor (EDPS), *Wojciech Wiewiórowski*, welcomed the European Commission’s review of the General Data Protection Regulation (GDPR – see separate news item). In a [statement issued on 24 June 2020](#), he especially agrees that the GDPR has strengthened the fundamental right to data protection and contributed to raising awareness about the importance of data privacy, both within the EU and in other parts of the world. He also shares the Commission’s view that consistent and efficient enforcement of the GDPR remains a priority. The EDPS points out that resources available to the national data protection authorities (DPAs) are sometimes still insufficient, and disparate legal frameworks and national procedural laws lead to discrepancies. The EDPS calls for strengthening solidarity and reinforcing cooperation with the [European Data Protection Board](#) (EDPB) and other related actors. He proposes setting up a Support Pool of Experts within the EDPB. This initiative could provide support to DPAs on complex and resource-demanding cases – a genuine expression of European solidarity and burden sharing. (TW)

#### **Commission: Aligning Justice and Home Affairs Instruments with Law Enforcement Data Protection Directive**

On 24 June 2020, the Commission presented a [Communication](#) in which it identifies ten legal acts from the former third pillar *acquis* that should be aligned with [Directive \(EU\) 2016/680](#) “on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA” (also dubbed the Data Protection Law Enforcement Directive – “LED,” see eucrim 1/2016, p. 78).

The Commission reviewed a total of 26 legal Union acts that entered into force before 6 May 2016 in the field of judicial cooperation in criminal matters and police cooperation, which initially remained unaffected by the LED (cf. the “grandfather” clause in Art. 60 LED). Art. 62 LED, however, requires the Commission to examine possible alignments and, if necessary, to propose amendments to these acts in order to ensure a consistent approach to the protection of personal data in law enforcement cooperation. The ten acts that should be aligned are:

- The FD on joint investigation teams;
- The Council Decision on exchange of information and cooperation concerning terrorist offences;
- The FD on exchange of information between law enforcement authorities;
- The Council Decision on cooperation between Asset Recovery Offices;
- The Prüm Decisions;
- The Council Decision on the use of information technology for customs purposes;
- The Mutual Legal Assistance Agreement with Japan;
- The Directive on the European Investigation Order;
- The Directive on exchange of infor-

mation on road safety-related traffic offences;

- The Directive on the use of passenger name records (PNR).

The Communication does not say whether and when it is going to make legislative proposals to amend the identified acts. (TW)

### EDPS Report on Data Protection Impact Assessments in EU Institutions

On 6 July 2020, the European Data Protection Supervisor (EDPS) published a [report](#) on how EU institutions, bodies, and agencies (EUIs) carry out Data Protection Impact Assessments (DPIAs) when processing information that presents a high risk to the rights and freedoms of natural persons. DPIAs are an important new accountability tool set out in Regulation (EU) 2018/1725 – the basic data protection legal framework for EUIs (for the Regulation, see [eucrim 4/2018](#), pp. 200–201).

The report is based on the replies to a questionnaire that the EDPS addressed to the EUIs' data protection officers in February 2020. It mainly contains the lessons learned after approximately one year of application of Regulation 2018/1725 and the best practices recommended. The report provides further guidance on DPIAs in accordance with Art. 39 of the Regulation.

The EDPS will carry out targeted surveys such as this one more frequently in the future, as they are a useful way to monitor compliance with the Regulation. This is also particularly true in view of the limited ability of the EDPS to check the situation on-the-spot in the immediate aftermath of the COVID-19 crisis. (TW)

### Commission: EU PNR Directive Delivered Tangible Results

On 24 July 2020, the Commission presented its review of [Directive \(EU\) 2016/681](#) of the European Parliament and of the Council of 27 April 2016 on the use of passenger name record (PNR) data for the prevention, detection, inves-

tigation, and prosecution of terrorist offences and serious crime (the 2016 “EU PNR Directive” – see [eucrim 2/2016](#), p. 78). The Directive notably provides for the obligation of air carriers to transfer to Member States the PNR data they have collected in the normal course of their business. PNR are pieces of information such as data on travel, travel itinerary, ticket information, contact details, travel agent, means of payment, seat number, and baggage information. Member States must establish specific entities responsible for the storage and processing of PNR data (Passenger Information Units (PIUs)). The Directive regulates the way Member States can use PNR data and provides for the necessary data protection safeguards. Member States had to transpose the Directive by 25 May 2018.

The [Commission's review report](#) is accompanied by a [Staff Working Document](#) that contains more detailed information and a comprehensive analysis of all matters supporting the findings of the review report. The documents set the Directive in its general context and present the main evaluation findings after two years of application of the Directive's provisions. The main findings are:

- In general, the establishment of an EU-wide PNR system has worked well. In particular, the vast majority of Member States established fully operational PIUs. These reached a good level of cooperation. However, two Member States have not (fully) transposed the Directive at the end of the review period. Slovenia has notified partial transposition, whereas the [Commission referred Spain to the CJEU](#) on 2 July 2020 for failure to implement the Directive;

- National transposition measures overall comply with the Directive's data protection safeguards. However, some Member States have failed to mirror all safeguards in their national laws. National authorities implement them in practice. The safeguards ensure the proportionality of PNR processing and aim at preventing abuse. In practice, the co-

operation between PIUs and data protection officers responsible for monitoring data processing operations apparently works well;

- The use of PNR data has delivered tangible results in the fight against terrorism and serious crime: law enforcement authorities report that PNR data has been successfully used to plan their interventions in advance, to identify previously unknown suspects, to establish links between members of crime groups, and to verify the assumed “modus operandi” of serious criminals;

- The broad coverage of the Directive, which concerns all passengers on inbound and outbound extra-EU flights, proved necessary;

- The retention period of five years for PNR data is necessary in order to achieve the objectives of ensuring security and protecting lives and safety of persons;

- Since only a small fraction of passengers' data was transferred to law enforcement authorities for examination, the PNR system is working in line with the objective of identifying high-risk passengers without impinging on bona fide travellers.

The Commission's review also tackles the question of a possible extension of the obligations under the PNR Directive. It states that all Member States except one extended PNR data collection to intra-EU flights, which is set out as an option in the Directive. From an operational point of view, Member States wish an extension to information from non-carrier economic operators. The Commission also notes that some Member States additionally collect PNR data from other modes of transportation, e.g. maritime, rail and road carriers, on the basis of their national laws (for the discussion on widening the scope of the PNR Directive, see [eucrim 4/2019](#), pp. 235–236). However, the Commission is hesitant to establish EU-wide rules in this regard and points out that a thorough impact assessment is needed first, since an extension raises sig-

nificant legal, practical and operational questions. Ultimately, several Member States pointed out that PNR data could also be useful to protect public health and to prevent the spread of infectious diseases, e.g. the coronavirus, by facilitating contact tracing.

In conclusion, the Commission’s assessment on the application of the EU PNR Directive during its first two years is overall positive. The Commission believes that there is currently no need for amendments. In this context, it is stressed that amendments need thorough impact assessments, and the outcome of the pending preliminary ruling procedures before the CJEU should be awaited (see in particular [Case C-817/19](#), [Ligue des droits humains](#), and [Joint Cases C-148/20, C-149/20 and C-150/20](#), [Deutsche Lufthansa AG](#)). (TW)

### German Court Asks CJEU about Compatibility of PNR Legislation

The Administrative Court of Wiesbaden initiated references for a preliminary ruling to the CJEU that tackle the question of whether the EU PNR Directive (Directive 2016/681, see [eucrim 2/2016](#), p. 78) and the German implementation law are compatible with Union law, in particular the Charter of Fundamental Rights.

In the cases at issue, the respective plaintiffs request the deletion of their passenger data (PNR data), which are currently stored by the Federal Criminal Police Office. The first proceeding concerns flights from the European Union to a third country, the second concerns flights within the European Union.

The Administrative Court has doubts as to whether the PNR Directive and the German Act on processing airline passenger name records to implement EU Directive 2016/681 (*Fluggastdatengesetz*) are compatible with the CFR, in particular the fundamental rights to respect for private and family life and the protection of personal data enshrined therein, as well as with the GDPR. As regards the case of intra-EU flights, com-

patibility with the freedom of movement within the European Union is additionally in question.

The Court considers the processing of PNR data to be comparable to the retention of telecommunications data and considers the associated encroachments on fundamental rights to be unjustified despite the objective pursued (combating terrorism and serious crime). The Court considers, *inter alia*, the following to be doubtful:

- The scope of PNR data collected and processed;
- The proportionality of the 5-year storage period for PNR data;
- The legal certainty of several provisions of the Directive and the transposition law;
- Whether passengers are adequately informed about the data processing;
- Whether the transfer of PNR data to third countries and domestically to the Federal Office for the Protection of the Constitution (the domestic intelligence service) is permissible;
- Whether the multiple entry of passenger data (by country of departure and destination of each intra-EU flight) is justified.

The Administrative Court has stayed the proceedings until the CJEU delivers its judgment. As regards data retention, the CJEU already took a critical stance against the mass storage of data by private companies. In 2014, the CJEU had already declared the 2006 EU data retention directive void (see [eucrim 1/2014](#), [12](#)). Subsequently, in 2016, the CJEU prohibited Member States from maintaining national data retention regimes if they entail a general and indiscriminate retention of data (see [eucrim 4/2016](#), [164](#)). (TW)

### EDPS Strategy 2020–2024

On 30 June 2020, the EDPS presented its new [Strategy for the years 2020–2024](#). Under the title “Shaping a Safer Digital Future: a new Strategy for a new decade”, the new Strategy sets out how the EDPS is going to carry out its statutory

functions and to deploy its resources in the given period. In order to achieve this aim, the Strategy is based on three pillars: foresight, action, and solidarity.

Hence, the EDPS commits to being a smart institution taking a long-term view of trends in data protection as well as the legal, societal and technological context. Measures to achieve this aim may include, for instance, the monitoring of jurisprudence; making an inventory of the measures introduced by EU institutions and bodies during the COVID-19 crisis; as well as organising and facilitating discussions with experts from all different fields. Furthermore, the EDPS intends to actively follow trends and evolutions in the field of new technologies and to monitor developments in the field of Justice and Home Affairs.

Actions shall include the proactive development of tools for EU institutions and bodies so as to contribute, for instance, to the development of strong and effective oversight mechanisms; to the minimisation of the reliance on monopoly providers of communications and software services; and to monitor the interoperability of EU systems. Furthermore, the EDPS will continue to contribute to the European Data Protection Board (EDPB) so as to ensure the consistent application and enforcement of the General Data Protection Regulation (GDPR) and to contribute to the update of the EU’s data protection framework for the digital age.

Finally, the EDPS intends to actively promote justice and the rule of law by advising, advocating, and contributing to the fundamental rights to data protection and privacy with different platforms and stakeholders. In addition, the EDPS plans to support measures and ideas in order to make data processing and protection go green. (CR)

### EDPS and FRA Revise Memorandum of Understanding

On 22 June 2020, the EDPS and the FRA signed a [revised Memorandum of Understanding](#) (MoU) replacing the first



one of 30 March 2017. The revised MoU additionally allows for the establishment of single contact points within the FRA and the EDPS to coordinate their cooperation; to share information about relevant initiatives; to meet annually in order to discuss matters of common strategic interest; and to stronger cooperate in research and training activities. (CR)

### Commission Website on Digital Response to Corona

The European Commission published a new subsite on its website, giving information on the various [digital measures](#) that have been established in response to the COVID-19 crisis, including:

- Mobile data and apps;
- The creation of European supercomputing centres;
- The use of artificial intelligence;
- The collection of data by [EU Space Programmes](#);
- The improvement of telecommunications, networks, and connectivity;
- The introduction of measures to fight misinformation online;
- Measures to counter cybercrime.

For each topic, further links to relevant guidelines, handbooks, websites, etc. are provided. (CR)

### EDPB Guidelines on Corona Apps

On 21 April 2020, the European Data Protection Board (EDPB) adopted [guidelines on the use of location data and contact tracing tools in the context of the COVID-19 outbreak](#). With regard to location data, the EDPB guidelines underline the necessity to respect the regulations set out by the ePrivacy Directive, for instance asking for anonymisation as well as consent of the data subjects for storage, processing, and other measures.

According to the guidelines, contact tracing applications must be voluntary, serve the purpose of managing the COVID-19 health crisis only, respect the principle of data minimisation, and ask for the data subjects' consent to any operations that are not strictly neces-

sary. Special attention should be paid to the regular review of algorithms and to applying state-of-the-art cryptographic techniques to secure the stored data. Finally, reporting users as infected with COVID-19 on the application must be subject to proper authorisation. (CR)

### EU Toolbox for Applications to Counter COVID-19

On 16 April 2020, EU Member States, supported by the Commission, published an [EU toolbox](#) for the use of mobile applications for contact tracing and warning in response to the coronavirus pandemic, together with a [guidance on data protection](#) for such apps.

The toolbox sets out essential requirements for such apps, such as their voluntary application, anonymisation, security, data protection compliance, and interoperability across the EU.

The guidance sets out features and requirements which apps should meet in order to ensure compliance with EU privacy and personal data protection legislation as well as to limit the intrusiveness of the app functionalities. It addresses only voluntary apps supporting the fight against the COVID-19 pandemic. The main ideas set out by the guidance include, for instance, ensuring that the individual remains in control; assigning national health authorities as data controllers; providing a legal basis and adhering to the specific purpose principle; and guaranteeing data minimisation. (CR)

### Roadmap to Lift Corona Containment Measures

On 15 April 2020, the European Commission published a [Joint European Roadmap towards lifting COVID-19 containment measures](#).

The roadmap sets out three main criteria to assess whether the time has come to begin to relax the confinement, namely epidemiological criteria, a sufficient health system capacity, and an appropriate monitoring capacity. Furthermore, the roadmap recommends

three basic principles to guide the EU and its Member States. According to these principles, action should be based on science and have public health at its centre. It should be coordinated between the Member States. Solidarity between the Member States should remain essential.

The roadmap also sets out accompanying measures to successfully manage the gradual lift of the existing confinement. Such accompanying measures include, for instance, gathering data and the development of a robust system of reporting; the creation of a framework for contact tracing and warning, with the use of mobile apps respecting data privacy; expanding testing capacities and harmonising testing methodologies; and increasing the capacity and the resilience of healthcare systems.

Therefore, the roadmap sets forth a number of recommendations to Member States on how to gradually lift containment measures. Hence, action should be gradual; general measures should progressively be replaced by targeted ones; most vulnerable groups should be protected for longer; diagnosed people or people with mild symptoms should remain quarantined and treated adequately; safe alternatives should replace existing general prohibitive measures; and general states of emergencies with exceptional emergency powers for governments should be replaced by more targeted interventions by governments. (CR)

### Ne bis in idem

#### Update on Ne Bis In Idem Case Law

At the beginning of May 2020, Eurojust published an [updated edition of its overview on the case law of the CJEU on the ne bis in idem principle in criminal matters](#), covering 20 cases from 2003 to 15 March 2020. The update explains the different provisions regulating the principle of ne bis in idem and the relationship between them. It contains sum-

maries of the CJEU's judgments and sets out the material and temporary scope of the principle and its possible limitations. (CR)

## Victim Protection

### Empowering Victims: Commission Tables EU Strategy on Victims' Rights

**spot light** On 24 June 2020, the Commission presented the first-ever [EU strategy on victims' rights](#). The strategy frames the work of the Commission, Member States, and civil society organisations for the next five years (2020–2025). The aim of the strategy is twofold:

- Empowering victims of crime, so they can report crime, participate in criminal proceedings, claim compensation and ultimately recover – as much as possible – from the consequences of crime;
- Strengthening cooperation and coordination involving all relevant actors for victims' rights.

The strategy outlines the [key actions](#) that the Commission, Member States, and civil society organisations should take in the upcoming years in order to improve protection of victims' rights and ensure better security of all citizens in the EU. Special attention is paid to victims with specific needs, e.g., victims of gender-based violence and victims of hate crime.

As regards the first aim – empowering victims of crime – the Commission sets out the following key priorities around which the actions are centred:

- Effective communication with victims and a safe environment for victims to report crime: inter alia, the Commission will launch an EU campaign to raise awareness about victims' rights and promote specialist support and protection for victims with specific needs. Member States are called on to fully and correctly implement the relevant EU rules, in particular the Victims' Rights Directive, while the Commission will continue to monitor implementation.

- Improving support and protection to the most vulnerable victims: the Commission will, inter alia, promote an integrated and targeted EU approach to support victims with special needs; it will also consider the introduction of minimum standards on victims' physical protection. Member States should, for instance, set up integrated and targeted specialist support services for the most vulnerable victims, including Child Houses, Family Houses, LGBTI and safe houses.

- Facilitating victims' access to compensation: the Commission will monitor and assess the [EU legislation on compensation](#), including state compensation and the [Framework Decision on mutual recognition of financial penalties](#). Member States are called on to ensure fair and appropriate state compensation for violent, intentional crime, to eliminate existing procedural hurdles for national compensation, and to take action so that victims are not exposed to secondary victimisation during the compensation procedure.

As regards the second aim (better cooperation and coordination), the priorities will be:

- Strengthening cooperation and coordination among all relevant actors;
- Strengthening the international dimension of victims' rights.

As regards improvement on cooperation and coordination at the EU level, the Commission will set up a Victims' Rights Platform. It will bring together, for the first time, all relevant EU-level actors for victims' rights, e.g., the European Network on Victims' Rights (ENVR), the EU Network of national contact points for compensation, the European Network of Equality Bodies (EQUINET), the EU Counter-Terrorism Coordinator, relevant agencies such as Eurojust, the Fundamental Rights Agency (FRA), CEPOL, and the European Institute for Gender Equality (EIGE) as well as civil society. The platform is to facilitate continuous dialogue, exchange of best practices and

cross-fertilisation between the Victims' Rights Strategy and other strategies, such as the [European Gender Equality Strategy 2020–2025](#).

In addition, a Commission Victims' Rights' Coordinator will ensure the consistency and effectiveness of different actions in relation to victims' rights policy. He/she will also be responsible for the smooth functioning of said platform.

One of the key proposed actions for Member States is the establishment of national victims' rights strategies that take a comprehensive and holistic approach to victims' rights and involve all actors likely to come into contact with victims.

As regards the international level, the EU will promote high standards for victims' rights, in particular victims with special needs. The EU will also promote cooperation to improve support and protection for EU citizens who have been victimised in third countries. It will continue to work closely with the candidate and potential candidate countries to strengthen victim's rights as well as support capacity-building actions for priority partner countries in relation to support for victims of terrorism.

The Commission announced that it will continue to assess EU instruments and their possible shortcomings and, where necessary, come forward with legislative proposals by 2022 to further strengthen victims' rights. The presented strategy will be regularly monitored and updated, if necessary, in particular through regular meetings by the Victims' Rights Platform.

The new Victims' Rights Strategy comes along with Commission implementation reports of key EU instruments that were presented on 11 May 2020. The Commission voiced its disappointment here as regards implementation of the 2012 Victims' Rights Directive and the European Protection Order (cf. separate news items). The main concern is the incomplete transposition and/or incorrect implementation of the EU rules into national legal orders. (TW) ■

### Commission Unsatisfied with Transposition of Victims' Rights Directive

The full potential of the 2012 Victims' Rights Directive ([Directive 2012/29/EU](#)) has not yet been reached. The implementation of the Directive is not satisfactory. This is particularly due to incomplete and/or incorrect transposition. These are the main conclusions of the recent Commission [implementation report](#) that was tabled on 11 May 2020.

The report assesses the extent to which Member States have taken the necessary measures to comply with the Directive – the core instrument of the EU victims' rights policy. The focus has been placed on the core provisions of the instrument, i.e.:

- Scope and definitions;
- Access to information;
- Procedural rights;
- Access to support services;
- Restorative justice;
- Rights to protection.

The Commission stressed that it not only looked at legislative transpositions, but also at non-legislative measures, which the Directive also requires to be taken, e.g., in the fields of support services and practitioners' training on victims' rights and needs. The Commission concludes that most Member States have unsatisfactorily taken measures on access to information, support services, and protection with respect to victims' individual needs. The implementation of provisions related to procedural rights and restorative justice is less problematic. The Commission has 21 ongoing infringement proceedings for incomplete transposition of the Victims' Rights Directive. If necessary, the Commission will open further infringement proceedings for incorrect transposition and/or incorrect practical implementation.

In parallel to the report on the implementation of Directive 2012/29, the Commission presented an implementation report on the Directive on the European Protection Order in criminal matters (cf. following news item). The

results of the two implementation reports also fed into the new EU's strategy on victims' rights, which the Commission tabled on 24 June 2020. (TW)

### Commission: Directive on European Protection Order Underused in Practice

The legislative implementation of [Directive 2011/99/EU](#) on the European Protection Order (EPO) in criminal matters is satisfactory, in particular the mechanism for recognising EPOs. The EPO has been applied only in few cases in practice, however; its full potential has not been reached. These are the main results of the [Commission implementation report on the Directive](#) that was tabled on 11 May 2020.

The Directive is a mutual recognition instrument, which – together with [Regulation \(EU\) No. 606/2013](#) on protection measures in civil matters – allows for a prolongation of national protection measures for persons in danger when they travel or move to another EU Member State. Such national protection measures include a ban on entering certain places or defined areas, a ban or a limit on contact, or a ban/restriction on approaching the protected person closer than a set distance. In practice, protection measures are mostly applied to protect women in cases of intimate partner or domestic violence, harassment, stalking, or sexual assault.

The implementation report assesses how the 26 EU Member States bound by the Directive (i.e., except Ireland and Denmark) have complied with the core provisions of the Directive. These include:

- Designation of the competent authorities;
- Language regime;
- The need for an existing protection measure under national law;
- Issuance and recognition of an EPO;
- Consequences of a breach of the measures taken based on an EPO;
- The obligation to inform the parties about their rights and relevant decisions.

The Commission concludes that pro-

visions transposing the issuance and recognition of EPOs are sufficient in all Member States but one. Implementation of some provisions, such as the obligation to inform, needs improvement in some Member States. According to the information available, only 37 EPOs were issued and only 15 were executed. Reasons for this underuse of the instrument may be:

- Both national authorities and persons in need of protection are not fully aware of the possibilities to issue/request an EPO;
- Some Member States do not envisage any sanctions for breach of a measure adopted in recognition of an EPO;
- Wide variety of protection measures available in the Member States (under civil, administrative, or criminal proceedings).

As a consequence, future action by the Commission will mainly focus on overcoming difficulties in the practical application of Directive 2011/99. To this end, the Commission will financially support awareness-raising campaigns and practitioner training on the availability of the EPO.

The implementation report on the EPO was presented alongside the implementation report on the 2012 EU Victims' Rights Directive. The results of the two implementation reports also fed into the new EU's strategy on victims' rights, which the Commission tabled on 24 June 2020. (TW)

### CJEU: Member States Must Sufficiently Compensate Victims

The Italian Supreme Court of Cassation referred questions on the applicability of Directive 2004/80/EC as regards compensation to crime victims and the amount of compensation provided therein. On 16 July 2020, the Grand Chamber of the CJEU delivered its [judgment](#) on the case ([C-129/19, Presidenza del Consiglio dei Ministri v BV](#))

#### ► Facts of the case

In the case at issue, Ms BV is struggling to obtain State compensation from

the Italian authorities because she felt victim of crime. In 2005, Ms BV, a resident of Italy, was the victim of sexual violence committed by two Romanian nationals in Turin. Although the perpetrators were sentenced to imprisonment and immediately ordered to pay €50,000 in her favour for the harm caused, she was unable to obtain the amount, as the perpetrators had absconded. After the CJEU found that Italy had infringed Directive 2004/80 for failure of transposition, Italy adopted a law in 2016 establishing a national compensation scheme for victims who are unable to obtain reparation from the offender. The law applied retroactively from 30 June 2005 but operates with fixed compensation rates, depending on the type of crime committed. For victims of sexual violence, the fixed amount is €4800.

► *First question*

The referring court must decide on Ms BV's claim to obtain State compensation from Italy for not having transposed EU law correctly and in time (non-contractual liability). Since the Directive aims at protecting victims in cross-border situations, i.e., to support victims of a crime committed in an EU country other than the one in which they usually live, the first question was essentially whether the Directive also applies to purely internal situations. In other words: Are Member States required to introduce a national compensation scheme that covers all victims of violent intentional crimes committed in their respective territories (which also covers non-cross-border situations), taking into consideration that the crime at issue was committed on Italian soil against an Italian citizen? For the referring court, this is a prejudicial question, namely whether Ms BV may claim non-contractual liability from the Italian state because the Italian law prohibits reverse discrimination.

► *The CJEU's Answer*

The CJEU calls to mind that non-contractual liability of Member States is established under three conditions:

- The rule of EU law infringed must be intended to confer rights on individuals;
- The breach of that rule must be sufficiently serious; and
- There must be a direct causal link between the breach and the loss or damage sustained by those individuals.

The CJEU found that the first condition must be examined in the present case. Taking into account not only the wording, but also the context and objectives of EU legislation, the CJEU concluded that Art. 12(2) of Directive 2004/80 imposes an obligation on each Member State to provide a scheme of compensation covering all victims of violent intentional crime committed on their territory and not only victims that are in a cross-border situation. As a result, any victim – regardless of his/her residence – is entitled to obtain fair and appropriate compensation when a crime has been committed against him/her.

► *Second Question*

In its second question, the Italian Supreme Court of Cassation essentially asks whether compensation fixed at €4800 for victims of sexual violence may be regarded as “fair and appropriate” within the meaning of Art. 12(2) of Directive 2004/80.

► *The CJEU's Answer*

The CJEU acknowledges that Art. 12(2) of the Directive allows Member States discretion as to the amount of compensation. Therefore, the judges follow the [opinion of Advocate General Bobek](#) that “fair and appropriate” compensation is not necessarily required to correspond to the damages and interest that may be awarded to the victim of a (violent intentional) crime, which are to be paid by the perpetrator of that crime. Consequently, this compensation is not necessarily required to ensure the complete reparation of material and non-material loss suffered by that victim. Nevertheless, Member States would exceed their discretion if they only provide purely symbolic or manifestly insufficient compensation. In conclusion, Art. 12(2) of Directive 2004/80 does not

per se preclude fixed rates for a compensation, but the compensation scale must be sufficiently detailed. In this context, the compensation scheme must take into account the consequences of the crime.

Although it is up to the Italian Supreme Court of Cassation to ultimately decide whether the established requirements have been fulfilled, the CJEU doubts that the fixed rate of € 4800 is “not manifestly insufficient,” because “sexual violence...gives rise to the most serious consequences of violent intentional crime.”

► *Put in focus*

In essence, the judges in Luxembourg follow the opinion of the Advocate General. AG *Bobek* favoured a broad interpretation of the scope of the Directive to all victims of crime as well. He also advocated that compensation cannot only be purely symbolic but must be meaningful. Nonetheless, it seems that the AG deemed the offered lump sum or standardised amounts to still be in line with EU law. He focused less on the consequences of the crime but instead on the criterion that there be some correlation between the injury and loss caused by the crime and the compensation provided under the scheme. He ultimately suggested that the EU legislator remove existing diversities in the compensation regimes, procedures, and amounts awarded in the individual Member States. (TW)

### EU Directive Requested against Gag Lawsuits

119 organisations signed a [statement that calls on the EU to stop gag lawsuits](#) against public interest defenders. The statement was published on the website of the European Centre for Press & Media Freedom (ECPMF) on 8 June 2020. The statement lists recent examples of “SLAPPs” against persons who hold powerful persons or organisations to account. SLAPPs is an English acronym for “Strategic Lawsuits Against Public Participation.” Such lawsuits are typically brought forward by powerful

actors (e.g., companies, public officials in their private capacity, high-profile persons) against persons with a watchdog function (e.g., journalists, activists, academics, trade unions, civil society organisations, etc.) in order to censor, intimidate, and silence critics. In a typical SLAPP, the plaintiff does not normally expect to win the case, but intends to burden the defendant with the costs of a legal defence, so that he/she abandons criticism or opposition.

The statement outlines that SLAPPs are a threat to the EU's legal order, threatening in particular:

- Access to justice and judicial cooperation;
- Enforcement of EU law, including protection of the EU budget;
- Freedom of movement.

The organisations urge the EU to take protective measures. These should include:

- An EU anti-SLAPP Directive that sets out Union-wide minimum rules for the protection of victims of such gag lawsuits;
- Reform of the EU rules on the jurisdictional regime, putting an end to forum shopping in defamation cases;
- Establishment of funds to morally and financially support all victims of SLAPPs, especially with legal defence.

Lastly, the statement clarifies that the scope of EU measures must be wide enough to include everyone who might be affected by SLAPPs. (TW)

## Freezing of Assets

### Commission Assesses EU's Asset Recovery and Confiscation Regime.

On 2 June 2020, the Commission presented its [report on asset recovery and confiscation](#), entitled "Ensuring that crime does not pay." The proceeds of organised crime in the EU are currently estimated at about €110 billion per year. As [reported by Europol](#), however, only about 2% of criminal proceeds are frozen, and 1% is confiscated in the EU.

Hence, organised crime groups are still able to invest in the expansion of their criminal activities and continue to infiltrate the legal economy.

