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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM



War in Ukraine: Legal and Political Challenges for the EU **La guerre en Ukraine : Défis juridiques et politiques pour l'UE** **Krieg in der Ukraine: Rechtliche und politische Herausforderungen für die EU**

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

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Guest Editorial

Dear Readers,

The EU's restrictive measures (commonly referred to as "sanctions") are neither new nor is Russia the only country subject to them, but the current regime against Russia is certainly unprecedented in its breadth. The EU is also in uncharted waters concerning the seriousness of the context. This also applies to our determination to coordinate and enforce these sanctions, and in turn requires us to address questions pertaining to their objectives and ambition.

In the EU, sanctions are implemented by Member States. However, the European Commission is ideally placed to coordinate their actions, connect the dots, and bridge any possible gaps. Commission President *Ursula von der Leyen* tasked me with setting up a dedicated Task Force (known as "Freeze and Seize") to bring together Member States and EU agencies, including Eurojust and Europol, with Commission experts.

This is unparalleled in the history of the EU and the coordination effort is already paying off. At the time of writing, more than €14 billion worth of assets have been frozen in the EU. This comes on top of the work the Commission is carrying out globally with the United States and the G7 countries in the Russian Elites, Proxies and Oligarchs (REPO) Task Force. The REPO has blocked or frozen more than \$30 billion worth of assets and around \$300 billion of Russian Central Bank assets. This consolidated effort makes it more difficult for Russia to procure the technology necessary to sustain its unjust war in Ukraine.

There is an urgent need to end impunity for the violation (or avoidance) of sanctions and also a desire to move from freezing assets to confiscating them. To confiscate, one must establish a link between assets and criminal activities. Not all Member States tackle violations of sanctions under their criminal law, however, if they do, definitions and penalties vary. To resolve this, the Commission has proposed adding the violation of Union restrictive measures to the list of EU crimes in Article 83(1) TFEU. This will allow the Commission to put forward a Directive harmonising criminal definitions and penalties for violation of restrictive measures.

There is so much at stake and the Ukrainian people will need every bit of financial help they can get when the time comes to rebuild the country. My objective is for the assets confis-

cated following criminal proceedings to be put into a fund that can be used to support the Ukrainian people. The agreement signed in March 2022 between the European Public Prosecutor's Office and the Ukrainian Prosecutor General already sent a positive signal and underlines the determination of the Ukrainian prosecution service to continue to work under siege to protect the financial interests of the EU and Ukraine.



Didier Reynders

Coordination always pays off. This is also true for the investigation of war crimes. There are currently over 25,000 reports of war crimes in Ukraine. In addition to the Ukrainian prosecution service, 14 EU Member States as well as the International Criminal Court (ICC) are investigating such cases. At the end of March 2022, two EU Member States (Lithuania and Poland) and Ukraine, with the support of Eurojust, established a Joint Investigation Team (JIT) to coordinate their investigations. Three more EU Member States have joined since April. It is noteworthy that this is the first time the ICC is participating in a JIT. The scope of Eurojust's mandate has also been expanded, so that it can analyse and store evidence securely and outside the Ukrainian war zone.

Besides ensuring that no sanction is breached, the Commission also aims to ensure that no crime is left unpunished. We recently organised a conference with the ICC and the Dutch Government to discuss how to ensure accountability for war crimes and coordinate international efforts to bring the perpetrators of war crimes to justice.

Never has there been a clearer need for cooperation. As the EU's Member States and allies are united in their horror towards Russia's illegal aggression against a sovereign country, so too must we be in our response.

Didier Reynders, European Commissioner for Justice

News

Actualités / Kurzmeldungen*



European Union

Reported by Thomas Wahl (TW), Cornelia Riehle (CR), and Anna Pinggen (AP)*

Foundations

Ukraine Conflict – Sanctions & Enforcement

Council Sanctions against Russia

spot light This news item provides an overview of the recent EU actions with regard to sanctioning Russia's war in Ukraine.

On 21 July 2022, the EU adopted a “[maintenance and alignment](#)” package that aims to tighten existing economic sanctions targeting Russia and to perfect their implementation in response to Russia's continuing war of aggression against Ukraine.

This “maintenance and alignment” package complements the restrictive measures and sanctions already in place since March 2014, [that have been imposed progressively by the EU on Russia](#) in response to:

- The illegal annexation of Crimea in 2014;
- The decision to recognize the non-government-controlled areas of the Donetsk and Luhansk oblasts as independent entities on 21 February 2022;

- The unprovoked and unjustified military aggression against Ukraine on 24 February 2022.

The EU imposed different types of sanctions, such as targeted restrictive measures against individuals, economic sanctions, diplomatic measures, restrictions on media etc.

- With regard to targeted restrictive measures, 1212 individuals and 108 entities are subject to asset freeze and travels bans because their actions have undermined Ukraine's territorial integrity, sovereignty and independence. The [list of sanctioned persons and entities](#) is constantly reviewed and renewed.

- The [economic sanctions](#), which mainly concern import and export restrictions on Russia, target the financial, trade, energy, transport, technology and defense sectors. They have first been imposed in July and September 2014 targeting exchanges with Russia in specific economic sectors. On 13 January 2022, the Council decided to prolong the restrictive measures targeting specific economic sectors until 31 July 2022. On 26 July 2022, the [prolongation](#) was extended until 31 January 2023.

- The restrictions on economic re-

lations with Crimea and Sevastopol, which were first imposed in June 2014 by the EU in response to the illegal annexation of Crimea and the city of Sevastopol, have been renewed on [20 June 2022](#) until 23 June 2023.

- In 2022, the EU has suspended the broadcasting activities of five Russian state-owned outlets (Sputnik, Russia Today, Rossiya RTR/RTR Planeta, Rossiya 24/Russia 24, TV Centre International) that have been used by the Russian government as instruments to manipulate information and promote disinformation about the invasion of Ukraine.

In response to the recognition of the non-government-controlled areas of the Donetsk and Luhansk oblasts and Russia's unprecedented and unprovoked military attack on Ukraine the EU has adopted six packages of sanctions:

- [First package](#) (adopted on 23 February 2022);
- [Second package](#) (adopted on 25 February 2022);
- [Third package](#) (adopted on 28 February and 2 March 2022);
- [Fourth package](#) (adopted on 15 March 2022);
- [Fifth package](#) (adopted on 8 April 2022);
- [Sixth package](#) (adopted on 3 June 2022).

On 3 June 2022, the Council adopted the [sixth package of economic and individual sanctions against Russia and Belarus](#). It comes in response to the con-

* Unless stated otherwise, the news items in the following sections (both EU and CoE) cover the period 1 April – 15 July 2022, if not stated otherwise. Have a look at the eucrim website (<https://eucrim.eu>), too, where all news items have been published beforehand.

tinuing Russia's war in Ukraine, its support by Belarus, and the reported atrocities committed by Russian armed forces in Ukraine. The sixth package includes measures concerning the following areas:

- Oil: Prohibition to purchase, import or transfer crude oil and certain petroleum products from Russia into the EU. A temporary exception is made for imports of crude oil by pipeline into those EU Member States that suffer from specific dependence on Russian supplies and have no viable other options due to their geographic situation;

- SWIFT: Extension of existing prohibition on the provision of specialized financial messaging services (SWIFT) to three additional Russian credit institutions – Sberbank, Credit Bank of Moscow, and Russian Agricultural Bank – and the Belarusian Bank For Development And Reconstruction;

- Broadcasting: Suspension of the broadcasting activities in the EU for three Russian state-owned outlets (Rossiya RTR/RTR Planeta, Rossiya 24/ Russia 24 and TV Centre International) that have been used to spread propaganda and promote disinformation about the invasion of Ukraine. In accordance with the Charter of Fundamental Rights, these media outlets and their staff will still be able to carry out activities in the EU other than broadcasting, e.g. research and interviews;

- Export: Expansion of the list of persons and entities concerned by export restrictions regarding dual-use goods and technology, and expansion of the list of goods and technology that may contribute to the technological enhancement of Russia's defense and security sector;

As part of the sixth package of sanctions, the Council also decided to impose [restrictive measures on additional 65 individuals and 18 entities](#), bringing the total number of sanctioned individuals and entities to 1,158 individuals and 98 entities.

In the list of the 65 individuals are among others the military staff members who led the actions of the Russian army

units in Bucha (including Colonel *Azatabek Omurbekov* – called the 'Butcher of Bucha'), who are considered responsible for the siege of Mariupol (including Colonel-General *Mikhail Mizintsev* – called the 'Butcher of Mariupol'), and who participated in the creation of the so-called Committee of Salvation for Peace and Order. The 18 sanctioned entities include a variety of companies that are supporting, directly or indirectly, the Armed Forces of the Russian Federation and the Government of the Russian Federation. The legal acts, including the names of the listed individuals and entities, have been published in the [Official Journal of the EU L 153](#).

On 21 July 2022, the EU adopted the aforementioned "[maintenance and alignment](#)" package. This new package includes the following:

- Introduction of a new prohibition to purchase, import, or transfer, directly or indirectly, gold (including jewellery), if it originates in Russia and has been exported from Russia into the EU or to any third country after;

- Extension of the list of controlled items which may contribute to Russia's military and technological enhancement;

- Extension of the port access ban to locks in order to ensure full implementation of the measure and avoid circumvention;

- Expansion of the scope of the prohibition on accepting deposits, including those from legal persons, entities or bodies established in third countries and entities majority-owned by Russian nationals or natural persons residing in Russia;

- Need of a prior authorisation for the acceptance of deposits for non-prohibited cross-border trade;

- Extension of the list of individual sanctions to additional 54 individuals (including senior members of the political or cultural establishment, high ranking military leaders and staff, politicians appointed in Ukrainian territories invaded by Russia, members of the Nightwolves (a nationalist motorcycle

club) propagandists and leading businesspersons) and 10 entities (including Sberbank, the Nightwolves, companies operating in the military sector or the shipbuilding industry or involved in the stealing of Ukrainian grain, and a variety of entities that have disseminated pro-Kremlin and anti-Ukrainian propaganda).

In an effort to ensure access to justice the "maintenance and alignment" package also allows exemptions from the prohibition to enter into any transactions with Russian public entities necessary to ensure access to judicial, administrative or arbitral proceedings.

In order to combat food and energy insecurity around the world, and in order to avoid any potential negative consequences, the package extended the exemption from the prohibition to engage in transactions with certain State-owned entities as regards transactions for agricultural products and the supply of oil and petroleum products to third countries. The package clarified that none of the measures in this Regulation or any of those adopted earlier in view of Russia's actions destabilising the situation in Ukraine are targeting in any way the trade in agricultural and food products, including wheat and fertilisers, between third countries and Russia. The Union measures also do not prevent third countries and their nationals operating outside of the Union from purchasing pharmaceutical or medical products from Russia.

A complete timeline of the EU restrictive measures against Russia over Ukraine is available on the [Council's website](#). (AP)

Commission: Violation of Restrictive Measures Should Become EU Crime

On 25 May 2022, the European Commission tabled a [proposal](#) for a Council Decision aiming to add the violation of Union restrictive measures to the areas of crime laid down in Art. 83(1) of the Treaty on the Functioning of the European Union (TFEU).

In [its explanatory memorandum](#) the Commission pointed out that the Union can impose restrictive measures against third countries, entities or individuals in order to promote the objectives of the Common Foreign and Security Policy (CFSP), and therefore also to safeguard the Union values, maintaining international peace and security as well as consolidating and supporting democracy, the rule of law and human rights. In the light of Russia's ongoing military aggression of Ukraine the overall goal is to effectively contribute to the implementation of EU restrictive measures as they are an essential tool for defending international security and promoting human rights. Such measures include asset freezes, travel bans, import and export restrictions, and restrictions on banking and other services.

Those measures are only effective if they are systematically enforced and violations punished. In order to strengthen the Union's ability to speak with one voice the Union-level coordination in the enforcement of these restrictive measures needs to be enhanced. The implementation and enforcement of Union restrictive measures is primarily the responsibility of Member States. The Commission noted that there has been, however, an increase of schemes to evade restrictive measures and Member States' systems significantly differ as to the criminalisation of the violation of Council Regulations on Union restrictive measures. Another problem is that there are often no direct victims of the violation of restrictive measures, so that the investigations and prosecutions depend on national competent authorities to detect infringements. The existing gap, created by the fact that Member States have very different definitions and penalties for the violation of Union restrictive measures under their administrative and/or criminal law, might benefit those engaged in illegal activities. Therefore, the Commission sees a need to add the violation of Union restrictive measures to the areas of

crime laid down in Art. 83(1) TFEU, in order to ensure the effective implementation of the Union's policy on restrictive measures.

The proposal to add the violation of Union restrictive measures to the list of "EU crimes" is accompanied by a draft setting out how a future Directive on criminal sanctions could look like ([Communication with an Annex](#)).

Negotiations on the proposal in the Council started under the French Presidency. On 30 June 2022, the Council [requested](#) the European Parliament's consent on a decision to add the violation of restrictive measures to the list of "EU crimes" as foreseen in the TFEU. Once the EP has given its consent and internal national procedures have been finalised, the decision can be formally adopted unanimously by the Council.

For a background analysis of the Commission's proposals → article by [Wouter van Ballegooij: "Ending Impunity for the Violation of Sanctions through Criminal Law"](#), in this issue. (AP)

Commission Proposes Directive on Asset Recovery and Confiscation

On 25 May 2022, the European Commission tabled a proposal for a [Directive of the European Parliament and of the Council on asset recovery and confiscation](#). The Commission stressed in its explanatory memorandum that organised crime represents one of the highest threats to the European Union's security and criminal organisations deployed sophisticated means to launder their vast revenues. The Commission referred to the importance of the EU Strategy to tackle Organised Crime (2021–2025) (→ [eucrim 2/2021, 90–91](#)) as a way to depriving criminals of these illicit profits in order to disrupt the activities of criminal groups and to prevent their infiltration into the legal economy.

With the proposed directive on asset recovery and confiscation the Commission aims to strengthen the capabilities of competent authorities to identify, freeze and manage assets, and rein-

force/extend confiscation capabilities so that all relevant criminal activities carried out by organised crime groups can be covered. The directive would also apply to the violation of restrictive measures, ensuring the effective tracing, freezing, management and confiscation of proceeds derived from the violation of restrictive measures. In this context, the Commission initiated the legislative train to get the competence to harmonise the national criminal laws in view of definitions and penalties as a result of the violation of Union restrictive measures (→ [aforementioned news item](#)).

The main elements of the Directive on asset recovery and confiscation include:

- Extension of the mandate of Asset Recovery Offices to swiftly trace and identify assets of individuals and entities subject to EU restrictive measures;
- Expansion of the possibilities to confiscate assets from a wider set of crimes, including the violation of EU restrictive measures;
- Establishment of Asset Management Offices in all EU Member States to ensure that frozen property does not lose value.

If adopted, the Directive will bring together rules on asset recovery and confiscation which are currently scattered in three different legislative instruments. At the same time, the Directive will strengthen law enforcement power in this area. (AP)

EU's "Freeze and Seize" Task Force Tackles Oligarchs' Money

In the light of Russia's ongoing unjustified and illegitimate military aggression against Ukraine, the European Commission set up the ["Freeze and Seize" Task Force](#) in March 2022. The Task Force is to ensure the efficient implementation of the EU sanctions against listed Russian and Belarusian oligarchs across the EU.

The Task Force is mainly responsible for ensuring strategic coordination among Member States and for exploring

the interplay between restrictive measures and criminal law measures. It coordinates actions by EU Member States, Eurojust, Europol and other agencies as regards the seizing and, where national law allows to do so, the confiscation of assets of Russian and Belarusian oligarchs.

The “Freeze and Seize” Task Force is composed of the Commission, national contact points from each Member State, Eurojust and Europol as well as other EU agencies and bodies as necessary. It is acting under four subgroups: (1) asset freezes and reporting; (2) exchange of best practices on criminal investigations and confiscation; (3) possible establishment of a Common Fund for the benefit of Ukraine; (4) [tax enforcement](#).

The first meeting of the “Freeze and Seize” Task Force took place on 11 March 2022 and was chaired by Commissioner *Didier Reynders*. Member States explained the measures they had already taken, the situation on ongoing judicial proceedings and the possibilities for the confiscation of assets under the appropriate legal bases. The Task Force meets regularly to assess developments and decide on further actions.

The Task Force will work alongside the recently established ‘[Russian Elites, Proxies, and Oligarchs \(REPO\) Task Force](#)’, under which the EU operates together with the G7 countries (Canada, France, Germany, Italy, Japan, the United Kingdom and the United States) and Australia. (AP)

REPO Task Force: More than \$30 Billion Russians’ Assets Frozen

On 29 June 2022, the Russian Elites, Proxies and Oligarchs (REPO) Task Force took stock of its successes during the first 100 days in operation. Accordingly, it managed to block or freeze more than \$30 billion worth of sanctioned Russians’ assets, freeze or seize sanctioned persons’ high-value goods, and heavily restrict sanctioned Russians’ access to the international financial system.

The REPO Task Force was launched on 17 March 2022 in response to Russia’s invasion of Ukraine, and represents a joint effort between the United States, Australia, Canada, France, Germany, Italy, Japan, the UK and the European Commission. The participants work together to take all available legal steps to find, restrain, freeze, seize, and, where appropriate, confiscate or forfeit the assets of those individuals and entities that have been sanctioned in connection with Russia’s invasion of Ukraine.

The [joint statement](#) stresses that the mission can only be achieved through close and extensive national and international coordination and collaboration and with the collaborative work with the private sector to promote effective sanctions implementation. The REPO Task Force will also keep working closely with the European Commission’s Freeze and Seize Task Force (→see aforementioned news item). In sum, the REPO Task Force has achieved the following:

- More than \$30 billion worth of sanctioned Russians’ assets in financial accounts and economic resources blocked or frozen;
- About \$300 billion worth of Russian Central Bank assets immobilised;
- Yachts and other vessels owned, held, or controlled by sanctioned Russians seized, frozen, or detained;
- Luxury real estate owned, held, or controlled by sanctioned Russians seized or frozen ;
- Russia’s access to the global financial system restricted, making it more difficult for Russia to procure technology necessary to sustain its war in Ukraine.

The REPO Task Force will continue its efforts track Russian sanctioned assets and it will also guard against spill over that affects global commodities markets and food supplies, the statement says. (AP)

Financial Investigations in Relation to the Russian Invasion of Ukraine

On 11 April 2022, Europol together with EU Member States, Eurojust and

Frontex launched [Operation Oskar](#), an umbrella operation comprising several investigations in relation to the Russian invasion of Ukraine. Operation Oskar supports the freezing of criminal assets owned by individuals and entities that are subject to EU-sanctions in relation to the said invasion as well as investigations in relation to the circumvention of EU-imposed trade and economic sanctions. The tasks of the EU agencies involved are manifold.

Europol, for instance, will centralise and analyse all information contributed under this operation to identify international links, criminal groups and suspects, as well as new criminal trends and patterns. Eurojust will provide legal assistance and support/strengthen cooperation between national investigating and judicial authorities. Frontex will undertake scrutiny measures in view of the persons who are crossing EU’s external borders (land, sea, and air) and fall under the scope of the sanctions. (CR)

Commission’s Recommendation on Investor Schemes Following the Russian Invasion of Ukraine

On 28 March 2022, the Commission issued a [recommendation](#) on immediate steps to be taken by Member States – in the context of the Russian invasion of Ukraine – in relation to investor citizenship schemes and investor residence schemes. The Commission noted that it had already issued a [report](#) on investor citizenship and residence schemes highlighting the inherent risks of such schemes on 23 January 2019 (e.g. risks involving security, money laundering, tax evasion, and corruption, etc.). The current context of the Russian aggression against Ukraine once again highlights these risks.

The Commission stressed that investor citizenship schemes, under which nationality is granted in exchange for a predetermined payment or investment and without a genuine link to the Member States concerned, have an affect on all Member States and the European Un-

ion. Every person holding the nationality of a Member State is at the same time a citizen of the Union and is therefore endowed with rights (right of free movement, right of access to the internal market to exercise economic activities, and the right to vote and stand as a candidate in local and EU elections). Investor residence schemes, under which a residence permit is granted in exchange for a predetermined payment or investment, also have implications for other Member States, and a valid EU residence permit grants certain rights to third-country nationals, including the right to travel freely in the Schengen area.

As a number of Russian and Belarusian nationals, who are subject to sanctions or are significantly supporting the war in Ukraine, might have acquired EU citizenship or privileged access to the EU under these schemes, the Commission recommends that the Member States do the following:

- Terminate investor citizenship schemes immediately if they are still being operated, as such schemes are neither compatible with the principle of sincere cooperation nor with the concept of EU citizenship enshrined in the EU treaties;
- Carry out assessments in order to determine whether citizenship previously granted to Russian and Belarusian nationals, who are subject to sanctions or significantly supporting the war in Ukraine, should be withdrawn;
- Take all necessary measures to prevent investor residence schemes from posing security risks, tax evasion risks, corruption risks, and risks of money laundering;
- Following an assessment, immediately withdraw or refuse the renewal of residence permits granted under an investor residence scheme to Russian and Belarusian nationals who are subject to EU sanctions in connection to the war in Ukraine;
- Suspend the issuance of residence permits under investor residence schemes to all Russian and Belarusian nationals.

The Commission highlighted that all of these measures need to be applied in compliance with the principle of proportionality, with fundamental rights, and with Member States' national law. The Commission stressed that the recommendation should be without prejudice to the admission and residence of Russian and Belarusian nationals in the EU on other grounds, such as humanitarian admission or international protection.

This recommendation is only one element of the Commission's overall policy to take determined action on both citizenship and residence investor schemes in this regard. The Commission pointed out that it may take additional action in the future if required. It will keep the European Parliament and the Council informed about the implementation of the recommendation by Member States. (AP)

Ukraine Conflict – EU Security

Justice and Home Affairs Ministers Discuss Responses to the Situation in Ukraine

At the [Justice and Home Affairs Council meeting on 9/10 June 2022](#), Ministers discussed several issues on how the EU needs to react to the Russian war of aggression against Ukraine.

A [discussion paper](#) by the French Council Presidency summarised the judicial responses to the situation in Ukraine and sought guidance on other useful measures, in particular political responses at the EU level. Justice Ministers agreed to continue the coordination begun by the French presidency to support investigation and prosecution in relation to international crimes. They reiterated their commitment to ensuring that, to the fullest extent possible, this war does not cause even greater suffering for displaced minors. They confirmed the importance of a political response at EU level. The Ministers also discussed the Commission's proposal of 25 May 2022 to extend the list of "EU crimes" to viola-

tions of EU restrictive measures (→news item supra, p. 75/76). In general, they responded to this proposal positively and agreed that negotiations at technical level should resume quickly.

The Home Affairs Ministers took stock of the [10-point action plan](#) for stronger coordination on welcoming persons fleeing the war. The plan was presented by the Commission at the Justice and Home Affairs meeting of 28 March 2022. The Ministers stressed the need to continue work on the full implementation of the plan. This particularly concerns support for the reception and integration of people fleeing the war and assistance to Moldova. They also examined whether further action might need to be taken in the medium and long term, in particular with regard to contingency plans and possible additional financial needs. The Home Affairs Ministers also discussed measures to prevent and combat the possible trafficking in human beings and firearms and stressed the importance of remaining very vigilant on the evolution of criminal threats (→Commission's fourth progress report on EU Security Union Strategy [→following news item]). (TW)

Commission Progress Report on Security Strategy Focuses on Threats from Russia's War

On 25 May 2022, the Commission presented its [fourth progress report on the implementation of the EU Security Union Strategy](#). The Strategy for the years 2020–25 was adopted on 24 July 2020 and 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 within the EU (→[eucrim 2/2020](#), 71–72).

The [regular progress reports](#) analyse the emerging threats to the EU's security in a certain period of time, give an overview of what the EU has done and of what should be done in the near future. The fourth implementation report is the first one that takes into account the threats to EU internal safety and security result-

ing from the Russian war of aggression against Ukraine. On the one hand, threats stem from potential attacks or accidents resulting from biological, radiological or chemical agents in the war zone. On the other hand, organised crime is influencing the threat scenarios by exploiting vulnerabilities of millions of people who have fled the war, e.g. through trafficking of women and children.

The report also reacts to the [Versailles Declaration](#) of 10/11 March 2022, in which the EU leaders stressed the need to prepare for fast-emerging challenges, including by “protecting ourselves against ever-growing hybrid warfare, strengthening our cyber-resilience, protecting our infrastructure – particularly our critical infrastructure – and fighting disinformation”. In this context, the report points out that the four strategic priorities set out in the Security Union Strategy remain directly relevant to this current geopolitical situation:

- A future proof security environment;
- Tackling evolving threats;
- Protecting Europeans from terrorism and organised crime;
- A strong European security ecosystem.

In order to cope with the new emerging risk, the report highlights the need for the EU and its Member States to make full use of legislative and policy instruments already available under the Security Union Strategy, “which underpin coordinated EU support to Member States on issues from organised crime and terrorism, to cybersecurity and hybrid threats”. Other important factors are the activities of the EU agencies in the field of Justice and Home Affairs and the strengthening of the Schengen area’s operational practice and governance. In the following areas, the report analyses vigilance and coordination as well as preparedness needs following Russia’s war:

- Cybersecurity and critical infrastructure;
- Organised crime and terrorism;
- Weapons, dangerous material and critical incidents;

- Foreign information manipulation and interference.

Looking ahead, the Commission stressed that the EU must be prepared and build up resilience to all eventualities. Some uncertainties remain, such as:

- Impact of displacement of Ukrainian criminal networks. This can have influence on the routes of drugs trade;
- Potential risks at the end or during pauses of the war. This could have effects on the circulation of firearms and on risks linked to foreign fighters who may have come into contact with extremist groups.

In conclusion, the report stresses that a determined implementation of the EU Security Union Strategy and other specific strategies/plans, such as the EU Cybersecurity Strategy, the Strategy to tackle Organised Crime, the Counter-Terrorism Agenda for the EU, the EU action plan on firearms trafficking, the EU Strategy on Combatting Trafficking in Human Beings, and the EU Drug strategy (2021–2025), are more important than ever. (TW)

Ukraine Conflict – War Crimes

Eurojust Mandate for Core International Crimes

As the ongoing Russian invasion of Ukraine is preventing the country from storing and preserving evidence on war crimes, such evidence must be stored outside Ukraine in order to ensure accountability for these crimes. For this reason, on 25 April 2022, the European Commission [submitted a proposal](#) amending the Eurojust Regulation with the aim of giving Eurojust the legal possibility to collect, preserve, and share evidence on war crimes. Under its current Regulation, Eurojust is neither allowed to preserve evidence on core international crimes on a more permanent basis, nor to analyse and exchange such evidence when necessary, or even to directly cooperate with international judicial authorities such as the ICC.

The amendment to the Eurojust Regulation was quickly adopted: The European Parliament approved it on [19 May 2022](#). The Council adopted it on [25 May 2022](#). Regulation (EU) 2022/838 of the European Parliament and of the Council of 30 May 2022 amending Regulation (EU) 2018/1727 as regards the preservation, analysis and storage at Eurojust of evidence relating to genocide, crimes against humanity, war crimes and related criminal offences was [published in the Official Journal L 148 of 31 May 2022](#). Thus, from 1 June 2022 on, Eurojust is able to collect, analyse and preserve evidence related to core international crimes and process data such as videos, audio recordings and satellite images. Eurojust is empowered to share such evidence with national and international authorities. Eurojust can also establish an automated data management and storage facility separate from its case management system for the purpose of fulfilling its new tasks. (CR)

EU Supports ICC in Investigation of International Crimes in Ukraine

On 25 April 2022 – for the first time in its history –, the Office of the Prosecutor of the International Criminal Court (ICC) [signed an agreement](#) to participate in a Joint Investigation Team (JIT). The respective JIT was set up on 25 March 2022 by Lithuania, Poland, and Ukraine with Eurojust’s support in order to facilitate investigations and prosecutions on core international crimes committed in Ukraine. At the end of May 2022, the judicial authorities of Estonia, Latvia and Slovakia joined the JIT.

The agreement with the ICC can be regarded as a clear signal that the international community undertakes all efforts to effectively gather evidence on core international crimes committed in Ukraine and bring those responsible to justice. Eurojust will accompany the JIT with operational, analytical, legal and financial support. Eurojust will also accommodate the coordination and cooperation between all national investigat-

ing and prosecuting authorities that have initiated investigations into core international crimes.

The EU is also financially supporting the ICC's investigations into international crimes committed by Russia in Ukraine. On 8 June 2022, the [Commission announced](#) that a new project was launched with a funding of €7.25 million. The project will support the Office of the Prosecutor of the ICC to build up capacities of large data storage on the respective international crimes in Ukraine. (CR)

Council Extends Security Mission in Ukraine

On 13 April 2022, the Council of the EU [amended the mandate](#) of the EU Advisory Mission for Civilian Security Sector Reform in Ukraine ([EUAM Ukraine](#)) – a non-executive civilian mission established on 22 July 2014 with the aim of supporting Ukraine in developing sustainable, accountable, and efficient security services that strengthen the rule of law. Under the extended mandate, EUAM Ukraine may now provide support to Ukrainian authorities in order to facilitate the investigation and prosecution of any international crimes committed in the context of Russia's military aggression in Ukraine. According to the amended mandate, the mission may now provide Ukrainian authorities with strategic advice and training on related matters, donate funds and equipment to Ukrainian authorities, and ensure close cooperation with the International Criminal Court and Eurojust as well as with EU Member States acting in direct support of the investigation and prosecution of international crimes in Ukraine. (CR)

Ukraine Conflict – Victim Protection

First Meeting of the Focus Group against THB

On 14 June 2022, the newly created [focus group](#) of specialised prosecutors against

trafficking in human beings (THB) met for the first time. The group was created to intensify judicial cooperation and build expertise in the fight against THB. Its creation was proposed by the European Commission in its [Strategy on Combating THB \(2021–2025\)](#). The efforts are supported by Eurojust.

In their first meeting, selected prosecutors and judges from the EU Member States discussed the challenges faced when addressing cases of THB at the national level and in cross-border situations. Furthermore, they discussed how to enhance the judicial response to cases of THB in relation to the war in Ukraine. (CR)

Common Anti-Trafficking Plan for Victims of Ukraine War

On 11 May 2022, the EU Solidarity Platform [presented its Common Anti-Trafficking Plan](#). As a result, the Solidarity Platform aims to address the risks of trafficking in human beings and support potential victims. [The Plan](#) has been developed by *Diane Schmitt* (EU Anti-Trafficking Coordinator) together with EU and national authorities.

The Plan builds on the [EU Strategy on Combating Trafficking in Human Beings](#), presented by the European Commission on 14 April 2021, and follows the [EU Anti-trafficking Directive](#) (Directive 2011/36/EU). It fulfils one of the points of the [10-Point Plan](#) for stronger European coordination on welcoming people fleeing the war from Ukraine, presented at the Justice and Home Affairs Council on 28 March 2022. The implementation of the plan will be coordinated by the EU Anti-Trafficking Coordinator, who will work closely with other bodies and entities, such as the National Rapporteurs and Equivalent Mechanisms, representatives of Ukraine and Moldova, the EU Civil Society Platform against trafficking in human beings, the EU's justice and home affairs agencies, and the European Labour Authority.

The Plan set out five main objectives,

which will be pursued through concrete actions at EU level and through recommendations to EU Member States:

- Strengthening awareness raising on the risks of trafficking in human beings and setting up helplines: this will include provision of relevant information through emergency helplines and material, e.g. leaflets and posters, and the setting up of dedicated websites, apps and awareness raising campaigns;

- Reinforcing prevention against trafficking in human beings: examples here are security checks of the entities and individuals offering accommodation and checks of the suitability of the offered accommodation, if allowed under national law;

- Enhancing the law enforcement and judicial response to trafficking in human beings: in this context, the European Multidisciplinary Platform Against Criminal Threats (EMPACT) will strengthen actions in order to address trafficking in human beings in relation to people fleeing Ukraine. Member States should, inter alia, make full use of existing instruments for operational cooperation, report all suspicious cases and launched investigations to Europol via SIENA, and systematically exchange data on investigations on human trafficking related to the war in Ukraine;

- Improving the early identification, support and protection of victims of trafficking in human beings: actions in this regard will include unconditional assistance, support and protection measures set forth in the EU Anti-trafficking Directive as soon as the authorities have reasonable grounds for believing that the person may have been exploited as well as programmes addressing the long-term needs of victims in view of their recovery and reintegration;

- Addressing the risks of trafficking in human beings in non-EU countries, especially Ukraine and Moldova.

The report concludes that, while these measures need to be further reinforced within the EU and externally, it is now important to focus on the detection, in-

investigation and prosecution of potential cases of trafficking.

The Solidarity Platform is the main EU coordination and operational mechanism set up immediately after the war in Ukraine started. It brings together representatives of EU countries, Schengen Associated Member States, EU Agencies, Ukrainian authorities, and partners such as the International Organization for Migration (IOM) and UNHCR. (AP)

EP: Protection of Women Fleeing Ukraine from Violence and Trafficking

Since the start of the Russian invasion of Ukraine on 24 February more than [5.5 million refugees](#) – 90% of whom are women and children – have fled Ukraine. On 5 May 2022, the European Parliament adopted a [resolution](#) in which MEPs strongly condemn the use of sexual and gender-based violence as a weapon of war. They expressed their concerns about the growing number of reports on human trafficking, sexual violence, exploitation, rape and abuse faced by women and children escaping the war.

The resolution also stressed that refugee reception centres need to address the specific needs of women and girls and put in place complaint mechanisms in languages and formats accessible to all. Trafficking networks profiting from sexual exploitation of women refugees should be swiftly identified and prosecuted by Member States and by the Union. The EU, all host and all transit countries should ensure access to sexual and reproductive health and rights (SRHR), and in particular emergency contraception and abortion care, including for victims of rape. (AP)

Fundamental Rights

EP Reviews Rule of Law Report 2021

On 19 May 2022, the European Parliament (EP) adopted a [resolution](#) on the Commission's 2021 annual Rule of Law Report ([→eucrim 3/2021, 134–135](#)).

Overall, the EP welcomed the Commission's second annual Rule of Law Report but also pointed out that the Commission still did not fully address the EP's recommendations in its resolution of 24 June 2021 on the first Rule of Law Report ([→eucrim 2/2021, 70](#)). In particular, this critique concerns the expansion of the scope of the Commission's reporting in order to cover all values enshrined in Art. 2 TEU, the differentiation between systemic and individual rule-of-law breaches, and a more in-depth, transparent assessment, including taking actions in response to breaches.

Looking at the methodology, the EP noted that not all rule-of-law issues were covered in sufficient detail or breadth in the 2021 report. Therefore the Commission is recommended to analyse rule-of-law issues in each pillar through the prism of all the values enshrined in Art. 2 TEU and fundamental rights as described in the Charter. Furthermore, MEPs urged the Commission to differentiate between systemic and deliberate breaches of the rule of law and isolated breaches in a clearer and more comprehensible way. They regret that the report failed to clearly recognise the deliberate process of the rule-of-law backsliding in Poland and Hungary.

Regarding the justice system, MEPs called on the Commission to include concrete recommendations in its 2022 report in order to ensure the independence of the judiciary in all Member States. According to the EP, the 2021 report does not reflect the increasingly hostile environment that is created through more state control, strategic lawsuits and smear campaigns, in which journalists and media actors are operating inside many Member States.

MEPs proposed setting up a “rule of law index”, based on a quantitative assessment of each country's performance by independent experts in order to signal the level of respect for the rule of law in the Member States. It should be based on an objective, non-discriminatory system. (AP)

MEPs Dissatisfied with Progress in Rule-of-Law Procedures against Poland and Hungary

In a [resolution of 5 May 2022](#), the European Parliament (EP) reiterated its dissatisfaction with the progress of the ongoing Article 7 TEU procedures against Poland and Hungary. The resolution – adopted with 426 to 133 votes (and 37 abstentions) – calls on the Council to show “genuine commitment” to make “meaningful progress” in the Article 7(1) TEU procedures. Although MEPs welcome the resumption of the hearings on both procedures against Poland and Hungary by the French Council Presidency, several critical points are raised and the Council is called on to do the following:

- Organising the hearings regularly and at least once per presidency;
- Addressing new developments, including those related to violations of fundamental rights;
- Publishing comprehensive minutes after each hearing and providing Parliament with a proper debriefing;
- Conducting the hearings in an objective, fact-based and transparent way;
- Following up to the hearings by addressing concrete recommendations to the Member States in question. In the light of the rapid deterioration of the situation in both countries, a swift adoption of such deadlines and the stipulation of clear deadlines for their information is urgently needed.

In the latter context, MEPs stressed their view that unanimity is not required in the Council when it comes to identifying a clear risk of a serious breach of Union values under Article 7(1) or to addressing concrete recommendations to the Member States.

The Commission is called on to make full use of all tools available to address breaches by Poland and Hungary of the values set out in Art. 2 TEU, on which the Union is founded, in particular expedited infringement procedures and applications for interim measures before the CJEU, as well as the Rule of Law

Conditionality Regulation. The Commission should also initiate proceedings against Poland under the Rule of Law Conditionality Regulation, as it has done with Hungary (→[eucrim 1/2022, 24](#)). In addition, the Commission and the Council should not approve the national plans of Poland and Hungary under the Recovery and Resilience Facility (→[eucrim 3/2021, 151](#)) until both countries have fully complied with all European Semester country-specific recommendations in the field of the rule of law and until they have implemented all the relevant judgments of the CJEU and the ECtHR.

Lastly, the resolution calls on the Council and the Commission to enter into talks on an EU mechanism on democracy, the rule of law and fundamental rights (DRF), as proposed by Parliament (→[eucrim 2/2020, 69–70](#)). (TW)

Poland: Rule-of-Law Developments April–July 2022

This news item continues the overview of recent rule-of-law developments in Poland (as far as they relate to European law) since the last update in [eucrim 1–2022, 5–7](#).

■ 14 April 2022: The ECtHR indicates an [interim measure in the case *Stepka v. Poland*](#) (application no. 18001/22). The ECtHR asks the Polish government, inter alia, that no immediately enforceable decision in respect of his immunity be taken by the Disciplinary Chamber of the Supreme Court until the final determination of his complaints by the European Court. The case concerns a Polish judge who is facing charges in disciplinary proceedings on “criminal negligence in relation to a judicial decision given in a criminal case”.

■ 26 May 2022: [Newspapers report](#) that the Polish Parliament (Sejm) passed a bill that removes the controversial Disciplinary Chamber of the Supreme Court. It has been subject to numerous proceedings before European Courts which concluded that the Chamber is not in line with EU and CoE law. The new Polish

law is to pave the way to the Commission’s approval of the Polish recovery and resilience plan – a precondition for Poland to receive money from the EU’s Recovery and Resilience Facility (RRF). The opposition voted against the bill saying that the changes are largely cosmetic.

■ 30 May 2022: On the eve of the endorsement of the Polish national recovery and resilience plans, a coalition of legal and human rights associations ([KOS](#)) [address an open letter](#) to Commission President Ursula von der Leyen. They question as to whether the Commission has duly taken into account that the Polish government has not fulfilled the obligations resulting from the relevant rule-of-law judgments by the CJEU, in particular as regards the Polish disciplinary regime against judges and prosecutors. It is pointed out that the Act passed on 26 May 2022 only contains cosmetic changes. The liquidation of the Disciplinary Chamber is only ostensible, an obligation to reinstate judges who have been unlawfully suspended by the Disciplinary Chamber is not provided for, and the functioning of an independent and impartial disciplinary system for judges, preventing the inadmissible influence of the executive is not restored. It is also stressed that “[i]nvariably, the source of problems with the functioning of the Polish judiciary is the new National Council of the Judiciary (the so-called neo-NCJ), which was appointed defectively, is deprived of independence and has a decisive role in shaping the executive and legislative powers.”

■ 1 June 2022: After months of dispute with Poland over the independence of the judiciary, the [Commission recommends the Council to approve Poland’s recovery and resilience plan](#). It involves €23.9 billion in grants and €11.5 billion in loans under the RRF. The disbursements are to be made subject to the fulfilment of milestones and targets. With regard to the independence of the judiciary, four milestones are mentioned, including a reform of the current disci-

plinary regime against judges and prosecutors.

■ 7 June 2022: In [another open letter](#) to Commission President Ursula von der Leyen, Commission Vice-President Věra Jourová, and Commissioner for Justice Didier Reynders, Polish and international NGOs detail their critical analysis on the Polish NCJ. They explain why the functioning of the NCJ in its current form, in subordination to political authorities, undermines the guarantees of effective judicial protection (Art. 19(1) TEU), the right to a court established by law (Art. 47 CFR) and the effectiveness of the preliminary ruling procedure (Art. 267 TFEU).

■ 9 June 2022: In a [resolution](#), MEPs criticise the Commission for having endorsed Poland’s RRF plan. They call on the Council to not approve the plan until all open rule-of-law related infringements by Poland are remedied. MEPs stress that compliance with EU values is a prerequisite to have access to the Facility and that the rule of law conditionality mechanism is fully applicable here.

■ 16 June 2022: The ECtHR finds a violation of Art. 6 ECHR (access to court) and Art. 10 ECHR (freedom of expression) in the [case *Żurek v. Poland*](#). The judges in Strasbourg conclude that the lack of judicial review of the decision to remove Mr Żurek from the National Council of the Judiciary (NCJ) had breached his right of access to a court. In addition, the accumulation of measures taken against Mr Żurek – including his dismissal as spokesperson of a regional court, the audit of his financial declarations and the inspection of his judicial work – had been aimed at intimidating him because of the views that he had expressed in defence of the rule of law and judicial independence.

■ 12 July 2022: The ECtHR indicates an [interim measure in the case *Rackowski v. Poland*](#) (application no. 33082/22). The case concerns a military judge, critic to the Polish government’s judicial reforms and former vice-president of the NCJ – the constitutional

body in Poland which is to safeguard the independence of courts and judges. He defends himself against disciplinary proceedings. The ECtHR asks Poland to ensure that the lifting of judicial immunity complies with the requirements of a “fair trial” as guaranteed by Art. 6 ECHR and that no decision be taken until the final determination of his complaints by the European Court. The case is similar to those of two Polish Supreme Court judges, Włodzimierz Wróbel and Andrzej Szepka, who were also granted interim measures on 8 February 2022 (→[eucrim 1/2022, 38](#)) and 14 April 2022 (see above) respectively.

■ 15 July 2022: The Commission decides to take the next step in the infringement procedure against Poland for EU law judgements handed down by its Constitutional Tribunal. The [Commission sends a reasoned opinion to Poland](#).

The background to this are rulings of the Polish Constitutional Tribunal of 14 July 2021 and 7 October 2021 (→[eucrim 3/2021, 135, 137](#)), in which provisions of the EU Treaties had been considered incompatible with the Polish Constitution and thus the primacy of EU law and the binding nature of decisions of the CJEU openly questioned;

■ 18 July 2022: The chairman of the ruling PiS party, [Jarosław Kaczyński, reacts](#) to the milestones included in the Commission’s endorsement of the Polish RRF plans and to the critical viewpoint by the European Parliament against the disbursement of EU money to Poland as long as rule-of-law issues are not solved (see above). “We have really demonstrated maximum goodwill. From the point of view of the treaties, we are under no obligation to listen to the Union on the justice system. None whatsoever,” he stressed.

■ 20 July 2022: A delegation of the EP’s [Budgetary Control Committee concludes a fact-finding mission](#) to Poland looking into the disbursement of EU funds. After having spoken with politicians, prosecutors, judges, NGO representatives, journalists, audit authorities

and recipients of EU funds, MEPs said that there are signs that the distribution of public funds, including EU money, is increasingly politicised. They also voiced concerns over the lack of independent verification of the spending of EU funds, the restrictions in place on Poland’s national court of auditors, and the lack of transparency by the state institutions. MEPs will now assess the findings and follow up on the information received.

■ 25 July 2022: The ECtHR gives notice to Poland of [37 applications concerning judicial independence](#) and requests the Polish governments to submit observations on these applications. The complainants argue that the judicial formation of the Supreme Court and the NCJ did not comply with the guarantee of an “independent and impartial tribunal established by law” as enshrined in Art. 6 ECHR. (TW)

Hungary: Rule-of-Law Developments April-July 2022

This news item continues the overview in previous eucrim issues of the recent rule-of-law developments in Hungary as far as they relate to European law.

■ 3 April 2022: Coinciding with the parliamentary elections, the Hungarian government lets carry out a [referendum on its controversial “Children Protection Act”](#), which prohibits or limits access to content that propagates or portrays “divergence from self-identity corresponding to sex at birth, sex change or homosexuality” for individuals under 18 (→[eucrim 2/2021, 72](#)). This law (dubbed by critics the “anti-LGBTIQ law”) is also subject to infringement procedures by the European Commission (→[eucrim 3/2021, 137](#)). However, the referendum turns out invalid because the threshold of 50% of registered voters casting a valid “yes” or “no” vote was not reached.

■ 8 April 2022: The [Hungarian National Election Committee \(NEC\) fines 16 NGOs](#) some of which have campaigned against the referendum for “having defeated the constitutional purpose of the

exercise of power”. The fine “is aimed at silencing the huge community that exercised its right to free expression and democratically defeated the government’s propaganda referendum”, the [NGOs wrote in a joint statement](#).

■ 15 April 2022: the [Hungarian Supreme Court \(Kúria\) quashes the decisions by the NEC](#) which fined the NGOs for their campaigns against the referendum (see above). The court held that freedom of expression, especially concerning public affairs, “must enjoy special protection” and should not be curbed “unless for a reason concerning the rule of law”. It added that “no legal stipulations contain a prohibition of campaign messages aimed at invalid voting.”

■ 27 April 2022: The Commission [triggers the so-called conditionality mechanism](#) against Hungary. The mechanism enables the EU to cut off an EU Member State from receiving EU money if it breaches principles of the rule of law (→details below under “Protection of Financial Interests”, p. 106).

■ 3 May 2022: FECSKE (Support Network for Detainees and their Families) [calls attention to the severe restrictions for detainees](#) to receive packages, correspondence and family visits. The NGO stresses that, despite a decrease in the crime rates in Hungary, imprisonments are increasing, in particular due to a stricter criminal policy. Imprisonment is increasingly ordered even in cases of petty offences, the FECSKE says.

■ 23 May 2022: The General Affairs Council holds its [fourth hearing in the Article 7\(1\) procedure against Hungary](#) examining whether there is a clear risk of a serious breach by a Member State of the values referred to in Art. 2 TEU. Discussion focus on the independence of the judiciary, the functioning of the constitutional and electoral system, freedom of expression and the fight against corruption. On the eve of the Council meeting, several civil society organisations provide input by assessing the recent rule-of-law developments in Hungary. In their [joint letter](#), they stress that “all

[these developments] highlight persistent, structural and interrelated deficiencies with the respect for democracy, the rule of law and fundamental rights in Hungary and point towards the need for urgent action.”

