



### **Institutional Cooperation in the Field of the Protection of the EU's Financial Interests** **Coopération institutionnelle en matière de protection des intérêts financiers de l'UE** **Institutionelle Zusammenarbeit beim Schutz der finanziellen Interessen der EU**

Editorial  
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Cooperation between the European Commission and the European Public Prosecutor's Office:  
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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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\* The news items contain Internet links referring to more detailed information. These links are embedded into the news text. They can be easily accessed by clicking on the underlined text in the online version of the journal. If an external website features multiple languages, the Internet links generally refer to the English version. For other language versions, please navigate using the external website.

# Editorial

Dear Readers,

The next two issues of *eu crim* will focus on the relationship between administrative and criminal law. Topics include, for instance, the information flow between authorities conducting administrative investigations and those conducting criminal investigations at the European and national levels. This is of particular pertinence in the new institutional setting for the protection of the EU's financial interests with the European Public Prosecutor's Office – the first supranational authority tasked with investigating and prosecuting crimes – because the Office's success heavily relies on cooperative support from administrative bodies, e.g. OLAF or authorities responsible for the financial management of EU funds. In addition to these issues of cooperation, the focus will be on the use of information gathered in administrative proceedings for criminal proceedings as well as the implications of rule-of-law standards for preventive measures.

These issues can be seen in the more general, dialectical context of preventive and repressive law, and belong to the overall question of how public security is or should be regulated. This is one of the reasons why the Department of Public Law was added to the Max Planck Institute for the Study of Crime, Security and Law. It aims to bring a specific public law perspective to the research field of public security law. Public security has often been perceived predominantly through the lens of criminal law, as it was the case during much of the time at the predecessor Institute, the MPI for Foreign and International Criminal Law. Almost every country has a criminal code and a research tradition focusing on criminal law as a discrete area of the law. But only a few countries have well-established codes and general doctrinal structures in place for the preventive aspects of the work of their authorities, such as police forces or secret services. Accordingly, public security law is much less developed as a specific area of legal research in most foreign legal systems.

This gap is addressed by the MPI's new department, which strives to structure developments in the field of public security law as part of its research programme – a programme that includes a three-dimensional matrix spanning the field from theoretical fundamentals to different trends, such as internationalization, digitalization, and fragmentation as well as specific challenges with respect to fundamental rights, the rule

of law, and democratic values. *eu crim* is a major information hub for the relevant developments in Europe, the project serving as an important contributor to and outlet for the department's programme, e.g. by providing a regular overview of threats to the EU's rule-of-law values (see news section "Fundamental Rights"). Another example of our diverse approach is the research we are carrying out on the use and limits of mass surveillance, which includes the surveillance of financial data in the field of money laundering (see also the article by *Lukas Landerer*, *eu crim* 1/2022, 67).

Against this background, one of the department's aspirations is to raise international awareness of public security law as a field of research. Its importance is reflected in *eu crim*'s trend over the past years of including questions of preventive administrative law in its regular reporting on essential developments in the protection of the EU's financial interests and related topics – both in its news section and in the scientific articles. The broadening of *eu crim*'s scope is also reflected in the composition of the *eu crim* editorial board, which recently welcomed new members with vast experience also in preventive administrative security measures. *eu crim* thus contributes to fostering a more comprehensive approach to public security law, which is very much in line with the research agenda of the new department at our Institute in Freiburg. I hope that the European Criminal Lawyers' Associations will increasingly address administrative and public security perspectives in their projects and recruit more lawyers with expertise in these fields for membership.

Prof. Dr. Ralf Poscher, Director at the Max Planck Institute for the Study of Crime, Security and Law, Freiburg



Ralf Poscher



## European Union

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

### Foundations

#### Fundamental Rights

#### Commission's 2022 Rule of Law Report

**spot light** On 13 July 2022, the Commission presented its [third EU-wide Report on the Rule of Law](#). The report follows the first Report on the Rule of Law presented on 30 September 2020 ([→eucrim 3/2020, 158–159](#)) and the second one presented on 20 July 2021 ([→eucrim 3/2021, 134–135](#)). It includes an overview of the trends across the EU as a whole and 27 country chapters looking at developments in every Member State since July 2021. For the first time, the Rule of Law Report also contains specific recommendations for each Member State in order to support them in their efforts to take forward ongoing or planned reforms, to encourage positive developments, and to help them identify where improvements or follow-up to recent changes or reforms may be needed. In sum, the Commission provided the following documents in relation to the 2022 Rule of Law Report:

- A [Communication](#) on the rule of law situation in the European Union (COM(2022) 500 final);
- An [Annex](#) listing all the recommendations to the individual EU Member States;
- 27 Staff Working Papers with the [country chapters](#);
- A [summary document](#) with the country chapters abstracts and recommendations;
- A document explaining the [methodology](#) of the annual rule of law report;
- The [questionnaire](#) for the input from the Member States;
- A [factsheet](#) on the European rule of law mechanism;
- A [factsheet](#) on the rule of law toolbox;
- A memo with [questions and answers](#) on the 2022 Rule of Law Report.

In this year's Rule of Law Report, the Commission recognised that Russia's military aggression against Ukraine and its people constituted a direct challenge to EU values and the rule-based world order. In this regard, [Commissioner for Justice, Didier Reynders, said](#): "The unprovoked and unjustified Russian military aggression against Ukraine shows

that protecting and promoting the rule of law is more important than ever. The EU will only remain credible if we uphold the rule of law at home and if we continue to reinforce the rule of law culture. I am glad to see that our report contributes to this objective. It helps to drive forward important reforms in the Member States. Today we are not only reporting on the rule of law situation, but we are also recommending constructive ways to improve justice systems, step up the fight against corruption, and ensure a free and independent media and strong checks and balances".

As in the previous reports, the 2022 Rule of Law Report examines developments related to the following:

#### ► Justice reforms

Surveys have pointed out that, among the general public, there has been a decrease in the perception of judicial independence in more than half the Member States. Legislative efforts to strengthening the independence of judicial councils were initiated in a number of Member States (Luxembourg, Croatia, Italy, Cyprus, the Netherlands, and Sweden). Several Member States also improved their judicial appointment procedures (Ireland, Croatia, Czechia, Cyprus, and the Netherlands), while challenges remain for others, particularly regarding appointments in higher courts and for court president positions (in Malta, Greece, and Austria). Some Member States have also continued strengthening

\* Unless stated otherwise, the news items in the following sections (both EU and CoE) cover the period 16 July – 31 October 2022, if not stated otherwise. Have a look at the eucrim website (<https://eucrim.eu>), too, where all news items have been published beforehand.

the independence of their prosecution services (e.g. Austria, Czechia, Bulgaria). However, concerns remain for many Member States that disciplinary proceedings could be used to curtail judicial independence. In order to invest in the quality and efficiency of justice, a few Member States have allocated additional resources to strengthen the resilience of their justice systems and to improve the digitalisation of justice. The report indicated that some Member States facilitated access to a lawyer, lawyers being key actors for judicial systems based on the rule of law.

#### ► *Anti-corruption framework*

The report pointed out that the Corruption Perceptions Index (CPI) indicates that ten Member States are in the top twenty countries perceived as being the least corrupt in the world, while the average score for the EU is good and has even improved in global comparison. Nearly all Member States have national anti-corruption strategies in place, which are regularly revised and evaluated. More and more Member States took actions to strengthen the capacity of their institutions and legal framework to combat corruption by filling legislative gaps, bringing the existing framework in line with anti-corruption standards and EU law, carrying out structural and organisational changes within anti-corruption authorities, and increasing the capacity of the prosecution authorities responsible for the fight against corruption. Several Member States have also tackled the elimination of obstacles to criminal investigations and prosecutions, such as the excessive length of criminal proceedings or immunity for government representatives for corruption offences. However, the 2022 Eurobarometer on corruption showed that corruption remains a serious concern for EU citizens and businesses in the EU. The report also stressed that there was a need to accompany and regulate lobbying by means of stronger transparency and integrity requirements in a number of Member States.

#### ► *Media pluralism and media freedom*

The findings of the report rest on a series of sources, including the [Media Pluralism Monitor \(MPM 2022\)](#), the [Council of Europe Platform to Promote the Protection of Journalism and Safety of Journalists](#) as well as the [Mapping Media Freedom Platform](#). The Media Pluralism Monitor, which assessed the risks to media freedom and pluralism in all Member States – focusing on four areas (basic protection of media freedom, market plurality, political independence, and the social inclusiveness of media) – has introduced an overall ranking of Member States for the first time: Bulgaria, Greece, Hungary, Malta, Poland, Romania, and Slovenia are considered to be high-risk countries. Since the last report, several Member States have adopted new legislation enhancing the transparency of media ownership or improving public availability of media ownership information. Some Member States have taken or stepped up existing measures to improve the safety of journalists. There has also been an increase in debates in the Member States on how to introduce procedural safeguards against strategic lawsuits against public participation (SLAPPs).

#### ► *Institutional checks and balances*

Since the 2020 and 2021 reports, many Member States have continued to improve the quality of the legislative process by improving stakeholder participation, including for civil society organisations. The report points out that constitutional courts are playing a crucial role in the system of checks and balances. Other key actors in the checks and balances system are National Human Rights Institutions (NHRIs), ombudspersons, equality bodies, and other independent authorities. The report stressed that these actors can only effectively fulfill their roles if structural guarantees of independence and sufficient resources exist. Drawing on lessons from the use of emergency measures and the COVID-19 pandemic, some are updating their legal frameworks to improve preparedness for future crises.

The report also indicated that systematic restrictions have further aggravated the ability of civil society to operate, which has had a potentially chilling effect in some Member States.

#### ► *What comes next?*

On the basis of this report, the Commission invited the European Parliament, the Council, national parliaments, and other key actors, including civil society, to continue to take part in general and country-specific debates. Member States are encouraged to address the challenges identified. The Vice-President for Values and Transparency, *Věra Jourová*, „called on Member States to follow the recommendations, engage in a serious debate and take action.” (AP) ■

### Situation of Fundamental Rights in the EU in 2020 and 2021

On 15 September 2022, the European Parliament adopted a [resolution on the situation of fundamental rights in the European Union in 2020 and 2021](#). MEPs assessed the state of fundamental values in the EU in 2020–2021, identified areas of concern and proposed ways to protect freedom, equality and the rule of law more effectively.

They are particularly concerned about how COVID-19 provisions may affect democracy and fundamental liberties. Regarding the continuous rule of law infractions in some member states, MEPs urged the Commission to use the budget conditionality mechanism of the EU to ensure that key EU values are better protected and that EU funds are distributed fairly and legally.

The MEPs further condemned Poland and Hungary for not complying with the judgements of the European Court of Justice, and asked for concrete action by the EU institutions. They also stressed the need to safeguard journalists from attempts to censor news through the use of the legal system (the so-called SLAPPs).

Another concern in the resolution is better protection of vulnerable groups. MEPs denounced gender-based violence and demand Bulgaria, Czechia,

Hungary, Latvia, Lithuania and Slovakia, and the EU itself ratify the Istanbul Convention. Additionally, they spoke out against anti-feminist and anti-gender movements that actively work to undermine the rights of women and LGBTIQ+ people, particularly those forces that are emerging in Poland, Slovakia, Croatia, and Lithuania.

In order to better protect these vulnerable groups, the Parliament demanded the full implementation of the [EU Framework Decision on combating racism and xenophobia](#) and welcomed the [Commission proposal to include hate crime/speech in the list of EU crimes](#) (→[eucrim 4/2021, 221](#)).

The Parliament also denounced the criminalization of activists and humanitarian workers, as well as border push-backs and brutality against migrants. (AP)

### New 2022 Rule of Law Index

On 26 October 2022, the World Justice Project (WJP), an independent, multidisciplinary organisation, released its [2022 Rule of Law Index](#). The WJP surveyed citizens and experts in 140 countries and jurisdictions in order to measure the state of the rule of law. The Index presents a portrait of the rule of law by providing scores and rankings based on eight factors:

- Constraints on government powers;
- Absence of corruption;
- Open government;
- Fundamental rights;
- Order and security;
- Regulatory enforcement;
- Civil justice;
- Criminal justice.

The 2022 Rule of Law Index noted a global and continuing decline in the rule of law. The adherence to the rule of law fell in 61% of countries. Two thirds of countries whose scores declined in 2021 experienced decline again in 2022. 4.4 billion people live in a country where rule of law is declining. Declines are especially visible in the area of fundamental rights, where a decline could be seen in two thirds of the coun-

tries in 2022. The report stressed that the decline in the respect for fundamental human rights and freedoms (such as freedom of expression and opinion) and the decline in the „constraints on government powers“ (e.g. oversight by the judiciary, legislature, and media) mark a rise in authoritarianism.

The top-ranked country in the WJP Rule of Law Index 2022 is Denmark, followed by Norway (2), Finland (3), Sweden (4), the Netherlands (5), and Germany (6). CoE Member States Hungary (73), Serbia (83), and Albania (87) draw up the rear in promoting a culture of lawfulness. (AP)

### Poland: Rule-of-Law Developments August – October 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 2/2022, 82–83](#).

■ 19 August 2022: The EP publishes a [study](#) that carried out an in-depth analysis on the change of jurisprudence by the Polish courts, in particular the Polish Constitutional Tribunal, regarding the principle of the primacy of the EU law in relation to the Polish law since the Polish accession to the EU. The study was requested by the EP’s JURI Committee. The authors recommend that the EU should give priority to reestablish the judicial independence in Poland.

■ 19 August 2022: In a letter, the President of the Court of Appeal of Warsaw, *Piotr Schab*, confirmed that the [transfer of two judges](#) from the criminal division to the labour and social division of the court has been a penalty because the judges questioned the legality of the new national council of the judiciary (NCJ) and its appointment of neo-judges. The judges’ approach was in accordance with the ECtHR and CJEU case law, but Schab and his deputy, who were appointed by Polish Minister of Justice *Zbigniew Ziobro*, disliked it.

■ 25 August 2022: Based on decisions by the ECtHR, the CJEU and Polish

courts, a judge of the Labour and Social Insurance Chamber of the Polish Supreme Court [challenged the legal status of a newly appointed judge](#) to the Chamber. He argued that the neo-judge’s participation in benches would lead to the incorrect staffing of the court and would breach Art. 6 ECHR – the citizens’ right to a hearing by an independent and impartial tribunal established by law.

■ 28 August 2022: Four associations of judges lodge an [annulment action](#) with the General Court seeking the annulment of the Council’s decision of 17 June 2022 that approved Poland’s Recovery and Resilience Plan. The applicants rely on five pleas in law. They argue that the endorsement falls short of what is required to ensure effective judicial protection and disregard the judgments of the CJEU on the matter. The case before the General Court is referred as [T-532/22](#).

■ 30 August 2022: Polish [President Andrzej Duda comments](#) on the annulment action by the four associations of judges regarding Poland’s Recovery and Resilience Plan (see above). According to Duda, this is an undemocratic attempt that “judicial circles simply want power”.

■ 20 September 2022: The new “Chamber of Professional Liability” at the Polish Supreme Court, which replaced the former and illegal Disciplinary Chamber (→[eucrim 2/2022, 82](#)), holds that the [suspension of several judges](#) on the ground that they applied CJEU and ECtHR case law was illegal. The decision is a signal of opposition against the approaches by Polish Minister of Justice *Zbigniew Ziobro* and his allies to exercise repression against Polish judges who wanted to implement ECtHR and CJEU decisions that had declared judicial reforms in Poland illegal.

■ 6 October 2022: The ECtHR rules in [Juszczyszyn v Poland](#) that the suspension of a Polish judge from his judicial office by the Polish Disciplinary Chamber of the Supreme Court violated Articles 6, 8 and 18 ECHR. The applicant had heard an appeal and reviewed

whether the first instance judge complied with the requirement of independence. According to the Disciplinary Chamber, this compromised the dignity of the judicial office and grossly violated the law. In its reasoning, the ECtHR emphasises that the appointment of judges to the established Disciplinary Chamber of the Supreme Court violates Art. 6 ECHR. The Disciplinary Chamber did not fulfil the requirements of an „independent and impartial tribunal established by law“, which also made the suspension unlawful in the sense of Art. 8 ECHR.

■ 17 October 2022: [30 Supreme Court Judges declare](#) that they cannot adjudicate in panels with neo-judges of the Supreme Court, i.e. judges nominated by the illegal, politicized National Council of the Judiciary (NCJ). They cite judgments of the CJEU, the ECtHR, but also the Polish Supreme Administrative Court and the Supreme Court, in which the legality of the NCJ and the appointments it had given to neo-judges was challenged. The judges argue that rulings given by such a panel with neo-judges will be defective, because it will be possible to overturn them and the State Treasury will have to pay compensation to the parties to the proceedings for that.

■ 18 October 2022: The [General Affairs Council discusses](#) developments in relation to the rule of law in Poland. This was not a formal hearing under Article 7(1) TEU, but simply a progress report. The focus was on concerns over the independence of the judiciary in Poland. The Commission informed the ministers about the recent reform of the disciplinary regime for Polish judges initiated by the Polish government. Poland was given the opportunity to make remarks and reportedly insisted that it had complied with all the requirements set out by the CJEU in its 2021 rulings. (TW)

### Hungary: Rule-of-Law Developments July – October 2022

This news item continues the overview of previous eucrim issues of recent rule-of-law developments in Hungary as far

as they relate to European law (previous overview → [eucrim 2/2022, 83–84](#)). The overview covers the period from the second half of July until the end of October 2022.

■ 15 July 2022: The Commission [refers Hungary to the CJEU over the controversial “Children Protection Act”](#). The Act was approved in 2021 and 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. The Commission immediately launched an infringement procedure against this act in 2021. Since Hungarian authorities did not sufficiently respond to the Commission’s concerns, the Commission now takes the last step of the infringement procedure and takes Hungary to the CJEU. The Commission believes that the law violates several internal market rules and the fundamental rights of individuals (in particular LGBTIQ people).

■ 15 July 2022: The Commission launches [another legal action against Hungary before the CJEU](#). The Commission proceeds against the Hungarian Media Council’s decision to reject Klubradio’s application for the use of radio spectrum. This prevented Klubradio (a liberal talk and news radio station based in Budapest) from continuing its activity in the radio broadcasting sector on the basis of radio frequency. The Commission opened an infringement procedure in June 2021 for breach of the EU telecom rules. The Hungarian authorities did not resolve the issues, which is why the Commission now decided to refer Hungary to the CJEU.