The Commission outlines that the EU has put considerable efforts into harmonising the legislation on confiscation and asset recovery. Since 2007, Asset Recovery Offices have been established in all Member States, and [Directive 2014/42/EU](#) on the freezing and confiscation of instrumentalities and proceeds of crime has harmonised rules on the freezing, management, and confiscation of such assets across the EU. The recently adopted Regulation on the mutual recognition of freezing orders and confiscation orders (see [eucrim 4/2018](#), p. 201), which will become applicable as from 19 December 2020, will improve cross-border cooperation.

The Commission report mainly assesses how Member States have transposed the key provisions of the 2014 Directive. This follows up from the [Commission staff working document on the analysis of non-conviction-based confiscation in the EU](#), which was adopted in 2019 and responds to a request by the European Parliament and the Council to assess the feasibility and possible benefits of introducing additional common rules on non-conviction based confiscation. In addition, the report examines the work of the Asset Recovery Offices (AROs), established by [Council Decision 2007/845/JHA](#), and the challenges they face when carrying out their day-to-day tasks. Ultimately, the report provides an overview of the international instruments that are relevant to the field of asset recovery.

The Commission concludes that the 2014 Directive led to substantive progress in the Member States' asset recovery framework. 24 of 26 Member States bound by the Directive have adapted their laws to higher standards. The legislative implementation of the Directive across the EU can therefore be considered satisfactory. However, the figures on asset recovery and low confiscation

rates are not convincing. As a consequence, the Commission suggests further strengthening the EU legal framework as set out in the Directive. This could be achieved by:

- Extending the scope of criminal offences to which the Directive is applicable;
- Introducing more effective rules on non-conviction based confiscation;
- Being more precise as regards the management of frozen assets;
- Introducing provisions on the disposal of assets, including the social reuse of confiscated assets;
- Laying down rules on the compensation of victims of crime;
- Reinforcing the capacity of the Asset Recovery Offices to trace and identify illicit assets.

The Commission does not exclude greater harmonisation of the EU's asset recovery regime. In response to the call by the EP and Council, further measures in the area of non-conviction based confiscation are conceivable, but the Commission first needs to analyse the effectiveness of national regimes (e.g., Germany and Italy), which may serve as a blueprint for an EU model. The Commission also stresses that a revision of EU legislation must not only include Directive 2014/42 but also Council Decision 2007/845. The ability to freeze and confiscate assets depends on the capacity to effectively trace and identify them. It is therefore crucial to ensure that the Asset Recovery Offices (AROs) are equipped to carry out their tasks effectively. (TW)

## Cooperation

### Police Cooperation

#### EP Rejects UK Plans to Join Prüm Dactyloscopic Data Exchange

On 13 May 2020, the EP [adopted a resolution](#) that calls on the Council not to allow the UK's participation in the Prüm

network as far as the exchange of dactyloscopic data is concerned. In December 2019, the Council principally gave the go-ahead for the automated exchange of dactyloscopic data between the UK and the EU Member States bound by the Prüm Decision. However, the UK was called on to review its policy of excluding suspects' profiles from automated dactyloscopic data exchange by 15 June 2020 (see eucrim 4/2019, p. 240).

MEPs believe that the Council should not adopt its implementing decision and also should not take any decision in this regard until guarantees from the UK as regards full reciprocity and data protection have been obtained. Furthermore, MEPs feel that, at this point in time, it makes no sense to let the UK participate in the Prüm network as long as no new legal framework for the new partnership cooperation with the United Kingdom has been concluded. The resolution was [drafted](#) by MEP *Juan Fernando López Aguilar* and debated first in the LIBE Committee.

The EP is only consulted in the procedure, however, and thus has no right to bring down the Council's implementing decision. The Prüm Decision ([Council Decision 2008/615/JHA](#)) is the major EU legal framework for law enforcement cooperation in criminal matters, which is primarily related to the exchange of fingerprints, DNA (on a hit/no-hit basis), and vehicle owner registration data (direct access via the [EU-CARIS](#) system). (TW)

### Commission Rejects UK's Plans to Remedy Deficiencies in Use of SIS

In 2017, the Council recommended that the UK address several serious deficiencies in the country's application of the Schengen acquis pertaining to the Schengen Information System (SIS). On 27 May 2020, the Commission stated in an [assessment report](#) that the action plan tabled by the UK to remedy the deficiencies identified during the 2017 evaluation is not adequate. The report states as follows:

“This is mainly because the implementation timelines of at least 10 of the recommendations are very lengthy and cannot be considered acceptable. In addition, the UK challenges nine recommendations adopted by the Council, meaning that UK disagrees on those recommendations. The documents submitted by the UK imply that the UK will not implement at all at least three of those recommendations, up to four of them will be implemented only partially and only two will be implemented in full. In addition, the information provided with regard to the implementation of certain actions is not detailed enough to allow assessing whether the deficiencies will be implemented effectively.”

The UK is now called on to accelerate the implementation of certain recommendations and to provide additional detailed information

Further background: In 2019, it emerged that the UK authorities had systematically misused the SIS, and cases of mismanagement were detected. [It was reported](#) that the UK unlawfully copied classified personal data from the database and shared information with US companies. Furthermore, the UK failed to keep data up-to-date, ignored alerts from other EU states, and allowed data to be held by private contractors and stored on backup laptops – all in breach of the Schengen data protection rules. It should be noted that the UK will actually only remain connected to the SIS until the end of the transition period provided for in the Brexit Withdrawal Agreement. Whether the UK can participate in the SIS after 31 December 2020 is still open. (TW)

## Judicial Cooperation

### Special Websites: Impact of COVID-19 on the Justice Field

The European Commission has established a [dedicated website](#) within the European e-Justice portal, which informs judicial authorities, legal practitioners,

businesses, and citizens of the measures taken within the European Union in relation to the COVID-19 pandemic and its effects on European justice. The page is regularly updated to reflect new, rapidly changing developments.

The Council of Europe has also created a [webpage](#) on national measures in the justice area in view of the COVID-19 pandemic. It compiles comments provided by the various CoE Member States. Some Member States have also transmitted government decrees or other official documents that display the measures taken by their countries to maintain the administration of justice. The EU website includes information on:

- The handling of the European Arrest Warrant;
- The exercise of the procedural rights of suspects and accused persons;
- Support to and protection of victims of crime during the COVID-19 pandemic;
- Special victim situations caused by the coronavirus crisis (victims of domestic violence, victims of cybercrime, and victims of hate speech);
- Situation in prisons;
- Probation.

A table also provides information on the digital tools used by the judiciary in the various Member States. As regards the European Arrest Warrant, the Commission set up an EAW coordination group. Its task is to deal with practical problems that occurred in application of the EAW instrument during the pandemic (see also the compilation of information by Eurojust and the EJM in this context as reported in a separate news item). The Commission stresses that the group may also be useful in other situations when a fast exchange between Member States is required, for example in reaction to judgments of the CJEU that have a direct impact on the smooth functioning of the EAW.

COVID-19 also determined the agenda of the [discussion in the JHA Council](#). The representatives of the Member States agreed that any extraordinary

measures should be taken in line with the fundamental values of the Union. Member State authorities are advised that, even in times of COVID-19, the procedural rights of suspects and accused persons need to be respected in order to ensure fair proceedings. Limited derogations, which are provided for by the EU's procedural rights directives, should be interpreted restrictively by the competent authorities and not be employed on a large scale. (TW)

### Eurojust/EJN: Impact of COVID-19 on Judicial Cooperation in Criminal Matters

The EJN and Eurojust compile and regularly update information on the impact of measures taken by governments to combat the spread of COVID-19. This extends to judicial cooperation in criminal matters in the European Union (and Iceland and Norway) and to the way forward. The [documents](#) are made publicly available in the Council's document register under the number "7963/2020." They describe how the following major EU instruments on judicial cooperation in criminal matters are applied in practice during the corona crisis:

- The Framework Decision on the European Arrest Warrant;
- The Directive on the European Investigation Order;
- The Framework Decision on the transfer of sentenced persons;
- The Framework Decisions on confiscation and freezing orders.

The reports, *inter alia*, point out difficulties in carrying out the actual surrender of persons under the EAW scheme and the effects of the work of judicial authorities on the execution of EIOs and MLA requests.

In addition, the EJN has published a [summary table](#) of the Covid-19 measures for judicial cooperation in criminal matters taken by the EU Member States on [its webpage](#).

The table presents the collected responses of EU Member States to the following questions:

- Whether the surrenders and transits of persons under the Framework Decision on the European Arrest Warrant (2002/584/JHA) are possible;
- Whether transits of persons under the Framework Decision on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement (2008/909/JHA) are possible;
- Whether European Investigation Orders and other requests for mutual legal assistance are executed in emergency cases only.

Eurojust, the European Judicial Network and the Commission [regularly inform](#) the JHA Council about the state of play as regards the impact of COVID-19 on the EU's area of justice. (CR)

### Impact of COVID-19 on Justice from Lawyer Viewpoint – CCBE Actions

The Council of Bars and Law Societies of Europe (CCBE) started several actions to alert the public to the situation of lawyers following confinement measures during the COVID-19 outbreak.

The association published an [overview of measures](#) taken in some European countries addressing the impact of the coronavirus crisis on justice issues. The overview includes the responses to a CCBE survey regarding experiences and best practices between bars. The bars describe the effects of the crisis on justice in the various European countries, including non-EU countries, e.g., Norway and Switzerland.

The overview focuses on the following:

- Court proceedings;
- Access to a lawyer (in prison and during preliminary proceedings);
- Individual measures taken by the bars or law firms;
- Potential economic and fiscal measures or incentives to mitigate the crisis (e.g., tax reductions).

Protection of the health of lawyers and clients as well as the guarantee of

fundamental rights, despite obligations to keep distance, play an important role in the responses. The overview reveals that approaches by the countries differ in many points. In Germany, for instance, it is up to the individual court to decide whether to hold hearings and take precautionary/safety measures or not. In contrast, the majority of judicial proceedings has been postponed in Greece. In Spain, procedures were suspended after the state of alarm had been established, but it provides for a number of exceptions, given the importance and essential nature of certain processes and actions. However, nearly all states are in agreement on the reduction of taxes and allow court proceedings by means of video conferences.

[CCBE newsletter issue #87](#) includes a special focus on the impact of COVID-19 on justice. It informs readers of the CCBE's initiatives to alert EU institutions to the implications of the COVID-19 crisis on justice and to request support for the justice sector. A [special web page](#) is devoted to the topic; it gathers information on the impact of the pandemic on justice at the international, European, and national levels. In May 2020, the CCBE also created a new Task Force ("Access to Justice – Current challenges, modern solutions") to discuss and anticipate the implications of the COVID-19 crisis on the legal profession and the justice sector in general. (TW)

### Council Discusses Extradition of EU Citizens to Third Countries

At a [video conference meeting on 4 June 2020](#), the ministers of justice of the EU Member States exchanged views on the issue of extradition of EU citizens to third countries. [Several questions remain](#) as to how judgements from the CJEU in recent years, in particular the judgement in the *Petruhhin* case (C-182/15, see [eu-crim 3/2016, p. 131](#)), should be implemented in practice. In these judgments, the CJEU set several benchmarks as to how EU countries should handle extra-

dition cases if they receive requests from countries outside the European Union against a national of another EU Member State. Problems occur especially in relation to extraditions of EU citizens for the purposes of prosecution (e.g., time limits, communication channels, and the refusal of a requested person to notify the home Member State). Ministers exchanged experiences on how their Member States cooperate with each other when they receive such requests. The Member States have applied the CJEU's case law on a case-by-case basis so far, but the Council now suggests exploring the establishment of common working arrangements. Ministers have invited Eurojust and the European Judicial Network (EJN) to analyse how requests for the extradition of EU citizens by third countries are handled in practice, and to make suggestions in this regard. (TW)

### German Court Links Petruhhin Doctrine with *ne bis in idem* and Boosts Common European Criminal Law

A German court transferred the principles on extradition of EU citizens to third countries (as established by the CJEU) to the privilege not to be prosecuted twice. In the [case at issue before the Higher Regional Court of Frankfurt am Main](#), the USA requested the extradition of an Italian national who had been arrested at Frankfurt airport on charges of gang fraud (art forgeries) against citizens in the USA, among others. The newly arrested person had previously been sentenced to imprisonment in Italy on the same accusation. The Higher Regional Court declared the extradition of the prosecuted person to be inadmissible because of the prohibition of double jeopardy (which Italy explicitly claimed).

According to the German-US Extradition Treaty, extradition shall not be granted if the requested person has already been tried and discharged or punished with final and binding effect by the competent authorities of the requested state for the offence for which

extradition is requested. Admittedly, this protection against double jeopardy principally applies only if the judgment was rendered by German courts. However, the Higher Regional Court is of the opinion that Union law forces the recognition of the conviction by Italian courts, which has a protective effect on the extraditions requested by third countries. The Court refers in this context to the CJEU judgments in *Petruhhin* (C-182/15, see [eucrim 3/2016, p. 131](#)) and *Pisciotti* (C-191/16, see [eucrim 1/2018, p. 29](#)).

It results from these judgments that prosecution of an EU citizen in his home (EU) country must take precedence over prosecutions in third countries. The protection of an EU citizen, which is guaranteed by his/her home country, must also be afforded by other EU Member States. This is the only way to ensure free movement in the EU. Hence, it would lead to inadmissible unequal treatment if an EU citizen could not be extradited if he/she were arrested in his home state, but could be extradited if the arrest took place in another EU Member State. If the defendant being prosecuted had been arrested in Italy as an Italian national, he/she would not have been extradited to the United States; the same must apply if he/she is arrested in Germany. In addition, the Court argues that if the defendant had not finally been convicted, the German authorities would have been obliged to grant surrender to Italy and block extradition to a third country. The applicability of the principle of double jeopardy is also justified in this case. (TW)

## European Arrest Warrant

### European Arrest Warrant: Commission Sees Highlights and Lowlights

The European Arrest Warrant (EAW) remains a success story, but Member States must properly implement the instruments of mutual recognition, including the EAW, to achieve the objec-

tive of developing and maintaining a European area of freedom, security and justice. This was [declared](#) by Commissioners *Věra Jourová* (Vice-President for Values and Transparency) and *Didier Reynders* (Commissioner for Justice) when they presented the [Commission report](#) on the implementation of the 2002 Council Framework Decision on the European Arrest Warrant (FD EAW) on 2 July 2020.

The report assesses how the FD EAW, as amended by Council FD 2009/299/JHA, has been transposed in all 27 Member States and the UK. It takes into account recommendations from previous evaluation rounds (led by the Council) and previous Commission implementation reports. This allows the Commission to draw overall conclusions on the application of the EAW from its beginning in 2004 until now. Nearly 186,000 EAWs have been issued since 2005, around one third of them were executed.

The Commission specifically assesses the implementation of the single core provisions of the FD EAW, including:

- The designation of the competent judicial authorities;
- The definition and the scope of the European Arrest Warrant;
- Fundamental rights and procedural rights of a requested person;
- Grounds for non-execution and verification of double criminality;
- Time limits for taking a decision and surrendering a requested person.

In general, the Commission is satisfied with the level of implementation in a significant number of Member States. Some progress has been made. For example, the lacking proportionality checks of European Arrest Warrants at the issuing stage in some Member States has been remedied. However, certain issues of compliance remain in some Member States, which have not addressed previous recommendations and/or have not implemented certain judgments of the CJEU. These issues concern, for instance, additional grounds for refusal or the non-observation of time



limits. Still existing shortcomings hamper the effectiveness of the instrument and the (full) application of the principle of mutual recognition in criminal justice matters.

The Commission announced that it will continue to monitor individual Member States' compliance with the FD EAW. If necessary, it will initiate infringement proceedings to ensure complete and conform implementation throughout the EU.

The Commission assessment comes shortly after a comprehensive implementation report on the EAW by the Eu-

ropean Parliament's Research Service that was commissioned by EP's LIBE Committee (see separate news item; see also *eucri* 1/2020, 26). The EPRS assessment draws conclusions as regards implementation of the EAW in the Member States and the recommendations on how to address identified shortcomings revolving around certain benchmarks (e.g., effectiveness, compliance with EU values, efficiency, and coherence) (TW)

### Statistics on Use of EAW in 2018

On 2 July 2020, the European Commission published [key statistics on the EAW](#)

[for 2018](#). The publication is accompanied by the Commission's implementation report on the FD EAW (see separate news item). The statistical report compiles replies to a questionnaire, providing quantitative information on use of the EAW in 27 of the 28 EU Member States (i.e., excluding Belgium, which was not able to deliver data for 2018). The key findings are as follows:

- 17,471 warrants were issued in 2018 (the figure is close to the figure for 2017, when 17,491 warrants were issued in 28 Member States);
- The most commonly identified categories of offences for which EAWs were issued were theft offences and criminal damage (2893 European arrest warrants), fraud and corruption offences (1739), and drug offences (1610) – this confirms previous trends;
- 300 EAWs were issued for terrorist offences (in 2017: 241);
- The number of EAWs issued for crimes related to counterfeiting the Euro remains proportionately low (38 EAWs, with 13 EAWs issued by France alone);
- Almost 7000 requested persons were surrendered across borders – a record figure compared to previous years (in 2017: 6317, in 2016: 5812);
- The majority of requested persons (54.5%) consents to their surrender (which is, however, a decrease compared to 2017 at nearly 63%);
- It takes 16 days on average from the arrest to the decision on surrender, when the person consents to his/her surrender (and 45 days when the person does not consent);
- The execution of an EAW was refused in 879 cases (in 26 Member States that provided figures on this question). This recorded aggregate figure has increased since 2017 (796 refusals for 24 Member States) and 2016 (719 refusals for 25 Member States);
- The most common ground for refusal to surrender was Art. 4(6) FD EAW (execution of a custodial sentence or detention order against nationals or residents of the executing State);

## Report

### European Arrest Warrant

#### EPRS: Implementation Assessment of EAW

In June 2020, the Ex-Post Impact Assessment Unit of the Directorate for Impact Assessment and the European Added Value of the Directorate-General for Parliamentary Research Service (EPRS) published the [second part of the evaluation on implementation of the Framework Decision on the European Arrest Warrant](#) and the [surrender procedures between Member States \(2002/584/JHA\)](#). The first part, presenting the framework for analysis and preliminary findings on implementation of the EAW, was published in February 2020 (see *eucri* issue 1/20). Both parts support an [own-initiative implementation report](#) by the EP's LIBE Committee (rapporteur: *Javier Zarzalejos*, EPP, Spain), improve understanding of the matter, and feed discussions on possible revision of the 2002 FD EAW.

The comprehensive study report of June 2020 (by Dr. *Wouter van Ballegooij*) presents conclusions on implementation of the FD EAW and makes recommendations as to how to address the shortcomings identified, as per the rapporteur's request. The report first analyses key issues and challenges in both the issuance and execution of EAWs in Member States. It also deals with the EAW's impact on the rights of individuals in the Member States. The assessment and conclusions as regards implementation of the EAW in the Member States and the recommendations as to how address shortcomings identified revolve around the following benchmarks:

- Effectiveness;
- Compliance with EU values, including fundamental rights;
- Efficiency;
- Coherence;
- Relevance;
- EU-added value.

The study concludes that the FD EAW has simplified and sped up handover procedures, including those for several high-profile cases of serious crime and terrorism. A number of unresolved challenges relate to core debates over judicial independence, the nature of mutual recognition and its relationship with international/EU law and values, constitutional principles, and additional harmonisation measures. Furthermore, there are gaps in effectiveness, efficiency, and coherence in conjunction with other measures and the application of digital tools. The EPRS recommends targeted infringement proceedings, support for judicial authorities, and hearing suspects via video link, where appropriate, in order to avoid surrender whilst ensuring the effective exercise of defence rights. It also details a range of measures aimed at achieving humane treatment of prisoners. For reasons of legitimacy, legal certainty, and coherence, a review of the FD EAW, as part of an EU judicial cooperation code in criminal matters is recommended in the medium term. (TW)

- 119 refusals were based on failure to meet the requirements applicable to trials in absentia;
- Fundamental rights issues led to 82 refusals reported by five Member States (76 in Germany);
- 1575 nationals or residents of the executing State were surrendered (based on information by 25 Member States) – which is nearly the same as in 2017 (when 22 Member States provided information).

It should be stressed that the figures must be interpreted cautiously. Not all of the Member States provided replies to every question in the standard questionnaire. Comparison to previous years is made even more difficult because the response rates of Member States vary from year to year, and approaches to collecting statistical data vary. For the 2017 statistics, see [eucrim 3/2019](#), pp. 178–179. (TW)

#### AG: Independence of Executing Judicial Authority Necessary to Decide on EAW Issues

In his [opinion of 25 June 2020](#), Advocate General (AG) *Campos Sánchez-Bordona* supports not recognising a public prosecutor’s office exposed to the risk of being subject, directly or indirectly, to directions or instructions from the executive in specific cases as an authority that can grant consent for possible prosecution of offences other than those for which a person is surrendered (Art. 27 para. 3 lit. g) FD EAW).

##### ► *Background of the case*

The case ([C-510/19](#)) goes back to a reference for a preliminary ruling by the Court of Appeal Brussels/Belgium, which, in essence, asks whether the Dutch public prosecutor’s office (Openbaar Ministerie) is covered by the concept “judicial authority” as established by recent CJEU case law (see the landmark judgment in [Joined Cases C-508/18 \(OG\) and C-82/19 PPU \(PI\)](#) = [eucrim 1/2019](#), pp. 31–32 and the follow-up judgments delivered on 12 December 2019 in [Joined Cases C-556/19](#)

[PPU and C-626/19 PPU](#) (French Public Prosecutor’s Office), Case [C-625/19 PPU](#) (Swedish Prosecution Authority), and Case [C-627/19 PPU](#) (Belgian Public Prosecutor’s Office) = [eucrim 4/2019](#), pp. 242–245).

##### ► *Legal question*

Unlike previously decided cases that dealt with the question of whether the public prosecutor’s office of a Member State is independent enough to issue EAWs (Art. 6(1) FD EAW), the case at issue concerns the subsequent consent of the public prosecutor in the executing State (here: Netherlands) to an extended prosecution of offences not recorded in the initial EAW submitted by the Belgian authorities. In other words, the case combines an interpretation of Art. 6(2) FD EAW – the conditions that must be met by the authority executing an EAW – in conjunction with the speciality rule and its exceptions as provided for in Art. 27 FD EAW.

##### ► *The AG’s opinion*

The AG first observes that the arguments in the context of Art. 6(1) FD EAW can be extrapolated to interpretation of Art. 6(2) FD EAW. The concept of “judicial authority” requires an autonomous interpretation. Second, the AG calls to mind the conditions set up by the CJEU for “issuing judicial authority.” In the concrete case at issue, however, the AG thirdly observes that the question is not whether the Dutch public prosecution office had the status of “executing judicial authority” in the abstract sense but whether it was able to consent to the aforementioned extension of punishable offences in accordance with Art. 27 para. 3 lit. g) FD EAW. It follows from a contextual interpretation that the authority that can provide consent can only be the entity that executed the EAW. Since it was the District Court of Amsterdam (Rechtbank Amsterdam) that decided on the execution of the first EAW, the Netherlands public prosecutor’s office was actually not competent to give the consent as referred in Art. 27 FD EAW.

##### ► *“Alternative dispute resolution”*

Since the Openbaar Ministerie took the view that the procedural autonomy of the Member States allows a different designation of “consenting judicial authority” and “judicial authority executing an EAW,” the AG alternatively examined the conditions that have to be met in order to be able to consent to an extension of the offences recorded in an already executed EAW.

*Sánchez-Bordona* argues that a national public prosecutor’s office is capable of acting both as a “consenting” and “executing” judicial authority only if the conditions that the CJEU set up for a public prosecutor’s office to be able to issue an EAW are met, namely:

- Participation in the administration of justice;
- Independence;
- Amenability of decision to judicial review.

As the case shows, decisions by the executing judicial authority can have the same impact on the right to liberty of the person concerned as the issuing of an EAW. Therefore, the authority must be in a position to perform the function objectively and independently. It must not be exposed, any more than the issuing judicial authority should have been, to the risk that its decision-making power be subject to external directions or instructions from the executive. This was not the case in the Netherlands when the events of the dispute took place. As a result, the risk of the Openbaar Ministerie being exposed to directions or instructions from the executive in specific cases means that it can neither be classified a “judicial authority” within the meaning of Art. 6(2) nor grant the consent referred to in Art. 27(3)(g) of the FD EAW. (TW)

#### Update on EAW Case Law

In March 2020, Eurojust issued [an update of its overview of the CJEU’s case law on the European Arrest Warrant \(EAW\)](#) covering 46 cases from 2007 until 15 March 2020. The document

contains an index of keywords, with references to relevant judgments, a chronological list of judgments, and summaries of CJEU judgments organised according to specific keywords (e.g., human rights scrutiny, refusal grounds, guarantees, time limits). This most recent overview contains revised chapters on the scope, content, and validity of the EAW and on the scrutiny of human rights. (CR)

## European Investigation Order

### AG: German Public Prosecutor's Office Can Be Considered "Judicial Authority" to Issue EIOs

In case [C-584/19](#) (*Staatsanwaltschaft Wien v A and Others*), the CJEU was requested to answer the question of whether its case law on the independence of the (German) public prosecutor's office in relation to the European Arrest Warrant (see [eucrim 1/2019](#), pp. 31–33) could be applied to the European Investigation Order (EIO). On 16 July 2020, Advocate-General *Manuel Campos Sánchez-Bordona* presented his [opinion on the case](#).

#### ► *Facts of the case*

In the present case, the Hamburg Public Prosecutor's Office was conducting criminal proceedings against A and other unknown perpetrators, during the course of which it forwarded a European Investigation Order to the Vienna Public Prosecutor's Office for further clarification of the facts. In accordance with Directive 2014/41, it requested the transmission of various documents relating to an Austrian bank account. The Vienna Public Prosecutor's Office applied to the Vienna Regional Court for Criminal Matters for authorisation to access information on bank accounts and banking transactions with the aim of obliging the bank to hand over the required account documents.

#### ► *The referring court's argumentation and question*

When examining whether this authorisation should be granted, the Vi-

enna Regional Court pointed out that, because the German Public Prosecutor's Office was in danger of being directly or indirectly subject to orders or individual instructions from the executive, it could not, according to CJEU case law, be regarded as the issuing authority for a European Arrest Warrant. This conclusion could be applied to the EIO issued by the Hamburg Public Prosecutor's Office, which could then be refused. Although Directive 2014/41 on the European Investigation Order names the Public Prosecutor as the issuing authority, not all public prosecutors' offices in the Member States meet the requirement of independence applicable to courts. If the CJEU case law on the EAW were to apply to the EIO, the term "public prosecutor" within the meaning of Directive 2014/41 would have to be interpreted as meaning that public prosecution offices that are in danger of being subject to individual instructions from the executive – like the Hamburg Public Prosecutor's Office – would not be covered by it. The Vienna court asked the CJEU to clarify this.

#### ► *The AG's conclusion*

AG *Sánchez-Bordona* concluded that Directive 2014/41 on the European Investigation Order contains comprehensive regulation of the relations between the authorities issuing an EIO and the authorities executing it. These rules shall respect the fundamental rights and other procedural rights of the suspected or accused person at all times. In addition to the presumption underlying the principle of mutual recognition, the system of judicial cooperation in criminal matters in this area provides sufficient guarantees for the protection of the rights of such persons. This regulatory framework was broad enough to cover the public prosecution services of all Member States, irrespective of their institutional position vis-à-vis the executive as an issuing authority. The executing authority would have to examine whether the requested EIO met the conditions for its execution in each individual case. Directive

2014/41 provides for appropriate legal remedies against this decision.

The fact that the public prosecutor's office of a Member State may be subject to individual instructions from the executive is therefore not sufficient to enable a systematic refusal to execute such EIOs. On the contrary:

- Each executing authority would have to ensure that the issuing public prosecutor's office was not bound by such instructions. This would probably lead to considerable legal uncertainty and to delays in investigation procedures with a cross-border dimension, thus making it more difficult to achieve "quick, effective and coherent cooperation between Member States in criminal matters;"

- Non-recognition would lead to a covert amendment of Directive 2014/41, in that the public prosecution services of certain countries would be degraded to "administrative authorities" that need judicial validation. This would mean that they would also not be able to validate the decisions of other administrative authorities issuing EIOs;

- The distribution of competences of the issuing authorities in the Member States would have to be redefined, which would amount to a distortion of the intentions of the Union legislator, who did not want to change the institutional and procedural systems of the Member States in force when Directive 2014/41 was adopted.

The AG therefore proposed that the CJEU reply to the Vienna Regional Court as follows: "Public prosecutor's offices of the Member States that have been designated as issuing authorities may be classified as issuing authorities under Article 2(c)(i) of Directive 2014/41/EU". (TW)

## Supervision of Judgments

### CJEU Rules on Recognition of Probation Decisions

The recognition of a judgment suspending the execution of a custodial sen-

tence, only under the condition that the accused does not commit new offences during a probation period, may fall within the scope of [Framework Decision 2008/947/JHA](#). This was decided by the CJEU on 26 March 2020 in its [judgment in case C 2/19](#) in the context of a preliminary ruling procedure brought forward by the Supreme Court of Estonia. The Framework Decision applicable in this regard regulates the mutual recognition of judgments. It also regulates probation decisions on the basis of which probation measures or alternative sanctions are imposed. Accordingly, the supervision of sanctions can be imposed on the Member State in which the sentenced person is a resident.