■ 25 May/8 June 2022: The Hungarian Parliament adopts an amendment to the Fundamental Law and [declares a state of danger](#) due to the “armed conflict and humanitarian disaster in the territory of Ukraine, and in order to eliminate the consequences of these in Hungary”. Subsequently, the Parliament adopted the [Fourth Authorization Act](#), removing parliamentary oversight over individual emergency government decrees. [Critics argue](#) that the Parliament’s acts give the Hungarian executive the carte blanche for governing with emergency decrees and enabling it to continue its excessive regulatory powers which were first acquired with the argument to overcome the COVID-19 pandemic.

■ 6 July 2022: Media report on a [legal opinion](#) commissioned by the Greens Group of the European Parliament in connection with the application of the EU’s conditionality mechanism (→[eucrim 3/2020, 174–176](#)) to Hungary. In it, the European Commission is recommended to cut off the country not only from funds from the various agricultural, cohesion and reconstruction budgets, but also from any inflow of money from Brussels. They base their opinion on the fact that the country violates democratic principles in such a “fundamental, regular and far-reaching” way, so that the “legitimacy of the allocation of EU funds” in Hungary is generally at risk. Therefore, the experts consider it “appropriate” for Brussels to “withhold one hundred percent” of the funds.

■ 13 July 2022: In a report, which is designed to underpin the European Parliament’s stance against Hungary in the Article 7(1) procedure, the [LIBE Committee voices harsh criticism](#) over Hungary undermining European values. The report details the areas triggering rule-

of-law concerns and stresses that the situation has deteriorated in recent years, exacerbated by EU inaction. MEPs urge the Commission to withhold recovery funds to Hungary until the country complies with recommendations (made by EU institutions) and CJEU rulings. (TW)

Reform of the European Union

Key Proposals from the Conference on the Future of Europe in the Area of Values, Rule of Law & Security

spot light On 29/30 April 2022, the Plenary of the Conference on the Future of Europe adopted [49 proposals on a wide range of EU topics and more than 300 measures](#) on how to achieve them. The Conference on the Future of Europe is a bottom-up exercise designed for European citizens to debate on Europe’s challenges and future priorities, under the authority of the three EU institutions, represented by the President of the European Parliament, the President of the Council and the President of the European Commission (→[eucrim news of 20 March 2021](#)). The Conference Plenary debated the recommendations (grouped by themes) from the national and European Citizens’ Panels and the input gathered from the Multilingual Digital Platform.

These recommendations had been presented by and discussed with citizens. At the seventh and last Plenary of the Conference on the Future of Europe, that closed a months-long process of intense deliberations, the proposals were put forward and formulated by the Conference Plenary to the Executive Board on a consensual basis.

On Europe Day (9 May 2022), the President of the European Parliament *Roberta Metsola*, French President *Emmanuel Macron* on behalf of the Council, and *Ursula von der Leyen*, President of the European Commission, received the final report on the outcome of the Conference from the Co-Chairs of the

Conference Executive Board [at a closing ceremony in Strasbourg](#),

In the area of “Values and rights, rule of law, security” the Plenary focused on topics such as upholding EU values, media independence, data protection and cybersecurity, and anti-discrimination.

► *Proposal: Upholding EU values across all EU countries*

The objective is to systematically uphold the rule of law across all EU Member States. The Plenary points out:

■ EU values must be fully upheld in all Member States. There is a need to ensure that the values and principles enshrined in the EU Treaties and in the EU Charter of Fundamental Rights are non-negotiable, irreversible and sine qua non conditions for EU membership and accession;

■ European values have to be made tangible for EU citizens. The Union citizenship should be strengthened through a European citizenship statute providing citizen-specific rights and freedoms, as well as a statute for European cross-border associations and non-profit organisations;

■ The EU Charter of Fundamental Rights should be made universally applicable and enforceable;

■ The scopes of the “Regulation on the Conditionality Mechanism” and other rule of law instruments need to be effectively applied and evaluated;

■ Educational and media programmes that make EU values part of migrants’ integration process and encourage interactions between migrants and EU citizens should be fostered.

In this context, the EP took several positions:

■ [Resolution of 19 May 2022](#) on the Commission’s 2021 Rule of Law Report;

■ [Resolution of 10 March 2022](#) on the rule of law and the consequences of the ECJ ruling (→[eucrim 1/2022, 23](#));

■ [Resolution of 16 January 2020](#) on ongoing hearings under Article 7(1) of the Treaty on European Union regarding Poland and Hungary.

► *Proposal on Data Protection*

The Plenary aims to guarantee a more protective and citizen-oriented data treatment policy. This objective will be achieved by:

- Fully implementing the existing data privacy legislation and reviewing it in order to evaluate, if necessary, the establishment of stronger enforcement mechanisms for entities processing personal data;
- Giving more effect to the principle of privacy by design and default, e.g. through easily understandable and user-friendly harmonised data processing consent forms;
- Evaluating and introducing clearer/more protective rules on the processing of minors' data;
- Licensing entities that process personal data shall at EU level. These entities should be subject to independent, external annual data protection audit in order to make sure that these entities do not violate data protection and the right to privacy.

Relevant EP positions:

- [Resolution of 7 October 2021](#) on the state of EU cyber defence capabilities
- [EP position on NIS 2 Directive](#) (→also [eucrim News](#) of 18 January 2022)

► *Proposal on Media, Fake News, Disinformation & Fact-Checking*

The Plenary aims to tackle disinformation by further promoting media independence and pluralism as well as media literacy by:

- Introducing legislation that addresses threats to media independence through EU-wide minimum standards;
- Preventing large media monopolies and ensuring media pluralism and independence from undue political, corporate and/or foreign interference by strictly enforcing EU competition rules in the media sector;
- Setting up an EU body in charge of addressing and tackling targeted disinformation and interference, increasing situational awareness and strengthening fact-checking organisations/independent media;

- Promoting citizens' media literacy and raising awareness about disinformation and unintentional dissemination of fake news;

■ Building on existing initiatives (such as the Code of Practice on Disinformation and the European Digital Media Observatory (EDMO)), to require online platforms to issue clear statements about the algorithms they use and the disinformation risks users are exposed to.

Relevant EP position:

- [Resolution of 11 November 2021](#) on strengthening democracy and media freedom and pluralism in the EU: the undue use of actions under civil and criminal law to silence journalists, NGOs and civil society

► *Proposal on Anti-Discrimination, Equality and Quality of Life*

The Plenary aims to take actions to harmonise living conditions across the EU and improve EU citizens' socio-economic quality of life by:

- Developing transparent quality of life indicators, including economic, social and rule of law criteria – in consultation with experts and social partners – in order to establish a clear and realistic timeline for raising social standards and achieving a common EU socio-economic structure;
- Increasing and facilitating direct public investment in education, health, housing, physical infrastructures, care for the elderly and people with disabilities;
- Encouraging taxing large corporations, fighting access to tax havens and eliminating their existence in the EU with a view to increasing public investment in priority areas such as education (scholarships, Erasmus) and research;
- Providing EU-wide criteria on anti-discrimination in the labour market and incentivizing the hiring by private companies of people that are usually most subject to discrimination;
- Ensuring the creation and facilitation of affordable kindergartens, both public and in the private sector, and free childcare for those in need of it.

Relevant EP position:

- [Resolution of 21 January 2021](#) with recommendations to the Commission on the right to disconnect

The European Parliament, the Council and the Commission will now examine how to effectively follow up on these proposals, each within their own spheres of competence and in accordance with the Treaties. A feedback event to update citizens will take place in autumn 2022. (AP)

EP Calls for Quick Start to Treaty Revision – EU Leaders Hesitant

On 9 June 2022, the European Parliament (EP) [adopted a resolution](#) calling on the European Council to set up a Convention to revise the EU Treaties as foreseen in Art. 48 TEU as part of the ordinary revision procedure. The resolution follows up on the final report of the Conference on the Future of Europe, which was submitted to European Parliament President *Roberta Metsola*, French President *Emmanuel Macron* on behalf of the Council Presidency, and European Commission President *Ursula von der Leyen* on 9 May 2022. The [final report](#) includes 49 proposals and over 320 measures, based on 178 recommendations from the European Citizen's Panels, input from the National Panels, ideas from the European Youth Events and contributions collected by digital platforms (see above).

The EP now pushes EU leaders to ensure that the citizens' expectations are met and the outcome of the Conference on the Future of Europe is put to good use. It will be up to the 27 Heads of State or Government at the European Council, however, to decide (by simple majority) on setting up the Convention for treaty revision.

In light of the ongoing and recent crises, MEPs called for the treaties to be changed and take into account the following points:

- The voting procedure in the Council should be reformed in order to enhance the EU's capacity to act. This would in-

clude the switch from unanimity to qualified majority voting in several areas, such as the adoption of sanctions and in the event of an emergency;

- The EU’s powers in areas of health and cross-border health threats, social and economic policies should be made more adaptable;
- Full implementation and incorporation of the European Pillar of Social Rights into the treaties should be ensured;
- The EU economy needs to be more resilient. A special focus should be put on small and medium-sized enterprises and on the promotion of investments focused on just, green and digital transitions;
- The European Parliament should be empowered with the right to initiate, amend and revoke legislation and have full co-decision rights on the EU budget;
- The procedure to protect the EU’s founding values needs to be strengthened and the determination and consequences of breaches of these values need to be clarified.

MEPs called on the European Council to swiftly adopt the next steps for the revision of the treaties, preferably at the EU summit on 23/24 June 2022. The [conclusions of the European Council meeting of 23/24 June 2022](#), however, merely mentioned that the European Council “took note” of the proposals set out in the final report of the Conference”, that “an effective follow-up to this report is to be ensured by the institutions, each within their own sphere of competences and in accordance with the Treaties”, and that the European Council “recalls the importance of ensuring that citizens are informed of the follow-up to the proposals made in the Report.”

The position of the European Commission is currently also not that clear. In her [speech at the closing event of the Conference](#) on the Future of Europe, President *Ursula von der Leyen* pointed out that “it is now up to us to take the most direct way [where citizens want this Europe to go], either by using the full limits of what we can do within the

Treaties, or, yes, by changing the Treaties if need be.” It is expected that she will further reflect on how to deal with the outcome of the Conference in her speech on the State of the Union in September 2022.

In a [Communication of 17 June 2022](#) entitled “Conference on the Future of Europe – Putting Vision into Concrete Action”, the Commission provided a first assessment of what is needed to follow up on the Conference proposals. The [annex](#) to this Communication divides the proposals into thematic areas and allocates the following four possible EU responses to them: (1) existing initiatives that address the proposals (e.g. the European Climate Law); (2) those already proposed by the Commission where the European Parliament and the Council are called upon to adopt (e.g. the New Pact on Migration); (3) planned actions which will deliver on the ideas, building in new reflections from the Conference (e.g. the Media Freedom Act); and (4) new initiatives or areas of work inspired by the proposals, falling within the remit of the Commission (e.g. issues related to mental health).

The Fondation Robert Schuman provided a good summary on the complex implementation of the ambitious ideas of the Conference on the Future of Europe ([European Issue n° 636](#)). (AP)

Area of Freedom, Security and Justice

Tenth EU Justice Scoreboard Shows Need to Restore Trust of the Public in the Judicial Systems

spot light On 19 May 2022, the Commission published the [tenth 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. It serves as one of the EU’s main tools to improve the effectiveness of the national judicial systems

of the 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. For the Scoreboards of previous years, see [eucrim 3/2021, 138](#); [eucrim 2/2020, 74](#); [1/2019, p. 7](#); [eucrim 2/2018, pp. 80–81](#); and [eucrim 2/2017, p. 56](#)).

The tenth edition of the Scoreboard includes 14 new or remodelled figures. In comparison to previous figures, it includes, for the first time, data on the effects of the COVID-19 pandemic on the efficiency of justice systems, the accessibility to justice for persons with disabilities, and the effectiveness of investment protection by the laws and courts.

In general, the 2022 Scoreboard presents a diverse picture of the effectiveness of justice systems in the Member States, in particular as regards digitalisation. While the high level of digitalisation in some Member States allowed for an almost unobstructed functioning of the courts and prosecution services during the COVID-19 pandemic, in others the temporary closures of courts led to a decrease in efficiency, particularly at first instance courts. Furthermore, challenges remain to ensure full trust of citizens in the legal systems of all Member States. The [key findings](#) can be summarised as follows:

► *Efficiency:*

- Looking at the data since 2012, the trends for civil, commercial and administrative cases are generally positive;
- The length of first instance court proceedings continued to decrease or remained stable;
- In several Member States identified as facing challenges with the length of proceedings in first instance courts, higher instance courts perform in a more efficient manner;

■ In the specific area of money laundering, in more than half of Member States, first instance court proceedings take up to a year on average, whereas they take around 2 years on average in several other Member States.

➤ *Quality:*

■ Compared to 2020, legal aid has become more accessible in around a third of Member States – especially partial legal aid – and more restricted in two Member States. This contrasts with the previous trend of legal aid becoming less accessible in some Member States;

■ Alternative dispute resolution remains lower in administrative cases than in civil, commercial or labour cases;

■ Regarding access to justice by persons with disabilities, all Member States have at least some arrangements in place (such as procedural accommodations), but only half of Member States offer also specific formats, such as Braille or sign language upon request. In addition, just over half of Member States offer digital solutions for disabled persons;

■ Regarding access to justice and its impact on investor confidence, almost all Member States have measures in place for companies to receive financial compensation for losses caused by administrative decisions or inaction, and courts may suspend the enforcement of administrative decisions upon request;

■ Although most Member States already use digital solutions in different contexts and to varying degrees, there is significant room for improvement in the digitalisation of justice. This concerns, inter alia, online information about Member States' judicial systems, digital-ready procedural rules, use of digital technology by courts and prosecution services, and secure electronic tools for communication.

➤ *Independence*

■ Based on a [Eurobarometer survey](#), the perception of independence of the national justice systems in the EU among the general public has improved in half of the Member States facing specific challenges when compared to 2016.

However, the general public's perception of independence decreased in more than half of all Member States and in more than half of the Member States facing specific challenges. In addition, the level of perceived independence remains particularly low in few Member States;

■ Another [Eurobarometer survey among companies](#) showed that independence has improved in over half of the Member States compared to 2016.

Compared to 2020, the companies' perception of independence decreased in less than one third of all Member States (whereas last year this was the case in over half of Member States) and in about one fifth of Member States facing specific challenges. In a few Member States, the level of perceived independence remains particularly low;

■ Among the reasons for the perceived lack of independence of courts and judges, the interference or pressure from government and politicians was the most stated reason;

■ Companies believed that administrative conduct, stability and quality of the law-making process, as well as effectiveness of courts and property protection are key factors for confidence in investment protection;

■ The unpredictable, non-transparent administrative conduct, and difficulty to challenge administrative decisions in court was the most stated reason by companies regarding the effectiveness of investment protection;

■ Regarding a more refined overview of the safeguards in place against a prosecutor's decision not to prosecute a case if the case deals with victimless crimes (e.g. money laundering) or crimes with a victim, the 2022 Scoreboard showed that there is, in both cases, the possibility to challenge the decision not to prosecute before a court in some Member States; however, in the majority of Member States there is either a review by a superior prosecutor, by a court or by both. In a few Member States there is no possibility to review a decision not to prosecute.

As outlined above the EU Justice Scoreboard has several links to other EU assessment actions. The findings will feed into the Commission's 2022 Rule of Law Report ([→eucrim 3/2021, 134–135](#)). They are also used for the monitoring of the National Recovery and Resilience Plans, in which the Member States outlined investment and reform measures to be funded through the [Recovery and Resilience Facility](#). (TW) ■

Schengen

Legislation on Information Alerts in SIS Passed

On 6 July 2022, the European Parliament and the Council passed new legislation that establishes the category of “information alerts” for entries into the Schengen Information System (SIS). The respective [Regulation \(EU\) 2022/1190](#) amending Regulation (EU) 2018/1862 was published in the Official Journal L 185 of 12 July 2022, p. 1.

“Information alerts” target third country nationals who are suspected to be involved in terrorist offences or other serious crime (listed in Annex I of the Europol Regulation 2016/794). The aim is to monitor their movement, and to make all information on the suspect directly and in real time available to front-line officers in Member States. Since the information on third country nationals is frequently provided by third countries or international organisations only to Europol, Europol will play a crucial role in the process of entering information alerts into the SIS.

According to the Regulation, Europol will propose to Member States to enter information alerts into the SIS in the following situations:

■ Where there is a factual indication that a person intends to commit or is committing any of the mentioned offences;

■ Where an overall assessment of a person, in particular on the basis of past criminal offences, gives reason to be-

lieve that that person may commit an offence mentioned above.

In addition, Europol must establish that the information alert is necessary and justified, i.e. Europol must be sure that the information received is reliable and accurate and that no other alert on the person concerned in the SIS already exists.

Other obligations for Europol include:

- Sharing all of the information that it holds on the case and the assessment of the person concerned;
- Informing Member States without delay if Europol has relevant additional or modified data in relation to its proposal to enter an information alert into SIS or evidence suggesting that data included in its proposal are factually incorrect or have been unlawfully stored
- Transmitting information to the issuing Member State “as soon as possible” if Europol has evidence suggesting that data entered into SIS as information alert are factually incorrect or have been unlawfully stored (e.g. if third countries provide the information for politically motivated reasons).

Member States must also meet several obligations, such as:

- Issuing Member States must inform other Member States and Europol if – after an own verification of the information received – the information alert is entered into the SIS. To this end, Member States must put in place a periodic reporting mechanism;
- Executing Member States must collect and communicate certain information about the third country national to the issuing Member State in the event of a hit;
- Member States must inform Europol about any hit on information alerts or the location of the suspect who is subject to an information alert on the territory of the issuing State;
- The issuing Member State must review the need to maintain the information alert after the retention of one year. Following a thorough individual assessment, the information alert can be kept longer than the review period.

Europol and the Member States now need to adopt the technical and procedural arrangements to implement the Regulation. The Commission will then set the date when Member States can start entering, updating and deleting information alerts in the SIS. Europol’s new role in the SIS comes shortly after Regulation 2022/991 set up the new mandate of Europol. It entered into force on 28 June 2022 (→below pp. 98–100). (TW)

New Legal Framework for Schengen Evaluation

On 15 June 2022, Council Regulation (EU) 2022/922 of 9 June 2022 on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen *acquis*, and repealing Regulation (EU) No 1053/2013 was [published in the Official Journal \(L 160,1\)](#).

The Regulation establishes an evaluation and monitoring mechanisms for the purpose of ensuring that participating Member States apply the *Schengen acquis* effectively, efficiently and correctly. It replaces the former specific mechanism as laid down in the 2013 Regulation. The new legal framework reacts to shortcomings which were identified in several assessments of the Schengen evaluation since November 2020 (→[eucrim 2/2021, 76](#)). Enhancements include, *inter alia*:

- Establishment of multiannual evaluation programmes covering a period of seven years in order to identify, where relevant, specific priority areas to be covered by the periodic evaluations;
- Better targeted unannounced and thematic evaluations;
- Evaluation of activities of EU agencies and private parties which perform functions under the Schengen legislation;
- Streamlined evaluation procedures and fast-track mechanism to identify/respond to serious deficiencies;
- Strengthened cooperation with national experts and EU agencies (in particular Frontex and Europol) in evaluation and monitoring activities;

- Enhanced political role of the Council, having, *inter alia*, the possibility to adopt recommendations in cases of serious deficiencies, for first-time evaluations and thematic evaluations, and where the evaluated member state substantially contests the report.

The European Parliament was consulted in the legislative procedure and adopted its resolution on 7 April 2022. The draft Act was formally endorsed by the Council on 9 June 2022. (TW)

State of Schengen Report 2022

On 24 May 2022, the Commission presented the [first State of Schengen Report](#), which assesses the management of internal and external borders by Schengen countries. The report also includes a new proposal on how Schengen countries can improve the management of their external borders – the [European Integrated Border Management](#).

The Schengen area as an area that depends on mutual trust among Member States requires a strong and structured governance. As a result, the Commission established in November 2020 the annual Schengen Forum as the first step towards fostering an inclusive political debate dedicated to building a stronger Schengen area; the Commission also developed a new governance model in the form of a “Schengen cycle” ensuring a regular “health-check” on the state of Schengen.

On the one hand, the annual State of Schengen Report serves to identify current challenges with a view to recommend priority actions for the way forward and, on the other hand, it is a starting point for the Schengen cycle representing the basis for discussions of MEPs and Home Affairs Ministers at the Schengen Forum that convened on 2 June 2022, and in the Schengen Council that took place on 3 June 2022.

The Schengen Report highlighted the following main priority actions for the Schengen area:

- Strengthening the management of the external borders;

- Ensuring that internal border controls are measures of last resort maintained for a limited period and accompanied by mitigating measures, where necessary;
- Establishing internal security through reinforced police cooperation within the EU.

In order to achieve these objectives, swift implementation of some priority actions should be addressed both at EU and national level, such as ensuring orderly checks at external borders for all travelers, making full use of available IT architecture and cross-border cooperation tools, and lifting all long-lasting internal border controls.

The report observed that the Schengen area is in excellent shape as more than 90% of the Schengen acquis is implemented in a compliant manner. The Commission again calls on the Council to take the necessary steps to consolidate the Schengen area by adopting the decision for enabling Bulgaria, Croatia, and Romania to become formally part of it.

The report stressed that given the enhanced mandate and significantly reinforced resources, Frontex should ensure its full accountability towards the EU institutions. The Commission will also launch a dialogue with the European Parliament and the Council in relation to the governance of the Agency. Given that the report is to mark the beginning of a new Schengen cycle, the Commission is calling for a stronger cooperation between the Commission, national governments, Frontex and others in the maintaining and monitoring of the Schengen area in this new cycle.

In addition to the State of Schengen Report, the Commission published two documents on external borders checks on 24 May 2022:

- A [report on systematic border checks](#) at the EU external borders, which have been reinforced by Regulation 2017/458;
- A [Policy Document](#), the Commission is starting a consultation of the European Parliament and of the Council, that aims to achieve a common understand-

ing between the European Parliament, the Council and the Commission with a view to adopt the Multi-annual Strategic Policy for European Integrated Border Management by the end of 2022. (AP)

Third Schengen Forum

The [third Schengen Forum](#) convened on 2 June 2022, following the publication of the New State of Schengen Report 2022 (→news item at p. 88). The Commission, Members of the European Parliament, Home Affairs Ministers, and other stakeholders, such as EU agencies and non-governmental organisations, discussed the state of the Schengen area and the new priorities for 2022–2023 on the basis of the report. Discussions in the Forum focused on:

- The management of EU's external borders and the means to strengthen the European integrated border management;
- The need for internal border controls to remain an exceptional measure of last resort in light of recent CJEU rulings;
- The reinforcement of police cooperation in order to ensure internal security. (AP)

CJEU Rules on Reintroduction of Internal Border Checks for Longer than Six Months

The CJEU, sitting in for the Grand Chamber, rendered a [judgement](#) on 26 April 2022 regarding the temporary reintroduction of internal borders because of serious threats to public policy/internal security, including a time limit for the reintroduction. The judges only partially followed the [opinion](#) of Advocate General (AG) Saugmandsgaard Øe (→[eucrim 3/2021, 139–140](#)).

► *Background of the case:*

In the wake of the migration crisis, Austria reintroduced controls at the borders it shares with Hungary and Slovenia. They were reintroduced several times from the middle of September 2015 on for successive six-month periods each. *NW* was ordered to pay a fine of €36 in Austria for having crossed

the Slovenian-Austrian border in August 2019 without being in possession of a valid travel document. He was controlled again when he attempted to enter Austria by car from Slovenia in November 2019. The defendant challenged these two controls as well as the imposed fine before the Landesverwaltungsgericht Steiermark (Regional Administrative Court, Styria, Austria). The referring court questioned whether the checks to which *NW* was subject and the penalty that was imposed upon him were compatible with EU law.

► *Decision of the CJEU:*

The CJEU first stressed that the Schengen Borders Code permits a Member State to reintroduce border controls temporarily at its borders with other Member States if there is a serious threat to its public policy or internal security. However, such a measure cannot exceed a maximum total duration of six months. A Member State can only reintroduce such measures afresh, immediately after the six-month period has ended, if it is faced with a new serious threat affecting its public policy or internal security. The new threat must be distinct from the threat initially identified, as the EU legislature considered a period of six months to be sufficient for the Member State to adopt measures disabling such a threat. This marks a clear difference to the AG's Opinion, who stated that the Member States' powers and responsibilities in the area of public policy and internal security could not be framed by absolute periods.

In the present case, the CJEU concluded that Austria did not demonstrate the existence of a new threat, with the result that the two border control measures to which *NW* had been subjected were incompatible with the Schengen Borders Code. In accordance with the AG, the CJEU also stated that a person cannot be obliged, on pain of a penalty, to present a passport or identity card upon entry from another Member State if the reintroduction of border controls is contrary to the Schengen Borders Code. (AP)

ECA: Internal Border Control during Pandemic Largely Unjustified

In its [Special Report 13/2022](#) (published on 13 June 2022), the European Court of Auditors (ECA) assessed whether the Commission had taken effective action to protect the right of free movement of persons during the COVID-19 pandemic. It came to the overall conclusion that the Commission has not scrutinised enough the challenges that the COVID-19 pandemic posed to the right of free movement of people. The main reason for this are limitations of the legal framework, which hampered the Commission to exercise its supervisory role.

However, the Commission did also not exercise proper scrutiny to ensure that internal border controls complied with the Schengen legislation. The auditors reviewed all 150 Member State notifications of internal border controls that were submitted to the European Commission between March 2020 and June 2021, of which 135 related exclusively to COVID-19. None provided sufficient evidence that the controls were a measure of last resort, proportionate and of limited duration.

The report acknowledged that the Commission launched important initiatives to coordinate measures affecting freedom of movement, but Member States' responses had been uncoordinated and often inconsistent with guidance by the EU institutions. (TW)

AG Opinion on SIS II Alerts for No Longer Relevant Objects

In his [opinion](#) delivered on 7 July 2022, Advocate General (AG) *Emiliou* clarified the obligations placed upon the competent authorities of the Member States in circumstances where an alert has been entered in the second generation Schengen Information System (SIS II) for the seizure of an object or its use as evidence in criminal proceedings, when that alert is no longer considered relevant.

The SIS II aims at preserving security and border management within the

Schengen area in the absence of internal border controls by allowing the competent national authorities, e.g., police forces and border guards, to upload specific information into the SIS II, and exchange supplementary information so that specific action could be carried out. The SIS II also allows to enter and consult alerts on persons or objects (e.g., banknotes, firearms and stolen, misappropriated or lost vehicles).

The case at issue ([Case C88/21](#), *Regionų apygardos administracinio teismo Kauno rūmai*) deals with an alert on an alleged stolen car, whose entry into the SIS II has not been lifted by Bulgarian authorities even though the Prosecutor's Office in Lithuania closed investigations and concluded that no criminal offence had been committed. The new owner of the car had attempted in vain to let register the car. The Bulgarian authorities did not take any action to remove the alert from the SIS II. The CJEU is asked to interpret Art. 39 of [Council Decision 2007/533/JHA](#) on the establishment, operation and use of the second generation Schengen Information System (SIS II). This provisions regulates the execution of the action based on an alert for objects.

The *Lietuvos vyriausybės administracinis teismas* (Supreme Administrative Court of Lithuania) is particularly asking whether Art. 39, on the one hand, *requires* the Member States to prohibit the registration of a vehicle, for which an alert has been entered into the SIS II, and, on the other hand, *precludes* derogations to such a prohibition in circumstances where the alert is considered no longer to be relevant.

The AG first stated that neither Art. 39 of Decision 2007/533 nor Section 2.2.2 of Appendix 2 to the Sirene Manual refer expressly to an obligation of the Member States to prohibit the registration of a vehicle for which an alert has been entered into the SIS II. Nor can such an obligation be read as being impliedly provided for in those provisions. Accordingly, there is also no textual element in Art.

39 which would suggest such an obligation. While Art. 39 does not *require* the Member States to prohibit the registration of a vehicle for which an alert has been entered into the SIS II, the AG recognised that there is nothing in Decision 2007/533 which *precludes* the Member States from introducing a rule to that effect, as long as such a rule is compatible with the other rules and principles flowing from EU law more broadly, including the Charter of Fundamental Rights of the European Union.

As to the question if EU law *precludes* a national rule prohibiting the registration of an object, such as a vehicle, for which an alert has been entered into the SIS II, where the alert is considered to be no longer relevant, the AG agreed that such a national rule may give rise to a number of concerns vis-à-vis the right to property enshrined in Art. 17 of the Charter. According to this guarantee, everyone has the right to own, use, and dispose of his or her lawfully acquired possessions. In the AG's opinion a national rule which lays down an absolute and indefinite prohibition on the registration of a vehicle goes beyond what is necessary and constitutes a disproportionate interference with the right to property in Art. 17 of the Charter in circumstances where an alert entered into the SIS II is objectively no longer relevant even though the alert remains on the system. (AP)

Legislation

Justice and Home Affairs Ministers Agree Approaches on Several Legislative Dossiers

At their [meeting on 9/10 June 2022](#), the Justice and Home Affairs Ministers of the EU Member States agreed on their positions on several legislative proposals that are in the pipeline in the area of freedom, security and justice. In detail, the agreements concern:

- Partial general approach on the draft environmental crime directive ([→eucrim 4/2021, 219](#));

- General approach on the draft regulation on digital information exchange in terrorism cases ([→eucrim 4/2021, 204–205](#));
- General approach on the draft regulation establishing a collaboration platform for joint investigation teams ([→eucrim 4/2021, 205](#));
- General approach on the reform of the Schengen borders code ([→eucrim 4/2021, 203](#));
- General approach on a directive on information exchange between law enforcement authorities ([→eucrim 4/2021, 225](#));
- General approach on a regulation on automated data exchange for police cooperation – “Prüm II” ([→eucrim 4/2021, 225](#));

The Ministers were also informed of the state of play of other [current legislative proposals](#). (TW)

The Strengthened Code of Practice on Disinformation

Following the Commission’s Guidance, major online platforms, emerging and specialised platforms, players in the advertising industry, fact-checkers, research and civil society organisations committed themselves to a strengthened Code of Practice on Disinformation. On 16 June 2022, the [strengthened Code of Practice on Disinformation](#) has been signed and presented by 34 signatories who have joined the revision process of the 2018 Code.

The strengthened Code of Practice contains 44 commitments and 128 specific measures, covering the areas pointed out by the Commission’s Guidance, e.g.:

- Caring for demonetisation and cutting financial incentives for purveyors of disinformation;
- Ensuring transparency of political advertising;
- Ensuring the integrity of services, for instance by reducing fake accounts, bot-driven amplification, impersonation, malicious deep fakes;
- Empowering users with enhanced tools to recognise, understand and flag disinformation;

- Empowering researchers;
- Empowering the fact-checking community;
- Putting in place a Transparency Centre and Task-force;
- Establishing a strengthened monitoring framework.

Signatories will have six months to implement the commitments and measures to which they have signed up.

Background: On 26 May 2021, the Commission published a [Communication](#) entitled “Guidance on Strengthening the Code of Practice on Disinformation” ([→eucrim 2/2021, 78–79](#)). The aim of the Guidance is to make the 2018 Code of Practice on Disinformation a more effective tool for countering disinformation. As a result, the Commission intends to address the shortcomings of the Code of Practice revealed by the [Commission’s Assessment of the Code of Practice in 2020](#) and to take into account the Commission’s [proposal for the Digital Services Act \(DSA\)](#). The revised Code will also include the new insights that have been gathered under [the “fighting COVID-19 disinformation monitoring programme”](#). The Commission’s Guidance reinforces the Code by several measures. (AP)

Controversial Proposal on Combating Child Sexual Abuse Online

On 11 May 2022, the Commission presented its [proposal to prevent and combat child sexual abuse online](#) (COM(2022) 209 final). The Commission pointed out that the EU is still failing to protect children from falling victim to child sexual abuse, while the online dimension represents a particular challenge. The circulation of images and videos of sexual abuse of children has dramatically increased with the development of the digital world.

Building on the [Directive on Child Sexual Abuse](#) (Directive 2011/93/EU), the [2020 EU strategy](#) for a more effective fight against child sexual abuse and Member States’ rules to fight against online child sexual abuse the proposed

regulation aims to set out targeted measures that are proportionate to the risk of misuse of a given service for online child sexual abuse and are subject to robust conditions and safeguards. The new Regulation will complement the Child Sexual Abuse Directive and repeal [Regulation 2021/1232](#), which provides for a temporary solution in respect of the use of technologies by certain providers for the purpose of combating online child sexual abuse.

It is submitted that the current system based on voluntary detection and reporting by companies has proven insufficient to adequately protect children and, in any case, will no longer be possible once the interim solution currently in place expires. The proposal consists of two building blocks:

- Imposition of obligations for online service providers to detect, report, remove, and block child sexual abuse material on their services.
- Establishment of an EU Centre on child sexual abuse (“the EU Centre”) as a decentralised agency to enable the implementation of the new Regulation and support removal of obstacles to the internal market.

The EU Centre will support national law enforcement and Europol by reviewing the reports from the providers to ensure that they are not submitted in error. It will channel reports quickly to law enforcement and support Member States by serving as a knowledge hub for best practices on the prevention of child sexual abuse and assistance to victims. It will also make detection technologies available to providers free of charge so that detection orders addressed to providers can be executed. The main elements of the planned regulation include:

- Mandatory risk assessment and risk mitigation measures: Providers will have to assess the risk that their services are misused to disseminate child sexual abuse material or for purposes to solicit children, known as grooming; providers must also take reasonable mitigation measures tailored to the risk identified;

- Strong safeguards on detection: Companies having received a detection order will only be able to detect content using indicators of child sexual abuse verified and provided by the EU Centre. Detection technologies must only be used for the purpose of detecting child sexual abuse. Providers will have to deploy technologies that are the least privacy-intrusive in accordance with the state of the art in the industry, and that limit the error rate of false positives to the maximum extent possible;

- Reporting obligations: Providers that have detected online child sexual abuse will have to report it to the EU Centre;

- Effective removal: National authorities can issue removal orders if the child sexual abuse material is not swiftly taken down. Internet access providers will also be required to disable access to images and videos that cannot be taken down;

- Oversight mechanisms and judicial redress: Detection orders will be issued by courts or independent national authorities. To minimise the risk of erroneous detection and reporting, the EU Centre will verify reports of potential online child sexual abuse made by providers before sharing them with law enforcement authorities and Europol. Both providers and users will have the right to challenge any measure affecting them in court.

The proposal and the measures have been widely [criticized](#) for attacking the right on privacy. Especially criticised is the imposition of obligations for online service providers to detect, report, remove, and block child sexual abuse material on their services as this would also affect publicly available interpersonal communications services, such as messaging services and web-based e-mail services, as well as direct interpersonal and interactive exchange of information, such as chats and gaming, image-sharing and video-hosting services that will be obliged to search for and report child sexual abuse material. Critics see in this a risk for the creation of a massive new surveillance system and therefore an attack on privacy. (AP)

European Data Protectors Call for Additional Safeguards in Data Act

On 5 May 2022, the European Data Protection Supervisor (EDPS) and the European Data Protection Board (EDPB) published their [Joint Opinion](#) on the planned Data Act. The Proposal for a Regulation of the European Parliament and of the Council on harmonised rules on fair access to and use of data (“Data Act”) was presented on 23 February 2022 by the Commission. The Data Act is designed to provide a legal framework on who can use and access data generated in the EU across all economic sectors. It aims to ensure fairness in the digital environment, stimulate a competitive data market, open opportunities for data-driven innovation and make data more accessible for all. It is one of the major outcomes of the Commission’s European Data Strategy of 2020 ([→eucrim 1/2020, 24](#)).

The EDPB and EDPS acknowledged the aim of the proposal to unleash the potential of information to be extracted from data in order to gain valuable knowledge for important common values and for health, science, research and climate action. They also welcomed the importance of providing a more effective right to data portability. However, the enhanced right to portability would extend to a broad range of products and services that may reveal highly sensitive data of individuals, including vulnerable categories of data subjects. Therefore, additional safeguards are needed to avoid lowering the protection of the fundamental rights to privacy and to the protection of personal data in practice. Such additional safeguards include:

- The rights to access, use and share data: The EDPS/EDPB called on the co-legislators to explicitly specify that data protection law “prevails” over the provisions of the proposal if conflicts occur in the processing of personal data. In order to promote data minimisation, products should be designed in such a way that data subjects are offered the possibility to use devices anonymously or in the least privacy intrusive way as possible,

irrespective of their legal title on the device. Clear limitations or restrictions on the use of personal data generated by the use of a product or service by any entity other than data subjects should also be included.

- The obligation to make data available in case of “exceptional need”: The EDPS/EDPB voiced deep concerns over the lawfulness, necessity and proportionality of the obligation to make data available to public sector bodies and Union institutions, agencies or bodies in case of “exceptional need”.

- Implementation and enforcement: The EDPS/EDPB highlighted the risk of operational difficulties that might result from the designation of more than one competent authority responsible for the application and enforcement of the proposed legislation. They called on the co-legislators to also designate national data protection supervisory authorities as coordinating competent authorities in the Data Act. (AP)

MEPs Warn against Mass Surveillance through AI

On 3 May 2022, the European Parliament adopted a [resolution on artificial intelligence in a digital age](#). The resolution endorsed the final recommendations prepared by the EP’s Special Committee on Artificial Intelligence in a Digital Age (AIDA). The AIDA Committee started its work in September 2020 and was tasked with exploring the impact of artificial intelligence (AI) on the EU economy and its different sectors ([→eucrim, news of 26 April 2022](#))

MEPs stressed that the EU needs to act as a global standard-setter in AI to hinder that standards in the use of AI will be developed elsewhere, often by non-democratic actors. MEPs believed, however, that the EU should not always regulate AI as a technology. The level of regulatory intervention should be proportionate to the type of risk associated with the particular use of an AI system.

Recognising the enormous potential of technology in different areas (e.g. health,

environment and climate change), MEPs acknowledged that AI technologies could pose important ethical and legal questions; they voiced concerns over military research and technological developments being pursued in some countries with regard to lethal autonomous weapons systems without meaningful human control. The resolution also stressed that AI technologies might pave the way for potential mass surveillance and other unlawful interference into fundamental rights by authoritarian regimes (for example by ranking their citizens or restricting freedom of movement) or by dominant tech platforms that use AI to obtain more personal information. The use of AI technology that controls, surveils, monitors, or spies on citizens, especially within the field of law enforcement, border control and the judiciary, is not in line with EU values. For MEPs, such profiling poses risks to democratic systems.

Accordingly, it is necessary for the EU to prioritize international cooperation with like-minded partners in order to safeguard fundamental rights and, at the same time, cooperate on minimizing new technological threats.

The resolution concludes that the EU is currently still far from fulfilling its aspiration of becoming competitive in AI on a global level. This is why an EU Roadmap for AI to 2030 should be swiftly adopted. The resolution outlines this Roadmap calling for the development of a favourable regulatory environment common to Member States, clear standards setting, sharing of data and stronger digital infrastructure. (AP)

Institutions

Council

Programme of the Czech Council Presidency

On 1 July 2022, the Czech Republic took over the Presidency of the Council of the European Union for the next six

months. It is the second country in the cycle of trio presidencies composed of France, the Czech Republic and Sweden (→[eucrim 4/2021, 207](#)).

Under the title “Europe as a Task – Rethink, Rebuild, Repower”, the [programme](#) of the Czech Council Presidency is guided by five priorities:

- Refugee crisis and post-war reconstruction of Ukraine;
- Energy security;
- Strengthening European defence capabilities and cybersecurity;
- Strategic resilience of the European economy;
- Resilience of democratic institutions.

In the area of justice, the programme pursues, amongst others, the following objectives:

- Working on the EU’s common approach to judicial cooperation and other aspects of criminal matters in response to the Russia’s aggression against Ukraine, including the investigation of possible war crimes and crimes against humanity and the freezing, seizure, and possible further disposition of assets of persons on the EU sanctions list;
- Taking steps towards the formal adoption of the proposal for a Council Decision on the extension of the list of “euro crimes” referred to in Art. 83(1) TFEU to include violations of EU restrictive measures (→[news item supra](#), pp. 75/76).
- Continuing trilogues with the European Parliament and Commission on the proposals for a Regulation amending the Eurojust Regulation, for the Council Decision on the exchange of information and cooperation concerning terrorist offences, and for a Regulation establishing a collaboration platform to support Joint Investigation Teams;
- Discussing the proposal for a Directive on asset recovery and confiscation;
- Proceeding with the revision of the Directive on the protection of the environment through criminal law;
- Continuing negotiations on the e-evidence package;
- Progressing negotiations on the EU’s

accession to the European Convention on Human Rights (ECHR);

- Making progress with negotiations on setting up a horizontal Regulation on the digitisation of cross-border judicial cooperation in civil and criminal matters.

In the area of home affairs, the Czech Presidency has the following issues on its agenda:

- Reflecting on the security and migration implications of the Russian aggression against Ukraine;
- Furthering the proper and secure functioning of the Schengen area, for instance by convening the Schengen Council, ensuring the operationalisation of the modernised Schengen Information System, and addressing the issue of the enlargement of the Schengen area to include Croatia, Bulgaria, and Romania;
- Proceeding with the proposals under the European Police Cooperation Code;
- Revising the Regulation on the European Monitoring Centre for Drugs and Drug Addiction;
- Continuing the discussion on the new legislative proposal to combat child sexual abuse.

In addition, political initiatives will be further discussed and supported, such as the implementation of the EU Strategy for the fight against organised crime for the period 2021–2025, the EU Strategy on combating trafficking in human beings 2021–2025, and the EU Counter-Terrorism Agenda. (CR)

Results of the French Council Presidency

On 30 June 2022, the [French Presidency](#) of the Council of the European Union, which was carried out during the last six months (→[news of 20 January 2022](#)), came to an end. The Presidency was marked by the efforts to provide a united and firm EU response to Russia’s aggression against Ukraine. Results in the area of justice and home affairs included:

- The introduction of the Schengen Council to improve the political governance of the Schengen area;

- The progress on the proposal to add hate speech and hate crimes to the list of “euro crimes”;
- The amendments to the mandate of Eurojust to address alleged core international crimes by collecting, preserving and sharing evidence (→news item supra, pp. 79).

Noteworthy is in addition that under the French Presidency the Digital Services Act and the Digital Markets Act could be adopted. This new EU legislation limits the distribution of illegal content and products online and restricts the economic domination of large digital platforms respectively.

In sum, 130 legal texts were adopted and more than 2000 meetings between European leaders took place. Under the French Council Presidency, also the Conference on the Future of Europe concluded the debate on the way forward of the Union in the next decades. The Conference agreed on recommendations which were submitted to the EU institutions and Member States for further discussion (→news item supra, p. 84). (CR)

OLAF

OLAF Activity Report 2021: Record Sum Recommended for Recovery

spot light In 2021, OLAF recommended the recovery of over €527 million to the EU budget – around €234 million more than in 2020 and over € million more than in 2019. The year 2021 continued to be marked by fraud schemes in connection with the COVID-19 pandemic as well as prevention work by OLAF staff, in particular as regards the Recovery and Resilience Facility with a future investment volume of over € 720 billion. Other key issues in the 2021 OLAF activity report, which was published on 8 June 2022, are new fraud trends detected in 2021 in a number of areas and OLAF’s contribution to ensure the EU’s green transition. The key figures regarding OLAF’s perfor-

mance in 2021 are as follows (for activity reports of previous years, (→[eucrim 2/2021, 80–81](#); →[eucrim 3/2020, 167](#) and →[eucrim 3/2019, 163](#))):

- OLAF concluded 212 investigations and issued 294 recommendations to the relevant national and EU authorities;
 - OLAF opened 234 new investigations, following 1,100 communications received and analysed by OLAF experts.
- Anti-fraud investigations mainly revealed four new trends in 2021:
- Establishment of more sophisticated and adaptable means to profit from the pandemic;
 - Organised crime groups increasingly seeking EU money from grants and loans through e.g. double funding or manipulation of tenders;
 - New scams in relation to green and digitalization projects, which are the main priorities of the EU budget in the years to come;
 - Adaptation of fraud schemes in order to make the detection of revenue fraud more difficult, e.g. by breaking up shipments of goods into smaller consignments, establishing shell companies in many jurisdictions, making underevaluations, etc.

The report stressed that fraud investigations involving COVID-19-related products and productions in relation to the green transition (including waste management) showed that human health and safety as well as the environment are increasingly likely to suffer collateral damage caused by ruthless fraud schemes which solely pursue the making of illicit profits.

The focus chapter of the 2021 report deals with OLAF’s role in preventing environmental damage and protecting the EU’s green recovery. On the basis of various investigated cases, the report gives an overview of OLAF’s support to prevent the arrival and entry into the EU of dangerous products that irreparably harm the environment. The interest of fraudsters in green projects is also shown which helps anticipate potential future fraud patterns. An example is traf-

ficking of waste where fraudsters take advantage of the gap between waste production and recovery capacities. According to the report, it is estimated that up to 30% of all waste shipments may be illicit, which is thought to be worth €9.5 billion annually for criminals.

Another key event in 2021 was the operational start of the EPPO (→[eucrim 2/2021, 82–83](#) and [eucrim special issue no. 1/2021](#)). The new layer to the protection of the EU’s financial interests also changed OLAF’s work. The EPPO opened 85 cases (with an estimated total damage to the EU budgets of around € 2.2 billion) as a result of OLAF’s reporting. In 2021, OLAF investigators and forensic analysts provided substantial support to EPPO investigations, most notably by participating in witness interviews as experts and providing detailed analysis of customs matters. The cooperation with the EPPO resulted in 26 complementary investigations that yielded some important results (for the cooperation agreement between the EPPO and OLAF →[eucrim 2/2021, 80](#) and the contribution by *N. Kolloczek* and *J. Echanove Gonzalez de Anleo*, [eucrim 3/2021, 187–190](#)).

When presenting the report, OLAF Director-General *Ville Itälä* stressed that “Prevention is the most effective tool that we have, and it is at the heart of the work of OLAF and the EU institutions.” He referred in this context to a case in which OLAF’s investigations succeeded in the stop of a potential misuse of €330 million. In addition, a dedicated task force was involved in the screening of the national plans for the Recovery and Resilience Facility. OLAF experts advised the European Commission on adequate measures of fraud prevention in the national plans which had to be approved for all 27 EU Member States. (TW) ■

OLAF and Belgian FIU Updated Cooperation Arrangement

On 23 March 2022, OLAF Director-General *Ville Itälä* and President of

the Belgian Financial Intelligence Unit (FIU) *Philippe de Koster* signed an [update of their cooperation arrangement](#) which was concluded in 2005. The new text takes into account developments in the legislative and operational frameworks in Belgium and in the EU; it reaffirms the cooperation between OLAF and the Belgian FIU, which is called Cellule de Traitement des Informations Financières/Cel voor financiële informatieverwerking (CTIF-CFI).

The arrangement allows OLAF and CTIF-CFI to collect, analyse and exchange intelligence that can support each other's work. Both offices cooperate if they gather information on suspicious financial transactions that could involve money laundering (or related criminal activities) and which affect the EU's financial interests. (TW)

Operation Dismantles Criminal Organisation Trading Illicit Refrigerant Gases

One of OLAF's operational priorities is the fight against the illegal trade in refrigerant gases (also called F-gases or hydrofluorocarbons (HFCs)), which are heavily regulated in the EU due to their major potential impact on the environment ([→eucrim 3/2021, 143–144](#)). On 30 June 2022, OLAF and the Guardia Civil informed the public about the [successful dismantlement](#) of a Spanish-based criminal network involved in the illicit trade of the gases. The network used false documents in order to import the gases from China to Spain and then illegally sold them in domestic black markets. The profits from this illicit trade were afterwards laundered and spent on luxury items, such as luxury cars and real estate.