■ 19 July 2022: The Hungarian government submits a [bill](#) to the parliament which is to strengthen public participation in the preparation of laws. Strengthening public consultation is one request by the Commission for approving Hungary’s access to the Recovery and Resilience Fund. [NGOs criticised](#), however, that the bill will not remove the actual problem that there is no governmental

commitment to meaningful, genuine public consultation. In addition, the bill lacks effective guarantees.

■ 29 July 2022: The Hungarian Civil Liberties Union (HCLU) and the Hungarian Helsinki Committee (HHC) communicate to the CoE Council of Ministers that [Hungarian authorities have failed to execute ECtHR judgments on freedom of information](#) cases. Considering the 2009 ECtHR judgment in *Kenedi v Hungary*, the two NGOs argue that the Hungarian Government has not taken the necessary general measures to prevent the occurrence of similar violations in the future and so has not executed the judgment. There are systemic causes behind the non-compliance with freedom of information judgments, such as the lack of effective and genuinely coercive enforcement tools. Criminal procedures launched for non-compliance with freedom of information judgments under the respective provisions of the Criminal Code rarely lead to indictments, HCLU and HHC say.

■ 30 July 2022: [EP political group leaders condemn](#) Prime Minister Viktor Orbán’s recent racist declarations about not wanting to become “peoples of mixed race”. The EP’s statement stresses that the declarations constitute a breach of the EU values and “have no place in our societies”. The Council is called on to finally issue its recommendations to Hungary in the framework of the Article 7 procedure. The Commission is urged to treat with priority the ongoing infringement procedures against Hungary’s violation of EU rules prohibiting racism and discrimination and make full use of the tools available to address breaches of values enshrined in Art. 2 TEU.

■ 23 August 2022: In an [open letter](#) to the Hungarian Minister of Justice, NGOs called on to carry out proper public consultations and involve CoE’s Venice Commission before any changes to the judicial system are made. The organisations fear that planned reforms might undermine the independence of the judiciary.

■ 6 September 2022: The Hungarian Helsinki Committee publishes [a research paper which reviewed secondment decisions](#) by the National Office for the Judiciary (NOJ) in the past years. According to the research, there are systemic deficiencies of the legal framework and practice, jeopardising the independence of the judiciary in Hungary.

■ 12 September 2022: NGOs publish several [briefing papers](#) that assess the publicly made commitments from the Hungarian government which reply to the launched conditionality mechanism against Hungary (→[eucrim 2/2022, 106](#)). The NGOs state that the commitments made, and the legislative proposals put forward by the government so far are clearly insufficient to reach any of the goals to protect the EU budget. The NGOs make several recommendations in order to bring about meaningful change in tackling corruption, protecting the EU budget, and recovering certain rule of law safeguards.

■ 15 September 2022: [The EP deplors in a resolution](#) the Council's inability to make meaningful progress in the ongoing Article 7 procedure against Hungary. MEPs argue that Hungary infringes EU values and rules in a number of areas, including the functioning of the constitutional and electoral system, the independence of the judiciary and of other institutions and the rights of judges, corruption and conflicts of interest, privacy and data protection, the right to equal treatment, including LGBTIQ rights, etc. MEPs believe that the situation has deteriorated since 2018 such that Hungary has become an “electoral autocracy”. Recovery funds should be withheld until the country complies with EU recommendations and CJEU rulings. MEPs also say that any further delay in acting under Article 7 rules to protect EU values in Hungary would amount to a breach of the principle of the rule of law by the Council itself. The report on the situation in Hungary, which was adopted by the resolution, builds on the resolution with which the EP launched

the Article 7 procedure in 2018 to provide an overview of developments in 12 areas of concern identified by the EP (→[eucrim 2/2022, 84](#)).

■ 4 October 2022: The Hungarian government submits several bills to the parliament in order to deliver on its commitments in the process of the conditionality mechanism initiated by the Commission in April 2022 (see above). In contrast, [NGOs criticise](#) after a review of the bills that many of the proposed remedial measures still have deficiencies. They say that “while in some of the above areas it is possible to identify steps in the direction suggested by the European Union, the Government, when formulating remedial measures, was careful not to introduce changes that would shake the institutional and procedural fundamentals of the captured, illiberal state.”

■ 26 October 2022: The Hungarian Helsinki Committee (HHC) communicates to CoE's Council of Minister that Hungary has failed to achieve any tangible progress with regard to preventing, investigating and sanctioning [ill-treatment by the police](#) since last year, and so continues failing to execute multiple ECtHR judgments. According to the HHC, Hungary should address outstanding structural deficiencies in several areas of police work. (TW)

### Council Debates Impact of Judicial Training on Rule of Law

At their [meeting on 13 October 2022](#), the Minister of Justice of the EU Member States discussed a [note from the Czech Council Presidency](#) that deals with judicial training and its impact on access to justice in the context of the rule of law. The note stresses the link between initial and continuing judicial high-quality training and the rule of law as demonstrated, for instance, in the EU Justice Scoreboard (→[eucrim 2/2022, 86–87](#) with references to the scoreboards of previous years).

Ministers debated on the ways to ensure a high level of participation by judges in continuing training and the

assessment regarding the impact and effectiveness of participation. In this context, Ministers highlighted the existence of national training schools, as well as the participation of judges in European trainings and exchanges. They also discussed links between the participation in continuing judicial training and the career development of judges. They stated that they have not experienced tensions between the participation of judges in judicial training and their independence. (TW)

### Ukraine Conflict

#### EU Reactions to Russian War in Ukraine: Overview July – October 2022

This news item continues the reporting on key EU reactions following the Russian invasion of Ukraine on 24 February 2022, as far as the impact of the invasion on the EU's internal security policy, criminal law and the protection of the EU's financial interests are concerned. The following overview covers the period from the end of July 2022 to the end of October 2022 (for the developments from February 2022 to mid-July 2022 →[eucrim 2/2022, 74–80](#)).

■ 26 July 2022: The Council [prolonged the restrictive measures targeting specific sectors](#), such as finance, energy, technology, dual-use goods, industry, transport and luxury goods of the Russian Federation, by six months, i.e. until 31 January 2023. These sanctions were first introduced in 2014 in response to Russia's actions destabilising the situation in Ukraine (illegal annexation of Crimea and the city of Sevastopol) and were significantly expanded since the Russian's military invasion in February 2022;

■ 1 and 2 August 2022: The European Commission, on behalf of the EU, [disburses €1 billion exceptional macro-financial assistance](#) (MFA) for Ukraine. It is to support Ukraine in addressing its immediate financial needs following the aggression by Russia. This MFA is the first part of the exceptional MFA package of



up to €9 billion endorsed by the European Council of 23–24 June 2022 and complements the financial support already provided by the EU in the first half of the year in the form of emergency loans. MFA is a form of financial aid extended by the EU to neighbouring countries experiencing a balance of payments crisis.

■ 4 August 2022: The Council decided to impose [restrictive measures on two additional individuals](#) in response to the ongoing unjustified and unprovoked Russian military aggression against Ukraine. They concern first Viktor Fedorovych Yanukovych, pro-Russian former President of Ukraine, for his role in undermining or threatening the territorial integrity, sovereignty and independence of Ukraine and the state's stability and security. Second, they target Oleksandr Viktorovych Yanukovych (Viktor's son) for also conducting transactions with the separatist groups in the Donbas region of Ukraine;

■ 5 September 2022: The EU fosters the connection of Ukraine to the EU's cooperation in customs and tax matters. It paved the way for [Ukraine's participation in the EU's Customs and Fiscalis programmes](#). Ukraine can now be a partner together with EU Member States and other participating countries if it comes to the promotion of cooperation in the fields of taxation and customs management.

■ 9 September 2022: In the framework of the informal [ECOFIN Council meeting in Prague](#), the finance ministers of the EU countries endorsed the next tranche of the exceptional macro-financial assistance (MFA) to Ukraine in the amount of €5 billion. "The new loan of €5 billion will be used for the day-to-day running of the state and to ensure the operation of the country's critical infrastructure, such as offices, schools and hospitals", *Zbyněk Stanjura*, Minister of Finance of Czechia said. The [EP approved](#) the €5 billion loan on 15 September 2022. A precondition for the granting of the MFA is that Ukraine respects effective democratic mechanisms – including a

multi-party parliamentary system – and the rule of law, and guarantees respect for human rights.

■ 14 September 2022: The [Council prolonged the duration of the restrictive measures](#) (such as travel restrictions for natural persons, freezing of assets, and a ban on making funds or other economic resources available) targeting those responsible for undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (1206 individuals and 108 entities are listed) for a further six months, until 15 March 2023;

■ 1 October 2022: Ukraine is able to [operate common transits](#). The country joined the *EU-Common Transit Countries' Convention on a Common Transit Procedure* and the *Convention on the Simplification of Formalities in Trade in Goods*. The conventions facilitate the movement of goods and trade between EU Member States and partner countries.

■ 6 October 2022: Following the "maintenance and alignment package of 21 July 2022 (→[eucrim 2/2022, 75](#)), the Council adopted the [eight package of sanctions](#) against Russia for its continued aggression against Ukraine. The package particularly comes in response to the illegal annexation of Ukrainian territory by sham referenda, the mobilization of additional troops and the issuance of open nuclear threats from the part of Russia. The [package includes](#) the geographical extension of restrictive measures to the oblasts of Kherson and Zaporizhzhia, new export and import restrictions, and the implementation of the G7 oil price cap. It also tightens prohibitions on crypto assets by banning all crypto-asset wallets, accounts, or custody services, irrespective of the amount of the wallet. Several services, such as IT consultancy, legal advisory, architecture and engineering services, can no longer be provided to the government of Russia or legal persons established in Russia;

■ 6 October 2022: The [Council decided to impose restrictive measures](#) on an ad-

ditional 30 individuals and 7 entities and to broaden the listing criteria on which specific designations can be based, in order to include the possibility to target those who facilitate the circumvention of EU sanctions. Restrictive measures from the EU presently cover a total of 115 entities and 1236 individuals. Those who have been identified have their assets frozen, and neither EU citizens nor businesses are allowed to provide them with funding. A travel prohibition that also applies to natural persons stops them from entering or passing through EU countries;

■ 6 October 2022: In a [resolution on Russia's escalation of its war of aggression](#) against Ukraine, the EP calls, inter alia, for the establishment of an ad hoc international tribunal for the crime of aggression against Ukraine, where Putin and all Russian civilian and military officials and their proxies responsible for masterminding, launching and conducting the war in Ukraine would be prosecuted;

■ 13 October 2022: At the [JHA Council meeting](#), minister took stock of ongoing work on judicial responses and the fight against impunity regarding crimes committed in connection with Russia's war of aggression against Ukraine. This includes support for the investigation and prosecution of war crimes and the other most serious crimes, as well as action to ensure the full implementation of the individual and economic sanctions adopted (→[eucrim 2/2022, 79–80](#));

■ 20 October 2022: The Council expands the list of individuals who are subject to restrictive measures for undermining or threatening the territorial integrity, sovereignty and independence of Ukraine to [three Iranians and one Iranian entity](#) for their role in the use of Iranian drones in the Russian war in Ukraine. (TW/AP)

### **JHAAN: Joint Paper on EU's Solidarity with Ukraine**

On 23 August 2022, the network of the EU Justice and Home Affairs Agencies

(JHAAN) published a [joint paper](#) on their contributions to the EU's solidarity with Ukraine. The paper outlines the main activities of CEPOL, EIGE, EMCDDA, EUAA, eu-LISA, Eurojust, Europol, FRA, and Frontex in key areas, for instance:

- The production of specific analytical products and reports;
- The identification of key fundamental rights challenges and ways to overcome them;
- Operational support in investigations of core international crimes allegedly committed in Ukraine;
- Provision of information and support to those displaced from home;
- Support to EU national authorities, especially in Member States bordering Ukraine and Moldova;
- Contributions to the enforcement of EU sanctions;
- Support to Ukrainian and Moldovan authorities.

Furthermore, by means of an interactive [map](#), the individual and joint efforts of all nine agencies can be explored.

The joint paper was compiled by CEPOL, which currently chairs the JHAAN. The joint paper aims to present the European Institutions and the general public a concise, yet comprehensive document, to be used as a source of reference, on how the nine JHA Agencies support the EU and Member States and several EU partners in view of the Russian invasion of Ukraine. It is considered as a living document to be regularly updated (as long as the current situation remains unchanged). (CR)

## Legislation

### Proposal for a European Media Freedom Act

On 16 September 2022, the Commission adopted a proposal for a [European Media Freedom Act](#). Through the Media Pluralism Monitor and previous Rule of Law reports, the Commission has been closely monitoring challenges regard-

ing media pluralism and independence in the EU. It has identified increasingly worrying trends across the EU, especially regarding the safety of journalists and abusive lawsuits against public participation (SLAPPs). With the European Media Freedom Act, the Commission aims at strengthening the integrity of the internal media market.

The European Media Freedom Act builds on the Commission's rule-of-law reports (Commission's 2021 Rule of Law Report →[eucrim 3/2021, 134–135](#)), the revised Audiovisual Media Services Directive, the Digital Services Act (DSA), and the Digital Markets Act (DMA) as well as on the new Code of Practice on Disinformation (→[eucrim News](#)).

In order to achieve this goal, the Commission has set out four major objectives:

- Fostering cross-border activity and investment in the internal media market in order to make it easier for media market players to expand their operations across the internal market;
- Increasing regulatory cooperation and convergence in the internal media market through EU-level opinions and guidance. Tools for collective – EU-wide – action should therefore be provided by independent regulators to protect the EU internal market from service providers (including those from third countries) not following EU media standards;
- Facilitating the free provision of quality media services in the internal market by enhancing media-specific ownership transparency and promoting self-regulation for the independent functioning of media companies;
- Securing transparent and fair allocation of economic resources in the internal media market in order to ensure a level playing field for media market players.

The Commission also proposed establishing a European Board for Media Services, a collective body of independent media regulators, to replace and succeed the European Regulators Group for

Audiovisual Media Services (ERGA). The Board is designed to promote the effective and consistent application of the EU media law framework.

The European Parliament and the Council will now have to discuss the Commission's proposal for a Regulation according to the ordinary legislative procedure. (AP)

### Proposal for a New Cyber Resilience Act

On 15 September 2022, the Commission proposed a new [Cyber Resilience Act](#) that builds upon the 2020 EU Cybersecurity Strategy (→[eucrim 4/2020, 282–283](#)) and the 2020 EU Security Union Strategy (→[eucrim 2/2020, 71–72](#)). With this Act, the Commission aims to offer consumers and businesses better protection from products with inadequate security features by introducing mandatory cybersecurity requirements for products with digital elements throughout their entire lifecycle.

The Commission had noticed that hardware and software products are becoming increasingly subject to successful cyberattacks, especially that such products suffer from two major problems, which are costly for users and society: First, a low level of cybersecurity, which transpires through widespread vulnerabilities and the insufficient and inconsistent provision of security updates to address them. Second, an insufficient understanding of and access to information by users, preventing them from choosing products with adequate cybersecurity features or from using them in a secure manner.

In order to counter these problems, the Commission is aiming to ensure the proper functioning of the internal market by pursuing two main general objectives:

- To establish favorable conditions for the creation of secure products with digital components by ensuring that hardware and software products are released onto the market with fewer vulnerabilities and that manufacturers

treat security seriously throughout a product's life cycle;

- To establish conditions that encourage users to consider cybersecurity when deciding on and utilising digital items.

The proposal further sets out four specific objectives:

- To ensure that manufacturers improve the security of products with digital elements, from the design and development phase and throughout their entire lifecycle;

- To establish a comprehensive cybersecurity framework that makes compliance easier for hardware and software manufacturers;

- To increase the transparency of security attributes in products with digital components;

- To make the security features of items with digital components more transparent.

It is now for the Council and the European Parliament to present their views on the draft Regulation and enter into negotiations. Once adopted, economic operators and Member States will have two years to adapt to the new requirements. (AP)

### New Controversies around Proposal to Combat Child Sexual Abuse Online

The [proposal to prevent and combat child sexual abuse online](#), proposed by the Commission on 11 May 2022, remains controversial (→[eucrim 2/2022, 91–92](#)). While more than 70 child rights organisations signed an [open letter](#) supporting the EU's proposed law to protect children from sexual abuse, the European Data Protection Board (EDPB) and the European Data Protection Supervisor (EDPS) pointed out the serious risk the proposal presents for fundamental rights in their [Joint Opinion on the proposal](#) adopted on 28 July 2022.

While pointing out the particular seriousness and heinousness of sexual abuse of children, the EDPB and the EDPS stressed that the Proposal raises concerns regarding the proportionality of the envisaged interference and the

limitations to the protection of the fundamental right to privacy and the protection of personal data. Both pointed out that out that procedural safeguards can never fully replace substantive safeguards.

They criticized that the draft legislation left too much room for potential abuse due to the absence of clear substantive norms. Some key elements, such as the notion of “significant risk” also lack clarity. The broad margin of appreciation afforded to the entities in charge of applying these safeguards (private operators and administrative and/or judicial authorities) leads to legal uncertainty on how to balance the rights at stake in each individual case.

Both the EDPB and EDPS also raised concerns about the measures envisaged for the detection of unknown child sexual abuse material (CSAM) and the solicitation of children (grooming) in interpersonal communication services. Artificial intelligence and other technologies that are used to scan user communications are likely to make mistakes and constitute a significant invasion of people's privacy. The use of technologies to scan audio communication (voice messages and live communications) presents a particular risk of intrusion and should therefore remain outside the scope of detection.

Technologies that use encryption fundamentally support freedom of expression, respect for private life, and communication privacy as well as innovation and expansion of the digital economy. The envisaged blocking measures and requiring providers of Internet services to decrypt online communications in order to block communications involving CSAM are seen as disproportionate. The Proposal must clearly state that nothing in the proposed Regulation should be interpreted as prohibiting or weakening encryption.

The EDPB and EDPS welcomed that the future EU Centre on child sexual abuse and a network of national coordinating authorities for child sexual

abuse will not affect the powers and competences of the data protection authorities. The Proposal should, however, clarify the purpose the opinion of the EDPB will have, once it is issued, on the technologies the EU Centre would make available in order to execute detection orders and how the EU Centre could act after having received an opinion from the EDPB.