In the case at issue, *A.P.* was sentenced to a suspended term of three years' imprisonment by judgment of the Riga City Court, Latvia. The only obligation for *A.P.*, as regards the suspension of the sentence, was seemingly not to commit a new criminal offence. The Estonian court pointed out that both the FD in its Art. 4 and Estonian law authorises recognition of a judgment only in so far as it imposes at least one of the listed probation measures. The referring court is uncertain whether the FD also provides for recognition of a judgment such as that delivered by the Latvian court.

The CJEU stated that the obligation not to commit a new offence may constitute a probation measure within the meaning of the FD if this obligation constitutes the precondition for suspending the sentence. The wording and structure of Art. 1(2) in conjunction with Art. 4(1) (d) ("instructions relating to behavior") of the FD support such an interpretation. To interpret the list set out in Art. 4(1) of FD 2008/947 as not including the obligation not to commit a new criminal offence would lead to a paradoxical result: such an interpretation would mean that the Member State of residence loses the power to adopt subsequent measures if the sentenced person commits a new offence; this would be counter to the context and spirit of the FD.

It is also a precondition, however, that the legal obligation arises from the judgment itself or from a probation decision taken on the basis of that judgment, which the referring court must review. (TW)

## Law Enforcement Cooperation

### JHA Agencies Response to COVID-19

The nine EU Justice and Home Affairs (JHA) Agencies (CEPOL, EASO, EIGE, EMCDDA, eu-LISA, Eurojust, Europol, FRA, and Frontex) published a [joint paper](#) summarising their response to the COVID-19 pandemic. Since its beginning, the Agencies have aimed at supporting EU Member States and institutions to meet the respective operational challenges, to gather expertise and provide analyses, as well as to foster dialogue and learning between key stakeholders. The report outlines the efforts taken by the relevant agencies, inter alia, in the following areas:

- Promoting and protecting fundamental rights and gender equality;
- Managing large-scale IT Systems for Internal Security;
- Managing EU external borders, asylum and migration;
- Informing policy and practice on drugs and drug addiction in Europe;
- Fighting cross-border crime;
- Providing training.

Examples for these efforts include the provision of studies, reports, and surveys on the impact of COVID-19 in the respective areas, together with guidance notes as well as operational support, such as the provision of protective and technical equipment. (CR)

### EMPACT Crime Fighting Initiative: 2019 Results

On 1 July 2020, the EU's operational mechanism to fight organised international crime, EMPACT, published its operational [results for 2019](#). Within the framework of the EU Policy Cycle to tackle organised and serious internation-

al crime, factsheets outline the numbers of arrests, investigations, action days, and seizures, as well as operational highlights for the different crime priority areas such as cybercrime, financial crime, trafficking in human beings, facilitated illegal immigration, drug trafficking, etc. Overall, combined EU efforts in the year 2019 led to 8,000 arrests, the identification of more than 1,400 victims of trafficking in human beings and child sexual abuse, the prevention of €400M in fraud affecting the interests of the EU, as well as the seizure of 75 tons of drugs and chemicals, 6,000 weapons, and €77M worth of criminal assets. (CR)

### Council: More Operational Activities with Western Balkans Partners

On 5 June 2020, the Council adopted [conclusions on enhancing cooperation with Western Balkans](#) partners in the field of migration and security. Support to the Western Balkans should be maintained in order to:

- Achieve a more efficient migration policy and border management;
- Further improve the countries' asylum systems;
- Enhance cooperation on readmission and return;
- Effectively combat terrorism and organised crime (especially organised criminal networks engaged in migrant smuggling, trafficking of firearms, drugs production and trafficking, trafficking in human beings, document fraud. and money laundering);
- Boost the Western Balkans countries' ability to address the spread of disinformation and fake news and respond to possible cyber-attacks and hybrid threats.

The conclusions place emphasis on reinforcing operational cooperation between the Western Balkans and the EU. As a result, possibilities for closer cooperation with EU agencies, such as Europol and Frontex, should be explored. Furthermore, broader convergence of operational standards and capacities between Western Balkans and EU partners

in the field of migration and security are to be developed. Western Balkans partners should also be increasingly involved in relevant operational actions, e.g., Joint Investigation Teams and operational task forces. The Commission

is, *inter alia*, called on to promote the timely exchange of counter terrorism-related information and to strengthen capacities for addressing other security challenges. (TW)

presence. This applies in particular to the handling of urgent cases and applications for provisional measures, the processing of incoming mail and the maintenance of the IT service necessary to enable the Court to work from a distance, as far as possible. Certain tasks that cannot be carried out remotely but are not of critical urgency either were postponed for the period of confinement since they would have required increased physical presence. Accordingly, the following actions were carried out:

- Single judge decisions on inadmissibility continued to be taken, but the applicants were not informed until the end of the confinement period;
- Applications were not formally notified (communicated) to respondent States during the confinement period except for important and urgent cases;
- The Grand Chamber, Chambers and Committees continued to examine cases under a written procedure insofar as possible;
- Decisions and judgments were signed only by the (Deputy) Section Registrar and were notified to the parties electronically (for Governments via the secure sites and for applicants via the eComms platform). Where applicants have not availed themselves of the eComms platform, the judgements or decisions were not notified to either party during the confinement period, with the exception of urgent cases. The judgements and decisions that were notified electronically were also published on HUDOC on the day of delivery.

#### ECtHR: Election of New Leadership

On 20 April 2020, *Robert Spano*, who has been Judge in respect of Iceland since November 2013 and the Vice-President of the ECtHR since 2019, has been elected the new President of the Court. Judge *Spano* studied law in Iceland and the United Kingdom and has worked in a range of judicial, academic and expert positions at both the national and international level.



## Council of Europe

Reported by Dr. András Csúri

### Foundations

#### European Court of Human Rights

##### ECtHR: Extension of Exceptional Measures due to the Global Health Crisis

In a [press release](#) published on 9 April 2020, in the context of the global health crisis, the ECtHR extended the exceptional measures at the Court that had been applied since 16 March 2020 (see [eucrim 1/2020](#), p. 30). The measures take into account the difficulties the parties face during the COVID-19 crisis and provide the following in relation to procedural time limits:

- The six-month time limit for the lodging of an application under Art. 35 of the ECHR was extended for a further two-month period to 15 June 2020 inclusive;
- The time limits that had been allotted in pending proceedings were extended for a further two-month period from 16 April 2020. This extension, however, did not apply to the three-month period under Art. 43 ECHR for requesting the referral of cases to the Grand Chamber.

The main activities of the Court con-

tinued in accordance with the confinement measures adopted by the host State, France, and by facilitating telework and electronic communication, including registering incoming applications and their allocation to the relevant judicial formations. The procedures introduced to enable the ongoing examination of requests for interim measures under Rule 39 of the Rules of Court were also maintained.

##### ECtHR: The Functioning of the Court during the Period of Confinement

On 15 April 2020, the ECtHR published a [press release](#) regarding its functioning during the period of quarantine that has been imposed by French authorities.

In order to comply with the measures adopted by the host State and with a view to pursuing its own policy as well as that of the CoE of seeking to protect its staff from contracting and potentially spreading COVID-19, the Court has taken a number of steps designed to minimise the physical presence of staff in the Human Rights Building (see also [eucrim 1/2020](#), p. 30).

The great majority of staff can work remotely, but certain tasks require their

On 24 April 2020, the Court elected Judge *Ksenija Turković* (Croatia) as the new Vice-President and Judge *Yonko Grozev* (Bulgaria) as new Section President for one of the five ECtHR sections. They took office on 18 May 2020.

*Ksenija Turković* has been Judge at the ECtHR in respect of Croatia since January 2013 and President of Section since May 2019. She was previously President of the Expert Committee responsible for drafting a new Croatian Criminal Code as well as Vice-President of the CoE Group of Specialists on Child-friendly Justice (CJ-S-CH).

*Yonko Grozev* has been a Judge at the ECtHR in respect of Bulgaria since April 2015 and Vice-President of Section between 2018 and 2019.

## Human Rights Issues

### Human Rights Commissioner: Annual Activity Report

On 21 April 2020, The Council of Europe Commissioner for Human Rights, *Dunja Mijatović*, published her [2019 annual activity report](#) covering the main problems, challenges, and opportunities European countries are facing in the field of human rights. In the current context, the Commissioner particularly warns that the COVID-19 pandemic is exacerbating long-standing problems.

The report covers topics that particularly illustrate the ongoing backlash in Europe.

In the context of the growing political and social acceptance of racism, the Commissioner underlines the alarming extent of anti-Semitism, Islamophobia, and anti-Gypsyism. These include hate speech and crimes, especially collective attacks, against Roma; the desecration of Jewish cemeteries and attacks on Holocaust memorials; or attacks on Muslim women for wearing face veils and headscarves.

As far as the disregard of the human rights of migrants and refugees is concerned, the Commissioner expresses

concerns over the increasing normalisation of illegal pushbacks, as well as acts aimed at dehumanising people attempting to cross borders. The lives of thousands of migrants and asylum seekers have also been put at risk by decisions to reduce state search and rescue operations in the Mediterranean as well as by outsourcing border controls to third countries with poor human rights records and unsafe conditions. Here, there is need for more transparency and accountability.

As regards gender inequality, progress is slow in bridging the gender pay gap, addressing discrimination at work, and tackling women's underrepresentation in political decision-making.

The repression of freedom of speech and dissent is also common, for example through disproportionate use of force by the police, through hostile work environments of human rights defenders and journalists in a growing number of European countries, and through legislation being misused to detain and prosecute them.

Judicial independence is in a state of increasing erosion through the attempts by some national authorities to use their leverage to influence and instruct the judiciary as well as to threaten judges for using their right to freedom of expression to state their opinion about an issue of public interest in the justice field.

Lastly, the Commissioner points out some new challenges, e.g. the balance between technological development and human rights protection. She warns against the risks the unregulated use of digital technologies and artificial intelligence poses to human rights, in particular privacy, equality, as well as freedom of expression and assembly.

The report further summarised the following:

- The Commissioner's activities against inequality faced by persons with disabilities, older persons, Roma, and LGBTI individuals;
- The Commissioner's country work through visits and missions;

- The Commissioner's cooperation with European and international organisations.

Regarding the latter, the Commissioner met with the Director of the European Union Agency for Fundamental Rights (FRA) in order to exchange views, including on ongoing activities in the field of asylum and immigration as well as artificial intelligence. The Commissioner also participated in a side-event on Communicating Human Rights organised by the EU representation to the CoE, with the participation of the EU FRA Director. The Commissioner also met with the European Union Special Representative on Human Rights, with their exchange of views focusing on their respective work in Member States of common interest.

## Specific Areas of Crime

### Corruption

#### GRECO: Preventing Corruption in the Context of the COVID-19 Pandemic

On 21 April 2020, GRECO published a [press release](#) and [guidelines which are addressed to its Member States](#) and aim at preventing corruption in the context of the health emergency caused by the COVID-19 pandemic. GRECO stresses in particular that tools such as transparency, oversight, and accountability are more important than ever, both for the central and the local levels in the context of any devolution of powers. GRECO stresses thereby the relevance of a number of Council of Europe documents, like the Criminal Law and Civil Law Conventions on Corruption and the Twenty Guiding Principles for the Fight against Corruption. Furthermore, the importance of other relevant Council of Europe standards is emphasised, such as that of equal access to healthcare as laid down in the CoE Parliamentary Assembly Resolution 1946 (2013) and the significance of GRECO evaluation cy-

cles, in particularly its recommendations on the incrimination of corruption in the third cycle (see [eucrim 3/2009](#), p. 84; [4/2009](#), pp. 149–151; [3/2010](#), pp. 101–103; [4/2010](#), pp. 149–150; [1/2011](#), pp. 19–21; [2/2011](#), pp. 71–73).

On the one hand, the document highlights in general the importance of transparency in the public sector, based on regular and reliable information as one of the most important means to prevent corruption. On the other hand, as emergency legislation shifts power towards the executive, GRECO stresses the oversight role of the other branches of power as being key.

With regard to bribery in the health sector, a highly topical matter in the context of the current pandemic, GRECO stresses that it makes medical services more expensive, leads to unequal access to medical care, undermines patients trust in health services, and has serious financial consequences for public healthcare insurers and thus for the state budget.

As the COVID-19 outbreak and the immediate need for medical supplies increase corruption risks, the document highlights selected types of corruption in the health sector: public procurement, bribery in medical-related services, corruption in new product research and development (including conflicts of interest and the role of lobbying), specific COVID-19-related fraud, as well as the oversight and (related to this) the protection of whistle-blowers in the health sector.

In relation to public procurement, the document refers to number 14 of the twenty guiding principles, which requires transparent procedures that encourage fair competition. Furthermore, with reference to the Civil Law Convention on Corruption, GRECO points out that its members shall provide for effective remedies for those who have suffered damage, including the possibility of compensation.

As regards bribery in medical-related services, e.g. hospitals, GRECO calls to

mind the CoE Criminal Law Convention on Corruption, which requires parties to criminalise both active and passive bribery, also covering private health-care providers. GRECO also reminds its members that petty bribery – like priority access to medical services, tests, burial procedures – also emerges in the pandemic context, even in Member States where this was rather uncommon. Therefore, GRECO calls to pay particular attention to its third evaluation-round recommendations on the incrimination of corruption. GRECO also recalls that its recently developed advisory tools support its members to provide for the CoE standard of equal access to health-care.

GRECO stresses that a huge amount of money is being invested in new product research and development – drugs and vaccines – against COVID-19. Therefore, it would be necessary to increase the capacity, authority and public accountability of State institutions. In this regard, GRECO recalls its recommendations regarding fighting conflicts of interest (cronyism, nepotism, and favouritism in recruitment and generally the management of the healthcare workforce) – in particular with regard to persons entrusted with top executive functions. Furthermore, GRECO recalls its recommendations about lobbying transparency, especially the need for duly reporting all contacts of persons entrusted with top executive functions with lobbyists and other third parties who seek to influence government decision-making. Finally, as regards insider trading, GRECO refers to its recommendations on the declaration of assets, income, liabilities, and interests.

As regards COVID-19-related fraud, GRECO stresses that with medical supplies in high demand, the risks of falsified medical products, fake shops and websites has grown exponentially online, with the money so defrauded being laundered thereafter. In this regard, GRECO refers to the CoE Medicrime Convention as well as the CoE AML

and CFT risk assessment methodology, the latter being a unique tool to mitigate money-laundering risks.

GRECO acknowledges the role of whistle-blowers in the fight against corruption. Therefore, states shall ensure the protection of these individuals and be guided by Recommendation CM/Rec(2014)7 on the Protection of Whistle-blowers as well as the GRECO recommendations in this area.

Lastly, GRECO stresses that the private sector faces increased corruption risks during this crisis. Among other things, these include facilitation payments, the falsification of documents, bypassing product certification requirements, and the non-certification of alternative supply chains. GRECO references for this sector the Criminal Law Convention on Corruption, Guiding Principle 5, and GRECO's recommendations in its second evaluation cycle.

#### **GRECO: Report on the Global Mapping of Anti-Corruption Authorities**

On 25 May 2020, the French Anti-Corruption Agency (AFA) – in partnership with GRECO, the OECD, and the international Network of Corruption Prevention Authorities (NCPA) – published an [analysis report](#) on the global mapping of anti-corruption authorities (ACAs). Despite their importance as institutional tools to counter corruption, there is an overall lack of up-to-date information about ACAs. The extensive data collected from 171 national authorities tasked with preventing and fighting corruption in 114 countries and territories aims at facilitating cooperation between them at the operational level. 43% of respondents were from GRECO Member States, and 48% were from countries that have adopted the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The analysis is based on the results of an online survey conducted between June and December 2019, with the main focus set on identifying relevant contact points and the role of international

gatherings, regional platforms, and individual ACAs.

The report concludes that in general, a single authority is responsible for fighting corruption in a given country. This authority is often equipped with investigative and/or prosecution powers that primarily affect natural persons. Sanction mechanisms – where they exist – are usually administrative in nature. Most ACAs are involved in the development of national anti-corruption strategies, while a minority of them are responsible for managing declarations of assets and interests. The report also points out that the adoption of codes of conduct is more common worldwide than risk mapping, and that both are rarely mandatory in the private sector. Finally, it points out that the ACAs wish to rather benefit from the exchange of best practices and information at the operational level and to network with their foreign counterparts.

### GRECO: 2019 General Activity Report

On 3 June 2020, GRECO published its twentieth [general activity report](#). GRECO President *Marin Mrčela* stressed that public office holders are expected to set an example in complying with anti-corruption measures and transparency standards. As no person, state, or institution is immune from corruption, the President urges the Member States not to wait for the next major scandal before implementing reforms, but to proactively implement GRECO's recommendations instead. The President also emphasised that the rapid-reaction mechanism under the new Rule 34 (concerning the ad-hoc evaluation procedure) is working well and has enabled GRECO to intervene in a timely and effective manner wherever necessary (see [eucrim 1/2020](#), p. 32).

In relation to political financing – an issue that was evaluated under the third evaluation round of GRECO – *Mrčela* recalls that most Member States have put in place a legal and regulatory system that provides for some form of transparency in this area. That said, new

challenges are also arising, the development of which needs a follow-up in the future. These include the (mis)use of new technologies in order to escape transparency requirements or providing political support through fake political advertising online, as well as unregulated foreign funding.

The annual report reviews the measures taken to prevent corruption in GRECO's Member States in 2019 in respect of parliamentarians, judges and prosecutors, as well as in central governments – including top executive functions – and law enforcement agencies.

Accordingly, in 2019, compliance with GRECO recommendations under the fourth evaluation round increased slightly as 35% of recommendations had been fully implemented by the end of the year. The recommendations with the lowest level of compliance continued to be those issued in respect of MPs (26%), whilst it was higher in respect of judges (36%) and prosecutors (47%). Therefore, the President calls politicians to step up their compliance with integrity standards. The report underlines that since the fourth evaluation round began in 2012, nearly half of GRECO's Member States have carried out constitutional reforms following its recommendations, while 150 concrete legislative, regulatory or institutional reforms were carried out to implement GRECO recommendations.

18 countries had been evaluated by the end of 2019 in relation to the prevention of corruption in governments and law enforcement agencies. GRECO often found shortcomings insofar as countries dealt with lobbying, conflicts of interest, and “revolving doors” in central governments, including the need to extend anti-corruption measures to advisers. GRECO's recommendations on law enforcement agencies referred mostly to codes of conduct, promotion and dismissal, conflicts of interest, post-employment restrictions, and the protection of whistle-blowers (see also [eucrim 1/2019](#), pp. 43–45;

[3/2019](#), pp. 182–184; [4/2019](#), pp. 249–251; [1/2020](#), pp. 30–32).

At the end of 2019, Armenia, Austria, the Czech Republic, Denmark, France, Germany, Hungary, Ireland, Luxembourg, Monaco, North Macedonia, Poland, Portugal, Romania and Turkey were subject to GRECO's fourth-round non-compliance procedure, and Belarus was the only country in the non-compliance procedure under the joint first, second and third round (as reported in [eucrim 1/2019](#), pp. 44–45).

GRECO recognises the need for further support to its members. Therefore, it decided to take on a new advisory role in 2019, coinciding with its 20th anniversary. In response to requests by one or more Member States or by a Council of Europe body, GRECO is now able to discuss and adopt expertise reports compiling lessons learned and good practices focusing on particular areas or topics covered by a prior GRECO evaluation. Depending on budgetary availability, GRECO could adopt one or two such expertise reports every year.

The annual activity report contains a feature article on the imminent European Public Prosecutor's Office by *Laura Kövesi*, the first Chief European Public Prosecutor. It also highlights that GRECO reports are now available for search on the European Union Fundamental Rights Information System (EFRIS).

### Money Laundering

#### MONEYVAL: Risks and Policies on COVID-19-related Money Laundering and Terrorist Financing

On 12 May 2020, MONEYVAL drew attention to a [paper](#) issued by the FATF on risks and policy responses in relation to COVID-19-related money laundering (ML) and terrorist financing (TF).

Based on information provided to the members of the FATF Global Network on 7 and 23 April 2020 (together more than 200 jurisdictions), the paper identifies challenges, good practices



and policy responses to new ML and TF threats and vulnerabilities arising from the COVID-19 crisis. The paper provides for an overview of the evolving ML-TF risks, on the impact of the COVID-19 crisis on the anti-money laundering and counter-terrorist financing (AML/CFT) regimes, as well as on the potential AML/CFT responses for consideration.

MONEYVAL draws the attention of its members and the private sector to the key findings of the paper, including:

- The increase in COVID-19-related crimes as the pandemic creates new sources of proceeds for illicit actors in relation to fraud, cybercrime, misdirection, or exploitation of government funds or international financial assistance;
- The potential impact of measures

to contain COVID-19 on profit-driven criminals to move to other forms of illegal conduct;

- The impact of the pandemic on the governments' and private sectors' abilities to implement AML/CFT obligations from supervision, regulation, and policy reform to suspicious transaction reporting and international cooperation.

The identified threats and vulnerabilities represent emerging ML and TF risks that could result in:

- Criminals finding ways to bypass customer-due diligence measures;
- The increased misuse of online financial services and virtual assets to move and conceal illicit funds;
- The misuse and misappropriation of domestic and international financial aid and emergency funding;

- Criminals and terrorists exploiting COVID-19 and the associated economic downturn to move into new cash-intensive and high-liquidity lines of business in developing countries.

In order to manage the new risks and vulnerabilities, the paper recommends the policy responses on anti-money laundering and counter-terrorist financing to include:

- A domestic assessment of the impact of COVID-19 on AML/CFT risks and systems;
- Strengthening communication with the private sector;
- Encouraging the full use of a risk-based approach to customer-due diligence;
- Supporting electronic and digital payment options.

# Articles

Articles / Aufsätze

## Fil Rouge

As illustrated in the editorial of this issue, an effective protection against complex crimes must not only rely on penal law, but requires *a variety of measures and regulations* from different legal regimes that form a coherent architecture of security, accompanied by specifically tailored human rights safeguards. The following first three articles reflect this change by focusing also on measures and legal regimes outside criminal law:

- The leading article of *Lothar Kuhl* on the “Implementation of Effective Measures against Fraud and Illegal Activities in Cohesion Policies” illustrates the great importance of technical control mechanisms for preventing subsidy fraud.
- The essay of *Samuel Hartwig* on “Frontex: From Coordinating Controls to Combating Crime” describes the triumphant development of the originally limited concept of the European Border and Coast Guard Agency (Frontex) from a merely coordinating and supporting body in the field of immigration to a more general instrument for the prevention of crime, including support for the work of Europol.
- In their summary of a research study on the question of whether EU administrative penalties reshape the Estonian system of sanctions, *Andreas Kangur, Alexander Lott* and *Anneli Soo* illustrate the options for dealing with minor crimes either by criminal law or by administrative sanction law; they especially tackle the question of proper human rights safeguards for each of these solutions. The expansion of criminal policy to these alternative legal regimes leads to problems with *special legal guar-*

*antees* which were developed in core criminal law and the application of which might be questioned in other legal regimes with more lenient consequences and without the moral blame of having committed a crime. In the field of transnational crimes, the necessary “transfer” of judicial decisions to other territories – by cooperation procedures or by overarching supranational law – creates additional problems of human rights. Such problems of human rights and safeguards are dealt with in the subsequent three articles:

- *Wouter van Ballegooij* summarizes the “European Implementation Assessment 2004–2020 on the European Arrest Warrant” developed by the European Parliamentary Research Service, identifying both human rights issues and practical problems in the application of the EU’s core judicial cooperation instrument, i.e. the EAW.
- *Werner Schroeder* argues, among others, that the „Limits to European Harmonisation of Criminal Law” do not result so much from barriers to competences as from the rule of law and fundamental rights.
- *Varun VM* proposes the political demand of a “Human Rights-Based Approach to Combat Transnational Crime” due to the infringements of victims’ human rights.

Prof. Dr. Dr. h.c. mult. Ulrich Sieber,  
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# Implementation of Effective Measures against Fraud and Illegal Activities in Cohesion Policies

**An Analysis of Current Structures, a Discussion of Reform Ideas, and a Look Towards Changes by the European Public Prosecutor's Office**

Dr. Lothar Kuhl\*

The article analyses the state of implementation and the effectiveness of measures applied by competent administrative programme authorities under shared management in the EU cohesion policy for the prevention, detection, correction and prosecution of fraud. It discusses the concrete initiatives taken to increase the preparedness of the management and control systems against fraud and presents the various components needed for a consistent administrative response in reaction to fraudulent irregularities. It also discusses possible reform ideas and looks at what will change with the European Public Prosecutor's Office.

## I. Introduction

EU funding in shared management with the Member States so far constitutes the largest part of the EU budget, with a proposed volume of more than € 373 billion over the multi-annual financial framework period 2021–2027 for cohesion policy alone.<sup>1</sup> It provides important financial support to innovation, economic development and employment and is designed to diminish regional disparities, achieve territorial cohesion throughout the EU and support the economy. The programmes drawn up in accordance with specific EU-thematic priorities<sup>2</sup> are implemented through projects at the national, regional and local level. The Commission's responsibility to execute the cohesion budget includes approval, monitoring and supervision of the operational programmes as well as their implementation. National and regional management authorities, as well as certifying authorities provide and validate expenditure to the beneficiaries.

A strengthened shared management assurance framework<sup>3</sup> protects the legality and regularity of the expenditure. It includes management verifications and audit controls of the compliance of EU cohesion expenditure in accordance with the legality and regularity requirements. Financed contracts are typically implemented through procurement procedures by applying horizontal and sectorial EU legal requirements to respect transparency of public spending, non-discrimination and equal treatment of beneficiaries,<sup>4</sup> as complemented by national law. The existence of effective anti-fraud safeguards is part of these management and system requirements as well as of sound financial management. Serious irregularities, fraud and the misuse of funds affecting the interests of the EU tax payer need to be detected and addressed already at the management level instead of concentrating on criminal law measures exclu-

sively. Specific regulatory reform steps have therefore been taken by the EU legislator for the 2014–2020 programmes so as to strengthen the assurance model, notably by introducing annual accounts and clarifying sound financial management requirements of national authorities<sup>5</sup> to achieve upfront protection against risks which may cause reputational and financial harm. While compliance and preventive anti-fraud measures need to be effective, they must take into account the objective of simplification at the same time, thus avoiding unnecessary administrative workloads and burdens for the beneficiaries. A risk-proportionate approach must address the particular system deficiencies through administrative capacity-building, including financial governance and transparency.

Zero tolerance applies to fraud. This objective requires preventive initiatives to preserve EU credibility and impartiality in programme spending already in presence of risks of conflict of interests. The objective can also be reached, for instance, through the systematic occurrence of red flags like “single bidding” in procurement procedures even if they do not establish evidence of criminal and corrupt conduct. Both, the European Parliament and the European Council, emphasise the need for data collection and transparent beneficial owner control of all final Fund recipients,<sup>6</sup> in particular to monitor whether they are unjustly drained off into the pockets of a few big beneficiaries and oligarch structures.<sup>7</sup> More generally, effective anti-fraud procedures are seen as a component of the discussion on EU values in public administration. Under the next multi-annual financial framework, rule of law conditionalities might even apply to Member States when receiving credits if generalised deficiencies in the administrative and judicial systems are found. Protection of financial interests as well as an effective, independent administration and judiciary are related objectives.

Protecting EU interests requires implementing and further developing structured multi-disciplinary preparedness measures. Their extent must take into account a diversity of administrative risk records of the respective EU programmes under shared management, but also the commitment for further increased financial solidarity in the follow-up of the COVID-19 crisis, going along with the COVID-19 recovery and resilience facility under the next-generation EU plan<sup>8</sup> far beyond the existing EU funds. Necessary action includes fraud prevention, risk analysis, control and detection (chapter II) as well as a consistent response in cases of irregularities, including consistent financial corrections. Effective measures would further include exclusion from funding of unreliable beneficiaries as well as judicial prosecution in cooperation with the European Public Prosecutor's Office (EPPO) in cases of criminal offences perpetrated against the EU's financial interests (chapter III).

## II. Increased Preparedness against Fraud and Illegal Activities

Programme management and control systems must ensure compliance with legality and regularity requirements. This includes fraud prevention based on risk analysis and assessment (section 1), but also verifications and controls to detect irregularities and fraud, transmitting relevant information and taking action to allow for investigations (section 2).

### 1. Fraud risk assessment

Fraud prevention comprises consistent risk analysis by the managing authorities (a), the consistent exploitation of audit and investigation results (b) as well as capacity-building through technical assistance, the systematic use of dedicated tools and cooperation with other competent bodies (c).