OLAF supported the operation (dubbed "[Marum](#)") as an intelligence hub and established the international route of the suspected shipments. The operation, in which also the Spanish Tax Authority and Europol participated, resulted in the arrest of 27 persons (including the leaders of the organisation)

and the seizure of 110 tonnes of different types of harmful gases, with an estimated value of €11 million. (TW)

Operation Lake VI

On 24 June 2022, European law enforcement authorities reported on the results of the [sixth edition of "Operation Lake"](#), which was carried out between November 2021 and June 2022. This annual operation targets the smuggling of the protected European glass eel. Europol, OLAF, the European Fisheries Control Agency and the European Commission's Directorate-General for Health and Food Safety (DG SANTE) coordinated law enforcement activities in 24 countries across the EU and beyond. The operation led to over 27,700 inspections, the arrest of 49 individuals and the seizure of 1,255 kilograms of glass eels worth about €1.9 million in total.

Since the first edition of the operation in 2016, more than 500 individuals have been arrested and 18 tonnes of glass eels have been prevented from being smuggled and returned to their natural habitats ([→eucrim 2/2021, 81–82](#)).

Operation Lake VI brought to light several patterns of this type of environmental crime, such as:

- Smuggling of glass eels in passenger suitcases after the relaxation of COVID-19 restrictions, whereby organised crime groups often rely on human mules and use sophisticated methods to keep glass eels alive in the baggage;
- Traffic routes go from Europe to Asia (especially China), where glass eels are considered a delicacy;
- EU nationals are mainly responsible for the illegal fishing while nationals from the destination countries in Asia arrange logistics and transportation;
- Once arrived in Asia, the eels are grown in fish farms and then distributed to different markets around the globe.

The analyses of the operations showed that European law enforcement is increasingly involved in combating cross-border wildlife crime. It also demonstrated that trafficking of these fish

is one of the most lucrative crimes for organised criminal networks. It is estimated that illegal profits amount to €3 billion per year. (TW)

European Public Prosecutor's Office

Cooperation between EPPA and Italian FIU

On 8 June 2022, the EPPA established the first formal cooperation arrangement with the Financial Intelligence Unit (FIU) of a Member State. *Claudio Clemente*, director of FIU Italy, and *Daniilo Ceccarelli*, Deputy European Chief Prosecutor and European Prosecutor for Italy, [signed a Memorandum of Understanding \(MoU\)](#) with the aim of facilitating cooperation between the bodies regarding suspicious financial transactions. The MoU lays down rules on:

- The exchange of information between the two parties;
- Analytical support;
- Suspension of suspicious transactions;
- Data protection;
- Mutual training initiatives. (TW)

One Year in Action: EPPA Requests More Fraud Detection

On 1 June 2022, the [EPPA presented updated figures on its operations](#) since the official operational start one year ago:

- 4006 crime reports registered and analysed;
- 929 investigations opened;
- 28 indictments filed;
- 4 convictions handed down;
- €259 million of freezing orders granted;
- 35 EDP offices in 22 countries working together.

The EPPA highlighted that the body have brought about tangible improvements. The biggest advantage is the quick access to case information in the participating countries which enables the establishment of connections and the detection of assets that could otherwise not be identified. This is especially

true since investigations often involve several countries. In this context, effective cross-border cooperation under the mechanism of the EPPO Regulation is another key added value of the Office.

On the occasion of its first anniversary, the EPPO also pointed out, however, that the low level of detection of EU fraud remains a key challenge. Therefore, the [European Chief Prosecutor Laura Kövesi proposed](#) the creation of an elite corps of highly qualified financial fraud investigators, who would be able to work transnationally within the EPPO.

The EPPO already provided a comprehensive overview of its operational activities in its annual report published in March 2022 ([→eucrim 1/2022, 15–16](#)). However, the report only covered the first seven months of actions (1 June – 31 December 2021). (TW)

First EPPO Case before CJEU

The first case concerning the interpretation of Regulation 2017/1939 on the establishment of the EPPO is at the CJEU. In a reference for preliminary ruling ([Case C-281/22, GK and Others](#), lodged at 25 April 2022), the *Oberlandesgericht Wien*, Austria) seeks clarification as to the extent of judicial review if it comes to cross-border investigations within the EPPO regime. In the case at issue, the Austrian court has to decide on appeals by natural and legal persons who were subject to searches in Austria. Investigations were conducted by the European Delegated Prosecutor (EDP) in Munich, Germany (handling EDP) who sought assistance from his colleague in Austria (assisting EDP).

The appellants contested the coercive measures in Austria as being inadmissible due to the lack of suspicion and proportionality and due to the infringement of fundamental rights. According to the *Oberlandesgericht Wien*, [Arts. 31\(3\) and 32 of the EPPO Regulation](#) are unclear as to which extent Austrian courts can verify the measure under their national law. On the one hand, it could be argued

that the courts in the assisting Member State (here: Austria) are not limited to a formal review only, but must also verify the substantive provisions of this Member State. On the other hand, this would mean, according to the referring court, that cross-border investigations under the established EPPO Regulation might be more cumbersome than approving a measure in accordance with the EU's instruments on mutual recognition, notably the European Investigation Order. The *Oberlandesgericht Wien* also poses the question to which extent decisions by courts in the Member State of the EDP handling the case (here: Germany) must be recognised. (TW)

Convictions in EPPO Cases: April – July 2022

After having assumed its operational tasks in June 2021, the EPPO recently reported on the first convictions in EPPO cases in several EU countries (for the first conviction of an EPPO case ever [→eucrim 4/2021, 210](#)). The following gives an overview of these verdicts:

- 11 July 2022: The Zagreb County Court issues the [first verdict in an EPPO case in Croatia](#). The verdict concerns an attempt of subsidy fraud in which the owner of a family farm presented a falsified certification in order to obtain funds from the European Agricultural Fund for Rural Development. Since the accused confessed to the offence, he was sentenced to prison for a period of 10 months, which was then replaced by community service.

- 30 June 2022: The [Specialised Criminal Court in Bulgaria sentences the manager of a wine company](#) to one year's imprisonment, suspended for three years, and a fine of BGN 2000 (around €1000). The manager was accused for attempted subsidy fraud because he forged company offers in order to meet the requirements for receiving financial aid (worth €400,000) from the EU's Support Programme for the promotion of wines to third countries. The managing authority detected the irregularity

and forwarded the case to Bulgaria's prosecution offices. After starting of operations, the EPPO in Bulgaria took over the case. The decision by the Specialised Criminal Court is based on an agreement between the EPPO and the defendant who pleaded guilty. It is the first conviction in an investigation by the EPPO in Bulgaria.

- 20 June 2022: A [District Court in Riga, Latvia confirms an agreement](#) between the EDP and accused persons punishing them for procurement fraud of over €100,000. In the case at issue, three Latvian citizens manipulated the procurement process by pre-coordinating prices so that they were able to receive subsidies from the European Agricultural Fund for Rural Development. The accused pleaded guilty; two were sentenced to 2.5 years of imprisonment and a fine of €2500, the other has to pay a fine of €2500. It is the first conviction in Latvia after the operational start of the EPPO in 2021.

- 25 May/8 April 2022: The Munich I Regional Court (*Landgericht München I*) concludes criminal proceedings against gang members having committed a major VAT carousel fraud. The criminal organisation repeatedly let circulate platinum coins through the same companies. As some of these companies did not fulfil their tax obligations, their criminal activities led to an estimated tax loss in Germany of at least €23 million. Criminal activities were also carried out in Czechia, Slovakia and Romania. On 8 April 2022, [the Munich court handed down the first judgment in the case](#) sentencing a suspect to three years of imprisonment; €170,000 were confiscated. [On 25 Mai 2022, two other suspects were sentenced](#). The head of the criminal organisation was sentenced to six years and nine months of imprisonment and the confiscation of over €10 million was ordered. The other accused was sentenced to four years and three months of imprisonment. In her case, another amount of more than €10 million has been ordered to be confiscated. (TW)

EPPO: Operational Activities – Reports from April to July 2022

This news item continues the regular overview of EPPO's operational activities in the past months (→[eucrim 1/2022, 17–18](#) and [eucrim 4/2021, 210–211](#)). The activities reported in April/May/June/July 2022 include the following:

- 14 July 2022: Croatian authorities [arrest the heads of three Croatian companies](#) who have allegedly been involved in collusive tendering. According to EPPO's investigations so far, the three suspects established deals that ensured that their companies would win bids within the framework of a major EU-funded cohesion project (worth in total €23.7 million).

- 8 July 2022: In an EPPO investigation, the [Guardia di Finanza seizes €2 million in Nuoro/Sardinia](#) (Italy). The investigations deal with the fraudulent obtainment of funds from the European Agricultural Fund for Rural Development. Different Sardinian agricultural companies which were beneficiaries from EU money mutually awarded each other contracts for carrying out the granted installation works and issued invoices for works that were never carried out.

- 7/8 July 2022: Within investigations by the EPPO, Croatian law enforcement authorities [move against a Croatian farmer](#) who illegally obtained or sought to obtain several subsidies for winery projects. However, he submitted false statements and false data in the tenders. An official of the Croatian Ministry of Agriculture assisted in the fraud.

- 29 June 2022: As part of an EPPO investigation, 18 searches are conducted and [12 persons arrested in the Bulgarian towns](#) of Petrich and Obzor. An organised criminal group involving the Head of the Petrich Regional Agricultural State Fund is suspected of having presented false, inaccurate, and incomplete documents/statements in order to receive EU money (around €3 million) from agricultural programmes.

- 28/29 June 2022: An [EPPO-led operation is conducted in Romania and](#)

[Austria](#) against an organised criminal group. 160 house searches are carried out and 12 defendants are put into pre-trial detention. Criminals allegedly received EU and Romanian funds for the purchase of equipment, although goods or services were either not actually purchased or the same equipment was used in several projects. The [gang operated](#), inter alia, with false declarations, fictitious payments, fictitious companies, and fictitious employments. It is estimated that the damage to the budgets amounts to more than €5 million.

- 28 June 2022: At the request of the EPPO, the [Guardia di Finanza of Palermo takes action against 22 persons](#), including high-level public officials. Money and assets worth approximately €2.5 million are preventively seized. Suspects are accused of having established a scheme of favouring certain private companies in order to receive EU and domestic funding for agriculture and engineering. Officials of the authority managing the funds were also involved. Criminal acts include criminal conspiracy, corruption, abuse of office, and forgery.

- 14 June 2022: In the framework of an investigation by the Vilnius office of the EPPO, law enforcement authorities [arrest 15 suspects and carry out more than 50 searches in Lithuania](#). The case involves a public procurement fraud in the field of food and feed safety. It is assumed that the two main suspects illegally enriched themselves by at least €250,000.

- 8 June 2022: Under the lead of the EPPO, Lithuanian law enforcement authorities carry out searches in a [major fraud in procurement for street lighting](#). A member of the municipal public procurement committee is suspected of having created exclusive conditions for another private company participating in the tender for the installation of street lightening in the municipality of Šiauliai. The company was awarded with the procurement contract worth €1.6 million funded by the EU.

- 30 May 2022: The EPPO [indicts three natural persons and one legal person](#) before the specialized criminal court in Slovakia. The accusations concern fraud and VAT evasion for fictitious overvaluation of machinery in Slovakia.

- 25 May 2022: At the request of the EPPO, Romanian law enforcement authorities search several locations in Romania. The [operation tackled an organised criminal group](#) that fraudulently received European funds from the Regional Operation Programme 2014–2020. Suspects developed a scheme of several companies which allowed them to use EU money in other places than granted, manipulate procurement procedures, and receive money for overpriced equipment. The estimated total damage amounts to approximately €3 million.

- 12 May 2022: [German law enforcement authorities raid several premises](#) and houses of suspects involved in a missing trader VAT fraud scheme. The suspects established virtual trading circuits and dummy companies for the sale of luxury cars and medical face masks, thus evading VAT of more than €40 million. The raid led to the arrest of two suspects and the seizure of five cars, real estate, luxury watches, bank accounts, data and documents.

- 29 April 2022: [the Guardia di Finanza in Vicenza, Italy, seizes €470,000](#) as part of an EPPO investigation. The company under investigation allegedly evaded anti-dumping and customs duties by hiding the true origin of imported goods (Tungsten electrodes). Since the company falsely declared Thailand instead of China as the origin of the goods, it was able to benefit from lower duties and thus evaded over €470,000.

- 28 April 2022: [Romanian law enforcement authorities search several locations in Romania](#) and crack down on six persons after investigations by the EPPO had detected fraud in an EU funded project. It is assumed that the beneficiary unjustly obtained over €3 million from EU funds by having used false and inaccurate documents and

statements. Since the beneficiary also operated with intermediary companies based in Spain, Portugal and Cyprus, investigative measures were also carried out in these countries by the competent European Delegated Prosecutors on the basis of the cooperation mechanism as provided in the EPPO Regulation.

■ 20 April 2022: [Italian law enforcement authorities seize over €2 million in financial assets](#). The investigations against a Venetian company were initiated after a report by OLAF and then continued by the EPPO office in Venice. Investigations revealed that the company imported complete e-bikes from China, but concealed the deliveries by importing the bikes unassembled and in separate shipments. Consequently, the company was able to evade anti-dumping and customs duties of over €2 million. (TW)

Europol

Amended Europol Regulation in Force – Criticism Remains

spot light On 8 June 2022, the European Parliament and the Council signed the controversial amendments to the 2016 Europol Regulation. A [compromise on the text](#) was already found at the beginning of February 2022 (for the Commission proposal → [eucrim 4/2020, 279](#)). The amendments will mainly strengthen Europol's cooperation with private parties, allow Europol to process big sets of personal data in support of criminal investigations and define Europol's role in research and innovation. The respective [Regulation \(EU\) 2022/991](#) amending Regulation (EU) 2016/794 was published in the Official Journal L 169 of 27 June 2022, p. 1. The amendments entered into force on 28 June 2022. The main changes to Europol's legal framework are as follows:

■ Several additional tasks are conferred to Europol (Art. 4 of the Regulation); new tasks include:

- Supporting investigations against high-risk criminals;
 - Issuing proposals for the entry of information alerts into the Schengen Information System (SIS), which is accompanied by a periodic reporting mechanism;
 - Contributing to the Schengen evaluation and monitoring mechanism;
 - Assisting in EU and Member States activities regarding security research and innovation;
 - Supporting the screening of specific cases of foreign direct investments into the EU;
 - Providing operational support to the competent national authorities in concrete operations and investigations;
 - Supporting, upon their request, Member States' actions in addressing online crisis situations, in particular by providing private parties with the information necessary to identify relevant online content;
 - Supporting Member States' actions in addressing the online dissemination of online child sexual abuse material;
 - Cooperating with Financial Intelligence Units (FIUs), in order to support cross-border investigations into money laundering and terrorist financing.
- Europol's possibility to request the initiation of criminal investigations is extended (Art. 6 of the Europol Regulation). Now, Europol's Executive Director can propose to the competent authorities of a Member State that they initiate, conduct or coordinate the investigation of a crime which concerns only that Member State but affects a common interest covered by a Union policy (i.e. a cross-border dimension to ask for the initiation of investigations is not required);
- The purposes for which Europol can process personal data are extended – this includes the possibility for Europol to publish information on the most wanted fugitives, thus legalizing past practice;
- The new rules define situations in which Europol is exempted from its duty

to allocate personal data to categories as defined in Annex II of the Europol Regulation. These rules mainly reply to the phenomenon that Europol has increasingly received large and complex data sets where a categorization is hardly feasible (→ [eucrim 1/2022, 18](#)). The new rules are accompanied by several procedural safeguards. The situations in which data can be processed without data subject categorisation defined in the amended Regulation include:

- Processing of personal data received for the purposes of research and innovation projects;
 - Processing of personal data that support specific criminal investigations and that were submitted by Member States, the EPPO, Eurojust or a third country requesting Europol's support – in this case, Europol can process the investigative data “for as long as it supports the ongoing specific criminal investigation for which the investigative data were provided” (new Art. 18a(1a));
 - Europol's own assessment finds that cross-checking of information or operational analyses cannot be carried out without processing personal data outside the categories allowed (new Art. 18a(1b)).
- The same rules for the processing of personal data in support of a criminal investigation apply if a third country shared personal data with Europol for operational analysis, which supports a specific criminal investigation in a Member State or Member States. Europol must verify that such data were not obtained through violating fundamental rights and that the amount of personal data is not “manifestly disproportionate” in relation to the investigation in the Member State (new Art. 18a(6)).
- Europol is enabled to carry out pre-analyses of personal data in order to determine whether they relate to one of the categories of data subjects listed in Annex II of the Regulation – the time limit is six months from the receipt of such data (Art. 18(6));

- In addition, Europol has 18 months (extendable up to three years) in order to assess the categorisation of personal data, e.g. if a re-assessment is necessary as a result of new information that became available (for example regarding additional suspects) – new Art. 18(6a);
- The amended Regulation sets out more concretely the relations between Europol and the European Public Prosecutor’s Office (EPPO). The new Art. 20a reaffirms that Europol shall establish and maintain a close relationship with the EPPO on the basis of a working arrangement. Europol must support criminal investigations at the EPPO’s request and notify it immediately of any criminal conduct which falls within its remit. Furthermore, operational support includes the possibility of the EPPO to have indirect access on the basis of a hit/no hit system to Europol data related to offences that fall within the EPPO’s competence;
- Cooperation with OLAF is strengthened, with Europol sending OLAF any information linked to possible illegal activity affecting the EU’s financial interests (Art. 21(8));
- The scope of Europol to cooperate with third countries is extended: first, Europol’s Executive Director is allowed to authorize also the transfer of a category of personal data; second, Europol is allowed to exchange personal data with third country authorities ad hoc (i.e. on a case-by-case basis), if appropriate safeguards with regard to the protection of personal data exist. The latter obligation is met if the appropriate safeguards are provided in a legally binding instrument or if Europol itself concludes that those safeguards exist, following an assessment of all the circumstances surrounding the transfer (amended Art. 25(4a));
- Europol will have extended powers to cooperate with private parties. Europol will be enabled to directly receive data from private parties and, in specific cases where necessary and proportionate, exchange personal data with private parties;

- Europol will be a contact point at the Union level for private parties who wish to lawfully and voluntarily share data with competent authorities of the EU Member States;

- Europol will be able to receive data from private parties for the purposes of identifying the competent jurisdiction and to investigate the respective crimes. In doing so, Europol may also send requests to private parties for missing information or send request to national units, in order to obtain personal data held by private parties (which are established or have a legal representative in the territory of the respective Member State) (amended Art. 26);

- Exchanges with private parties that are established in a third country, which is not the subject of an adequacy decision, with which no international cooperation agreement has been concluded or where no appropriate safeguards with regard to the protection of personal data could be established, are possible under the condition of an authorisation by Europol’s Executive Director. He/she needs to determine that the fundamental rights and freedoms of the data subject concerned do not override the public interest that requires the transfer (Art. 26(6));

- It is clarified that transfers or transmissions of personal data with private parties shall not be systematic, massive or structural (Art. 26(6a));

- Europol will be the central hub at Union level and allowed to obtain, process and exchange personal data in cases of “online crisis situations” and the online dissemination of online child sexual abuse material (new Arts. 26a and 26b);

- Europol’s role in security research and innovation is defined: Europol will help Member States use emerging technologies, explore new approaches and develop common technological solutions, including solutions based on artificial intelligence.

Beside these essential amendments to Europol’s tasks and powers, Regulation 2022/991 entails changes to Europol’s

data protection regime as well as its control mechanisms. The first important change concerns the *applicability of Regulation 2018/1725* that sets out the rules on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies. In particular, Chapter IX of that Regulation becomes now applicable to Europol, in which the rules for the processing of operational data by EU law enforcement bodies/agencies are laid down. This is complemented by specific data protection provisions in the Europol Regulation taking into account specific processing operations that Europol performs. The legal change notably means that the *supervisory powers of the European Data Protection Supervisor (EDPS) are reinforced*. To that end, the EDPS will not only be able to order Europol to bring processing operations into compliance with the Regulation or to order suspension of data flows to the recipient in a Member State or third country, but also to impose an administrative fine if Europol is not compliant with EU data protection law. In addition, the Regulation sets out the cases in which the EDPS must be consulted or informed.

The amended Regulation establishes a *Fundamental Rights Officer* within Europol. He/She will be responsible for supporting Europol in safeguarding the respect of fundamental rights in all its activities and tasks, in particular Europol’s research and innovation projects and the exchange of personal data with private parties. The Fundamental Rights Officer will be designated by the Europol Management Board following a proposal from the Executive Director. The position can be filled by a member of Europol’s existing staff.

Democratic oversight and accountability are slightly *reinforced*. The amendments *inter alia* oblige Europol to provide the Joint Parliamentary Scrutiny Group (JPSG) with detailed annual information on the development, use and effectiveness of additional tools and

capabilities as provided in the amended Regulation. Moreover, two representatives of the JPSG must be invited to at least two ordinary Management Board meetings per year to address the Management Board on behalf of the JPSG and to participate in certain discussions. Nonetheless, the JPSG representatives will not have voting rights in the Management Board. Lastly, the JPSG will be enabled to establish a consultative forum to assist it, upon request, by providing it with independent advice in fundamental rights matters.

Statements: The negotiators of the EU institutions, Europol, and the Management Board [welcomed](#) the new legal framework.

Europol's Executive Director, [Catherine De Bolle](#), said: "It is the role of law enforcement to implement and protect the rule of law. I am concerned by the impact of serious and organised crime on the daily lives of Europeans, our economy, and the resilience of our state institutions. I therefore welcome the amended Regulation as it will considerably improve the efficiency of Europol's support to the law enforcement authorities of the European Union in fighting serious and organised crime and terrorism."

[Ylva Johansson](#), the European Commissioner for Home Affairs, told the press: "Because fighting organised crime and terrorism depends on police cooperation at European level, Europol is irreplaceable in supporting the law enforcement authorities in their investigations. With its stronger mandate, Europol will be able to step up its expertise and operational capabilities to become the EU information hub on criminal activities and a cornerstone of EU's internal security architecture."

Criticism: Nonetheless, the amendments to the 2016 Europol Regulation still trigger criticism (for the criticism to the Commission proposal → past eucrim issues). [The German Bar Association \(DAV\) criticised](#) that the agreed amendments fall short of the level of fundamental rights protection, respect for pri-

vacy and data protection, as requested by stakeholders.

In a press release of 27 June 2022, the EDPS, [Wojciech Wiewiórowski](#), [expressed his concerns](#) that the amendments weaken the fundamental right to data protection and do not ensure an appropriate oversight of Europol. He considers data protection safeguards insufficient, in particular if it comes to Europol's expanded powers to process large datasets where data related to individuals who have no established link to a criminal activity will be treated in the same way as the personal data of individuals with a link to a criminal activity. The EDPS also criticises that Regulation 2022/991 retroactively authorises Europol to process large data sets (without data subject categorisation), which Member State authorities already shared with Europol prior to the entry into force of the amended Regulation (cf. Art. 74a of the amended Regulation). Indeed, these cases were subject to the EDPS order of 3 January 2022 (→ [eucrim 1/2022, 18](#)), which requested the deletion of these large data sets concerning individuals with no established link to a criminal activity. Therefore, the EDPS believes that the transitional arrangement in the amended Europol Regulation renders the order ineffective. He calls on the Europol Management board to soon put in place the data protection safeguards in order to limit effectively the impact of such intrusive data processing activities on individuals, as required by the legislator. (TW) ■

Europol Improves Data Exchange with New Zealand

On 30 June 2022, the [EU and New Zealand signed an agreement](#) on the exchange of personal data between Europol and New Zealand to better fight crime and terrorism. The agreement aims to promote law enforcement cooperation while ensuring strong protection of fundamental rights, such as data protection in particular. Europol officials will be able to assist New Zealand au-

thorities on a case-by-case basis in investigations, specifically in the fight against terrorism, organised crime, child sexual abuse and cybercrime. (TW)

Europol's Executive Director Reappointed

Ms. [Catherine De Bolle](#) has been appointed for a [second term as Executive Director](#) of Europol. The Executive Director of Europol is appointed for a four-year period, extendable once. Ms. De Bolle's first term started in May 2018 (→ [news of 20 October 2018](#)) and ended on 1 May 2022. The second term will last until May 2026. (CR)

Eurojust

Report on Combatting Impunity for Core International Crimes

On 23 May 2022, the Genocide Network Secretariat published a [report](#) on the main developments in the fight against impunity for core international crimes in the EU.

Looking back at recommendations made in the [2014 strategy of the Genocide Network](#) to combat impunity for the crime of genocide, crimes against humanity and war crimes within the EU and its Member States, this new report highlights the achievements and shortcomings of the EU's judicial response to such crimes in the last 20 years. As a result, the Genocide Network Secretariat will take measures to update the set of recommendations and to define a new strategy to combat impunity for such crimes.

Looking back at the past years, the report underlines that significant achievements have been reached. While in 2014, the Genocide Network was the only actor in the EU working on the topic of investigating and prosecuting core international crimes, today, three EU agencies, namely Eurojust, Europol and the European Union Agency for Asylum, contribute to tackling core international crimes under their respective mandates. Furthermore, many EU Member States

have increased their capacities to tackle these crimes, e.g. by establishing specialised units, increasing cooperation between judicial and immigration/asylum authorities, or improving access to battlefield information as a new source of evidence. Recent developments also led to a stronger awareness of core international crimes in the EU and a renewed commitment to combating impunity.

In parallel to the report, a [factsheet](#) outlining key factors for successful investigations in and prosecutions of core international crime was published. Accordingly, the number of newly opened cases of core international crimes in Member States increased overall by 44% between 2016 and 2021; 3,171 cases were ongoing across all EU Member States in 2021.

The Genocide Network (i.e., the European network of contact points in respect of persons responsible for genocide, crimes against humanity and war crimes) was established by the Council of the EU in 2002 to ensure close cooperation between national authorities in investigating and prosecuting the crime of genocide, crimes against humanity and war crimes. The Secretariat of the Genocide Network is based at Eurojust in The Hague. (CR)

New Vice-President of Eurojust Elected

On 28 June 2022, *Margarita Šniutytė-Daugėlienė*, National Member for Lithuania, was elected [Vice-President](#) of the College of Eurojust. Prior to joining Eurojust as National Member for Lithuania in 2019, Ms *Šniutytė-Daugėlienė* had served as Chief Public Prosecutor of the 2nd Criminal Prosecution Division at the Regional Prosecutor's Office of Klaipėda.

She replaces *Klaus Meyer-Cabri* (National Member for Germany) who recently left the Agency. The second Vice-President of Eurojust is *Boštjan Škrlec* (National Member for Slovenia) who was elected Vice-President in November 2020. The Vice-Presidents of Eurojust carry out duties entrusted to

them by the President and are deputizing him when necessary. (CR)

New National Member for Austria at Eurojust

In April 2022, Mr *Michael Schmid* took up his position as [National Member for Austria](#) at Eurojust. Mr Schmid started his career as a prosecutor in Vienna, followed by positions as Seconded National Expert to Eurojust and as Assistant to the National Member at Eurojust. He also served as Justice Counsellor for the Permanent Representation of Austria to the EU in Brussels. Mr Schmid replaces Mr *Gerhard Jarosch* who held the position from 2018 until 2022. (CR)

Fraud Assets in the Millions Seized

At the beginning of April 2022, a joint [operation](#) between Italian and Austrian authorities that was also supported by Eurojust dismantled a massive fraud scheme depriving Italian authorities of at least €440 million. Under the scheme, Italian companies were used to sell false tax credits, to simulate business leases in order to obtain COVID-19-related compensation, and to simulate tax credits for false works to improve the safety and energy consumption of the companies. As a result of the operation, 12 suspects were arrested and approximately 90% of the proceeds recovered. The seized assets included cryptocurrencies as well as gold, platinum, and watches of high value. Eurojust supported the operation coordinating cross-border judicial cooperation. This included assistance in the execution of a European Investigation Order and a freezing order in Austria issued by the Italian authorities. (CR)

Frontex

Frontex Signed Working Arrangement with EUCAP Sahel Niger

On 17 July 2022, Frontex and the European Union Capacity Building Mission in Niger (EUCAP Sahel Niger) signed

a [Working Arrangement](#) to increase their cooperation regarding migration and broader security, including the fight against criminal networks. It will also promote integrated border management standards and improve awareness and risk analysis.

[EUCAP Sahel Niger](#) is a civilian mission under the EU's Common Security and Defence Policy. It was launched at the request of Niger's government in 2012 and aims to help establish an integrated, coherent, sustainable and human rights-based approach among the various Nigerien security actors in the fight against terrorism and organised crime. Over 100 international experts, the majority of whom are from European security forces and justice departments, are permanently deployed in Niamey. They provide advice and training to Nigerian authorities in strengthening their capacities. (CR)

Working Arrangement with EASA Signed

On 25 March 2022, Frontex and the European Union Aviation Safety Agency (EASA) signed a [Working Arrangement](#) to establish a framework for closer cooperation between the two agencies.

Under the arrangement, the agencies will exchange operational experience. Furthermore, they may conduct joint capacity building and training related to Frontex's use of aircraft in its surveillance activities. EASA is enabled to assist Frontex in the selection of best providers and equipment, as well as in monitoring the safety of the operations of Frontex aircraft, including unmanned aircraft. (CR)

International Handbook to Combat Fire-Arms Smuggling by Frontex

At the beginning of July 2022, Frontex published an [international version of its Handbook on Firearms](#) for Border Guards and Customs Officers. The handbook contains the latest information on firearms, their parts and ammunition, associated documentation, and the phe-

nomenon of firearm trafficking itself. It also provides guidelines for border control and further handling of seized weapons. The handbook puts together the recent developments and best practices existing on both European and international levels to support national border and customs authorities in both EU and non-EU countries to reinforce their operational response against arms-related crime. (CR)

Frontex Fundamental Rights Officer: Annual Report for 2021

At the end of June 2022, Frontex's Fundamental Rights Officer released the [Annual Report](#) for the year 2021. The report provides an overview of the activities carried out by the Fundamental Rights Office in the last year, including the work of the Fundamental Rights Monitors.

The report looks at the situation at the European borders and beyond and provides an overview of the work of the Fundamental Rights Office in 2021, in line with the Fundamental Rights Action Plan. It outlines the activities of the Fundamental Rights Office regarding fundamental rights monitoring, especially regarding field monitoring, return operations, and aerial surveillance. Reporting and accountability mechanisms and fundamental rights safeguards which guide the work of the Fundamental Rights Office are set out as well. Furthermore, the report provides a brief overview of capacity building activities and new technologies. Ultimately, it looks at internal processes to enhance the fundamental rights compliance of the Agency and the work in collaboration with the Consultative Forum.

In 2021, the new Fundamental Rights Officer took office in June, 20 of the minimum 40 Fundamental Rights Monitors became operational and the recruitment of 20 additional Fundamental Rights Monitors was initiated. The staff of the Fundamental Rights Office and Fundamental Rights Monitors were deployed in monitoring missions for an overall

duration of more than 200 days, covering 9 countries. The main operational focus was on Lithuania and Greece. In addition, the Fundamental Rights Office engaged in training on relevant fundamental rights standards and practices for Standing Corps, Frontex, national officers, and border management officials of third countries. The Fundamental Rights Office provided advice to the Agency, gave inputs to the Frontex processes (from operational plans to evaluations and working arrangements) and handled an increasing number of Serious Incidents Reports.

Looking ahead at the year 2022, the Fundamental Rights Office sets out three priorities:

- Reinforcing the team;
- Bringing processes and tools further together;
- Maximising the impact of its work.

Frontex's Fundamental Rights Officer is mandated with monitoring the implementation of the Agency's fundamental rights obligations in accordance with EU and international law. This includes reporting on possible violations, promoting the inclusion of fundamental rights in the activities of the Agency, and providing advice and recommendations. (CR)

Frontex Executive Director Resigns

On 29 April 2022, Frontex Executive Director [Fabricio Leggeri resigned](#) following a series of events that included criticism by MEPs accusing the Agency of failing to protect the human rights of asylum seekers, allegations of the Agency's involvement in illegal pushbacks of asylum seekers, and finally an investigation by OLAF, allegedly calling for disciplinary action against Leggeri. The resignation was accepted by the Frontex Management Board the same day.

In its extraordinary meeting on 28–29 April 2022, the Frontex Management Board appointed Ms Aija Kalnaja, Deputy Executive Director for Standing Corps Management, to lead the Agency until the board appoints the Executive Director ad interim at its June meeting. (CR)

Frontex Discharge Decision Postponed

At the end of March 2022, the Budget Control Committee of the European Parliament [postponed](#) the decision on the 2020 accounts of Frontex. Reasons given were the alleged failure to fulfil the conditions set out in the European Parliament's previous discharge report (→news of [12 November 2021](#)) and findings by OLAF on harassment, misconduct and migrant pushbacks involving the Agency. In addition, the Budget Control Committee referred to alleged fundamental rights violations involving the Agency (→news of [20 September 2021](#)), including the fact that reported violations in Greece have not been addressed and operations in Hungary were continued regardless of the CJEU ruling that refugee return operations in Hungary in 2020 were incompatible with EU law. It is believed that the discharge decision on Frontex will be resumed in autumn 2022. (CR)

Joint Reintegration Services Launched

At the beginning of April 2022, for the first time, Frontex started supporting Member States in providing [reintegration measures](#) to migrants returned to their countries of origin. These measures include a number of services such as support with long-term housing, medical assistance, job counselling, education, assistance in setting up a small business, and family reunification. The Joint Reintegration Service is conducted with several selected partners such as Caritas Int. Belgium, IRARA, WELDO, ETTC, and LifeMakers Foundation Egypt. It is part of the EU Strategy on Voluntary Return and Reintegration. (CR)

Electronic System Against Document Fraud Launched

On 1 April 2022, Frontex and Interpol launched a [new system to detect document fraud](#). The Frontex-INTERPOL Electronic Library Document System (FIELDS) is designed to display original and genuine documents and the main forgeries detected on that type of docu-

ment. The information on travel documents collected by Frontex aims to facilitate the work of first-line border control officers and law enforcement authorities of the Member States when performing document checks. Frontex and Interpol stressed that document fraud is a global challenge for migration management. It is the driver of many other criminal activities, such as migrant smuggling and trafficking, terrorist mobility, smuggling of drugs or weapons, etc. (CR)

Joint Operation Moldova Launched

On 17 March 2022, the European Union and the Republic of Moldova [signed a Status Agreement](#) regarding operational activities carried out by Frontex. The agreement lays down the basis for increased deployment of Frontex teams in Moldova. On 21 March 2022, Frontex and the Moldavian authorities signed an Operational Plan allowing Frontex to provide increased technical and operational assistance in Moldova. [Joint Operation Moldova](#) aims to assist Moldovan authorities in processing the immense number of people fleeing the war in Ukraine as well as to control illegal immigration flows. It also tackles cross-border crime and enhances European cooperation and law enforcement activities. Frontex's assistance in the border management is one part of several immediate measures of the EU to help Moldova cope with the huge number of people fleeing the war in Ukraine after the Russian invasion on 24 February 2022. (CR)

Agency for Fundamental Rights (FRA)

FRA's Amended Regulation into Force

On 5 April 2022, the Council of the EU [approved](#) the enhanced mandate for the Agency for Fundamental Rights (FRA). [Council Regulation \(EU\) 2022/555](#) of 5 April 2022 amending Regulation (EC) No 168/2007 establishing a European Union Agency for Fundamental Rights was published in

the Official Journal L 108 of 7 April 2022, p. 1.

One of the key novelties is that FRA is enabled to undertake own-initiative work on police and judicial cooperation in criminal matters ([→news of 9 July 2021](#)). Furthermore, the multi-annual framework to define the agency's work programme is replaced with a more operational annual and multi-annual programming. Some technical amendments are introduced in line with common principles across all EU agencies. The area of Common Foreign and Security Policy remains outside the agency's remit.

The aim of the amendments was an alignment of FRA's mandate to the Lisbon Treaty since its founding legal framework stems from the time before the Lisbon Treaty entered into force. In addition, the amendment will bring in line FRA's governance with the common EU approach on decentralised agencies.

FRA [welcomed](#) the amendment of its founding Regulation. Élise Barbé, Chair of the FRA Management Board said: "This political agreement is an important milestone for FRA." FRA Director Michael O'Flaherty said: "A stronger Fundamental Rights Agency sends a clear signal that the EU stands firmly behind its core values of equality, inclusion, democracy and justice."

The amended Regulation entered into force on 27 April 2022. (CR)

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

EP's Statement on Annual PIF Report 2020

In a [resolution of 7 July 2022](#) (adopted by 437 to 94 votes with 39 abstentions), the European Parliament (EP) assessed the findings of the annual report 2020 on the protection of the EU's financial inter-

ests. This so-called PIF report was presented by the Commission on 20 September 2021 ([→eucrim 3/2021, 149–151](#)). It highlighted, *inter alia*, the risks associated with the COVID-19 pandemic and risks in relation to the new Recovery and Resilience Facility (RRF), which will pour a huge amount of money into the Member States in order to mitigate the consequences of the pandemic ([→eucrim 3/2020, 174](#)).

Parliamentarians stressed that COVID-19 is indeed likely to offer new opportunities to fraudsters. Member States should continue to subject emergency expenditure to a high level of control and monitoring. Moreover, an unprecedented level of attention and control is needed to ensure that the EU funds under the new Multiannual Financial Framework (MFF 2021–2027), combined with the NextGenerationEU recovery plan, are able to make the best contribution to the common goals of the Union.

The resolution additionally addresses several topics of the PIF report. The main calls of the EP for these topics are as follows:

- Detected fraudulent and non-fraudulent irregularities: Since there is diversity of approaches to the protection of the EU budget by the criminal laws of the Member States, the Commission is urged to consider further harmonising measures. Due to the fact that fraud is becoming increasingly appealing for organised crime groups, many Member States should consider to establish specialised legislation to tackle organised crime, including mafia-type crime;
- Revenue – own resources fraud: Member States must assess the risks and shortcomings of their respective national customs control strategies, while the Commission must help Member States to ensure the implementation of uniform controls within the EU;
- Expenditure fraud: Strengthened transparency rules regarding beneficiaries are needed. More investigations must be carried out against companies that use EU funds but do not respect em-

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light

ployment laws or fundamental rights of workers;

- External dimension of PIF: EU institutions and bodies should put more emphasis on the correct spending of EU funds allocated to non-EU countries. Measures must include the suspension of budgetary support in non-EU countries where authorities manifestly fail to take action against widespread corruption. Corruption risks associated with large-scale construction and investment projects undertaken by authoritarian third countries in Member States must be monitored;

- Digitalisation in the service of PIF: The EU must achieve a greater degree of digitalisation, interoperability of comparable data systems and harmonisation of reporting, monitoring and auditing. The Commission should explore the possibility of using AI to protect the EU's financial interests. The risk scoring tool ARACHNE must be made mandatory for the 2021–2027 MFF and the implementation of the RRF. Lastly, the Early Detection and Exclusion System (EDES) must also cover shared management of EU funds (→ ECA special report 11/2022 (news item infra, pp. 105/106));

- The Commission's (2019) anti-fraud strategy (CAFS): Considering that Member States have a frontline responsibility for managing about 80% of the EU's expenditure and for collecting almost all the revenue, it is disappointing that Member States have given only little support to the implementation of the CAFS in the first years;

- PIF at Member State-level: More Member States must adopt national anti-fraud strategies (NAFS) and those Member States which have done so must update them in order to cope with new risks posed by the increased amounts of the EU funds;

- OLAF and EPPO: Having regard to the decline in the indictment rate in cases that OLAF referred to Member States, national authorities must cooperate closely with OLAF and open criminal cases whenever necessary to ensure

the recovery of misused EU funds. Furthermore, the complex anti-fraud architecture in place (involving OLAF, the EPPO, Europol, the AFCOS and other EU and national agencies) requires close cooperation between the players. Member States not participating in the EPPO must soon sign cooperation agreements with it;

- Rule of law and the fight against corruption: It is high time for the Commission to fulfil its role as “guardian of the treaties” and to tackle the ongoing violations of the rule of law in several Member States, in particular Poland and Hungary, as these violations represent a serious danger to the EU's financial interests. High-level corruption cases must be systematically prosecuted and funds must be repaid whenever cases of corruption or fraud have been proven;

- Anti-fraud architecture of the EU and annual reporting: The Commission should ensure that a holistic approach is followed avoiding overlapping and fostering integration of the several existing layers involved in anti-fraud measures. Furthermore, a specific annual Commission report is needed which includes analyses and the state of play of the overall anti-fraud infrastructure, assesses the level of interoperability in the fight against fraud and addresses links with other relevant instruments, such as the anti-corruption report and the application of the Rule of Law Conditionality Mechanism.

The EP's resolution is an important policy statement on how the EU intends to protect its budget in the near future. (TW) ■

EP: EU Needs Strong Auditing and Monitoring Mechanism for Recovery and Resilience Facility

On 23 June 2022, the European Parliament (EP) adopted a [resolution on the implementation of the Recovery and Resilience Facility](#) (RRF). The resolution aimed to provide EP's input to a review process regarding the progress of the RRF implementation. A review report

by the Commission is expected by the end of July 2022.

The RRF (laid down in [Regulation 2021/241](#)) is the EU's main financing tool in order to overcome the negative impacts on the EU's economy due to COVID-19. In order to receive money from the RRF (financed through grants and loans), Member States must meet specific conditions. They are, *inter alia*, required to present a coherent set of reforms and investments in a national Recovery and Resilience Plan (NRRP). The Commission assesses the plans focusing on their relevance, effectiveness, efficiency and coherence, and proposes their adoption to Council through Council implementing decisions (CID). The RRF is a performance-based instrument and the payments are conditional upon the achievement of milestones and targets.

Regarding the protection of the EU's finances and values, MEPs stress that a strong auditing and monitoring mechanism for RRF expenditure, implementation and data management must be ensured, so that misuse, double funding or the overlapping of objectives with other EU funding programmes is prevented. It is further underlined that compliance with the rule of law and Art. 2 TFEU is a prerequisite for accessing RRF funding and that the [EU's rule of law conditionality mechanism](#) is fully applicable to the RRF. Hence, the Commission and the Council are called on to refrain from approving Hungary's draft NRRP as long as concerns regarding the observance of the rule of law, the independence of the judiciary and the prevention and detection of and fight against fraud, conflicts of interest and corruption persist.

In addition, the sound financial management of EU funds need continuous evaluation throughout the lifecycle of the RRF and it should be possible to halt or recover already-disbursed funds in case of non-compliance.

Regarding transparency, MEPs expect continuous monitoring of the implementation of the RRF's [six pillars](#), as well as the 37% target for green spending

and 20% for digital issues. They call to mind that Member States should collect and ensure access of data on beneficial owner(s) of the recipient of the funds and beneficiaries of the programme.

MEPs took also position on strategic autonomy, the war in the Ukraine and social investment. In this context, MEPs encourage, *inter alia*, Member States to use the full potential of the RRF, including [loans](#), to counter the effects of current and future challenges – in areas like SMEs, health care, measures to support Ukrainian refugees, and aiding local and regional administration in using funding effectively. (TW)

Commission Proposed More Effective Management and Control of EU Budget

On 16 May 2022, the European Commission presented a [proposal for the recast of the EU's financial rules](#) applicable to its general budget, known as the “Financial Regulation”. The Financial Regulation is the EU's basic legal act that governs the establishment, implementation and control of the EU budget. A substantial revision of the Financial Regulation took place in 2018.

The Commission now proposed “targeted adjustments” to the Financial Regulation to align existing rules with the current long-term budget 2021–2027 and make improvements in view of three axes:

- Increased transparency;
- Better protection
- More agility.

Regarding a more effective control and a better protection of the EU's financial interests, the proposal foresees, *inter alia*:

- Mandatory collection of data on the recipients of EU funding including their beneficial owners;
- Improving the identification of irregularities and fraud through a single integrated IT system for data-mining and risk-scoring to enhance the quality and interoperability of data;
- Extending the scope of the early detection and exclusion system (which the

Commission currently applies for funds under direct management) to the shared management mode, e.g. funding from the European Regional Development Fund or under the Recovery and Resilience Facility;

- Adding new autonomous grounds for excluding beneficiaries from EU funding, which include:

- Refusal to cooperate in investigations, checks or audits carried out by an authorising officer, OLAF, the EPPO, or the European Court of Auditors;
- Incitement to hatred or discrimination;
- Breach of conflict of interest avoidance rules.

- Making better use of digitalisation and emerging technologies such as data-mining, machine learning, robotic process automation and artificial intelligence to help increase the efficiency and quality of controls and audits.

The proposal is now subject to negotiations by the European Parliament and EU Member States in the Council with the Commission expecting a swift adoption. (TW)

ECA: Commission Should Dig Deeper to Fight Fraud in Agricultural Spending

In its [Special Report 14/2022](#) (published on 4 July 2022), the European Court of Auditors (ECA) examined different patterns of fraud in the Common Agricultural Policy (CAP) and the appropriateness of the Commission's responses to the fraud risks in agricultural spending. CAP is the largest component of expenditure under the EU budget. The 27 EU Member States made direct payments of €38.5 billion on average per year in 2018–2020 to this sector.

The report found that the Commission has responded to instances of fraud in CAP spending, but was not sufficiently proactive in addressing the impact of the risk of illegal land grabbing on CAP payments, in monitoring Member States' anti-fraud measures, and in exploiting the potential of new technologies.

The report presented an overview of fraud risks affecting the CAP, which range from risks linked to beneficiaries concealing breaches of eligibility conditions, the complexity of the financed measures to illegal forms of “land grabbing”.

Regarding the use of new technologies, the report acknowledged that the Commission has made several efforts in promoting new technologies, such as the use of satellite images for checks and the development of its own risk-scoring tool Arachne; however, Member States have taken up these technologies at a low pace. Artificial intelligence and big data have potential in fighting fraud but Member States face challenges in seizing these opportunities.

The ECA recommends to the Commission actions to deepen its insight of fraud risks and anti-fraud measures and to subsequently act on its assessment. Furthermore, the Commission should increase its role in promoting new technologies for preventing and detecting fraud. (TW)

ECA: Blacklisting to Protect EU Funds Ineffective

“Blacklisting” is not being used effectively to protect EU money from being paid out to untrustworthy individuals or entities, a report by the European Court of Auditors (ECA) says. [Special report 11/2022](#) entitled “Protecting the EU budget – Better use of blacklisting needed” was released on 23 May 2022.

“Blacklisting” (or exclusion/debarment) is a key tool for international organisations or national authorities to protect their finances. Financial arrangements are not concluded with individuals/entities/organisations who/which are on the list due to an “exclusion situation”, e.g. professional misconduct, fraud, corruption, money laundering, and unpaid taxes.