Lastly, the EDPB and EDPS supported the envisaged close cooperation between the EU Centre and Europol but made several recommendations for improvement of the relevant provisions, including that the transmission of personal data between the EU Centre and Europol only take place on a case-by-case basis, following a duly assessed request, and via a secure exchange communication tool, such as the SIENA network. (AP)

### German Bundesrat: Statement on Proposal to Combat Child Sexual Abuse Online

On 5 October 2022, the German Bundesrat (a legislative body representing the 16 federal states (Länder) at Germany's federal level) published an [opinion](#) on the Commission's proposal to prevent and combat child sexual abuse online (→[eucrim 2/2022, 91–92](#)). The Bundesrat welcomed a number of measures contained in the proposal (such as the establishment of a new, independent EU center to facilitate its implementation) and generally supports the Commission's goal of improving the protection of young people from sexual violence. However, it took also a critical stance to some regulations:

- Interference by the new law with the freedoms of expression, communication, and the media, given the widespread use of technology to identify child sexual abuse;

- Danger of creating a „chilling effect“ on media freedoms, as the regulations offer the possibility to check and thus monitor the content concerning and communication of children if there is a significant risk to their integrity;

- Dangerous impact of restrictions on journalists' and whistleblowers' ability to communicate and conduct research;
- Fundamental rights concerns regarding the use of technology to detect child sexual abuse material (Art. 10 of the proposal) – this pertains particularly to the intended legal obligation of service providers to search the private communications of their users for suspicious patterns using technical aids („chat control“).

In addition, the Bundesrat welcomes the fact that Arts. 14 and 15 of the proposed Regulation also focus on the prompt removal of depictions of child sexual abuse from the Internet, but the process is seen critically. The Bundesrat prefers a deletion obligation that arises directly from the Regulation and takes effect immediately after the hosting service becomes aware of the misuse.

The Bundesrat's opinion follows numerous critical statements on the Commission's initiative which is seen as a too broad attack on the rights to privacy (→[eucrim 2/2022, 91–92](#) and news item above). (AP)

### Commission Welcomes Political Agreement on 2030 Digital Policy Programme

On 14 July 2022, the Commission [welcomed](#) the political agreement reached by the European Parliament and the Council of the EU on the 2030 Policy Programme „Path to the Digital Decade“. The aim of this programme is to set up a monitoring and cooperation mechanism to achieve the common objectives and targets of Europe's digital transformation as set out in the [2030 Digital Compass](#).

The 2030 Digital Compass was presented on 9 March 2021 by the Commission and aims to provide a vision and avenues for Europe's digital transformation by 2030 (→[eucrim 1/2021, 8–9](#)). A [proposal for a Path to the Digital Decade for Europe's digital transformation by 2030](#) was submitted during the State of the Union Address by Commis-

sion President *Ursula von der Leyen* in September 2021. On 26 February 2022, the Commission also proposed a [Declaration on digital rights and principles for a human-centred digital transformation](#) (→[eucrim 1/2022, 10–11](#)), which is currently being discussed by the European Parliament, the Council, and the Commission.

The political agreement reached will now be subject to formal approval by the two co-legislators. Once approved, the Digital Decade policy programme will enter into force. After entry into force, the Commission and the Member States will develop key performance indicators (KPIs) based on an enhanced [Digital Economy and Society Index \(DESI\)](#), in order to measure progress towards the 2030 digital targets. This will serve as preparation for the first annual report on the “State of the Digital Decade” – possibly to be adopted as early as June 2023. (AP)

## Institutions

### Council

#### Justice and Home Affairs Council Meeting in October 2022

On 13–14 October 2022, [the Justice and Home Affairs Council met in Luxembourg](#). The war in Ukraine was again in the focus. Topics included the judicial responses and the fight against impunity in Ukraine, the situation of Ukrainian refugees in the EU and the implications of the war on internal security.

In addition, the Ministers of Justice discussed, *inter alia*, the following items:

- Judicial training and its impact on access to justice in the context of the rule of law (→[separate news item](#));
- Progress made on the draft directive on the protection of the environment through criminal law (→[eucrim 4/2021, 219](#));
- Latest developments in the functioning of the European Public Prosecu-

tor's Office (EPPO) and discussion on the possible extension of its mandate to cover the protection of violations of EU sanctions;

- Upholding fundamental rights in times of crises.

In the area of home affairs, Ministers for home affairs exchanged views on these topics:

- Overall state of the Schengen area, with a particular focus on the managements of external borders;
- The state of play regarding the enlargement of the Schengen area without internal borders to Bulgaria, Romania, and Croatia;
- The state of play of the EU's reform in the area of asylum and migration;
- Recent developments in migrations over the Western Balkan route;
- Progress made on the implementation of interoperability.

Lastly, ministers were updated on the state of play of several legislative proposals in the area justice and home affairs. (TW)

### European Commission

#### Commission Work Programme for 2023

On 18 October 2022, the European Commission published its [Work Programme](#) for the year 2023. The programme contains 43 new policy initiatives across all six of the headline ambitions of European Commission's President *Ursula von der Leyen*'s Political Guidelines reinforcing her first State of the Union speech (→[news of 27 July 2020](#)). Many of the key initiatives in this Work Programme also follow up on the outcomes of the Conference on the Future of Europe (→[eucrim 2/2022, 84–85](#)). In the Annex, the Work Programme lists potential new initiatives, pending proposals, and those to be withdrawn or repealed. In the area of justice and home affairs, new ideas for initiatives concern the following:

- Updating the anti-corruption legislative framework;

- Setting up a sanctions framework targeting corruption;
- Revising the Directive on combatting child sexual abuse;
- Setting up a Cybersecurity Skills Academy;
- Intensifying cross-border police cooperation;
- Strengthening the Schengen area through the adoption of the revised Schengen Border Code.

As next steps, the Commission will start discussions with the EP and Council, in order to agree on joint legislative priorities. The Commission will also continue to support and work with Member States to ensure the implementation of new and existing EU policies and laws. (CR)

## European Public Prosecutor's Office

### Working Arrangement between EPPO and Prosecution Office of North Macedonia

On 24 October 2022, the European Chief Prosecutor, *Laura Codruța Kovesi*, and the State Public Prosecutor of the Republic of North Macedonia, *Ljubomir Joveski*, signed a [working arrangement](#) between the European Public Prosecutor's Office (EPPO) and the State Public Prosecutor's Office of the Republic of North Macedonia (SPPO).

The Arrangement aims at facilitating judicial cooperation in criminal matters and the exchange of information. Both parties assure that they will cooperate with the widest possible extent for the gathering of evidence on the basis of the relevant international legal framework. Cooperation by setting up joint investigation teams is also foreseen.

The parties may exchange any strategic and other non-operational information in areas within their competence. The SPPO may second a liaison officer to the EPPO's headquarters in Luxembourg and the EPPO will have a contact point in the Republic of North Macedonia.

The exchange of personal data will be possible in accordance with the respectively applicable Union and North Macedonian legal framework. The Arrangement includes several data protection rules, including on the rights of the data subject and public access requests, and on onward data transfers. The Arrangement entered into force on 24 October 2022. (TW)

### Working Arrangement between EPPO and Croatian Ministry of the Interior

On 13 October 2022, a working arrangement between the EPPO and the Ministry of the Interior of the Republic of Croatia was signed. According to the arrangement, EPPO's Delegated Prosecutors in Croatia and the European Prosecutor for Croatia will have direct access to data contained in the Ministry of Interior's records.

Access is authorised if there are reasonable grounds to believe that an offence within the competence of the EPPO is being or has been committed, and access to such data is necessary for conducting the inquiry or investigation. Data which can directly be accessed include, for instance, records of criminal offences reported and injured persons, records of tracing and announcements on persons, and records of citizens' residence and stay as well as date in the national border management information system. (TW)

### EPPO Signed Working Arrangements with Prosecution Services of Montenegro and Georgia

On 22 September 2022, European Chief Prosecutor *Laura Kövesi* and Acting Supreme State Prosecutor of Montenegro *Maja Jovanović* signed a [working arrangement](#). The Arrangement entered into force on the same day. It aims at facilitating judicial cooperation and exchange of strategic and other non-operational information between the EPPO and the Supreme State Prosecutor's Office (SSPO) of Montenegro. The parties agreed to cooperate by applying the relevant multilateral instruments for judicial

cooperation in criminal matters when it comes to the gathering of evidence, the freezing of assets and extradition of persons sought. They may also cooperate by setting up joint investigation teams on the basis of special agreements in accordance with the Second Protocol to the CoE MLA Convention.

Furthermore, the Arrangement foresees that the SSPO may second a liaison officer to the EPPO's headquarter in Luxembourg and the EPPO has a contact point in Podgorica, Montenegro. Rules on the protection of personal data for the exchange of information complement the Arrangement.

A similar [working arrangement was signed with the Prosecution Service of Georgia](#) on 28 September 2022, which entered into force on the same day. (TW)

### Cooperation between EPPO and Luxembourgish FIU

On 18 August 2022, the EPPO signed a [Memorandum of Understanding \(MoU\) with the Financial Intelligence Unit of Luxembourg](#) (CRF, Cellule de renseignement financier). The MoU will provide a structured framework for cooperation between the Parties. It will facilitate the exchange of information about suspicious transactions or activities reports and other information (e.g. results of analyses) with regard to suspicious facts that may fall under EPPO's competence. Provisions of the MoU relate to:

- The exchange of information and analytical support;
- Requests related to the suspension of suspicious financial operations;
- Confidentiality and onward transfer of information to third parties;
- Modalities of exchange of information;
- Exchange of strategic and other information;
- Contact persons;
- Meetings, trainings and workshops;
- Data protection rules.

It is the second formalised cooperation concluded by the EPPO with a FIU

of an EU Member State after the MoU with the Italian FIU signed in June 2022 (→ [eucrim 2/2022, 95](#)). (TW)

### **EPP0 Signs Working Arrangement with U.S. Law Enforcement**

On 26 July 2022, the [EPP0 signed a Memorandum of Understanding \(MoU\) and Working Arrangement \(WA\) on co-operation](#) with the United States Department of Justice and the United States Department of Homeland Security. The MoU/WA will facilitate cooperation between the participants in investigations and prosecutions relating to criminal offenses within their respective competences, with respect to the exchange of strategic and operational information and evidence, extradition and other forms of cooperation.

It is stressed that the gathering and provision of information and evidence follows the rules of applicable international agreements or law governing mutual legal assistance, “or through an available arrangement or other police cooperation mechanism”. The U.S. Department of Justice confirms that it “intends to provide mutual legal assistance in response to a request made on behalf of a European Delegated Prosecutor [EDP] handling the matter and transmitted between the appropriate authority of the EU Member State in which the investigation or prosecution is being carried out and the U.S. Central Authority for mutual legal assistance”. The EPP0, in turn, “intends to cooperate (...) in providing evidence needed by the U.S. Department of Justice or Department of Homeland Security for an investigation, prosecution, or related proceeding conducted under their respective authority”.

Moreover, the U.S. side acknowledges that the handling EDP can request the competent authority of its Member State to seek provisional arrest or extradition of persons sought for prosecution the EPP0 is conducting, in line with the applicable extradition treaty of the EU Member State and the United States of America.

Other provisions of the MoU/WA address:

- Participation in Joint Investigation Teams;
- Other ways of cooperation, e.g. the exchange of strategic and non-operational information;
- Points of contact and liaison officers;
- Mode and channels of communication;
- Data protection;
- Consultation;
- Expenses;
- Modification of the MoU/WA.

The arrangement became applicable on 26 July 2022. (TW)

### **EPP0 Establishes Advisory Board for Asset Recovery and Money Laundering**

By [decision 042/2022 of 28 September 2022](#), the EPP0 College established an asset recovery and money laundering advisory board (ARMLAB). It is a central body within the EPP0, building up expertise as well as facilitating and streamlining EPP0’s strategic objectives in the fields of asset recovery and money laundering.

The ARMLAB will be composed of three European Prosecutors and one member of the Operations and College Support Unit. Its tasks will *inter alia* be:

- Preparing draft proposals for general guidelines of the EPP0 in the fields of asset recovery and money laundering;
- Promoting the sharing of good practices;
- Engaging and representing the EPP0, vis-a-vis relevant stakeholders and counterparts;
- Serving as a consultative body in legislative and evaluation procedures on issues of asset recovery and money laundering;
- Providing, upon request, customized advice to the College, the Permanent Chambers, the European Prosecutors, the European Delegated Prosecutors and the operational units of the EPP0;
- Consulting with or providing customized advice to law enforcement authorities or other competent authorities of the participating Member States;

■ Identifying and defining the needs for training of the EPP0’s staff in the fields of its mandate.

It is also foreseen that the ARMLAB draws up an annual activity report for the College. For the issue of recovery in EPP0 cross-border cases → [article by Nicholas Franssen, p. 206 ff.](#) (TW)

### **EPP0’s Operational Activities Mid July – Mid-October 2022**

This news item continues the regular overview of EPP0’s operational activities for the period from mid-July to mid-October 2022 (for previous overviews → [eucrim 2/2022, 97–98](#); [eucrim 1/2022, 17–18](#); and [eucrim 4/2021, 210–211](#)):

■ 18 October 2022: The EPP0 in Zagreb, Croatia, launches an investigation into a [fraud case involving money received from the European Agricultural Fund for Rural Development \(EAFRD\)](#). An entrepreneur is suspected of having applied for subsidies from the EU fund although he did not meet the eligibility criteria.

■ 14 October 2022: After a [broad media echo](#) on the EU’s procurement of COVID-19 vaccines, the EPP0 confirms in a brief press release that it has an ongoing [investigation into the acquisition of COVID-19 vaccines](#) in the EU. The EPP0 did not specify who was being investigated, or which of the EU’s vaccine contracts were under scrutiny. However, [media speculate](#) that the investigations could deal with a high-level contract between the EU and the company Pfizer, in which also the involvement of Commission President Ursula von der Leyen is questioned.

■ 12 October 2022: The EPP0 in Bologna, Italy, concluded a fraud case in which the suspected farm owner together with two accomplices [unlawfully received EU money for reconstruction after the earthquakes](#) in Emilia-Romagna in 2012. In total, the fraud involves over €700,000. The suspect made false declarations in order to obtain financial support claiming that his farm was active in 2012 which was not true. During

the investigations, Italian law enforcement authorities seized €520,000 and a number of assets.

■ 10 October 2022: The EPPO in Bucharest, Romania, [indicts a Romanian businessman and a company with fraud and money laundering](#) to the detriment of the EU's financial interests to the tune of over €3 million. According to EPPO's investigations, the Romanian businessman together with an accomplice representing a Spanish company established a fraud scheme in order to obtain EU funds for a project for the creation of a research-development centre in medical recovery and bio reconstruction. The suspects, inter alia, submitted false documents and declared overestimated prices for medical products. In addition, a money laundering scheme all over Europe was established for the EU money obtained.

■ 7 October 2022: The Lithuanian Financial Crime Investigation Service [arrests five persons and carries out searches in several locations in Lithuania](#) in an EPPO investigation into credit fraud. According to the investigation, the director of two Lithuanian companies received at least €343,000 in EU funds, although his companies have been unable to fulfil the commitments of having own resources for co-financing the supported projects. To this end, the suspects provided false data on loans, forged documents of equipment manufacturers and inflated equipment prices, in order to obtain the funds illegally.

■ 6 October 2022: The EPPO in Vilnius, Lithuania, [indicts a person for fraud, attempted fraud and document forgery](#), causing significant damage to the EU's financial interests. The person concerned received EU money and applied for further EU funding, in order to carry out agricultural projects. However, after carrying out inspections, the Lithuanian agency managing these funds discovered that the agricultural activities were not being carried out.

■ 5 October 2022: The EPPO in Athens [indicts a Greek police officer for forgery](#)

[and attempted fraud](#). This is the first indictment in Greece since the EPPO started its operational activities in June 2021. The public official is suspected of having claimed expenses (€12,000) for his activities covered by the EU's Internal Security Fund (ISF) that were never incurred.

■ 27 September 2022: The Guardia di Finanza of Asti, Italy, executes a decree of the [preventive seizure of €200,000](#) against an Italian company. EPPO investigations revealed that managers of the company artificially duplicated costs and issued fictitious invoices in a project for the promotion of typical regional products, which was funded by the EU's Agricultural Fund for Rural Development.

■ 26 September 2022: The Riga District Court, Latvia, [sentences four persons for having organised a fraudulent tender procedure](#). EPPO investigations detected that the persons colluded in receiving a construction contract from a public tender, which was co-financed by the European Regional Development Fund. The unlawfully obtained EU funds (€780,000) were fully recovered before the trial. The EPPO stressed that investigations took less than one year and the case is the result of an excellent cooperation with the Competition Council of the Republic of Latvia which initially identified the irregularities in the public procurement procedure.

■ 21 September 2022: An EPPO investigation into the manipulation of a public procurement procedure leads to the [arrest of two suspects in Zagreb](#), Croatia. An employee of the Croatian agency which was responsible for the public procurement allegedly unlawfully favoured a business owner for a graphics project which is funded by the EU.

■ 20 September 2022: An EPPO investigation in the autonomous region of Aosta Valley, Italy, leads to the [house arrest and seizure of €15,000](#) of a suspect who allegedly illegally obtained EU agricultural funds for the maintenance of agricultural grasslands

■ 16 September 2022: An EPPO-led investigation provokes the [seizure of more than €2 million](#) from an Italian company. It is alleged that the company fraudulently obtained EU funds related to the promotion of agricultural products within and outside the EU.

■ 5 August 2022: Upon request by the EPPO, more than €1.1 million of liquid assets and real estate are [preventively seized from two Italian companies](#) and their director. It was investigated that the companies seemingly defrauded healthcare facilities and hospitals in the region of Emilia-Romagna with FFP masks during the COVID-19 pandemic, although the masks had not had the suitable certification.

■ 27 July 2022: In an aggravated fraud case, the Palermo office of the EPPO lets [seize €160,000 in movable assets and real estate in Sicily](#) (Italy). The two suspects allegedly have falsified statements and wrongly declared ownerships / possession of lands, in order to obtain EU agricultural funds.