#### a) Reinforced management responsibilities

Since 2015, the managing authorities have been provided by the Commission with structured guidance on how to conduct a fraud risk assessment.<sup>9</sup> It comprises a tool for self-assessment, quantifying the likelihood and impact of fraud, and the control of effectiveness in the conduct of risk-orientated administrative verifications. The Commission has subsequently monitored its implementation and has checked whether (based on concrete risk assessment) effective measures have been put in place. In addition to a performance audit of the effectiveness of anti-fraud measures in seven Member States, a stocktaking study was carried out for 50 operational programmes covering all EU Member States. It grasped the impact of the regulatory anti-fraud requirements, identified to what extent managing

authorities comply with the legal provisions on the effectiveness of anti-fraud measures put in place and researched in particular whether an effective risk analysis was conducted and what still had to be improved.<sup>10</sup> It concluded that proportionate measures had been taken in general, but it also found that some risks like double-financing, non-compliance with public procurement rules and the occurrence of conflicts of interests had not yet been addressed in every case with sufficient measures that were fully effective and proportionate to the risks.

Against the background of implementation practices developed so far, the shared management services of the Commission, the Directorates-General for Regional and Urban Policy (DG REGIO), Employment and Social Affairs (EMPL), and Maritime Affairs and Fisheries (MARE), have therefore recently revised their multi-annual Joint Anti-Fraud Strategy (JAFS) for European Structural and Investment Funds (ESIF). Based on experiences with the implementation of the new regulatory framework, the Commission services have identified concrete actions to further improve fraud prevention and assistance, providing a tool box for training with an e-learning platform, raising awareness and other supporting initiatives, and tools to remedy continuous weaknesses in the management and control systems, as well as addressing new fraud-risk tendencies identified in ESIFs.<sup>11</sup> A joint typology of irregularities and identified fraud is used for an analysis of irregularities by management authorities, together with audit authorities and the European Anti-Fraud Office (OLAF). It enables coordinated feedback to managing authorities so as to better target their verifications. Implemented for the 2014–2020 programmes, this joint typology helps improve their risk assessment, identify the most important sources of errors as well as fraudulent irregularities (both in terms of frequency and amounts) and learn in which types of programmes they occur.<sup>12</sup>

#### b) Practical role of audits and OLAF investigations in the analysis of fraud risks

Beyond the results of their own verifications,<sup>13</sup> managing authorities use the results of audit controls (1) and OLAF investigations (2) to assess risks for the relevant types of programmes and expenditure.

(1) Different layers of system and operations audits by the authorities, further reviewed on a risk basis through audit controls by the Commission, are in place to provide robust assurance for payments. Complementary to Member States' audit activities, the Commission has shared management audit services in DG REGIO, EMPL and MARE to conduct their own fraud risk assessment. Their audits are not suspicion-run but risk-based, targeting tendencies and weaknesses identified in the checked management and control systems that reveal

risks of misuse and illegal spending. The single audit strategy aims at ensuring that reliable audit opinions and error rates are reported to the Commission by audit authorities as a result of their approximately 500 national system audits per year for the European Regional Development Fund (ERDF) and Cohesion Fund (CF). Based on whether effective controls are in place and function reliably, the Commission services regularly update their bi-annual audit plan. Audit resources are targeted at high risk areas. About 100 risk-based audits are carried out each year for the Regional Development as well as for cohesion and social funds. Commission auditors perform controls under complementary shared management compliance, taking into account past legality compliance of each operational programme or thematic controls of specific types of expenditure, e.g. financial instruments, specific risk patterns (like conflicts of interests) and error-prone types of grants (such as public procurement procedures).<sup>14</sup>

Even if auditors are not primarily responsible for investigating fraud, they may identify and assess systemic fraud risks in the performance of these audits. They take into account the particularities of the funds under shared management in their common single audit strategy.<sup>15</sup> For the 2014–2020 programmes, audit findings from DG REGIO and EMPL are recorded in the specific IT tool “MAPAR” for audit procedures. Findings that are specific to fraud and irregularities primarily identify shortcomings in the fraud-specific system requirements. Key Requirement (KR) No7 concerns the anti-fraud environment as well as effective and proportionate anti-fraud measures. A specific checklist is applied by auditors. Individual fraud findings are registered and give rise to systematic transmission in the OLAF – even if they are not very frequent.<sup>16</sup>

(2) A periodic analysis of OLAF findings is carried out in DG REGIO. It currently covers the complete case data affecting ERDF/CF projects in the 2007–2013 programmes, for which the final OLAF report was accompanied by a financial recommendation. The recent assessment is based on the analysis of about 140 such cases. The OLAF itself identifies in its investigations recurrent risk scenarios and a modus operandi in cohesion policy fraud.<sup>17</sup> Examples include false or falsified supporting documents, various types of public procurement fraud, intentionally claimed ineligible expenditure and undisclosed conflicts of interests in the implementation of the funds. The OLAF cases and financial recommendations have been analysed by domain and type of irregularity, as well as for the public procurement findings by concerned procedures and tendering phases. Financial recommendations may sometimes also be based on findings of administrative irregularities without evidence of a fraudulent intention. These results are fed back into the risk approach for management verifications and audits. Based on OLAF investigations concluded in cases

affecting cohesion-funded projects within the responsibility of DG REGIO, the highest fraud risk concerns the domain of EU financial support to infrastructure (43%), followed by research and development projects as well as funding of investment into information technology.<sup>18</sup> Half of the cases concern irregularities affecting public procurement procedures.

### c) Increased administrative capacity-building and perspectives for EPPO cooperation

Capacity-building measures address integrity weaknesses in compliance and financial good governance. Risks can be mitigated by increasing transparency, professionalism in public procurement and anti-fraud commitment through sufficiently qualified, professional and skilled personnel on the part of the programme authorities. Specific Commission guidance to support administrative capacities is offered, in particular by a periodically updated<sup>19</sup> public procurement action plan or, for instance, by a compendium of anti-fraud practices<sup>20</sup> and a dedicated e-learning module.

The managing authorities are trained to look more consciously at specific red flags in their decision-making on funding. With a view to analysing the possible implications of “single bidding” for cohesion funding, DG REGIO, for instance, commissioned a targeted study<sup>21</sup> on the reasons for recurrence in ten selected Member States. Widespread single bidding and non-competitive tendering may be a multi-faceted phenomenon with a variety of possible explanations, including state of the market, availability of contractors, proportion of EU funds in public spending etc. But they also constitute an indication of possible anti-competitive practices and arrangements which may distort the bidding environment and might be designed or at least be of a nature to harm the Union’s financial interests, in particular if identified frequently in a specific region or state. Single bidding raises doubts about the effective organisation of the procurement process and calls upon improving the administrative capacity of procurement entities in order to address the risk of corruption and bid-rigging. This risk may actually affect many EU regions.<sup>22</sup>

Capacity-building is supported by the Commission via technical assistance to develop cooperation with other stakeholders and actors, including civil society organisations, in particular by using “integrity pacts” as well as “peer-to-peer” cooperation and exchange. Effective and proportionate risk prevention efforts need to be tailored to the specific features of each programme and project. Used in certain high-volume procurement procedures, “integrity pacts” are agreements between a contracting authority and the companies bidding for public contracts; they provide for a commitment to abide by standards of integrity, transparency and efficiency as well as by ab-

staining from corrupt practices in the procurement process.<sup>23</sup> For purposes of accountability, the parties accept the monitoring by a civil society organisation, thereby ensuring credibility and legitimacy in contracting and the execution phases of the projects. So far, the launch of 18 “integrity pacts” has been overall successful and has already shown some important results, like identifying risk scenarios (thereby avoiding potential irregularities), helping contract authorities in handling public contracts in accordance with the regulatory framework and, last but not least, identifying and signalling concrete and tangible risks of harmful and illegal practices before the procurement is concluded.

In the future, multidisciplinary capacity-building efforts may also be further supported by cooperation with the EPPO. Once the EPPO has taken up its activities, it may be an important contribution to prevention based on its knowledge about fraud cases and action across Member States as well as its EU-wide professional criminal case expertise. Its case management system documents information from all participating Member States and allows for collecting a record and register of experiences. The EPPO Regulation foresees the development of a cooperation relationship between the EPPO and the Commission.<sup>24</sup> In particular, this should include concrete terms on increased capacity-building and for “taking precautionary measures, in particular to prevent any continuous wrongdoing or to protect the Union from reputational damage”.<sup>25</sup>

## 2. Detection and control

An effective detection of instances of fraud and serious irregularities is the basis for any successful investigative and prosecutorial action. Detection and reporting are a management responsibility (a), which can be exercised more effectively with the support of improved technical IT tools, data enrichment, comparability and inter-operability (b). Cooperation on detected cases includes the OLAF and, in the future, the EPPO (c).

### a) Management controls: irregularities detection and reporting

In the first place, managing authorities are responsible to detect fraud. The frequency and volume of reported fraud, however, is statistically low (1).<sup>26</sup> Detection responsibilities extend to instances of conflict of interests. This includes the stage of the project selection, the evaluation of the tenders, the choice of the beneficiaries and the stage of project implementation, even if it is not part of their function to investigate concrete suspicions (2).

(1) The detection effort is mainly reflected by reporting via the Irregularities Management System (IMS) to the Commis-

sion. The IMS is a specific electronic monitoring instrument for periodic reporting of both non-fraudulent and fraudulent irregularities by competent Member States authorities. Detected cases must be declared and entered into the IMS by competent authorities from the first stage of the primary administrative finding.<sup>27</sup> At least as much as they may indicate an objective fraud risk affecting the respective programmes and spending priorities, the reporting statistics therefore also reflect the efficiency in detecting fraud at the managing level. Fraud reporting in the IMS translates increased detection capacities by managing authorities responsible for cohesion. But huge discrepancies between different authorities remain, which explains the assumption of underreporting.<sup>28</sup>

Based on their verifications, the reporting practice by Member States demonstrates the presence of continued risks, such as double invoicing or costs overstatement, and of situations with a conflict of interests. The Commission report on the protection of the EU’s financial interests analyses the domains in which most fraudulent irregularities are detected and reported (by amounts for 2007–2013).<sup>29</sup> There are significant increases in the number of cases related to incorrect, missing or false documents and the infringement of public procurement rules. The most-concerned spending priorities are research and technological development (RTD), increasing the adaptability of workers and firms, enterprises and entrepreneurs as well as improving access to employment and sustainability<sup>30</sup> – domains into which continued efforts will need to be invested. This investment is also crucial for the future with respect to the proposed COVID-19 crisis REACT measures,<sup>31</sup> as well as the specific recovery effort under Next Generation EU: the size of EU expenditure combined in a package with the future multiannual financial framework increases and the current state of emergency requires fast action, which exposes the Union to more risks.

Whereas the tendency of the Member States to focus on fraudulent rather than non-fraudulent irregularities is higher for the programming period 2014–2020, the detected irregular financial amounts seem to have decreased. This may be due to the implementation of a more performant assurance framework that is reinforced by the obligation to present annual accounts about expenditure that are declared to the Commission for acceptance every year. However, Member States showed different reporting patterns in their tendency to detect fraudulent irregularities with high financial amounts involved. For the ERDF, Italy, Portugal and Slovakia showed a more consistent practice to detect and report fraudulent cases with large financial amounts. Italy allows its authorities to systematically draw information from the IMS for detection purposes, interlinking it directly with national data systems.

(2) Specific and extended detection responsibilities result from the now very explicit provisions for national authorities managing EU funds, so as to avoid or identify conflicts of interests. These situations arise if a public officer cannot sufficiently clearly separate the exercise of his/her functions in the management of the funds from his/her personal interests. The need to detect and make transparent a possible conflict of interests applies whenever objective indications generate this perception.<sup>32</sup> Effective disclosure and detection are instrumental to avoid putting at jeopardy trust in the impartial decision-making by public authorities. In order to assist the Member States authorities in further strengthening procedures to detect situations of conflicts of interests, the Commission has committed to submit guidance on implementing Art. 61 of the Financial Regulation.<sup>33</sup> It also conducted a survey of legal and administrative measures already implemented in the Member States with the aim to undertake an updated risk assessment based on a comprehensive mapping. According to the objective to protect public trust in the impartiality of fund management, Member States authorities, when executing the EU budget, must respect these obligations at all stages of budget implementation, including preparatory acts, and at all levels of authority, including the political office level.

Situations of a conflict of interests cannot be assimilated to fraud and criminal conduct themselves. But their consequent detection and disclosure are paramount to identifying possible risks of misuse, bias, fraud and corruption in fund management, as well as to preventing reputational harm. For the European Union as a community of law, effective procedures to detect conflicts of interests at all governance levels, are also part of the broader challenge to enforce the rule of law. Transparency at all levels is crucial to conclude on appropriate Member States' administrative capacities and financial governance.

In the recent implementation practice of the programmes under shared management, the European Commission services have therefore attributed specific attention to the systems in place in order to prevent and detect conflicts of interests by Member States authorities. A high-level precedent in the Czech Republic has led to targeted compliance audits so as to control the implementation of measures to avoid conflicts of interests in its national control systems under shared management.<sup>34</sup> The recent audit practice of the European Commission overall confirms that self-declarations of the absence of conflicts of interests during either the selection of operations or public procurement procedures are not a sufficient single means of protection and detection. Only if effectively checked by Member States authorities, they can lead to effective detection. Criminal sanctions in place for false self-declarations are not a guarantee that no further audit evidence of their validity is needed.

## b) Improved detection tools, data enrichment and inter-operability

Under shared European Structure and Investment (ESI) funds management, detection is supported by the obligation to monitor and publish data on the beneficiaries.<sup>35</sup> These transparency duties for managing authorities play a central role in risk mitigation and the detection of irregularities. Private-source information may help further enrich and process this information. In the context of decentralized Member States' administrative responsibilities for the implementation of cohesion policies, the Commission services offer support for the effective detection of illegal practices. They stimulate and encourage a more systematic enrichment of stored and recorded technical data by using data-mining and risk-scoring tools (1), as well as supporting data access through the enhanced inter-operability of Member States' data bases (2).

(1) Managing authorities gain from making more systematic use of artificial intelligence tools during project selection and implementation.<sup>36</sup> For this purpose, they can use a specific data-mining tool called *Arachne*, which allows for further enrichment of information provided by the Member States authorities in accordance with Commission Delegated Regulation 480/2014.<sup>37</sup> Member State data are combined with external information from private data service providers; the system also collects company, fiscal and accounting data of more than 200 million entities worldwide. Risks affecting operations and beneficiaries can be checked along specific categories of information, e.g. "public procurement", "conflict of interests" or "fraud", in order to verify the presence of specific indicators, e.g. the level of compliance with fiscal, accounting and insolvency laws. This may lead to identifying red flags on the basis of which the system provides a "risk-scoring". The managing authority entirely preserves its discretion in decision-making but benefits from the warnings provided to detect areas at risk and target verifications on the spot.

The analytical device *Arachne* (developed by the Commission) is currently a voluntary preventive detection tool. Based on a private service contract, it is provided free of charge to managing authorities<sup>38</sup> and can identify a project exposure to risks of fraud, conflicts of interests, double financing, corruption or other irregularities. As not all Member States currently use artificial intelligence tools, the question is whether and on which terms the EU legislator should provide a requirement to make compulsory use of the data-mining system. This could help with a more effective uptake of *Arachne* for all programmes and Member States, lead to more complete information being inserted and thereby further increase its quality. A reference in an EU legal instrument would overcome the opposition of some Member States which do not yet use it.<sup>39</sup>

(2) Relevant information on the state of implementation of financed operations and on payments to beneficiaries is already included and publicly accessible in the cohesion open-data platform.<sup>40</sup> However, this information is currently not fully interoperable and entered in accordance with different data quality standards. Not all Member States authorities insert their information using comparable categories and parameters of information, such as an official identifier code for beneficiaries. This still makes it difficult to trace and detect contractors, beneficial owners and final recipients of the beneficiary company or trust. In order to further increase data interoperability and transparency for fund management, the Commission has therefore tested smart processing of open data by using an advanced knowledge tool for a limited number of Member States in a pilot project. It will insert content from relevant Member States' data bases on an interoperable platform, processing the data with linguistic, data-mining and search functions. If successful, this pilot could ultimately become a smart processing tool for all Member States and might technically be used for risk analysis and detection.

Improved data interoperability could help track and detect more effectively beneficial owner control in shared management and cohesion policies. This is currently required for EU funds participation in financial instruments and budgetary guarantees under an indirect spending mode by European banks.<sup>41</sup> But the use of the data needs to respect the purpose of the legal basis under which it is collected. As a concrete example, for cohesion and agriculture policies, the European Parliament requests to obtain from the Commission the lists per Member State and, within the EU, of the 50 largest individual recipients (natural persons or beneficial owners of a company).<sup>42</sup> The purpose and the need to know for protecting the EU's financial interests is presented in broad terms. The data protection challenges will need to be addressed in compliance with the GDPR<sup>43</sup> and the other EU data protection regulations<sup>44</sup>. The proposal for a regulation on common provisions for cohesion programmes in 2021–2027 provides, for monitoring purposes, a more harmonised input, but does not include the systematic disclosure of beneficial owner data and on contractors in procurement. The regulatory templates would need to be completed with updates, but without disproportionately increasing the administrative burden for managing authorities. According to its recent anti-money-laundering action plan, the Commission also intends to submit, within the next year, a rule book on whether the Anti-Money Laundering Directive needs to be further harmonised.<sup>45</sup>

### c) Cooperation on detected cases with the OLAF – and with the EPPO in the future

Detected cases with a suspicion of fraud are systematically communicated to the OLAF by Commission services. This

is done based on information received from all sources: from the managing and audit authorities at the national level and in the regions and, in particular, based on Commission audits. In practice, Commission services report the majority of public-sources information to the OLAF. Even though the transmitted information does not always lead to the opening of investigations, about one third of cases are accepted for investigation by the OLAF. Transmission of information by Member States authorities to the OLAF for investigation is comparatively less frequent. The managing authorities currently transmit detected cases to national investigation services, or in case of criminal suspicion directly to judicial authorities for purposes of investigation and prosecution.<sup>46</sup>

The future relationship between the European Public Prosecutor's Office and the Commission will explore ways for operational cooperation and assistance on detection. In the future, a structured and periodical exchange of information and experiences could lead to cross-reference information, which would allow for extracting data for operational analysis<sup>47</sup> and for detecting fraud. The interest of the Commission services will notably include the development of available knowledge for precautionary measures in case of a detection of potential irregularities and fraud. Information collected by the European Public Prosecutor's Office – as a specialised investigation and prosecution body – with a European decentralised structure and a case management system covering cohesion fraud cases could support detection results. Considering the respective prerogatives and priorities, however, this assistance to detection is not evident, at least not in pending investigation cases, where it needs to be reconciled with judicial secrecy. The transmission of sufficient information by the European Public Prosecutor's Office to Commission services is “without prejudice to the proper conduct and confidentiality of its investigations”.<sup>48</sup> But it should not be excluded in principle. It could contribute to effective protection.

## III. A Consistent Response in Reaction to Fraudulent Irregularities

Compliance of the management and control systems predominantly depends on the protective capacities of financial correction and recovery, which should be exercised effectively without undue delay under the responsibility of the Member States authorities (1). In addition to paying back unlawfully obtained monies, administrative sanction procedures for the exclusion and blacklisting of unreliable beneficiaries under the European Detection and Exclusion System (EDES) could complement future judicial prosecution of criminal offences by the European Public Prosecutor's Office (2).



## 1. Financial correction and recovery

Irregular expenditure is corrected and recovered (a), but procedures must become swifter (b).

### a) Administrative financial correction and recovery procedures in cases of irregularities and fraud

If irregularities or fraud are detected and established, Member States authorities are responsible for applying financial corrections and recovering expenditure from the beneficiaries. If related serious system deficiencies are not corrected, the Commission itself interrupts interim payments, suspends programme implementation and applies financial corrections against the respective Member State (1). The amount is determined by flatrate corrections if the financial prejudice cannot be clearly quantified (2). Corrections may in particular need to be adopted as a consequence of OLAF financial recommendations (3).

(1) Under shared management, financial corrections and recovery are implemented in different layers. With respect to EU cohesion expenditure, financial corrections by Member States authorities<sup>49</sup> are implemented either by cancelling all or part of the EU contributions to an operation, through de-certifications of declared amounts from the annual accounts or through withdrawals in case of “pending recoveries”. Under Art. 325 TFEU, it is the Member States’ responsibility to issue a recovery order and to ensure that beneficiaries pay back the obtained monies to the managing authorities if irregularities due to fraud and illegal activities are established. This duty applies in accordance with the rules under the applicable legal, administrative and contractual framework, independent from a criminal conviction. The Commission imposes financial corrections on the Member State<sup>50</sup> if – based on audit results reported by the Member States or on own audits – material risks remain in the functioning of the management and control systems. The Commission is required to launch financial correction procedures each time once the national control cycle (including corrections) is completed if it concludes that the residual total error rate for a programme is still above 2 %. As precautionary measures, this comprises the swift interruption of interim payments. If an application for interim payments comprises irregular and, in particular, fraudulent expenditure, the payment scheme may be suspended by the Commission.<sup>51</sup>

The programme authorities can reuse the monies in a subsequent accounting year for another operation within the same programme.<sup>52</sup> However, the Commission shall apply net financial corrections should serious deficiencies be identified by its audit directorates (or the European Court of Auditors), provided that they were not identified, reported and corrected by

the Member State authorities when submitting the corresponding accounts.<sup>53</sup> In this case, the amounts subject to financial correction are deducted as net corrections from its Member State credits. In practice, this possibility is rarely used, but it has a disciplinary effect and ensures Member States’ compliance when submitting the accounts. This can be illustrated by the high amount of deductions in the declared expenditure of the annual accounts from final annual interim payment requests.<sup>54</sup> However, once financial corrections are made by the programme authorities, the Commission itself has, under shared management responsibilities, no further means to insist that the illegally received monies are paid back to the authorities by the beneficiary. Of course, this is without prejudice to Member State obligations under Art. 325 TFEU to take effective measures so as to recover fraudulently obtained amounts.

(2) Financial corrections correspond with the value of the wrongly charged expenditure. But if a prejudice cannot be specifically and precisely quantified for individual irregularities, flatrate corrections are applied.<sup>55</sup> These may need to be imposed on beneficiaries by programme authorities, particularly for cases of fraud, conflict of interests and bid-rigging in public procurement. The specific rates depend on the seriousness of the breach and the systemic nature of the identified irregularities, which may range from 5 % to 100 % of the affected expenditure.<sup>56</sup> If fraud is uncovered, the complete failure of compliance may justify a maximum flatrate correction of 100% of the affected expenditure.<sup>57</sup> Standard correction rates are, in particular, foreseen in the recently revised Commission guidelines on financial corrections in public procurement.<sup>58</sup> These are addressed to Commission services and not directly legally binding for the Member States, but for reasons of equal treatment, they are relevant for the exercise of their discretion. The guidelines thereby clarify the obligations of programme authorities to correct any prejudice to the EU’s financial interests, in particular in cases of fraud affecting public procurement expenditure. The rates set a generally applicable proportionate standard rate of correction, but the specific decision must take into account all circumstances of the individual irregularity. The flatrate depends on the nature and gravity of the irregularities, which may be opposed to the Member States authorities and the resulting financial implications for the funds.<sup>59</sup> The gravity may need to be clarified in cases of bid-rigging, cartel and anti-competitive agreements between tenderers, in particular if the administration itself is a victim. The full flatrate of 100 % financial correction is, however, foreseen in cases of involvement of public administration officials.<sup>60</sup>

(3) Recovery of illegally obtained monies may in particular be a consequence of OLAF investigations with fraud findings. The Commission’s shared management services systemati-

cally follow up on financial recommendations accompanying OLAF final case reports. It is the Commission with its competent fund managing Directorates General (REGIO or EMPL) which is the direct addressee of relevant financial recommendations accompanying the findings in a final OLAF case report. But the financial recommendations need to be transmitted for implementation by the Commission services to the national managing authorities. As the OLAF recommendations themselves are not a binding decision for the national authorities, a contradictory process is organised. If the managing authorities do not agree to applying financial corrections without a valid reason – or not for the recommended full amount –, the Commission may need to launch administrative procedures for financial corrections. The implementation of all transmitted OLAF recommendations is comprehensively monitored by DG REGIO, which closely checks progress. The average ratio of implementation of OLAF financial recommendations by DG REGIO reached about 86 % of the volume of recommendations made by the OLAF in 2019.<sup>61</sup> This result is due to upfront informal coordination between the different Commission services about anticipated findings, their legal presentation in the OLAF final report and the amount of recommended financial recovery – without prejudice, but to the OLAF’s investigative independence. Nonetheless, the follow-up process is currently still quite long, requiring a period of about 18 months on average. This is due to the need in many cases to await the outcome of pending lengthy national administrative and criminal proceedings.

#### **b) Perspectives for accelerated recovery with the assistance of the EPPO?**

The question is whether further progress on recovery can in the future be expected from cooperation with the EPPO. The Regulation is rather silent on recovery cooperation between the EPPO and the Commission. In addition, the EPPO Regulation regrettably does not draw up concrete procedural approaches on how to reconcile the exercise of concrete managing tasks in order to safeguard the precautionary financial measures with actions by the specialised prosecution service. This includes, for instance, the provision of a reinsurance that interference between criminal and administrative procedures will be avoided more effectively. If fraud is identified, the performance of contracts may need to be interrupted and programmes suspended quickly, payments have to be refused and unduly paid amounts recovered. The need to accelerate recovery procedures is reflected insufficiently in the EPPO Regulation, which argues that “to the extent that recovery procedures are deferred as a result of decisions taken by the EPPO in connection with investigations or prosecutions under the EPPO Regulation, Member States should not be considered at fault or negligent for the purposes of recovery procedures”.<sup>62</sup> This

is the wrong signal: the EPPO has been established to become a factor of acceleration and not of delay in the response to fraud. It should contribute to safeguarding a quick recovery of monies.

The EPPO may need to protect the EU’s financial interests through fast precautionary and conservative measures in its investigation procedures, in particular to stop payments and avoid putting at risk EU monies.

On the one hand, the EPPO Regulation does not comprise many specific provisions describing how the EPPO will advise on administrative measures. Precautionary measures by programme authorities to protect financial interests could comprise suspensions and interruptions of payments, as specified for ongoing OLAF investigations.<sup>63</sup> The EPPO Regulation indicates in general terms that the EPPO may “recommend specific measures”.<sup>64</sup> But in concrete terms, the EPPO Regulation only covers cooperation with the Commission on the correction of illegal expenditure for two scenarios – which occur at the very end of investigative procedures – and specifies the EPPO’s mandate to help recover the defrauded sums. First, in case of prosecution, the EPPO will notify the Commission of the decision “where necessary for the purposes of recovery”.<sup>65</sup> This information flow is indeed necessary both to protect the secrecy of criminal proceedings or investigative measures and to avoid further putting at risk the EU’s financial interests. Second, the EPPO Regulation mentions the referral of the file in case of dismissal, for the recovery and administrative follow-up to the OLAF or other competent authorities.<sup>66</sup>

On the other hand, the EPPO Regulation does not in itself provide a legal basis for specific judicial powers to take conservative or other precautionary judicial measures. This matter continues to be subject to national criminal procedural law. According to the Regulation, national law may specify the relevant investigative and precautionary powers of freezing instrumentalities, proceeds and assets,<sup>67</sup> depending on concrete conditions, so as to avoid “that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation”. But the Regulation does not clarify, for instance, the cooperation with offices responsible for freezing and confiscating proceeds of fraud.<sup>68</sup>

## **2. Future use of administrative sanctions and prosecution**

EU anti-fraud legal instruments emphasise the objective of a deterrent fight against fraud, in particular the directive on criminal law protection, which provides harmonised criminal offences, including fraud and corruption,<sup>69</sup> as well as the

EPPO Regulation, whose criminal investigation and prosecution powers will extend to fraud affecting cohesion funds. But the exclusion of unreliable beneficiaries from EU projects and blacklisting by managing authorities could also be a relevant type of sanction, which would be necessary for the protection systems in cohesion (a) and complementary to anti-fraud deterrence through effective prosecution by the EPPO (b).

#### a) Legal framework for administrative EU sanctions and the EDES

Companies and persons who have committed serious illegal activities and fraud should possibly be blacklisted<sup>70</sup> and banned from participation in EU-financed tenders. Beyond corrections, the EU Financial Regulation provides for the application of financial penalties as well as the exclusion and blacklisting of unreliable beneficiaries in cases of serious irregularities (1). These administrative sanctions might also be introduced in cohesion policies to swiftly apply, without prejudice to criminal law responsibility and the assessment of guilt by the competent judiciary (2).