ECA's audit assessed whether the EU's Early Detection and Exclusion System (EDES) has been operating effectively in direct and indirect manage-

ment. In addition, the ECA examined whether exclusion systems in selected EU Member States (Estonia, Italy, Poland, Portugal) have been working well.

The ECA found in the area of *direct management* that the EDES has a broad scope of application and a robust exclusion procedure, but there is a very low level of exclusions. Only two out of 448 counterparties named on the EU list at the end of 2020 were excluded due to fraud and corruption. The auditors believe that the main reasons are shortcomings in the arrangements for identifying counterparties in exclusion situations as well as legal and technical difficulties, such as the lack of access for Commission services to business registers and criminal records in the Member States. Furthermore, the Commission relies too much on declarations of honour given by the applicants instead of vetting them.

Regarding *indirect management* where the Commission implements EU spending with partners, such as the European Investment Bank, the report found that the partners have made only a small contribution to the number of exclusion cases registered in EDES. This can mainly be explained by the same reasons that apply for direct management.

In the area of *shared management* where day-to-day management of EU funds is under the responsibility of Member States' administrations and where EDES does not apply, the auditors observed considerable differences in the approach to exclusion. None of the countries examined (Estonia, Italy, Poland, Portugal) had established a fully-fledged exclusion system for EU funds. As a result, EU funds are protected very unevenly. Moreover, data and tools available at the EU level, including data on fraud and irregularities, and the data-mining and risk-scoring tool, Arachne, are not well used by Member States' authorities.

Therefore, the ECA recommends the following to the Commission:

- Extending the range of exclusion;
- Strengthening the implementation of the EDES;
- Improving the monitoring of the EDES under indirect management;
- Extending the EDES to shared management;
- Making better use of data and digital tools for exclusion purposes.

The findings are intended to support the ongoing revision of the EU's financial rules for a better control of the management of the European taxpayers' money. (TW)

Commission Triggers Conditionality Mechanism against Hungary

On 27 April 2022, the European Commission officially triggered the so-called conditionality mechanism against Hungary. Based on Regulation 2020/2092, the mechanism allows the EU to cut off an EU Member State from receiving EU money if it breaches principles of the rule of law (→eucrim 3/2020, 174–176).

The step was already announced by Commission President Ursula von der Leyen shortly after the Hungarian parliamentary elections at the beginning of April 2022 (→eucrim 1/2022, 23–24).

Pursuant to Art. 6 of that Regulation, the Commission sent a written notification to Hungary setting out the factual elements and specific grounds on why the Commission believes that the conditions for adopting measures to protect the EU's financial interests due to rule-of-law infringements are met. Allegations include shortcomings in the control of the use of EU money, in audit and transparency obligations, and in public tender procedures. Furthermore, the Commission criticised widespread corruption and the lack of independence of the judiciary.

At the end of July 2022, following the observations of Hungary, the Commission sent a letter to inform the Member State of the measures that the Commission intends to propose to the Council. However, Hungary has now one month to react to the Commission's letter and

provide for statements in particular on the proportionality of the envisaged measures.

Hungary is one of the largest net recipients of EU funds, almost €5 billion in 2020 alone. This is more than three and a half percent of Hungary's economic output. A suspension or interruption of funds could hit Orbán's government hard. (TW)

Corruption

New Surveys on Citizens' and Businesses' Perception of Corruption in the EU

On 13 July 2022, the European Commission published two Eurobarometer surveys showing the public's opinion on corruption in the EU.

► Citizens' perceptions of corruption

The first survey captured European citizens' perception of and experiences on corruption. It covered the following areas:

- General perceptions of corruption including acceptability, its extent and the perceived changes in incidence in recent years;
- Attitudes to corruption in public institutions and business, and the effectiveness of government, the judicial system and institutions in tackling corruption;
- Personal experience of bribery, and the incidence of corruption in contact with institutions;
- Bribery and corruption in the health-care sector;
- Reporting of corruption.

The main results of the survey are:

- 68% of EU citizens believe that corruption is widespread in their country;
- 58% of respondents do not think government efforts to combat corruption are effective;
- Up to 6% of Europeans say they experienced or witnessed a case of corruption in the last 12 months, but only 15% of them reported the issue;
- 53% of Europeans do not know where to report corruption;

■ Regarding the reasons why corruption is not reported, nearly the half of Europeans believe that it is difficult to prove anything, 30% think that the responsible persons will not be punished, and 28% submitted that there is no protection for those who report corruption.

It is stressed that, as has been the case in surveys of previous years, the results vary across EU countries. Also socio-demographic differences must be taken into account. In conclusion, and in comparison with the last wave, the general consensus amongst Europeans remains that corruption is unacceptable, that it is widespread – particularly in public bodies and institutions – and that national government efforts to curb corruption are not effective.

➤ *Businesses' attitudes towards corruption*

The [second survey](#) focused on businesses' attitudes towards corruption in the EU. The survey covers a range of areas, including perception of:

- Problems encountered when doing business;
- Businesses' perception of the level of corruption in their town;
- The prevalence of practices leading to corruption;
- Corrupt practices in public tender and public procurement procedures;
- How corruption is investigated, prosecuted and sanctioned.

The [main results](#) of this survey are:

- 34% of companies in the EU believe that corruption is a serious problem when doing business in their country – however, this attitude varies considerably across Member States;
- 63% of the companies think the problem of corruption is widespread in their country. The highest proportions reporting that corruption is widespread in their country are seen in Greece (90%), Cyprus and Italy (both 92%), and Croatia (93%);
- Favouring friends and/or family members in business or in public institutions is considered the most widespread corruptive practice in the EU countries;

■ 79% of respondents agree that too close links between business and politics in their country lead to corruption and 38% believe that having political connections is the only way to succeed in business;

■ 52% of the companies think it is likely that individuals and businesses engaging in corrupt practices in their country would face charges and go to court.

■ About half of companies (49%) also believe that individuals and businesses engaged in corrupt practices are likely to be caught by or reported to the police or prosecutors.

■ 38% of the respondents think that individuals and businesses engaging in corrupt practices will be heavily fined or imprisoned by a court.

The surveys are important sources of information for the European Commission to further develop EU legislation and actions against corruption. The last surveys on the public's perception of corruption in the EU were conducted in 2019. (TW)

Eurojust Casework on Corruption

On 5 May 2022, Eurojust [published](#) its first [report](#) presenting the key findings of its casework on corruption in the years 2016–2021. Based on 505 corruption cases registered at Eurojust during this period, the report identified legal and practical issues, proposed solutions, and suggested best practices for judicial cooperation in cross-border corruption cases.

In its conclusions, the report underlines the necessity for coordinated actions to avoid duplication of work and, ultimately, *ne bis in idem*. Trustful cooperation between judicial authorities and tools by which to cooperate with third states are essential in order to effectively combat corruption. Hence, Eurojust encourages judicial authorities involved in such cases to make use of the support it offers, such as the involvement of its national members and liaison officers as well as coordination meetings with and the involvement of

Eurojust's cooperation network with other agencies. Lastly, the report finds Joint Investigation Teams (JITs) to be a highly effective tool in judicial cooperation and confirms their increased use in corruption cases. (CR)

Tax Evasion

MEPs Blame Hungary for Blocking Historic Tax Deal

In a [resolution of 6 July 2022](#), the European Parliament expressed its dissatisfaction with the blocking of EU rules on global minimum effective corporate taxation for large group companies. A planned Council Directive on “ensuring a global minimum level of taxation for multinational groups in the Union”, which was [proposed by the Commission on 22 December 2021](#), is currently at a standstill since some Member States are exercising their right of veto in the Council.

MEPs particularly call on Hungary to put an immediate end to its blockage of the global tax deal in the Council; the Commission and the other Member States must not give in to blackmail. The resolution submits that Hungary's reported demands, notably in relation to substance-based carve-outs, were already largely taken into account in the international agreement. In any event, the Commission and the Council must “refrain from approving Hungary's national recovery and resilience plan unless all the criteria are fully complied with”. If Hungary persists with its veto, alternative options should be explored to honour the EU's commitments, including the possible use of “enhanced cooperation”.

The resolution also stressed that global and EU tax rules are not fit for modern-day economy, favouring tax avoidance and hurting small and medium-sized companies. For the longer term, Member States should consider the benefit of transitioning to qualified majority voting, and the Commission

should relaunch the idea to gradually introduce majority voting on tax matters.

The Council Directive at issue is to implement the so-called second pillar of the historic [global tax reform agreement](#) reached by the OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting (BEPS) in 2021. Pillar II aims to control tax competition on corporate profits by introducing a global minimum tax of 15% from 2023. (TW)

EU and Norway Want to Improve Cooperation in Combating VAT Fraud

On 17 June 2022, the [Council authorised](#) the Commission to negotiate with Norway the revision of the agreement between the EU and Norway on administrative cooperation, combating fraud and recovery of value added tax (VAT) claims. The agreement enables the tax authorities of the EU and Norway to exchange information and to carry out joint activities to fight VAT fraud in a similar way EU Member States do. It already produced tangible results when Norway alerted the Member States to possible fraud and potential VAT loss amounting to €5 billion in the carbon credit area.

Both [the Commission and Norway consider](#) an update of the agreement necessary, since EU legislation has changed after the entry into force of the agreement in September 2018. An amendment to the agreement should allow, *inter alia*, new information exchange tools and joint enquiries. (TW)

Reverse Charge Mechanism Can Be Applied until 2027

The Council extended the application period of the optional VAT reverse charge mechanism until 31 December 2026. The respective [Directive \(EU\) 2022/890](#) amending Directive 2006/112/EC entered into force on 11 June 2022. The extension became necessary since the Council has not been able to agree on two Commission proposals (tabled five years ago) for the introduction of the definitive VAT system, which aim to pro-

vide a comprehensive response to VAT fraud. The current temporary rules on the optional reverse charge mechanism would have been expired on 30 June 2022.

The reverse charge mechanism is considered a useful instrument to combat fraud, in particular Missing Trader Intra-Community fraud. As a general rule, Art. 193 of the 2006 VAT Directive stipulates that the taxable person supplying goods or services is liable to pay VAT. As a derogation, the reverse charge mechanism allows to designate the recipient of the supply as the person liable for the payment of VAT. Under this reverse charge mechanism, VAT is not charged by the supplier but accounted for by the customer (a taxable person) in his VAT return. This VAT is then deducted in that same VAT return and, therefore, insofar this person has a full right of deduction, the result is nil.

In addition, Directive 2022/890 also extends the application of the Quick Reaction Mechanism (QRM). The QRM allows Member States to quickly introduce a temporary reverse charge mechanism for the supply of goods and services in particular sectors if sudden, massive fraud occurs. (TW)

Counterfeiting & Piracy

ECA: EU's IPR Protection Not Fully Waterproof

The EU's legal framework for the protection of intellectual property rights is generally solid and robust, but a number of shortcomings in several areas still exist. This is the European Court of Auditors' (ECA) main conclusion in its [Special Report 06/2022](#), which was published at the end of April 2022.

For the first time, the ECA assessed the protection of intellectual property rights (IPR) in the EU. It scrutinised the protection of EU trademarks, designs and geographical indications within the Single Market from 2017 to 2021 by addressing the following issues:

- Provision of the necessary IPR regulatory framework and support measures by the Commission;
- Proper implementation of the IPR regulatory framework by the Commission, the European Union Intellectual Property Office (EUIPO) and the Member States;
- Correct implementation of the IPR enforcement controls by Member States.

Shortcomings were mainly detected in the EU Designs Directive and the EU's geographical indication framework, the EU's fees mechanism, and the IPR enforcement framework. In the latter context, the report criticised that the Intellectual Property Rights Enforcement Directive ([Directive 2004/48/EC](#)) is not uniformly applied throughout the EU, customs control in the Member States are weak and inconsistent, and discrepancies in the IPR protection exist since they are dependent on the place of importation. As a result, the ECA makes the following recommendations to the Commission:

- Completing and updating the EU IPR regulatory frameworks;
- Assessing the governance arrangements and methodology for determining fees;
- Developing initiatives to improve the EU geographical indications systems;
- Improve the IPR enforcement framework.

EUIPO should also improve the management of its European Cooperation Projects. (TW)

Organised Crime

New Reports on European Illicit Markets for Cocaine and Methamphetamine

On 6 May 2022, Europol together with the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) published two new [online modules](#) of reports taking a detailed look at the illicit EU markets for cocaine and for methamphetamine. The reports provide broad

analyses of these markets following the supply chain from production and trafficking to distribution and use.

According to [the report on the European Union drug market for cocaine](#), cocaine is the most commonly used illicit stimulant drug in Europe with an estimated retail market worth at least €10.5 billion in 2020. It is estimated that about 5 % of adults (aged 15–64) in Europe have tried cocaine during their lives with data suggesting an increasing trend. Looking at coca and cocaine production, the global cocaine trade, its criminal networks, and the retail markets, the report concludes that, due to high availability, the use of cocaine is spreading geographically to new markets and socially to new groups. There is also a tendency to more harmful patterns of use, e.g. smoking or injection. The cocaine market appears to be resilient to control efforts and at the same time innovative in developing new methods to avoid detection and increase profits. These profits tend to create further security threats, such as corruption, violence and the undermining of legitimate business activities. Furthermore, alliances between European-based crime groups and those operating from outside of the European Union are increasing. Against this background, the report recommends numerous measures under the following headings:

- Improve the intelligence picture;
- Strengthen responses to reduce supply and enhancing security;
- Strengthen international cooperation;
- Invest in capacity-building;
- Strengthen policy, public health, and safety responses.

Examples for such measures include, for instance:

- Gaining the capability to chemically profile cocaine at European level;
- Improving the targeting of illicit revenues;
- Making full use of existing EU-funded operational coordination platforms and programmes;

- Improving forensic testing capabilities at European and Member State level;
- Raising better awareness of cocaine threats at policy level.

The [report on the EU drug market for methamphetamine](#) looks at the main production methods, Europe as a producer, prices and purities, signals of spreading use, the relevant criminal networks as well as the global context of methamphetamine. While methamphetamine is reported to be the most widely consumed synthetic stimulant drug in the world, Europe remains a relatively small market for the consumption of methamphetamine; however, there are signals of increasing use. Nevertheless, Europe emerges as a globally important producer of methamphetamine with production sites located in countries such as the Netherlands, Belgium, and the Czech Republic. As a response to these emerging threats, the report recommends several measures, e.g.:

- Increasing the forensic and toxicological capacity at European and Member State level;
- Targeting key EU locations for methamphetamine production and increasing capacities to safely dismantle such sites;
- Intensifying cooperation efforts with countries on heroin trafficking routes to Europe to also address methamphetamine-related threats.

The EU Drug Markets modules utilise data from multiple sources. Primarily, this include data and information reported to the EMCDDA and Europol. Global data are sourced from the United Nations Office on Drugs and Crime (UNODC) and the International Narcotics Control Board (INCB). It is planned that [further material](#) supporting the analyses is made available to the public. The reports on the cocaine and methamphetamine markets will be supplemented by further reports on the illicit markets for amphetamine, cannabis, heroin, MDMA (3,4-methylenedioxymethamphetamine), and NPS (New Psychoactive Substances), which are to be published in 2023. (CR)

Cybercrime

New Cybercrime Judicial Monitor Published

On 30 June 2022, Eurojust published the [seventh issue of the Cybercrime Judicial Monitor](#) (CJM), an annual publication offering an update on legislative and other developments as well as court rulings regarding cybercrime and cyber-enabled crime. In the seventh issue, special attention is paid to information on ransomware investigations looking at national legal frameworks in Europe, case experiences and cooperation with the private sector. (CR)

Europol Report on Criminal Use of Deepfake Technology

On [28 April 2022](#), Europol's Innovation Lab published its first [report](#) giving a detailed overview of the criminal use of deepfake technology. The phenomena of deepfakes, the technology behind them, deepfake technology's impact on crime and on law enforcement, the detection of deepfake, and actions e.g. by technology companies and the EU to respond to deepfakes are explained in six chapters.

Employed properly, deepfake technology can produce content that convincingly shows people saying or doing things they never did or create people that never existed in the first place. Regarding the technologies behind deepfakes, the report stressed that the adaptation of generative adversarial networks (GANs) – a mechanism designed to minimise the chance products can be discriminated from the authentic content – a great leap in the quality and accessibility of deepfake technology. Furthermore, the growing involvement of crime as a service (CaaS) in parallel with such technologies is of increasing concern for law enforcement. Deepfake technology can facilitate various criminal activities, *inter alia*:

- Harassing or humiliating individuals online;
- Perpetrating extortion and fraud;
- Facilitating document fraud;

- Falsifying online identities and fooling “know your customer” mechanisms;
- Non-consensual pornography;
- Online child sexual exploitation;
- Falsifying or manipulating electronic evidence for criminal justice investigations;
- Disrupting financial markets;
- Distributing disinformation and manipulating public opinion;
- Supporting the narratives of extremist or terrorist groups;
- Stoking social unrest and political polarisation.

Alternately, deepfake technologies have an impact on police work and the legal process as deepfake material requires more qualified assessment and cross-checking and new methods of detection. Hence, the report sees a strong need to adapt the regulatory frameworks – from laws to policies and practices. Law enforcement, online service providers and other organisations need to develop their policies and invest in detection and prevention technology. Policymakers and law enforcement agencies need to evaluate their current policies and practices, and adapt them to be prepared for the new reality of deepfakes. New legislation should therefore set guidelines, enforce compliance, and support law enforcement preparedness efforts. (CR)

Take-Down of RaidForums

At the beginning of April 2022, [Operation TOURNIQUET](#) resulted in the successful take-down of the illegal marketplace ‘RaidForums’, one of the world’s biggest hacker forums selling access to high-profile database leaks. These leaks mainly belonged to several US corporations and contained information for millions of credit cards, bank account numbers and routing information as well as usernames and associated passwords. The forum had a community of over half a million users.

Operation TOURNIQUET was coordinated by Europol supporting investigations of the United States, United

Kingdom, Sweden, Portugal, Romania, and Germany.

Next to the shut-down of the marketplace and the seizure of its infrastructure, the forum’s administrator and two of his accomplices have been arrested. (CR)

Commission Seeks Mandate to Negotiate UN Cybercrime Convention

On 29 March 2022, the Commission published a recommendation for a Council decision authorising the Commission to [start negotiations on a UN Convention on Cybercrime](#) on behalf of the EU (cf. Art. 218(3) TFEU). According to the Commission, this is to ensure the appropriate participation of the EU in the negotiations. For the negotiations are likely to concern aspects relating to EU legislation and competence, especially in the area of cybercrime.

In December 2019, the UN General Assembly had decided to work on a comprehensive international convention on countering the use of information and communications technologies for criminal purposes. For this purpose an open-ended *ad hoc* intergovernmental committee of experts was established. Negotiations were supposed to start in January 2022, but were postponed to a later date due to the COVID-19 pandemic. (TW)

Environmental Crime

Europol: Environmental Crime Threat Assessment 2022

On 27 June 2022, Europol published a new [report assessing the environmental crime threats](#) targeting the EU.

In three main chapters, the report looks at the criminal networks involved in environmental crimes, the main typologies of environmental crimes investigated in the EU, and the impact of other organised crime activities (such as illicit drug production, counterfeiting, and fraudulent schemes) on the environment. Main typologies of environmental crimes include:

- Waste and pollution crimes;
- Wildlife trafficking;
- Illegal, unreported, unregulated fishing;
- Other environmental crime phenomena such as forestry crimes and illegal pet trade.

In the field of wildlife trafficking, the report points out that the EU is functioning as a hub for global wildlife trafficking. Accordingly, the EU is the main destination for trafficked wildlife as well as a point of origin for endemic wildlife trafficked to other continents. Regarding waste crimes, the report finds that EU criminal networks are increasingly targeting central and eastern Europe to traffic illicit waste produced in Western Europe.

Looking at the incentives for criminal networks to get involved in environmental crimes, it is concluded that opportunities for high profits, legal discrepancies among countries, low risk of detection, and marginal penalties make environmental crime an attractive business for criminals. The infrastructure used by criminal networks to operate such crimes is based on three pillars, i.e. the extensive use of document fraud, the abuse of discrepancies in legislation, and corruption. For the laundering of their illicit proceeds, criminals mainly use the same legal businesses in which they operate. Green investments, certificate and emission trading systems are increasingly subject to fraudulent activities. Overall, the report finds most environmental crime actors as opportunistic legal business owners/operators who decide to increase their chances of profit by establishing a criminal venture. Given that such a large part of the criminal activities is carried out by legal businesses, identifying the criminal networks behind environmental offences is one of the main challenges for law enforcement.

Looking ahead, the following aspects are seen as key for law enforcement to keep up with environmental criminals:

- Increasing the respective budgets;

- Developing specialised environmental units in every EU Member State;
- Filling technical knowledge gaps.

The report pays special attention to climate change, which functions as a push and pull factor for organised crime. The increasing scarcity of natural resources will likely trigger organised crime interests in terms of profit over their future allocation. (CR)

EP Stands Up for “EU Green Prosecutor”

In a [resolution adopted on 23 June 2022 on illegal logging in the EU](#), MEPs emphasises, among other things, that the establishment of a “green prosecutor” could help to combat environmental crimes, such as illegal logging. This could be achieved by broadening the mandate of the European Public Prosecutor’s Office. According to Art. 86 (4) TFEU, this would require a unanimous decision of the European Council after approval by the European Parliament and consultation with the Commission.

Another main request of the resolution is the establishment an EU Forest Observation, Reporting and Data Collection framework (“Forest Observatory”), in order to harmonise collection of comparable data across the EU Member States. Law enforcement authorities must be equipped with more resources and personnel, so that criminal proceedings against environmental crimes can be more effective. And environmental activists, whistle-blowers, staff responsible for forest management and investigative journalists need better protection, MEPs said. (TW)

Terrorism

Europol TE-SAT 2022

On 13 July 2022, Europol published its [EU Terrorism Situation and Trend Report \(TE-SAT\) 2022](#). The report gives an overview of terrorism in Europe in 2021, analyses the situation regarding Jihadist, right-wing/left-wing and anarchist ter-

rorism as well as ethno-nationalist and separatist terrorism, and provides for an outlook on potential developments.

The year 2021 saw a total of 15 completed, failed, and foiled terrorist attacks recorded in the EU compared to 57 attacks in 2020 ([→eucrim 2/2021, 93–94](#)). According to the TE-SAT, the difference to the previous year can be explained with a significant decrease in the number of attacks reported as left-wing terrorism. Other main results for 2021 include:

- EU law enforcement authorities arrested 388 suspects for terrorism-related offences (compared to 449 in 2020) and 423 convictions for terrorist offences were passed by the courts in the EU Member States;

- Three Jihadist terrorist attacks were reported. All completed jihadist terrorist attacks were carried out by individuals acting alone. While no failed attacks were reported, eight jihadist attacks were foiled in six EU Member States and 260 suspects arrested in 2021;

- Regarding right-wing terrorism, no right-wing terrorist attacks were completed in 2021. One failed attack was reported, and 64 arrests were made in nine EU Member States. Remarkably, the ages of the suspects continued to decrease, which may be explained by the increased time spent online and therefore being subject to right-wing terrorist and extremist propaganda during the Covid-19 pandemic;

- In the field of left-wing terrorism, one left-wing terrorist attack was completed and carried out. Nevertheless, the report finds the use of confrontational violence posing a threat to public order in the EU a key issue of left-wing and anarchist terrorism;

- No completed, failed, or foiled attack was carried out by ethno-nationalist and separatist terrorists in the EU in 2021. 26 individuals were arrested in four EU Member States. Notably, most suspects arrested for alleged ethno-nationalist and separatist terrorist offences were male, between 20 and 62 years of age,

and mostly citizens of the countries where they have been arrested.

Looking at societal factors with increasing potential to spread terrorism propaganda and narratives, to polarise, mobilise, and recruit individuals, the report draws attention to the impact of (geo-)political instability in and outside the EU, the uncertain socio-economic situation in the EU, developments in the digital society and advanced technologies, the lasting impact of COVID-19, and environmental developments within the climate change. These factors can influence the terrorism landscape in the EU. (CR)

Council Conclusions on Combating Terrorism

On 9 June 2022, the JHA Council adopted [conclusions on the achievements and next steps in protecting Europeans from terrorism](#). Combatting terrorism, especially with regard to the return of foreign terrorist fighters and the detection of terrorist individuals in the Schengen area, was one of the priorities of the French Council Presidency in justice and home affairs ([→eucrim 1/2022, 206–207](#)).

The conclusions stressed that the EU is facing a persistent high level of terrorist threat, which is fostered by an unstable international environment. Several recommendations were addressed to the Member States, *inter alia*:

- To continue discussions on the effective sharing of information on foreign terrorist fighters who constitute a serious threat;

- To issue entry bans on third-country nationals who constitute a threat to national security and to enter these bans into the Schengen Information System (SIS);

- To maximise coordination by furthering cooperation between counter-terrorism authorities and immigration/asylum authorities;

- To coordinate as much as possible their actions and restrictive measures, such as the freezing of assets and eco-

conomic resources of the persons and organisations concerned.

The Commission was, among other things, invited to do the following:

- Assess legal and technical changes that would allow voluntary Member States to be informed of a hit in the SIS on foreign terrorist fighters who constitute a serious threat, in order to improve information exchange on measures already adopted and currently awaiting implementation (→[eucrim 1/2022, 9–10](#));
- Consider a legal act allowing the mutual recognition of entry bans on terrorist suspects;
- Examine different solutions that would allow counter-terrorism authorities to be informed about the timing and state of progress of certain procedures of international protection application lodged by an individual posing a terrorist threat;
- Launch a legislative initiative for establishing minimum rules on the definition of criminal offences and sanctions in the field of illicit arms trafficking.

Ultimately, the conclusions highlight the importance of access to digital data, including data retention, encryption, and artificial intelligence. (TW)

Racism and Xenophobia

Rules on Removing Terrorist Content Online Now Applicable

On 7 June 2022, [Regulation \(EU\) 2021/784](#) on addressing the dissemination of terrorist content online [became applicable](#). From now on internet companies in the EU must take swift measures to prevent the misuse of their services for dissemination of terrorist content. For a detailed summary of the Regulation →[eucrim 2/2021, 95–97](#). The new legal framework aims at preventing terrorists from easily exploiting the internet to recruit, encourage attacks, provide training and glorify their crimes. Negative examples had been the livestreamed terrorist attacks of Christch-

urch, New Zealand in 2019 and of Buffalo, USA in May 2022.

The main elements of Regulation 2021/784 are:

- Obligation for Hosting Service Providers (HSPs) to remove terrorist content online within one hour after receiving a removal order from a competent national authority of an EU Member State;
- Limited scrutiny of cross-border removal orders by the competent authority of the Member State where the HSP has its main establishment or where its legal representative resides;
- Obligation for platforms to take proactive measures when they are exposed to terrorist content;
- Inclusion of several safeguards to ensure respect with fundamental rights, in particular freedom of expression and the right to information;
- Obligation for Member States to sanction platforms for non-compliance with the obligations under the Regulation.

In order to ensure a smooth application of the Regulation, the Commission has been holding workshops for Member States and HSPs since the entry into force of the Regulation on 7 June 2021. Europol has also developed an EU platform on addressing illegal content online ([PERCI](#)) to support the implementation of the Regulation. In doing so, it is ensured that HSPs can receive removal orders from Member States through a common secure channel.

The Commission Directorate-General for Migration and Home Affairs provides a [dedicated website](#) on terrorist content online. Next to factsheets, it includes an [online register](#) of competent national authorities and contact points, which is continuously updated. The website also informs about the EU Internet Forum – a platform for the exchange of trends and evolution of terrorists’ use of the internet as well as for tackling child sexual abuse online. The Forum brings together EU and EFTA States as well as international partners. (TW)

Procedural Criminal Law

Procedural Safeguards

CJEU Clarifies Conditions for Trials and Convictions *in absentia*

In a [judgment of 19 May 2022](#), the CJEU clarified when an accused can be tried in his/her absence and a decision *in absentia* taken against him can be enforced.

The case ([C-569/20](#)) concerns a situation before the Specialised Criminal Court in Bulgaria, in which the defendant (IR), who was indicted for having committed tax offences punishable by custodial sentences, indicated an address at which he could be summoned, but summons failed since he seemingly absconded. After having closed the criminal proceedings due to an irregularity in the first indictment that had been served on IR a new indictment had been drawn up and the proceedings had been reopened; IR, once again, was sought but could not be located.

The referring Specialised Criminal Court had doubts as to whether it can correctly inform the defendant of the procedural safeguards available to him and wondered whether [Directive 2016/343](#) on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings would hamper the next steps of the criminal proceedings. Arts. 8 and 9 of that Directive provide for several situations in which an accused can be tried in his/her absence and a subsequent sentence be enforced or the accused has a right to a new trial.

The judges in Luxembourg replied that Arts. 8 and 9 of Directive 2016/343 must be interpreted as meaning that an accused person whom the competent national authorities, despite their reasonable efforts, do not succeed in locating and to whom they accordingly have not managed to give the information regarding his or her trial may be tried and convicted *in absentia*. In that case, that person must nevertheless, in principle, be

able, after notification of the conviction, to rely directly on the right, conferred by that directive, to secure the reopening of the proceedings or access to an equivalent legal remedy resulting in a fresh examination, in his or her presence, of the merits of the case.

The Court makes clear, however, that that person may be denied that right if it is apparent from precise and objective indicia that he or she received sufficient information to know that he or she was going to be brought to trial and, by deliberate acts and with the intention of evading justice, prevented the authorities from informing him or her officially of that trial. The CJEU stressed that this interpretation is in line with the rights to a fair trial enshrined in Art. 47 and 48 CFR and Art. 6 ECHR. (TW)

Data Protection

CJEU: PNR Directive Valid if Limited to the “Strictly Necessary”

spot
light

In a [landmark ruling of 21 June 2022](#), the CJEU, sitting in for the Grand Chamber, upheld the EU’s regime to collect and use records of travellers, provided that it is strictly interpreted in line with the EU’s fundamental rights. In addition, indiscriminate processing of the data in cases of flights carried out only within the EU is banned unless there is a threat of terrorism. In general, the passengers’ data must also be deleted after six months at the latest unless a connection to terrorism or serious crime has been established. These are the key statements of the answers given to the Belgian Constitutional Court in Case [C-817/19](#) (*Ligue des droits humains*). For the opinion of AG [Pitruzzella](#) → [eucrim 1/2022, 30–31](#).

► Background of the case

Passenger Name Record (PNR) data are booking data stored by air carriers in their reservation and check-in systems. [Directive \(EU\) 2016/681](#) on the use of passenger name records for criminal law purposes (the PNR Directive) re-

quires air carriers to transfer the data of all passengers on flights between a third country and the European Union (extra-EU flights) to the Passenger Information Unit (PIU) of the Member State of arrival or departure in order to combat terrorist offences and serious crime. The PNR data transferred are subject to prior verification by the PIU and subsequently stored for possible further verification by the competent (law enforcement) authorities of the Member State concerned or of another Member State. Art. 2 of the PNR Directive leaves it to the Member States whether they wish to apply the Directive also to flights within the Union (intra-EU flights) – most Member States selected this option.

The *Ligue des droits humains* (Human Rights League) filed an action for annulment with the Belgian Constitutional Court against the law which transposed the PNR Directive into Belgian law. The association claimed that this law violates the rights to respect for private life and to the protection of personal data due to the very broad nature of PNR data and the general nature of their collection, transmission and processing. Furthermore, it submitted that the law restricts the freedom of movement, as it indirectly re-introduces border controls by extending the PNR system to EU flights as well as to transport by other means within the EU.

In this context, the Belgian Constitutional Court referred ten questions to the CJEU for a preliminary ruling concerning, *inter alia*, the validity and interpretation of the PNR Directive and the applicability of the GDPR.

On the basis of these questions, the Court had again the opportunity to rule on the processing of PNR data in the light of the fundamental rights after having examined the deal between the EU and Canada on the transfer and processing of PNR data in its landmark judgment of 26 July 2017 (Opinion 1/15 → [eucrim 3/2017, 114–115](#)).

In its judgment of 21 June 2022, the Grand Chamber of the CJEU confirmed

the validity of the PNR Directive as it can be interpreted in accordance with the Charter and provides clarifications on the interpretation of certain provisions of the Directive.

► On the validity of the PNR Directive

The CJEU first held that the PNR Directive can be interpreted in conformity with primary EU law, in particular with the Charter of Fundamental Rights of the EU (CFR). It acknowledged that the PNR Directive “entails undeniably serious interferences with the rights guaranteed in Arts. 7 and 8 CFR”, but proportionality within the PNR Directive’s justification can be upheld if the transfer, processing and retention of PNR data are limited to what is strictly necessary.

In this context, the CJEU clarified the restrictive interpretation of several provisions of the PNR Directive as follows:

- Several data headings in Annex I of the PNR Directive must be interpreted more precisely and specifically;

- Since the Directive gives Member States some leeway by providing maximum penalties only, it must be ensured that Member States apply the system only to terrorist offences (as defined by EU law) and serious crime “having an objective link, even if only an indirect one, with the carriage of passengers by air” – hence, the application to ordinary crimes must be excluded;

- The optional application of the Directive to intra-EU flights must be curtailed: application to all intra-EU flights is only possible if a Member State is confronted with a genuine and present or foreseeable terrorist threat. In the absence of such a terrorist threat, the application of the Directive to intra-EU flights must be limited to certain routes or travel patterns or to certain airports for which there are, at the discretion of the Member State concerned, indications that would justify that application. In addition, this is flanked by the procedural requirement that the extension of the application of the PNR Directive to selected intra-EU flights is subject to effective review, either by a court or by an

independent administrative body;

- The automated processing when an advance assessment of PNR data is carried out must be limited and accompanied by several safeguards: for instance, the PIU cannot use artificial intelligence technology in self-learning systems (“machine learning”) and verification of positive results must be subject to non-automated (i.e. human) intervention with clear and precise rules that provide sufficient guidance and support for the analysis carried out by the PIU agents. In order to guarantee a uniform administrative practice and respect the principle of non-discrimination, objective review criteria must be established;

- The subsequent disclosure and assessment of PNR data after arrival or departure of the person concerned must include several guarantees: substantially, this assessment can only be carried out on the basis of new circumstances or objective evidence capable of giving rise to a reasonable suspicion of the person’s involvement in serious crime as defined above. procedurally, disclosure must, in principle, be subject to a prior review carried out either by a court or by an independent administrative authority.

➤ *On the interpretation of the PNR Directive*

Regarding questions on the compatibility of the Belgian legislation with the PNR Directive, the judges in Luxembourg make important statements on the retention periods. They point out that a distinction must be drawn between passengers who present a risk in relation to terrorist offences or serious crime and those who do not. In view of different periods defined in Art. 12 of the Directive, the retention of all passengers subject to the PNR system complies with the requirement of “strict necessity” only during the initial six months. A retention up to five years (as indicated in Art. 12(1) of the PNR Directive) is only allowed for data on air passenger if objective evidence revealed a possible involvement in terror-

ist offences or serious crime (having an objective link, even if only an indirect one, with the carriage of passengers by air). In conclusion, the full retention period of five years is only permissible for “targeted passengers”.

Lastly, the CJEU ruled on possible infringements of the rights to free movement within the EU if a Member State applies the PNR scheme to intra-EU flights and – as Belgium did – to other means of transport (transport by rail, by road, and by sea), departing from or going to Belgium and carried out within the European Union, i.e. without crossing external borders with third countries. The judges in Luxembourg reiterated their viewpoint that in these situations restrictions to citizens’ rights are only proportional, if there is a genuine and present or foreseeable terrorist threat to which the Member State concerned is confronted or, in the absence of that, application is limited to certain routes or travel patterns or to certain airports/stations/seaports (see above). Furthermore, EU law precludes national legislation that wishes to use such system for the purposes of improving external border controls and combating illegal immigration.

➤ *Put in focus*

The CJEU’s judgment is widely influenced by its previous judgment ruling on the legality of the EU-Canada agreement on the transfer and processing of PNR data (see above). Also, the CJEU’s standpoints on the retention of telecommunications data (e.g. recently voiced in the judgment of 5 April 2022 in Case C-140/20 → following news item) played a role in the PNR context as well. The CJEU mainly follows the opinion of AG Pitruzzella in this case (→ [eucrim 1/2022, 30–31](#)). Both the Court’s and AG’s results are widely driven by maintaining the EU secondary legislation (the PNR Directive), while attempting to ensure the appropriate balance between freedom and security at the national level.

Nonetheless, compared to the AG, the CJEU partly took a more restrictive

stance particularly in relation to two issues: (1) stricter limits as to intra-EU flights and transport operations within the EU; (2) stricter approach to storage periods.

It is now up to the Belgian Constitutional Court to decide on the compliance of the Belgian law transposing the EU’s PNR legislation. It is likely that the Belgian Court concludes its invalidity; at least, it must apply a narrower interpretation of the Belgian law.

The judgment in *Ligue des droit humains* is also a harbinger of further decisions on pending references seeking clarification on the compatibility of the PNR Directive with fundamental rights and/or of national implementing laws with the EU’s statutory requirements on the collection and processing of PNR data. Thus, the judgment will likely apply to the German implementation against which doubts were casted by the Administrative Court of Wiesbaden (Cases [C-215/20, JV](#) and [C-222/20, OC v Bundesrepublik Deutschland](#)) and by the Local Court of Cologne (Case [C-150/20, Deutsche Lufthansa](#)).

➤ *Comments*

The ruling prompted rather restrained reactions from lawyers, NGOs, and academics.

Catherine Forget, who pleaded the case before the CJEU for the Ligue des droits humains, [told euobserver](#) that the judgment is a “victory” and “[it] undoubtedly calls into question our [Belgium’s] law [on PNR].”

MEP and digital freedom fighter [Patrick Breyer commented](#): “The EU surveillance fanatics have once again disregarded our fundamental rights. (...) The fact that non-transparent black-box machine learning risk evaluation systems have been banned is a particular success against dystopian AI technologies in general, such as ‘video lie detectors’. I am disappointed that a six-month retention of information of all travellers to and from non-EU countries was allowed at all.”

Douwe Korff, emeritus professor of

international law at the London Metropolitan University, [said in euractiv](#): “While the Court refrained from invalidating the directive altogether, it has imposed numerous detailed and demanding conditions and restrictions on the use of PNR data and especially on the mining of the data to create profiling.” *Korff* pointed out that the ruling has broader implications for future EU legislation, stressing that “rather than expanding generalised data trawling and mining and profiling, as the EU wants to do through Europol, these invasive measures should be dropped.”

[European Digital Rights \(EDRi\) fed back](#): “On several key provisions, the Court grants a disproportionate degree of trust in the Member States to apply the PNR Directive in a restrictive way to meet the requirements of the Charter. For example, the Court counts on Member States to restrict the use of the PNR surveillance system in the fight against terrorism and serious crime, although the Directive does not adequately prevent risks of abuse by investigative authorities and the use of PNR data for ordinary crime.”

[Estelle Massé, Europe Legislative Manager at Access Now, said](#): “Considering the impact that the EU PNR Directive has on fundamental rights — as confirmed by the Court — the law should have been invalidated. All EU states will now have to limit their use of PNR data due to its intrusiveness.”

Similarly, *Christian Thönnies*, a doctoral researcher at the Department of Public Law of the Max Planck Institute for the Study of Crime, Security and Law in Freiburg, [wrote on Verfassungsblog](#): “[The CJEU] altered [the Directive] beyond recognition. (...) Some of the Court’s guidelines will almost certainly force Member States to adapt their transposition laws, foreseeably embroiling them in protracted legal battles. (...) I am not sure, however, if European security authorities would not have been better served with a clear decision to invalidate.” (TW) ■

CJEU Clarifies Exceptions to Data Retention in Irish Case



On 5 April 2022, the European Court of Justice (CJEU) added another chapter to the long history of the admissibility of data retention in the EU. In [Case C-140/20 \(G.D. v Commissioner of An Garda Síochána\)](#), the [CJEU confirmed](#) its established case law that general and indiscriminate retention of traffic and location data relating to electronic communication is contrary to Union law even if it intends to combat serious crime. In the Irish case at issue, a convicted murderer contested the use of evidence in the form of his traffic and location data in criminal proceedings and proceeded against the Irish provisions on data retention (for the AG’s opinion → [eucrim 4/2021, 222–223](#)).

► *The CJEU’s main arguments*

The CJEU again stressed that the national legislature must comply with the principle of proportionality (in the narrower sense) and strike a balance between the various rights and interests in question. As a result, the Court rejected the submission that particularly serious crime, such as murder, could be treated in the same way as a threat to national security which is genuine and current or foreseeable and could, for a limited period of time, justify a measure for the general and indiscriminate retention of traffic and location data (→ CJEU in *Privacy International* and *La Quadrature du Net*, [eucrim 3/2020, 184–186](#)).

The CJEU, however, specified the limits of the fundamental ban on data retention. As indicated in previous case law, the following categories of measures are permissible, in order to combat serious crime and to prevent serious threats to public security:

- Targeted retention of traffic and location data on the basis of categories of persons concerned or by means of a geographical criterion;
- General and indiscriminate retention of IP addresses assigned to the source of an internet connection;

- General and indiscriminate retention of data relating to the civil identity of users of electronic communication systems;

- The quick freeze of traffic and location data in the possession of service providers.

Therefore, it is in line with Union law, for instance, to use data retention measures for combating serious crime in areas with a high average crime rate or strategic places, e.g. airports, stations, maritime ports or tollbooth areas. It will also not be queried if expedited retention is ordered from the moment when authorities commence an investigation into a possible serious crime. Such measure could even be extended to persons other than those who are suspected or having planned or committed a serious criminal offence, provided that such data can – on the basis of objective and non-discriminatory factors – shed light on such an offence or acts.

► *Put in focus:*

The specified catalogue of exceptions will further fuel the debate on national regulations or even a new European regulation on data retention. NGOs still warn of the dangers of data retention for the fundamental rights of those affected. Meanwhile, further relevant proceedings are pending before the CJEU. The judges in Luxembourg have to decide, among others, on the cases C-793/19 and C-793/19 (*SpaceNet and Telekom Deutschland*) regarding the admissibility of the German regulation on data retention and cases C-339/20 and C-397/20 (*VD and SR*) seeking clarification on a French approach to data retention for investigations in the financial market (→ [eucrim 4/2021, 222–223](#)). (TW) ■

CJEU: Consumer Protection Associations Can Bring Representative Actions under GDPR

On 28 April 2022, the CJEU [ruled](#) that consumer protection associations may bring representative actions against infringements of laws protecting personal data.

The case at issue deals with an action for an injunction brought forward by the Federal Union of Consumer Organisations and Associations, Germany (*Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.*) against Meta Platforms Ireland, which manages the provision of services of the online social network Facebook. The Federal Union alleged that Meta Platforms Ireland had infringed rules on the protection of personal data, when it made available to users' free games provided by third parties, and put forward the action on the basis of combat of unfair commercial practices and consumer protection. However, there was neither a specific infringement of a right to data protection of a data subject nor a concrete mandate from a data subject.

Against this background, the Federal Court of Justice (*Bundesgerichtshof*) [casted doubts](#) as to whether the Federal Union's action was admissible and asked whether, following the entry into force of the [General Data Protection Regulation \(GDPR\)](#), a consumer protection association still has standing to bring proceedings in the civil courts against infringements of that regulation.

The CJEU decided that a consumer protection association, such as the Federal Union at issue, falls within the scope of the concept of a "body that has standing to bring proceedings" within the meaning of Art. 80 GDPR in that it pursues a public interest objective consisting in safeguarding the rights of consumers. The Court noted that such an interpretation is consistent with the objective pursued by the GDPR: ensuring a high level of protection of personal data.

The case is referred to as [C-319/20](#), *Meta Platforms Ireland Limited, formerly Facebook Ireland Limited v Bundesverband der Verbraucherzentralen und Verbraucherverbände – Verbraucherzentrale Bundesverband e.V.* (AP) ■

Ne bis in idem

CJEU Ruled on Duplication of Criminal and Administrative Penalties in French System

Following its landmark rulings in 2018 on the duplication of criminal penalties and administrative sanctions of a criminal nature as an exception to the *ne bis in idem* principle in Art. 50 CFR (in particular Case C-584/15, *Luca Menci* → [eucrim 1/2018, 24–25](#)), the CJEU was asked whether duplications are possible under the French system. The case is referred to as [C-570/20](#), *BV v Direction départementale des finances publiques de la Haute-Savoie*.

► Facts and background of the case

In the case at issue before the referring *Cour de Cassation* (Court of Cassation, France), the defendant was convicted for evasion of VAT to 12 months' imprisonment by a criminal court. He appealed and maintained that he had already been subject of a tax adjustment procedure which resulted in the imposition of final tax penalties in respect of the same acts, amounting to 40% of the charges evaded. He argued that the requirements with which a duplication of prosecution and penalties of a criminal nature must comply as established by the CJEU in *Menci* are not satisfied in French law. In particular, the French rules lack clarity and foreseeability and do not satisfy the requirements of necessity and proportionality of the duplication of penalties.

The peculiarity of the case was that the legislative landscape in France results from the interaction between two statutory provisions (allowing for administrative penalties and for criminal penalties in the form of fines and prison sentences for certain acts in breach of the tax provisions) and the judicial interpretation of those provisions by the Conseil constitutionnel, which developed three interpretative reservations on these provisions.

► Decision by the CJEU

By its [judgment of 5 May 2022](#), the CJEU held that the fundamental right

guaranteed by Art. 50 CFR, read in conjunction with Art. 52(1) thereof, does not preclude a situation whereby the limitation of the duplication of proceedings and penalties of a criminal nature to the most serious cases of fraudulent concealment or omissions from a return relating to VAT is based only on settled case-law, provided that such duplication is reasonably foreseeable at the time when the offence was committed. However, Art. 50 and 52(1) CFR preclude national legislation which does not ensure, in cases of the duplication of a financial penalty and a custodial sentence, by clear and precise rules, where necessary as interpreted by the national courts, that all of the penalties imposed do not exceed the seriousness of the offence identified. The latter is for the referring court to determine. (TW)

CJEU Clarified Duplication of Punitive Administrative Proceedings in Competition Law

spot light On 22 March 2022, the [CJEU delivered two important judgments](#) that clarify the application of the *ne bis in idem* rule, as enshrined in Art. 50 CFR, in competition law.

► Facts and background of the case *bpost*

In the first case ([C-117/20, *bpost*](#)), the Belgian postal regulator imposed a fine of €2.3 million on *bpost* (the postal service provider in Belgium) in 2011 for having infringed rules of the postal sector since it applied a discriminatory rebate system. This decision was later annulled by the Court of Appeal, Brussels. In the meantime, in 2012, the Belgian competition authority imposed a fine of €378.4 million on *bpost* for abuse of a dominant market position because of the application of the same rebate system. The fine previously imposed by the postal regulator was taken into account in the calculation of that amount.

The referring court (Court of Appeal, Brussels, Belgium) asked whether the final decision relating to the infringe-

ment of sectoral rules in the postal market conducted by a first administrative authority (here: the Belgian postal regulator) prevents the sanctioning of a legal person for infringements of competition rules in a subsequent proceeding conducted by another administrative authority (here: the Belgian competition authority).