■ 20 July 2022: In a [joint operation](#) between the EPPO Investigative Section of the Carabinieri Palermo Provincial HQ (Sicily, Italy) and the EPPO, two high-ranking public officials and one private accountant are arrested for unlawful inducement to give or promise money. The suspects allegedly embezzled part of the sums of money allocated to a housing renovation project by the EU's Cohesion Fund. (TW)

## Europol

### EDPS Action for Annulment against Parts of New Europol Regulation

**spot light** On 16 September 2022, the European Data Protection Supervisor (EDPS) brought an [action for annulment](#) under Art. 263 TFEU before the CJEU regarding Arts. 74a and 74b of the newly amended [Europol Regulation](#) (EU) 2022/991 that entered into force on 28 June 2022 ([→ eucrim 2/2022, 98–100](#)). The provisions confer on

Member States the possibility to retroactively authorise Europol to process large data sets already shared with Europol prior to the entry into force of the amended Regulation. They are contrary to the order that the EDPS issued on 3 January 2022 ([→ eucrim 1/2022, 18](#)) requesting Europol to delete data concerning individuals with no established link to a criminal activity within a predefined, clear time limit. With the amended Europol Regulation, the co-legislators, however, chose to retroactively make this type of data processing legal and, hence, to override the EDPS' order.

As a consequence, the EDPS sees the need to apply for annulment of these provisions in order to safeguard legal certainty for individuals in the field of law enforcement and to ensure independent supervision from undue political influence. The EDPS first argued that, based on his order, individuals could be supposed that their data are erased by January 2023 at the very latest. The amended Europol Regulation, however, authorises the continuation of the data processing. Second, the EDPS puts forth that decisions of supervisory authorities such as the EDPS could otherwise be retrospectively overridden at (political) will, which would make them subject to political pressure and undermine their independence as enshrined in the EU Charter of Fundamental Rights. (CR)

### Policing in the Metaverse

On 21 October 2021, the Europol Innovation Lab published a [report](#) providing a detailed overview of the potential for criminal activities within the metaverse. [Metaverse is described](#) as a virtual-reality platform in which people can explore things together or socially interact with each other without being in the same physical space. It is widely considered as the eventual successor to the internet. Europol's report aims to inform police forces of the opportunities and best practices for building police presence online.

Under the title „Policing in the metaverse: what law enforcement needs to know“, the report explains the notion of metaverse, its adverse use, crime in the metaverse as well as law enforcement use of the metaverse and related technology. It takes a detailed look at several crimes such as money laundering, harassment, abuse and exploitation, and terrorism as well as the phenomenon of mis- and disinformation. It also deals with their impact in the physical world. Furthermore, the report gives advice on how law enforcement authorities can enter into online policing.

In its conclusions, the report underlines the need for law enforcement to establish its presence online and to use the available technology. Staying abreast of these challenges involves cultivating an organisational awareness of the corresponding challenges and opportunities. Furthermore, there is a need to establish international networks of law enforcement experts on the subject in order for them to exchange experiences and to build a knowledge base more quickly and efficiently. (CR)

### Europol Signs Working Arrangement with Qatar

On 5 October 2022, Europol and the Ministry of Interior of the State of Qatar signed a [working arrangement](#) to prevent and combat serious crime and terrorism. Under the arrangement, parties can exchange information under a secure system as well as specialist knowledge, general situation reports, and the results of strategic analysis. Furthermore, they can participate in training activities and provide each other with advice and support in individual criminal investigations. Qatar can deploy a liaison officer to Europol's headquarters in the Hague. (CR)

### Liaison Bureau from United Arab Emirates at Europol

On 22 September 2022, Europol and the Ministry of Interior of the United Arab Emirates (UAE) signed a [Liaison](#)

[Officer Agreement](#) allowing UAE law enforcement liaison officers to be deployed to Europol's headquarters in The Hague. The presence of a UAE liaison officer at Europol will promote operational cooperation between the UAE and the law enforcement authorities of the EU Member States. The agreement on UAE's Liaison Bureau at Europol follows the conclusion of an [Agreement on Strategic Cooperation](#) between the UAE and Europol in 2016. (CR)

### Europol Podcasts Launched

On 1 August 2022, Europol launched the first episode of a new series called [The Europol Podcast](#). In this podcast series, contributors from Europol and law enforcement around the world talk about some of the most high-profile operations that Europol has been involved in. Each podcast focuses on another area of crime, from cybercrime, to organised crime, to financial crime and more.

The [first episode](#) is dedicated to the protection of vulnerable children, outlining the take-down of the online platform Boytown. Further podcasts already available for listening present [Operation Greenlight](#) and its [Action Day](#) – one of the largest international law enforcement operations to date dealing with encrypted networks. The fourth podcast describes the take-down of the so-called “[King of Malware](#)”, one of the most dangerous botnets of the last decades. [Catching cocaine traffickers](#) is the subject of the fifth podcast. The sixth looks at the fight against models that offer [ransomware](#) as a service. (CR)

### Eurojust

#### Publication of Guidelines Documenting International Crimes

On 21 September 2022, Eurojust, together with the EU Network for investigation and prosecution of genocide, crimes against humanity and war crimes (Genocide Network), and the Office of the Prosecutor at the International Crim-



inal Court (ICC) published [practical guidelines](#) for civil society organisations on how to document international crimes and human rights violations for accountability purposes. Setting out a series of “do’s and don’ts”, the guidelines aim at supporting civil society organisations in the collection and preservation of information related to international crimes and human rights violations that may become admissible evidence in court at national or international levels.

The guidelines contain advice on a number of important areas, such as:

- How to approach vulnerable persons;
- How to take a person’s account, photographs, and videos;
- How to deal with documents, digital information, and physical items;
- How to store, safeguard, and analyse collected information.

They also contain a checklist setting out the core principles and practical steps that can be followed.

The guidelines are part of the strengthened cooperation between Eurojust and the Prosecutor at the ICC after Russia’s aggression in Ukraine. The aim is to support the storage and sharing of evidence of alleged core international crimes committed in Ukraine (see also news items on Ukraine conflict above). (CR)

### **Eurojust Cooperation with the American Association of Public Prosecutors Offices**

At the end of July 2022, Eurojust and the Ibero-American Association of Public Prosecutors Offices (AIAMP) signed a [working arrangement](#) to enhance their cooperation in the fight against intercontinental organised crime. AIAMP is an association representing 22 Ibero-American public ministries and national public prosecutor’s offices in the following partner countries: Andorra, Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, Uruguay, and Venezuela. The association has addition-

ally set up seven permanent, specialised Ibero-American cooperation networks comprised of expert public prosecutors from all the Ibero-American public prosecutor’s offices:

- The AIAMP Criminal Cooperation Network (REDCOOP);
- The Network against Trafficking in Persons and Smuggling of Migrants (REDTRAM);
- The Cybercrime Network (CiberRed);
- The Network of Anti-Drug Prosecutors (RAFI);
- The Ibero-American Network of Prosecutors against Corruption;
- The Specialised Gender Network (REG);
- The Environmental Protection Network.

Under the working arrangement, Eurojust may establish new contact points with the AIAMP networks to combat criminal activities, such as drug trafficking, cybercrime, environmental crime, and migrant smuggling. In addition, the working arrangement includes provisions for the exchange of strategic information, communication with contact points, and for data protection. (CR)

### **New Representative for Denmark**

In October 2022, Mr [Torben Thygesen](#) was appointed Eurojust Representative for Denmark. Prior to joining Eurojust, Mr Thygesen served as Deputy State Prosecutor and Chief Prosecutor in different sections of the Danish prosecution service. He has a wealth of working experience in tackling serious and organised cross-border crime. Thygesen succeeds [Jesper Hjortenberg](#), who had served at Eurojust since 2010.

Due to its opt-out in EU legislation in the area of freedom, security and justice subsequent to the Lisbon Treaty, Denmark has no longer been a member of Eurojust since the new Eurojust Regulation came into force in 2019. However, an agreement between Eurojust and Denmark foresees that Denmark can second a representative to the agency. (CR)

### **New National Members for Germany, Ireland and Greece at Eurojust**

In July 2022, [Jan MacLean](#) took up his work at Eurojust as new National Member for Germany. Prior to joining Eurojust, Mr McLean had served as head of division and counsellor at the German Ministry of Justice and as deputy to the Permanent Representative of Germany at the Council of Europe in Strasbourg. Mr McLean succeeds former National Member for Germany and Vice-President of Eurojust, [Klaus Meyer-Cabri](#).

In September 2022, Ms [Tricia Harkin](#) was appointed [National Member for Ireland](#) at Eurojust. Ms Harkin has 20 years of operational and policy experience as a prosecutor at the Office of the Director of Public Prosecutions of Ireland (DPP). Prior to joining Eurojust, she was the Irish representative to the Council of Europe’s Consultative Council of European Prosecutors. Ms Harkin succeeds Mr [Frank Cassidy](#).

At the end of September 2022, Ms [Amalia Bakaloni](#) started at Eurojust as new [National Member for Greece](#) for a period of five years. Prior to joining Eurojust, during her long-standing career as a public prosecutor, she held positions in Greece as Director of Public Prosecutions, as Supervising Prosecutor at the Detention Facilities, as President of the Disciplinary Board of the national independent Authority of Public Revenue, and as Vice-President of the Hellenic Association of Prosecutors. Ms Bakaloni succeeds Mr [Paraskevas Adamis](#). (CR)

### **Judicial Libraries Catalogue Published**

On 16 September 2022, Eurojust published a [judicial libraries catalogue](#) listing the judicial libraries of the 27 EU Member States and 13 affiliated third countries. The catalogue aims to provide practitioners and legal experts with quick access to national case law and relevant legal documents across all EU Member States and respective third countries. Information on the content

of and potential registration requirements for these online libraries (hosted by the national courts or Ministries of Justice) is provided in addition to QR codes with which to access the websites. The 13 third countries include Albania, Georgia, Iceland, Liechtenstein, Moldova, Montenegro, North Macedonia, Norway, Serbia, Switzerland, Ukraine, United Kingdom, and the United States. (CR)

## Frontex

### Frontex Discharge for 2020 in Limbo

On 14 September 2022 – after widespread criticism of Frontex’s involvement in illegal pushbacks, return operations, financial management and transparency policy – the agency published a [fact sheet](#) summarising the main steps recently taken to improve its activities and standards to meet the expectations of stakeholders. Above all, it addresses the issues raised in the EP’s Committee on Budgetary Control (CONT) draft second report on Frontex’s discharge for the financial year 2020. According to the fact sheet, the agency has taken several measures to avoid mistakes in the future, e.g. as regards its budgetary and financial management by, for instance, providing training for staff and establishing an Internal Audit Capability.

In the field of fundamental rights, the agency boosted the number of Fundamental Rights Monitors to 46. In addition, the Standard Operating Procedure for the Serious Incident Report (SIR) mechanism was amended, better defining the role of the Fundamental Rights Officer in this process. A Standard Operating Procedure was introduced to support the Executive Director in the exercise of his/her powers to suspend, terminate, or not launch activities. Furthermore, the recommendations on implementation of the Frontex Regulation set out in the 2021 report by the Frontex Scrutiny Working Group (→ eucrim news of [20 September 2021](#)) were implemented. Looking at re-

turn operations in Hungary (supported by Frontex), a series of measures were taken to ensure full compliance with the EU’s asylum legislation.

In the area of data protection, the agency’s Data Protection Officer prepared an Action Plan to implement the EDPS’ recommendations on Frontex’s data processing rules. To comply with the call for more transparency, a Transparency Register was set up to provide information on meetings and contacts between third-party stakeholders and senior managers in matters concerning procurement and tenders for services and equipment. The agency also set up a Public Register of Documents by which the public can search and access a wide range of documents. With regard to its operations, the agency is working on an operational brief to meet two aims: informing the public about its operational activities and respecting the confidentiality of the operational data, wherever possible. Lastly, the role and function of the Frontex Management Board have been enhanced to ensure oversight over the agency’s activities.

Despite these efforts, the [European Parliament \(EP\) still refused to discharge Frontex](#) for the financial year 2020. On 18 October 2022, 345 MEPs voted in favour of the Committee on Budgetary Control [recommendation of 6 October 2022](#) to refuse the discharge, while 248 MEPs voted against, and 8 abstained. The majority of MEPs welcomed the appointment of the new interim Frontex Director in July 2022, corrective actions already taken or planned, and the new management style within the agency. [They criticised](#), however, the magnitude of misconduct under the previous Executive Director, existing flaws in financial management, and the non-fulfilment of several conditions for the discharge. One reprimand concerned the fact that the OLAF report on Frontex’s activities has not been made available to all MEPs, which is why an informed decision cannot be taken. Furthermore, MEPs believed that the agency still has

structural problems that must be solved and pointed out that there are still issues open regarding the fundamental rights protection of asylum seekers and migrants, transparency, data protection, and alleged sexual harassment within the agency.

Frontex Executive Director ad interim, *Aija Kalnaja*, reacted to the vote on 20 October 2022. In her [statement](#), she acknowledged the EP’s decision while also emphasising the steps the agency has already taken in response to the recommendations of the EP to address the issues (see above). She also attested to the added value of Frontex for the EU Member States. Additional measures have been taken to prioritise the well-being of staff and to foster a change in management culture. (CR)

### 2021 Report of the Consultative Forum on Fundamental Rights

On 17 October 2022, the Frontex Consultative Forum on Fundamental Rights published its annual [report](#) for the year 2021. The report gives advice on fundamental rights in conjunction with Frontex operations, activities, and procedures. The ninth report pays special attention to the following:

- Child protection and safeguarding in Frontex activities;
- Fundamental rights safeguards in sea operations;
- Fundamental rights training;
- Suspension of Frontex operations in Hungary;
- Two observation missions in Lithuania and Greece in 2021.

Lists of all activities, information requests, and recommendations of the Consultative Forum can be found in the annexes.

According to the report, 2021 was marked by allegations associating Frontex with fundamental rights breaches and by corresponding external oversight mechanisms looking more closely into the agency’s activities. The Consultative Forum contributed to these inquiries by outlining its past and present advice to

the agency, by proposing specific measures addressing shortcomings, and by observing their further implementation. In addition, the Consultative Forum undertook observation missions to accompany Frontex operations. (CR)

### Frontex Reacted to OLAF Report

In February 2022, the European Anti-Fraud Office (OLAF) finalised its investigation into serious misbehaviour on the part of Frontex. Among the irregularities, OLAF looked into allegations regarding illegal pushbacks at the EU's external borders in the Aegean Sea in Greece. Other irregularities concerned the exclusion of Fundamental Rights Officers from the reporting line as well as intimidation, humiliation, and harassment of staff members. The sensitive [report was released](#) by various media organisations because it was deemed to be of public interest.

In response, on 14 October 2022, Frontex published a [statement](#) following publication of the OLAF report. In this statement, Frontex executive management underlined that the alleged irregularities were practices of the past. The agency and its management board point to a number of remedial measures that have been taken to address these shortcomings since January 2021, e.g. a procedure to suspend or terminate operations in case of serious abuses, obligations to inform the Consultative Forum, and measures to strengthen the role of the Fundamental Rights Officer. Furthermore, Greek authorities, together with the agency, have established an action plan to right the wrongs of the past and present. Once OLAF has completed an investigation, it is up to the competent EU and national authorities to examine and decide on the follow-up to OLAF's recommendations. (CR)

### Frontex Annual Risk Analysis 2022/2023

On 7 October 2022, Frontex released its annual [Risk Analysis](#) for the year 2022/2023. The report presents the situation at the EU's external borders re-

garding irregular migration, secondary movements/returns, and cross-border crime as well as an outlook on key risks affecting European Integrated Border Management. According to the report, these risks include the following:

- Irregular migration on the well-established migratory routes to the EU;
- Cross-border crime and terrorism;
- Instrumentalization of migration as a political pressure tool;
- The increasing gap between return decisions and effective returns.

These risks will be further affected by other key factors: mainly the Russian war against Ukraine, climate change, the impact of the COVID-19 pandemic, and an increasingly violent and hostile international environment. To respond to these threats, the report emphasises the need for stronger links between border management authorities and greater law enforcement, customs, and security constituencies. (CR)

### Opening of Risk Analysis Cell in Mauritania

Within the framework of the Africa-Frontex Intelligence Community (AFIC), Frontex and Mauritanian authorities opened a [risk analysis cell in Nouakchott](#) on 20 September 2022. Risk analysis cells collect and analyse data on cross-border crime, such as information on illegal border crossings, document fraud, trafficking in human beings, and other types of cross-border crime, and they support authorities involved in border management. They are run by local authorities and trained by Frontex. The cell in Mauritania is the eighth risk analysis cell established under the AFIC network. The AFIC network (comprising 32 African countries) was launched in 2010 to provide a framework for regular information sharing about migrant smuggling and border security threats. (CR)

### Frontex' Cooperation with Third Countries 2021

At the end of June 2022, Frontex issued its [annual report](#) on the agency's coop-

eration with third countries for the year 2021. The report sets out the respective highlights in 2021, the dialogues and cooperation frameworks that were continued and/or established over the past year, the agency's technical and operational cooperation, and capacity-building measures. Cooperation highlights in 2021 show that the focus was placed on cooperation with the Western Balkan region. This included more concretely, among other things, the following:

- Renewed working arrangements with Georgia and Albania;
- The deployment of a second liaison officer in the Western Balkan region;
- A new cooperation plan with Moldova;
- Joint operations with Serbia and Albania.