(1) European administrative sanctions are, however, currently not yet applicable in cohesion policies against beneficiaries who have committed serious irregularities, as the implementation mechanism – which the EU Financial Regulation provides under the EDES – and the registration of beneficiaries in the EDES have not yet been extended to areas of shared management.<sup>71</sup> So far, it only applies to direct (by Commission) and indirect (by EU-agencies, e.g. EU-public banks) spending. Two types of registration need to be distinguished:

First, the EDES provides to apply measures of reinforced control so as to protect the Union's financial interests against risks through unreliable beneficiaries and entities. In order to warn authorising officers, registration in the system ensures the early detection of beneficiary entities and persons of interest representing risks that threaten the Union's financial interests.<sup>72</sup> This is not a decision on sanctions. The registration does not in itself constitute a final measure that brings about a binding effect and a change in the legal position of the entities concerned. But in the future, the EPPO may request the deferral of an EDES detection and early warning notification,<sup>73</sup> as long as there are compelling legitimate grounds to preserve confidentiality in its investigations.<sup>74</sup>

Second, administrative sanctions, such as the exclusion of persons and entities from receiving Union funds, are foreseen in cases of findings of serious misconduct.<sup>75</sup> The regulatory sanctions include the imposition of a financial penalty on an economic operator<sup>76</sup> and, in the most severe cases, the publication of the exclusion on the Commission's internet site, in order to rein-

force the deterrent effect.<sup>77</sup> The Commission and the other EU authorising officers feed information of serious irregularities about unreliable beneficiaries into the EDES. The procedure strives for swift decision-making while respecting defence rights and the contradictory procedure.<sup>78</sup> The information that triggers exclusion may be based on both a final or non-final judgement or administrative decision, but could also (and in particular) rely on facts and findings by the OLAF, audits or any other check, as well as audits or controls performed under the responsibility of the competent authorising officer. In the future, the exclusion can also be based on information transmitted after investigations by the EPPO. In the absence of a final judgement, the responsible authorising officers make their decisions on the basis of a preliminary classification in criminal law, with due regard to the recommendations of the high-level EDES panel.<sup>79</sup>

(2) Cases of fraud under shared management could equally be inserted in the future, if provided by sectorial regulations. This could complement the current Irregularities Management System (IMS), in which shared management authorities periodically report irregularities and fraud in accordance with regulatory monitoring duties – but it is simply a reporting and monitoring tool for risk analysis and statistics.<sup>80</sup> The full extension of the EDES to compulsory use by shared management beneficiaries, bodies implementing financial instruments and final recipients, however, would require a significant legislative and administrative effort. Currently, Member States are only encouraged to use the EDES when selecting beneficiaries of their programmes on a voluntary basis. Access to EDES information on exclusions from expenditure under direct and indirect management needs to be granted *ad hoc* to national authorities by the Commission if this information is necessary for assessing a fraud risk and the possible ineligibility of a registered beneficiary. So far, only Malta and Slovenia have requested access. Legislative changes with respect to the exclusion from all EU funds across different spending modes of beneficiaries who are also registered under shared management would additionally entail the need to provide that Member States can directly access the Commission-owned system and insert information about beneficiaries under their own responsibility. Hence, the EDES structure would need to be changed as well.

#### b) The relevance of future cooperation with the EPPO

The EPPO might take up its activities at the end of 2020.<sup>81</sup> Effective EU-wide, equivalent and more expedient procedures for prosecution and criminal sanctions in cases of fraud in cohesion funds are expected outcomes of this important reform.<sup>82</sup> Investigations currently often take too much time and need to be enforced by applying different criminal procedural

standards. On the one hand, the different modalities for cooperation between the Commission – including the OLAF – and the EPPO in individual investigations still need to be clarified, even if they have to build on practices that are already in place (1). On the other hand, in accordance with existing anti-fraud policies, management authorities themselves need to systematically submit fraud suspicions for dissuasive action of the prosecution. Cooperation with the EPPO by Member States must therefore necessarily be taken into account when assessing the proper functioning of the management and control systems for purposes of audit arrangements – and possibly also in the future when assessing the enabling conditions, which may lead to the suspension of funds in accordance with rule-of-law criteria (b).

(1) Spontaneous fraud reporting by Commission services will be the main source of information for the EPPO. For practical reasons and with a view to reporting fraud suspicions without undue delay,<sup>83</sup> DG REGIO may follow existing reporting mechanisms within the Commission and make use of its OLAF arrangements.<sup>84</sup> In practice, this may be advisable so as to assess whether there are sufficient suspicions as well as to find the appropriate moment and extent of information exchange to start criminal investigations with the EPPO. This may be preferable with a view to checking whether the facts are within the material scope of competence of the EPPO for criminal conduct.<sup>85</sup> In practice, the criminal dimension is an aspect with which the programme authorities and DG REGIO have little experience, notwithstanding a possible preliminary evaluation of the allegations to be reported and their first classification in criminal law.<sup>86</sup> With a view to properly assessing who is competent to prosecute, it also seems important to determine whether the level of maximum sanctions is equal or less severe in the presence of non-harmonised offences.<sup>87</sup> Finally, the OLAF may be better placed than DG REGIO for assessing the question whether the threshold of sanction and damage criteria are met in *de minimis* cases, so as to confirm the EPPO's competence.<sup>88</sup>

Information exchange will also become necessary on request by the EPPO in pending fraud investigations. The EPPO may in particular request “further relevant information” available to the Commission.<sup>89</sup> It may also want to obtain any relevant information stored in data bases and registers of the Commission.<sup>90</sup> In this context, the question arises of the modalities and the extent of such access, in particular whether the EPPO should be given direct access to certain Commission data bases, or whether information shall be extracted by Commission services from the data bases. DG REGIO will need to collect further information on a request by the EPPO within the limits of the obligation for loyal cooperation. But the role of the Commission auditors differs from the one of fraud in-

vestigators, and does not equal that of an auxiliary of justice. For these reasons, it would make sense that a possible liaison with the EPPO in ongoing investigations should be established via or in close consultation with the OLAF.

(2) As mentioned above, the EPPO should contribute to more expedient, effective and equivalent criminal law action in cases of fraud. However, not all EU Member States participate in the EPPO scheme. In line with the anti-fraud criminal law policies for national authorities, the cohesion common provisions proposal for 2021–2027<sup>91</sup> therefore links the use of certain simplifications in national assurance systems (such as the use of single audit procedures and the application of enhanced proportionate audit arrangements) to the participation of the concerned Member State in prosecution cooperation with the EPPO.<sup>92</sup> This link is formulated in flexible terms but illustrates the understandable expectation that this cooperation with the EPPO will be key to strengthening and enforcing sound financial management. Member States are invited to avail themselves of the EPPO investigation and prosecution functions with regard to achieving effective protection of the EU budget before enjoying simplified assurance conditions. However, it will be important to confirm the actual relevance of participation by Member States in the enhanced cooperation with the EPPO on the basis of practical results. It must also be confirmed whether the new system achieves effective operational protection of the EU's financial interests through dissuasive criminal law measures against fraud. This test will only prove successful if the EPPO can confirm – in concrete cases – its efficiency in simplifying and accelerating prosecution, which can lead to dissuasive sanction procedures.

Some Member States, including Poland and Hungary, which both finance an important part of their public investment budgets through cohesion funding, do not intend to participate in the enhanced cooperation. Should this ultimately lead to an operationally less effective prosecution function by these non-participating States, this would be a deficiency in their management and control systems. In the future – and under conditions which still need to be clarified –, this could – even justify a requirement for EU cohesion funding under the rule-of-law principle if the lack of participation with the EPPO indicates a generalised deficiency of the judicial system.

#### IV. Conclusions

Anti-fraud measures in cohesion policies are more structured today than in the past, but the need for tailor-made and proportionate, risk-based approaches remains topical. In the years to come, following the COVID-19 crisis, the need for a robust overall protection of EU finances will even increase. Even for

the 2014–2020 period, the COVID-19 pandemic regulatory initiatives already provide increased funding that is available under flexible conditions and offers the possibility of 100 % EU financing. In many Member States, this is combined with high time pressure on implementing the funding measures foreseen and proposed in May 2020,<sup>93</sup> which complete the earlier measures of the immediate response to the impact of the pandemic.<sup>94</sup> For the new multi-annual financial framework, the important volume of EU support foreseen under the EU recovery package put forward in May 2020 in the Commission proposal for the 2021–2027 period even more evidently illustrates the need to further strengthen measures to address risks of fraud.<sup>95</sup> The challenges ahead require full synergies between all actors involved, updated risk assessments for the programmes, an attentive detection of any possible irregularities as well as investigations into and the prosecution of suspicions of fraud.

The existence of functioning management and control systems as well as the availability of effective prosecution and independent criminal law protection in cases of criminal ac-

tivities affecting EU cohesion expenditure are intertwined. In this context, the EPPO, which will work together with the other competent authorities and stakeholders and resist temptations of empire building, will become an indispensable key player for an effective operational system of anti-fraud measures under the next multi-annual financial framework. It will provide a criminal law safeguard, which is necessary for and complementary to the administrative assurance systems, as well as being relevant for achieving the objectives of EU policies on cohesion and values. As can be seen from most recent European Council conclusions<sup>96</sup>, in the negotiations on the multi-annual financial framework, however, Member States might remain divided on rule-of-law conditionalities. Whereas the European Parliament has endorsed the main thrust of the Commission proposal<sup>97</sup> about respect for the rule of law for the 2021–2027 programmes,<sup>98</sup> the European Council has not yet been able to fully endorse the “rule-of-law conditionality” as an integral part of the future multi-annual financial framework funding schemes.

\* Opinions expressed in this article are purely personal and do not commit the European Commission.

1 See Communication from the Commission, “The EU budget powering the recovery plan of Europe”, COM(2020) 442, 27.5.2020, p. 18. See also European Council, conclusions 17–21 July 2020, Annex MFF commitment appropriations, p. 67.

2 Most prominently research and innovation, competitiveness of small and medium-sized enterprises (SMEs), low carbon and the creation of jobs.

3 Based on a designation process for the authorities, ex-ante conditionalities, a 10% payment retention until accounts acceptance and an annual submission of accounts.

4 ECJ, 6.12.2017, case C-408/16, *Compania Națională de Administrare a Infrastructurii Rutiere SA*, para. 57, which confirms “that the role of the European Union is to finance through its funds only actions conducted in complete conformity with EU law, including the rules applicable to public procurement”; see also ECJ, 14.7.2016, case C406/14, *Wrocław – Miasto na prawach powiatu*, para. 43. See in particular Directive on Public Procurement 2014/24, *O.J. L 94*, 28.3.2014, 65.

5 Common Provisions Regulation EU No. 1303/2013, laying down common rules for cohesion programmes, *O.J. L 347*, 20.12. 2013, 320. See in particular Art. 125(4)(c): “... the managing authority shall ... put in place effective and proportionate anti-fraud measures taking into account the risks identified”.

6 European Parliament resolution of 14.5.2020 on discharge in respect of the implementation of the general budget of the European Union for the financial year 2018, Section III – Commission and executive agencies (2019/2055(DEC)) P9TA-PROV (2020)0114, para. 26, in which the European Parliament requests “the Member States ... to maintain a publicly available list of final beneficiaries (and) calls on Member States to publish such data in a uniform manner and ensure the interoperability of the information.” European Council conclusions, 17–21 July 2020, para. 24; See also Report from the Commission on the follow-up to the discharge for the 2018 financial year, COM(2020) 311 final.

7 See discharge resolution for 2018, *op. cit.* (n. 6), para. 24: “... strongly

disapproves of the creation and establishment of oligarch structures in some Member States; is deeply concerned that members of these oligarch structures draw on Union funds particularly in the area of agriculture and cohesion to strengthen their position of power...”; and para. 25: “... is deeply worried by recent reports about agricultural funds allegedly benefiting oligarchic structures; reiterates that this represents a severe injustice towards Union taxpayers and particularly towards small farmers and rural communities ...”.

8 See Communication from the Commission, “The budget powering the recovery plan of Europe”, COM(2020) 442, 27.5.2020, p. 18, which provides a budget sealing of nearly € 985 billion.

9 Guidance for Member States on Fraud Risk Assessment and Effective and Proportionate Anti-Fraud Measures, European Structural and Investment Funds, EGESIF 14-0021-00, 6.6.2015.

10 L. Bonnemains, M. Campagno, B. Kessler, O. Mala and G. Razavi, pwc, Preventing fraud and corruption in European Structural and Investment Funds – taking stock of practices in the EU Member States, October 2018, available for download at: <[https://ec.europa.eu/regional\\_policy/en/information/publications/studies/2019/preventing-fraud-and-corruption-in-the-european-structural-and-investment-funds-taking-stock-of-practices-in-the-eu-member-states](https://ec.europa.eu/regional_policy/en/information/publications/studies/2019/preventing-fraud-and-corruption-in-the-european-structural-and-investment-funds-taking-stock-of-practices-in-the-eu-member-states)> accessed 20 July 2020.

11 Joint Anti-Fraud Strategy for Shared & Indirect Management 2020–2025, REGIO EMPL MARE, Ares(2019)7845154 of 20 December 2019, also available at: <<https://ec.europa.eu/sfc/en/2014/anti-fraud>>. The

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actions take into account the recommendations and the action plan of the updated Commission Anti-Fraud Strategy, COM(2019) 196 (29.4.2019) and SWD(2019) 170. For the new Commission's Anti-Fraud Strategy, see C.A. Makri and O. Marin, (2019) *eucri*, 218.

12 For the accounting year 2017–2018, see REGIO AAR 2019, Annex 10D; the most important categories are public procurement, ineligible expenditure, missing documentation and state aid.

13 See section 2 below (Detection and control).

14 The most frequent sources of errors are unjustified direct awards, artificial splitting of contracts, discriminatory selection criteria, unequal treatment at the evaluation stage and contract modifications disregarding publication requirements.

15 See point 3.2.5, Single audit Strategy update 2020, including risks, e.g. due to the limited period of keeping supporting documents.

16 From 2016 to 2018, 15 carried out REGIO audit missions revealed 22 findings in No KR 7, 17 out of which were evaluated as 'important', four as 'very important' and one as 'critical'.

17 See Information note on fraud indicators for ERDF, ESF and CF, COCOF 09/0003/00-EN of 18 February/2009.

18 15% and 12% respectively.

19 Fourth update 2020: Public Procurement Action Plan in the context of Cohesion Policy 2020–2027.

20 DG REGIO, Preventing Fraud and Corruption in European Structural and Investment Funds, Compendium of Anti-Fraud Practices, 5 October 2018.

21 Study by M. Fazekas, Single Bidding and Non-competitive Tendering Procedures in EU-Co-funded Projects. Scope and Explanations, May 2019: <[https://ec.europa.eu/regional\\_policy/en/information/publications/reports/2019/single-bidding-and-non-competitive-tendering](https://ec.europa.eu/regional_policy/en/information/publications/reports/2019/single-bidding-and-non-competitive-tendering)> accessed 20 July 2020.

22 Commission, Seventh Report on Economic, Social and Territorial Cohesion, 2017, chapter 4 para. 3.6. See also summary data in Annex 1 REGIO lit. d).

23 European Commission, <https://ec.europa.eu>, EU regional and urban development, regional policy, integrity pacts.

24 See Art. 103 of Regulation (EU) No 2017/1939 on the implementation of enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO), *O.J. L 283, 31.10.2017, 1*.

25 See Recital 107 of the EPPO Regulation.

26 For the 2007–2013 period, the level of reported fraud in cohesion was 0.47%, while it currently is 0.87% for 2014–2020.

27 Art. 2 of Commission Delegated Regulation 2015/1970 with specific provisions of the reporting of irregularities, *O.J. L 293, 10.11.2015, 1*.

28 European Court of Auditors, Special Report 06/2019, 27.3.2019, "Tackling Fraud in Cohesion spending", in particular paras. 48–57 and 89. For the report, also see T. Wahl, "ECA: Fighting Fraud in the Cohesion Sector is Unsatisfactory", (2019) *eucri*, 93.

29 Protection of the Financial Interests, Commission Report 2018, see para. 4.3.2.1 and table Annex 1, lit a).

30 Frequency of 8.6%, 9.7% and 9.5% respectively of the irregularities reported as fraudulent in comparison with all reported irregularities.

31 See in this context the Commission proposal COM(2020) 451, 28.5.2020 to top up the 2014–2020 spending by € 55 billion under Cohesion funds to address the COVID crisis.

32 Art. 61 of Financial Regulation (EU, Euratom) No. 2018/1046, applicable to the general budget of the Union, *O.J. L 193, 30.7.2018, 1*: "1. Financial actors within the meaning of Chapter 4 of this Title and other persons, including national authorities at any level, involved in budget implementation under direct, indirect and shared management, including acts preparatory thereto, audit or control, shall not take any action which may bring their own interests into conflict with those of the Union. They shall also take appropriate measures to prevent a conflict of interests from arising in the functions under their responsibility and to address situations which may objectively be perceived as a conflict of interests."

33 Commission "Guidance on avoidance of conflicts of interest under the Financial Regulation".

34 European Parliament resolution of 14 May 2020 with observations forming an integral part of the decisions on discharge in respect of the implementation of the general budget of the European Union for the financial year 2018, Section III – Commission and executive agencies (2019/2055(DEC)), see in particular para. 218: "Also deplores initial indications that the Commission auditors detected very serious cases of conflict of interests related to the Czech government; understands, however, that the Czech national law on conflicts of interests did not before February 2017 penalise the granting of public funds to public officials."

35 The specific rules are defined in Art. 115(2) of Regulation No. 1303/2013 for the ERDF, the CF and the European Social Fund (ESF), as well as in Arts. 111–114 and 117 of Regulation No. 1306/2013 for expenditure under the Common Agricultural Policy. See also Art. 44(3) and (4) as well as Art. 63 of the Commission proposal for a Common Provisions Regulation for the period 2021–2027, COM(2018) 375, 29.5.2018.

36 European Parliament, 2018 discharge resolution, *op. cit.* (n. 6), para. 230.

37 Regulation (EU) 480/2014, *O.J. L 138, 13.5.2014, 5*, see Annex III including 55 data fields.

38 By September 2019, 20 Member States used *Arachne*, 16 of which had integrated it into their management and verification processes for at least one operational programme. The most active users were Slovakia and the Czech Republic and Bulgaria, but also France, Italy, Latvia and Romania. However, some Member States currently abstain from using *Arachne* (Austria, Germany, Sweden, Finland, Denmark) or are undecided (Poland, Cyprus). Among the reasons may be stricter national rules on data confidentiality (DE) or plans to develop alternative national systems (PL).

39 See request by the European Parliament in the discharge for 2018, para. 230, *op. cit.* (n. 6).

40 Art. 115 of Regulation) 1303/2013.

41 See in particular Art. 155(3) 2 of the Financial Regulation. When implementing financial instruments and budgetary guarantees, persons and entities acting under indirect management shall make funding contingent under this Regulation upon the disclosure of beneficial ownership information in accordance with Directive (EU) 2015/849 and publish country-by-country reporting data within the meaning of Art. 89(1) of Directive 2013/36/EU.

42 See EP, 2018 discharge Resolution, *op. cit.* (n. 6), para. 28.

43 In particular Arts. 5 and 6 of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data, *O.J. L 119, 4.5.2016, 1*.

44 For Commission processing: Arts. 4 and 5 of Regulation (EU) 2018/1725, *O.J. L 295, 21.11.2018, 39*.

45 See Directive (EU) 2015/849, as amended by (Fifth) Directive (EU) 2018/843, *O.J. L 156, 19.6.2018, 43*, laying down rules to facilitate the use of financial and other information for the prevention, detection, investigation and prosecution of certain criminal offences, as well as designating authorities empowered to have access to the centralised bank account registries; for beneficial ownership information, see in particular Arts. 3(6), 30, 31 and 31a. See the recent Commission action plan C(2020) 2800, 7.5.2020.

46 See Art. 14 of Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law, *O.J. L 198, 28.7.2017, 29*. For the Directive, see A. Juszcak and E. Sason, (2017) *eucri*, 80.

47 See Art. 44(2)(c) of the EPPO Regulation.

48 Art. 103(2) of the EPPO Regulation.

49 Art. 143 of Regulation 1303/2013: "1. The Member States shall in the first instance be responsible for ... making the financial corrections required and pursuing recoveries. ... 2. Member States shall make the financial corrections required in connection with individual or systemic irregularities detected in operations or operational programmes. Financial corrections shall consist of cancelling all or part of the public contribution

to an operation or operational programme. The Member States shall take into account the nature and gravity of the irregularities and the financial loss to the Funds.”

50 Art. 85 of Regulation 1303/2013: “1. The Commission shall make financial corrections by cancelling all or part of the Union contribution to a programme and effecting recovery from the Member State, in order to exclude from Union financing expenditure which is in breach of applicable law.” See also Art. 144(1).

51 Art. 142(1)(b) of Regulation 1303/2013.

52 Art. 143(3) of Regulation 1303/2013. In order to avoid financial corrections, in the case of ongoing national procedures and proceedings, pending recoveries may also be taken out of expenditure declared in the accounts and reinserted in future accounts if the suspicion is not confirmed, see Art. 137(2) of Regulation 1303/2013.

53 In 2019, DG REGIO did not have to initiate procedures to reduce programme allocations (net financial correction).

54 For structural funds, € 3.1 billion in 2018–2019; see Annual Activities Report REGIO 2019, ARES (2020) 3011513, 10.6.2020, p. 32, and Annex 10C, p. 62.

55 See Art. 144(1) 3 of Regulation 1303/2013.

56 Art. 31(2) of Commission-Delegated Regulation (EU) 480/2014, *O.J. L* 138, 13.5.2014, 5.

57 A financial correction of 100% is applied to the expenditure affected by irregularities stemming from a breach of public procurement rules with an impact on the EU budget and relating to fraud, affecting the Union’s financial interests or any other offence defined in Arts. 3–5 of Directive (EU) 2017/1371, as established by a competent judicial body, or identified by a competent EU or national authority.

58 See point 1.1 of the Commission Guidelines on financial corrections in cases of public procurement irregularities in the Annex to the Commission Decision of 14.5.2019, laying down the guidelines for determining financial corrections to be made to expenditure financed by the Union for non-compliance with the applicable rules on public procurement, C(2019) 3452.

59 Settled case law, ECJ, C-406/14, *op. cit.* (n. 4), para. 47, and ECJ, C-408/16, *op. cit.* (n. 4), para. 65. See also point 1.4. of the above-mentioned Guidelines.

60 See Guidelines, *op. cit.* n. (58) irregularity type 22.

61 See overview in the DG REGIO Annual Activity Report for the year 2019, Annex 10 K.

62 Particularly relevant under cohesion policies, see Recital 106 of the EPPO Regulation, with reference to Art. 122 of Regulation 1303/2013.

63 Art. 7(6) 2 of Regulation (EU) 883/2013, concerning investigations conducted by the OLAF, *O.J. L* 248, 18.9.2013, 1.

64 Art. 103 of the EPPO Regulation.

65 Art. 36(6) of the EPPO Regulation.

66 Art. 39(4) of the EPPO Regulation.

67 Art. 30(1)(d) of the EPPO Regulation.

68 See Art. 10 of Directive (EU) 2014/42 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, *O.J. L* 127, 29.4. 2014, 39.

69 Directive 2017/1371, *op. cit.* (n. 46).

70 EP discharge resolution for the financial year 2018, 14 May 2020, para. 230, see note 6 above.

71 See list of those concerned in Art. 135(2) of the Financial Regulation, *op. cit.* (n. 32). Art. 142(2)(d) foresees the transmission of information to the EDES by entities implementing the budget in accordance with shared management in cases of detected fraud only where such transmission of information is required by sector-specific rules. This is currently not yet

provided in the Common Provisions Regulation (CPR) 1303/2013. The CPR proposal for 2021–2027 (COM(2018) 375) does not provide a reference to the EDES either.

72 This is a preparatory measure, see General Court, 24.10.2018, case T-477/16, Epsilon International SA, paras. 160 and 161.

73 See below B.2.a.

74 Art. 142(1) of the Financial Regulation.

75 Art. 136(1) of the Financial Regulation. In particular, the grounds for exclusion concern the non-payment of taxes or social security contributions, grave professional misconduct and fraud, corruption, participation in a criminal organisation, money-laundering or terrorist financing and offences etc.

76 Art. 138 of the Financial Regulation.

77 Art. 140 of the Financial Regulation.

78 General Court, 22.4.2015, case T-320/09, Planet AE Anonymi Etaireia Parochis Symvouleftikon Ypiresion v European Commission, paras. 76, 83.

79 Art. 136(2) of the Financial Regulation.

80 See supra II.2.a)(1).

81 Subject to a Commission decision to be taken on a proposal by the European Chief Prosecutor in accordance with Art. 120(2) of the EPPO Regulation.

82 See comparative analysis of actions taken by national judicial authorities 2012–2018, the OLAF Report 2018, Judicial monitoring, point 5.2, p. 41.

83 Art. 24 of the EPPO Regulation.

84 See also Recital 51 of the EPPO Regulation.

85 Under Art. 22 of the EPPO Regulation.

86 See Art. 136(1) of the Financial Regulation for Exclusion.

87 Art. 25(3) of the EPPO Regulation.

88 Arts. 24(5) and 25(2) of the EPPO Regulation.

89 Art. 24(9) of the EPPO Regulation.

90 Art. 43(2) of the EPPO Regulation.

91 Common Provisions Regulation proposal, COM(2018) 375, 29.5.2018.

92 See proposed Arts. 74(2) and 78(1) COM(2018) 375.

93 See in particular the proposal of the Commission regarding exceptional additional resources and implementing arrangements under the investment for growth and jobs goal to provide assistance for fostering crisis repair in the context of the COVID-19 pandemic and preparing a green, digital and resilient recovery of the economy (REACT-EU), COM(2020) 451, 27 May 2020.

94 Coronavirus Response Investment Initiative Regulations (EU) 2020/460, *O.J. L* 99, 31.03.2020, and 2020/558, *O.J. L* 130, 24.4.2020, 1 (CRII and CRII+).

95 See Communication from the Commission, “The EU budget powering the recovery plan for Europe”, COM(2020) 442.

96 European Council conclusions, 17–21 July 2020, paras. 22 and 23.

97 Proposal for a Regulation on the protection of the Union’s budget in case of generalised deficiency as regards the rule of law in the Member States, COM(2018) 324, 3.5.2018; see also more recently Communication from the Commission, “Strengthening the rule of law within the Union – a blueprint for action”, COM(2019) 343. For reflections on the 2018 proposal, see L. Bachmaier, “Compliance with the Rule of Law in the EU and the Protection of the Union’s Budget”, (2019) *eucri*, 120.

98 European Parliament Resolution of 4 April 2019 (first reading), T8-0349/2019, in particular, see Arts. 2A and 3. *Inter alia*, the EP has added a definition of what may constitute a generalised deficiency affecting the rule of law and explicitly mentioned the proper functioning of investigation and public prosecution services against EU fraud as well as authorities carrying out financial control amongst the risks for EU financial interests.

# Frontex: From Coordinating Controls to Combating Crime

Samuel Hartwig

The last few years have seen the European Border and Coast Guard Agency (“Frontex”) grow ever more central to European efforts to control the external borders. The Agency moved from a merely coordinating and supporting role to a much more operational one. Frontex now engages in tasks running the gamut from surveying the borders and returning irregular migrants to combating criminal activity. To make this possible, the financial and personnel resources at the disposal of the Agency were increased substantially. This article first sheds some light on the historical background of the Agency. It then traces the successive mandate revisions and the growth in power they entailed. The article then examines how crime fighting was introduced into Frontex’ mandate, before analysing the Agency’s contribution to combating criminal activity and its implications.

## I. Introduction

During the past few months, headlines about the corona pandemic have dominated the news. As the virus spread around the globe, strict measures to contain it were enforced, curtailing many of the basic freedoms that people living in the EU have grown accustomed to. One of the most visible measures that was implemented in the early stages of the pandemic was the closure of European borders. Even though this effort was of dubious utility in the fight against the virus, since it had already gained a foothold in most European countries, the pandemic at least offered political leaders a welcome excuse to impose stricter border policies with regard to migrants at Europe’s doorstep. While the media became fixated on comparing the latest infection statistics from around the world, the plight of migrants more or less vanished from public discourse.

Unfortunately, the border closures are only the latest act in a process that has been going on for quite some time. That process led, on the one hand, to the meteoric rise in the resources made available to Frontex, the European Border and Coast Guard Agency while, on the other hand, pushing its activities in a significantly more repressive direction. This article will elucidate, in particular, the expanded role Frontex plays these days with regard to combating criminal activity.

## II. The Origins of Frontex: Securing Europe’s Borders

Although initiated outside the European framework, the Schengen area is nowadays considered by many a signature achievement of European integration. The idea behind Schengen is that Member States abolish all internal border controls between them, so that people and goods can travel unhindered between the Member States. Right from the start of the pro-

ject, it was clear that this would also create new challenges, as this freedom of unimpeded movement would also prove a boon to people engaged in all manner of illegal behaviour as well as to people trying to irregularly enter the area. In order to mitigate this risk, the focus of border controls moved to the external borders surrounding the Schengen area.<sup>1</sup> Since the late 1990s, different and largely informal formats were tried out to coordinate the management of the external borders, but all of these mechanisms were found lacking.

Nevertheless, the Member States were reluctant to cede powers in the sensitive area of border controls to a European institution; it was only the impending accession of several Eastern European countries in 2004 that generated sufficient political impetus for the creation of a European mechanism, since there were concerns over the ability of the prospective members of the EU to properly control their borders.<sup>2</sup> As a result, the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (commonly referred to as “Frontex”) was established through Council Regulation (EC) No. 2007/2004 in October 2004; it began operations in May 2005.