► *The CJEU's decision and arguments in bpost*

In reply to those questions, [the CJEU, sitting in for the Grand Chamber, specified](#) both the scope and the limits of the protection conferred by the *ne bis in idem* principle guaranteed by Art. 50 CFR.

Considering that the referring court affirmed the criminal nature of the proceedings, the CJEU first noted that the application of the *ne bis in idem* principle is subject to a twofold condition, namely:

- There must be a prior final decision (the “bis” condition);
- The prior decision and the subsequent proceedings or decisions must concern the same facts (the “idem” condition).

The “bis” condition was considered fulfilled because there was a judgment on the fine by the Belgian postal regulator which acquired the force of *res judicata*.

Regarding the “idem” condition, the CJEU clarified that in competition law matters, as in any other area of EU law, the relevant criterion is the identity of the material facts regardless of their legal classification under national law or the legal interest protected (“*idem factum*”). Accordingly, it is up to the referring court to determine whether the subject matter of the two administrative proceedings dealt with a set of concrete circumstances stemming from events which are, in essence, the same, in that they involve the same perpetrator and are inextricably linked together in time and space.

Should that be the case, the CJEU emphasised that the referring court must then examine a possible limitation of the

ne bis in idem rule guaranteed in Art. 50 CFR. Such a limitation of the *ne bis in idem* principle may nevertheless be justified on the basis of Art. 52(1) CFR. In accordance with that provision, any limitation on the exercise of the rights and freedoms recognised by the Charter must be provided for by law and respect the essence of those rights and freedoms. That provision also states that, subject to the principle of proportionality, limitations on those rights and freedoms may be made only if they are necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

By examining the requirements of Art. 52 CFR, the CJEU referred to its previous case law on the possible duplication of criminal and administrative proceedings, notably its judgment in Case C-584/15, *Luca Menci* → [eucrim 1/2018, 24–25](#). In doing so, it called to mind:

- The possibility, provided for by law, of duplication of the proceedings conducted by two different national authorities and the penalties imposed by them respects the essence of Art. 50 CFR;
- National rules which provide for the possible duplication of proceedings and penalties under sectoral rules and competition law are capable of achieving the objective of general interest of ensuring that each of the two sets of legislation concerned is applied effectively, since they are pursuing the distinct legitimate objectives (here: liberalisation of the postal market, on the one hand and ensuring the functioning of the internal market through the guarantee of competition on the other hand);
- With regard to the strict necessity of such a duplication, it is necessary to assess the following issues:

- There are clear and precise rules making it possible to predict which acts or omissions are liable to be subject to a duplication of proceedings and penalties;
- There are rules on the coordination

between the two competent authorities;

- The two sets of proceedings have been conducted in a sufficiently coordinated manner within a proximate timeframe;
- The overall penalties imposed correspond to the seriousness of the offences committed.

Ultimately, the CJEU indicated that the requirements for a lawful duplication of the proceedings in the Belgian case at issue are fulfilled.

► *Facts and background of the case Nordzucker*

In the second case ([C-151/20, Nordzucker AG and Others](#)), both the Austrian and German competition authorities investigated sugar producers’ agreements not to compete with each other and to control the sugar markets in different regions. In 2014, the German competition authority found, by a decision which has become final, that Nordzucker, Südzucker and the third German producer Agrana Zucker had participated in an anticompetitive agreement in breach of Art. 101 TFEU and the corresponding provisions of German law; it imposed a fine of €195.5 on Südzucker. That decision also reproduced the content of a telephone conversation that was conducted between the sales directors of Nordzucker and Südzucker in 2006 concerning sugar deliveries to the Austrian sugar market.

The referring court (Austrian Supreme Court) was unsure whether it can proceed with competition proceedings against the sugar cartel in Austria. In particular the Austrian court doubted as to whether Art. 50 CFR precludes it from taking account of the 2006 telephone conversation in the proceedings pending before it, since that conversation was expressly referred to in the German competition authority’s decision of 2014. That court also posed the question whether the *ne bis in idem* principle applies in proceedings finding an infringement, which, owing to an undertaking’s participation in a national leniency pro-

gramme, do not result in the imposition of a fine.

► *The CJEU's decision and arguments in Nordzucker & Others*

[The CJEU, sitting in for the Grand Chamber, first repeats its findings](#) in *bpost*, i.e. the requirements of Art. 50 CFR to be fulfilled. Although the case is different to *bpost*, since it deals with decisions by two administrative bodies competent in the same field of law, but situated in two different Member States, the CJEU examined the conditions and limits of Art. 50 CFR in the same way as in *bpost*.

The CJEU particularly emphasised that the identity of anticompetitive practices must be examined in the light of the identity of the material facts, regardless of the legal classification of the offending act under national law or the legal interest protected (“*idem factum*”). Similarly to the decision in *bpost*, the CJEU pointed out that it is for the referring court to ascertain, by assessing all the relevant circumstances, whether the German competition authority’s decision of 2014 found that the cartel at issue existed, and penalised it, as a result of the cartel’s anticompetitive object or effect not only in German territory, but also Austrian territory. If this is the case, the referring court must subsequently verify whether a limitation of Art. 50 CFR is justified in accordance with Art. 52(1) CFR (see above).

In this regard, the main problem was whether the two cartel proceedings pursued complementary aims which relate to different aspects of the same unlawful conduct, as a consequence of which the general interest objective in Art. 52(1) CFR can be met. The judges in Luxembourg, however, argued: if two national competition authorities were to take proceedings against and penalise the same facts in order to ensure compliance with the prohibition on cartels under Art. 101 TFEU and the corresponding provisions of their respective national law prohibiting agreements which may affect trade between Member States, those two au-

thorities would pursue the same objective of ensuring that competition in the internal market is not distorted. Such a duplication of proceedings and penalties would not meet an objective of general interest recognised by the EU, with the result that it could not be justified under Art. 52(1) CFR.

Lastly, the CJEU confirms that the *ne bis in idem* principle also applies if one of the undertakings (here: Nordzucker) takes part in a national leniency programme, as a consequence of which a fine cannot be imposed, but only a declaration of the infringement of the cartel law can be made.

► *Put in focus*

The two judgments of 22 March 2022 include important clarifications on the protection by the *ne bis in idem* principle. It must first be stressed that the fundamental right in Art. 50 CFR does not only apply if it comes to penalties imposed in criminal proceedings *strictu sensu*, but also in proceedings which are conducted by different administrative authorities and which can lead to the imposition of sanctions of a criminal nature in the wider sense. In essence, the CJEU applies the criteria established in its landmark rulings of 2018 concerning the juxtaposition of administrative and criminal proceedings against the same natural or legal person (→[eucrim 1/2018, 24–27](#)).

An important aspect of the two judgments is that the CJEU unifies the interpretation of the “*idem*” condition across law disciplines. This means that the CJEU departed from its special path in the assessment of the “*idem*” criterion in the double jeopardy prohibition in competition law (so-called “*idem-crimen*” approach considering a triple identity involving the protected legal interest next to the identities of person and fact). The Court considered the [criticism by Advocate General Bobek](#), who was responsible for the cases, to be justified in principle, but chose an approach to legal unification other than the one proposed by him, namely the

orientation towards the *idem factum* approach as established in the *Menci* case in 2018 (→analysis by *Rossio-Maccanico*, “A Reasoned Approach to Prohibiting the Bis in Idem – Between the Double and the Triple Identities”, [eucrim 4/2021, 266–273](#)).

In addition, the CJEU makes clear that the protection against double jeopardy has its limits, i.e. it is not absolute. The CJEU developed a uniform, multi-stage review programme for Art. 52 CFR in relation to the *ne bis in idem* protection enshrined in Art. 50 CFR. Decisive aspects here are the assessment of the objectives pursued by the two procedures as well as the proportionality of the double punishment.

Even if the CJEU should have unified its previous case law on double jeopardy and created more coherence, caution is required, however, in the assessment of individual cases. The CJEU’s findings are very fact-oriented and different results may be reached in the concrete application of the criteria in other cases. (TW) ■

Victim Protection

15 Member States Have Not Transposed Whistleblower’s Directive – Infringement Proceedings Continue

On 15 July 2022, the European Commission [informed the public](#) that it proceeded with infringement proceedings against 15 EU Member States for not having transposed the [Directive on the protection of persons who report breaches of Union law](#) (the “EU Whistleblower’s Directive” (2019/1937)). The Member States concerned are:

- Bulgaria;
- Czechia;
- Estonia;
- Finland;
- France;
- Germany;
- Greece;
- Hungary;
- Ireland;

- Italy;
- Luxembourg;
- The Netherlands;
- Poland;
- Slovakia;
- Spain.

The deadline for Member States to transpose the Directive was 17 December 2021. The Commission initiated the infringement proceedings in January 2022. The Commission now sent reasoned opinions to the Member States. If the Commission does not receive satisfactory replies within the next two months, it may decide to refer the concerned Member States to the CJEU.

The Whistleblower's Directive establishes rules and procedures to protect individuals who report information they acquired in a work-related context on breaches of EU law in key policy areas. Breaches include both unlawful acts or omissions and abusive practices ([→eucrim 4/2019, 238–239](#)). (TW)

Commission Tabled Evaluation of Victims' Rights Directive

On 28 June 2022, the Commission published an [evaluation](#) of the Victims' Rights Directive ([Directive 2012/29/EU](#)). This will feed into a proposal for a revision of the Directive, which is expected next year. [According to Justice Commissioner Didier Reynders](#), there is a need to improve victims' access to information about their rights and to better protect those among them who are particularly vulnerable to becoming victims of crime, such as children or victims of organised crime.

The evaluation also showed concrete manoeuvre for improvements. In order to ensure better access to justice, victims of crime could be given procedural rights, for instance the right to request evidence. A better protection of victims could also be achieved through minimum standards for physical protection measures, such as restraining orders. In addition, anonymous reporting channels could help to increase rates of reported crime. (TW)

Commissions Actions to Tackle SLAPPs

On 27 April 2022, the Commission proposed [a new Directive and a complementary Recommendation](#) in order to tackle strategic lawsuits against public participation ('SLAPPs'), which constitute a particular form of harassment directed primarily against journalists and human rights defenders to prevent them from or penalise them for speaking up on issues of public interest. The Commission's measures follow the [European Democracy Action Plan](#) (December 2021) and the Commission's first [Recommendation](#) to Member States on the safety of journalists (September 2021). The prevalence of SLAPPs as a matter of serious concern in some Member States had also already been identified in the 2020 and 2021 Rule of Law Reports.

► Directive against SLAPPs

With this [Directive](#), the Commission aims at providing courts and victims of SLAPPs with the tools to fight back against manifestly unfounded or abusive court proceedings. The key elements of the proposal are:

- Early dismissal of manifestly unfounded court proceedings: If a case is manifestly unfounded, courts will be able to take an early decision to dismiss the proceedings. In this case, the burden of proof will be on the claimant to prove that the case is not manifestly unfounded;

- Procedural costs: If a case is dismissed as abusive, the claimant will have to bear all the costs, including the defendant's lawyer's fees;

Compensation of damages: Targets of SLAPPs will have the right to claim and obtain full compensation for the material and immaterial damage incurred;

- Dissuasive penalties: In order to prevent SLAPPs, the courts will be able to impose dissuasive penalties on those who bring such cases to the court;

- Protection against third-country judgements: Member States should refuse recognition of a judgment coming from a non-EU country against a person domiciled in a Member State if the proceedings are found to be manifestly

unfounded or abusive under the Member State's law.

The proposed directive still has to be negotiated and adopted by the European Parliament and the Council.

► Recommendation for Member States:

With the new [Recommendation](#), the Commission encourages Member States to ensure the following:

- A national legal framework providing the necessary safeguards: This includes ensuring the procedural safeguards for an early dismissal of manifestly unfounded court proceedings;

- Training of legal professionals to effectively deal with SLAPPs;

- Raising awareness and organising information campaigns, so that journalists and human rights defenders recognize when they are facing a SLAPP;

- Providing targets of SLAPPs with access to individual and independent support.

The Commission Recommendation is directly applicable. Member States are to report to the Commission on its implementation 18 months after adoption of the Recommendation. (AP)

Cooperation

Customs Cooperation

Expert Group Presents Reform Proposals for Customs Union

On 31 March 2022, the "Wise Persons Group on Challenges Facing the Customs Union" (WPG) presented proposals for a reform of the EU Customs Union. [The report identified](#) the root causes of problems for customs administration, such as the major changes in trade and technology with an expansive increase in e-commerce, new expectations on customs increasingly involved in ensuring security, and lack of unity in applying customs rules and procedures.

The WPG made ten recommendations which address the main shortcomings and should be implemented by 2030:

- Initiating a package of reform proposals by the European Commission that relate to processes, responsibilities, liabilities, and governance of the European Customs Union;
- Introducing a new approach to data that diminishes reliance on customs declarations, focusses on obtaining better quality data from commercial sources, and provides businesses with a single data entry point for customs formalities;
- Setting up a comprehensive framework for cooperation, including data sharing between European Customs and market surveillance authorities, law enforcement bodies and tax authorities;
- Establishing a European Customs Agency to complement the role of the Commission and support the work of Member States;
- Reforming and expanding the Authorised Economic Operator scheme;
- Building a new framework of responsibility and trust on the basis of an “ABC model” (Authorised, Bonded or greater Control);
- Removing the customs duty exemption threshold of €150 for e-commerce and providing some simplification for the application of Customs duties rates for low value shipments;
- Implementing a package of measures to green EU Customs, which, inter alia, aim to digitalise procedures and remove incentives not in line with sustainability;
- Improving capacities by properly resourcing, upskilling and equipping customs;
- Introducing an annual Customs Revenue Gap Report based on an agreed methodology and data framework to better manage Customs revenue collection.

The WPG’s report also identified the lack of a common list of prohibitions and restrictions legislation as a major problem, because it results in divergent approaches and practices across Member States. To address this issue, the Commission published a [compilation of the existing prohibitions and restrictions at EU level](#).

The WPG’s report will now be discussed with the European Parliament and with representatives of the Member States in the “Reflection Group”. Based on further inputs and on broader consultations with stakeholders, the Commission plans to table a customs reform package at the end of 2022.

The [WPG is an expert group](#) which was set up in September 2021. Its mission is to reflect on the development of innovative ideas and concepts on the future of the EU Customs Union and deliver its ideas in the presented report. (TW)

Police Cooperation

Recommendations on Operational Law Enforcement Cooperation

spot light On 9 July 2022, the Council adopted a [recommendation](#) on operational law enforcement cooperation. It aims at strengthening operational cooperation in situations where law enforcement authorities of one EU Member State operate in the territory of another EU Member State in the context of cross-border and other transnational actions involving two or more EU Member States. Such situations include, for instance, cross-border hot pursuit, cross-border surveillance, joint patrols, or other joint operations, e.g., in connection with the touristic season or a mass event. According to the recommendation, the Council invites the EU Member States to establish the following:

- Principles for cross-border hot pursuits and surveillance, including a list of offences for which cross-border hot pursuit and surveillance should be allowed;
- A framework for joint operations;
- Common tasks for Police and Customs Cooperation Centres (PCCCs);
- Support platforms for joint patrols and other joint operations;
- Effective access of their law enforcement authorities to information and communication through secure channels;
- Access to joint training and profes-

sional development with a view to setting up a European police culture.

The recommendation was part of the Commission’s package on a police cooperation code ([→eucrim 4/2021, 225–226](#)). Next to the proposal for the mentioned recommendation, the Commission presented two other legislative proposals: one to reform the legal framework on information exchange between law enforcement authorities of Member States (new directive), and another one on automated data exchange for police cooperation (Regulation on “Prüm II”). In parallel to the recommendation, the Council [adopted](#) general approaches on these two legislative dossiers. Negotiations with the European Parliament in this context will start once the latter has adopted its positions.

Better cooperation between police/law enforcement authorities in the EU was one of the priorities of the French Council Presidency. It strived for improving the fight against terrorist groups and organised crime organisations that spread their activities across the bloc. (CR) ■

EDPS Opinions on the Proposed Police Cooperation Code

On 2 and 7 March 2022, the [EDPS issued two opinions](#) on the Commission’s proposals for a Regulation on automated data exchange for police cooperation and for a Directive on information exchange between law enforcement authorities of Member States ([→eucrim 4/2021, 225–226](#)).

The [opinion](#) on the [Proposal for the Regulation on automated data exchange for police cooperation \(Prüm II\)](#) criticises that the proposed new framework does not clearly lay down essential elements of the exchange of data which may justify a query, for instance the types of crimes. Furthermore, the scope of data subjects affected by the automated exchange of data is not sufficiently clear. Looking at the automated searching of DNA profiles and facial images, the EDPS recommends limiting these possibilities to individual investigations

into serious crimes instead of applying it to any criminal offence. In addition, the legislator should introduce common requirements and conditions concerning the data in the national databases that are made accessible for automated searches. With regard to the automated searching and exchange of police records, the EDPS believes that the necessity of the proposed automated searching and exchange of police records data is not sufficiently demonstrated. Lastly, the EDPS finds that the proposal should be more explicit regarding the responsibility for the processing of personal data.

In his [opinion](#) on the [Proposal for a Directive on information exchange between law enforcement authorities of Member States](#), the EDPS advocates amending the proposal in order to ensure compliance with data protection requirements. Such amendments should entail:

- Establishing a clear definition of the personal scope of the information exchange;
- Limiting the categories of personal data that may be exchanged about witnesses and victims;
- Introducing (short) storage periods for personal data stored in the case management systems of the Single Points of Contact,
- Inserting a requirement for the Member States to decide on a case-by-case basis whether Europol should receive a copy of the exchanged information, and for what purpose.

The Opinion also analyses and provides recommendations on several other specific issues, such as the relationship of the proposed Directive with the existing data protection legal framework. (CR)

EP Pleads for Strong Safeguards in Future EU-Interpol Agreement

On 5 July 2022, the European Parliament (EP) [addressed several recommendations](#) to the Commission and the Council regarding the negotiations for a cooperation agreement between the EU and Interpol. Authorised by the Council

in 2021, the Commission is currently negotiating the agreement on behalf of the EU with Interpol. It is to be concluded by the end of 2022 and aims to establish reinforced cooperation between the EU and Interpol, including access to Interpol's databases and the strengthening of operational cooperation. The recommendations address the following issues:

- Data protection, processing and storage of personal data, judicial redress;
- Interoperability;
- Transfer of data and onwards transfers;
- Red notices and diffusions;
- Russia.

According to MEPs, the final agreement must take robust measures to guarantee compliance with the principles relating to the processing of personal data, as set out in the EU data protection acquis, and the accuracy of personal data received in the context of this cooperation. The purposes for which data may be transferred should be clearly indicated and it must be ensured that data processing incompatible with the initial purpose is prohibited. The agreement should also clearly outline Interpol's obligations to notify personal data breaches to the relevant EU agencies and Member State authorities. Independent bodies responsible for data protection with effective powers of investigation and intervention must oversee data consultations. Furthermore, the Commission must guarantee that Interpol does not retain data for longer than is necessary for the purpose for which it was transferred and ensure effective and enforceable rights to administrative and judicial redress.

Regarding possible future enhanced connection between the EU's and Interpol's information systems in the fields of police and judicial cooperation, asylum and migration, and integrated borders management and visas, MEPs called for the need to include adequate mitigation measures and non-discrimination mechanisms as well as to take measures for improved data quality.

Transfer of sensitive personal data, revealing, for example, racial or ethnic origins, political opinions, sexual orientation, etc. as well as biometric data should only be allowed in exceptional circumstances and where such transfer is necessary and proportionate in the individual case for preventing or combating criminal offences that fall within the scope of the agreement. Moreover, the agreement must explicitly lay down a rule that data transferred by the EU to Interpol are not used for requesting, handing down or executing a death penalty or cruel and inhuman treatment.

The EP called on the Commission to negotiate a firm requirement that Interpol improves the transparency of its red notices and diffusions review system. Interpol should be requested to produce, update and make available procedural and substantive tools on the legal handling of red notices and diffusions, ensuring the consistent and transparent processing of requests, reviews, challenges, corrections and deletions. Other measures to increase transparency and accountability of Interpol's red notice system should include the uniform compilation of statistical data on the processing of red notices and diffusions in annual reports, Interpol's encouragement to increase its efforts in countering the abuse of its system by authoritarian regimes, and better human resources for the review of red notices and diffusions.

Given Russia's current blatant breaches of international law and disregard for the rules-based international system, Interpol's Executive Committee and General Secretariat should take immediate and firm measures to revoke the access rights of Russia and Belarus to Interpol's systems. The EP strongly recommended the Commission putting forward enhanced monitoring measures, in the context of this agreement, regarding notices and diffusions issued before the war in Ukraine by Russian authorities. (TW)

Judicial Cooperation

ECBA Requests Mutual Recognition of Certain Extradition Decisions in Favour of Individual

spot light In June 2022, the European Criminal Bar Association (ECBA) published a [statement on mutual recognition of extradition decisions](#). The statement deals with the situation that individuals have currently no means or legal remedies to successfully and effectively challenge Interpol Red Notices or alerts in the Schengen Information System (SIS) although an extradition request or European Arrest Warrant (EAW) was refused in one Member State. In general, decisions taken by one Member State (e.g. Member State A) are not binding for other Member States and persons are re-arrested if they cross borders. The same extradition request is then reassessed in Member State B, and the persons concerned are possibly extradited to the requesting country. This is also true even though the request was refused by the authorities of Member State A due to disproportionality, breaches of fundamental rights, or political persecution. As a consequence, these persons are deprived of their liberty to free movement within the European Union.

The statement mainly concludes the following:

- Entering alerts into the SIS or Interpol systems is technically independent from EAW or extradition procedures; thus, a national judicial decision denying surrender pursuant to an EAW or refusing extradition does not in itself affect the subsistence of the alert, and the requested person could therefore be re-arrested in another state;
- Under the governing laws, requested persons have no opportunity to contest a request for extradition or an EAW at EU level with binding effect on all Member States. Furthermore, they have no opportunity to obtain a decision prior to entering another Member State, nor can they trigger pre-emptive proceedings in another Member State;

- Currently, there is no mechanism which could avoid the culmination of extradition detentions in different EU Member States;

- Although Interpol and SIS regulations provide for rights to challenge certain data stored, the procedures remain unclear and ineffective.

As a result, the ECBA demands that, as a general principle, certain extradition decisions should have binding effect within the European Union and Schengen area in order to ensure the effective exercise of the right to freedom of movement. Therefore, it is suggested:

- That a decision by a judicial authority of a Member State is binding upon the authorities of another Member State and as such prevents arrest and extradition or surrender if the denial is based on a permanent reason for refusal, in particular if a court has found the request for extradition to violate the principle of *ne bis in idem* or to be disproportionate;

- That a decision by a judicial authority of a Member State is binding upon the authorities of another Member State and as such prevents arrest and extradition or surrender if the denial is based on a risk of a violation of fundamental rights (e.g. risk of ill-treatment, flagrant denial of a fair trial), as long as it has not been established that the requesting state has taken steps to remediate this risk;

- That an independent, harmonised mechanism at the EU level is created in order to regulate the issuance and subsistence of alerts in the SIS (and the execution and continued effects of an INTERPOL alert within the EU) and to provide effective procedural safeguards on national and European levels with regard to the access and effective remedies against alerts.

Lastly, the statement encourages that said solutions are also applied by all Council of Europe Member States.

► Put in focus

The ECBA statement takes up some specific issues from the 2017 “[Agenda 2020](#)” that seeks to further promote procedural safeguards in criminal proceed-

ings across the EU, thereby strengthening the principle and application of mutual trust and recognition (→[H. Matt, Guest Editorial, eucrim 1/2017, 1](#))

The statement builds upon the CJEU’s judgment in Case C-505/19 (*WS v Bundesrepublik Deutschland* →[eucrim 2/2021, 100–101](#)), in which the judges in Luxembourg acknowledged that a final judicial decision by one Member State establishing that the Schengen/EU-wide *ne bis in idem* principle applies is binding on other Member States and prevents the provisional arrest and extradition upon Interpol Red Notices in these other Member States. The statement seeks to extend the spirit of this judgment to other extradition refusals, especially those connected with disproportionality, political persecution and fundamental rights infringements in the issuing/requesting country.

The statement also follows up longstanding [previous demands by academics](#) that the principle of mutual recognition must not only apply to judicial decisions which have a negative effect on an individual, but also to those that have been taken in favour of the individual. Otherwise, a single legal area in the EU that is trusted by all citizens cannot be established. (TW) ■

Commission Guidelines on Extradition to Third Countries

On 7 June 2022, the Commission presented [guidelines on extradition to third countries](#). The guidelines respond to Council conclusions on challenges and the way forward for the European Arrest Warrant and extradition procedures. The conclusions were adopted at the end of the German Council presidency in December 2020 (→[eucrim 4/2020, 290](#)). The Council, *inter alia*, expressed the dilemma for EU Member States’ authorities to handle the CJEU’s 2016 landmark judgment in the Petruhhin case (→[eucrim 3/2016, 131](#)) and several related judgments of the Court (→e.g. [eucrim 4/2020, 289](#), and [eucrim news of 3 April 2020](#)).

The Council stressed that EU Member States are faced with two obligations: on the one hand, the duty to fulfil existing obligations under international law and to combat the risk that the offence concerned will go unpunished and, on the other hand, Member States that do not extradite their nationals are obliged, in accordance with the principles of freedom of movement and non-discrimination on grounds of nationality, to protect citizens from other Member States as effectively as possible from measures that may deprive them of the rights of free movement and residence within the EU. The Council additionally pointed out unfounded and abusive requests for extradition submitted by third countries, which form another problem.

The Commission also refers to the assessment made by Eurojust and the EJN on the practical consequences of extradition requests by third countries seeking for the extradition of EU citizens ([→eucrim 4/2020, 288](#)). Against this background, the Commission guidelines include the following:

- Summary of the CJEU case law in Petruhhin and subsequent relevant cases;
- Analyses of scope, steps to be followed, information exchange mechanism, etc. in said extradition cases that concern the nationality exception;
- Guidelines applicable to all Member States regardless of the nationality exception, i.e. fundamental rights assessments before extradition and handling unfounded and abusive extradition requests (including politically motivated Interpol Red Notices);
- Practical aspects of the Petruhhin mechanism and politically motivated extradition requests, such as language regime and costs, and data protection issues.

Further practical information is provided in the annexes of the guidelines. The annexes include an illustration of steps to be taken concerning extradition requests for prosecution purposes,

an overview of nationality exceptions, and several templates, for instance, to request additional information, to make notifications and to reply. (TW)

European Arrest Warrant

CJEU Interprets Time Limits for Surrender in FD EAW

In the case [C-804/21 PPU \(C and CD\)](#), the CJEU had the opportunity to decide on the consequences of the time limits set out in Art. 23 of the Framework Decision 2002/584 on the European arrest warrant (FD EAW). Pursuant to Art. 23 FD EAW, the requested person must be actually surrendered within a very short period of time (10 days) once the final admissibility decision has been taken by the executing judicial authorities. Another time limit of 10 days for surrender can only be set in cases of *force majeure*. A temporary postponement is possible if the requested person's life or health is endangered. If the requested person is not surrendered within the time limits, he/she must be released (Art. 23(5)).

In the case at issue, surrender of two Romanian nationals from Finland to Romania failed three times. The first and second time, surrender failed due to COVID-19 issues. The third time, the requested persons lodged applications for international protection in Finland.

The referring Finnish court first asked whether the concept of "*force majeure*" extends to legal obstacles.

In its [judgement of 28 April 2022](#), the CJEU clarified that the bringing of legal actions by the requested person, in the context of proceedings provided for by the national law of the executing Member State, with a view to challenging or delaying the surrender, cannot be regarded as an unforeseeable circumstance, and thus cannot constitute a situation of "*force majeure*". within the meaning of Art. 23(3) FD EAW. As a consequence, the authorities of the executing Member State are bound to the time limits set in

Art. 23 FD EAW, because no situation of suspension is given.

Second, the referring court asked whether the requirements of Art. 23(3) are fulfilled if the executing judicial authority makes a police service responsible for ascertaining whether there is a situation of *force majeure*. Here, the CJEU held that the finding of a situation of *force majeure* by the police services of the executing Member State and the setting of a new surrender date, without intervention on the part of the executing judicial authority, does not meet the formal requirements laid down in Art. 23 FD EAW, irrespective of whether a situation of *force majeure* actually exists. As a consequence, the time limits in the case must be regarded as expired and the requested person in custody must be released in accordance with Art. 23(5) FD EAW. The CJEU clarified that the FD EAW does not provide for any exceptions from this obligation. However, the executing Member State can take any measure (except deprivation of liberty) to prevent the requested person from absconding. (TW)

Financial Penalties

CJEU: Dutch Appeal System in Line with FD 2005/214

On 7 April 2022, the CJEU decided on the compatibility of the Dutch procedure to impose fines in respect of a criminal offence with Framework Decision (FD) 2005/214 on the application of the principle of mutual recognition to financial penalties. In the case at issue ([Case C-150/21, D.B.](#)) the referring Polish court asked whether it can recognise and enforce a fine imposed on a Polish citizen for a road traffic offence in the Netherlands by the Central Fine Collection Agency of the Ministry of Justice and Security (CJIB). According to the Dutch system, the fine imposed by the CJIB may be challenged before a public prosecutor in the Netherlands within six weeks. If the prosecutor rejects the posi-

tion of the person concerned, that person can bring an appeal before the Kantonrechter (District Court (Cantonal Sector), Netherlands).

The Polish court casted doubts as to whether this Dutch legislation fulfils the criteria set out in Art. 1(a)(ii) of FD 2005/214. Accordingly, it must be ensured that the case of the person concerned can be tried by “a court having jurisdiction in particular in criminal matters” if the decision imposing a final penalty was made by an administrative authority, such as the CJIB. The referring court mainly argued that the public prosecutor in the Netherlands might not be independent since he/she receives instructions from the Dutch Minister of Justice and thus cannot be regarded as a “court having jurisdiction in particular in criminal matters” within the meaning of Art. 1(a)(ii) of FD 2005/214. In this context, reference is made to the position of the public prosecutor’s office in the Netherlands legal system and the CJEU’s case law in which the judges in Luxembourg denied the Dutch prosecutor the status of “executing and (implicitly) issuing judicial authority” in the system of the European Arrest Warrant (Case C-510/19 → [eucrim 4/2020, 292–293](#)).

[The CJEU pointed out](#) that it is irrelevant for the interpretation of Art. 1(a)(ii) FD 2005/214 whether the public prosecutor who is placed under the hierarchical authority of the Minister of Justice, is a court. It is only decisive whether the Kantonrechter fulfils the criteria of a “court having jurisdiction in particular in criminal matters”. The involvement of the public prosecutor is an intermediate step which is accepted by FD 2005/214. The CJEU finally concluded that the Kantonrechter fulfils the criteria of the concept of “court having jurisdiction in particular in criminal matters” which is an autonomous concept of EU law.

By this judgment, the CJEU implicitly clarified that the case law on the status of public prosecutors in the EAW system (cf. in particular [Joined Cases C-508/18](#)

[\(OG\) and C-82/19 PPU \(PI\) → eucrim 1/2019, 31–33](#)) cannot be transferred to the mutual recognition of financial penalties on the basis of FD 2005/214. (TW)

Law Enforcement Cooperation

EP and Council Reach Consensus on E-evidence Dossier

On 28 June 2022, negotiators of the European Parliament (EP) and the Council [reached a political agreement](#) on the core elements of the Commission proposals on e-evidence (→ [eucrim 1/2018, 35–36](#)). As reported in previous eucrim issues, negotiations have been extremely controversial and cumbersome since positions between the EP and the Member States in the Council on finding the right balance between security and fundamental rights protection considerably differed. The major aim of the future EU legislation on e-evidence is to allow national authorities to request evidence directly from service providers in other Member States, or ask that data be preserved for future use. This will mean a major paradigm shift to the existing rules on judicial cooperation in criminal matters. The new rules would also mandate companies to appoint EU legal representatives to deal with electronic evidence requests in a centralised way.

The [EP negotiators now announced](#) that they were able to push through major safeguards for fundamental rights and data protection, including:

- If traffic and content data are sought from a service provider, the Member State where the service provider is located must be notified, except for situations where the suspect of the crime has its permanent residence in the issuing State and the crime was or is likely to have been committed exclusively in the issuing State;
- The notified authority may reject the order within ten days or, in emergency cases, within eight hours on the basis of a list of reasons. During this time, the

service provider shall back up the data;

- The double criminality requirement is a refusal ground, i.e. if the crime under investigation is not a crime in the service provider’s country, carrying out the request is to be denied;
- The violation of fundamental rights enshrined in the Charter and the EU Treaties would also constitute a refusal ground;
- Special provisions ensure that a refusal on the basis of an assumed violation of fundamental rights can be made if requests are issued by authorities of an EU Member State which is under an ongoing rule-of-law procedure pursuant to Art. 7 TEU (such as Poland and Hungary at the moment);
- Service providers may bring surrender orders not only to the attention of the issuing authority, but also to the authorities of the country in which they are located, for example if they restrict media freedom;
- The provisional provisions are better aligned to existing EU data protection rules; for example, orders have to be sent to data controllers, in principle, and can only be addressed to data processors under certain conditions.

The EP and the Council also found compromises on the reimbursement of costs and sanctions that could be imposed to the service providers in case of non-compliance. Lastly, they agreed that orders are sent through a specific, secure IT system so that genuineness of the orders and confidentiality of data transmissions to investigating authorities are ensured.

The political agreement will now be further debated at the technical level. Moreover, the EP and Council have to agree on other outstanding aspects of the legislative dossier. It is expected that the final compromise can be submitted to the EP and Council for adoption later this year. The compromise is still fragile. Nonetheless, civil society organisations remain critical and fight against this planned new piece of EU legislation. (TW)



Council of Europe

Reported by Dr. András Csúri

Foundations

European Court of Human Rights

ECtHR: New Factsheet on Protection of Property

On 27 June 2022, the ECtHR issued a new [factsheet on protection of property](#) with an overview of its case law in this context. The ECHR enshrines the principle of the peaceful enjoyment of one's property and makes its deprivation conditional, providing protection against unjustified interference by the state. According to the ECtHR case-law, attention must be paid to maintaining a fair balance between the competing interests of the individual and those of the community as a whole.

The factsheet provides examples of general and specific measures reported by States regarding the implementation of ECtHR judgments, in particular:

- The protection of one's possessions such as pensions, social welfare benefits, bank deposits, intellectual property;
- The access to justice and enforcement of property-related judicial decisions awarding damages;
- The restitution of property in the context of nationalisations and expropriations, as well as compensation for loss of one's property;
- The control of use of property through: legal control of tenancies, business licences, urban planning and granting of building permits, bankruptcy, insolvency and/or enforcement proceed-

ings, seizure and confiscation, taxation, reforestation, and hunting-related regulations.

Human Rights Issues

ECtHR Expansion of Interim Measures Regarding Russian Military Action in Ukraine

On 1 April 2022, the [ECtHR expanded previous interim measures](#) in relation to Russia's military action in Ukraine. After having indicated a number of interim measures to the Government of the Russian Federation in relation to the military action which commenced on 24 February 2022 in various parts of Ukraine on 1 and 4 March 2022 ([→eucrim 1/2022 p. 37–38](#)), the ECtHR decided on further requests brought forward by Ukraine on 16 March 2022.

The ECtHR reiterated its interim measure of 1 March 2022, which thus remained in force, as this interim measure must be understood to cover any and all attacks against civilians, including with the use of any form of prohibited weapons, measures targeting particular civilians due to their status, as well as the destruction of civilian objects under the control of Russia forces.

The Court also recalled the interim measure already indicated on 4 March 2022 to the Government of the Russian Federation that, in accordance with their engagements under the ECHR, notably in respect of Articles 2, 3 and 8, they should ensure unimpeded access of the

civilian population to safe evacuation routes, healthcare, food and other essential supplies, rapid and unconstrained passage of humanitarian aid and movement of humanitarian workers.

Regarding the new request, the ECtHR indicated to the Government of the Russian Federation, under [Rule 39 of the Rules of Court](#), that the said evacuation routes should allow civilians to seek refuge in safer regions of Ukraine.

Lastly, the ECtHR has decided to give immediate notice of the new interim measure to the Committee of Ministers of the CoE in accordance with Rule 39 § 2 of the Rules of Court.

Specific Areas of Crime

Corruption

GRECO: Fifth Round Evaluation Report on Serbia

On 5 July 2022, GRECO published its [fifth round evaluation report on Serbia](#). The focus of this evaluation round is on preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies. The evaluation particularly tackles issues of conflicts of interest, the declaration of assets, and accountability mechanisms.

Serbia has been a member of GRECO since 2003 and has so far undergone four evaluation rounds, during which it has achieved initially positive results in the implementation of the recommendations: in the first and second joint evaluation rounds, 80% of the recommendations were fully implemented, and in the third evaluation round 93% (the rest was partially fulfilled in both cases). Serbia is currently in the fourth evaluation round for MPs, judges and prosecutors, where 61.5% of the recommendations have been fully implemented and 38.5% have been partially implemented.

Corruption is considered widespread in Serbia and the country is ranking low

in various indices: in the Transparency International Corruption Perceptions Index, Serbia ranks 38th in 2020, and the House of Freedom downgraded the effectiveness of anti-corruption safeguards in 2021. In this context, it was noted that, despite an increase in arrests and prosecutions for corruption in recent years and several reports on corruption investigations involving members of the executive branch, arrests and prosecutions are very rare. One of the reasons is that prosecutors considered that the police had not provided sufficient evidence in cases against government ministers.

The report highlights that the Agency for the Prevention of Corruption (APC) plays a central role in many areas (e.g., public bodies' integrity plans to offset corruption, public officials' asset declarations, training and advice, lobbying rules, etc.). Its action is based on the Law on the Prevention of Corruption (LPC), which imposes requirements on public officials, and the Law on Lobbying. The notion of public officials within the LPC is broad and includes most persons with top executive functions (PTEFs). It does not cover, however, the Prime Minister's and Deputy Prime Ministers' chiefs of cabinets and advisers working for ministers, both roles being closely associated with government decision-making. In parallel with the APC, the report recommends to fully recognise and harness the role of the Anti-Corruption Council in analysing legislation and identifying systemic problems.

Regarding central governments, GRECO recommends:

- Laying down rules requiring integrity checks prior to the appointment of ministers/chiefs of cabinet and advisers in order to identify and manage possible risks of conflicts of interest;
- Adopting strategic documents for preventing corruption amongst all PTEFs for the government and the Presidential administration;
- Strengthening the role of the APC by making public its recommendations and the government's response to them;

- Expanding the remit of the Law on Prevention of Corruption to cover all PTEFs, including the Prime Minister's and Deputy Prime Ministers' chiefs of cabinet as well as special and government advisers;

- Acknowledging (in full) the advisory role of the Anti-Corruption Council in the institutional framework to combat corruption;

- Providing systematic briefing and training on all integrity standards to all PTEFs when they take office and at regular intervals;

- Systematically submitted laws emanating from the Government for public consultations, and systematically accompanying an explanatory note to revised bills presented before the National Assembly;

- Expanding the scope of the Law on Lobbying to cover contacts with PTEFs whether they have been formalised in a written request or not;

- Obliging all PTEFs to disclose ad hoc conflicts of interest;

- Applying post-employment restrictions rules to all PTEFs.

With regard to law enforcement agencies, GRECO recommends:

- Adopting a strategic document with clear goals on corruption prevention in the police identifying risk areas;

- Updating the Code of Police Ethics so as to cover in detail all relevant integrity matters supplemented with specific examples;

- Organising compulsory training for new recruits and serving police officers on the basis of the revised Code of Police Ethics;

- Preventing political appointments of top police officials and including more open and transparent competition in the appointment procedure of the Police Chief;

- Carrying out security checks relating to the integrity of police officers at regular intervals throughout their career;

- Recording secondary activities of police officers with regular checks undertaken thereafter;

- Setting up a body responsible for recording and evaluating gifts and considerably reducing the value of occasional gifts that can be kept by police officers;

- Revising the applicable safeguards to oversight mechanisms of police misconduct with the aim to ensure sufficiently independent investigations into police complaints and a sufficient level of transparency;

- Strengthening awareness of and training on whistleblower protection in the police.

The implementation of the recommendations addressed to Serbia will be assessed by GRECO in 2023 through its compliance procedure.

Money Laundering

Moneyval: Fifth Round Evaluation Report on Bulgaria

On 27 June 2022, MONEYVAL published its [fifth-round evaluation report on Bulgaria](#). The fifth evaluation round builds on previous MONEYVAL assessments examining in a strengthened way how effectively Member States prevent and combat money laundering (ML) and terrorism financing (TF). The compliance level refers to the date of the site visit to Bulgaria in September 2021. The report calls on Bulgarian authorities to improve the regulatory framework and the use of financial intelligence, investigation and prosecution, the confiscations regime and other measures to combat ML and TF.

It is acknowledged that Bulgaria has carried out a comprehensive national risk assessment. Overall, there is a reasonable understanding of the main ML risks, while awareness of TF risks is limited. A reason is the lack of comprehensive statistics that limits the authorities' insight and ability to respond to risks. A lack of the necessary technical tools hampers inter-agency cooperation between law enforcement agencies.

The number of ML investigations, prosecutions and convictions, and the

severity of criminal sanctions for ML is low and not in line with the identified ML risks. Bulgaria should adopt a more systematic approach to examining the financing aspects of terrorism-related offences, improve the national mechanism for the enforcement of targeted financial sanctions and conduct a more comprehensive analysis of the vulnerability of non-profit sectors to terrorist financing. Moreover, risk-based supervision or monitoring of non-profit organisations at risk of terrorist financing abuse should be strengthened.

According to the report, Bulgaria achieved a moderate level of effectiveness in several areas, e.g., the assessment of ML and TF risks, domestic coordination, investigation and prosecution of TF, targeted financial sanctions related to TF, the implementation of preventive measures by and supervision of financial institutions and non-financial professions, and in international cooperation.

There is however a low level of effectiveness in areas related to the use of financial intelligence, investigations and prosecutions of ML, confiscation of proceeds of crime or property of equivalent value, targeted financial sanctions related to proliferation financing and the prevention of misuse of legal persons and arrangements.

MONEYVAL recommends an urgent review of the beneficial ownership regime to increase its transparency, because there are significant concerns in relation to the accuracy of the beneficial ownership information held in the registers and by the obliged entities.

Looking at international cooperation, Bulgaria provides timely and constructive assistance, even if there are technical and procedural constraints.

Moneyval: Annual Report for 2021

On 4 May 2022, MONEYVAL published its [annual report for 2021](#). The Committee examined the measures needed to improve the fight against money laundering. It also assessed compliance with international standards and the evolution

of the legal and institutional framework for the prevention of AML/CFT in the 34 jurisdictions subject to its monitoring as at 31 December 2021.

MONEYVAL member states and jurisdictions continue to show moderate effectiveness on average in their AML/CFT efforts. The median level of compliance is below the satisfactory threshold. The best results were achieved in risk assessment, international cooperation and use of financial intelligence. However, effectiveness remains particularly weak in the areas of financial sector supervision, private sector compliance, transparency of legal entities, ML convictions and confiscations, and financial sanctions for terrorism and proliferation of weapons of mass destruction.

The COVID-19 pandemic, continued to have a significant impact on the work of anti-money laundering authorities in MONEYVAL member states, as already pointed out in the annual report for 2020 ([→eucrim 2/2021, 109](#)). Against this background, the Committee adopted a comprehensive typological report in 2021 to assist supervisors in MONEYVAL member states and territories to adapt their working methods to crisis situations, based on best practices from the region ([→eucrim 1/2022, 41–42](#)).

The use of hybrid tools has enabled MONEYVAL to carry out four mutual assessments in 2021 and a total of six since the start of the pandemic, the highest number in the FATF-led global AML/CFT network.

MONEYVAL continued to expand its engagement with the FATF, initiated a proposal to reform the Global AML/CFT framework, and deepened the organisational relationship between the two bodies.

MONEYVAL has also had a significant impact on the ongoing review of the FATF standards and the FATF's assessment methodology, in particular the enhanced requirements for the so-called "gatekeepers" of the financial system, i.e. lawyers, accountants and fiduciaries/corporate service providers who may

be complicit in large-scale transnational ML schemes.

MONEYVAL has paid considerable attention to the work of the FATF's International Cooperation Review Group (ICRG), which is carrying out the so-called "grey listing" of jurisdictions with low compliance levels, including MONEYVAL members.

Lastly, the report draws attention to the fact that the emerging sector of virtual assets and the increasing use of cryptocurrencies pose a significant challenge in the fight against money laundering, as traditional forms of control exercised by banks and institutions over financial flows and services are no longer operational and financial products can be accessed via the internet from anywhere in the world ([→guest editorial by Elżbieta Franków-Jaśkiewicz, eucrim 1/2022, 1](#)).

Moneyval: Latest Follow-up Reports

Moneyval's latest follow-up reports published on 8 and 10 June 2022 have upgraded the level of compliance of the following member states from "partially compliant" to "largely compliant" in a number of areas:

- [Hungary](#) in three areas: correspondent banking, internal control of financial institutions and transparency and beneficial ownership of legal entities;
- [Albania](#) in two areas: transparency and beneficial ownership of legal persons, and regulation and supervision of financial institutions;
- [Moldova](#) in four areas: activities of designated non-financial businesses and professions, customer due diligence, politically exposed persons, and higher risk countries;
- [Slovenia](#) in one area: assessment of money laundering and terrorist financing risks.

However, in the area of new technologies, where new international requirements for virtual devices were introduced, Moldova's classification was downgraded.

Furthermore, Slovenia's legal framework still contains significant shortcom-

ings with regard to criminalisation of terrorist financing. Therefore, MONEYVAL has decided to apply Compliance Enhancing Procedures against the country. As a first step, the Secretary General of the Council of Europe will send a letter to the authorities of Slovenia requesting the necessary corrective measures to be taken.

Cooperation

Law Enforcement Cooperation

CoE Treaty on E-evidence Open for Signature – Council Gives Green Light for EU Member States

spot light After almost four years of negotiations (September 2017 to May 2021) and formal adoption on 17 November 2021 ([→eucrim 4/2021, 234](#)), the Second Additional Protocol to the Convention on Cybercrime (Budapest Convention) was [opened for signature](#) on 12 May 2022. [The Second Additional Protocol](#) serves the goal of effectively combating crime on the Internet and improving international cooperation in the securing and surrender of electronic evidence. The protocol contains, among other things, regulations on direct cooperation of authorities with providers based in another State Party in

order to receive domain registration and subscriber data. In addition, the protocol provides for several tools for enhanced cooperation between the authorities of the State Parties ([→eucrim 2/2021, 109](#)).

On 12 May 2022 (the day that opened the treaty for signature), 17 Council of Europe member states (among them 13 EU Member States) and four non-members of Council of Europe [signed the protocol](#). In order to enter into force, five ratifications are required.