Dialogues for structured cooperation were established and/or continued with the Western Balkans and Turkey, Africa and the Middle East, Eastern neighbourhood countries, Silk Route countries, and countries sharing strategic interests, e.g. Australia, and Latin America. In the field of technical and operational cooperation, the report outlines the agency's work in the areas of situational awareness and monitoring, the European Travel Information and Authorisation System (ETIAS), border control, and return activities and operations. Capacity-building measures undertaken in 2021 especially include three technical assistance projects: with the Western Balkans and Turkey, with the Southern Neighbourhood, and with the Africa-Frontex Intelligence Community (AFIC). (CR)

### Launch of High-Level Network on Returns

On 8 September 2022, the first [High-Level Network on Returns](#) was launched, comprising expert representatives from Member States and Schengen Associated Countries' institutions responsible for returns. The network aims at coordinating the efforts made by all Member States to ensure effective returns on the EU level. Together with experts from

Frontex and the European Commission, at its first meeting, the network discussed the main challenges and developments affecting return operations in the EU. (CR)

### Irregular Entries at Peak Level

By the end of August 2022, Frontex recorded the [highest total](#) of irregular entries in the January–August period since 2016. With 188,200 irregular entries detected at the external borders of the EU in the first eight month of 2022, the number had increased by 75% compared with the same period in the previous year. People fleeing Ukraine and entering the EU at border crossing points are not included in the figures for detected illegal entries. The Western Balkan, Eastern Mediterranean, and Central Mediterranean routes remain the most actively used routes, with an increase of up to 190% compared to the same period last year. (CR)

### Agency for Fundamental Rights (FRA)

#### Guidance for National Monitoring Mechanisms at External Border

On 14 October 2022, the Fundamental Rights Agency (FRA) published general [guidance](#) offering assistance to EU Member States in setting up independent mechanisms to monitor fundamental rights compliance at the EU's external borders. When setting up such independent national monitoring systems, EU Member States are to ensure that their independence and operational autonomy is guaranteed, that they have a broad thematic mandate and the necessary configuration and level of power as well as the necessary expertise, resources, and funding to carry out their mandate. Reporting, transparency, and accountability requirements should be part of the mechanisms. Ultimately, the new mechanisms should ensure synergies with existing monitoring mechanisms and cooperation with national border and migration authorities. De-

tailed advice is given on how to best establish these parameters and safeguards, followed by explanations on the policy background and objectives of border management monitoring.

FRA's guidance comes in the context of a request by the Commission, which tabled a proposal for a screening regulation in September 2020 that included an obligation for EU Member States to establish an independent national border-monitoring mechanism. (CR)

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### 33rd PIF Report

On 23 September 2022, the European Commission presented the [33rd annual report](#) on the protection of the EU's financial interests and the fight against fraud in 2021. It provides information on:

- The key legislative acts adopted and the relevant CJEU jurisprudence in 2021;
- The EU anti-fraud architecture;
- The cooperation in anti-fraud matters;
- The key measures for the protection of the EU's financial interests;
- The results of control activities;
- An outlook for 2022, including conclusions and recommendations.

The report stressed that the introduction of the Recovery and Resilience Facility (RRF) to overcome the COVID-19 pandemic caused new challenges for the protection of the EU money. The Commission has supported national authorities while assessing the national plans, paying particular attention to the design of measures to protect the RRF resources from fraud, corruption, conflict of interest and double funding. Nonetheless, Member States must develop expertise and control strategies of different management modes linked to the implemen-

tation of the various funds in the coming years.

Another key development in 2021 was the start of operational activities by the EPPO on 1 June 2021. It is highlighted that the operational results from OLAF and the EPPO show the added value that EU bodies bring to the protection of the EU's financial interests and the fight against fraud, in particular in view of overcoming limitations of national systems in dealing with cross-border crime.

Regarding the key figures in 2021, the report stated that 11,218 cases of fraud and irregularities in total were reported. This is a bit less than in 2020. The related irregular amounts increased to €3.24 billion, due to a limited number of significant cases in some Member States.

Regarding the outlook into the near future, the Commission addressed the following recommendations to the Member States:

- Member States must ensure the correct implementation of the PIF Directive – the Commission will continue to control the correct transposition of the EU legislation into national law;
- Member States that have not yet joined the EPPO should do so and the Member States that participate should ensure the EPPO is in a position to exercise all the powers bestowed upon it by its founding Regulation;
- Member States should fully use the potential of digitalisation in the fight against fraud and especially take advantage of the existing tools, such as ARACHNE, EDES, and IMS.
- Member States must strengthen fraud risk analyses.

Along these lines, the Commission will strengthen EU action particularly by new rules of the Financial Regulation, which were recently proposed ([→eucrim 2/2022, 105](#)). As in the previous years, the annual report on the protection of the EU's financial interests is accompanied by several other documents, including:

- [Annual overview with information on](#)

[the results of the Union anti-fraud programme in 2021](#);

- [Activity report of the inter-institutional panel of the Early Detection and Exclusion System \(EDES\)](#);

- [Follow-up by the Member States on the recommendations of the PIF Report 2020](#);

- [Measures adopted by the Member States to protect the EU's financial interests in 2021](#) (Implementation of Art. 325 TFEU);

- [Report on the state of play of the Commission Anti-Fraud Strategy \(CAFS\) Action Plan](#);

- [Statistical evaluation of irregularities reported for 2021](#)

For the annual reports of previous years → [eucrim news of 20 November 2021](#) and the related links there. (TW) ■

### Commission Proposes Budgetary Protection Measures against Hungary – EP Remains Sceptic

After having formally launched the process of applying the conditionality mechanism against Hungary on 27 April 2022 (→ [eucrim 2/2022, 106](#)), the Commission [took another decisive step](#) on 18 September 2022. The Commission tabled a “[proposal for a Council implementing decision](#) on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary” (COM(2022) 485 final). Based on Art. 6(9) of [Regulation 2020/2092](#) on a general regime of conditionality for the protection of the Union budget (→ [eucrim 3/2020, 174–176](#)), the proposal considers that a risk for the EU budget remains due to rule-of-law breaches in Hungary, including corruption. In other – more technical – words the Commission believes that the conditions under Art. 4 of Regulation 2020/2092 are fulfilled, laying down which rule-of-law breaches in Hungary affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.

The proposal outlines in detail the Commission’s concerns as notified to Hungary and the replies for remedial measures by Hungary. The Commission took the view that the proposed remedial measures could in principle address the issues at hand, if they are correctly detailed in relevant laws and rules, and implemented accordingly. This has not been implemented yet in Hungary. Therefore, the Commission proposes the following measures:

- A suspension of 65% of the commitments for three operational programmes under cohesion policy;

- A prohibition to enter into legal commitments with the public interest trusts for programmes implemented in direct and indirect management.

[Johannes Hahn, Commissioner for Budget and Administration](#) said: “Today, we show the power of this new protective tool to fix problems: we have seen significant movement at the level of reform commitments. At the same time, our proposal to the Council is equally an expression that we will suspend funds to protect the budget if the promised fixes are not applied.”

The Council has now one month to decide whether to adopt the proposed measures, by qualified majority. It can also amend the Commission’s proposal. The one-month period can be extended by a maximum of further two months if exceptional circumstances arise.

The Commission will continue to monitor the situation in Hungary and collect further information. Hungary has committed to fully inform the Commission about the implementation of the remedial measures by 19 November 2022.

*Reaction by the EP:* MEPs, on contrast, were largely disappointed by the restrictive approach of the Commission. In a [debate in plenary on 4 October 2022](#), the EPP, Greens, S&D, Renew and GUE/NGL groups took the view that the Commission had not fulfilled its role as guardian of the Treaties. The principles of the rule of law were not negotiable. In this respect, a stricter catalogue of

measures towards Hungary would have been desirable. Some MEPs accused the Commission of a “half-hearted application” of the rule of law conditionality mechanism. Especially in view of the past statements and actual actions of the Hungarian head of government, *Victor Orbán*, caution was also called for in believing the renewed promises of the Hungarian government too quickly. Deeds and evidence are what the Commission should look for. ECR and ID MEPs stressed that the case against Hungary was merely a political mission against conservative governments. They also argued that the Commission’s action imposes “Brussels ideology” on the Hungarian people and the democratically elected government of Hungary, while overlooking similar rule of law, judiciary and corruption issues in other EU countries. (TW)

### ECA Identified Increased Errors in EU Spending in 2021

Errors in spending involving the EU budget have increased from 2.7% in 2020 to 3.0% in 2021. Several risks exist in relation to the EU’s funds that have been made available in response to the COVID-19 pandemic and the war of aggression in Ukraine. These are the main results of the European Court of Auditors’ (ECA) [annual reports on the EU’s general budget and the European Development Fund in 2021](#), published on 13 October 2022. The reports present the ECA’s statement of assurance as to the reliability of the accounts and the legality and regularity of the transactions underlying them. For the first time, the 2021 report provides an opinion on the legality and regularity of expenditure under the Recovery and Resilience Fund (RRF), which is intended to alleviate the economic repercussions of the COVID-19 pandemic (→ [eucrim 3/2021, 151](#)).

While the [ECA is satisfied](#) with the revenue side of the EU budget in 2021, the EU budget expenditure (3.0% in 2021) is subject to material error. In situ-

ations in which beneficiaries often have to follow complex rules when they submit claims for incurred costs, high risks to expenditure exist. Accordingly, the level of high-risk expenditure increased from 59% in 2021 to 63.2% in 2021, which is considered substantial. The level of error is estimated to be 4.7% (2020: 4.0%) in this part of the audit population. As in the previous two years, this error is material and pervasive, and therefore the ECA issued an adverse opinion on EU budget expenditure.

Although estimations on the level of error are different from measuring fraud, the auditors identified 15 cases of suspected fraud (compared to six in 2020), which were reported to OLAF. One case was reported in parallel to the EPPO.

Since only one payment in 2021 was made to Member States (payment to Spain) under the RRF, the audit on RRF expenditure was limited. Nonetheless, the auditors found that one of the 52 milestones included in the Spanish payment request had not been satisfactorily fulfilled but did not amount to a material error. The auditors identified weaknesses in the Commission's assessment of the milestones, however, and call for improvement in future assessments of the same kind.

The ECA also cautioned that the financial responses to the COVID-19 pandemic and the war of aggression in Ukraine have considerably increased budgetary risks. The report pointed out that €91 billion in bonds were issued to finance the Next Generation EU (NGEU) package and €50.2 billion were spent to financially assist Member States in protecting jobs and workers affected by the pandemic. This doubled the EU's potential future obligations in 2021 compared to 2020. Regarding the war of aggression, the report stated that Ukraine had outstanding loans with a nominal value of €4.7 billion under multiple EU programmes at the end of 2021. The European Investment Bank has also granted Ukraine loans, covered by EU guarantees, to the value of €2.1 billion.

Lastly, the ECA also assessed the Commission's annual management and performance report. In this context, criticism was voiced that the Commission did not disclose details of the letter sent to Hungary in April 2022, which triggered the conditionality mechanism. Thus, open questions remain on how this notification may affect the regularity of the expenditure concerned. (TW)

### ECA Report on Commission's Assessment of National Recovery and Resilience Plans

On 8 September 2022, the European Court of Auditors (ECA) published its [Special Report no. 21/2022](#) entitled "The Commission's assessment of national recovery and resilience plans – Overall appropriate but implementation risks remain".

This assessment is the first in a series of ECA audits on the Recovery and Resilience Facility (RRF). The RRF is the EU's centrepiece to respond to the effects of the COVID-19 pandemic amounting to nearly €724 billion (in current prices) in total. The ECA selected a sample of six Member States (Germany, Greece, Spain, France, Croatia and Italy) and examined the appropriateness of the Commission's assessment of the national Recovery and Resilience plans and the guidance provided to the Member States in this context. The audit also addressed compliance with the RRF regulation.

The ECA found that the Commission's assessment was generally appropriate, given the complexity of the process and the time constraints. It pointed, however, to a number of weaknesses in the process (e.g. comprehensive internal Commission guidelines and checklists had not been used systematically or uniformly for the qualitative assessment). According to the report, there are also risks to the successful implementation of the RRF, such as unclear milestones and target values.

In the context of the audit on the Commission's assessment of the monitoring

and control arrangements proposed by Member States, the ECA acknowledged that the Commission correctly identified gaps and deficiencies requiring additional measures. It criticised, however, that the assessment was to some extent based on the description of systems which were yet to be set up. It is also noted that some Member States decided not to use the Commission's data-mining and risk scoring tool, which may increase the risk of non-detection of fraud.

As a result, the ECA made several recommendations to the Commission, e.g.:

- To improve assessment procedures and documentation;
- To promote the exchange of good practices between Member States;
- To ensure clear verification mechanisms for milestones and targets and their adequate definition;
- To verify compliance with the specific milestones for monitoring and control.

ECA's audit is a basis for any future assessment by the Commission, particularly in relation to the submission of amended recovery and resilience plans, highlighting the risks and challenges that might affect the implementation of the RRF. (TW)

## Corruption

### Moldova: Report Assessed Factors of Large-Scale Corruption

In July 2022, the Independent Anti-Corruption Advisory Committee (CCIA) presented a [report](#) that provided a first comprehensive analysis of corruption in the financial, banking and insurance systems in Moldova. [The CCIA](#) was established in June 2021 by [Presidential Decree](#) as a joint independent international and national body. Its main purpose is to analyse systemic corruption issues that cut across Moldovan institutions and improve implementation of anti-corruption measures by the relevant parties. The CCIA's activities are financially supported by the European Union

and the U.S Department of State Bureau of International Narcotics and Law Enforcement Affairs. Further reports on the failures to tackle corruption in the country will follow.

The report of July 2022 assessed the contributing factors and institutional responses that led to large-scale corruption, fraud, and money laundering in the post-Soviet era of Moldova. It was found that legal amendments, questionable appointments of heads of institutions, lack of genuine independence of oversight institutions and the absence of stronger actions in respect of red flags brought the country to the brink of “captured state”.

The report includes over 40 recommendations, such as:

- Strengthening institutional capacity;
- Increasing transparency of institutions;
- Changing legislation;
- Improving oversight mechanisms in the financial, banking, and insurance sectors;
- Ensuring transparent procedures and clear criteria for appointment of governor and deputy governors at the National Bank of Moldova and other state institutions;
- Strengthening early detection of money laundering in relevant institutions;
- Improving civil and criminal recovery by streamlining coordination between agencies;
- Solidifying the international support.

Moldovan institutions and authorities are expected to implement these recommendations in close cooperation with the CCIA and its partners.

Ultimately, the CCIA experts stressed that the war in Ukraine has a particular impact on the situation in Moldova. It creates enormous opportunities for domestic and transnational individual oligarchs and kleptocrats, their networks and, where extant, their state sponsors, to profit enormously from instability, wartime disruption and distraction. Therefore, Moldova must be vigilant in its struggle to avoid even more pernicious

corruption during these extraordinarily dangerous times. (TW)

## Money Laundering

### Eurojust Publishes Report on Money Laundering

On 20 October 2022, Eurojust published its first [Report on Money Laundering](#). The report, which aims to support national authorities, presents a structured overview of the legal and practical issues arising from the investigation and prosecution of cross-border money laundering cases. It is based on an analysis of approximately 2870 cases registered at Eurojust from 1 January 2016 to 31 December 2021.

The main topics of the report include issues in conjunction with identification of the predicate offence, i.e. the illicit origin of the money. Furthermore, the report sets out various complex money laundering schemes, such as the misuse of legal business structures, the misuse of cryptocurrencies, the misuse of international treaties and instruments on the mutual recognition, and the misuse of cultural goods as well as money laundering through high-value products or pension schemes. Other key topics include the handling of financial/banking information and asset recovery. Additionally, the report describes cooperation with third countries and with the European Public Prosecutor’s Office. It outlines issues involving potential conflicts of jurisdiction, *ne bis in idem*, and spontaneous exchanges of information. In conclusion, the report recapitulates the ten most relevant legal and practical challenges as well as ten most relevant best practices. Legal and practical challenges identified by the report include, e.g.:

- Issues arising from differences in national laws in relation to the requirements for identifying the predicate offence for the conviction for money laundering;
- Difficulties arising from the use of cryptocurrencies;

- Difficulties arising from the identification of the beneficial owner of the criminal assets;
- The lack of financial expertise and resources.

Best practices identified in the report include, e.g.:

- The use of the European Investigation Order;
- The use of highly skilled experts to perform house searches;
- The use of asset recovery offices;
- Setting up a joint investigation team solely for the purpose of conducting a financial investigation, if possible under the law of the countries involved;
- Cooperation between public prosecutor’s offices and financial intelligence units, which is seen as essential for an efficient system by which to tackle money laundering. (CR)

### Crack-Down of Invoice Fraud

At the end of July 2022, Europol and Hungarian authorities released the results of two action days that had been carried out in November 2021. As a result, Hungarian authorities were able to [arrest nearly 100](#) individuals suspected of defrauding public sector companies. The syndicate is suspected of defrauding 94 legal entities of an estimated €2.8 million through a complex fraud scheme involving invoice fraud and a sophisticated money laundering infrastructure. Europol’s European Financial and Economic Crime Centre has been supporting the operations. It was able to detect links with other European countries and complete the intelligence picture on the activities carried out by the organised crime groups. (CR)

## Organised Crime

### Europe’s Biggest “Narco-Bank” Taken Down

In a joint investigation between Spanish authorities, Europol, and Eurojust, Europe’s allegedly biggest [“narco-bank” was taken down](#) at the end of September

2022. The „bank“, which had been active since 2020, provided financial services to criminal organisations linked to drug trafficking in over twenty countries. It is believed to have laundered over €300 million per year.

Next to €2.9 million in cash seized over the course of the investigation, during the action day on 27 September 2022, over €428,000 in cash, 19 cryptocurrency accounts worth €1.5 million, 11 luxury vehicles, 70 kilos of hashish, 1.2 tonnes of marijuana, and a plantation with 995 marijuana plants were seized. 32 persons were arrested during the raid. The “bank” had its centre in a local restaurant where the “customers” could collect or deposit cash. It used a sophisticated underground banking system (informal hawala money transfers) to launder the money. The investigation was financially supported by the European Multidisciplinary Platform Against Criminal Threats (EMPACT →[eucrim 1/2022, 35](#)). (CR)

## Cybercrime

### 136 Tools against Ransomware

Celebrating [six years](#) of the launch of the portal [No More Ransom](#) (→[eucrim 3/2016, p. 128](#)), Europol took stock of the successful public-private partnership. Today, the portal offers 136 free tools for 165 ransomware variants in order to assist victims of ransomware. Together with over 188 partners from the public and private sectors, the portal regularly provides new decryption tools for the latest strains of malicious software. It is available in 37 languages. (CR)

### Hit Against Investment Fraud

A coordinated action undertaken in November 2022 revealed a [case of large-scale investment fraud](#) using cryptocurrencies, with the estimated number of victims in the hundreds of thousands. Using dozens of call centres in numerous countries and hundreds of online platforms, members of the organised

crime group presented themselves as brokers helping investors to earn large amounts of money through small investments. The damage caused is estimated at €50 million per quarter since the start of the fraud (likely in 2016). Investigations began in 2018. Since then, 13 coordination meetings have been held at Eurojust. In addition, Europol provided analytical support in seven operational meetings. On the action day, 15 call centres were searched as well as 27 other locations and five vehicles. Five suspects were arrested and hundreds of objects seized. The action involved 10 European countries. (CR)

### Takedown of Online Investment Fraud

An [Action Day](#), carried out on 6 September 2022, resulted in the arrests of two authorised disposers of a network operating various fraudulent online investment platforms. Over 100 victims from 11 different countries lost several million euros through these platforms, which promised profits for investments that never took place. The investigations were conducted by authorities from Finland, Germany, Belgium, and Latvia. They were supported by Eurojust and Europol. The operation was carried out as part of the [European Multidisciplinary Platform Against Criminal Threats \(EMPACT\)](#) (→[eucrim 1/2022, 35](#)). (CR)

## Procedural Criminal Law

### Procedural Safeguards

#### CJEU: Consequences of the Lack to Interpretation/Translation to Acts Ancillary to Criminal Proceedings

In its [judgment](#) in [Case C-242/22 PPU](#) (*criminal proceedings against TL*), the CJEU clarified the interpretation of the need to translate essential documents and to ensure the presence of an interpreter when that document is being drawn up (Art. 2(1) and Art. 3(1) of

Directive 2010/64). In addition, the case addresses the right to be informed on the right to interpretation and translation (Art. 3(1)(d) of Directive 2012/13).