At this time, the “securitization” of migration was already in full swing. That is, migration was no longer considered to be mainly an issue of immigration policy but rather perceived to belong to the realm of security policy. The roots of this development date back as far as the 1980s, but it became a salient feature of public debate about migration and border controls in the wake of the 9/11 attacks, as migration was associated with criminality and terrorism.<sup>4</sup> This change in perception was reinforced by the terrorist attacks in Madrid in 2004 and London in 2005; a political consensus started to emerge that one of the keys to guaranteeing security within the EU lay in stricter border controls.<sup>5</sup>



The next decisive push for a more “securitized” approach to border controls occurred during the so-called “migrant crisis” in 2015. The large influx of persons trying to enter Europe went hand in hand with calls to strengthen the external borders in order to bar terrorists and criminals from entering Europe illegally. The political culmination of these developments can be seen in the EU security strategy of 2016.<sup>6</sup> The document considers migration to be one of the key challenges that Europe faces in the realm of security policy.<sup>7</sup> The upshot of all these developments is that migration and border controls are seen almost exclusively from a security perspective. This outlook has ramifications, of course, for the tasks assigned to Frontex and the way the Agency operates.

### III. Financing Frontex: From Rags to Riches

Frontex started operations as a small agency with little staff and a limited budget. During its first year of operation, Frontex had only 70 staff members and a budget of about €6 million.<sup>8</sup> Both the amount of personnel and the budget increased steadily in the following years, with marked increases occurring during the height of the “migrant crisis.” But even in the aftermath of the crisis, more staff and a bigger budget were made available to the Agency each year. In 2018, approximately 700 people worked at the Agency and the budget had already grown to €320 million.<sup>9</sup> Both numbers are set to rapidly increase yet again, as the plan is to make a standing force of 10,000 border guards available to the Agency by 2027.<sup>10</sup>

In addition, the Agency will also be provided with the means to procure its own equipment, so that it will no longer depend on materiel being provided by the Member States. In order to make all of this possible, it is planned to fund Frontex to the tune of €1.3 billion in the 2019–2020 period and, thereafter, make available a stunning €11.3 billion for the years 2021–2027.<sup>11</sup> Within just a few years, the means at the disposal of the Agency have thus expanded enormously, establishing it as the major player regarding border controls in the European Union.

### IV. The Agency’s Expanding Remit

Notwithstanding this stellar rise in resources, it is worth recalling that Frontex started out with a rather narrow mandate that focused on facilitating cooperation and providing support to the Member States with respect to controls at the external borders of the EU; this limited mandate proved to be no hindrance, however, to successive structural shifts delegating ever more powers and tasks to the European Border and Coast Guard Agency.<sup>12</sup>

The first changes to its mandate were made in 2007:<sup>13</sup> Frontex was empowered to deploy “Rapid Border Intervention Teams” to assist Member States that were at risk of being overwhelmed by migrants trying to enter their territory illegally.<sup>14</sup> This shift away from a merely coordinating role for the Agency was underlined by changes made to its mandate in 2011.<sup>15</sup> Frontex was charged with setting up “European Border Guard Teams,” to which it was expected to contribute from a pool of seconded border guards put at its own disposal.<sup>16</sup>

In 2013, the Agency acquired a powerful new tool for border controls through the establishment of the European Border Surveillance System (Eurosur).<sup>17</sup> Eurosur was created to expedite information exchange between Frontex and the Member States; its aim is to “improve their situational awareness and reaction capability at the external borders”<sup>18</sup> through the collection of data on both the national and the European levels.<sup>19</sup> The geographical area that Eurosur surveys is vast, as it not only encompasses the EU proper but also the so-called “pre-frontier area” defined as “the geographical area beyond the external borders.”<sup>20</sup> The Agency gathers data within this ample area, making use of methods ranging from mobile sensors to ship reporting systems and satellite imagery.<sup>21</sup> It then uses this data and information collected at the national level to create compilations of intelligence that it shares with the Member States.<sup>22</sup>

The 2015 “migrant crisis” marked the beginning of the next period of profound change. In 2016, a substantial reform saw the Agency assume a host of new operational powers.<sup>23</sup> An initial Commission proposal even went so far as to recommend that the Agency should stand ready to be deployed at the behest of the Commission on the territory of a Member State, even against the wishes of said State, thus granting the Commission a “right to intervene.”<sup>24</sup> Though this particular idea was not adopted, Art. 8(1) of the revised regulation nonetheless sets out a greatly expanded array of tasks for the Agency, many of which involve the Agency adopting a much more operational stance than before. This new posture was underscored by officially renaming it the “European Border and Coast Guard Agency.”

The next set of reforms was already enacted in 2019. The Commission tried – albeit unsuccessfully – to resurrect the idea of a “right to intervene.”<sup>25</sup> Nonetheless, the Commission succeeded in increasing the powers of the Agency considerably. The catalogue of tasks accorded to Frontex is now so exhaustive, the legislator has to make use of every letter in the alphabet to denote the different responsibilities of the Agency.<sup>26</sup> The most significant change concerns the creation of a “standing corps” with up to 10,000 members, allowing Frontex to act much more independently.<sup>27</sup> In addition, Eurosur was formally incorporated into the Frontex Regulation.<sup>28</sup>

This plethora of modifications has changed Frontex almost beyond recognition. The small agency tasked mainly with coordinating cooperation and supporting the Member States has become a strong actor in its own right, with an extensive mandate and substantial operational capacities. Having thus relinquished its backstage role, the Agency nowadays sits squarely at the centre of border control operations in Europe.

## V. Frontex and the Fight against Crime

Crime fighting was not originally envisioned to be among Frontex' tasks, as the transfer of executive powers in this area is a rather delicate issue for the Member States. The repeated strengthening of the Agency's mandate, however, not only affected areas closely related to its original task of coordinating border controls, such as return operations but also opened up whole new areas of activities to the Agency. Considering the touchiness of the subject, it is perhaps only fitting that tasks related to crime fighting were first assigned to the Agency through the backdoor by including them in the Eurosur Regulation. Though the Eurosur Regulation was legally separate from the Frontex Regulation, responsibility for administering the system was handed to the Agency, thus effectively putting it in control of Eurosur. One of the explicit aims of this new tool in the hands of Frontex was to aid in "detecting, preventing and combating illegal immigration and cross-border crime."<sup>29</sup>

After assigning tasks related to crime fighting to the Agency in this roundabout way, the 2016 reform introduced the task of crime fighting to the Frontex Regulation itself. The rechristened "European Border and Coast Guard Agency" was thus charged with "contributing to addressing serious crime with a cross-border dimension."<sup>30</sup> The most recent mandate revision of 2019 put it in even starker terms, stating that the Agency is to contribute to the "combating of cross-border crime."<sup>31</sup> In addition to this robust language, the definition of the term "cross-border crime" was expanded to include attempted crimes as well.<sup>32</sup> All of this shows that crime fighting has moved from being a task only indirectly associated with Frontex to being one of its core purposes. This is reflected in the self-description of its missions on its website. "Operation Themis," for example, is portrayed as having "an enhanced law enforcement focus," concentrating on activities running the gamut from the seizure of drugs and weapons to the collection of intelligence on people smugglers and criminal networks.<sup>33</sup>

Much of the Agency's contribution to combating criminal activity consists not in independent operations but in the mandated cooperation with other actors in this area.<sup>34</sup> The "securitization" of border control operations has led to them being seen first and foremost as security measures; data gathered during

these operations are therefore considered a valuable resource that should be mined for security purposes.<sup>35</sup> Frontex can bring a lot to the table, especially in the form of information gathered through Eurosur. A particularly notable example is the cooperation between Frontex and Europol. The first agreement between the two agencies dates back to 2008. Interestingly, while this "Strategic Cooperation Agreement" explicitly precluded the exchange of personal data, instead focusing on the exchange of "strategic and technical information," it already contained provisions that are normally reserved for agreements authorising the exchange of personal information.<sup>36</sup> This initial agreement was followed by a much more detailed "Agreement on Operational Cooperation" in 2015 elaborating on the specifics of enhanced cooperation between the two agencies. The exchange of information is no longer limited to "strategic and technical information." Instead, Frontex is to supply Europol with information gathered through Eurosur as well as to provide it with the personal data of people suspected of engaging in cross-border criminal activity.<sup>37</sup> Building on this, the executive directors of Frontex and Europol signed a "Statement of Principles for collaboration between Europol and Frontex" in 2018. The document stresses the importance of intensifying cooperation even further.<sup>38</sup> Reflecting the increasingly operational role that Frontex was already occupying at that time, the Agency is no longer just expected to chip in its intelligence but to provide the "boots on the ground" for the combined crime fighting efforts of the two partners.

But this was not the only important cooperation that Frontex engaged in. Since 2018, the Agency has also been involved in the "Crime Information Cell," a pilot project under the umbrella of "Operation Sophia," a Common Security and Defence (CSDP) mission in the Mediterranean. The project also includes Europol and is aimed at linking up crime fighting efforts by actors both from the CSDP and Justice and Home Affairs; it "will provide a platform to make full use of the agencies' unique capabilities to disrupt criminal networks."; once more, Frontex is to contribute by making intelligence available to its partners and through its strong operational presence.<sup>39</sup> "Operation Sophia" ran out in March 2020, but that did not end the involvement of the Agency in this type of joint activity, since Frontex is now participating in the "Crime Information Cell" of the follow-up mission "Irimi."<sup>40</sup>

## VI. Conclusion: New Roles Demand New Rules

The political winds in Europe changed considerably in the wake of the "migrant crisis," as European leaders took an increasingly tough stance on migration. It was against this political background that Frontex gained its new resources and powers. The expanded tasks and powers not only led Frontex

to assume a more operational posture but also pushed its activities in a more repressive direction.<sup>41</sup> These days, the Agency has moved far beyond a merely coordinating and supportive role and now engages in activities ranging from return operations to combating crime. This repressive turn is in itself highly problematic, given the fact that the vast majority of the persons directly confronted by the Agency are not criminals but people in dire need of protection. Compounding this problem, many of Frontex' activities now take place in sensitive areas in

terms of fundamental and human rights and should therefore be under intense official scrutiny. Nonetheless, the relentless growth in power has, regrettably, not yet been matched by a growth in means to hold the Agency accountable.<sup>42</sup> In order to remedy this state of affairs, it is of vital importance that transparency is increased and proper means of accountability are devised. Frontex has a lot to contribute to European efforts to combat criminality, but its powerful role should go hand in hand with robust oversight.

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## Are EU Administrative Penalties Reshaping the Estonian System of Sanctions?

Andreas Kangur, PhD, Alexander Lott, PhD, and Anneli Soo, PhD

EU legislation on administrative penalties has prompted an intense discussion in Estonia on whether to resurrect a measure from the past, namely administrative penalties. These penalties were abolished in Estonia in 2002, with all minor offences since then being classified as misdemeanours. Proponents of the administrative penalty procedure raise two main arguments: first, that the EU requires transposition of administrative penalties laid down in EU legislation specifically under a domestic administrative procedure and, second, that an administrative procedure would be a speedier and effective way to detect and punish offenders. In 2019, the authors of this article carried out a research project for the Estonian Ministry of Justice to map out the options for transposing EU administrative sanctions into Estonian law and to assess their compatibility, feasibility, and consequences. This paper summarizes the main results of that project.

### I. Introduction

In 2002, the new [Penal Code of Estonia](#)<sup>1</sup> created a uniform offence concept comprising crimes and misdemeanours. The idea underpinning the reform was that misdemeanours, previously classified as administrative infractions, while clearly less serious in nature, are still punishable offences like crimes. Therefore, they should be governed by the same general principles and provisions in terms of both substantive and procedural criminal law. This fundamental policy decision means that punishing offenders belongs to the domain of criminal law instead of administrative law.

In 2019, a bill was introduced to transpose EU legislation on administrative sanctions into Estonian law. It sought to adjust the definitions of some misdemeanours and increase the maximum fines in order to achieve conformity with European requirements. Regulatory bodies – institutions also responsible for conducting misdemeanour proceedings in areas in which EU legislation has been developed (e.g., the Financial Supervision Authority, the Estonian Financial Intelligence Unit, etc.)

– were not satisfied: while the maximum fines for misdemeanours in Estonia certainly needed an upgrade, the procedural framework for misdemeanours was also deemed cumbersome and inadequate for effective law enforcement, especially with regard to corporate entities. This opposition led the bill to be scrapped.

The Estonian government is now planning to transpose EU administrative sanctions for corporations to the Estonian legal system by re-introducing administrative infractions. Work on drafting the law on the administrative sanctions procedure has already begun. While the government seems to have made up its mind, the authors call into question whether EU law actually requires that punishment be imposed specifically under an administrative procedure or, indeed, whether the idea of administrative infractions is compatible with Estonian law.

This article is based on a study conducted by the authors for the Estonian Ministry of Justice from September 2019 to January 2020. Its aim was to map out the options for transposing EU administrative sanctions into Estonian law and to assess

the compatibility, feasibility, and consequences of deciding in favour of each mapped option. The study comprised both desktop research and interviews with Estonian regulatory bodies. The following sections summarize the main results of this project and provides a reasoned opinion of the authors on what they consider to be the most preferred option to transpose EU administrative sanctions into Estonian law.

## II. Does the EU Call for Administrative Punishments?

In recent decades, the boundaries between criminal and administrative punitive sanctions have become blurred in Europe.<sup>2</sup> The grey zone between these two areas has even been given a name: “criministrative law”.<sup>3</sup> Generally speaking, governments justify their increasing use of administrative punitive sanctions by pointing to a reduction in the workload of courts and achieving speedier proceedings.<sup>4</sup> In criminal proceedings, the defendant is guaranteed a “full package of procedural safeguards” (the contents of which, of course, depend on the state as well as the international context in which a particular state operates), while proceedings under administrative law generally offer a more limited set of safeguards – and regulatory authorities like the “limited set”.

The EU is making extensive use of punitive administrative sanctions in its legislation. Historically, its limited competence and lack of an appropriate legal basis prevented it from using other measures.<sup>5</sup> The EU’s increasing use of administrative sanctions led to criticism that it was seeking to regulate criminal law, an area in which it had no legislative competence.<sup>6</sup> Even after the necessary legal basis appeared, the EU was still initially required to operate under the three-pillar system, as a result of which its activity on administrative sanctions continued.<sup>7</sup> Paradoxically, now that Art. 83 of the Treaty on the Functioning of the European Union (TFEU) lays down the explicit competence of the EU to provide for criminal sanctions, the EU continues to adopt punitive measures on legal bases other than Art. 83, calling them “administrative.” This preference for administrative punitive sanctions over criminal ones may stem from a desire to extend the EU’s criminal jurisdiction beyond the scope of Art. 83 TFEU. It may also be an attempt to strip defendants of some of their procedural rights in criminal prosecutions so that possible lawbreakers can be punished swiftly and effortlessly – an aspiration possibly running contrary to the European Court of Human Rights (ECtHR’s) ruling in *Engel*.<sup>8</sup> In *Engel*, the ECtHR held that the question whether an offence amounts to “criminal offence” for the purposes of Art. 6 of the European Convention on Human Rights (ECHR) cannot be answered according to the domestic classification alone, but has an autonomous meaning which takes into consider-

ation not only the domestic classification of the offence but also the nature of the offence and the severity of the potential penalty. The Court of Justice of the European Union (CJEU) has recognized *Engel’s* criteria and has, over time, explicitly extended at least some of its criminal procedural guarantees to punitive administrative sanctions.<sup>9</sup>

Proponents of administrative sanctions in Estonia have successfully managed to spread a serious misconception that the EU prescribes the exact procedural regime for handling breaches of EU law in the Member States. Although these measures in EU law are called administrative, EU law does not actually rule out the possibility of imposing them through quasi-criminal proceedings such as the existing misdemeanour procedure in Estonia. In Estonia, the majority of misdemeanours are initially adjudicated by the regulatory agencies themselves who have the authority to impose fines. This distinguishes the Estonian procedure, for example, from that of Denmark where all sanctions are imposed directly by the courts.

In accordance with the principle of subsidiarity, the EU treaties do not require complete harmonization of the procedural rules applied by the Member States when imposing administrative sanctions. According to the established case law of the CJEU, the choice of penalties also remains within the Member States’ discretion. The principle of loyalty dictates that violations of EU law must be handled under conditions that are analogous to those applicable to infringements of national law of similar nature and importance. The sanction must be effective, proportionate, and dissuasive.<sup>10</sup> In fact, many EU instruments explicitly state that Member States may decide not to enact sanctions under administrative law for violations that are subject to domestic criminal sanctions.<sup>11</sup> Therefore, as long as the enforcement of EU law is effective, the EU really does not dictate whether the sanctions are transposed under administrative law or fall under the quasi-criminal category. This begs the question of whether enacting a new category of offences with separate procedural rules under administrative law is really necessary in Estonia.

## III. Does Estonia Need to Bring Back Administrative Infractions?

In the analysis commissioned by the Estonian government, the authors explored two options to transpose EU legislation on administrative sanctions:

- As administrative measures;
- As misdemeanours.

These options are discussed below as the authors give their reasoned opinion on why they prefer transposition of EU administrative sanctions via misdemeanour proceedings.

## 1. EU administrative sanctions as administrative measures

While the government's attempt to raise maximum fines for misdemeanours within the existing criminal law scheme got bogged down (see Introduction above), some penalties prescribed in the EU's legal acts related to regulation of credit institutions and data protection, for example, have already been transposed into the Estonian legal order as penalty payments. Penalty payments belong to the general part of administrative law and can be imposed by regulatory authorities in order to enforce their compliance notices.<sup>12</sup> As provided in the relevant domestic laws,<sup>13</sup> penalty payments can be imposed if an authority's compliance notice remains fruitless. The maximum amount of an administrative penalty that can be levied at a time is normally only €9600 in Estonia.<sup>14</sup> The new penalty payments may run in the millions. Furthermore, the procedure for imposing a penalty payment is not a suitable expeditious reaction to violations that call for punitive measures. The law expressly states that a penalty payment is a coercive measure as opposed to a punitive one;<sup>15</sup> it must be preceded by a compliance notice and a written warning, i.e., a formal document that directs a person to perform a required act or refrain from illegal activity and sets a deadline by which the directions in the notice must have been complied with.<sup>16</sup> The penalty payment is imposed only after the time limit has elapsed and the directions have been ignored.<sup>17</sup> This multi-stage procedure hardly qualifies as an effective enforcement mechanism of EU law.

If Estonia is to adopt EU administrative sanctions under an administrative procedure, a new procedure aimed distinctly at punitive measures should be devised. This new procedure would likely be intertwined with regulatory enforcement activities as provided for by the Law Enforcement Act (LEA). The LEA provides for a wide variety of measures such as questioning of people and requiring of documents, obtaining data from telecommunications providers, entry into premises and examination of both real and personal property. Laws governing particular fields may also authorize regulatory agencies to use other more far-reaching regulatory measures, such as orders to cease activity. For example, the Estonian Financial Supervision Authority has the right to require disclosure of information, prohibit a credit institution from concluding certain types of transactions or to restrict the volume thereof; it can also prohibit payment of dividends from the profit of a credit institution, demand restrictions on the operating expenditures of a credit institution, demand suspension of an employee of a credit institution from work, make a proposal to amend or supplement the organisational structure of a credit institution, etc.<sup>18</sup> Such measures can be imposed by the authority both as a preventive as well as remedial action in order to ensure regulatory compliance. Introducing a punitive component to

regulatory enforcement, however, could potentially cause the current non-punitive regime to become less effective, as the fear of punishment would likely deter cooperation between the regulators and those being regulated.

Interview partners in nearly all regulatory enforcement agencies complained about the current legal framework for misdemeanours. They argued that introducing a new category of punishable offences under a general framework of administrative law would make law enforcement much more effective. The interviews revealed that, for the enforcement agencies, "effectiveness" primarily means the discretion to expeditiously mete out harsh punishments to violators with less judicial oversight. While attractive, this effectiveness cannot come at the expense of fundamental rights to the extent that it is contrary to the ECHR or the Estonian Constitution.<sup>19</sup> If an offence deserves greater social condemnation and a severe punishment, the state must afford to the person charged with such an offence practical and effective means to put up a defence – even if it means spending more government resources.

## 2. Transposition of EU administrative sanctions as misdemeanours

The other route for transposing EU administrative sanctions would be a reform of the misdemeanour law. Although the Ministry of Justice has cast aside this option at this point in time, revamping the misdemeanour law actually appears more workable than the previously described routes under administrative procedure. Addressing the identified shortcomings in misdemeanour law would improve the effectiveness of law enforcement with regard to both European and domestic contexts, making any upgrade of the misdemeanour law and procedure a doubly productive endeavour.<sup>20</sup>

The authors have identified several areas in misdemeanour law that need revision. Firstly, it is certain that the maximum fines must be adjusted. Some of the EU legislation requires Estonia to adopt fines that exceed both the current maximum fines for misdemeanours as well as pecuniary punishments for crimes.<sup>21</sup> In principle, the seriousness of the offence should be reflected in the sanction (i.e., punishments for crimes should be more severe than for misdemeanours or administrative infractions), and a steep increase in the fines for misdemeanours upsets this balance significantly.<sup>22</sup> This inconsistency can be overcome by recognizing that criminal defendants are usually also faced with the prospect of imprisonment and the stigma that accompanies every criminal conviction regardless of the sentence. This, along with possible ancillary sanctions, is sufficient to justify lower rates of pecuniary punishment as compared to the fines for misdemeanours.

Interview partners at regulatory authorities unanimously complained about the current regime of corporate criminal liability and the authors agree with them. Following the model used by Germany in its administrative infractions law, Estonia has adopted the concept of derivative liability for corporations in both criminal and misdemeanour cases. The derivative liability model offers a distinct advantage for larger corporate entities where complicated multi-tiered structures often disconnect the corporate *mens rea* (i.e., the authorized decision-makers) from the individuals committing the actual offence. As there is no corporate officer or authorized agent whose personal actions would constitute an offence committed in furtherance of corporate interests, an attempt to prosecute the corporation would fail. The authors recommend that Estonia abandon this narrow approach and follow, for instance, the more pragmatic example of the Netherlands where the intent of a corporation is either determined according to derivative responsibility or gleaned from organizational policy and everyday procedures.<sup>23</sup> Contrary to a common misconception, there is no constitutional barrier preventing Estonia from moving towards the more flexible organizational approach, which would not only lighten the onerous burden placed on law enforcement but also reflect modern corporate reality.

Interviewed regulatory enforcement authorities further criticized the limitation periods for misdemeanours as being too short to conduct investigations in complex matters. Currently, the Estonian Penal Code sets the maximum limitation period for misdemeanours at three years. For crimes in the second degree<sup>24</sup> this period is five years, and there is no real reason why the maximum limitation period for misdemeanours could not be the same. This amendment, together with adjustments made in the concept of corporate liability, have the potential to significantly simplify the detection and prosecution of misdemeanants.

Perhaps even more pervasive was the criticism levelled against the procedural regime applicable to misdemeanours. Most misdemeanours in Estonia are investigated by the same government agency that has regulatory authority in the relevant field. So, in practice, a misdemeanour investigation is often prompted by a regulatory inspection. Once the investigation is complete, sanctions for the misdemeanour are also initially imposed by the same agency in most cases. The district courts get involved only if the government seeks a short-term custodial sentence for the misdemeanant or the defendant disputes the initial decision, in which case a *de novo trial in the district court will follow*.<sup>25</sup> The interviewees argued that the process should be streamlined: the information gathered in the regulatory enforcement procedure should be admissible as evidence in misdemeanour proceedings, the burden of proof should be shared more evenly with the defendant, the standard of proof

should be lowered to resemble that in administrative law, and the sanctions imposed should fall under administrative court jurisdiction and be reviewed for abuse of discretion.

These arguments are intrinsic to *Herbert Packer's* “crime control model”, which focuses on punishing offenders as efficiently and rapidly as possible, unlike his “due process model” that emphasizes respect for the fundamental rights of an individual.<sup>26</sup> In an attempt to balance the two opposing considerations, the ECtHR has held that, in the proceedings that meet the so-called *Engel* criteria,<sup>27</sup> defence rights (including the rights provided for in Art. 6 ECHR) must be guaranteed, irrespective of the classification of the procedure and the offence under national law. The CJEU has also emphasized in its case law that the effective fulfilment of the objectives of the Union (including the effective punishment of offenders) must not be achieved at the expense of the fundamental rights of individuals.<sup>28</sup> In other words, the crime-control focused approach advocated by the regulatory enforcement authorities must be tempered to avoid unconstitutional overreach. The specific grievances from the regulators discussed below aptly illustrate this tension.

The allocation of the burden of proof to the prosecution in criminal matters is derived from the presumption of innocence and is well established in the jurisprudence of the ECtHR.<sup>29</sup> The Estonian Supreme Court and the ECtHR have recognized that the burden may be reversed in the light of certain specific facts. A prime example in Estonia is the defence of alibi, but the Supreme Court has also recognized, for example, a rebuttable presumption of criminal intent for transactions that resemble stock market manipulation.<sup>30</sup> The use of reverse burdens and rebuttable presumptions is justified based on the defendant's independent legal obligation to keep records and report relevant data. In other situations, the reverse burden with a rebuttable adverse presumption could be based on *prima facie* evidence adduced by the government, as long as such presumptions are clearly stated in the applicable statutes and will not have the effect of shifting the overall burden of proof in the case to the defendant.

The presumption of innocence is also the root of another well-established principle criticized by the regulatory authorities – the privilege against self-incrimination. Both the presumption of innocence and the privilege against self-incrimination are enshrined in Art. 22 of the Estonian Constitution. The tension between the regulatory enforcement procedure and the privilege against self-incrimination becomes apparent in the duty to cooperate – a standard feature of modern regulatory practice but virtually unheard of in criminal procedure. In regulatory matters, Estonian enforcement authorities routinely demand and receive information from the regulated parties. As long

as there is no impending or ongoing criminal investigation, the privilege against self-incrimination trumps the duty to cooperate in regulatory enforcement matters under very limited circumstances.<sup>31</sup> As a backstop, Estonian Supreme Court has held that any statements made by the defendant to the authorities before he was notified that he is being suspected of an offence and advised of his legal rights are inadmissible.<sup>32</sup> Interview partners at regulatory authorities expressed their frustration over how the privilege against self-incrimination bars the use of information compelled from the defendant in regulatory enforcement proceedings. They also argued that the privilege against self-incrimination is only applicable in criminal proceedings – an interpretation which has been held erroneous by the Estonian Supreme Court.<sup>33</sup> They also point to the – rather outdated – *Orkem* judgment<sup>34</sup> in which the CJEU circumscribed the privilege against self-incrimination in competition law enforcement cases. One should note that the ECtHR decided its leading case on the privilege against self-incrimination (*Saunders v. U.K.*)<sup>35</sup> seven years later and extended the privilege to all procedures, including administrative procedures. This calls the CJEU’s wisdom in *Orkem* in question.

Lastly, Art. 6(3) lit. d) ECHR entitles the criminal defendant to the right to question witnesses brought against him and to produce witnesses on his own behalf. Most of the information gathered in the course of regulatory inspections and enforcement is admissible in misdemeanour court proceedings unless it violates the privilege against self-incrimination. The confrontation right limits the admissibility of out-of-court statements to impeachment purposes and situations where the witness is unavailable. While inconvenient for the regulatory enforcement authority in its function as prosecutor, the confrontation clause is a vital part of a fair trial and instrumental in testing the credibility and reliability of witnesses in court. Therefore, dispensing with or limiting the confrontation right as advocated by the regulatory authorities would again be an unacceptable encroachment on defence rights.

The Estonian Supreme Court has held that the statutory “inner conviction of the judge” as a standard of proof in criminal and misdemeanour cases means “proof beyond a reasonable doubt.”<sup>36</sup> While the statutory language for administrative law courts uses the same “inner conviction” phrase, the Supreme Court’s administrative law chamber has not elaborated on its meaning.<sup>37</sup> What these standards actually mean in terms of the required level of probability or subjective certainty of a judge writing a decision is *terra incognita*; it could be an interesting topic for empiricists. Perhaps, in an administrative regulatory context, a lower standard would be acceptable, as regulation and enforcement are a continuous process aimed at achieving compliance. Furthermore, regulatory measures could be

adjusted as the situation changes. The interviewees at regulatory authorities opined that the standard of proof for criminal and misdemeanour cases in district courts is too high and that they would prefer to have their decisions reviewed by administrative law courts for abuse of discretion instead of having to prove their case at a *de novo* district court trial. Such an arrangement would be contrary to the ECHR. The ECtHR has held that a procedure in which a sanction is imposed by an administrative authority is compatible with Art. 6(1) ECHR only if the decision is subject to appeal to an independent and impartial body with full powers.<sup>38</sup> Such a body must have full jurisdiction in the meaning of having the power to amend the decision in all its factual and legal aspects.<sup>39</sup> Indeed, unless there is a *de novo* trial of the matter before a court, the presumption of innocence in misdemeanour cases would be an empty promise, as the first decision in the matter is made by the same authority that investigated and prosecuted the case.

Punishing someone is a reaction to the past and the past cannot be changed. There is a certain vibe of finality in imposing or receiving a punishment. The standard of proof is a tool for preventing errors. Punishing someone when the government is not able to convince the judge that an offence has been committed and who committed it would not be justified under the rule of law.