The EU participated in the negotiations of the Protocol. The Commission negotiated on behalf of the EU after having received a respective mandate by the Council in June 2019 ([→eucrim 2/2019, 113](#)). However, the EU itself cannot sign the Protocol as only states can be parties to it. Therefore, on 5 April 2022, the [Council adopted a decision authorising](#) the EU Member States to sign, in the interest of the EU, the Second Additional Protocol to the Budapest Convention following the procedure of [Art. 218\(5\) TFEU](#). Member States were encouraged to sign the Protocol during the signing ceremony on 12 May 2022, or as soon as possible after that. The decision was made on the basis of a respective proposal by the Commission, which was presented in December 2021 ([COM\(2021\) 718](#)). Still not finalised is the procedure that will lead to a Council decision to ratify the protocol. In order for the Council to adopt such a deci-

sion, the [European Parliament must first give its consent](#) (Art. 218(6) TFEU). The Commission tabled the proposal for this decision in December 2021 as well ([COM\(2021\) 719](#)).

On 20 January 2022, the European Data Protection Supervisor ([EDPS](#)) [submitted his opinion](#) on the two Commission proposals to sign and ratify the Second Protocol to the Budapest Convention. He acknowledged positively that no provision on direct access to data by law enforcement authorities has been included in the final text of the Protocol and that many safeguards have been included. The EDPS recommended EU Member States to declare the reservation not to apply direct cooperation with service providers if requests for accessing certain types of information are made by non-EU countries that will be party to the Protocol. Thus, the EU can ensure that additional safeguards in the review process of these requests are upheld in the EU Member States. The EDPS also called for further clarifying the interaction between the Protocol and other international agreements, such as [the EU-US Umbrella Agreement](#), which could apply instead of the data protection provision of the Protocol.

Meanwhile, negotiations on EU legislation to regulate access by law enforcement authorities to data stored by service providers are ongoing ([→news item supra, p. 124](#)). (TW) ■

Articles

Articles / Aufsätze

Fil Rouge

In the summer of 2022, this special issue of *eu crim* – entitled “The War in Ukraine: Legal and Political Challenges for the EU” – discusses some of the most pressing issues that the EU and its Member States are currently confronted with due to the ongoing, illegal Russian war in Ukraine. The major challenges for the EU are productively discussed in the editorial by *Didier Reynders* and examined further in the following articles.

Specifically, the special issue is divided into three thematic blocks consisting of five articles altogether. The first section focuses on the current state of play of EU restrictive measures (sanctions) and legal challenges. The second section ventures a look into the future and explores possible scenarios regarding the EU’s legal response to the violation of restrictive measures as well as the prevention of and fight against corruption in a post-war era in Ukraine. The final section focuses on the political dimension and challenges for the EU due to the ongoing Russian war in Ukraine.

In the first section, *Anton Moiseienko* focuses on the current regime of sanctions against Russia, placing emphasis on its objectives and humanitarian impact. He argues that, while there are pros and cons to the use of sanctions in general, the EU’s sanctions need to be designed to help Ukraine secure full reparations from Russia for the damage caused. He concludes that some of the main sanctions, such as the freezing of the Russian Central Bank’s assets, are here to stay for a long time.

Next, *Michael Kilchling* provides us with a discussion of the EU’s targeted sanctions and the adaption of this instrument to Russia’s warfare in Ukraine. He then addresses plans for a further intensification of targeted sanctions as proposed by the EU. *Kilchling* focuses, *inter alia*, on the new, extended measures introduced quite recently in Germany, which he uses as a case study. Ultimately, he discusses to what extent this constitutes symbol-driven, legislative activism that raises serious human rights concerns.

Subsequently, in the second section, *Wouter van Ballegooij* discusses the important new proposal recently presented by the European Commission to adopt a Council Decision identifying the violation of restrictive measures – i.e. sanctions – as an EU crime to be listed under Art. 83(1) TFEU. The possible future Directive harmonizing the criminal law of the EU Member States will apply to violations of restrictive measures that the Union has adopted on the basis of Art. 29 TEU or Art. 215 TFEU, such as measures concerning the freezing of funds and economic resources. *Van Ballegooij* discusses the key legal challenges associated with this proposal and why it is urgently needed.

Drago Kos, in turn, focuses on future challenges by discussing the war in Ukraine from the perspective of Ukraine’s fight against corruption. He aptly observes that when the war is over, the Ukrainian anti-corruption framework will be weaker than it was before the war and that it will face a series of new challenges concerning how to counter corruption. This will be of particular importance for the possibility for the Ukraine to join the EU, as it now has official candidate status.

In the final section, *Christian Kaunert* reflects on and discusses the impact of the Ukrainian conflict on the EU’s Eastern Partnership, which has been significant, as it has considerably impacted on the EU’s relationship with Russia. *Kaunert* describes, *inter alia*, the use of hybrid war theory and mercenary armies, which raise many intriguing questions in regard to the establishment of culpability from the perspective of international law. He points at Russia’s ongoing commission of war crimes through military actions in Ukraine and Crimea and at Russia’s willingness to openly flout international rules and norms to achieve its strategic goals.

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The Future of EU Sanctions against Russia

Objectives, Frozen Assets, and Humanitarian Impact

Anton Moiseienko

EU sanctions against Russia are unprecedented in their breadth, as well as in the seriousness of the wrongdoing they seek to address. As a result, the EU finds itself in uncharted waters as it develops its sanctions policy vis-à-vis Russia. This paper offers an overview of three strategic issues that are likely to impact the further evolution of EU policy in this area, namely: the objectives that EU sanctions against Russia can pursue; the fate of hundreds of billions of dollars' worth of Russian assets reportedly frozen across EU Member States; and the possible humanitarian impact of sanctions on Russian population. While questions associated with each of these issues admit of no easy answers, thinking through them will be essential to shaping a coherent, credible and effective sanctions policy in response to Russia's aggression in Ukraine.

EU sanctions against Russia are unusual in many ways. Most conspicuously, the circumstances of their adoption are unusual, as they concern the first overt, large-scale military interstate aggression in Europe since World War II as well as widespread and incontrovertible reports of war crimes.¹ The diversity of the resulting sanctions, which range from individual sanctions against over a thousand people to the freezing of the Russian Central Bank's assets, is likewise unprecedented.²

As this situation unfolds, it is worth considering the possible endgame of the EU's sanctions against Russia. Since predicting the future is a fool's errand, this contribution aims to analyse several of the legal and policy issues that sanctions against Russia engender in light of the EU's previous sanctions programmes and the current circumstances. In particular, this includes the objectives that these sanctions pursue, the fate of the frozen assets, which potentially amount to hundreds of billions of dollars, and the humanitarian impact of such sanctions.

I. Objectives of Sanctions

What the EU's sanctions against Russia seek to achieve is, almost self-evidently, a crucial question. It should have a bearing on the design of sanctions and the conditions for their relaxation, in addition to contributing to the evaluation of whether or not they are, in fact, fulfilling their purposes. This, at least, is the theory. Accordingly, the EU's sanctions guidelines state as follows:³

The objective of each measure should be clearly stated and consistent with the Union's overall strategy in the area concerned. Both the overall strategy and the specific objective should be recalled in the introductory paragraphs of the Council legal instrument through which the measure is imposed. The restrictive measures do not have an economic motivation.

One can surmise that the exclusion of economic motivations means sanctions should not be used as an instrument of, for instance, economic competition in order to undermine a third country's industrial capacity. Other than that, it is obvious that economic considerations are central to the assessment of both which measures are likely to have an impact on the targeted state and what consequences they entail for the EU itself.

In relation to Russia, the EU's sanctions date back to Decision 2014/512/CFSP of 31 July 2014, which was adopted in the aftermath of the Russian annexation of Crimea and its proxy invasion of Eastern Ukraine. The Decision does not expressly list the objectives it pursues, but they are implicit in its recounting of the previous appeals the EU had made to Russia, including the following:⁴

- To immediately withdraw its armed forces to the areas of their permanent stationing;
- To actively use its influence over the illegally armed groups [in Eastern Ukraine] in order to achieve full, immediate, safe, and secure access to the site of the downing of Malaysian Airlines Flight MH17;
- To stop the increasing flow of weapons, equipment, and militants across the border.

These appeals are consistent with the stipulation in the EU's sanctions guidelines that sanctions are generally imposed to "bring about a change in policy or activity by the target country, part of country, government, entities or individuals."⁵ The notion that sanctions are intended to elicit a change in behaviour is widely accepted in the political science literature on sanctions and, to a lesser degree, in legal studies on the subject.⁶ The appeal of this idea lies, in part, in the simple benchmark it offers for assessing the effectiveness of sanctions, namely whether or not they succeed in making the targeted state or

person mend their ways. It also provides plausible deniability as to whether or not less elevated considerations, such as the desire to inflict a degree of punishment on the target, play a part in decision-making.

That said, there is a richer tapestry of possible objectives of sanctions. The US government has identified three main objectives, which include behaviour change, constraining the target's malicious activities, and signalling disapproval thereof.⁷ Even if the first of these objectives is unattainable, the other two can make the game worth the candle. On a more general level, sanctions objectives can also be classified as primary (achieving the desired change in the target's behaviour), secondary (affecting the sanctioning state's own domestic politics or bolstering its international reputation), and tertiary (maintaining the integrity of international rules and institutions).⁸ The latter classification gives expression to the symbolic aspect of sanctions, which can either be a distraction from or a complement to more tangible action.⁹ To reflect the diversity of the possible expectations from sanctions, one commentator draws a distinction between the "purposes" of sanctions, i.e. the envisaged effects on the target, and broader "objectives."¹⁰ There is, in short, a great variety of reasons why sanctions may be imposed, in addition to the ways of thinking about what they are supposed to achieve.

Eight years since Russia's original invasion of Ukraine in 2014, all of the aforementioned objectives – such as pressuring Russia to change its behaviour, constraining its action, and signalling its disapprobation – are relevant to sanctions, although in what combination, and in what proportion, is in the eye of the beholder. As long as Russia's hostilities against Ukraine continue, there is little doubt that the most basic of these objectives, namely that of eliciting a change in Russia's behaviour, remains paramount. One must give some thought, however, to what exactly that means. There is a difference between achieving a permanent, let alone temporary, ceasefire, on the one hand, and securing a comprehensive peace settlement between Ukraine and Russia, on the other. The latter would need to encompass issues of reparations for the damage caused; credible investigation of apparent war crimes, crimes against humanity, and acts of genocide; territorial entitlements; and treatment of the Ukrainian and Crimean Tatar minorities within Russia, to name a few of the most salient issues.

A key political decision that the EU faces is whether its sanctions should be leveraged to achieve the latter, longer-term objective as well as the former, more immediate outcome. One obvious ramification that the decision will have is the future of frozen Russian assets. According to press reports cited by the EU itself, over half of Russian Central Bank assets, put at US\$630 billion before the invasion, have been attached across

the world.¹¹ A significant proportion of these assets is supposedly to be found in EU Member States, in particular France and Germany.¹² A hypothetical decision to scale back or reverse EU sanctions upon the attainment of a ceasefire could, depending on its exact form, result in the restoration of these assets to Russia, while Ukraine would have no realistic prospect of recovering the hundreds of billions of dollars in damage it suffered.

This state of affairs would likely be politically untenable, largely because of its iniquitous effects but also because of the signal it would send about the EU's willingness to relinquish its most powerful coercive tool with the job less than half done. If one accepts this view, which is ultimately a matter of political and moral judgment, then complex considerations arise. The reason for this is because EU sanctions rarely involve the freezing of billions in value, let alone in sovereign assets arguably protected by immunities under international law, and its previous attempts to link (temporary) sanctions to (permanent) confiscation have proven less than successful. These issues are discussed in greater detail in the following section of this article, but another general comment is worth making first.

While it is uncontroversial that resorting to sanctions should be done in a deliberate and thoughtful manner, genuine clarity about their objectives, in the sense of visualising the desired endgame, may not be within reach at the time of their imposition. Consider the case, not too far removed from the present situation, of EU sanctions against Belarus. They were first imposed on human rights grounds in 2012, due to ongoing repression¹³ but were then largely lifted in 2016 because of the perceived constructive role that Belarus was playing in negotiations between Ukraine and Russia.¹⁴ The signification of relaxation of the sanctions had little to do with the problem they originally set out to address but was instead a reward for advancing EU and allied interests in foreign affairs. These sanctions have since been reinstated and broadened in response to Belarus's rigged elections, massive repression, and, ultimately, support for the Russian invasion of Ukraine.¹⁵ What this example amply demonstrates is the potential for using sanctions in a flexible manner, so as to calibrate the amount of pressure the EU is exerting on a third country, depending on the latter's conduct and attendant circumstances.

The lesson this holds for current sanctions against Russia is that the experts who call for greater certainty on what the EU wishes to achieve and under what conditions sanctions can be scaled down may be overstating their case. It is exceedingly difficult, if at all possible, to predict how the war between Russia and Ukraine will continue to unfold. Subject to one exception outlined below, it may therefore not be wise to nail one's

colours to the mast too early and commit to any particular *outcome*, as opposed to using sanctions as a pressure point against Russia in support of the evolving EU and Ukrainian objectives in this war.

II. The Fate of Frozen Assets

All that said, one matter that is exceedingly likely to arise in any political constellation as long as the Ukrainian state survives is that of compensation for the damage caused to Ukraine, its citizens and companies, and foreign persons or businesses affected by Russia's war. The international law term is reparation and, in line with customary international law, the applicable principle is stated as follows in the Articles on Responsibility of States for Internationally Wrongful Acts:¹⁶

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

The Ukrainian government has asserted its willingness to seek full reparation and estimated the damages at over half a trillion dollars as of late March 2022.¹⁷ At present, a complete estimate remains elusive due to the ongoing destruction, with a recent report suggesting that Ukraine's economy will shrink by over 45% in 2022.¹⁸ Meanwhile, effective avenues for securing compensation are few and far between. The interstate dispute initiated by Ukraine in the International Court of Justice has yielded an order on provisional measures that enjoined Russia from continuing its military operation, but it was – predictably – ignored.¹⁹ Likewise, in the past, Russia has been known to ignore monetary awards issued by international arbitral tribunals, including the \$50 billion *Yukos* award.²⁰

It would be incongruous *not* to draw a connection between this conundrum and the fact that significant Russian assets are frozen across EU Member States as a result of sanctions. On its face, using this pool of property to satisfy Ukrainian claims would be incompatible with the temporary nature of sanctions, which involve the provisional *freezing* of assets, not their permanent *confiscation*. This, however, is not really the issue. While sanctions per se are temporary, they can also be a prelude to a more definitive disposal of the property in question, such as confiscation.

That was precisely the idea behind the EU's misappropriation sanctions, which froze the assets allegedly misappropriated by former public officials from Egypt, Tunisia, and Ukraine with a view to their ultimate confiscation, based on court judgments in

their countries of origin.²¹ The problem that bedevilled misappropriation sanctions is that the countries concerned proved incapable of furnishing those final judgments or even substantiating the continued need to keep those targeted on a sanctions list. As a result, misappropriation sanctions ended not with a bang of confiscations but with a whimper of sanctions designations being struck down one by one by the Court of Justice of the EU.²²

As with misappropriation sanctions, there is apparently some appetite in the present circumstances to explore opportunities for the confiscation of frozen Russian assets. In March 2022, the European Commission set up a "Freeze and Seize" Task Force, led by the Commissioner for Justice *Didier Reynders*, whose objective was described as follows:²³

The 'Freeze and Seize' Task Force is composed of the Commission, national contact points from each Member State, Eurojust and Europol as well as other EU agencies and bodies as necessary. It will coordinate actions by EU Member States, Eurojust, Europol and other agencies to seize and, where national law allows provides for it, confiscate assets of Russian and Belarussian oligarchs.

If the announcement is taken at face value, it appears that the Task Force's work is limited to private assets, as being distinct from frozen funds that belong to the Russian Central Bank. One of the legal grounds for confiscation that will likely be explored is the possibility that the assets at hand constitute the proceeds of crime, such as corruption, or were intended for use in the commission of crime. The use of the proceeds of crime, or money laundering, is a criminal offence in all EU Member States as per the EU's successive Money Laundering Directives and the non-binding but influential standards of the Financial Action Task Force (FATF). Some of these states also have procedures in place that enable confiscation in the absence of a criminal conviction. Nonetheless, assembling the evidence that would trigger the application of any such measures is bound to prove challenging, not least since no cooperation from Russia will be forthcoming.

The legal position of Russian state-owned assets is rather different. Their confiscation is precluded by the enforcement immunity that the emanations of the Russian state enjoy under customary international law.²⁴ There is, of course, bitter irony in proclaiming that the assets of a state that has made its contempt for international law well known should be safe from confiscation on the basis of neither sound policy nor principle but solely on the basis of steadfast commitment to a rule of international law. Given the circumstances, the issue arises as to whether any exception to sovereign immunity rules applies, for example because the claims stem from a violation of a *jus cogens* norm,²⁵ or whether circumstances precluding wrongfulness – such as countermeasures – could neutralise the potential breach of international law by a state that will move to confiscate the assets.²⁶ These matters deserve detailed analysis

and are thus beyond the scope of this article, but there is little doubt that they will continue to preoccupy the minds of government lawyers and policymakers in the months to come.

One of the key challenges for the EU is that, while the outcome of its sanctions programmes has reverberations for the EU's credibility, the potential confiscation of frozen assets can only take place under Member States' domestic legislation. So far, two likely avenues for such action appear to exist. One is the confiscation of private assets, such as those belonging to so-called oligarchs, based on proceeds of crime laws. The other is the enactment of bespoke legislation enabling the confiscation of frozen assets, potentially including those belonging to the Russian state.

So far, however, it is non-EU states, specifically the USA and Canada, that have been exploring respective legislative initiatives, namely the Asset Seizure for Ukraine Reconstruction Act and the Frozen Assets Repurposing Act, respectively.²⁷ While the proposed Canadian Frozen Assets Repurposing Act has been subsumed, in substance, within the Budget Implementation Act 2022 tabled by the country's government,²⁸ the analogous bill in the USA has stalled in Congress, reportedly due to the American Civil Liberties Union's opposition to extrajudicial confiscation of property.²⁹ In the meantime, the Polish government has suggested that it will explore amending the country's constitution to allow for precisely that prospect.³⁰ This gives us a taste of the legal and policy maze that EU members and, by extension, the EU itself will need to navigate in order to settle on the manner of the ultimate disposal of frozen Russian assets.

Unless and until these issues are resolved, it is difficult to see how any relaxation of respective financial sanctions can be anything but premature and counterproductive. Or, to put it another way, it becomes apparent that the objective of sanctions must be linked not only to the cessation of hostilities but also to the provision by Russia of full reparations for the damage it caused. Therefore, while there is some overall benefit to maintaining flexibility in relation to the purposes that sanctions serve, as discussed above, this is one area where articulating the EU's commitment to a particular outcome, namely full reparation, would be desirable.

III. Humanitarian Impact

Among other things, the extent of financial and trade sanctions on Russia brings into focus a concern that has been attenuated in most sanctions programmes over the past several decades, namely their potential impact on the population of the sanctioned state. Most recent accounts of sanctions build a narrative

arc from comprehensive sanctions, such as a trade blockade, to targeted or smart sanctions, which hurt individuals and not nations.³¹ The sentiment underpinning this shift is eloquently summed up in *W. Michael Reisman's* assessment of the United States' trade embargo against Haiti, when "[t]he wealthy elite and the military command were waxing rich off the contraband industry the economic sanctions had spawned", while the rest of the population was "without exaggeration starving to death."³² EU and allied sanctions against Russia do not fit this trajectory from comprehensive to targeted sanctions, and that conjures up the same spectre of unintended humanitarian consequences that beset some of the sanctions programmes of the past. It is therefore appropriate, and arguably desirable, for the policy discourse on sanctions against Russia to address this aspect.

As a preliminary observation, it is useful to note that the distinction between comprehensive and targeted sanctions is not a binary one, and the measures directed at Russia fall somewhere on the continuum between the two extremes. On the one hand, they encompass asset freezes and travel bans against a number of individuals responsible for Russia's policies, including President Putin and Foreign Minister Lavrov, among others. On the other hand, initiatives such as the freezing of Central Bank assets are obviously directed at the state as a whole, rather than at specific people. Therefore, they go in the direction of comprehensiveness, although, as mentioned previously, they have not at present reached the maximum level of pressure possible. The assets of the state are, in theory at least, the assets of its people. Likewise, sanctions aimed at degrading Russia's economy, for instance by inducing the depreciation of its currency, are out of necessity going to hurt Russian citizens, provided these measures enjoy a modicum of success.

At first sight, this gives rise to exactly the sort of dilemma identified by Reisman. For better analysis, however, it is helpful to distinguish between sanctions that aim to pressure a certain government into changing its internal policy stance, on the one hand, and those that seek to address the threat it poses internationally, on the other. Here, again, we are talking about a continuum rather than a clear delineation – the difference is between unilateral sanctions against a certain country's regime due to internal repression and those against a state carrying out a military aggression or bent on developing nuclear weapons. Unilateral sanctions by the USA against Haiti in the 1980s and 1990s or the ongoing sanctions imposed by a number of Western states against Myanmar's military regime are instances of the former category; measures against Russia, North Korea, and Iran are firmly in the latter.

Insofar as countries posing a serious outward-facing threat are concerned, one must go beyond a balancing exercise that

weighs up the likelihood of altering the ruling regime's calculus against the amount of pain inflicted on its civilian population. Disrupting the state's activities becomes a significant consideration. That is, in effect, shorthand for saying that its military, economic, and social resilience must be depleted so as to deprive it of the tools needed to carry on with its destructive foreign policy course. And, while in the case of North Korea or Iran there is a relatively narrow category of activities that sanctions are aiming to impede, namely those related to nuclear proliferation, Russia's malign actions involve waging a full-scale war by the country's regular army, supported by its budget – so that, out of necessity, Russia's entire economy is the inevitable target for sanctions.

The fact that some sanctions inevitably have an adverse humanitarian impact is not a new phenomenon. For instance, in relation to North Korea, this has been highlighted time and again in the reports by the UN Independent Panel of Experts, with little in the way of tangible recommendations, save for encouraging continued engagement with relevant non-governmental organisations.³³ In practice, therefore, the necessity of dealing with the risk North Korea presents has left very little room to mitigate the unintended consequences that sanctions sadly wreak on the country's population.

Russia is, broadly speaking, in the same situation, except that the need for sanctions is all the more acute, since there is not merely the risk of a country developing weapons of mass destruction in the future but rather the reality of a nuclear-armed power carrying out a war of aggression, accompanied by widespread and credible allegations of war crimes.³⁴ Against this background, it is incredibly difficult to say whether there is at all a point beyond which further escalation of sanctions becomes unconscionable, except that it is abundantly clear that such a point, should it exist, remains far off for now. It may be all too easily forgotten that, in these circumstances, the humanitarian imperative cuts both ways, as one must be concerned not only with preventing the unnecessary immiseration of the Russian people but also, first and foremost, with forestalling further violence in Ukraine and, subsequently, with helping restore the livelihoods ruined by an aggressive war.

The humanitarian aspect is among the most intractable dilemmas in the law and policy of sanctions, and it is regrettable that no credible multilateral initiative exists to study it. In 2014, the UN Human Rights Council set up the office of the Special Rapporteur on the negative impact of unilateral coercive measures on the enjoyment of human rights, which might have become a commendable initiative. The Council's respective resolution, however, exhibited little readiness to engage in a free and unbiased inquiry that the issue deserves, stipulating *ab initio* that the Council "[c]ondemns the continued unilat-

eral application and enforcement by certain powers of such measures as tools of political or economic pressure against any country."³⁵ More importantly, the Special Rapporteur's terms of reference concentrate on documenting and cataloguing the negative impact of sanctions, and thereby give short shrift to the real issue, which is how it should be weighed against the (legitimate) objectives and (positive) effects of sanctions.³⁶ As might be expected, the documents since published by the Special Rapporteurs have been creative, to the point of being imaginative, in their assessment of the facts and legal analysis.

Following his official visit to Russia, the first Special Rapporteur, the late Ambassador *Idriss Jazairy* of Algeria, was anxious to recommend as a "priority" that members of the Russian parliament should be exempt from Western sanctions, as "parliamentary immunity is recognized worldwide and this must be for good reason."³⁷ (Of course, while members of parliament may enjoy domestic immunity, no immunities from another state's exercise of jurisdiction accrue to them under international law, to say nothing of the complexities of applying sovereign immunities to sanctions in the first place!).³⁸ Ambassador Jazairy's successor as Special Rapporteur, Professor *Alena Douhan* of Belarus State University, has likewise utilised her mandate to promote an idiosyncratic understanding of international law, such as by arguing that "[sanctioning] State officials *ex officio* contradicts the prohibition of punishment for activity that does not constitute a criminal offence."³⁹

As a result, despite the Human Rights Council's engagement with the issue, there is still no serious multilateral process for considering the legal, political, and ethical quandaries related to the humanitarian impact of sanctions.⁴⁰ There is, instead, a corpus of eccentric reports bearing the UN's imprimatur, along with "letters of allegation" that the current Special Rapporteur has been sending to the USA in relation to its sanctions programmes,⁴¹ which are bound to be used before long to impugn Russia-related sanctions on ostensibly humanitarian grounds. Instead of accepting these at face value, it is vital for policymakers to reason from first principles, namely to keep in mind not only the humanitarian impact of sanctions but also the ongoing humanitarian crisis in Ukraine that they are intended to stop and, insofar as possible, rectify the consequences of.

IV. Conclusion

This contribution has attempted to sketch out some of the key legal and policy issues that are likely to determine the development of the EU's sanctions regime against Russia. The focus here has been neither on further measures that may or may not be put in place, nor on the likelihood of EU sanctions resulting

in any substantial changes to Russia's stance, but rather on the three matters likely to remain salient, regardless of the precise shape of sanctions: what their objectives are; what happens to frozen Russian assets; and how one should think about the humanitarian implications of sanctions.

In brief, the argument of this paper is that it is perfectly legitimate not to have a well-defined answer to the first question. As long as sanctions remain a useful way of exerting pressure on Russia in a highly volatile and fluid situation, it would be foolhardy to limit the room for manoeuvre by adhering to any particular dogma as to what sanctions should intend to achieve. That said, and of particular relevance to

the second question, EU sanctions should be found wanting in ambition if they were not leveraged to help Ukraine secure full reparations from Russia for the damage it caused. If accepted, this simple premise means that some of the main sanctions, such as the freezing of the Russian Central Bank's assets, are here for the long run. Finally, it is inevitable, and indeed appropriate, that considerations of a humanitarian nature become part of the discussion if and when sanctions begin taking a toll on Russian living standards. These arguments should be taken seriously, but the only way to do so is by placing them in the context of the much more profound humanitarian crisis that Russia's military aggression is continuing to exacerbate.

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Beyond Freezing?

The EU’s Targeted Sanctions against Russia’s Political and Economic Elites, and their Implementation and Further Tightening in Germany

Michael Kilchling

Since 2014 persons allegedly involved in or supporting the undermining or threatening of the territorial integrity, sovereignty and independence of Ukraine are subject to freezing measures against their property and other financial resources within the European Union. As part of several comprehensive political and economic sanctioning packages initiated by the Commission and the Council after the invasion of February 2022, these financial sanctions have been significantly extended, currently targeting, *inter alia*, some 1,200 individuals, most of them of Russian nationality. This article provides a general overview of the concept of the EU’s so-called targeted (“smart”) sanctions and the adaption of this instrument to Russia’s warfare in Ukraine, followed by an exploration of the plans for a further tightening of such measures as proposed by the European Commission. The intention is to go beyond the – temporary – freezing of assets owned by listed individuals and entities, thus promoting their seizure and confiscation. The new extended measures introduced quite recently in Germany clearly anticipate this new policy direction. They can be seen as a blueprint and have been depicted as point of reference for a critical analysis of such symbolic legislative activism which raises serious fundamental rights concerns.

I. Introduction

“We will target the assets of Russian oligarchs.” With this clear message presented by European Commission President *Ursula von der Leyen* earlier this year, the plans of the Commission to further tighten the already existing targeted sanctions regime related to Russia’s war against Ukraine were publicly communicated. In her statement, she further announced:

“The European Union is looking into ways of using the frozen assets of Russian oligarchs to fund the reconstruction of Ukraine after the war. Our lawyers are working intensively on finding possible ways of using frozen assets of the oligarchs for the rebuilding of Ukraine.”¹

The sheer amount of assets, which are already under freeze, provides a considerable incentive for such a policy plan. According to various estimates of May 2022, assets frozen as a result of Western sanctions may total between 300 and 500 billion US dollars;² of these, approximately **€200 billion in Belgium alone**.³ A possible way forward to realizing such “use” of (private) property is the criminalisation of sanctions evasion in connection to which new grounds for confiscation may be established.⁴

This article is meant to provide a general introduction to the current system of EU sanctions, its origins and current practices as well as to give some guidance through the jungle of relevant EU documents. Given that Germany is one of the first EU Member States which already implemented such additional penal measures, without waiting for EU framework legislation, and based on a portrayal of Germany’s actual amendments, the article also discusses potential infringements of fundamental rights arising from such a tightened concept.

II. EU’s Targeted Sanctions Regime

1. General concept

The so-called targeted sanctions⁵ are a genuine instrument of the EU’s Common Foreign and Security Policy (CFSP) that can be imposed under Chapter 2 of the Treaty of the European Union (TEU). Art. 29 TEU provides an explicit legal basis for Council decisions imposing such sanctions. The procedure is regulated in Art. 215 of the Treaty on the Functioning of the European Union (TFEU); its second paragraph authorises the Union to impose sanctions against natural or legal persons, groups, and non-state entities.⁶ Their formal name is “restrictive measures”.⁷

The first legal document imposing restrictive measures was adopted on 28 October 1996 and concerned the imposition of sanctions on Burma/Myanmar. The measures imposed at

that occasion were still rather modest: a visa ban for selected politicians and military officers, and a suspension of high-level bilateral governmental visits.⁸ Since then, the concept developed to become one of the most dynamic and impactful instruments of the EU’s foreign policy.⁹ Meanwhile, targeted sanctions are being imposed at many occasions. Over time a change in the use of restrictive measures has been identified, which has shifted from targeting states to targeting individuals and non-state entities.¹⁰ Parallel to the EU’s autonomous sanctions, UN-determined sanctions have been adopted and implemented by the European Union as well.¹¹ The related measures are self-executing; transformation into domestic law is not required.

The purpose and scope of targeted sanctions can be diverse, aiming to promote peace and security, to prevent conflicts, to support democracy, and to defend the principles of international law. They can be imposed in a variety of different forms, and selected and combined according to a modular concept.¹² Standard sanctions mainly include economic boycotts, restrictions on services, travel restrictions (including visa or travel bans), flight bans, arms embargoes and embargoes for dual use goods, restrictions on equipment used for internal repression and other specific imports or exports, and most importantly, financial restrictions. In addition, atypical measures customised to specific situations are also possible. For the purpose of this article, the focus is on the financial restrictions.

Distinct from the current public perception, the sanctions regime is not an instrument that would mainly or even exclusively target Russia. As can be seen from the map provided in Figure 1, targeted sanctions are currently in force in relation to a considerable number of states, members of their governments or illegitimate regimes, and individuals or entities supporting those or fighting against those, respectively. Besides Russia, the EU currently targets, *inter alia*, the following countries: Belarus, Burundi, the Central African Republic, the Democratic Republic of Congo, Iran, Iraq, Lebanon, Myanmar, Nicaragua, Sudan and South Sudan, Syria, Tunisia, Venezuela, Yemen, Zimbabwe, and some more.¹³ North America and Canada, together with Australasia and Japan are the only world regions that are totally devoid of any EU sanctions. Within Europe, the political situation in Bosnia and Herzegovina is considered to be quite unstable; accordingly, the legal basis for a potential imposition of targeted sanctions against those undertaking activities aiming to undermine the sovereignty, territorial integrity, constitutional order and international personality of Bosnia and Herzegovina, or seriously threaten the security situation there, or undermine the Dayton peace agreement, has already been passed on a preparatory status quite some years ago.¹⁴ Although EU policy against Russia has become more and more rigorous, the related sanctions have not reached yet

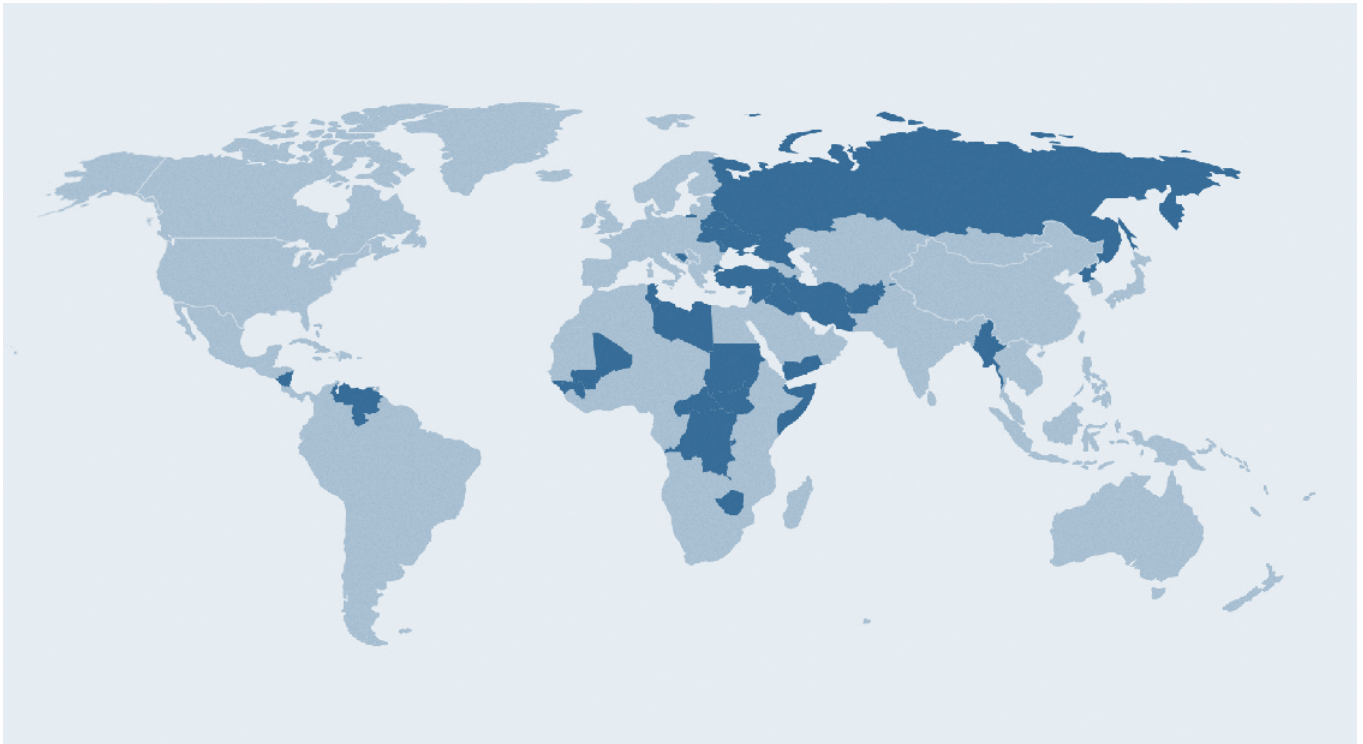


Figure 1: Map of Targeted EU Sanctions in Force, Source: EU Sanctions Map (provided online at <https://sanctionsmap.eu/#/main>)

the top position; while 39 restrictive measures have so far been put in place in the context of the Russian aggression against Ukraine, some 52 types are currently effective against North Korea; and some 24 measures have been introduced in relation to the warfare in Syria.¹⁵

2. Asset Freezing

With the exception of no more than a handful of cases, asset freeze and other finance-related sanctions commonly apply in all cases. The most prominent example from the past are certainly the financial sanctions imposed in relation to the Taliban.¹⁶ This instrument is one of the most frequently amended legal acts in the area of the targeted sanctions. What had been initiated in the year 2000 as a sanctioning regime against the (first) Taliban regime of Afghanistan¹⁷ was widened in the aftermath of 9/11 into an instrument targeting “certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban”. Notwithstanding its character as an UN-determined measure,¹⁸ the related Council Regulation 881/2002,¹⁹ together with its currently more than 330 amendments,²⁰ through which the lists²¹ of targeted persons, groups and entities have been updated on a regular basis, developed to become the prototype of what is commonly discussed as “terror lists”. This scheme raises a number of con-

cerns related to the limited possibilities for effective judicial supervision.²² Meanwhile the title of the core Regulation (no. 881/2002) was changed again, thus widening the scope to the so-called ‘Islamic State’.²³

The key substance of asset freeze is stipulated in Art. 2 of that Regulation which provides:

1. All funds and economic resources belonging to, or owned or held by, a natural or legal person, group or entity designated by the Sanctions Committee and listed in [the annex hereto] shall be frozen;
2. No funds shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in [the annex hereto];
3. No economic resources shall be made available, directly or indirectly, to, or for the benefit of, a natural or legal person, group or entity designated by the Sanctions Committee and listed in [the annex hereto], so as to enable that person, group or entity to obtain funds, goods or services.

The same wording can be found in many other legal acts as well. Meanwhile, standard formulations have been developed which are provided in the related guidelines. These include, *inter alia*, also the following key definitions which are regularly incorporated in the individual legal acts:²⁴

- “Freezing of funds” means preventing any move, transfer, alteration, use of, access to, or dealing with funds in any way that would result in any change in their volume, amount, location, ownership, possession, character, des-

mination or other change that would enable the use of the funds, including portfolio management;

- “Funds” means financial assets and benefits of every kind, including but not limited to:
 - (a) cash, cheques, claims on money, drafts, money orders and other payment instruments;
 - (b) deposits with financial institutions or other entities, balances on accounts, debts and debt obligations;
 - (c) publicly – and privately-traded securities and debt instruments, including stocks and shares, certificates representing securities, bonds, notes, warrants, debentures and derivatives contracts;
 - (d) interest, dividends or other income on or value accruing from or generated by assets;
 - (e) credit, right of set-off, guarantees, performance bonds or other financial commitments;
 - (f) letters of credit, bills of lading, bills of sale;
 - (g) documents evidencing an interest in funds or financial resources;
- “Freezing of economic resources” means preventing their use to obtain funds, goods or services in any way, including, but not limited to, by selling, hiring or mortgaging them;
- “Economic resources” means assets of every kind, whether tangible or intangible, movable or immovable, which are not funds but can be used to obtain funds, goods or services.

A further core element of the financial sanctions are the annexes related to the regulations, in which the targeted individuals and entities for which the measures will apply, are listed. Over the years, hundreds of natural and legal persons have been listed and, sometimes, de-listed again in the context of such regulations. Besides the individual impact for those affected, the selection process and final decision about the listing is a core component of the political dimension of this instrument. The measures taken should target those identified to be responsible for the policies or actions that have prompted the EU’s decision to impose restrictive measures and those benefiting from and supporting such policies and actions.²⁵ Their selection and imposition is meant to bring about the intended change in policy or activity by the target country, part of country, government, entities or individuals, in line with the objectives set out in the CFSP Council Decisions.²⁶ Accordingly, the list has been characterised in the literature as a technology of governance.²⁷

This political dimension has immediate implications when it comes to the determination of the legal character of the targeted sanctions in general and the freezing of assets and other financial resources in particular. As a CFSP instrument they are meant to be a political sanction in form of a temporary and partial restriction of the exercise of certain property rights; however, ownership remains with the sanctioned persons; and

the restrictions will automatically lapse when the sanction regime comes to an end. In the guiding documents, the freezing has been classified as an administrative measure that is to be distinguished from judicial freezing, seizure and confiscation.²⁸ The latter cannot be imposed within the scope of restrictive measures; the same is true in regard to any further penal intervention. Where appropriate, the related documents, such as, e.g., the Lebanon Regulation, explicitly point out that the measures have been imposed without prejudice to the ultimate judicial determination of the guilt or innocence of any individual.²⁹ However, further penal measures, such as confiscation due to criminalisation of the breach of sanctions, might be allowed under domestic law.³⁰

3. Sanctions Related to Russia’s Invasion of Ukraine

In relation to Russia’s military aggression against Ukraine, six sanction packages have been passed until now. A long list of sanctions, such as restrictions on travel, economic cooperation, imports and exports, and also on broadcast, have been imposed.³¹ Even caviar has been banned.³² Freezing of assets is an integral part of the sanctioning regime.³³

Immediately after the annexation of the Ukrainian Crimea by Russia, the Council of the European Union already issued the first restrictive measures against persons in relation to acts that undermine or threaten the territorial integrity, sovereignty and independence of Ukraine. Pursuant to Art. 2 of Regulation 269/2014,³⁴ no funds or economic resources may be made available, directly or indirectly, to or for the benefit of the natural persons listed in Annex I hereto or to natural or legal persons, institutions or organisations associated with them. In addition, Art. 8(1) of the Regulation includes an explicit duty for those concerned to provide the necessary information about sanction-relevant property to the competent authority of the Member State where they are resident or located, and to the Commission. Since the beginning of the current war on the 24 February 2022, the related instruments were repeatedly extended and the list of targeted individuals and entities amended. Currently, some 1,200 individuals and almost 100 entities in Russia are sanctioned.³⁵ Targeted persons concerned include President Putin and the political and economic elites, the so-called oligarchs, and many further private individuals who are considered to be responsible for actively supporting or implementing, actions or policies which undermine or threaten the territorial integrity, sovereignty and independence of Ukraine, as well as stability and security in Ukraine.

Distinct from earlier cases, the lists of individuals provide extensive information about the grounds in regard to which the individuals have been listed.³⁶ Four randomly selected

examples of such “statements of reasons” from that document which read like the facts of a criminal court verdict may illustrate the reasoning behind these listing decisions:

“Function: Activist, journalist, propagandist, host of a talk show named “The Antonyms” on RT, Russian state-funded TV channel.” – “[Mr. X.]³⁷ is a journalist, who hosts the “The Antonyms” talk show on RT, Russian state-funded TV channel. He has spread anti-Ukrainian propaganda. He called Ukraine a Russian land and denigrated Ukrainians as a nation. He also threatened Ukraine with Russian invasion if Ukraine was any closer to join NATO. He suggested that such action would end up in “taking away” the constitution of Ukraine and “burning it on Khreshchatyk” together. Furthermore, he suggested that Ukraine should join Russia.”³⁸

“Function: Owner of the private investment group Volga.” – “[Mr. X.] is a long-time acquaintance of the President of the Russian Federation Vladimir Putin and is broadly described as one of his confidants. He is benefiting from his links with Russian decision-makers. He is founder and shareholder of the Volga Group, an investing group with a portfolio of investments in key-sectors of the Russian economy. The Volga Group contributes significantly to the Russian economy and its development. He is also a shareholder of Bank Rossiya which is considered the personal bank of Senior Officials of the Russian Federation. Since the illegal annexation of Crimea, Bank Rossiya has opened branches across Crimea and Sevastopol, thereby consolidating their integration into the Russian Federation. Furthermore, Bank Rossiya has important stakes in the National Media Group which in turn controls television stations which actively support the Russian government’s policies of destabilisation of Ukraine.”³⁹

“Function: Oligarch close to Vladimir Putin. One of the main shareholders of the Alfa Group.” – “[Mr. X.] is one of Vladimir Putin’s closest oligarchs. He is an important shareholder of the Alfa Group, which includes one of major Russian banks, Alfa Bank. He is one of approximately 50 wealthy Russian businessmen who regularly meet with Vladimir Putin in the Kremlin. He does not operate independently of the President’s demands. His friendship with Vladimir Putin goes back to the early 1990s. When he was the Minister of Foreign Economic Relations, he helped Vladimir Putin, then deputy mayor of St. Petersburg, with regard to the Sal’ye Commission investigation. He is also known to be an especially close personal friend of the Rosneft chief Igor Sechin, a key Putin ally. Vladimir Putin’s eldest daughter Maria ran a charity project, Alfa-Endo, which was funded by Alfa Bank. [...]”⁴⁰

“Function: Journalist of the state-owned TV Rossiya-1, leading a political talk-show “60 minutes” (together with her husband [Mr. X]) – the most popular talk-show in Russia.” – “[Ms. X.] is a journalist of the state-owned TV station Rossiya-1. Together with her husband [Mr. X], she hosts the most popular political talk-show in Russia, “60 Minutes”, where she has spread anti-Ukrainian propaganda, and promoted a positive attitude to the annexation of Crimea and the actions of separatists in Donbas. In her TV show she consistently portrayed the situation in Ukraine in a biased manner, depicting the country as an artificial state, sustained both militarily and financially by the West and thus – a Western satellite and tool in NATO’s hands. She has also diminished Ukraine’s role to “modern anti-Russia”. Moreover, she has frequently invited such guests as Mr. Eduard Basurin, the Press Secretary of the Military Command of so-called “Donetsk People’s Republic” and Mr. Denis Pushilin, head of the so-called “Donetsk People’s Republic”. She expelled a guest who did not comply with Russian propaganda narrative lines, such as “Russian world” ideology. Ms. [X.] appears to be conscious of her cynical role in the Russian propaganda machine, together with her husband.”⁴¹

The above quotes well underline the purely political motifs under which those entered on the list of targeted individuals have been selected. The rationale of the freezing of their properties can even be specified a bit more in view of the actual situation, in distinction from the basic concept of that instrument. In regard to the – real or alleged – supporters of Russia’s aggression it is meant to be an expressive⁴² political sanction in form of a temporary constriction of the possibility to enjoy their – often extremely luxurious – properties located in the European Union, and their fruits. As mentioned earlier, ownership remains with the sanctioned persons, and the restrictions will automatically lapse when the sanction regime comes to an end.

III. Tendencies for a Further Tightening

1. European Union

It can be presumed that the temporary character of the current freezing measures may be one of the reasons why the financial sanctions are deemed amongst EU politicians to be not sufficiently tough. With a certain focus on the oligarchs and tempted by their financial wealth which often counts in billions of Euros, the need for a further tightening of the sanctions has been repeatedly promoted, even so by Commission President *von der Leyen*.⁴³ Such a logical next step would be the seizure and confiscation of the properties concerned (with the purpose of using these assets for supporting the post-war reconstruction of Ukraine’s infrastructure as mentioned above).

Meanwhile, additional penal measures, which, besides criminal prosecution, explicitly include confiscation, have already been introduced in relation to infringements of several of the economic restrictions.⁴⁴ By means of an additional Regulation,⁴⁵ the original Regulation 883/2014 was accordingly amended. *Inter alia*, its Art. 8(1) has been replaced by the following provision:

(1) Member States shall lay down the rules on penalties, including as appropriate criminal penalties, applicable to infringements of the provisions of this Regulation and shall take all measures necessary to ensure that they are implemented. The penalties provided for must be effective, proportionate and dissuasive. Member States shall also provide for appropriate measures of confiscation of the proceeds of such infringements.