#### ► *Facts of the case*

The case was referred by the Court of Appeal, Évora, Portugal, which has doubts on the compliance of the Portuguese criminal procedure rules with the aforementioned Directives. In the case at hand, TL, a Moldovan national who only understands Romanian, was placed under criminal investigation in connection with the offences of resisting and coercing an official, reckless driving of a road vehicle and driving without a valid licence. The criminal court sentenced TL to three years of imprisonment, but ordered that the execution of the sentence be suspended on certain conditions. One of the conditions was that it must be possible to locate TL at the address he had given in the so-called “declaration of identity and residence” (*Termo de Identidade e Residência*; the “DIR”), a procedure that was carried out prior to the trial at the time of placing TL under investigation. As he was not found at that address, the suspension was revoked and TL was sent to prison to serve his sentence. TL was assisted by a lawyer and interpreter during the trial, but not at the DIR procedure. Neither the DIR nor subsequent acts, i.e. the order summoning TL to a hearing in respect of the failure to comply with the conditions of the probation scheme and the order which revoked the suspension of the prison sentence, were translated into Romanian. Another peculiarity of the cases referred to the provision of “relative nullity”, i.e. Portuguese law stipulates that the act linked to the defects of assistance by an interpreter and of translation of essential documents into the language understood by the person concerned must be invoked within prescribed periods by the beneficiary of the rights, failing which the challenge will be time-barred.

#### ► *The CJEU’s decision*

Since the referring court argued that Arts. 2 and 3 of Directive 2010/64 and



Art. 3(1)(d) of Directive 2012/13 have not been transposed or have not been fully transposed into Portuguese law, the CJEU emphasised first that the Directives' provisions fulfil the criteria of direct effect. As a result, any person benefiting from those rights may rely on them against a Member State before the national courts.

Second, the CJEU clarified that the three procedural acts in question, i.e. the DIR, the order summoning TL to appear and the order revoking the suspension of the prison sentence, constitute, *inter alia*, "essential documents" of which a written translation should have been provided to TL under Art. 3(1) of Directive 2010/64. The CJEU pointed out that these three procedural acts are an integral part of the procedure which established TL's criminal liability and the application of Directive 2010/64 (and Directive 2012/13) to those acts is fully justified by the objectives pursued by this Union law.

Third, the CJEU examined the consequences of the relative nullity, i.e. the legal situation that Portuguese law (Art. 120 CCP) places nullity of the violation of the right to an interpreter and to translation under the double condition that (i) the request for a declaration of nullity is made by the person concerned, and (ii) this request is made before the finalisation of the act in question.

The judges in Luxembourg clarified that neither Directive 2010/64 nor Directive 2012/13 specify the consequences of an infringement of the rights provided in the Directives. Therefore, these arrangements are a matter for the domestic legal order of the Member States in accordance with the principle of procedural autonomy of the Member States, provided that they respect the principle of equivalence and the principle of effectiveness.

In this context, the CJEU argued that the principle of effectiveness is not maintained. It means that national law cannot undermine the objectives pursued by the procedural rights directives, namely

safeguarding the fairness of criminal proceedings and ensuring respect for the rights of the defence of suspects and accused persons during those proceedings. Contrary to the principle of effectiveness is in particular the national procedural provision under which the time-limit to invoke an infringement of the rights granted by Art. 2(1) and Art. 3(1) of Directive 2010/64 began to run even before the person concerned was informed in a language which he speaks or understands (Art. 120 CCP). The CJEU stressed that the person concerned must be aware first of the existence and scope of his/her right to interpretation and translation, and second of the existence and content of the essential document in question as well as its effects. This is not guaranteed if one applies Art. 120 CCP to the current situation.

If the Portuguese court is unable to interpret this provision in conformity with Union law, it must disapply of its own motion this national legislation without the need for that court to request or await the prior setting aside of such national legislation or practice by the legislature or other constitutional means.

#### ► Put in focus

The CJEU first clarified in the judgment TL that the scope of Directives 2010/64 and 2012/13 conferring the rights to interpretation, translation and information also extends to procedural acts that are ancillary to the sentencing of the person concerned and form part of the criminal proceedings.

The second main issue concerned the need for the person concerned to plead the nullity of procedural acts that failed to guarantee procedural safeguards. It should be stressed in this regard that the CJEU did not rule that any such need would be *per se* impermissible according to Union law. This is especially because the Directives under examination do say nothing about the implementation of consequences of their infringements, which is left to the national legal systems of the EU Member States. By contrast, it was the Portuguese provision

that connected the necessity to plead with a very short time limit, which was hardly to fulfil for the person concerned and rendered the exercise of his rights to interpretation and translation almost meaningless in the present situation. (TW)

## Data Protection

### Commission Presented First Evaluation Report on Data Protection Law Enforcement Directive

**spot light** On 25 July 2022, the Commission presented the [first report on the evaluation and review of Directive 2016/680](#). The Directive lays down rules on the protection of personal data if it comes to their processing by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties (→ [eucrim 2/2016, 78](#)). This is why the Directive is also briefly called the "Data Protection Law Enforcement Directive" (LED). The evaluation report is foreseen by Art. 62(1) of the Directive.

It examines the level of transposition of the LED in the EU Member States, e.g. with regard to the scope of the LED, the governance and powers of data protection supervisory authorities, remedies and data subject rights, draws first lessons from the application and functioning of the LED, and looks into international data transfers pursuant to the various transfer tools provided by the LED. Lastly, the report outlines the way forward.

It is stated that the LED has generally been transposed in a satisfactory manner, but a number of issues have been identified. In this context, the Commission points out to a number of infringement procedures that had to be launched; additionally, several references for preliminary rulings are pending before the CJEU. Nonetheless, the LED has significantly contributed to a more harmonised and higher level of protection of indi-

viduals' rights and a more coherent legal framework for competent authorities. Furthermore, the LED has resulted in a higher level of awareness and attention on data protection by national competent authorities, especially with regard to the security of processing.

Looking at the way forward, the report, *inter alia*, calls on the Member States to ensure full and correct transposition of the LED. Another focus should be laid on data protection supervisory authorities. They should be provided with sufficient resources to perform their LED tasks, must have the powers set out in the LED, and be better consulted on draft legislation and administrative measures. Member States should also continue efforts to provide training on data protection requirements to competent authorities, including in relation to new technologies.

With regard to international data transfers, the Commission intends to take the following actions:

- Actively promote possible new adequacy decisions with key international partners;
- Negotiate new cooperation agreements between Europol and Eurojust, on the one hand, and third countries, on the other hand;
- Engage in negotiations with Japan with a view to amend the existing EU-Japan Mutual Legal Assistance Agreement to ensure appropriate data protection safeguards;
- Pursue and conclude the negotiation of a bilateral agreement with the United States on cross-border access to electronic evidence for judicial cooperation in criminal matters, including by complementing the data protection safeguards guaranteed by the EU-US Umbrella Agreement;
- Explore the possibility of concluding data protection framework agreements for data processing in the area of criminal law enforcement with important criminal law enforcement partners, building on the example of the EU-US Umbrella Agreement. (TW) ■

## CJEU: German Rules on Data Retention Not in Line with EU Law

spot  
light

On 20 September 2022, the CJEU (Grand Chamber) ruled that the German legislation on data retention is incompatible with EU law ([Joined Cases C-793/19 and C-794/19, \*SpaceNet and Telekom Deutschland\*](#)). The regulation provided for the indiscriminate, ten-week storage of telephone and internet connection data as well as a four-week storage of location data and has been on hold since 2017.

► *The reference for a preliminary ruling*

The referring German Federal Administrative Court (Bundesverwaltungsgericht – BVerwG) doubted the incompatibility of the German rules on the basis of the CJEU's previous case law on data retention, because the retention obligation in the German Telecommunications Act (TKG) concerns fewer data and a shorter retention period ([→\*eucri\*m 3/2019, 176](#)). In the referring court's view, those characteristics reduce the possibility that the retained data may allow to draw very precise conclusions on the private life of a person whose data have been retained. In addition, the BVerwG believed that the TKG ensures the effective protection of retained data against risks of abuse and unlawful process.

► *The CJEU's decision*

The CJEU counters these arguments and referred to its established case law on the retention of and access to personal data in the electronic communications sector, in particular the most recent judgments in *La Quadrature du Net and Others* of October 2020 ([→\*eucri\*m 3/2020, 184–186](#)) and *G.D. v Commissioner of An Garda Síochána* of April 2022 ([→\*eucri\*m 2/2022, 115](#)). The CJEU particularly reiterated its line of argument that EU law (Art. 15(1) of [Directive 2002/58/EC](#), read in light with Arts. 7, 8 and 11 and Art. 52(1) CFR) precludes national legislative measures which provide, on a preventive basis, for the purposes of combating serious crime

and preventing serious threats to public security, for the general and indiscriminate retention of traffic and location data.

► *The CJEU's reasoning*

First, the CJEU noted that the retention obligation laid down in the TKG applies to an extensive set of data, which corresponds, in essence, to those which led to the previous judgments (in particular *La Quadrature du Net and Others*), and which is indiscriminate as to persons, time and geography. Thus, the data retention obligation such as that at issue cannot therefore be regarded as targeted data retention.

Second, the CJEU stated that, in view of the quantity and diversity of the data retained, the storage period of 4 or 10 weeks cannot discard the possibility to draw very precise conclusions about the private life of the person or persons whose data have been retained and, in particular, make it possible to establish a profile of the person or persons concerned. Consequently, the retention of traffic or location data is serious in any event, irrespective of the length of the retention period and of the amount or nature of the data retained, provided that the set of data retained is capable of giving rise to such inferences.

Third, as regards the safeguards intended to protect the data stored against risks of misuse and against any unauthorised access, the CJEU called to mind that the retention of data and access to them constitute separate interferences with the fundamental rights of the data subjects which require separate justification. It follows that national legislation ensuring full respect for the conditions established by the case law interpreting Directive 2002/58 as regards access to retained data cannot, by its very nature, be capable of either limiting or even remedying the serious interference with the rights of the persons concerned which results from the general retention of those data.

► *The exceptions*

However, the CJEU stressed that, in line with its previous case law, national

legislation can provide for a data retention regime in the following situations:

- General and indiscriminate retention of traffic and location data if the Member State concerned is confronted with a serious threat to national security that is shown to be genuine and present or foreseeable;
- A limited targeted retention of traffic and location data for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security;
- General and indiscriminate retention of IP addresses for a limited period in time and limited to what is strictly necessary (for the purposes of safeguarding national security, combating serious crime and preventing serious threats to public security);
- General and indiscriminate retention of data relating to the civil identity of users of electronic communications (for the purposes of safeguarding national security, combating serious crime and safeguarding public security);
- Expedited retention of traffic and location data in the possession of service providers on the basis of an instruction by a competent authority (that is subject to effective judicial review) and for a specific period of time (for the purposes of combating serious crime and, a fortiori, safeguarding national security).

However, all the aforementioned legal measures must ensure, by means of clear and precise rules, that the retention of data at issue complies with the substantive and procedural conditions applicable to it and that the persons concerned have effective safeguards to protect them against the risk of abuse. These different legal provisions may be applied together, at the choice of the national legislator and within the limits of what is absolutely necessary.

#### ► *Put in focus*

Taking into account the CJEU's previous case law on data retention, the verdict for Germany have already become apparent (→ [Gerhold, Verfassungsblog](#)). In the end, the CJEU shared the opinion

by Advocate General *Campos Sánchez-Bordona*, which was submitted in November 2021 (→ [eucrim 4/2021, 222–223](#)) and which already clearly stated the incompatibility of the German data retention regulation with EU law. The CJEU provides, however, for a legal framework, which would give Member States leeway to regulate certain forms of data retention for the purposes of safeguarding national security and combating serious crime.

The future of data retention in Germany is open. [Germany's Federal Minister of the Interior, Nancy Faeser, announced](#) after the judgment that she wishes to use the leeway given by the CJEU and to especially provide rules on the retention of IP addresses for the purposes of combating and preventing crime. By contrast, [Federal Minister of Justice, Marco Buschmann, advocates for the "quick freeze" model](#). Accordingly, law enforcement officers would be allowed to have communications data „frozen“ if there is suspicion of a respective serious criminal offence and a judge authorised the freeze. Thus, the imminent deletion of the data is prevented when an offence was committed. The judicial emergency order could also be issued without naming a specific person and refer, for example, to connection data at a specific crime scene and its surroundings. If the suspicion becomes concrete, law enforcement officers can then „unfreeze“ the secured data and use it for their work. (TW) ■

#### **CJEU: French Legislation on Data Retention for the Purpose of Combating Market Abuse Offences Unlawful**

**spot light** National legislation providing for the general and indiscriminate retention of traffic data for the purpose of combating market abuse offences is incompatible with EU law. In addition, a national court cannot restrict the temporal effects of a declaration that national legislation providing for such retention is invalid. These are the main conclusions in the CJEU's Grand Cham-

ber judgment in the [Joined Cases C-339/20 and C-397/20 \(VD and SR\)](#).

The judgment was delivered on 20 September 2020 – on the same day as the CJEU's judgment concerning the (in)compatibility of the German rules on data retention (→ [news item p. 188](#)).

#### ► *Facts of the case*

The case at issue concerned investigations against VD and SR in respect of insider dealing, concealment of insider dealing, corruption and money laundering. They were initiated by the *Autorité des marchés financiers* (Financial Markets Authority, France; "AMF"), which collected certain information from operators providing electronic communications services. Under French law, investigators are allowed to request such operators to transmit traffic data in connection with telephone calls for the purposes of investigating market abuse, including insider dealing, as defined by [Regulation \(EU\) No 596/2014](#). Operators had to retain such data for one year from the date on which they were recorded.

VD and SD challenged the use of the information obtained by the AMF. They first argued that the legal basis for the collection of the data did not comply with EU law as interpreted by the numerous CJEU's judgments on data retention. Second, French law did not lay down any restrictions on the powers of the AMF's investigators to require the retained data to be provided to them.

#### ► *The reference for a preliminary ruling*

The referring *Cour de Cassation* (Court of Cassation, France) was unsure whether the French legislation can be maintained. It pointed out on the one hand that EU law on market abuse (i.e. Directive 2003/6 and Regulation 596/2014) oblige that competent national authorities should have the investigatory powers to require existing telephone and existing data traffic records. In addition, such data are the crucial, and sometimes the only, evidence to detect and prove the existence of market

abuse offences, such as insider dealing or market manipulation. On the other hand, Art. 15(1) of [Directive 2002/58/EC](#) on privacy and electronic communications, read in the light of Arts. 7, 8, 11, and 52 CFR and as interpreted by the CJEU restricts the possibilities of national legislators to provide for a general and indiscriminate retention of data ([→ eucrim 3/2020, 184–186](#) and [eucrim 2/2022, 115](#)). In essence, the referring court asked how the obligations to combat market abuse and to safeguard privacy can be reconciled. Against the background of case law by the *Conseil constitutionnel* (Constitutional Council, France), the *Cour de Cassation* additionally asked as to whether the French legislation – if proved to be inconsistent with EU law – retains provisional effects, in order to avoid legal uncertainty.

► *The CJEU's decision*

First, the CJEU ruled that neither the wording nor the context nor the objectives of the Market Abuse Directive/Regulation allowed the conclusion that the EU legislature intended to give Member States the power to impose on operators providing electronic communications services a general obligation to retain data. Thus, this EU law cannot constitute the legal basis for a general obligation to retain the data traffic records held by operators providing electronic communications services for the purposes of exercising the powers conferred on the competent financial authority under those measures.

The only measure of reference on the retention is the Directive on privacy and electronic communications (Directive 2002/58/EC). It solely governs the question on the retention of traffic data to be used to investigate crimes in the context of market abuses. It follows, however, from this Directive as interpreted by previous CJEU case law (see above) that the general and indiscriminate retention by operators providing electronic communications services of traffic data for a year from the date on which they were recorded for the purpose of combating

market abuse offences including insider dealing, is not authorised.

Second, the CJEU upheld its established case law according to which EU law precludes a national court from restricting the temporal effects of a declaration of invalidity which it is required to make, under national law, with respect to provisions of national law. The CJEU argued that maintaining the effects of national legislation such as that at issue in the main proceedings would mean that the legislation would continue to impose on operators providing electronic communications services obligations which are contrary to EU law and which seriously interfere with the fundamental rights of the persons whose data have been retained.

Lastly, the CJEU pointed out that the question of the admissibility of evidence obtained as part of the (unlawful) data retention is a matter of national law. This follows from the principle of procedural autonomy. However, the national law must respect the principles of equivalence and effectiveness. As a consequence, a national criminal court would be obliged to disregard information and evidence obtained by means of the general and indiscriminate retention of data in breach of EU law if:

- The persons concerned are not in a position to comment effectively on that information/evidence;
- Information/evidence pertain to a field of which the judges have no knowledge and
- Information/evidence are likely to have a preponderant influence on the findings of fact.