The hope of calling the multi-million-euro sanctions “administrative” and bypassing “criminal” guarantees is misguided. The severity of the sanctions places them squarely within the ambit of a “criminal charge” as established in the ECtHR’s *Engel* case law and, as such, they are subject to the fair trial requirement under Art. 6 ECHR, regardless of what they are called or how they are systematized under the Estonian national legal system. Keeping this in mind, the authors suggest that it is far more economical, compatible with the Constitution, and in alignment with the logic of existing Estonian legal framework to update both substantive and procedural misdemeanour law. This would allow for more effective enforcement of domestic law and for adequate transposition of the sanctions under European legislation.

#### IV. Conclusions

The EU does not require its Member States to transpose EU administrative sanctions specifically under an administrative procedure. Nonetheless, even if the administrative infractions procedure is reinstated in Estonia, its procedural guarantees cannot fall below what is required by the Strasbourg system. The existing Estonian misdemeanour procedure has the potential to adequately balance the need to effectively punish offenders and, at the same time, to protect the individual rights



provided by the ECHR. The amendments that should be made to misdemeanour law to meet this goal would be equally useful in prosecuting domestic offences. Therefore, the obligation to transpose EU administrative sanctions serves as an opportunity for Estonia to critically review its misdemeanour law and to improve its efficiency generally. This opportunity will be missed if the Estonian legislator decides to transpose EU administrative sanctions by creating a new procedure altogether.

- 1 The Estonian Penal Code is available in English at: <<https://www.riigiteataja.ee/en/eli/513012020005/consolide>>, accessed 23 June 2020.
- 2 A. Weyembergh and N. Joncheray, "Punitive Administrative Sanctions and Procedural Safeguards. A Blurred Picture that Needs to be Addressed", (2016) 7 *New Journal of European Criminal Law*, 190.
- 3 A. Bailleux, "The Fiftieth Shade of Grey. Competition Law, 'Criministrative Law' and Fairly Fair Trials", in: F. Galli and A. Weyembergh (eds.), *Do Labels Still Matter? Blurring Boundaries between Administrative and Criminal Law*, 2014, p. 139.
- 4 D. Ohana, "Administrative Penalties in the Rechtsstaat: On the Emergence of the Ordnungswidrigkeit Sanctioning System in Post-War Germany", (2014) 64 *The University of Toronto Law Journal*, 243, 244.
- 5 J. Schwarze, "Rechtsstaatliche Grenzen der gesetzlichen und richterlichen Qualifikation von Verwaltungssanktionen im europäischen Gemeinschaftsrecht", (2003) *Europäische Zeitschrift für Wirtschaftsrecht*, 261.
- 6 E. Herlin-Karnell, "Is Administrative Law Still Relevant? How the Battle of Sanctions Has Shaped EU Criminal Law", *Jean Monnet Working Paper 25/14*, p. 4.
- 7 A. Weyembergh, N. Joncheray, *op. cit.* (n. 2), 203–204.
- 8 ECtHR, 8 June 1976, Appl. nos. 5100/71, 5101/71, 5102/71, 5354/72, 5370/72, *Engel and others v The Netherlands*.
- 9 ECJ, 5 June 2012, C-489/10 *Bonda*, para. 28ff; CFI, 8 July 2008, T-99/04, *AC-Treuhand AG v Commission of the European Communities*, para. 113ff; ECJ, 8 July 1999, C-199/92, *Hüls v Commission of the European Communities*, para. 150; ECJ, 8. July 1999, C-49/92, *Commission v Anic Partecipazioni*, para. 78.
- 10 ECJ, 21 September 1989, case 68/88, *Commission v Greece* ["Greek Maize"], paras 22–24; ECJ, 10 July 1990, C-326/88, *Anklagemyndigheden vs Hansen & Søn I/S*, para. 17; ECJ, 27 March 2014, C-565/12, *LCL Le Cr dit Lyonnais SA v Fesih Kalhan*, para. 53. On the proportionality criterion, see, e.g., ECJ, 17 July 2014, C-272/13, *Equoland Soc. coop. arl v Agenzia delle Dogane*, para. 35.
- 11 See, e.g., Art. 31(2) of Directive 2016/97/EU, *O.J. L* 26, 2.2.2016, 19. See also Art. 58(2) of Directive 2015/849/EU, *O.J. L* 141, 5.6.2015, 73; Art. 22(1) of Directive 1286/2014, *O.J. L* 352, 9.12.2014, 1; Art. 61(1) of Directive 909/2014, *O.J. L* 257, 28.8.2014, 1; Art. 99(1) of Directive 2014/91/EU, *O.J. L* 257, 28.8.2014, 186; Art 70(1) of Directive 2014/65/EU, *O.J. L* 173, 12.6.2014, 349.
- 12 Confusingly sometimes translated as "precepts" in Estonian sources.
- 13 Money Laundering and Terrorist Financing Prevention Act, e.i.f. 27.11.2017, Section 65(2). Credit Institutions Act, e.i.f. 1.7.1999, Section 104-1(2). Securities Market Act, e.i.f. 1.1.2002, Section 234-1. Financial Crisis Prevention and Resolution Act, e.i.f. 29.3.2015, Section 91. Personal Data Protection Act, e.i.f. 15.1.2019, Section 60. All of these acts and subsequent acts can be found in English here: <<https://www.riigiteataja.ee/en/>>, accessed 23 June 2020.
- 14 Law Enforcement Act, e.i.f. 1.7.2014, Section 28(2).
- 15 Substitutive Enforcement and Penalty Payment Act, e.i.f. 1.1.2002, Section 3(2).
- 16 *Ibid*, Section 4(1).
- 17 *Ibid*, Section 2(1).
- 18 Credit Institutions Act, e.i.f. 1.7.1999, Section 104.
- 19 The Constitution of the Republic of Estonia is available in English at: <<https://www.riigiteataja.ee/en/eli/521052015001/consolide>>, accessed 23 June 2020.

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20 This would also obviate the theoretical question: is there an actual difference between misdemeanours and administrative infractions to justify keeping the two under separate names – because, if not, and the administrative infractions are so much more government-friendly, should there even be misdemeanours?

21 Currently, the highest maximum fine is set out in the General Data Protection Regulation (Regulation (EU) 2016/679), *O.J. L* 119, 4.5.2016, 1), which includes an obligation to impose fines on natural and legal persons up to a maximum of €20 million.

22 The Estonian Penal Code imposes a fine of up to €1200 on natural persons and €100 to €400,000 on legal persons (sections 47 (1) and (2) of the Penal Code). The amount of the pecuniary penalty is 30 to 500 daily rates (minimum daily rate is €10) for natural persons and €4000 to €16,000,000 for legal persons (subsections 44 (1), (8) and (9) of the Penal Code).

23 J. Keiler and D. Roef (eds.), *Comparative Concepts of Criminal Law*. 3rd edition, 2019, pp. 357–364. The Netherlands are not a lone outlier but rather represent the contemporary mainstream of looking at corporate criminal responsibility. In this sense, Estonia and Germany just seem to be clinging to the past.

24 The Estonian Penal Code distinguishes between the crimes of first and second degree according to prescribed punishments by stating:

"§ 4. Degrees of criminal offences

(1) Criminal offences are criminal offences in the first and in the second degree.

(2) A criminal offence in the first degree is an offence the maximum punishment prescribed for which in this Code for a natural person is imprisonment for a term of more than five years or life imprisonment. An offence of a legal person is a criminal offence in the first degree if imprisonment for a term of more than five years or life imprisonment is prescribed for the same act as maximum punishment for a natural person.

(3) A criminal offence in the second degree is an offence the punishment prescribed for which in this Code is imprisonment for a term of up to five years or a pecuniary punishment."

25 In 2019, all Estonian district courts handled 2049 misdemeanour mat-

ters (incl. 1114 cases for de novo trial) while the police and border guard officers of the Northern Region alone disposed of 56,941 cases – keeping in mind that there are four regions in the country and a host of other government agencies authorized to handle certain misdemeanors, such as the ones interviewed for this project. The proportion naturally varies depending on the area of law.

26 H.L. Packer, *The Limits of the Criminal Sanction*, 1968, pp. 149–173.

27 ECtHR, *Engel and others v the Netherlands*, *op. cit.* (n. 8). Accordingly, a measure is to be understood as a “criminal charge” if (i) it is classified as criminal (indicative criterion), (ii) it follows a punitive aim, and (iii) it is severe. As a consequence, the ECtHR has triggered the application of Art. 6 ECHR to administrative proceedings.

28 ECJ, 17 January 2019, C-310/16, criminal proceedings against Peter Dzivev, Galina Angelova, Georgi Dimov, Milko Velkov (see also *eu-crim* 1/2019, 23–24).

29 ECtHR, 6 December 1988, Appl. no. 10590/83, *Barberà, Messegué and Jabardo v. Spain*.

30 Sup. Ct. No. 3-1-1-70-11, see also ECtHR, 20 March 2001, Appl. no. 33501/96, *Telfner v. Austria*.

31 See, for example, Tallinn Circuit Court of Appeal no. nr 3-17-1916/28.

32 Sup. Ct. No. 3-1-1-105-97.

33 Sup. Ct. No. 3-1-1-39-05.

34 ECJ, 18 October 1989, case 374/87, *Orkem v. Commission*.

35 ECtHR, 17 December 1996, Appl. no. 19187/91.

36 Sup.Ct. No. 3-1-1-38-11.

37 The Court has, however, underlined that trial courts should consider all evidence and set out the reasoning for their findings of fact. See Sup. Ct. No. 3-12-1360/131. Furthermore, in reviewing the decisions of regulatory enforcement agencies, the administrative court will use the standard of proof that the law has prescribed for the regulator which may be even lower (e.g. reasonable suspicion is sufficient to create a rebuttable presumption of tax evasion).

38 ECtHR, 4 March 2014, Appl. no. 18640/10, *Grande Stevens v. Italy*, paras 138 and 161. As according to the ECtHR lack of independence of the administrative body can be resolved in subsequent judicial proceedings, most countries have not drawn a strict boundary between the investigative and the decision-making administrative body in administrative proceedings. F. P. Mateo, “Harmonising National Sanctioning Administrative Law: An Alternative to a Single Capital Markets Supervisor”, (2018) 24 *European Law Journal*, 321, 344.

39 ECtHR, 4 March 2004, Appl. no. 47650/99, *Silvester’s Horeca Service v. Belgium*, paras 25–30.

## Limits to European Harmonisation of Criminal Law

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**The harmonisation of criminal law and criminal procedure in the EU is subject to specific conditions, which differ from those generally applicable to the approximation of laws in the Union. Specific limits may result from the rules of competence set out in Art. 82 et seq. TFEU, from EU fundamental rights, or from constitutional conditions applicable in certain Member States. These factors can impede the negative approximation of national criminal law systems through mutual recognition as well as the positive approximation through EU secondary law. Furthermore, if serious doubts arise as to whether the rule of law is fully respected by Member States participating in the Area of Freedom, Security and Justice, the premise for any form of judicial cooperation in criminal matters in the EU is no longer valid.**

### I. Objectives of EU Harmonisation of Criminal Law

The terms “approximation of laws” and “harmonisation” stand for the alignment of national rules with a standard prescribed by Union law. Since the Treaty of Lisbon, criminal law in the EU has been approximated or harmonised within the supranational framework of “Judicial Cooperation in Criminal Matters” (Art. 82 et seq. of the Treaty on the Functioning of the European Union, TFEU), which is part of the “Area of Freedom, Security and Justice” (Art. 67 et seq. TFEU). In principle, criminal law thus follows general rules, which also apply in other areas of Union law, e.g., in the internal market. However, the harmonisation of criminal law is subject to a number of peculiarities.

In the EU, legislative harmonisation is not an end in itself but has to be understood functionally. It therefore not only

serves to reduce legal differences between the Member States but also to achieve certain policy objectives as well as an overall “European common good.”<sup>1</sup> For example, the European harmonisation of the Member States’ criminal laws under Art. 67 para. 3 and Art. 82 et seq. TFEU is a building block in the Area of Freedom, Security and Justice, as it ensures a “high level of security.” However, this policy goal of the EU is not merely designed to meet criminal law problems arising as a side effect of a European area without internal borders. Beyond that, it has a meaningful function for the EU as a whole, which has developed from a European economic area into a supranational living space. This becomes clear in the values and objectives of the EU, which are set out in Art. 2 and Art. 3 para. 2 of the Treaty on European Union (TEU). Consequently, the harmonisation of criminal law is an expression of the common values of the Member States.

## II. Instruments for EU Harmonisation of Criminal Law

Primarily, limits for the harmonisation of criminal law result from the EU's limits of competence. The perception that the EU legislator is only allowed to harmonise legislation where it has the necessary legislative powers to do so may seem trivial. It is well known, however, that the EU legislator tends to extend its legislative and harmonisation powers. For example, Directive (EU) 2015/849 on combating money laundering and terrorist financing<sup>2</sup> is based on the internal market competence (Art. 114 TFEU), which seems reasonable, since there is a given link to the free movement of capital. However, as the Directive constitutes accompanying law to the effective enforcement of criminal law prohibitions, Art. 83 TFEU should have served as its genuine legal basis.

As a rule, legal harmonisation in the EU is achieved by way of minimum harmonisation, which gives Member States room for broad discretionary power. For example, Art. 17 Regulation (EC) No. 178/2002 on the general principles and requirements of food law<sup>3</sup> obliges Member States to create effective, proportionate and dissuasive sanctions in the event of infringements of food law<sup>4</sup> but leaves it up to the States on how to implement this obligation at the national level.<sup>5</sup>

In exceptional cases however, certain areas of EU law require full harmonisation. In this case, all requirements concerning the approximation of legislation derive from the EU act itself. This means that Member States will not then be able to incorporate laws into their legislation or maintain laws other than those set out in the applicable EU act.<sup>6</sup> In regards to the areas of criminal procedural law and substantive criminal law, the EU does not have such a comprehensive competence for legal harmonisation, even under the Lisbon Treaty. Instead, in specifically defined areas under Art. 82 and Art. 83 TFEU, it may establish “minimum rules” for the approximation of national law, and only by means of “directives.”

## III. Positive and Negative Strategies for EU Harmonisation of Criminal Law

In order to understand the significance of approximating laws in the EU, it is important to note that this method exists in a relationship of mutual tension with other strategies that promote European legal integration.

### 1. Principle of mutual recognition

In a strict sense, the concept of approximation of laws described above is also referred to as an instrument of *positive*

*integration*. This instrument eliminates differences in national legal systems by creating a (positive) uniform standard for the entire EU with the enactment of EU secondary legislation.

The method of *negative integration*, on the other hand, is based on the elimination of national legal differences in the EU through mutual recognition.<sup>7</sup> This concept has its origin in the internal market principle and applies to areas that have not been harmonised by EU secondary legislation yet. It provides that authoritative decisions from the Member State of origin regarding a product, service, or person (e.g., a permission, an authorization, or a license, etc.) also have legal effect in the Member State of destination, thus making further legal scrutiny dispensable. Therefore, a specific good, service, or professional activity that is approved in one Member State must also be approved in other Member States.<sup>8</sup> As a result, this mechanism brings about a *de facto* approximation of laws, in the form of a negative approximation of laws to the lowest national level applicable in the EU.

However, mutual recognition has its limits. In the internal market, this concept presupposes that the legal standards applicable in the two Member States concerned, i.e., the country of origin and the country of destination, are almost equivalent. If this is not the case, the Member States of destination may refuse recognition by relying on justifications, e.g., necessary protection of the national *ordre public*.

### 2. Relationship between EU harmonisation of criminal law and mutual recognition

The TFEU chapter on judicial cooperation in criminal matters also encompasses these two strategies described above. In comparison with internal market law, however, it is remarkable that mutual recognition should take priority over the approximation of national legislation by means of EU secondary legislation. Positive harmonisation of criminal law should merely be a subsidiary means of enforcing the principle of mutual recognition.<sup>9</sup> In relation to criminal procedural law, this is set out in Art. 67 TFEU (“if necessary”) and in Art. 82 para. 2 TFEU (“to the extent necessary”).

As the above mentioned example of the internal market law shows, mutual recognition ultimately brings about an indirect European approximation of law – yet, an approximation at the lowest legal level applicable in an EU Member State, as the decisions of each Member State have to be recognised by all other Member States. This approach is particularly problematic in the area of criminal law. The functionalist considerations on which mutual recognition in the internal market is based cannot simply be transferred to the recognition of criminal de-

cisions.<sup>10</sup> In the latter area, the principle of recognition does not – in contrast to its application in the internal market – serve to extend rights and freedoms but rather serves to reduce them transnationally. Hence, in order to make mutual recognition a proper tool for the integration of criminal law, further conditions must be observed:

(1) Firstly, unlike in the internal market, mutual recognition of acts may not work automatically in the area of criminal justice. Rather, pursuant to Art. 83 para. 1 subpara. 2 lit. a TFEU, the principle of recognition must first be implemented by the EU under secondary law through special “rules and procedures.” Framework Decision 2002/584/JHA on the European arrest warrant<sup>11</sup> represents the most important example of such a rule, which lays down certain conditions for the mutual recognition of an arrest warrant.

(2) Secondly, implementation of the principle of mutual recognition of judicial decisions crucially depends on mutual trust in the quality and rule of law of criminal justice in all Member States.<sup>12</sup>

### 3. Limits of mutual recognition

One may wonder whether such mutual trust is justified if criminal justice in the Member States has not been brought to a European minimum standard yet. Art. 82 para. 1 TFEU ignores these concerns and calls for mutual recognition of judicial decisions even without prior approximation of laws. In this regard, the Framework Decision on the European arrest warrant, according to which a European arrest warrant issued by the requesting EU Member State must be enforced by the delivering Member State (Art. 1 para. 2), is again worth mentioning. This strict standard “which reflects the consensus reached by all the Member States”<sup>13</sup> is justified by the fact that all Member States are constitutional states, a condition that was scrutinized when they joined the EU (cf. Art. 2 TEU in conjunction with Art. 49 TEU).

In fact, this assumption is no longer valid.<sup>14</sup> We are witnessing a massive rule-of-law crisis in some Member States, such as Hungary, Poland, and Romania, with regard to the judiciary in particular. The European Court of Justice (ECJ) has therefore limited the application of the principle of mutual recognition in the area of criminal proceedings by adding an implicit reservation regarding matters of the rule of law and fundamental rights to the Chapter on Judicial Cooperation in Criminal Matters in the TFEU. Therefore, if serious shortcomings regarding the rule-of-law principle or fundamental rights within a Member State are identified, other Member States may no longer recognise judicial decisions from that State. In contradiction

to the wording of Framework Decision 2002/584/JHA, this is how the ECJ has rendered decisions in cases concerning the execution of a European arrest warrant.<sup>15</sup> Additionally, the same explicitly applies to Directive 2014/41/EU on the European Investigation Order in criminal matters.<sup>16</sup> According to Art. 11 para. 1 lit. d) and f) of the Directive, the recognition or execution of an investigation order in the executing State “may” (!) be refused if there is reason to fear that the rule-of-law principle or fundamental rights will be violated. This provision is to be interpreted in conformity with fundamental rights to the effect that recognition “must” be refused in such cases.

## IV. Limits of EU Harmonisation of Criminal Law

### 1. Emergency brake on EU harmonisation of criminal law

When harmonising criminal law, each Member State has a right of objection, the so-called “emergency brake” (Art. 82 para. 3, Art. 83 para. 3 TFEU) in order to stop an ongoing EU legislative procedure in the Council. This instrument may be used by a Member State if the planned EU measure were to affect “fundamental aspects of its criminal justice system.” In such cases, a specific procedure provides for the referral to the European Council, which must seek a consensus.

It should be up to each Member State to define such “fundamental aspects.” From the German point of view, this would probably concern the principle of personal guilt (*Schuldprinzip*) and the principle of non-retroactivity. In this respect, the German Federal Constitutional Court has set strict rules according to which the German representative in the Council of the EU must apply the emergency brake.<sup>17</sup>

### 2. “Cautious” EU harmonisation of criminal law?

Art. 67 para. 3 and Art. 82 para. 2 TFEU emphasise that the approximation of national criminal law must be “necessary.” At the same time, they demand respect for the “legal systems and traditions of the Member States.”

For some authors of criminal law this reference, acknowledges a genuine legal principle under Union law, based on respect for the sovereignty of Member States and in deference to democratic decision-making in these states. According to this principle, the EU may only intervene cautiously in the national criminal law systems (“*Schonungsgrundsatz*”).<sup>18</sup> In my opinion, however, the TFEU by no means requires that every act of EU criminal law need be subject to a particularly restrictive examination. The Treaty of Lisbon in fact rejects a complete

European harmonisation of criminal law. In my view, therefore, the references in Art. 67 and Art. 82 TFEU merely underscore the importance of the principles of subsidiarity and proportionality in the area of EU criminal law.

Because of the subsidiarity principle under Art. 5 para. 3 of the EU Treaty, EU harmonisation measures under criminal law must also have an added value for Europe; otherwise, the objectives cannot be achieved to a sufficient degree by the Member States. Moreover, according to the proportionality principle set out in Art. 5 para. 4 TEU, they may not “go beyond what is necessary.” This means, the more intrusive harmonisation measures intervene in national criminal law systems, the more important they must be for achieving the Union’s objectives.

However, a further reaching towards national “criminal law sovereignty” by means of a legal principle calling for a restrictive approach to the EU legislation in the area of criminal matters, in general, cannot be said to exist. Such a principle cannot be proven in the case law of the ECJ either,<sup>19</sup> for example as the judgment of the ECJ on the annulment of Framework Decision 2003/80/JHA on the protection of the environment through criminal law<sup>20</sup> clearly shows:<sup>21</sup>

However, (this) does not prevent the Community legislature (...) from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective.

### 3. Harmonisation of EU criminal law in light of fundamental rights

In my estimation, the more important limits of European criminal law harmonisation are to be found in the Charter of Fundamental Rights of the European Union (CFR). This is already emphasised in Art. 67 para. 1 TFEU, which reflects the European legal perspective according to which criminal law is not an area like any other. Thus, any approximation of criminal law through EU secondary law must be compatible with the CFR (Art. 6 para. 1 TEU in conjunction with Arts. 51 para. 1 and 52 para. 1 CFR). Above all, this applies to fundamental judicial rights, e.g., the presumption of innocence under Art. 48 CFR and the principle of proportionality in connection with penalties under Art. 49 CFR.

While the question was raised in the past as to whether the Union standard of fundamental rights in the area of criminal law would provide adequate protection for the individual, this has changed with the entry into force of the CFR. Hence, the ECJ’s awareness of fundamental rights has grown considerably since then. However, the Court’s strategy regarding the area of criminal law has not yet been to declare EU criminal

acts null and void for violations of fundamental rights. Instead, it favours an interpretation of the Union Act in conformity with fundamental rights. For example, it instructs national authorities and courts not to execute a European arrest warrant if the person who is to be surrendered is threatened with inhuman and degrading treatment in the issuing Member State within the meaning of Art. 4 CFR<sup>22</sup> or if there is a risk that the courts of the issuing State will violate the fundamental right to a fair trial guaranteed in Art. 47 para. 2 CFR.<sup>23</sup>

### 4. A German perspective on national limits of EU harmonisation of criminal law

In some Member States, national constitutional law imposes limits on European criminal law approximation. This applies to Germany in particular.

In its ruling on ratification of the Lisbon Treaty, the German Federal Constitutional Court identifies criminal law as the most important area that must be retained by the Member States. For this reason, the EU’s powers to harmonise criminal law and criminal procedure must be interpreted restrictively. The German Federal Constitutional Court (*Bundesverfassungsgericht*, hereinafter: *BVerfG*) has urged taking Art. 83 para. 1 TFEU seriously, which requires a particular need to harmonise substantive criminal law. In this regard, it is not sufficient for the Union legislature to demonstrate a corresponding willingness to act.<sup>24</sup> Also, according to the *BVerfG*, the catalogue of criminal offences under Art. 83 para. 1 subpara. 2 TFEU must be interpreted restrictively. Care should be taken to ensure that the European framework provisions address the cross-border dimension of a particular criminal offence only.<sup>25</sup> The same applies to the annex competence under Art. 83 para. 2 sentence 1 TFEU. In order to make use of this competence, a serious lack of enforcement has to be demonstrated.<sup>26</sup>

The court had previously already demanded in its ruling on the European arrest warrant that “a gentle way” must be found in European criminal law legislation “in order to preserve national identity and statehood in a uniform European legal area.”<sup>27</sup> Therefore, the “principle of cautious harmonisation” mentioned above is not rooted in Union law but rather in the jurisprudence of the *BVerfG*.

Whether these requirements set out by the *BVerfG* for the interpretation of Art. 82 et seq. TFEU are promising in terms of EU law seems questionable. In my opinion, a national court cannot simply declare certain areas of criminal law to be unavailable to European harmonisation. This applies, in particular, to the offences listed in Art. 83 para. 1 TFEU. In this regard, the clear wording of Art. 83 para. 1 and para. 2 TFEU goes be-

yond the requirements imposed by the BVerfG. In addition, the teleological restriction of the norm by the BVerfG is by no means mandatory according to Union law. The same applies to the German court's idea that the Union legislator must provide empirical evidence for a regulatory need. Ultimately, from the EU's point of view, this is a question of legislative discretion.

It might be more convincing, if the BVerfG assumes the role of an advocate for a superior European fundamental rights standard in EU criminal legislation and thus enters into a dialogue with the European Court of Justice. This is happening to some extent. In 2015, before the ECJ's *Aranyosi* decision of 2016, the BVerfG had already ruled that German courts may not extradite persons in accordance with a European arrest warrant if this violates human dignity, e.g., because the principle of personal guilt is disregarded when the person is convicted in absentia in the issuing State.<sup>28</sup> Such a process of discussion when initiated by a national constitutional court can be helpful but must also be mediated in the other Member States.

## V. Conclusion

European harmonisation of criminal law not only promotes security in the European Union but also makes an important contribution to European integration. Limits to the harmonisation of criminal law result less from barriers to jurisdiction/competences and national sovereignty than from the rule of law and fundamental rights, which are particularly relevant to this sensitive area of law. If there are serious doubts as to whether the rule of law and fundamental rights are being observed in EU Member States, the fundamental premise on which judicial cooperation in criminal matters is based – the mutual trust of the Member States that their partner's legal and judicial systems adhere to the values of the European Union (Art. 2 of the Treaty on European Union) – , is no longer valid. In this case, we must therefore not only stop mutual recognition of judicial decisions but also question whether further selective harmonisation of criminal procedure and substantive criminal law is still acceptable at all.



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- 1 Regarding the terminology, cf. ECJ, 17.12.1970, case 11/70, *Internationale Handelsgesellschaft*, para. 16.
- 2 Directive 2015/849/EU of the European Parliament and of the Council of 20 May 2015 on prevention of the use of the financial system for the purpose of money laundering or terrorist financing, *O.J.* L 141, 5.6.2015, 73.
- 3 Regulation No. 178/2002/EC of the European Parliament and of the Council of 28 January 2002 laying down the general principles and requirements of food law, *O.J.* L 31, 1.2.2002, 1.
- 4 Cf. ECJ, 13.11.2014, case C-443/13, *Reindl*, para. 37 et seq.
- 5 Cf. H. Satzger, "The Harmonisation of Criminal Sanctions in the European Union", (2019) *eu crim*, 115, 116.
- 6 Cf. ECJ, 19.10.2017, case C-295/16, *Europamur Alimentación*, para. 38 et seq.
- 7 M. Schwarz, *Grundlinien der Anerkennung im Raum der Freiheit, der Sicherheit und des Rechts*, 2016, pp. 45 et seq.
- 8 See the landmark decision ECJ, judgement of 20.2.1979, case 120/78, *Cassis de Dijon*, para. 13 et seq.
- 9 Cf. H. Satzger, "Art. 82 AEUV", in: Streinz (ed.), *EUV/AEUV*, 3rd ed. 2018, mn. 10.
- 10 See Schwarz, *op. cit.* (n. 7), pp. 203 et seq.
- 11 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *O.J.* L 190, 18.7.2002, 1.

- 12 ECJ, 11.2.2003, joined cases C-187/01 and C-385/01, *Gözütok and Brügge*, para. 33; H. Satzger, *op. cit.* (n. 9), mn. 19.
- 13 ECJ, 26.2.2013, case C-399/11, *Melloni*, para. 62.
- 14 Cf. W. Schroeder, "The European Union and the Rule of Law", in: Schroeder (ed.), *Strengthening the Rule of Law in Europe*, 2016, p. 3.
- 15 ECJ, 5.4.2016, joined cases C-404/15 and C-659/15 PPU (*Aranyosi and Căldăraru*), para. 82 et seq.; ECJ, 25.7.2018, case C-216/18 PPU, *LM*, para. 43 et seq.
- 16 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *O.J.* L 130, 1.5.2014, 1.
- 17 Cf. BVerfGE 123, 267, 413 et seq. [decision on the Lisbon Treaty].
- 18 B. Hecker, *Europäisches Strafrecht*, 5th ed. 2015, p. 296 et seq.; H. Satzger, *op. cit.* (n. 9), mn. 3.
- 19 Cf. H. Folz, "Karlsruhe, Lissabon und das Strafrecht – ein Blick über den Zaun", (2009) *ZIS*, 427, 428.
- 20 Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law, *O.J.* L 29, 5.2.2003, 55.
- 21 ECJ, 13.9.2005, case C-176/03, *Commission vs. Council*, para. 48.
- 22 ECJ, 5.4.2016, joined cases C-404/15 and C-659/15 PPU (*Aranyosi and Căldăraru*), para. 98, 104; see also recently ECJ, 15.10.2019, case C-128/18, *Dorobantu*, para. 70 et seq. on serious deficiencies in detention conditions as an obstacle to surrender under a European arrest warrant.
- 23 ECJ, 25.7.2018, case C-216/18 PPU, *LM*, para. 44 et seq.
- 24 BVerfGE 123, 267, 410 et seq. [decision on the Lisbon Treaty].
- 25 BVerfGE 123, 267, 412 et seq.
- 26 BVerfGE 123, 267, 411 et seq.
- 27 BVerfGE 113, 273, 299 [decision on the German law implementing the Framework Decision on the European Arrest Warrant].
- 28 BVerfG NJW 2016, 1149 [decision on the identity control in European Arrest Warrant cases, cf. also *eu crim* 1/2016, p. 17]. This decision is a direct reaction to the ECJ judgement of 26.2.2013, case C-399/11, *Melloni*, para. 35 et seq., 49 et seq. and 57 et seq.