Currently, this tightening is limited to the economic sanctions provided in Regulation 883/2014; therefore, it does not apply in relation to the freezing measures under Regulation 269/2014. Nevertheless, it is referred to as a reference measure in the policy discussions in Brussels and the Member States. The Commission foresees in its proposal for a next, revised and amended (general) directive on asset recovery and confis-

cation⁴⁶ that the entire penal asset recovery and confiscation regimes of the Member States would also apply in cases of the violation of EU's restrictive measures as a whole.⁴⁷

2. Germany

Meanwhile, the German legislature has already adopted Ms. *von der Leyen's* idea and became a forerunner in the further tightening of the EU's sanctioning regime. In May 2022, new domestic legislation was passed, which aims to reach a more effective implementation of the EU's restrictive measures. The government bill for a so-called *Sanctions Enforcement Act* was introduced in the legislative process on 10 May 2022,⁴⁸ followed by an extraordinarily hasty enactment: the related Act already entered into force two weeks later, i.e., on 24 May 2022, one day after its publication in the Federal Law Gazette.^{49/50} This piece of legislation relates to the EU sanctions regimes in general, not only to the current ones targeting the Russian aggression in Ukraine. Formally speaking, it is a technical, so-called article act,⁵¹ through which a couple of specified material laws have been amended. These include, first of all, the Foreign Trade and Payments Act, as well as the Money Laundering Act, the Banking Act, the Securities Trading Act, and the Financial Services Supervision Act.

What might on the face of it look like a bunch of technical provisions meant to clarify the administration of finance-related regulations, includes some specific provisions that, directly and indirectly, pave the way to the field of criminal law and penal intervention. Most relevant in our particular context are the amendments to the Foreign Trade and Payments Act (*Außenwirtschaftsgesetz – AWG*, hereinafter: FTPA).

The directive-based obligation for those listed to provide the necessary information⁵² was transposed into a penalised duty to declare any relevant properties concerned to the German Bundesbank or the Federal Office for Economic Affairs and Export Control without delay.⁵³ Failure to do so is a criminal offence which may incur imprisonment of up to one year or a fine.⁵⁴ The declaration has to specify all relevant details as to, e.g., value and ownership, and must be submitted in German.⁵⁵ Selected third parties who have business contacts to listed persons have to file a similar report in case that they have knowledge about potentially sanction-related assets.⁵⁶ The need for such a penalisation was justified by a presumption according to which unwillingness to cooperate with the authorities might be an indicator of the intention to frustrate the sanctioning regime.⁵⁷ While the government bill puts explicit emphasis on the need to strictly and severely punish such manifestation of criminal behaviour,⁵⁸ it fails to mention the further impact of this actual criminalisation. Not any reference – not even in a

footnote – has been made to the fact that all statutory offences prescribed in Section 18 of the FTPA, are reference crimes that allow non-conviction-based confiscation. This patrimonial variant of penal confiscation⁵⁹ was introduced in Germany in 2017 in transposition of the 2014 EU Directive on the freezing and confiscation of instrumentalities and proceeds of crime.⁶⁰ Such an *in rem* procedure can be applied in cases in which a person cannot be prosecuted for legal or factual reasons, upon mere suspicion of one of the reference crimes provided.⁶¹ An initial degree of suspicion (*einfacher Tatverdacht*) is sufficient to order seizure of the related assets; further investigation *in personam* is not required, nor the prosecution or conviction of any individual.⁶² In principle, application of this most extensive variant of confiscation is limited to cases of particularly serious crimes, in particular those related to organised crime and terrorism. This threshold has been concretised by the (definite) catalogue of eligible reference crimes which are considered to generally justify not only the penal intervention as such but also the related presumption of illicit origin of the targeted assets.

Hence, the 2022 amendment to the FTPA automatically⁶³ opens the door for the seizure and confiscation of such properties. However, like all variants of penal confiscation, non-conviction-based confiscation also requires, at least in principle, criminal origin or a reasonable suspicion of criminal origin of the objects or properties that shall be confiscated. Therefore, an additional – technical – step is necessary to make the undeclared properties of those listed liable for confiscation. And indeed, the FTPA further provides that any objects relating to FTPA crimes are subject to confiscation.⁶⁴ As a result of this sector-related widening of the scope of confiscation, the character of the undeclared property becomes irrelevant – be it of licit or illicit origin. Such a fiction of illicitness is not new at all; it also exists since long in the area of money laundering where the law likewise stipulates that any objects relating to that offence – that is, laundered moneys – may be confiscated.⁶⁵ Against this background, the term “undeclared property” earns a totally new, highly problematic meaning. Not enough, as a further side effect the criminalisation of non-compliance with its duty to declare all property also paved the way to (additional) money laundering investigations.⁶⁶ Furthermore, the general rules for third-party confiscation apply.⁶⁷ It may appear questionable whether the mere failure to file a declaration on property – property that is not *per se* incriminated – can justify such serious penal consequences (see below, IV.).

With the Sanctions Enforcement Act I several further new procedural and administrative regulations were introduced, among others:

- It significantly widens the investigative powers of the competent authorities with the purpose to clarify ownership of

- assets and other properties.⁶⁸ In particular, agencies are entitled to summon and examine witnesses, seize and secure evidence, search residence homes and business premises, and examine land registers and other public registers;
- In addition, the possibilities for investigating and accessing details of bank accounts and for investigating the safety deposit boxes and security deposits of sanctioned individuals and companies were extended;⁶⁹
 - In cases of urgency, funds and other economic resources can be secured until ownership has been clarified;⁷⁰ as a concrete example, the government bill makes reference to the situation of a stopover of a suspicious airplane at a German airport the ownership of which is momentarily unclear;⁷¹
 - Moreover, the competences for the exchange of relevant information between agencies were expanded.⁷² This also applies to personal data, in compliance with data protection regulations. Data from the transparency register in which the beneficial owners are listed can also be retrieved;
 - Last, but not least, the responsibilities of the various agencies were clarified in more detail. Actors involved in the enforcement of the sanctions include the German Bundesbank, the Federal Financial Supervisory Authority (BaFin), the Central Financial Intelligence Unit (FIU), the Customs Investigations Office (ZKA), and the Federal Office for Economic Affairs and Export Control (BAFA). Two of these agencies, namely, the FIU and the ZKA, are genuine law enforcement agencies whose general tasks are penal investigation into, and prosecution of, crime.

These domestic regulations go far beyond the purpose and scope of the EU's restrictive measures, at least in their current shape. They also exceed what the title of the Sanctions Enforcement Act implies, at least literally. As has been analysed here, it is not only about enforcing what is prescribed by the related EU regulations as freezing – a measure that explicitly does not include confiscation of assets frozen.

The potential power of the new, tightened national regulations already materialised in a first criminal case opened just a few weeks after their entry into force when German authorities in Bavaria, based on joint investigations,⁷³ seized three properties (private apartments) located in Munich and a bank account, on which the monthly rent payments totalling around 3,500 Euros were received, upon suspicion of criminal offences pursuant to Section 18 of the FTPA in conjunction with Art. 2 of EU Regulation 269/2014.⁷⁴

According to the facts summarised in the press release, accused persons in the Munich case are a member of the State Duma of the Federal Assembly of the Russian Federation, together with his wife who has a registered residence in Munich.

They are joint owners of two apartments in Munich and generate income from the rental of their apartments. While the Duma member himself is listed in one of the annexes to EU Regulation 269/2014, the wife is targeted as a person associated with her listed husband.

As further emphasised in the press release, the public prosecutor's office was supported during their investigations by other agencies, in particular by the "Ukraine investigation group" which has been set up within the Investigation Unit for Serious and Organised Crime⁷⁵ (*sic!*) at the Federal Criminal Police Office (BKA). In particular, the BKA's expertise in the area of complex money laundering investigations has been praised as a useful resource for tracking assets targeted by the sanctions.

The penal variant of seizure was applied by the Munich prosecution authorities notwithstanding the fact that an administrative seizure procedure would be available as well. However, such an administrative seizure pursuant to Sections 9a and 9b of the FTPA is an interim measure which is of preventive nature;⁷⁶ it would not allow confiscation of the related assets.

IV. Discussion

In its sanctions guidelines the Council of the European Union clearly emphasised that the listing of targeted persons and entities must respect fundamental rights.⁷⁷ However, the amendment of the current system of asset freezing with an additional penal component in fact raises such fundamental rights concerns which go far beyond a formal critique of an unreasonable blurring of political and penal instruments. The headline of one of the recent press releases by the Commission well illustrates the basic problem; with their announcement that the

"EU proposes new rules to confiscate assets of criminals and oligarchs evading sanctions";⁷⁸

criminals and oligarchs are equated. This is to some extent irritating, for not to say disconcerting. The exemplary cases shown above⁷⁹ have also been selected for the purpose of this article to demonstrate that the targeted individuals are, without doubt, responsible for the dissemination of disgusting attitudes; some of these persons may be even marionettes of Putin's regime – but they can hardly be labelled criminals (at least most of them). Notwithstanding the frequently dubious appearance of the oligarchs' wealth, there is no evidence that their property might have been acquired with criminal means. This is particularly true for private persons who do not have any political function.

Confiscation is much more than a "restrictive measure". Distinct to the current freezing which is a temporary partial

suspension of (most of the) property rights,⁸⁰ confiscation is final and means nothing less than expropriation. The temporary character of the original measure is extinguished. The political idea of making use of the confiscated assets for the reconstruction of Ukraine after the war gives the notion of an appropriation of external private properties⁸¹ for political and moral reasons. Of course, there can be no doubt that Russia will have to take responsibility and make amends for all the damage caused by its intervention. This is, however, a matter of international litigation, and also an issue to be addressed in a future peace agreement, but not a responsibility for which private citizens have to stand for with their private property.

The example of the criminalisation as recently introduced in Germany points to some fundamental rights problems. First of all, the right to private property may be at stake. In the past, the German Federal Constitutional Court (*Bundesverfassungsgericht, BVerfG*) constantly held that penal confiscation does not violate the constitutional guarantee of private property.⁸² According to the Court's interpretation, property derived from crime does not enjoy constitutional protection from the outset. Therefore, penal confiscation is considered to be a (penal) variant of the *civil condictio sine causa* or *ex iniusta causa* action aiming to the dissolution of unjust enrichment.⁸³ However, such a concept necessarily requires evidence, or at least strong indication, of illicit origin of the assets that are subject to confiscation. This is not the case in regard to the property of the individuals sanctioned. Next comes the principle of proportionality. Even if the criminalisation of the failure to declare the property would be considered reasonable, doubts might be raised as to whether the confiscation of property can be justified in light of the actual criminal substance of such non-compliance which could also be seen as a contravention rather than a crime.

Further doubts relate to the principles of legality and the related right to fair trial and right to effective defence. The legal fiction of German law according to which all objects relating to FTPA crimes, which now include the failure to declare all sanction-related property, are subject to confiscation⁸⁴ makes a significant difference to all other scenarios of confiscation, conviction- and non-conviction-based ones. Distinct from the standard procedures on confiscation of allegedly illicit property, those concerned do not have the chance to demonstrate legal origin of their property. Because in regard to the legal fiction that automatically applies in FTPA cases, rebuttal is neither foreseen nor procedurally relevant. The fact alone that property has not been declared is meant to justify the rigid consequence of confiscation. This situation is likely to induce some parallels to the civil forfeiture regime applied in the US.⁸⁵ In light of the wide range of circumstances which allow

confiscation of property without evidence on criminal conduct, *Levy*⁸⁶ once spoke of that system as a "license to steal".

The penal duty to declare private property might also be seen as an infringement of the right to privacy. What justifies backing the obligation to register private property with state agencies by introducing a statutory offence that provides a criminal penalty in case of non-compliance? Admittedly, such an obligation exists in the field of taxation, too. However, in the latter case the duty to provide the necessary information has been introduced for the purpose of fair and proper calculation of taxes. The information to be delivered in that context enjoys fiscal secrecy, and the procedure leaves the property rights completely untouched. The possibility to enjoy private property and the various rights connected to it include, in principle, the right to keep the related information undisclosed. In relation to the EU sanctions, though, the disclosure of the requested information enforced by penal means is to be understood as – active – self-subjection to an immediate restriction of the rights of exercise of the property concerned.

Last, but not least, the criminalisation bears the possibility of imposition of further non-penal consequences that might add up to a potential conviction and confiscation. These are of particular relevance for non-nationals. Among a variety of such collateral consequences, criminal conviction can have serious impact also for immigration and visa issuance.⁸⁷ Consequently, non-compliance with the obligation to register sanction-relevant property can impede the future options of those convicted to re-enter the EU and travel around, even if the current visa and travel restrictions imposed as part of the current sanction regime have lapsed.

The concerns which could be mapped out here only in short, will have to be examined in more detail by domestic and European courts. And, on a side note, many details of the non-conviction-based confiscation legislation systems have neither found final judicial approval yet.

V. Outlook

Making the Russian regime and society pay for the breach of international law, with its dramatic loss of lives and immeasurable material damages, is more than justified. However, it is questionable whether the idea to make the penal confiscation system available to contribute to such aim is an adequate legal means to pursue this aim.

Over the centuries, the purpose of, and legal rules for, confiscation have significantly changed. In her historic review, *Stöckel* reminds of ancient instruments of confiscation that

were categorised in those times as “*mort civile*” (civil death).⁸⁸ It is not even necessary to go back so far. In the last century, such criminal law-based measures of expropriation had been readily utilised during communism in the jurisdictions in Eastern Europe as an instrument for punishing and eliminating political opponents and dissidents in case of alleged political “crimes” against socialist economy or socialist society or ideology.⁸⁹ The penal code of some of those states, namely, East Germany (the former German Democratic Republic), even provided for an extra clause on non-conviction based confiscation⁹⁰ which in regard to both, its concept and wording, shows perplexing similarities to the related provision in its modern shape.⁹¹ In essence, such kind of policy-driven confiscation is a totalitarian concept that should never be re-introduced.

Imagine Russia or China or any other totalitarian regime would impose similar measures against, e.g., the US’s economic elites, confiscating properties owned by Jeff Bezos, Warren Buffet, Bill Gates, Elon Musk, Mark Zuckerberg, and others. There can be no doubt that the outrage in the democratic parts of the world would be tremendous – and rightly so.

After all, for the sake of the credibility of the European principles of the liberal and rule-of-law based model of society, any impression of an instrumentalisation of criminal law for the purpose of political or moral justness should be avoided. Otherwise the integrity of both, the criminal justice systems of the Member States and the political sanctioning regimes of the European Union, would be at risk.



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1 Statements by European Commission President Ursula von der Leyen; quoted after Reuters, <www.reuters.com/world/europe/eu-exploring-us-ing-oligarchs-frozen-assets-rebuild-ukraine-von-der-leyen-2022-05-19/>. All hyperlinks in this article were last accessed on 8 August 2022.

2 See <www.ukrinform.net/rubric-polytics/3523199-ec-preparing-legal-framework-for-confiscation-of-russian-assets-in-favor-of-ukraine-von-der-leyen.html>.

3 Wirtschaftswoche of 21. April 2022, <www.wiwo.de/my/politik/europa/russland-sanktionen-dieser-mann-hat-mehr-als-200-russische-milliarden-eingefroren/28268864.html?ticket=ST-94093-kJncyihMjDC9KbcrSC-cas01.example.org>.

4 See, e.g., <www.politico.eu/article/eu-moves-to-confiscate-russian-oligarchs-assets/>.

5 Alternatively, they are also referred to as „smart sanctions“; for more details on the terminology, see E.V. Stöckel, *Smart Sanctions in the European Union*, 2014, p. 29.

6 Art. 215(3) TFEU further provides that such measures shall include necessary provisions on legal safeguards.

7 Council of the European Union, Sanctions Guidelines – update, 4 May 2018, document no. 5664/18, <<https://data.consilium.europa.eu/doc/document/ST-5664-2018-INIT/en/pdf>> (hereinafter: EU Guidelines).

8 Common Position 96/635/CFSP of 28 October 1996 on Burma/Myanmar, *O.J.*, L 287, 8.11.1996, 1.

9 S. Sattler, “Einführung in das Sanktionsrecht”, (2019) *Juristische Schulung (JuS)*, 18.

10 F. Giumelli, “Sanctions as a Regional Security Instrument: EU Restrictive Measures Examined”, in: E. Cusumano and S. Hofmaier (eds.), *Projecting Resilience Across the Mediterranean*, 2020, p. 103–119.

11 For a detailed overview, see Stöckel, *op. cit.* (n. 5), pp. 89 et seq., 142 et seq.

12 Sattler, *op. cit.* (n. 9), 19.

13 For a full list, see <<https://sanctionsmap.eu/#/main>>.

14 Council Decision 2011/173/CFSP of 21 March 2011 concerning restrictive measures in view of the situation in Bosnia and Herzegovina, *O.J.* L 76, 22 March 2011, 68.

15 All details relate to the situation on 1 August 2022.

16 For an in-depth analysis, see R. Tehrani, *Die „Smart Sanctions“ im Kampf gegen den Terrorismus*, 2014.

17 Council Regulation (EC) 337/2000 of 14 February 2000 concerning a flight ban and a freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *O.J.* L 43, 16 February 2000, 1.

18 UN-determined means that the listing and de-listing is mainly prepared by the UN Sanctions Committee in New York. From a conceptual point of view, instruments such as Regulation 881/2002 are fully comparable with the EU’s autonomous instruments. The EU’s autonomous (additional) anti-terrorism instruments have their origin in Council Regulation 580/2001 of 27 December 2001 on specific restrictive measures directed against certain persons and entities with a view to combating terrorism, *O.J.* L 344, 28 December 2001, 70.

19 Council Regulation (EC) 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Usama bin Laden, the Al-Qaida network and the Taliban, and repealing Council Regulation (EC) No 467/2001 prohibiting the export of certain goods and services to Afghanistan, strengthening the flight ban and extending the freeze of funds and other financial resources in respect of the Taliban of Afghanistan, *O.J.* L 139, 29 May 2002, 9.

20 See, most recently, Commission Implementing Regulation (EU) 2022/413 of 10 March 2022 amending for the 330th time Council Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the ISIL (Da’esh) and Al-Qaida organisations, *O.J.* L 85, 14 March 2022, 1.

21 Provided in annexes I and II hereto.

22 The issues arising cannot be discussed in the context of this chapter. For more details, see, e.g., N. Zelyova, “Restrictive measures – sanctions compliance, implementation and judicial review challenges in the common foreign and security policy of the European Union”, (2021) *ERA Forum*, 159. See also the Study commissioned by the European Parliament, Subcommittee of Human Rights, on targeted sanctions against individuals on grounds of human rights violations – impact, trends and prospects on EU level, April 2018, <[www.europarl.europa.eu/thinktank/en/document/EXPO_STU\(2018\)603869](https://www.europarl.europa.eu/thinktank/en/document/EXPO_STU(2018)603869)>.

23 Council Regulation (EU) 2016/363 of 14 March 2016 amending Regulation (EC) No 881/2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the Al-Qaida network, *O.J.* L 68, 15 March 2016, 1, through which the former title of the core act was replaced by the new title „Council Regulation (EC)

No 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with the ISIL (Da'esh) and Al-Qaida organisations".

24 See EU Guidelines, *op. cit.* (n. 7), paras. 59 to 61.

25 See EU Guidelines, *op. cit.* (n. 7), para. 13, which further explains that the individualised imposition of the targeted measures is considered to be more effective than indiscriminate measures as they help to minimise adverse consequences for those not responsible for such policies and actions.

26 See EU Guidelines, *op. cit.* (n. 7), para. 4.

27 G. Sullivan, *The Law of the List*, 2020, pp. 59 et seq.

28 Council of the European Union, Update of the EU Best Practices for the effective implementation of restrictive measures, 4 May 2018, document no. 8519/18, para. 28, <<https://data.consilium.europa.eu/doc/document/ST-8519-2018-INIT/en/pdf>> (hereinafter: EU Best Practices).

29 Council Regulation (EC) 305/2006 of 21 February 2006 imposing specific restrictive measures against certain persons suspected of involvement in the assassination of former Lebanese Prime Minister Rafiq Hariri, *O.J.* L 51, 22 February 2006, 1, recital 2.

30 EU Best Practices, *op. cit.* (n. 28) paras. 29 and 48.

31 For a comprehensive overview of the current EU sanction regimes, see <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/overview-sanctions-and-related-tools_en>.

32 See Annex XXI to Regulation (EU) 833/2014.

33 For a consolidated list of financial sanctions, see <<https://data.europa.eu/data/datasets/consolidated-list-of-persons-groups-and-entities-subject-to-eu-financial-sanctions?locale=en>>.

34 Council Regulation (EU) 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, *O.J.* L 78, 17 March 2014, 6.

35 Press release of 16 July 2022 by Josep Borrell, High Representative of the European Union for Foreign Affairs and Security Policy, <https://www.eeas.europa.eu/eeas/sanctions-against-russia-are-working_en>.

36 See, e.g., Council Implementing Regulation (EU) 2022/336 of 28 February 2022 implementing Regulation (EU) No 269/2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, *O.J.* L 58, 28 February 2022, 1.

37 All real names of listed persons provided in the original document have been anonymized for the purpose of this article. All of them were listed as of 28 February 2022.

38 Listed under no. 688.

39 Listed under no. 694.

40 Listed under no. 674.

41 Listed under no. 683.

42 Expressiveness means that through its publication the measure also carries a clear political message.

43 See introduction, n. 1.

44 See Regulation (EU) 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *O.J.* L 229, 31 July 2014, 1.

45 Council Regulation (EU) 2022/879 of 3 June 2022 amending Regulation (EU) 833/2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *O.J.* L 153, 3 June 2022, 53.

46 Proposal of 25.05.2022, COM(2022) 245 final – 2022/0167 (COD).

47 Art. 2 para. 3 of the draft proposal for a new directive („scope“).

48 See Bundestags-Drucksache 20/1740 of 10 May 2022 (hereinafter: government bill).

49 First Act for More Effective Enforcement of EU Sanctions (Sanctions Enforcement Act I – *Sanktionsdurchsetzungsgesetz I*) of 23.05.2022, BGBl. I (Federal Law Gazette, part I), p. 754.

50 An additional Sanctions Enforcement Act II is under preparation. It shall provide the legal basis for establishing a national register for assets subject to sanctions and the setting up of a special whistleblower hotline. See <www.bundesfinanzministerium.de/Content/DE/Pressemitteilungen/Finanzpolitik/2022/05/2022-05-10-sanktionsdurchsetzungsgesetz.html>.

51 *Artikelgesetz*.

52 See Art. 8 para. 1 of Council Regulation 269/2014, *op. cit.* (n. 34).

53 Section 23a para. 1 of the FTPA.

54 Section 18 para. 5b of the FTPA; according to its para. 6, attempt is punishable, too.

55 Section 23a para. 3 of the FTPA.

56 Section 23a para. 2 of the FTPA. Addressees are logistics service providers according to Sections 453 and 467 of the German Commercial Code (HGB).

57 See government bill, *op. cit.* (n. 48) p. 19.

58 See government bill, *op. cit.* (n. 48).

59 Section 76a para. 4 of the German Criminal Code.

60 Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, *O.J.* L 127, 29 April 2014, 39.

61 See Section 76a para. 4 no. 1 to 8 of the German Criminal Code.

62 Section 111b of the German Code of Criminal Procedure. For more details on the system of penal asset confiscation in Germany, including its non-conviction-based variants, see M. Kilchling, "Country Report Germany – Extended Confiscation in Scope of the Fundamental Rights and General Principles of the European Union", 2022, published online at Adam Mickiewicz University, Poznan, <<https://konfiskata.web.amu.edu.pl/en/documents/>>.

63 It is not known whether all those who voted in favour of the Sanctions Enforcement Act were aware of this consequence.

64 Section 20 para. 1 of the FTPA. This provision also existed already before the 2022 amendment.

65 Section 261 para. 10 of the German Criminal Code. For further details on the connections between money laundering control and asset confiscation, see B. Vogel, "Germany", in: B. Vogel and J.-B. Maillart (eds.), *National and International Anti-Money-Laundering Law. Developing the Architecture of Criminal Justice, Regulation and Data Protection*, 2020, pp. 157–301.

66 With the 2017 amendment of the money laundering laws Germany realized a radical system change from the so-called catalogue to the "all crime principle". For more details, see Vogel, *op. cit.* (n. 65).

67 Section 20 para. 2 of the FTPA in conjunction with Section 74a of the Penal Code.

68 Section 9a of the FTPA.

69 Section 24c of the Banking Act, as amended by Article 3 of the Sanctions Enforcement Act I.

70 Section 9b of the FTPA.

71 See government bill, *op. cit.* (n. 48), p. 17.

72 Section 24 of the FTPA.

73 Involved were the Munich prosecutor's office, the Federal Criminal Police Office (BKA), the Munich Police Headquarters and the Munich Tax Office.

74 Public Prosecution Office Munich I, press release no. 03 of 20 June 2022, <www.justiz.bayern.de/gerichte-und-behoerden/staatsanwalt/schaft/muenchen-1/presse/2022/3.php>.

75 Unit SO33.

76 See government bill, *op. cit.* (n. 48), p. 17.

77 EU Guidelines, *op. cit.* (n. 7), para. 15.

78 Press release of 25 May 2022 by the European Commission, DG for Migration and Home Affairs, <https://home-affairs.ec.europa.eu/news/eu-proposes-new-rules-confiscate-assets-criminals-and-oligarchs-evading-sanctions-2022-05-25_en>.

79 See above, sub-chapter III.3.

80 Accordingly confirmed by the ECJ, 3 September 2008, Joined Cases C-402/05 P and C-415/05 P, *Kadi and Al Barakat*, para. 358. For more details, see also Tehrani, 2014, *op. cit.* (n. 16), pp. 128 et seq.

81 Distinct from the case of private properties, the situation might be different in regard to the frozen funds of the Russian Central Bank and other public institutions.

82 BVerfG, ruling of 12 December 1967, Official Case Reports BVerfGE 22, 387; ruling of 14. January 2004, BVerfGE 110, 1; and, most recently, rulings of 10. February 2021, (2021) *Neue Juristische Wochenschrift* (NJW), 1222, and 7 April 2022, (2022) *Neue Zeitschrift für Wirtschafts-, Steuer- und Unternehmensstrafrecht* (NZWiSt), 276.

83 For more details, see Kilchling, *op. cit.* (n. 62).

84 See above, sub-chapter III.2.

85 For more details on the US system, see M. Tonry, "Forfeiture Laws, Practices and Controversies in the US", (1997) *European Journal on Crime, Criminal Law and Criminal Justice* (themed issue on confiscation models in a variety of jurisdictions), 294.

86 L.W. Levy, *A Licence to Steal: The Forfeiture of Property*, 1996.

87 For more details, see E. Fitrakis, (ed.), *Invisible Punishments. European Dimension – Greek Perspective*, 2018. A comparative study on restrictions and disenfranchisement of civil and political rights after conviction in Europe is currently conducted at the Freiburg Max Planck Institute for the

Study of Crime, Security and Law; see <<https://csl.mpg.de/en/projects/comparative-european-study-on-restrictions-and-disenfranchisement>>; the findings will be published in 2023.

88 Stöckel, *op. cit.* (n. 5), pp. 46 et seq.

89 See, e.g., Section 57 of the Penal Code of the former German Democratic Republic; Section 120 of the Penal Code of the former Czechoslovakia, or Articles 46 and 47 of Poland's old (socialist) Penal Code.

90 Section 57 para. 4 of the Penal Code of the former German Democratic Republic.

91 Section 76a of the German Criminal Code; see above, III.2.

Ending Impunity for the Violation of Sanctions through Criminal Law

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This article discusses the two-step approach proposed by the Commission to end impunity for those violating sanctions ("Union restrictive measures") following Russia's invasion of Ukraine. The first step concerns a proposal for a Council Decision identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union. The Council is expected to formally adopt that Decision in October 2022, which will be the first time that the list of EU crimes is extended. This will allow the Commission to then immediately put forward a Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures as a second step. In this regard, the Commission already suggested elements for such a future Directive in a Communication. Appropriate consultations are ongoing to ensure a high-quality text which empowers law enforcement and judicial authorities, while respecting criminal law principles and fundamental rights.

I. Introduction

1. Union restrictive measures

Preserving international peace and security is critical in the current context of Russia's invasion of Ukraine. Council Regulations adopted pursuant to Article 215 of the Treaty on the Functioning of the European Union (TFEU)¹ have put in place a series of Union restrictive measures against Russian and Belarusian individuals and companies, some of which date back to 2014.² They include targeted individual measures, i.e., asset freezes and restrictions on admissions (travel bans), as well as sectoral measures, i.e. arms embargoes and economic/financial measures (e.g. import and export restrictions, restrictions on the provision of certain services, such as banking services).³

The implementation and enforcement of restrictive measures are primarily the responsibility of EU Member States. Competent authorities in Member States must assess whether there has been an infringement of the relevant Council Regulation and take adequate steps. These Regulations generally include:

- The restrictive measures;
- The anti-circumvention clause, which prohibits knowing and intentional participation in activities that seek to circumvent the restrictive measures in question⁴;
- Other obligations, in particular to report on steps taken to implement the restrictive measures (e.g. reporting to authorities the amount of assets that have been frozen).

The Council Regulations also systematically include a penalty provision that requires Member States to adopt national rules providing for effective, proportionate and dissuasive penalties, to be applied in the event of infringements of their provisions. The penalty provisions of the most relevant Regulations⁵ have recently been strengthened in response to the Russian aggression against Ukraine. They now oblige Member States "to lay down the rules on penalties, including as appropriate criminal penalties, applicable to infringements of the Regulation".⁶ However, Art. 215 TFEU cannot serve as a legal basis for the approximation of criminal definitions and the types and levels of criminal penalties.

2. Lack of a common approach on criminal law enforcement

In the absence of such harmonisation at the Union level, national systems differ significantly as far as criminalisation of the violation of Union restrictive measures is concerned. In 12 Member States, the violation of Union restrictive measures is solely a criminal offence. In 13 Member States, the violation of Union restrictive measures can amount to an administrative or a criminal offence.⁷ As far as these 13 Member States are concerned, the criteria according to which the conduct falls within one or the other category are usually related to its gravity (serious nature), either determined in qualitative (intent, serious negligence) or quantitative (damage) terms,⁸ but they are different in each Member State. In two Member States, the specific offence of violation of Union restrictive measures can currently only lead to administrative penalties.⁹

Penalty systems also differ substantially across the Member States. As regards prison sentences, in 14 Member States, the maximum length of imprisonment is between 2 and 5 years. In eight Member States, maximum sentences between eight and 12 years are possible.¹⁰ The maximum fine that can be imposed for the violation of Union restrictive measures – either as a criminal or as an administrative offence – varies greatly across Member States, ranging from €1,200 to €500,000.¹¹

14 Member States provide for criminal liability of legal persons for the violation of Union restrictive measures.¹² In addition, twelve Member States provide for administrative penalties, notably fines, which may be imposed on legal persons when their employees or their management violate restrictive measures. Maximum fines for legal persons range from €133,000 to 37.5 million.¹³

Therefore, law enforcement and judicial authorities currently do not have the right tools and resources available to prevent, detect, investigate and prosecute the violation of Union restrictive measures, including through cross-border cooperation facilitated by EU agencies, notably Europol and Eurojust. For example, Member State A imposes a higher monetary threshold for an offence related to the violation of Union restrictive measures to be deemed serious enough for it to be treated under criminal law or imposes a significantly lower minimum-maximum sentence, which could also be caused by differences in aggravating circumstances, than Member State B. The consequence of these differences could be that either cross-border law enforcement and judicial cooperation might be hampered or similar investigative tools might not be available.

Another example relates to the mutual recognition of freezing and confiscation orders. Art. 3(2) of Regulation (EU) 2018/1805¹⁴ provides for the verification of dual criminality

for offences, which are not listed in Art. 3(1), which applies in the case of the violation of sanctions. This means that the recognition and/or execution of freezing and confiscation orders from issuing authorities in Member States which have not criminalised the violation of Union restrictive measures, may be refused by executing judicial authorities in Member States which have criminalised it. As a result of these impediments, in practice only very few individuals or legal persons responsible for the violations of Union restrictive measures are effectively held accountable. For instance, due to a lack of cross-border cooperation, individuals and entities whose assets are theoretically frozen or whose activities are restricted, continue to be able to access their assets in practice and support regimes that are targeted by Union restrictive measures. Also, the proceeds generated by the exploitation of goods and natural resources traded in violation of Union restrictive measures may allow the individuals targeted by those restrictive measures to purchase arms and weapons with which they can continue to perpetrate their crimes.

3. Commission response

Against this background, on 25 May 2022 the Commission adopted (as a first step) a proposal for a Council Decision identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Art. 83(1) TFEU.¹⁵ If the Council accepts the violation of restrictive measures as an EU crime under Art. 83(1) TFEU Commission would be enabled, as a second step, to propose a Directive under the ordinary legislative procedure to approximate the definition of criminal offences and penalties in this regard. Consequently, the Commission adopted in parallel a Communication entitled ‘Towards a Directive on criminal penalties for the violation of Union restrictive measures’,¹⁶ in which the Commission committed itself to putting forward a proposal for a Directive immediately after said Council Decision is adopted. The annex to this Communication suggests elements for such a future criminal law Directive. The proposal for a Council Decision and the Communication will be further discussed in sections II and III below, followed by a short discussion of the way forward in section IV.

II. Proposal for a Council Decision to Include the Violation of Restrictive Measures as EU Crime

The Commission submits that the criteria, referred to in Art. 83(1) TFEU, for identifying a new area of EU crime relating to the cross-border dimension of that area of crime, namely the nature, or impact of criminal offences and the special need to combat on a common basis, are met.¹⁷

This is the case because the violation of Union restrictive measures is a particularly serious area of crime, which – in terms of gravity – is of a similar degree of seriousness to the areas of crime already listed in Art. 83(1) TFEU, since it can perpetuate threats to international peace and security. Furthermore, violations of Union restrictive measures have a clear and, at times, even inherent cross-border dimension. Their violation therefore equates to conduct on a cross-border scale requiring a common cross-border response at Union level. In addition, the fact that Member States have very different definitions and penalties for the violation of Union restrictive measures hinders the consistent application of Union policy on restrictive measures. They can even lead to forum shopping by offenders and a form of impunity because they could choose to conduct their activities in those Member States that provide for less severe penalties for the violation of Union restrictive measures.

Enhancing the dissuasive effect of criminal sanctions by raising the possibility of being criminally prosecuted, the proposal will strengthen the enforcement of restrictive measures in the Member States. It thereby complements the penalty provisions of the Regulations adopted on the basis of Art. 215 TFEU (see above). In particular, the harmonisation of definitions and sanctions will help to overcome the current fragmented approach. It will also decrease the risk of forum shopping by offenders and increase the deterrent effect of sanctions. In conclusion, the violation of Union restrictive measures should be identified as an area of crime for the purposes of Art. 83(1) TFEU.

It should also be considered that the proposed Council Decision and subsequent Directive, approximating criminal definitions and sanctions related to the violation of Union restrictive measures, complement and ensure consistency with other policy areas. In particular, they will complement the Commission proposal for a Directive on asset recovery and confiscation, which was also presented on 25 May 2022.¹⁸ Following the adoption of all three instruments, the rules on tracing and identification, freezing, and confiscation measures will become applicable to property related to the violation of Union restrictive measures. In the end, proceeds of the violation of Union restrictive measures, for example in instances where individuals and companies would make funds available to those subject to targeted financial sanctions (i.e. asset freezes), could become the object of confiscation measures. At the same time, instrumentalities used to pursue the violation of restrictive measures could be confiscated as well.

Extending the list of EU crimes under Art. 83(1) TFEU requires unanimity in the Council after obtaining the consent of the European Parliament. Following swift negotiations in

the Council, an agreement on the text was reached on 29 June 2022.¹⁹ The Council also requested the European Parliament to consent under the urgent procedure, which it did on 7 July 2022.²⁰ Given the requirement of a unanimous Council position, the final adoption of the Decision by the Council will, however, only take place in autumn, as Germany needs to pass domestic legislation²¹ before it may vote in favour.

III. Future Criminal Law Directive on Restrictive Measures

The suggested main elements of a future Directive on criminal penalties for the violation of Union restrictive measures have been set out in the annex to the Commission Communication (see above). The future Directive will cover a range of criminal law issues that are customary in EU Directives adopted on the basis of Art. 83 TFEU, notably Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law ("PIF Directive")²² and Directive 2014/57/EU on criminal sanctions for market abuse ("Market Abuse Directive")²³. The following explains the scope of the Directive, definitions of the criminal offences, and penalties for natural and legal persons, as well as the rules on jurisdiction, on limitation periods, on cooperation and on the protection of whistleblowers.

1. Scope and definitions

The Directive will apply to violations of Union restrictive measures that the Union has adopted on the basis of Art. 29 TEU or Art. 215 TFEU, such as measures concerning the freezing of funds and economic resources, the prohibitions on making funds and economic resources available, the prohibitions on entry into the territory of a Member State of the European Union, and sectoral economic measures, including arms embargoes.

2. Criminal offences

The provisions on the offences to be approximated by the Directive will include precise definitions of various criminal offences related to violations of Union restrictive measures, such as:

- Making funds, property or economic resources available directly or indirectly, to, or for the benefit of, a designated natural or legal person, entity or body in violation of a prohibition by a Union restrictive measure;
- Failing to freeze funds, property or economic resources belonging to or owned, held or controlled by a designated natural or legal person, entity or body in violation of an

- obligation to do so imposed by a Union restrictive measure;
- Engaging in financial activities which are prohibited or restricted by a Union restrictive measure;
- Engaging in trade, commercial or other activities where it is prohibited or restricted by a Union restrictive measure;
- Breaching applicable conditions under authorisations granted by competent authorities to conduct certain activities which in the absence of such an authorisation are prohibited or restricted under a Union restrictive measure;
- Failure to comply with an obligation to provide information to the competent authorities;
- Engaging in conduct that seeks to directly or indirectly circumvent a Union restrictive measure;
- Failure to report a violation of a Union restrictive measure, or conduct that seeks to circumvent such a measure in violation of a specific obligation to report contained in a restrictive measure.

The offences to be approximated, unless otherwise provided, will require intent, or at least serious negligence.

The Directive will also include related offences, e.g. money laundering. For the latter, a provision will oblige Member States to take the necessary measures to ensure that the money laundering offence, as described in Art. 3 of Directive (EU) 2018/1673²⁴, applies to property and proceeds derived from the criminal offences covered by the Directive.

The Directive will furthermore contain a provision obliging Member States to take the necessary measures to ensure that inciting, aiding and abetting the commission of the criminal offences referred to in the Directive, as well as the attempt to commit such offences, are punishable as criminal offences.²⁵

3. Penalties for natural and legal persons

The future Directive will also contain a provision on penalties for natural persons. These penalties will be applicable to all offences mentioned above, and equally require Member States to apply effective, proportionate and dissuasive penalties as well as to set out a certain minimum of the maximum criminal penalties. Member States must also ensure that such penalties will be proportionate in relation to the considerable seriousness of the offences.²⁶

In addition, the Directive will include provisions on the liability of legal persons. In accordance with the proposal, Member States would need to provide for the liability of legal persons:

- (i) for any of the criminal offences referred to above committed for their benefit by persons having a leading position within the legal person; or

- (ii) for the lack of supervision or control by persons in a leading position which has made possible the commission, by a person under their authority, of any of the above-mentioned criminal offences for the benefit of that legal person.²⁷

The Directive will also approximate sanctions applicable to legal persons. In particular, the Member States will be required to take the necessary measures to ensure that a legal person held liable pursuant to the relevant offences is subject to effective, proportionate and dissuasive sanctions, including:

- Exclusion from entitlement to public benefits or aid;
- Temporary exclusion from access to public funding, including tender procedures, grants and concessions;
- Temporary or permanent disqualification from the practice of business activities;
- Withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence;
- Placing under judicial supervision;
- Judicial winding-up; and
- Temporary or permanent closure of establishments used for committing the offence.²⁸

In addition, the Directive will oblige Member States to ensure that legal persons that benefit from the commission by others of offences in violation of Union restrictive measures are punishable by fines. The maximum limit should be not less than a certain percentage of the total worldwide turnover of the legal person in the business year preceding the fining decision. The liability of legal persons would not exclude the possibility of criminal proceedings against natural persons who are the perpetrators of the criminal offences mentioned above.

4. Jurisdiction rules

The Directive will also include rules on jurisdiction. Following the example of Art. 11 of the PIF Directive and Art. 19 of Directive (EU) 2017/541 on combating terrorism²⁹ and taking into account the specific nature of the violation of Union restrictive measures,³⁰ each Member State will need to establish jurisdiction over the offences referred to above in the following situations:

- Where the criminal offence is committed in whole or in part within its territory;
- Where the offence is committed on board of any aircraft or any vessel under the jurisdiction of the Member State;
- Where the offender is one of its nationals or habitual residents;
- Where the offence is committed for the benefit of a legal person, entity or body which is established on its territory;
- Where the offence is committed for the benefit of a legal

person, entity or body in respect of any business done in whole or in part within the Union.

In cases where the offender is one of their nationals or habitual residents, Member States would not be allowed to make the exercise of jurisdiction subject to the condition that a prosecution can only be initiated following:

- (i) a report made by the victim in the place where the criminal offence was committed; or
- (ii) a denunciation from the State of the place where the criminal offence was committed.

5. Limitation periods

The Directive will require the establishment of a minimum limitation period applicable to all offences mentioned above, and of the limitation period for the enforcement of penalties following a final conviction. A relevant example may be found in Art. 12 of the PIF Directive. Thus, Member States have to:

- (i) prescribe limitation periods for a sufficient period of time after commission of the criminal offences referred to in the Directive in order for those criminal offences to be tackled effectively, with minimum limitation periods applying to offences punishable by a maximum penalty of at least four years of imprisonment;
- (ii) take the necessary measures to enable penalties to be enforced.

6. Cooperation between Member States, Union institutions and bodies, offices and agencies

To enhance the investigation of cases with a cross-border element, the Directive will include a provision which will require mutual cooperation between Member States' competent authorities, Union institutions, bodies, offices and agencies, including Eurojust and Europol.³¹ This provision will also facilitate the sharing of information on practical issues with

authorities in other Member States and with the Commission, notably information on patterns of circumvention, e.g. structures to hide the true ownership/control of assets.

7. Reporting of offences and protection of whistle-blowers

To enhance the effectiveness of the Union restrictive measures, the Commission recently launched the EU Sanctions Whistleblower Tool.³² Due to the importance of the whistle-blowers' contribution to the proper application of the Union restrictive measures, the Commission proposal will ensure that the protection granted under Directive (EU) 2019/1937³³ is applicable to persons reporting criminal offences referred to in the Directive on the violation of restrictive measures.

IV. Way Forward

The approximation of criminal definitions and penalties for the violation of Union restrictive measures is a key priority for the Commission in order to put an end to impunity. Once the Council Decision identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Art. 83(1) TFEU is adopted, the Commission will be in the position to immediately propose a Directive under the ordinary legislative procedure. The Directive will include rules on the definition of criminal offences and penalties for the violation of Union restrictive measures and other related provisions in the spirit of other criminal law Directives adopted on the basis of Art. 83(1) TFEU. Appropriate consultations will ensure a high-quality text which will empower law enforcement and judicial authorities, while respecting criminal law principles and fundamental rights. This approach should facilitate the swift adoption of the text by co-legislators. Afterwards, Member States have to transpose the Directive into their domestic criminal legal order so that practitioners can apply the provisions to stop impunity for violations of Union restrictive measures.

* Any views expressed in this article are solely those of the author.

1 Art. 215 TFEU enables the Council to adopt restrictive measures against natural or legal persons and groups, or non-State entities, or to adopt measures providing for the interruption or reduction, in part or completely, of economic and financial relations with one or more third countries, on the basis of a decision pursuant to Art. 29 TEU.

2 Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, *O.J.* L 229, 31.7.2014, 1 (consolidated version available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0833-20220604>); Council Regulation (EU) No 269/2014 of 17 March

2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, *O.J.* L 78, 17.3.2014, 6 (consolidated version available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014R0269-20220604>). All references to websites in this article were last accessed on 14 July 2022.

3 For an overview, see European Commission, Sanctions adopted following Russia's military aggression against Ukraine, available at: https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/sanctions-adopted-following-russias-military-aggression-against-ukraine_en#sanctions.

4 For an example, see Art. 12 of Council Regulation (EU) No 833/2014, *op. cit.* (n. 2). It is noted that this clause is also applicable if the restrictive measures have not been breached; it is enough to participate in schemes created to that end.

5 Council Regulation (EU) No 833/2014 and Council Regulation (EU) No 269/2014, *op. cit.* (n. 2).

6 *Idem.*

7 Genocide Network, *Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis*, 2021, Annex, available at: <https://www.eurojust.europa.eu/sites/default/files/asets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf>. In view of a presentation in the Council Working Party on Judicial Cooperation in Criminal Matters (COPEN), the report was also published in Council doc. 7274/22 of 16 March 2022.

8 Genocide Network, *Prosecution of sanctions*, *op. cit.* (n. 7), section 5.1., p. 22.

9 *Idem.*

10 *Idem*, section 5.2., p.23.

11 *Idem*, section 5.3., p.24.

12 *Idem*, based on the report of the Genocide Network and further investigation by the Commission.

13 *Idem.*

14 Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, *O.J.* L 303, 28.11.2018, 1.

15 European Commission, Proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union, COM(2022) 247 of 25 May 2022. Art. 83(1) TFEU reads: "The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension resulting from the nature or impact of such offences or from a special need to combat them on a common basis. These areas of crime are the following: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and organised crime. On the basis of developments in crime, the Council may adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. It shall act unanimously after obtaining the consent of the European Parliament."

16 Communication from the Commission to the European Parliament and the Council, Towards a Directive on criminal penalties for the violation of Union restrictive measures, COM(2022) 249 of 25 May 2022.

17 For a detailed explanation see the Commission Proposal, *op. cit.* (n. 15).

18 European Commission, Proposal for a Directive of the European Parliament and of the Council on asset recovery and confiscation, COM(2022) 245 of 25 May 2022.

19 Council doc. 10287/1/22 REV 1 of 30 June 2022.

20 European Parliament legislative resolution of 7 July 2022 on the draft Council decision on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Article 83(1) of the Treaty on the Functioning of the European Union (10287/1/2022 – C9-0219/2022 – 2022/0176(NLE)), available at: <https://www.europarl.europa.eu/doceo/document/TA-9-2022-0295_EN.html>.

21 In accordance with § 7(1) of the Act on the Exercise by the Bundestag and by the Bundesrat of their Responsibility for Integration in Matters concerning the European Union (*Gesetz über die Wahrnehmung der Integrationsverantwortung des Bundestages und des Bundesrates in Angelegenheiten der Europäischen Union*), available at: <<https://www.gesetze-im-internet.de/intvg/BJNR302210009.html>>.

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22 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *O.J.* L 198, 28 July 2017, 29. See for the Directive the article by A. Juszczyk and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PIF Directive)", (2017) *eu crim*, 80; W. van Ballegooij, "Protecting the EU's Financial Interests through Criminal Law: the Implementation of the "PIF Directive", (2021), *eu crim*, 177.

23 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), *O.J.* L 173, 12.6.2014, 179.

24 Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, *O.J.* L 284, 12.11.2018, 22. For a summary, see T. Wahl, "New Directive on Criminalisation of Money Laundering", (2018) *eu crim*, 150–151.

25 Cf. Art. 5 of the PIF Directive, *op. cit.* (n. 22) and Art. 6 of the Market Abuse Directive, *op. cit.* (n. 23).

26 Cf. Art. 7 of the PIF Directive and Art. 7 of the Market Abuse Directive.

27 Cf. Art. 6 of the PIF Directive and Art. 8 of the Market Abuse Directive.

28 Cf. Art. 10 of the PIF Directive and Art. 9 of the Market Abuse Directive.

29 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *O.J.* L 88, 31.3.2017, 6. For a summary, see T. Wahl, "Directive on Combating Terrorism Published", (2017) *eu crim*, 69.