► *Put in focus*

The present judgment in VD and SR fits into the series of CJEU rulings on the legality of data retention. The judges in Luxembourg stick to their line that national laws providing for the general and indiscriminate retention of electronic communications data for the purpose of combating criminal offences are not in line with EU law and thus unlawful. In the present case, the CJEU ultimately

saw no conflict between the Directive on privacy and electronic communications and the EU regulations on market abuse. First it makes clear that clauses in secondary EU law harmonising the fight against certain forms of crime (here: market abuse offences) do not give green light for the national legislature to implement data retention rules. Second, it is clarified that the sole yardstick to assess the legality of data retention is Directive 2002/58/EC. The French legislator must now take action and bring its national law in line with the CJEU's case law. (TW)

### AG: Data Retention for the Prosecution of Copyright Offences Permitted

Access to civil identity data linked to IP addresses is permissible if such data are the only means to identify a person suspected of online copyright infringements. This is the view of Advocate General Szpunar in his [Opinion](#) of 27 October 2022 on [Case C-470/21](#) (*La Quadrature du Net, Fédération des fournisseurs d'accès à Internet associatifs, Franciliens.net, French Data Network v Premier ministre, Ministère de la Culture*).

► *Facts of the case*

The reference for a preliminary ruling by the *Conseil d'État* (France) is based on an action brought by data protection associations against a decree of the French Prime Minister. According to the decree, the “*Haute Autorité pour la diffusion des œuvres et la protection des droits sur internet*” (High Authority for the dissemination of works and the protection of rights on the internet” – “Hadopi”) shall have direct access to personal data held by electronic communications operators and is allowed to inspect the data in order to warn subscribers against offending conduct of copyright infringements in the internet. The purpose is to combat the offence described as “gross negligence”, which is the fact that a person does not prevent his/her access to the internet from being used to commit acts constituting an in-

fringement of the Intellectual Property Code. Holders of relevant subscriptions receive recommendations, which are part of a “gradual response procedure”.

➤ *The applicants’ arguments*

The applicants claimed that the decree violates provisions of [Directive 2002/58](#) on privacy and electronic communications and the Charter of Fundamental Rights and relied on the respective CJEU’s case law on principal unlawfulness of data retention. They argued first, that the decree permits access to connection data in a manner which is disproportionate considering that only minor copyright infringements committed online are concerned. Second, there is no prior review by a court or an authority offering guarantees of independence and impartiality.

➤ *The questions referred*

The *Conseil d’État* pointed out on the one hand that according to the CJEU’s recent judgment in *La Quadrature du Net and Others* (→[eucrim 3/2020, 184–186](#)), a general and indiscriminate data retention regime relating to the *civil identity* of users of electronic communications systems for the purposes of combating crime is not precluded by EU law. On the other hand, the French court referred to the CJEU’s judgment in *Tele2 Sverige and Watson* (→[eucrim 4/2016, 164](#)), in which a prior review by a court or an independent administrative authority is requested for the access of retained data by the competent authority. The French court stressed, however, that Hadopi issues thousand of recommendations to subscribers per year, so that a prior review is impracticable.

As a result, the *Conseil d’État* wishes to know whether Art. 15(1) of Directive 2002/58, read in the light of Arts. 7, 8 and 11 and Art. 52(1) CFR, precludes the French legislation which allows an administrative authority to have access to civil identity data, corresponding to IP addresses, in order to protect copyright infringements, without that access being subject to a prior review by a court or an independent administrative body.

➤ *The AG’s opinion*

AG *Szpunar* first took the view that in the case at issue a general and indiscriminate retention of IP addresses assigned to the source of a connection is justified and compatible with EU law. He argued that otherwise there is a risk of impunity for the commission of copyright offences on the internet. However, he stressed that such a data retention regime must be subject to proportionality requirements.

Second, AG *Szpunar* denies a mandatory prior control insofar as the data access does not allow for tracking the visited internet pages and is limited to the goal of law enforcement (i.e. the prevention, investigation, detection and prosecution of online criminal offences). He bases this result on the strict adherence to the principle of proportionality in data retention according to CJEU’s case law.

➤ *Put in focus*

In essence, the AG proposes a “light” readjustment of the CJEU’s case law on national measures for the retention of certain data (here: IP addresses). In light of the recent CJEU’s judgment on French legislation holding a general and indiscriminate data retention regime for the purposes of combating market abuse offences incompatible with Directive 2002/58 and the CFR (→[separate news item](#)) and taking into account the massive and extensive collection of data by the French administrative authority “Hadopi”, it is open whether the judges in Luxembourg will follow the AG’s conclusions. In this context, it should be additionally stressed that previous CJEU case law requires effective procedural safeguards against the abuse of access to retained data in the exceptional cases where data retention is allowed. Therefore, it should be more closely assessed whether the French legislation offers such yardsticks sufficiently. (TW)

**Future Trans-Atlantic Data Privacy Framework Makes Progress**

The United States took another decisive step to establish the new Trans-Atlantic Data Privacy Framework. After the EU

and US side had announced in March 2022 that they agreed on the key principles of the framework (→[eucrim 1/2022, 31–32](#)), US President *Joe Biden* signed an [Executive Order](#) on “Enhancing Safeguards for United States Signals Intelligence Activities” on 7 October 2022.

The Executive Order translates the agreed principles into US law and particularly provides for the following:

- Binding safeguards that limit access to data by US intelligence authorities to what is necessary and proportionate to protect national security;
- The establishment of an independent and impartial redress mechanism, which includes a new Data Protection Review Court (“DPRC”); according to the mechanism, it will be possible that complaints regarding access to Europeans’ data by US national security authorities are investigated and resolved.

The Executive Order also requires US intelligence agencies to review their policies and procedures to implement these new safeguards.

The redress mechanism will consist of two layers: First, Europeans will be able to lodge a complaint with the “Civil Liberties Protection Officer” – a person who is responsible for ensuring compliance by US intelligence agencies with privacy and fundamental rights. Second, Europeans will be able to appeal the decision of the Civil Liberties Protection Officer before the newly created DPRC. The DPRC will act in full independence from the government and will have the power to order the deletion of data, if necessary.

The [Commission believes](#) that the Executive Order together with other US regulations fulfils the requirements as set out in the CJEU’s *Schrems II* judgment, which toppled the predecessor agreement, the EU-US Privacy Shield in 2020 (→[eucrim 2/2020, 98–99](#)). On the basis of the measures taken by the United States, the Commission will now prepare a draft adequacy decision and launch the EU’s adoption process.

This necessitates, *inter alia*, an opinion by the European Data Protection Board (EDPB). (TW)

## Ne bis in idem

### CJEU: EU's Double Jeopardy Ban also Applies to Non-EU Citizens and Blocks Extradition to Third Countries

**spot light** On 28 October 2022, the CJEU (Grand Chamber) ruled that the principle *ne bis in idem*, as enshrined in Art. 50 CFR and Art. 54 CISA, precludes the extradition, by the authorities of an EU Member State, of a third country national to a third country, if that national has been convicted by final judgment in another Member State for the same acts as those referred in the extradition request and has been subject to the sentence imposed in that State. Furthermore, this solution cannot be called into question by the fact that a bilateral treaty between the requested EU Member State and the third country limits the scope of the principle *ne bis in idem* to judgments handed down in the requested State.

#### ► Background of the case

This judgment in [Case C-435/22 PPU](#) (*HF / Generalstaatsanwaltschaft München*) follows the landmark ruling in [Case C-505/19](#) (*WS v Germany*), in which the CJEU ruled that EU Member State authorities can refuse (on the basis of Art. 54 CISA) to follow an Interpol red notice seeking extradition of an individual to a third country if he/she has already been finally tried in one of the EU Member/Schengen States (→ [eucrim 2/2021, 100–101](#)).

The referring Higher Regional Court of Munich, Germany (*Oberlandesgericht München*) doubted, however, whether the ruling in the *WS* case can be transferred to the case at issue. In the case before the Munich court, the defendant (*HF*) is a Serbian national who is sought by an US extradition request for bank fraud and computer sabotage. He defended his extradition from Ger-

many to the United States by pointing out that he was already convicted for the offences at issue by a Slovenian court and he fully served the sentence. He believed that Art. 54 CISA applies and extradition is inadmissible.

By contrast, the Munich court questioned as to whether Art. 54 CISA and Art. 50 CFR can block extradition and hinted at the following differences to the *WS* case:

- HF is not a Union citizen;
- The proceedings concern a formal extradition request and not solely the execution of an Interpol red notice for provisional arrest;
- According to the Germany-USA Extradition Treaty, Germany is obliged to extradite because its Art. 8 only allows refusal of extradition on account of *ne bis in idem* if the respective judgment was handed down by the requested State (here: Germany) and does not cover convictions from other EU Member States;
- HF enjoys not a right to free movement on the basis of a Union citizenship (Art. 21 TFEU), but only a right to free movement because he has been exempted from the visa requirement (Art. 20 CISA) and, in 2020, Slovenian authorities rejected HF's application to renew a residence permit.

#### ► Questions referred

Therefore, the Higher Regional Court of Munich asked whether the principle *ne bis in idem* requires it to refuse the US extradition request for offences for which final judgment has been passed in Slovenia and whether the extradition treaty concluded between Germany and the United States affects the application of that principle.

#### ► The CJEU's reasoning

The judges in Luxembourg first gave their view on the scope of the Union-wide *ne bis in idem* principle as enshrined in Art. 54 CISA/Art. 50 CFR. They held that according to the wording, context and objectives of the provisions, all citizens (and not only nationals of a Member State), who were acquitted or finally judged within the Schengen area,

enjoy this fundamental right. They ensure that every person may travel within the Schengen area without fear of being prosecuted in another Member State for the same acts again.

In addition, enjoyment of this fundamental right is not subject, as regards third-country nationals, to conditions relating to the lawful nature of their stay or to a right to freedom of movement within the Schengen area. The only requirement established by Art. 54 CISA, and applicable in all cases, is that of the trial having been finally disposed of in one of the Member States.

The conclusion that Art. 54 CISA also applies to third-country nationals and regardless of whether or not their stay was unlawful can be founded on the principles of mutual trust and mutual recognition of judicial decisions in criminal matters on which the Union-wide *ne bis in idem* principle is based.

Second, the judges in Luxembourg ruled that Art. 54 CISA must also be applied in the extradition relations between an EU Member State and a third country (here: Germany and United States). The fact that the Germany-USA Extradition Treaty limits the scope of the principle *ne bis in idem* to judgments delivered in the requested State cannot call into question the applicability of Art. 54 CISA. The CJEU argued in this context on the basis of Art. 17(2) of the Agreement on extradition between the European Union and the United States of America, which, in principle, allows for denying extradition requests where the constitutional principles of, or final judicial decisions binding upon, the requested State may pose an impediment to fulfilment of its obligation to extradite. According to the CJEU, Art. 17(2) constitutes an autonomous and subsidiary legal basis for the application of the principle that extradition of persons who have already been finally judged in respect of the same offence for which extradition is sought in another Member State where the applicable bilateral treaty does not enable that question to be resolved.

### ► *Put in focus*

By its judgment in HF, the CJEU continues its case law initiated with the WS decision. It emphasises the primacy of EU law over international treaties. Thus, Art. 54 CISA now has a very broad extraterritorial scope. Citizens who have been acquitted for or convicted of their crimes by a Schengen State have a good chance of not being extradited for the same facts to third countries where they would most likely have had to fear much higher penalties. (TW) ■

### AG: Reservation in Relation to Application of *ne bis in idem* Principle Incompatible with Art. 50 CFR

On 20 October 2022, Advocate General (AG) *Szpunar* [published its opinion](#) on the controversial question of whether declarations made by Schengen States on the basis of Art. 55 CISA, with the consequence that they are not bound by the principle *ne bis in idem* as provided for in Art. 54 CISA, are compatible with the ban of double jeopardy as guaranteed in Art. 50 and Art. 52(1) CFR. The AG concluded that such declarations are incompatible with the CFR and provisions referred to in such declarations cannot be applied in judicial proceedings.

#### ► *Facts of the case and questions referred*

The case before the CJEU ([Case C-365/21, MR / Generalstaatsanwaltschaft Bamberg](#)) is based on the following facts: On suspicion of forming a criminal organisation and commercial fraud in the form of “cybertrading”, the Local Court of Bamberg, Germany issued an arrest warrant against MR on the grounds of risk of absconding and, based on this, a European arrest warrant. MR claimed that these arrest warrants violated the ban of double jeopardy (Art. 54 CISA), because the same acts had already been the subject of a conviction against him by the Regional Court of Vienna, Austria to a term of imprisonment of four years (for offences of serious commercial fraud and money laundering).

However, his complaint was rejected by the Regional Court of Bamberg as unfounded. In particular, the Regional Court pointed out that the prohibition of double jeopardy under the CISA did not apply because Germany had made a reservation upon ratification under Art. 55 (1)(b) CISA. Accordingly, Germany is not bound by Art. 54 CISA where the acts to which the foreign judgment relates constitute an offence against national security and other equally essential interests. This refers, *inter alia*, to offences provided for in Sec. 129 of the German Criminal Code, entitled “Forming criminal organisations”.

The referring Higher Regional Court of Bamberg (*Oberlandesgericht Bamberg*) did not share this legal view and referred the question to the CJEU whether the reservations of exceptions under Art. 55 CISA (made in the 1990s) were still valid against the background of the *ne bis in idem* guarantee enshrined in the meanwhile binding Charter of Fundamental Rights (Art. 50).

#### ► *The AG's Opinion*

AG *Szpunar* argued first that such a reservation was not provided for by law as required by Art. 52(1) CFR. Since the declarations of the reservations must be deposited with the Government of Luxembourg (Art. 139 CISA) and are not published at the EU level, he believed that the requirements of accessibility and foreseeability are not met. Second, the AG argued that Art. 55(1)(b) CISA does not respect the essence of the principle *ne bis in idem*. According to the AG, Art. 55(1) CISA enables a renewed prosecution, conviction and enforcement of a sentence despite a conviction that has become final and has been enforced. This runs directly counter to the very purpose of the principle *ne bis in idem*.

If the CJEU should not follow this conclusion, the AG additionally proposes that Art. 55(1)(b) CISA cannot cover the prosecution of financial crimes if no further objectives (e.g. political or ideological ones) were pursued by the organisation. (TW)

### Freezing of Assets

#### EDPS: Robust Data Protection Safeguards Needed in Asset Recovery Proposal

Following up on the European Commission's proposal for a Directive on asset recovery and confiscation from 25 May 2022 (→ [eucrim 2/2022, 76](#)), the European Data Protection Supervisor (EDPS) published his [opinion](#) on the proposal on 19 July 2022. According to the EDPS, processing personal data in the context of asset recovery and confiscation can cause interference with individuals' rights as guaranteed by the EU Charter of Fundamental Rights, including the right to data protection.

He therefore welcomed the fact that the proposal explicitly underlined the particular importance of the protection of personal data. However, the EDPS also stressed that he doubts whether certain special categories of personal data (including DNA, behavioural data, fingerprints, dental records) – listed under Annex II.B.(2)(c)(v) of Regulation (EU) 2016/794 – would be relevant in the context of asset recovery and confiscation and whether this data should be available for cross-border exchanges between EU Member States' asset recovery offices.

The European Data Protection Supervisor made clear that the proposed Directive will need to be transposed into national law by the Member States and that they should designate the competent authorities responsible for the management of the registry of frozen and confiscated property.

The European Data Protection Supervisor also clarified that any exchanges of personal data during cooperation between the EU Member States' asset recovery offices and Europol, Eurojust, and the European Public Prosecutor's Office (EPPO) must be carried out in full respect of the relevant rules on the processing of personal data as laid down in the legal acts establishing the aforementioned EU agencies. (AP)

## Cooperation

### Police Cooperation

#### Civil Rights Organisations Criticise Prüm II Proposal

On 7 September 2022, the European Digital Rights (EDRi) network published a [position paper](#) on the proposed Regulation on automated data exchange for police cooperation, known as “Prüm II”. The proposal to modernise the 2008 legal framework on police cooperation, which currently primarily consists of a data-sharing network (interlinking national DNA, fingerprint and vehicle registration databases), was tabled by the Commission in December 2021 (→ [eucrim 4/2021, 225–226](#)). It foresees, *inter alia*, the expansion of the data-sharing network to the interconnection of facial images and, on a voluntary basis, “police records”. The overall aim is to make the automated exchange of data for law enforcement purposes more efficient and to facilitate the availability of relevant data in the national databases of the Member States.

The position paper raises several critical issues of the proposal, among others:

- Insufficient alignment to Directive 2016/680 on the protection of personal data with regard to the processing of data by police and criminal justice authorities (the “Law Enforcement Directive”, LED);
- Failure of the draft law to demonstrate the necessity and proportionality of its measures;
- Causation of serious fundamental rights risks, such as undermining the presumption of innocence, enabling mass surveillance and criminalising migration by the expansion to other data categories;
- Exacerbation of trends like systemic discrimination in policing and the broader rule-of-law crisis in Europe.

The position paper presents several examples that attempt to demonstrate that the Prüm II proposal “risks missing a vital opportunity to fix systemic issues

in the exchange of data across borders by law enforcement agencies under the existing Prüm framework.” Therefore, the EDRi network makes several recommendations to the EU co-legislators:

- Implement specific rules for Member States’ police databases prior to their connection to the Prüm II system, to ensure a high level of protection of fundamental rights;
- Remove the sharing of Europol-held third-country biometric data and remove Europol’s own-initiative biometric searches, which lack a legal basis;
- Add additional safeguards to the sharing of reference data, as well as more broadly throughout the Prüm system in order to align to the Law Enforcement Directive;
- Request a thorough necessity and proportionality assessment of the proposal for Prüm II, including requiring evidence and statistics to clarify whether the current framework is effective. If not, the co-legislators should delete all elements of the proposal that are not demonstrably necessary and proportionate;
- Delete the large-scale automated exchange of unidentified DNA data;
- Ensure all searches can only be undertaken on the basis of genuinely individual cases, and only in the event of serious crimes, with additional safeguards;
- Grant member states a meaningful right of refusal before the exchange of personal data;
- Fully reject the inclusion of facial image exchange in Prüm II due to the serious risks of fundamental rights violations;
- Limit the definition of police records to ensure that biased assumptions, hearsay and other illegitimate records will not be shared via Prüm II;
- Resist the attempt to add national driving license systems, which would treat whole populations as if they are suspected of serious crimes.