# European Implementation Assessment 2004–2020 on the European Arrest Warrant

Dr. Wouter van Ballegooij

This article provides a summary of an assessment and conclusions on the implementation of the Framework Decision on the European Arrest Warrant (FD EAW) recently published by the European Parliamentary Research Service. It also contains recommendations on how to address the shortcomings identified. It is intended to contribute to the European Parliament's discussions on this topic, improving understanding of the subject, and ultimately feeding into an implementation report by the European Parliament. The study concluded that the FD EAW has simplified and sped up surrender procedures, including for some high-profile cases of serious crime and terrorism. A number of outstanding challenges relate back to core debates concerning judicial independence, the nature of mutual recognition and its relationship with international and EU law and values, constitutional principles and additional harmonisation measures. Furthermore, there are gaps in effectiveness, efficiency and coherence with other measures and the application of digital tools. The study recommends targeted infringement proceedings, support to judicial authorities and hearing suspects via video-link where appropriate to avoid surrender whilst ensuring the effective exercise of defence rights, as well as a range of measures aimed at achieving humane treatment of prisoners. In the medium term, for reasons of legitimacy, legal certainty and coherence, a review of the FD EAW as part of an EU judicial cooperation code in criminal matters is recommended.

## I. Introduction

The Framework Decision on the European Arrest Warrant (FD EAW)<sup>1</sup> is the most well-known tool for judicial cooperation within the EU. The product of rapid negotiations after the 9/11 terrorist attacks on New York and Washington, it has been in force since 2004. The European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) is currently drawing up an own-initiative implementation report on the FD EAW (2019/2207(INI), rapporteur: MEP *Javier Zarzalejos*, EPP, Spain). A European Implementation Assessment<sup>2</sup> authored by me for the Ex-Post Evaluation Unit of the Directorate for Impact Assessment and European Added Value, Directorate-General for Parliamentary Research Services (EPRS), supports the implementation report by providing an assessment and conclusions on the implementation of the Framework Decision. It also contains recommendations on how to address the shortcomings identified, as per the request of the rapporteur.

The study concludes that the FD EAW has simplified and sped up handover procedures, including for some high-profile cases of serious crime and terrorism. In 2018, the average time between the arrest and surrender of people who did not consent to surrender was 45 days, a remarkable reduction compared to the lengthy pre-existing extradition regime.<sup>3</sup> A number of challenges in the issuance and execution of EAWs remain. Those challenges related back to core debates concerning judicial independence, the nature of mutual recognition<sup>4</sup> and its

relationship with international and EU law and values, constitutional principles<sup>5</sup> and additional harmonisation measures.<sup>6</sup> The second section of this article will explore those challenges in more detail. Furthermore, there are gaps in effectiveness, efficiency and coherence with other measures and the application of digital tools. Those gaps will be further discussed in the third section. Finally, as will be detailed further in the fourth section, the study recommends targeted infringement proceedings, support to judicial authorities and hearing suspects via video-link where appropriate to avoid surrender whilst ensuring the effective exercise of defence rights, as well as a range of measures aimed at achieving humane treatment of prisoners. In the medium term, it recommends a review of the FD EAW as part of an EU judicial cooperation code in criminal matters for reasons of legitimacy, legal certainty and coherence.

## II. Challenges in the Issuance and Execution of the European Arrest Warrant

Chapter 2 of the study identifies challenges in the issuance and execution of EAWs concerning the following matters:

- The definition of issuing judicial authorities and their independence from government, which excludes police officers<sup>7</sup> and organs of the executive,<sup>8</sup> but can include public prosecutors in accordance with certain conditions;<sup>9</sup>
- The proportionality of a number of EAWs issued for “minor crimes” and before the case was “trial ready”, also in view of other possible judicial cooperation measures, where the

- European Parliament's call for legislative reform<sup>10</sup> has been answered through guidelines in a Commission Handbook;<sup>11</sup>
- The situation pending the hearing by the executing judicial authority, such as possibilities offered for hearing by the issuing judicial authorities via video-link prior to surrender<sup>12</sup> and the time limits to be respected;<sup>13</sup>
  - The verification of double criminality by executing judicial authorities,<sup>14</sup> leading to a lively academic debate on the compatibility of this requirement with the principle of mutual recognition<sup>15</sup> and potential further questions to be raised with the CJEU;<sup>16</sup> and the lack of approximation of certain offences for which verification is no longer allowed;<sup>17</sup>
  - EAWs for nationals and residents of the executing Member State<sup>18</sup> and their interplay with the framework decision on the transfer of prisoners<sup>19</sup> with the dual aim of social rehabilitation and the prevention of impunity;
  - EAWs issued in cases concerning final judgments for the same acts, where the sentence has been served, or is currently being served, or can no longer be executed (*ne bis in idem*)<sup>20</sup> and the larger issue of the prevention and settlement of conflicts of exercise of jurisdiction in criminal proceedings;<sup>21</sup>
  - EAWs based on decisions following proceedings at which the person concerned was not present (*in absentia*)<sup>22</sup> raising practical problems caused by non-implementation, differences concerning implementation, or incorrect implementation of the framework decision on *in absentia* decisions;<sup>23</sup>
  - The role of the executing judicial authority in safeguarding the fundamental rights of the requested person as developed in the CJEU's case law, both regarding EAWs where there are concerns relating to poor detention conditions<sup>24</sup> and broader concerns relating to the right to a fair trial, including an independent and impartial tribunal;<sup>25</sup> and
  - The relationship with third states generally based on CJEU case law,<sup>26</sup> in accordance with treaties between the EU and the third states concerned (Norway, Iceland)<sup>27</sup> and those that might result from negotiations with the UK.<sup>28</sup>

Finally, requested persons have also faced difficulties in effectively exercising their procedural rights in the issuing and executing Member State based on the FD EAW itself<sup>29</sup> and specific provisions relating to the EAW and various directives approximating the rights of suspected and accused persons within the EU.<sup>30</sup>

### III. Implementation Gaps

Chapter 3 of the study draws conclusions regarding the implementation of the FD EAW. This has been done by applying the following evaluation criteria as set out in the European Commission's better regulation toolbox:<sup>31</sup>

- Effectiveness;
- Efficiency;
- Coherence;
- Relevance;
- EU added value;
- Compliance with EU values including fundamental rights.

On this basis, semi-structured interviews were held with a wide range of stakeholders. In terms of *effectiveness*, the study concludes, as mentioned, that the FD EAW has achieved the objective of speeding up and simplifying surrender procedures. However, in practice, the executive is still called in to assist judicial authorities and practical cooperation based on the EAW form does not always run smoothly. Court of Justice (CJEU) case law, through offering more clarity on a number of aspects left open by the generic drafting of the FD EAW, has also led to further practical questions. Finally, the rights of the defence may have been compromised due to the shortening of appeal possibilities.<sup>32</sup>

The objective of limiting the grounds for refusal based on the verification of double criminality seems to have been achieved overall. However, there are remaining uncertainties as regards the scope of the test to be applied in situations where such verification is still allowed. The limitation of the nationality exception has also been successful. Still, in cases relating to nationals and residents of the executing Member State, it is found that issuing judicial authorities do not sufficiently focus on the perspectives of social rehabilitation, before issuing an EAW. The decision of certain Member States to no longer surrender their nationals to the UK during the transition period<sup>33</sup> demonstrates the enduring sensitivities. CJEU case law has reinforced control by (independent) judicial authorities in the issuing and executing Member State. At the same time, there are concerns regarding the degree in which this case law results in effective judicial protection of requested persons.<sup>34</sup>

EU action to monitor and uphold EU values has not led to a swift and effective resolution of threats to the rule of law in certain Member States. CJEU case law, which requires the executing judicial authorities to assess potential violations of fair trial rights in the issuing Member State on a case-by-case basis, has led to different outcomes regarding EAWs issued by the same Member State,<sup>35</sup> also revealing a different appreciation of the relationship between (constitutional) values and mutual recognition.<sup>36</sup> Furthermore, CJEU case law puts the spotlight on the need to provide national courts with proper human and financial resources. They also need access to (centralised) knowledge on the criminal justice systems (including EAW decisions) and safeguards for compliance with EU values in the other Member States.



Detention conditions may be easier to assess than compliance with EU values more generally, especially if the resources of the Fundamental Rights Agency (FRA, criminal detention database<sup>37</sup>) and Eurojust<sup>38</sup> and other relevant information from the ground are relied upon in the process. Nevertheless, there is no mechanism in place to ensure a proper follow-up to assurances provided by issuing judicial authorities after surrender.<sup>39</sup> Much is to be gained through further intensifying cooperation and funding to international prison monitoring bodies and making sure their reports are properly followed up by EU Member States. Furthermore, a lot is expected of EU funding to modernise detention facilities in the Member States and to support them in addressing the problem of deficient detention conditions. However, this should go hand-in-hand with domestic criminal justice reforms.

EU legislation in the area of detention conditions could have added value.<sup>40</sup> However, the impact would depend on the scope of such legislation (only addressing procedural requirements in terms of reasoning for pre-trial detention and regular reviews, or also material detention conditions), the level of harmonisation chosen<sup>41</sup> and its ultimate implementation.

In terms of *efficiency*, it is reported that the majority of Member States have put mechanisms in place in their domestic systems for ensuring that EAWs are not issued for minor offences. This has resulted in the impression that there is a decrease of EAWs issued for “minor crimes”. At the same time, there are still some cases where a suspect appears to be wanted for questioning, rather than prosecution. Here, another cooperation mechanism (the European Investigation Order, EIO)<sup>42</sup> should be used. The option provided by the FD EAW for the issuing judicial authorities to hear the requested person by video-link could also be further stimulated. Another important issue is that the requested person has access to a lawyer in the issuing Member State.<sup>43</sup> In some cases (where surrender would be disproportionate), this lawyer could encourage the withdrawal of the EAW. However, certain Member States still do not provide and/or facilitate such access.<sup>44</sup> Furthermore, the inability of a lawyer to access information on the case in the issuing state<sup>45</sup> can make provision of effective assistance impossible.

As regards *coherence*, the study points out that the EAW should be seen as a tool for surrender to be used within the criminal proceedings of the Member States as a subsidiary measure to other, less intrusive options, in the spirit of a common EU criminal justice area. However, judicial authorities see it too often as a tool to obtain the person for the benefit of *their* criminal proceedings, or to obtain execution of *their* sentence. In part, this is due to inconsistencies between various EU measures. Other EU measures either have different objectives (social rehabilitation versus free movement of ju-

dicial decisions for instance), intervene at a different point (a supervision measure<sup>46</sup> should be considered before issuing an EAW) or do not contain mandatory language in their operational provisions regarding the need to consider them as an alternative to issuing an EAW (this is e.g. the case for the EIO). Finally, a number of Member States have so far not made sufficient efforts to transpose and implement EU procedural rights directives on time and correctly.<sup>47</sup> In the absence of the Commission launching infringement proceedings, it is to be feared that practitioners will only see EU legislation in this area as guidance.

In terms of *relevance*, it must be noted that the FD EAW was adopted in 2002. This was prior to the accession of 13 new Member States and the recent departure of the UK. Since 2002, the European Parliament has achieved and exercised equal legislative powers with the Council as regards the field at stake. As long as the FD EAW is not adapted to the Lisbon Treaty framework, it lacks the democratic legitimacy provided by the involvement of the European Parliament based on the ordinary legislative procedure. In terms of the serious crimes addressed, terrorism continues to constitute a major threat to security in EU Member States as identified in Europol reports.<sup>48</sup> At the same time, globalisation and digitalisation have led to forms of cyber criminality that one could have not imagined in 2002.<sup>49</sup> The list of “serious crimes” referred to in Art. 2(2) FD EAW should reflect this reality.

Technological advancement since the adoption of the FD EAW could also be seized upon to improve the efficiency and *fundamental rights compliance of the EAW* procedure. In this regard, cooperation between judicial authorities can be improved through the use of modern techniques. The Covid-19 crisis has forced Member States to enhance the use of modern technologies in the criminal justice area. The aforementioned option of hearing a requested person by video-link should therefore be more accessible. At the same time, the Covid-19 crisis has highlighted the need to ensure the effective exercise of defence rights, notably access to a lawyer and their guaranteed physical presence (with appropriate safety measures) during questioning and trial.

The European Commission’s indications for assessing the added value of EU criminal law<sup>50</sup> do not offer sufficient guidance for assessing the *added value of the FD EAW*. However, the FD EAW is clearly a founding stone for the establishment of an area of freedom, security and justice. Its level of cooperation could not have been achieved without having this objective in mind. This may be illustrated by the relationship with non-EU Schengen States and the negotiations with the UK after Brexit, in which traditional grounds for refusal based on national sovereignty return.<sup>51</sup>

#### IV. Recommendations to Overcome Shortcomings of the EAW

Finally, Chapter 4 of the study offers a number of recommendations on how to overcome the shortcomings identified. The effective implementation of the FD EAW could be further improved. In this regard, the initiation of infringement proceedings against those Member States that have incorrectly or deficiently transposed the FD EAW and the related provisions of the procedural rights directives is recommended. Furthermore, the assistance and coordination of Eurojust to the judicial authorities in the Member States could be further promoted and funded through the EU budget. The same holds true for training and exchanges between judicial authorities. The Commission (in cooperation with Eurojust, the European judicial (training) network and the FRA) could also develop and regularly update a “handbook on judicial cooperation in criminal matters within the EU”. Finally, judicial authorities would benefit from a centralised database containing the national jurisprudence on the EAW (as is the case in other areas of EU law).

Compliance with EU values and fundamental rights could be enhanced by systematically involving judicial authorities in the development of Commission, European Parliament and Council mechanisms monitoring compliance with EU values (Art. 2 TEU) in the Member States. More generally, Member States could be reminded of the need to comply with international obligations by properly executing European Court of Human Rights judgments and Council of Europe recommendations, notably related to prison conditions.<sup>52</sup> In this regard, all EU Member States could be encouraged to ratify the relevant international conventions.<sup>53</sup> At the same time, cooperation within the area of freedom, security and justice based on the principle of mutual recognition requires a specific level of fundamental rights protection for Member States to comply with.<sup>54</sup> The FRA could be requested to conduct a comparative study on the follow-up of assurances given by issuing judicial authorities on detention conditions in their Member States, in the context of EAW procedures. EU funding to modernise detention facilities in the Member States could be further exploited.<sup>55</sup> Finally, as discussed, the Commission could propose EU legislation in the area of detention conditions.

In terms of efficiency, beyond further stimulating the use of alternatives to an EAW, the proportionality test to be conducted by judicial authorities could be revised and further clarified in the light of CJEU case law<sup>56</sup> and comparable provisions in the EIO.<sup>57</sup> The Commission could be called upon to take enforcement action against those Member States that have not (properly) implemented the relevant provisions of the Access to a Lawyer Directive. Such enforcement action should also be taken against Member States that do not grant lawyers access

to the case file prior to the surrender, as without such access this lawyer (in the issuing Member State) would not be able to effectively assist the lawyer in the executing Member State.

To enhance coherence, the Commission could adopt a communication discussing the list of the 32 “serious crimes” referred to in Art. 2(2) FD EAW, relevant EU harmonisation measures and their national transposition. This communication could also assess the need for adopting or revising the definitions and sanctions of these offences at EU level to ensure mutual trust. Where deemed appropriate, the Commission should suggest updates to the list. As discussed, in terms of relevance, technological advancement could be used to improve the efficiency and fundamental rights compliance of the EAW procedure.

In the medium term, for reasons of democratic legitimacy, legal certainty and coherence with other judicial cooperation and procedural rights measures, a ‘Lisbonisation’ of the FD EAW is recommended. This process could be part of a proposal on an “EU judicial cooperation code in criminal matters”. Such an initiative could also contain legislative proposals on the prevention and resolution of conflicts of exercise of criminal jurisdiction and the transfer of proceedings.<sup>58</sup> The final decision on embarking on such a comprehensive review should take into account the implementation report that has recently been issued by the European Commission<sup>59</sup> and the mutual evaluations that the Member States are currently conducting in the Council. In addition, the European Parliament could also consider requesting the Commission to conduct a “fitness check”<sup>60</sup> evaluating and identifying gaps and inconsistencies, and considering possible ways of simplifying and streamlining the current EU framework in the area of judicial cooperation in criminal matters. Finally, the European Parliament could conduct further implementation reports on related judicial cooperation instruments, notably the EIO and the FD on transfer of prisoners.

1 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *O.J. L* 190, 18 July 2002, 1.

2 W. van Ballegooij, “European Arrest Warrant, European Implementation Assessment”, European Parliamentary Research Service, June 2020, available at <[https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS\\_STU\(2020\)642839\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2020/642839/EPRS_STU(2020)642839_EN.pdf)> accessed 13 July 2020.

3 Commission Staff Working Document, “Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2018”, SWD(2020) 127 final, 2 July 2020, p. 5.

4 Cf. W. van Ballegooij, *The nature of mutual recognition in European law, re-examining the notion from an individual rights perspective with a view to its further development in the criminal justice area*, Antwerp, 2015.

5 E. Guild (ed.), *Constitutional challenges to the European Arrest Warrant*, 2006; E. Guild and L. Marin (eds.), *Still not resolved? Constitutional chal-*

lenges to the European arrest warrant: A look at challenges ahead after the lessons learned from the past, 2009.

6 G. Vernimmen-van Tiggelen, L. Surano and A. Weyembergh (eds.), *The future of mutual recognition in criminal matters*, 2009

7 CJEU, 10 November 2016, Case C-452/16, *Polorak*, paras. 34–52.

8 CJEU, 10 November 2016, Case C-477/16, *Kovalkovas*, paras. 28–48.

9 CJEU, 27 May 2019, Joined cases C-508/18, *OG* and C-82/19 PPU, *PI*, paras. 51 and 74; CJEU, 12 December 2019, Joined case C-566/19 PPU, *JR* and C-626/19 PPU, *YC*, para. 52.

10 European Parliament resolution of 27 February 2014 with recommendations to the Commission on the review of the European Arrest Warrant (INL)), *O.J.* C 285, 29.08.2017, 135.

11 Handbook on how to issue and execute a European arrest warrant, *O.J.* C 335, 6.10.2017, 1, available at: <[https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006\(02\)&from=DA](https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52017XC1006(02)&from=DA)>.

12 In accordance with Art. 18(1)(a) FD EAW.

13 In accordance with Art. 17, 23 FD EAW.

14 In accordance with Art. 2(1), 2(4) and 4(1) FD EAW.

15 L. Bachmaier, “European Arrest Warrant, Double criminality and Mutual recognition: A much debated case”, (2018) 8 *ECLR*, 152; H. Satzger, “Mutual recognition in Times of Crisis - Mutual recognition in crisis? An Analysis of the New Jurisprudence on the European Arrest Warrant”, (2018) 8 *ECLR* 317.

16 F. Ruiz Yamuza, “CJEU case law on double criminality. The Grundza-Piotrowski paradox? Some notes regarding the Puigdemont case”, (2019) 19 *ERA Forum*, 465, 481, 482.

17 In accordance with Art. 2(2) FD EAW.

18 In accordance with Arts. 4(6), 5(3) FD EAW.

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## Human Rights-Based Approach to Combat Transnational Crime

Varun VM

The article starts with discussing the impact of globalization on crime and with further details on challenges posed by transnational crime. The author uses the legal approach and the human rights-based approach to address the issue. He outlines the limitations of a purely legal approach to transnational crime and highlights the role of the human rights-based approach as well as the attribution of State responsibility to transnational crime as effective means to combat transnational crime. He concludes that through the human rights-based approach, State responsibility can be attributed to transnational crime for the default of the State to take reasonable measures, in order to prevent acts that cause core human rights violations, including the omission to cooperate in global efforts to combat transnational crime.

### I. A Globalized World

The 1940s witnessed the conclusion of World War II, decolonization and the birth of independent Nations, as well as the beginning of the Cold War. The period also witnessed a strive for recognizing human rights and the establishment of the United Nations Organization (UN) so as to establish peace and security across the globe. But the effort to achieve peace

was retarded by mounting tensions between nations due to the arms race and the Cold War politics. It was during this time that the concept of globalization gained relevance.

Globalization is the process of integrating the local economies and societies with the global ones. Together with computerization, technological and transportation advancement, the process has increased interdependence and connectedness

between people and nations. By the end of the 1970s, international human rights law matured and major human rights treaties were concluded; Concurrently the concept of “complex interdependence<sup>1</sup>” emerged in international relations, which propounded that “*states and their fortunes are inextricably tied together*”. This means that the recognition of human rights and the interdependence between nations as promoted by globalization has reduced the probability of war between States. Undoubtedly globalization has played a key role in establishing peace across the globe but behind its veil transnational crime has been breeding.

## II. The Globalization of Crime

Traditionally, crime is regarded as a wrong done against the State, and the State reserves the right to prosecute the offender following the penal law in force in that jurisdiction. Territorial jurisdiction, i.e. the place of commission of a crime determines the right of the State to initiate prosecution and the competence of the court to try the offence. Until the early 1970s, the concept of territorial jurisdiction was well defined. With the advent of the World Wide Web which also gave birth to the dark web and allied cyber offences as well as the concurrently growing connectedness between people, the shadow economy and transnational crime bred. The advancement of globalization undoubtedly fed the globalization of crime or transnational crime, which has weakened the concept of boundaries and territorial jurisdiction. For this reason, globalization is a shield cum sword.

According to Art. 2(a) of the United Nations Convention on Transnational Organized Crime (UNTOC),<sup>2</sup> transnational crime mostly involves perpetration by an intentionally formed organized group that consists of three or more persons who act in concert to commit a crime punishable by at least four years in order to obtain monetary or other material benefits. The element of trans-nationality is satisfied if the stages or consequence of such crime have effects across national borders. Human, firearms, and drug trafficking, money laundering and cybercrime transcending national boundaries are examples of transnational organized crime.

## III. Challenges Posed by Transnational Crime

Due to the transnational nature of this type of crime, the major challenge is first to identify the “organized group” as it is largely invisible. Such groups largely breed on the territories of countries with weak law enforcement systems or in those areas of a national territory where the State do not have effective control. Second, this makes it equally difficult to identify and trace their victims, as they may be displaced to any part of

the world. For instance, in the case of human trafficking, the victims are illegally transported from one country to another for sexual slavery, forced labour etc. The third challenge is the limitation to conducting an investigation, the collection of evidence, the extradition of offenders, and legal complexities in initiating prosecution. The different legal traditions, language barriers, lack of co-ordination and co-operation between States as well as disputes over determining jurisdiction are the fourth challenge and last but not the least, the victims of transnational crime are deprived of access to justice.

## IV. The Legal Approach to Transnational Crime

The above-mentioned barriers can be crossed by strengthening the international co-operation to combat transnational crime through mutual legal assistance, extradition, transfer of criminal proceedings, and transfer of sentenced persons. These legal arrangements between countries reinforce the need for a globalization of law-enforcement efforts to counter the globalization of crime. The international legal instrument to counter organized crime is the UN Convention against Transnational Organized Crime supplemented by the Palermo protocols which have been signed by 147 countries. The high number of signatories is evidence that the world nations of the world recognize the need to eliminate transnational organized crime as a collective responsibility.

## V. The Human Rights-Based Approach to Transnational Crime

The limitation of the legal approach to counter transnational crime is that it establishes a mechanism that comes to action after transnational crime has been committed. It has limited possibilities to eradicate it. Also, the efficiency of the UNTOC depends on the ability of the States to implement its rules at the regional level. But the human rights-based approach, which calls for the universalization of human rights, is an effective tool to eradicate this global menace because any form of transnational crime is a violation of core human rights, which are universal, inalienable and non-derogable. This enables the victims to seek protection irrespective of the local jurisdiction. Furthermore, the Convention on organized crime and the international human rights laws are interdependent. For instance, Art. 25 of the UNTOC obliges the State parties to protect victims and provide appropriate measures to safeguard their rights, and Art. 2 of the International Covenant on Civil and Political Rights recognizes the right to effective remedy of the victims whose rights or freedoms recognized therein have been violated. This interdependence reinforces the need for a human rights-based approach to transnational crime.

## VI. Attaching State Responsibility to Transnational Crime

Another issue to deal with is the role of the State in preventing transnational crime and associated human rights violations. Due to its transnational nature, planning and preparation may be conducted in one State, whereas the commission or consequence occurs in another State. The question is: can the State be held responsible for non-state actors committing a transnational crime? Prima facie, the answer is “no” because transnational crime is perpetrated by private agents and is purely a private act, although has a transnational effect. The State’s responsibility cannot be invoked when we approach it from a strictly legal perspective. On the other hand, invoking the human rights-based approach would sustain the argument of State responsibility in transnational crimes. These violate core human rights, which are jus cogens and cannot be derogated.

Thus the State is bound to take reasonable measures to prevent the violation of core human rights. Necessarily, State is bound to adopt measures to regulate private conduct causing transnational crime. This does not mean that it can be directly held responsible for all transnational crimes committed by non-State actors. The State’s responsibility is attracted only when it has omitted to adopt “reasonable measures” to prevent transnational crime, such as co-operation with other States in investigating, prosecuting, and punishing the offenders. The applica-

tion of State responsibility would become more relevant once the international instrument on the “Responsibility of States for the Internationally Wrongful Acts” comes into force.<sup>3</sup> The draft Art. 1 of the instrument regards an “act or omission of the State breaching an international obligation of the State as an internationally wrongful act of the State.” In the context of transnational crime, this means that the failure of the State to adopt reasonable measures to prevent a transnational crime which causes a human rights violation would be regarded as an international crime in itself even though it is perpetrated by a non-State actor.

## VII. Conclusion: the Need of the Hour

Transnational crime violates core human rights with a *jus cogens* status, and hence the offence of transnational crime is a jus cogens crime. The international law regime provides that a jus cogens crime can be prosecuted and punished by any States because “offenders are the common enemies of mankind and all nations have equal interest in their apprehension and prosecution.”<sup>4</sup> In order to deal with crimes of globalization, building a global response is essential. Furthermore, strengthening the human rights regime and applying State responsibility to transnational crime would eventually eradicate this global menace.



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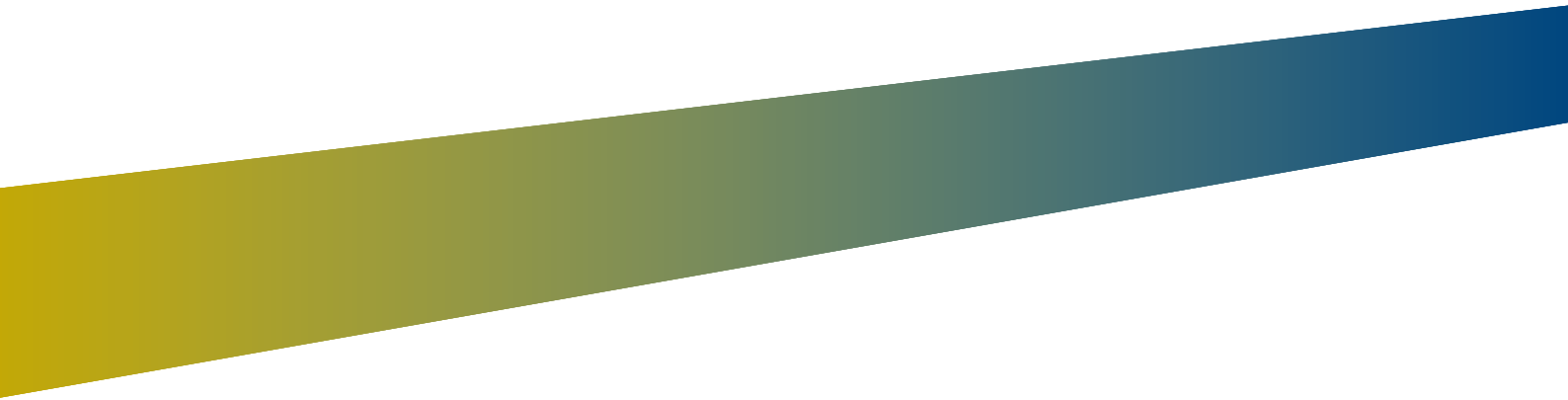
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