30 Council Regulations adopted under Art. 215 TFEU systematically include the following jurisdiction clause: "This Regulation shall apply: (a) within the territory of the Union, including its airspace; (b) on board any aircraft or any vessel under the jurisdiction of a Member State; (c) to any person inside or outside the territory of the Union who is a national of a Member State; (d) to any legal person, entity or body, inside or outside the territory of the Union, which is incorporated or constituted under the law of a Member State; (e) to any legal person, entity or body in respect of any business done in whole or in part within the Union." This would also be reflected in the Directive. In particular, Member States would be required to extend their criminal jurisdiction to non-EU persons outside the EU territory insofar as their business has an EU nexus (which may, by extension, also concern their assets).

31 See also Art. 15 of the PIF Directive, *op. cit.* (n. 22).

32 European Commission, Overview of sanctions and related tools, available at <https://ec.europa.eu/info/business-economy-euro/banking-and-finance/international-relations/restrictive-measures-sanctions/overview-sanctions-and-related-tools_en#whistleblower>.

33 Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the protection of persons who report breaches of Union law, *O.J.* L 305, 26.11.2019, 17. For a summary, see T. Wahl, "Whistleblower Directive Published", (2019) *eu crim*, 238–239.

War and Corruption in Ukraine

Drago Kos

The situation concerning corruption in Ukraine before the Russian invasion was not particularly encouraging: there were no significant improvements on the ground; independent, newly established, specialised anti-corruption bodies were being hindered from doing their job in every possible way. As in almost all countries participating in armed conflicts, it is entirely understandable that fighting corruption is no longer a priority now that the country is under attack. When the war is over, the Ukrainian anti-corruption framework will be weaker than it was before the war, yet it will face a series of new challenges, especially those resulting from the vast influx of material and financial support for humanitarian purposes and for the reconstruction of the country. In order to avoid a scenario in which the country, having survived the war, could become a victim of corruption, the Ukrainian government, supported by the international community, will have the important task of renewing and enhancing the activities of national anti-corruption agencies in addition to that of assisting civil society in re-engaging in its monitoring functions. In doing so, utmost attention will need to be devoted to the development of effective, transparent, and accountable mechanisms for the fair distribution of humanitarian aid and to the development of a well-planned, efficient, and rational reconstruction of the country – with little room for diverting available resources into private pockets.

I. Introduction

The war raging in Ukraine will significantly influence many important features of life in the country, in Europe, and in the world. Due to the conflict, Europe and the rest of the world are sliding into a new Cold War era, with a new Iron Curtain, which – though less tangible than its predecessor in the last century – is dividing many more nations: the USA and Europe in the West and the Russian Federation, China, India, and numerous other countries in the South and the East. In addition to this geopolitical shift of cataclysmic proportions, many things will also change in Ukraine itself. Since the magnitude of corruption in all countries affects their levels of democracy, the extent of social injustice, and their adherence to the rule of law, any worsening in the area of corruption is of particular importance for a country also fighting for its very existence, like Ukraine.

In general terms, no circumstances are more conducive to the existence and development of corruption than those of an armed conflict: the state systems of social control – law enforcement and the judiciary – are unable to perform their core functions; in the absence of basic goods, such as food, medicine, etc., the levels of predatory behaviour and disregard for legal norms and ethical principles increase; and there is never enough attention paid to fighting corruption during a conflict and the ensuing post-conflict chaos. Add to that the potentially significant influx of foreign assistance, and the result is a mix of objective and subjective circumstances and conditions, which may well lead to an explosion of corruption at all levels. Is this also to be the fate of Ukraine?

This article first presents the situation in the area of corruption in Ukraine before and during the war. It subsequently includes a forecast of potential developments after the war, accompanied by a proposal on some crucial steps needed to decrease the risks of corruption emanating from a significant volume of incoming financial assistance to Ukraine from abroad.

II. Pre-War Corruption in Ukraine

At the perceived level of corruption, Ukraine had been slowly improving its rating in the Transparency International Corruption Perception Index from a rating of 1.5¹ out of a possible 10 points in 2000 to a rating of 33 out of a possible 100 points in 2020.² Clearly, the people of Ukraine believe the situation is improving but also that it is improving very slowly, as the 2020 index rating of 33 is lower than that of Albania at 36, Bosnia and Herzegovina at 35, Armenia at 49, Georgia at 56, and Kazakhstan at 38.³

When it comes to hard data, i.e. the question as to what percentage of the population resorted to bribery in the past year to secure a necessary service, the Transparency International Global Corruption Barometer indicates: in Ukraine, this percentage was 37% of the population in 2011⁴ and 38% in 2017,⁵ meaning that low-level corruption was slightly on the rise. A comparison with other countries again shows a worrying situation. According to the 2017 survey, the percentage of people from the aforementioned countries who paid bribes was as follows: Albania – 34%, Bosnia and Herzegovina – 24%, Armenia – 27%, Georgia – 7%, and Kazakhstan – 29%.⁶

Under pressure from the international community, Ukraine established several specialised anti-corruption institutions to investigate, prosecute, and adjudicate high-level corruption cases, including the National Anti-Corruption Bureau of Ukraine (NABU), the Specialised Anti-Corruption Prosecution Office (SAPO), and the High Anti-Corruption Court (HACC). Contrary to the expectations of many decision-makers in the country, these institutions started to function effectively and, as a countermeasure, immediate efforts were made by almost the entire political establishment to slow down if not completely disable their functioning. Measures against these institutions ranged from incomprehensible decisions by the Constitutional Court, to the engagement of other state bodies (mostly SBU, the State Intelligence Agency) against the anti-corruption entities, and even to smear campaigns against these entities and their leaders.

As a case in point, the recent attempts to appoint a new Head of SAPO are a typical example. The recruitment process started in autumn 2020 and when the best candidate was finally selected in December 2021, the members of the selection commission nominated by the *Verkhovna Rada*, the Ukrainian parliament, simply refused to formally endorse the selection, ignoring the fact that President *Zelensky* had promised other world leaders, including the US President,⁷ that the selection process would be completed as soon as possible. This has been used by the President of the Russian Federation to publicly criticise Ukraine for allowing what might be called “interference of the West into its internal affairs.”⁸ One way or another, much to the frustration of the international community, the civil society in Ukraine, and Ukrainian citizens, Ukraine still does not have a Head of SAPO, which may become a significant impediment to fighting corruption in these times and those to come.

Generally, it can be concluded that there have been no notable improvements in recent decades when it comes to fighting corruption, either at the perceived level of corruption or in the lives of the Ukrainian people. Even when some positive developments occurred, the corrupt actors in all three branches of power and at all levels began a concerted campaign to keep the situation as it was before: non-transparent and corrupt, thus ensuring impunity for the perpetrators.

Since the level of corruption in a particular area may be quite different from the overall situation, it is worth exploring whether anti-corruption efforts in the area of defence, which is by far the most important sector in Ukraine today, developed and made some headway or whether it suffered the same bleak fate as anti-corruption efforts in general.

In 2016, the Independent Defence Anti-Corruption Committee (NAKO), composed of three national and three international

members, was established, with the aim of fighting corruption in the defence sector. After exhaustive research, NAKO published several reports covering the delivery of security assistance to Ukraine; corruption risks in the Ministry of Defence system governing their medical supply chain; illegal trade with occupied Donbas; the balance between secrecy and transparency in the defence sector; the most frequently encountered corruption risks in Ukraine’s defence procurement processes; reform of the State Defence Order as the basic document for procuring military assistance in the country; and corruption in the real estate sector of the Ministry of Defence, etc.

The most important findings of these reports did not come as too much of a surprise:

- Security assistance to Ukraine was not always provided in accordance with the needs of the Ukrainian defence forces, and in some cases, the equipment provided was missing components that were vital for it to work efficiently and to its full capacity. Equipment was also sometimes distributed to troops who lacked the training to operate it effectively, and a lack of spare parts and maintenance capability rendered some equipment useless;⁹
- The Ministry of Defence system governing its medical supply chain had a number of gaps and obscure mechanisms, leading to corrupt practices in the procurement of medicines/medical products, e.g. the purchase of low-quality products for the frontline and for the military hospitals;¹⁰
- The illegal trade between government-controlled Ukraine and the occupied Donbas was conducted systematically and facilitated by Ukrainian defence and security institutions, which undermined Ukraine’s defence capacity and damaged its economy and reputation;¹¹
- The following were identified as the most significant risks in Ukraine’s defence procurement:¹²
 - The deliberate restriction of competition;
 - Biased intervention in the procurement process by defence ministry officials to unfairly favour a particular company;
 - The winning bidders having a shareholder or other business relationship with a politically exposed person/persons in the country;
 - The Ministry of Defence allowing unqualified or hostile state suppliers to win and/or deliver a contract;
 - Contractual terms and conditions that deviated markedly from industry and/or market norms;
 - Companies with a history of anti-competitive behaviour being awarded contracts;
 - The State Defence Order as a “means of state regulation of the economy to meet the needs for national security and defence” was not formulated according to the needs of the Ukrainian armed forces but according to the finan-

cial resources available, thereby relying on non-competitive procedures – some even rooted in the Soviet and pre-war eras.¹³

In light of the above findings, the conclusion can be drawn that, just before the war, the Ukrainian defence sector, while having many positive elements was also characterised by a certain level of inefficiency and disorganisation, and it definitely possessed the potential for corruption. This is surprising, since one would expect that the defence sector would have engaged heavily in eliminating risks posed by corruption following the occupation of Crimea and Donbas in 2014, after which further military clashes simply had to be expected – not just for the sake of reducing corruption but, more importantly, to preserve and enhance the combat readiness and capability of the Ukrainian armed forces, which were directly at risk of being undermined by corruption in the defence sector.

III. The War and Fighting Corruption

As seen above, despite the efforts of the Ukrainian government and its international partners, the Ukrainian armed forces may not have been in the best possible shape when the Russian invasion began on 24 February 2022. Every war brings chaos and, apart from causing the loss of human lives and endless suffering, it also influences other areas of life, including corruption. During armed conflicts, especially when nations are fighting for their survival, combating corruption is never a priority. Understandably, all human and material resources are engaged in defending the country, and the only things that matter are the military's achievements in fending off the enemy and protecting the nation's cities, towns, and villages from attack. Nobody expects countries under invasion to be particularly engaged in the prevention and suppression of corruption, if at all, although it does not need to be completely overlooked if parts of the country and/or the government are still functioning normally. This is the case in Ukraine today, and the situation is further characterised by a significant volume of incoming military, humanitarian, and financial assistance from abroad. While the country's primary focus must be on its military efforts, the government in Kyiv must also focus some of its attention on setting up a robust structure to effectively deal with the influx of foreign assistance in order to ensure that it is distributed and delivered to those sections of the population and military forces that most need it – an undertaking that would be a significant challenge even in peacetime. It is beyond doubt, as in any other country during an armed conflict, that some individuals will exploit this situation for their personal gain. Unfortunately, being preoccupied with defending the country, the government can only expect to be marginally successful in fighting the activities of war profiteers.

The supposition surrounding Ukraine's de-prioritisation of its anti-corruption efforts was confirmed by the only survey concerning anti-corruption activities in the country during the current war. It was conducted during the first half of April 2022¹⁴ and although only 169 replies were received¹⁵ from anti-corruption experts in the country, the results of the survey are very telling:

- Since the invasion, 93% of anti-corruption experts have stayed in the country and only 7% have left,
- 47% of the anti-corruption experts feel personally endangered by continuing to fight corruption during the conflict,
- 84 % of the anti-corruption experts abandoned their anti-corruption activities due to the war,
- 5% of the anti-corruption experts have lost their job due to the war.

Fortunately, the state anti-corruption agencies, mainly NABU, SAPO, and the National Anti-Corruption Prevention Commission (NACP), have remained institutionally intact. Due to the engagement of their staff in the armed forces, however, they have been forced to scale down their activities. In order to quickly reach the pre-war levels of engagement of the anti-corruption bodies and experts after the war, a determined and immediate effort will be needed in Ukraine as soon as the war ends – if not earlier.

IV. Corruption in a Post-War State

1. Corruption risks after the war

Every war ends eventually, and we can only hope that the current war in Ukraine will be completely over soon. As a consequence of the lack of attention apportioned to corruption during an armed conflict, the level of corruption in an affected country invariably increases, and that does not end with the conclusion of hostilities. On the contrary, a vast array of additional corruption risks is usually present in post-war states, of which Ukraine can expect to face the following:¹⁶

- *Capacity challenges:* Post-conflict countries are often confronted with the loss of their anti-corruption infrastructure and trained staff, which is an important deficit in circumstances during which a massive inflow of international assistance is aimed at the accelerating reconstruction of the country. Pressure to disburse large amounts of aid quickly and the questionable level of the state's capacity to effectively absorb and use the massive influx of foreign aid in a transparent and accountable manner always creates incentives for corruption and profit seeking;
- *Lack of political will:* The question always arises as to when the government of a post-conflict nation realises that, in addition to all other reconstruction efforts, fighting corruption

also has to be re-instigated. Intentional or unintentional delays in doing so can lead to irreparable consequences for the country and for its anti-corruption setup;

- *Legacy of pre-war and wartime corruption*: Post-war countries regularly inherit the patterns of corruption that existed before the war as well as those that developed during the armed conflict;
- *Weak rule of law*: Where there is a very low level of engagement on the part of law enforcement in a specific area as a consequence of war or for any other reason, corruption and abuse of power become activities characterised by a low risk for perpetrators to get caught and with a high probability to acquire significant profits.

In addition to the corruption-prone areas that existed prior to the war, Ukraine may face risks in a number of new areas after the conflict ends:

- *Reconstruction programmes*: The rehabilitation of destroyed or damaged infrastructure involves massive construction projects, and there is often a lack of transparency in contracts, money expenditure, etc. In many countries, the public budgetary and financial management systems are not able to cope with the new challenges, exacerbating the corruption risks associated with procurement for large-scale infrastructure projects;
- *Domestic public institutions*: In addition to the state capture of many public institutions prior to the hostilities, the centralised chain of command essential during the war may also result in the state capture of many other institutions;
- *Distribution of humanitarian aid*: Aid allocation to victims can also be susceptible to corruption, as it involves the exercise of different levels of discretion in decision-making processes concerning the distribution of the aid.

2. Theoretical solutions to fighting corruption in post-war countries

After the war, the combative spirit of the population slowly fades, and people return to their normal day-to-day activities. Although they understand that the government is preoccupied with reconstruction efforts and cannot engage immediately and fully in other areas, they are extremely sensitive to the emergence of corrupt individuals who manage to profit from the war and its atrocities. This eventually forces governments to re-engage in the anti-corruption area; otherwise their recent military achievements may be overshadowed by their post-war ignorance of growing corruption.

In theory, the following circumstances can favourably impact the efficiency of the anti-corruption measures of the post-war government:

- Starting early: Corruption is often relegated after what are considered more pressing and readily solvable issues, which can contribute to the “institutionalisation” of corruption and can seriously undermine the start of a successful reconstruction effort;
- Recognising the real magnitude of the problem;¹⁷
- Adjusting anti-corruption activities to the existing forms of corruption;
- Going after “the low-hanging fruit”: Both the general population and governments badly need quick wins in fighting corruption – to improve morale and to show that the rule of law is functioning again;
- Supporting anti-corruption champions and islands of integrity to prove that the government is serious and capable of fighting corruption;
- Strengthening government structures.

As for actions needed to reignite the fight against corruption, academics usually mention¹⁸ fighting impunity, strengthening financial management systems, strengthening public administration and government accountability, and addressing corruption in the reconstruction area/in the delivery of aid.

V. The Basic Elements of a Practical Fight against Corruption in a Post-War Ukraine

Ukraine will exit the war into a situation in which its anti-corruption institutional framework will be weaker than it was before the war. There will also be fewer anti-corruption experts in the country, and it will – if countries keep their promises concerning the reconstruction of Ukraine – literally be flooded with foreign material and financial assistance. There is another important element that will also influence the corruption landscape of the country after the war: the acceptability of corruption as a possible means of solving problems will be at least as great as it was prior to the war, especially as regards high-level corruption. In summary, it can be said that, after the war, Ukraine will face significantly increased corruption risks with a weakened anti-corruption framework. This is nothing new; it has happened in every country that has ever been engaged in an armed conflict. That is why the answer to the following question is exceedingly important: What should Ukraine and its international partners do in order to prevent the country from falling victim to corruption after having survived the war?

As a precondition for successfully fighting corruption, specialised Ukrainian anti-corruption agencies will need to begin functioning at full capacity as soon as possible: by bringing back their staff from the battlefields, by recruiting the

requisite new staff, and by switching from “war mode” to business mode.

Since civil society in Ukraine is an extremely important and powerful actor in the fight against corruption, its participation in these activities as well as its return to “normality” will be essential. However, non-governmental organisations will simply not be in a position to achieve their pre-war levels of operation without considerable financial input from domestic and international donors, many of whom discontinued their financing during the war. Even if the necessary funds are made available, a way needs to be found to attract back the non-governmental anti-corruption experts who were forced to abandon their anti-corruption pursuits because of the war.

1. Prevention

In addition to the pre-existing corruption risks, the reconstruction of the country and the incoming humanitarian aid are bound to increase the appetites of a few individuals both in Ukraine and abroad who wish take advantage of the situation and to benefit from it. Therefore, how both activities – the distribution of humanitarian aid and the reconstruction of the country – are organised will be of crucial importance.

Simple, clear, and absolutely transparent mechanisms in both areas will have to be developed in cooperation between the international donors and the Ukrainian government. Without exception, it will need to be clear right from the beginning which parts of the government and which other organisations are responsible for which part of the operation, from acceptance of aid or reconstruction money, to making decisions concerning where, when, and for which purposes the aid or reconstruction money will be spent, right through to the allocation and ultimate spending of money. It will be absolutely essential for each of the organisations dealing with the distribution of humanitarian aid and reconstruction of the country to have embedded anti-corruption experts who will participate in daily activities and who will not answer to the heads of these aid organisations but instead to the heads of their own, anti-corruption organisations. In the most important organisations (those dealing with the largest portions of aid or money), experts will need to be either specialised representatives of civil society or of foreign donors or both. The National Anti-Corruption Prevention Commission can play an important role in these activities, ensuring the consistency of the approach and implementation of the agreed principles.

In addition to reports on the use of aid or reconstruction money, regular reports on issues such as good governance, transparency, and integrity will also need to be prepared, brought

to the attention of the government/international community, and published. To ensure compliance with these obligations, international donors will need to introduce and apply strict conditionality. If not, the corruption temptation will simply be too strong.

2. Law enforcement

After the war, specialised anti-corruption agencies, i.e. NABU and SAPO, will have an extremely important role to play. In order to do so, however, they will need to see their top managers appointed first. In the case of SAPO, the candidate who won the selection process back in 2021 will have to be appointed without delay. If this does not happen, it may unnecessarily trigger the question of the Ukrainian President’s credibility in light of his promises to the world to make this appointment possible. For NABU, the recruitment of a new director will need to resume immediately, since the current director’s term of office expired on 16 April 2022. It is not only the start of the process that is important but also its duration: under no circumstances should such an appointment procedure last as long as the selection of the SAPO Head (18 months before the war).

Given the understandable sensitivity of the public and the utter abhorrence of acts of corruption committed during or in relation to the war, NABU and SAPO will have to heavily engage in the swift investigation and prosecution of well-founded suspicions of war-related corruption offences. This would include those offences committed during the distribution of humanitarian aid and/or the reconstruction of the country, both tasks that may take quite some time. Therefore, NABU and SAPO will need to either establish special units for these areas or have their investigators and prosecutors specialise in dealing with these topics. All international assistance in any form, from financial support, to training, through to embedding foreign subject matter experts, investigators, and prosecutors, will be of extreme importance for any effective investigations and prosecutions conducted by NABU and SAPO. The government can also be of considerable assistance, if by nothing else, by ensuring the commitment and full support of other state bodies, especially those dealing with the distribution of humanitarian aid and the reconstruction of the country.

The level of support provided to the activities of NABU and SAPO by the Ukrainian government will be the best possible test of its genuine and sincere will to tackle corruption offences committed before, during, and after the war. Without providing the necessary level of support to NABU and SAPO or even by tasking other less autonomous state authorities to

deal with these offences will simply mean that the government does not want independent, objective, and impartial investigation and prosecution of corruption offences.

VI. Conclusion

Today, Ukraine is in a very difficult situation and the country, its people, and the government deserve all the assistance they can get. Objectively, however, the influx of foreign aid is also increasing the risk of corruption. Although Ukraine can neither be blamed for the war nor for the increased corruption risk, it is exclusively the responsibility of its government to tackle corruption in the country. The government must make the country ready to fight corruption immediately after the war or even earlier and ready to target the old as well as the new corruption risks. The country will

need international assistance in this area, too. In light of the devastation currently facing Ukraine, it must be extremely difficult to keep a cool head and plan anything, including its current and future anti-corruption efforts; however, there is no other way to ensure the maximum effectiveness of any future anti-corruption activities. Any mistakes made in this area, for whatever reason, sentimental or otherwise, will be exploited by corrupt individuals and other unscrupulous enemies of Ukraine. This should be avoided at all cost and, therefore, international donors, the Ukrainian government, and the Ukrainian people should get ready to fight the next set of battles, this time against corruption. They should be ready to do so in accordance with the best international standards and best practices – professionally, impartially, and rigorously. Any deviation from such an approach will have very harmful and costly consequences for Ukraine and for the international community.

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4 Transparency International, "Global Corruption Barometer 2011", <<https://www.transparency.org/en/gcb/global/global-corruption-barometer-2010-11>>.

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Drago Kos

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EU Eastern Partnership, Hybrid Warfare and Russia's Invasion of Ukraine

Christian Kaunert

This article aims to conceptualise and map Europe's Eastern Partnership that is under attack from the outside – notably by Russia. It analyses the impacts of Russia's hybrid warfare on the European Union. Russia's relationship with the West is characterised by the collective trauma and stigma associated with the disintegration of the USSR, which inspired Putin's geopolitical vision. However, in recent years, Putin's Russia has sought to re-establish itself on the world stage by projecting power, harking back to the height of Soviet influence in the 1970s and 1980s. In this endeavour, Russia has used both private military companies and far-right terrorist groups in its hybrid war strategy against the European Union. This article analyses this development, suggesting that Russia is aiming to establish itself as an expansionist power in Europe with little regard for international law and norms.

I. Introduction

In the aftermath of the fall of the Berlin Wall and the disintegration of the USSR, there were hopes for a bright future for a new Europe. This provided a political opportunity that led to the accession of several Eastern European countries to the European Union between 2004 and 2007, particularly triggered by the desire to become key champions of stability and prosperity in the region.

Since 2003, the European Neighbourhood Policy (ENP) has sought to create a “ring of friends”, i.e. an area of political stability, security and economic prosperity, comprising the countries situated to the east (i.e. Armenia, Azerbaijan, Belarus, Georgia, Moldova, and Ukraine) and to the south of the EU (i.e. Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestinian Authority, Syria, and Tunisia) (Commission of the European Communities 2003: 4). Thus, one of the aims of the ENP has been to foster security cooperation. More than two decades after the launch of the ENP, results have been mixed. Cooperation, notably in the field of security, has not progressed as much as envisaged in the ENP official documents (Kaunert and Léonard, 2011). Moreover, the international environment, notably in the EU's neighbourhood, has changed significantly since the ENP was launched. Political developments, such as the Arab uprisings in the south, and the war in Ukraine in the east, have led some observers to argue that the EU is now surrounded by a “ring of fire”, rather than a “ring of friends” (Economist, 2014). As a result, security concerns have been prioritised on the EU's agenda. Although the initial plan was objectively designed in the context of a discourse of stability and prosperity, it soon was reviewed and replaced by a strategy defined by resilience. Launched in June 2016, the European Union Global Strategy (EUGS) called for the need

for “a strong European Union like never before” and opened the security debate about “the European project” which, in the words of *Federica Mogherini* (former High Representative and Vice-President of the EU Commission), had “brought unprecedented peace, prosperity and democracy” and was now “being questioned” (EEAS, 2016).

II. European Security and the War in Ukraine

The impact of the conflict in Ukraine on the EU's Eastern Partnership has been considerable, in particular because it significantly impacted the EU's relationship with Russia. *Zwolski* (Zwolski, 2017) outlined the two competing positions derived from this debate: firstly, Europe “threatened by expansionist Russia” which is linked to more assertive EU responses to this threat. *Sakwa* (Sakwa, 2015) links this with the idea of Europe in the wider sense, and the EU subsumed in a wider Atlantic community. Secondly, the EU could become more “inclusive towards Russia”, which *Sakwa* links to the idea of a greater Europe, including Russia, but also Turkey and Ukraine as concentric circles (Sakwa, 2015). *Zwolski* underlines the implications of these two competing visions: on the one hand, Russia has become expansionist despite efforts by the EU and NATO to develop closer ties. This implies the EU standing up to Russia's bullying neighbouring countries, outlined by the 2015 House of Lords review on the future of EU-Russia relations (House of Lords, 2015). On the other hand, Russia is portrayed as a victim of European and Euro-Atlantic expansionism (Mearsheimer and Walt, 2007; Kissinger, 2014; Milne, 2014). According to this line of reasoning, the EU must become more receptive to Russia's legitimate security concerns (Sakwa, 2015). *Sakwa* even blames Europe for systematically ignoring Russia's at-

tempts to create new, more inclusive institutional co-operative frameworks and submits that Europe is “dead”.

Indeed, the relations between Russia and the EU have been distinctly shaped by Russia's conception of the West and by Russia's own identity-building practices. The discourse about “us” and the “them” was conducted in an environment where historical traumas play a central role and where ideological, societal, and spatial divisions are echoes of Russia's securitised civilisational dialogue (Kazharski, 2020, p. 2). In recent history, Russia experienced two major collective traumas that forever transformed how it related to Europe: the first was the collapse of the USSR and the second was the West's insistence that it had defeated the USSR, relegating the recently formed Russia to a minor partner. The great aspirations of the 1990 Charter of Paris for a New Europe, endorsing the end of the Cold War and the division within Europe, were perceived by Russia as illusive and feeble, when the West refused to give Russia the place it deserved (Sakwa, 2015). Russia's grievances towards Europe deepened when Gorbachev's “Common European Home” aspirations (Gorbachev, 1989) started to transform into an elusive idea as, according to *Sakwa*, the European Union transformed its peace project into an expansionist and political one (Sakwa, 2015, p. 2). The same was defended by *Zielonka*, who argued that “two Europes” came together in the aftermath of the Cold War (Zielonka, 2006) instead of a “Europe whole and free” (OSCE, 1990) ready to start from zero.

Since the disintegration of the USSR, Russia has struggled to find its path, its identity and especially its geopolitical space as an entity with a “distinct civilisation” strongly anchored on a civilisational ideology that was at odds with the situation after the Cold War (Tsygankov, 2016, p. 3). Additionally, the uncomfortable fact that Europe did not disentangle its Atlanticists knots, not only deepened Russia's scepticism of the West, as it also nurtured a sense of humiliation, a key factor in the emergence of Russia's identity today. It is precisely here where the emotional dimension plays a pivotal role. It is important to understand how narratives of shame, fear and grievance influence how Russia perceives Europe and how Europe portrays Russia. On the one hand, Europe traditionally sees Russia as fundamentally expansionist and interventionist (Baranovsky, 1997), seeking to expand its sphere of influence and power towards its neighbours. On the other hand, hit by international sanctions, Russia has been portraying itself as a victim of international injustice, whose dignity and interest have been widely ignored. Not surprisingly, the optimism born of Perestroika was therefore soon diluted and was tangibly undermined by the crisis in Crimea and the subsequent war in Ukraine: Europe regarded the crisis as an annexation, whereas Russia saw it as a unification. This marks a decisive turning point

where Russia assumes its own autobiography as one defined by and entrenched in a “wider” continental Europe (Sakwa, 2012). The speech in which *Putin* declared the reintegration of Crimea to the Russian Federation revived the narratives of a symbolic past founded on the reminiscence of a shared identity shattered after the collapse of the Soviet Union. This needed to be recovered in the name of a new greater project, alluding to a greater past whose ambitions were built upon strengthened domestic political and economic interests, and amalgamating political legitimacy with national and regional objectives (Putin, 2014).

The next sections analyse the way in which Russia has related to the EU since the annexation of Crimea, the wars in Donetsk and Luhansk, and, subsequently, the full invasion of Ukraine in 2022, demonstrating Russia's increasing turn towards an expansionist power, which, increasingly, threatens the European security order.

III. Russia's Hybrid Warfare and its Private Military Companies

This section outlines the way in which Russia has used hybrid warfare and private military companies to challenge the European security order. This challenge has provided us with reasonable grounds to perceive Russia as an expansionist power. Over the last eight years, Putin's Russia has sought to re-establish itself on the world stage by projecting its influence across the Middle East and Africa, harking back to the height of Soviet power in the 1970s and 1980s. The Kremlin sees this as Russia's right in the world. This has been notably attempted through the use of *hybrid warfare*. The phenomenon of hybrid warfare has been debated since it entered into the security and military lexicon. In general, states and non-state actors have employed both conventional and irregular methods to achieve their goals throughout history. According to *Hoffman* (2007, p. 8), hybrid warfare comprises different types of warfare, which can all be executed by both state and non-state actors. These types of warfare include conventional capabilities, irregular tactics and formations, terrorist acts, and criminal disorder. By conducting this variety of acts of warfare, *Hoffman* (ibid, p. 8) asserts that the main goal of hybrid warfare is to obtain “synergistic effects in the physical and psychological dimensions of conflict”. In addition, he notes that in hybrid war, all the forces, whether regular or irregular, become blurred into the same force in the same battlespace (ibid, p. 8). *Pindjak* (2014, p.18) contends that hybrid warfare involves multi-layered endeavours that aim to destabilise a functioning state and polarise its society. Thus, by combining kinetic operations with subversive efforts, the adversary goal is to have an impact on decision-makers. Usually, the

aggressor using hybrid warfare conducts clandestine actions that leave no credible smoking gun in order to avoid attribution or retribution (Pindjak, p. 18). In that sense, *Deep* argues that hybrid warfare has the “potential to transform the strategic calculations of potential belligerents due to the rise of non-state actors, information technology, and the proliferation of advanced weapons systems” (Deep, 2020).

With this in mind, Putin’s Russia started to employ what have been termed Private Military Companies (PMC’s) or perhaps more accurately semi-state security forces to assist in the re-establishment of Russia’s international standing (Marten, 2019). However, Russia’s deployment of such companies represents a very serious threat to international security as they have re-interpreted the mercenary in their own way and in a departure from the traditional “soldier of fortune” seen in the mid to late 20th century. Russia can and has been using the legal ambiguity surrounding such companies in terms of International Law to expand its influence in Ukraine, Africa and Syria. The annexation of Crimea in 2014 and the encroachment of so-called Russian separatists in Eastern Ukraine highlight their increased use by Moscow to further its regional goals in a more aggressive interpretation of the “near and abroad” policy or in Soviet parlance “Spheres of Influence”. This has been made possible by the ambiguous legal status of private military companies internationally. The most prominent Russian mercenary group is the Wagner group which first appeared in Crimea in 2014 and has since been in the vanguard of Russian foreign policy in Africa, the Middle East and in the contested areas of Eastern Ukraine.

Where does the Russian military doctrine and strategy stem from? It was derived from the Soviet armed forces, which, based on a Marxist perspective, viewed war “as a socio-political phenomenon . . . [where] armed forces are used as chief and decisive means for the achievement of political aims” (Glantz, 1995, p. xiii). After the October Revolution, the Bolsheviks established a militia-type volunteer army, which, for instance, fought against the Basmachi insurgents in Central Asia (Statiev, 2010, p. 25). Subsequently, Leon Trotsky transformed the Red Army into a regular army with hundreds of thousands of soldiers. After the end of World War II, the Soviet leadership used militias extensively to suppress nationalist insurgents in Western Ukraine (ibid, 97–123). Militias were subsequently used as a tool of Soviet counter-insurgency operations to tap into local knowledge and intelligence. Thus, militias played an important role of the regular army, and the Communist Party of the Soviet Union closely supervised them (ibid, 26). The collapse of the Soviet Union facilitated nationalism in the former Soviet territory. Ethnic conflicts prompted Moscow to intervene in former Soviet republics, whereby Russia had inherited most of the Soviet military capabilities,

yet its army was trained to fight a conventional war against NATO. One example for Russia’s new foreign policy approach in the post-Soviet area is the case of the insurgents from the Russian-speaking region of Transnistria, who fought a short war against the former Soviet republic of Moldova in 1992. While the Moldova-based Soviet/Russian 14th Army was officially neutral, it covertly supported pro-Russian Transnistrian militias. Another example is the war in Georgia. In 2008, Russian forces supported local militias of the breakaway republics of Abkhazia and South Ossetia. Several thousand South Ossetians and volunteers from North Caucasus, as well as up to 10,000 Abkhazians, participated in the war (Holcomb, 2017, p. 216).

The primary objection to mercenaries is that they are warriors without a state, fighting for money rather than national ideology. The post-war surge in mercenary activity prompted Geneva Protocols I and II in 1977 that banned mercenaries. Geneva Protocol I also includes the most widely accepted definition of a mercenary in international law in its Art. 47(2) which reads as follows:

A mercenary is any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

However, it is widely regarded that Art. 47(2) is not only unworkable legislation but also so ambiguous that any capable lawyer would be able to argue their client out of it (Geoffrey, 1980, p. 375). Due to Art. 47, Russian military companies, like their western counterparts, operate globally with relative ease. This exploitation of inadequate laws and loopholes within international legislation is referred to as “lawfare” (Chifu & Frunzeti, 2020, p. 47). While Russian law prohibits mercenary activity (Art. 13(5) of the Constitution of the Russian Federation and Art. 208 of the Russian Penal Code), there has been an upsurge in Russian mercenary activity in the last eight years. Papers relating to the Wagner and the Slavonic corps have pointed out that the Kremlin uses the question of legality as leverage against the Russia military companies in order to control them and to ensure that they act in Russia’s interest (Chifu & Frunzeti, 2020). However, this view does not adequately take into consideration that the Kremlin interprets and applies Russian law ad hoc as required. This is especially

the case when it comes to matters of state security and foreign intelligence operations. Russian law has been continually distorted to suit the ends of the oligarchs and of Vladimir Putin. This corresponds to what has happened in Russia since the end of communism, in what *Klebnikov* (Klebnikov, 2001) termed the era of “gangster capitalism”. Russia has a propensity to act in the grey zone between peace and war, where it can deny any involvement and quite often gets away with actions that violate the social norms of the international community, if not international law itself (Peterson, et al, 2019, p. 30). *Chifu* and *Frunzeti* point out that these so-called Russian PMC’s are the perfect tool for conducting lawfare by allowing the Kremlin to operate on the edge of the law or in territories where the law has no application (Chifu & Frunzeti, 2020, p. 47).

The registration of the various PMC’s outside of Russia is not simply an effort to circumvent Art. 13 of the Russian Constitution, which prohibits mercenary activities and enshrines the monopoly on violence with the armed forces of the Russian Federation. It is a very simple template to protect Moscow whenever such companies are deployed. In a word: deniability. The question of the legality of Russian military companies is merely a façade that shields Moscow and its intentions. The proximity of oligarchs such as Wagner’s owner Yevgeni Prigozhin to Vladimir Putin indicates collusion at the highest level. Prigozhin is an unusual individual to head up a military company, as he has no military background and made his money in a chain of restaurants in St. Petersburg after a stint in jail for petty crime (Harding, 2020, p. 160–161). *Marten* (Marten, 2019, p. 196–197) considers him a middleman when it comes to Wagner, making money out of contracting Wagner operations. Prigozhin is meanwhile worth an estimated 200 million dollars after securing lucrative catering contracts for the Russian military in the region. Prigozhin denies any links to Wagner and the Kremlin also denies the existence of the Wagner Group; after all, being a mercenary is illegal in Russia. Prigozhin is no stranger to deniable operations as he is also suspected of funding a troll farm in St. Petersburg that was involved in the online manipulation of the US election in 2016 (Chifu & Frunzeti, 2020, p. 47; Belton, 2020, p. 483). This places Prigozhin firmly in the grey zone of hybrid warfare along with Wagner. As Putin’s press secretary Dmitry Peskov noted “De jure we do not have such legal entities” (Harding, 2020, p. 153). However, Putin has noted that individuals do not represent the Russian Federation that “it is a matter of private individuals not the state” (Belton, 2020, p. 483). *Belton* notes that in this instance Putin was being facetious, and that the term private individual was a typical KGB tactic that allowed for plausible deniability for any Kremlin involvement. She adds that by this time, all of Russia’s so-called private businessmen had become agents of the State (ibid., p. 483). This is a sentiment shared

by *Browder* (Browder, 2015) who highlighted this same issue in his acclaimed book *Red Notice*.

In the same way as we have viewed groups like Wagner or ‘RUS-CORP’ to be PMC’s, attributing the title company to them, we have perhaps also overestimated the role of oligarchs in this landscape. Far from being independent from the Russian State, they are inextricably linked to it and to Vladimir Putin. They merely do the Kremlin’s bidding and benefit financially by acting as caretakers for Moscow’s deniable operations, as in the case of Prigozhin and Wagner. The oligarchs owe their loyalty to Putin and the Russian State, essentially making them an extension of the Russian intelligence apparatus and in that regard insulated and protected. The motion to legalise PMC’s in Russia in 2018 was vetoed, as it would have put at risk the ‘Main Directorate of the General Staff of the Armed Forces of the Russian Federation’, mainly known as GRU, and its deniable operations, and it was not in the best interests of the Russian Federation to allow the legalisation of such companies. Maintaining the status quo is in the interest of the Russian secret services structures with which the PMCs are linked and through which they are controlled because legalisation of their activities could limit this influence and control (Dyner, 2018, p. 2). Doing so would have destroyed the veneer of plausible deniability that protects the GRU and its private army. It is no coincidence that the Wagner group trains on GRU bases and deploys globally with the assistance of the regular Russian military.

Even if international law could be applied, in particular with a view to establishing culpability, it would be necessary to establish beyond any doubt who owns the companies and where they are registered. With the exception of the RSB-group and the Moran Group, it is unclear where Wagner is registered. Whether inside Russia or externally, it will be inherently difficult to challenge these groups and, their use in Eastern Ukraine and in particular the Donbas, very worrying. In every respect, the Kremlin has established a very dangerous foreign policy tool with the PMCs. Moscow has completely applied the deniability rationale, including the denial of the death of Russian contractors in Syria in 2018 at Deir ez-Zor. This deadly incident involving United States Special Forces led to the death of up to 200 to 300 Russian contractors of the Wagner Group. The death of Russian nationals in a foreign country should have elicited a strong response from the Kremlin, yet it did not (Neff, 2018). This shows the ruthlessness with which Moscow is willing to pursue its foreign policy goals up to the point of abandoning its operatives if necessary. While Africa represents a significant part of Wagner’s operations, it also represents a learning curve. Moscow deployed Wagner on the continent, using it as a proving ground for how best to employ them, with little or no consequence should the operations there fail. As

we have seen, this approach has been very successful and the scope of operations has become broad. Groups like Wagner are very well suited to making a significant contribution at low financial cost in a ‘power as prestige’ way (Østensen, & Bukkvoll, 2022, p.144).

IV. Far-Right Terror, Russia and the EU’s Eastern Partnership

This section outlines the way in which Russia has used hybrid warfare and far right terror groups to challenge the European security order. This challenge has provided us with further grounds to perceive Russia as an expansionist power. While Russia did not create all of the far-right activity in Eastern Europe, it has utilised pre-existing far-right networks and has further expanded far-right activity in the region. Eastern Europe and EaP countries have been viewed as places with populist far-right movements (Buščíková, 2018). Far-right elements in Ukraine gained notoriety during the Euromaidan revolution of 2013–2014, which led to the removal of pro-Russian president Viktor Yanukovich and a turn towards the West (Freedom House, 2018). They have been closely linked to the fighting that erupted in Eastern Ukraine in 2014, with the emergence of the volunteer battalions. Following the Euromaidan revolution, Russia intervened in Ukraine, which led to the former’s annexation of the Crimean Peninsula. With Russia’s intervention and Ukraine’s military being woefully ill-prepared, Kyiv turned to volunteer battalions, with thousands of individuals, many with little training, answering this call (Aliyev, 2016; Karagiannis, 2016). The Azov Regiment, Right Sector, and Organisation of Ukrainian Nationalists were or are overtly far-right, while others are or were not so, including the Georgian National Legion. The first of these has become particularly notorious, with far-right terrorist Brenton Tarrant bearing one of its symbols. It is known for forging links with other Western far-right organisations. Furthermore, there have been moves to designate it a foreign terrorist organisation in the US, and there are concerns about its continuing role (Umland, 2019; Lister, 2020). However, Kyiv soon recognised the problems and negative attention caused by the foreign fighters, including their use for Russian propaganda purposes. It therefore disbanded and integrated these groups into the military by 2016, although some rogue elements persisted into 2019. Thus, some far-right volunteers were present in Ukraine in the early stages of the conflict in 2014 and others have continued to be (Aliyev, 2020).

An influential far-right group with important activity in Ukraine is the Russian Imperial Movement (RIM). Despite being entirely Russian, it has become an important player in the far right environment of Ukraine. RIM is a

pro-Russian entity aimed at defending Russian culture against the West, founded in St. Petersburg in 2002. They are a tsarist, ultranationalist and Christian-orthodox group grounded on the defence of Russian ethnic identity and white supremacy. The group is presently the first white nationalist organisation to be designated a terrorist group by the US State Department (Pompeo, 2020) although it continues to operate its two paramilitary training camps in St. Petersburg and its training programme called “Partizan”. According to the leader and founder, Stanislav Anatolyevich Vorobyev, the group accuses western culture of the “destruction of the family and healthy moral values” through “abortion, propaganda of debauchery and acceptance of sexual perversions.” (Shekhovtsov, 2015a). Among its primary goals are the repossession of the “lost territories” of the old Russian Empire and the reinstatement of the monarchy (Shekhovtsov, 2015b). Starting as a small group in St. Petersburg, whose objective was to promote a healthy lifestyle and military ideals based on the values of the Russian Orthodox Church, and to study the history of Russian military glory” (Yudina and Verkhovsky, 2019), in 2007, the RIM has grown into a paramilitary organisation creating a small tactical army, the Rezerv (“Reserve”). Between 2007 and 2014, the RIM engaged in political activism and became involved in Russian politics, working closely with far-right organisations. But it was not until Crimea’s Annexation that the RIM came into the spotlight. The day after the invasion, Vorobyev flew to Crimea with a small crew to help pro-separatist forces in Ukraine. According to the leader of the RIM, this was a unique opportunity to protect ethnic Russians and to destroy “the stability of anti-Russian regimes on all the territory inhabited by the Russian ethnos.” (Horvath, 2015). They soon started to provide military training in their Reserv training camp to Russian citizens wishing to enlist in the conflict as pro-Russian separatists, and three months after the annexation, created an exclusive training facility for foreign fighters, the Imperial Legion Military-Patriotic Club (Yudina and Verkhovsky, 2019). However, in March 2015, the RIM emerged as a transnational ideological group. It joined Rodina, a Russian far-right party and together embarked on a new enterprise, “The Last Crusade” – an international extreme right network called the “World National-Conservative Movement” (WNCM) (Oliphant 2020). In the same year, the group gathered in the International Russian Conservative Forum (Shekhovtsov, 2015c), with several European political parties, such as the Greek Golden Dawn, the German National Democratic Party, and the Italian Forza Nuova, and some special guests, including Nick Griffin, former leader of the British National Party, Udo Voigt (NDP) and Roberto Fiore (Forza Nuova). Later in the same year, the RIM strengthened its ties to the Swedish neo-Nazi group Nordic Resistance Movement (NRM) that was operating across

several Scandinavian countries. Over the subsequent years, the RIM clearly expanded and grew its network; in 2017, it started talks with US supremacists groups, in particular with the leaders of the Charlottesville's assembly (Omelicheva, 2020). Seeking to expand its network throughout Europe even further, in 2019, the RIM attended several meetings in Poland, Bulgaria, Austria, Spain, and Germany.

Over the past five years, the two training camps have become a hotspot for training right-wing extremists, wishing to learn how to perpetrate attacks. Until 2018, one of its training facilities, Partizan, was registered online as a surveillance and security company. According to the group's site on the Russian social network Vkontakte, they provide online courses on weapons handling, personal fighting and military topography. More recently, it came to light that members of the Young Nationalists, the youth wing of Germany's oldest right-wing extremist party, the NPD, and Der III. Weg (The Third Way), one of the most radical German far-right parties, received military field training from the RIM (Welle, 2020). Syrian mercenaries and members of far-right associations have allegedly also received training in their facilities. Approximately 18,000 users identified themselves as Partizan community members on the VKontakte social network (IGTDS, 2020); some from Sweden, others Finland, and about three dozen from the Baltic States (IGTDS, 2020). While the RIM portrays an official façade of being against Putin's regime, in truth the RIM is quite close to the government. There are several suggestions indicating that the Kremlin not only has closely monitored the group's operations in Crimea and in Syria but has also ignored the fact that they use official military weaponry. Partizan is largely accepted by the authorities and operates liberally across Russia (Shekhovtsov, 2015a; Carpenter, 2018). Moreover, the RIM is to some extent represented in the Duma by Alexei Zhuravlev, leader of the Rodina party, who has also supported Russian separatists in Ukraine. Finally, whilst the RIM does not represent the Kremlin, the truth is that it has been covertly protecting the group since its designation as a terrorist association.

V. Conclusion

El Economista wrote in 2017:

“The reason Putin supports the far-right in Europe is because he knows that this weakens us (...) it divides us and divides Europe. (...) he knows the extreme right makes us weak, he knows the far-right divides us. And a divided Europe means that Putin is the boss.”

Contrary to what happened during the Cold War, Russia is not seeking to spread the communist message across the continent or pursue military control of Europe. The objective is now to reshuffle and reshape the continent's liberal security order.

Putin appears as the definition and personification of a moral and identitarian Russia that is quite attractive to far-right nationalists in Europe, and a person several far-right politicians would wish to emulate. In the Eastern neighbourhood, activities of far-right groups are rapidly growing. Far-right groups have been striving on ethnic-nationalist discourses. They have close links not only to Russia, but also with the burgeoning far right in Europe. Furthermore, over the last decade, the Russian intelligence community has reinterpreted and developed the concept of mercenary in a way unlike anything we have seen in the past. While the use of soldiers of fortune was popular during the Cold War, the Kremlin has turned them into a 21st-century tool of hybrid warfare. Russia has created a completely deniable military entity that can use any means necessary to achieve the end goal. A military force comprised of professionals that are not bound by the articles of war or international norms is truly dangerous. Russia has shown through military actions in Ukraine and Crimea, and wider political influence operations, its willingness to openly flout international rules and norms to achieve its strategic goals (Peterson et al, 2019).

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