*Ella Jakubowska*, Policy Advisor at EDRi, commented: “Without serious improvements, the proposed Prüm II Regulation will be like pouring petrol on

the fire that is the state of data collection, processing and cross-border exchange by law enforcement in Europe.”

In addition, [civil stakeholder organisations criticised](#) the Commission for having started a new round of awarding funds to the “EPRIS project”, which will establish technical solutions for cross-border searches of police records. Pilot projects in this regard already started in 2017. The Commission is criticised for driving forward the establishment of the system before the law will come.

*Chris Jones, Statewatch Director, said:* “The story of EPRIS is one that close observers of EU justice and home affairs policy have seen too many times before: interior ministries and police forces advancing their interests behind closed doors, far away from the fora that should be used to host meaningful democratic debates. Instead, elected representatives are left to nitpick over the finer points of a fait accompli disguised as a choice. Before anything else, MEPs should demand meaningful evidence of the necessity and proportionality of EPRIS and the other intrusive novelties put forward in the Prüm II proposal, such as the plan for a European police facial recognition system.” (TW)

### Judicial Cooperation

#### Report on AI Support for Judicial Cooperation

In July 2022, Eurojust and eu-LISA published a joint [report](#) and [factsheet](#) looking at how Artificial Intelligence (AI) can support cross-border cooperation in criminal justice. Issues covered by the report entail the policy and legal context for the use of AI in cross-border judicial cooperation, including ethical and fundamental rights considerations as well as relevant technologies and use-cases for the application of AI in the judicial field. For the latter, two categories of technologies are specifically explored, i.e. natural language processing (NLP) and computer vision. These two technolo-



gies are particularly relevant in applications where the processing of large-scale unstructured data is necessary. In this context, the report discusses the use of NLP applications like the following:

- Automated document processing;
- Automated translation;
- Automated summarization systems;
- NLP for evidence analysis and anonymization;
- NLP for legal research and analysis.

Furthermore, the report looks at the use of AI for forensic analysis and anonymisation of audio-visual media as well as the use of AI for the purpose of anonymisation of multi-media evidence. It pays special attention to ethical and fundamental rights considerations. The key requirements for AI systems are:

- Human agency and oversight;
- Technical robustness and safety;
- Privacy and data governance;
- Transparency;
- Diversity;
- Non-discrimination and fairness;
- Societal and environmental well-being;
- Accountability.

Although the report sees great potential for AI systems in improving the efficiency and effectiveness of the operation of judicial authorities and in reducing their costs, it also emphasizes the need for a balanced approach to ensure the protection of fundamental rights while enhancing the digital transformation process. Hence, the report recommends developing and applying a risk-based approach – integrating cost benefit analysis, fundamental rights, and data protection assessments – to determine the safeguards and deployment models for AI systems in practice. (CR)

## European Arrest Warrant

### CJEU Gives Guidance on Double Criminality Test

In its [judgment of 14 July 2022](#) in Case [C-168/21](#) (*KL / Procureur général près la cour d'appel d'Angers*), the CJEU de-

termined the scope of the condition of double criminality in European arrest warrant cases.

#### ► *Background of the case*

The case concerns the execution of an Italian EAW for the purpose of enforcing a sentence against KL who was convicted for the offence of “devasting and looting”, committed in the context of the G8 summit in Genoa (Italy) in 2001. If he is surrendered, KL will face an imprisonment of over 12 years in Italy.

The referring *Cour de Cassation* (Court of Cassation, France) asked whether the Court of Appeal of Angers (France) was right in refusing the Italian EAW because the “breach of peace” is a constituent element for the offence of “devasting and looting” under Italian law, but not under French law. Should the requirement of double criminality not preclude the surrender of KL, the referring court further asked whether the execution of the EAW should be refused in the light of the principle of proportionality in relation to criminal offences and penalties enshrined in Art. 49(3) CFR.

#### ► *The CJEU's decision*

In the first place, the CJEU determined the parameters for the double criminality test pursuant to Art. 2(4) and Art. 4 No. 1 of the Framework Decision on the European Arrest Warrant as follows:

- It is sufficient if the acts giving rise to the sentence imposed in the issuing Member States also constitute an offence in the executing Member State;
- The offences do not need to be identical in the two Member States concerned;
- The condition of double criminality is met if the factual elements underlying the offence would also be subject to a criminal sanction in the territory of the executing Member States if they were present in that State;
- If an exact match between the protected legal interests were required, the effect of the EU's surrender system would be affected and it would also counter the rule that refusal grounds in the FD EAW

must be interpreted strictly in order to limit the cases of non-recognition and non-enforcement.

As a result, the condition of double criminality in Art. 2(4) and Art. 4 No. 1 FD EAW is met if the acts in question impair a legal interest protected in the issuing Member State, and if such acts are also covered by a criminal offence under the law of the executing Member State but the impairment of that legal interest is not an element constituting that criminal offence there.

In the second place, the CJEU held that Art. 2(4) and Art. 4 No. 1 FD EAW, read in the light of Art. 49(3) CFR, must be interpreted as meaning that the executing judicial authority may not refuse to execute an EAW issued for the enforcement of a custodial sentence where that sentence was imposed in the issuing Member State for the commission by the requested person of a single offence consisting of several acts and only some of those acts constitute a criminal offence in the executing Member State. (TW)

### AG: EAWs Cannot Be Refused if there Are no Systemic & Generalised Deficiencies of Fair Trial Protection

The CJEU will have the opportunity to rule again on the fiercely discussed question of the conditions under which a European Arrest Warrant can be refused because the executing judicial authority assumed that fundamental rights of the person concerned were not maintained in the issuing Member State. The case at issue refers to the “Catalan case.”

#### ► *Background of the case and questions referred*

The quarrel between the Spanish Supreme Court and Belgian courts on the execution of European Arrest Warrants (EAWs) against former Catalan leaders has entered the next round and reached the CJEU. In [Case C-158/21](#) (*Lluís Puig Gordi and Others*), the Spanish Supreme Court proceeds against the approach taken by Belgian courts, which refused to execute EAWs against Catalan politicians who fled Spain for Belgium after

an independence referendum was held in the autonomous community of Catalonia (Spain) on 1 October 2017. The Belgian courts based their refusal particularly on the argument that there was a risk of violation of the persons' right to be tried by a court established by law, namely that there was no express legal basis for the competence of the Spanish Supreme Court to try the persons claimed. In essence, the EAWs were refused because of a breach of the defendants' right to a fair trial.

Based on the CJEU's judgment in *AY* (→[eucrim 2/2018, 105–106](#); see also the article by *Florentino-Gregorio Ruiz Yamuza* in [eucrim 4/2020, 336–343](#)), the Spanish Supreme Court questions whether an executing judicial authority can refuse to execute an EAW on the basis of a ground for non-execution not contained in Framework Decision 2002/584 (FD EAW). Furthermore, it has doubts about the power of the executing judicial authority to assess the competence of the issuing judicial authority, under the latter's national law, to judge the defendants and to refuse the execution of the EAW on the basis of an alleged violation of the defendants' fundamental rights. It argues that the Belgian courts did not take into account the interpretation of the Spanish courts or the fact that the parties had the benefit of first and second degree judicial review of the EAWs issued against them. The Spanish Supreme Court points out that it has to rule on the maintenance or withdrawal of existing EAWs and asks the CJEU about the possible issuance of new EAWs.

#### ► *The AG's opinion*

On 14 July 2022, [Advocate General \(AG\) Richard de la Tour](#) tabled his [opinion](#) in the case. First, he takes the view that an executing judicial authority can only refuse to execute an EAW on account of fundamental rights infringements if it relies on the CJEU's case law, which lays down strict conditions under which a refusal can be made in this sense. An executing authority cannot ap-

ply a fundamental rights clause widely, meaning that it would lead to a mandatory and automatic basis for refusing to execute an EAW in the event of an alleged breach of the fundamental rights of the person concerned.

Second, the AG puts forth that the FD EAW does not allow an executing judicial authority to review whether an issuing judicial authority is competent to issue an EAW under the law of the issuing Member State. To allow such a review would run counter to the principle of procedural autonomy – under which Member States may designate, according to their national law, the judicial authority with competence to issue an EAW – and the principle of mutual recognition, which forms the “cornerstone” of judicial cooperation in criminal matters.

Third, he asserts that a refusal is not permitted if the existence of systemic or generalised deficiencies affecting the judicial system of the issuing Member State has not been demonstrated. In this context, he argues, *inter alia*, that he sees no reason to admit a refusal ground for fundamental rights infringements in the absence of such deficiencies, because the persons concerned dispose of judicial remedies in Spain to have a possible breach of the fundamental right to a fair trial corrected. He points out that the principle of mutual trust between the Member States, which is of essential importance in creating and maintaining an area without internal borders, must be given full play so that both the objective of speeding up and simplifying judicial cooperation pursued by the FD EAW and the objective of combating impunity can be achieved. A thorough check by the executing judicial authority of the existence of a risk of violation of the fundamental right to a fair trial in the absence of systemic or general deficiencies in the functioning of the judicial system of the issuing Member State would compromise this principle.

Lastly, as regards the possibility of the Spanish Supreme Court to issue new

EAWs, the AG is of the opinion that the FD EAW does not preclude an issuing judicial authority from issuing a new EAW against the same person and to the same executing judicial authority if the latter has refused to execute a previous EAW contrary to Union law. However, the issuing authority must examine whether the issuing of the new EAW is proportionate.

#### ► *Put in focus*

In the case at issue, the CJEU must answer an open question left over from its previous case law, in particular the landmark decision in *LM* (→[eucrim 2/2018, 104–105](#)). For extraditions under the EAW regime, the CJEU has acknowledged a refusal due to infringements of the fundamental right to a fair trial only if a two-step procedure is applied: first, evaluation of systemic and generalised deficiencies in the protection of the fundamental right in the issuing Member State; second, specific and precise assessment of the real risk of the infringement, taking account of the individual situation of the defendant in the issuing country.

The case law in this context to date, however, has only referred to the worrisome rule-of-law situation in Poland, and national courts have easily been able to confirm the first step of the generalised and systemic deficiencies in the current Polish judicial system (→[eucrim 1/2020, 27–28](#)). But they failed in most cases to answer the second step of the test in the affirmative (→[article by T. Wahl, eucrim 4/2020, 321–330](#)). Therefore, the CJEU's approach has been criticised as being too narrow, and national courts tried (unsuccessfully) to convince the CJEU to give up the second part of the test, i.e. the individual assessment, so that a refusal can be claimed only if the generalised and systemic deficiencies have been established (→[eucrim 4/2020, 290–291](#) and [eucrim 1/2022, 33–34](#)).

The *Puig Gordi* case turns the problem around, since it poses the question: Does the FD EAW (i.e. its Art. 1(3)) also include a fundamental rights re-

fusal ground if *only* the assessment of the individual situation of the persons concerned (the assessment *in concreto*) could lead to the conclusion of a real risk of breaches of fundamental rights in the issuing Member State.

AG *de la Tour*'s opinion certainly has explosive force, particularly in two directions: First, the AG turns the general assessment to an autonomous point and does not admit a complementary individual test. This exacerbates the trend as initiated by the LM judgment that successful complaints about fundamental rights infringements will be practically impossible. In the end, the AG's view will lead to a principal preponderance of the effectiveness of law enforcement and surrender over the individuals' rights.

Second, it must be doubted whether the AG's approach is compatible with the ECHR as interpreted by ECtHR case law on extraditions and deportations. According to the judges in Strasbourg, a general assessment is acknowledged, but it is not necessary to determine a "flagrant denial of justice," which would lead to a refusal of extraditions under Art. 6 ECHR. By contrast, the judges in Strasbourg have always allowed applicants to demonstrate the existence of individual circumstances putting them at risk of a fundamental rights infringement, i.e. an assessment *in concreto* (→Considerations on the AG's Opinion in the case of *Puig Gordi and Others* [by Johan Callewaert](#)). (TW)

### AG: EAW Can be Refused if Proceedings Revoking Suspension Were Conducted in *absentia*

In her [Opinion](#) of 27 October 2022 in [Joined Cases C-514/21 and C-515/21 \(\*LU and PH v Minster for Justice and Equality\*\)](#), Advocate General (AG) *Tamara Čapeta* dealt with the question of whether a European Arrest Warrant (EAW) can be refused if the proceedings resulting in the revocation of the defendant's suspension of a prison sentence were conducted *in absentia*. In other words, the cases, referred by the Court

of Appeal of Ireland, concern the interpretation of the concept of "trial resulting in the decision", as used in the introductory sentence of Art. 4a(1) of the FD EAW. Art. 4a(1) of the FD EAW foresees the right for the executing authority to refuse the execution of EAWs for *in absentia* trials unless certain scenarios of a waiver of the right to be present or a guarantee of a retrial are given.

The AG elaborated a general definition of this concept and concluded that the term "trial resulting in the decision" is to be interpreted as any step of the proceedings which has the decisive influence on the decision on the deprivation of a person's liberty. This is because the person in question must be given the opportunity to influence the final decision concerning his or her liberty. As a result, Art. 4a(1) FD EAW also applies if the person concerned was absent in the proceedings revoking the suspension of the prison sentence or in the proceedings finding guilt and determining the sentence for the second offence that triggered the revocation. Therefore, the Irish authorities would be allowed to refuse the execution of respective EAWs unless one of the scenarios in Art. 4a(1)(a)–(d) FD EAW had applied in the cases at issue.

If the CJEU were not to follow the proposed definition, the AG provides her view on a second set of questions referred by the Irish court, i.e. whether it could deny the EAWs because the *in absentia* proceedings infringed Art. 6 ECHR – the defendants right to a fair trial.

According to AG *Čapeta* this question implicitly raise the issue whether Art. 1(3) FD EAW allows for additional reasons to refuse surrender on account of fundamental rights infringements in the issuing state, be it as a result of a "flagrant denial of justice", or of the breach of the essence of the fundamental right to a fair trial.

The AG answers this question in the negative. The executing authority cannot refuse EAWs on account of breaches of fundamental rights unless it first es-

tablished systemic or generalised deficiencies in the protection of the right to a fair trial in the issuing state. Allowing verifications of the respect of fundamental rights in each individual case means the reversal of the EAW mechanism to something more similar to the pre-existing extradition procedures and compromise the aim that surrender can happen quickly. This argumentation is fully in line with the recent opinion by AG *Richard de la Tour* in the *Puig Gordi* case C-158/21 (→news item p. 195). (TW)

## European Investigation Order

### EncroChat Turns into a Case for the CJEU

Two years ago, French and Dutch law enforcement authorities, with the support of Europol and Eurojust, [succeeded in infiltrating the encrypted phone network](#) provided by the enterprise EncroChat. The law enforcement authorities were thus able to read the chat messages of thousands of users in real time, including those who used the network for criminal activities. This action led to numerous follow-up investigations in many European countries. In Germany, the Higher Regional Courts and the Federal Court of Justice backed the approach taken by the police forces and judicial authorities and confirmed the admissibility in German criminal proceedings of the evidence collected by means of the infiltration (→[eucrim 1/2021, 22–23](#) and [eucrim 1/2022, 36–37](#)). By contrast, NGOs, defence lawyers, and several academics [voiced deep concerns](#) over the rule of law and infringements of the right to a fair trial by the action.

In its [decision of 19 October 2022](#), the Regional Court of Berlin (*Landgericht Berlin*) suspended a trial against a defendant who was being prosecuted for drug trafficking on the basis of the skimmed EncroChat data. The Berlin court is the only German court that deviates from the upper German courts, and it had already taken a decision in 2021

that advocated the inadmissibility of the collected EncroChat data in criminal proceedings (→[eucrim 2/2021, 106](#)). Now, the same court has referred several questions to the CJEU on interpretation of the [Directive regarding the European Investigation Order in criminal matters](#). The Regional Court wishes to clarify whether the receipt of the data by the German authorities from their French counterpart via a European Investigation Order (EIO) was lawful and can thus serve as a valid basis for criminal proceedings against EncroChat users in Germany. The questions particularly concern:

- The admissibility of the EIO pursuant to Art. 6(1) EIO Directive;
- Interpretation of Art. 31 EIO Directive, which regulates the surveillance of telecommunications without the technical assistance of a Member State;
- The consequences of a possible infringement of EU law for the national criminal proceedings.

In total, the judges in Berlin posed 14 questions to the CJEU. They include, for instance, the question of whether the German EIO was proportionate and necessary, considering that it related to the receipt of all EncroChat data of users on German territory without individual suspects having been specified beforehand. Furthermore, they are in doubt as to whether the German EIO was compatible with Art. 6(1)(b) EIO Directive, because the investigative measure could not have been authorised in a similar case in Germany.

Regarding the consequences generated by a possible violation of EU law, the Regional Court believes that the Union principles of effectiveness and equivalence (which limit the procedural autonomy of the Member States in evidence-related issues) as interpreted by previous CJEU case law result in the inadmissibility of evidence in the case at issue. In this context, the court highlighted the lack of transparency on the part of the law enforcement authorities: first, due to non-disclosure of the technical approach

by France, the integrity of the required data could not be assessed; second, the EU agencies' and German law enforcement authorities' refusal to hand over parts of the file to the defence made the investigation of facts even more difficult in the trial.

Lastly, according to the Regional Court of Berlin, other German courts erred when they attached higher importance to the objectives of criminal law enforcement than to the infringements of the individuals' fundamental rights. According to the referring judges, the reasoning of the CJEU's case law prohibiting the general and indiscriminate retention of data – even for purposes of combating serious crimes (→[eucrim 3/2020, 184–186](#)) – must also apply here and result in the inadmissibility of evidence. (TW)

## Law Enforcement Cooperation

### UK-US E-Evidence Agreement in Force

On 3 October 2022, the [Agreement](#) between the Government of the United Kingdom and the Government of the United States of America on access to electronic data for the purpose of countering serious crime [entered into force](#). It is shortly dubbed the UK-US Data Access Agreement (DAA). As far as can be seen, this is the first executive agreement within the framework of part II of the US CLOUD Act, which allows UK law enforcement authorities to directly receive communications data from US service providers instead of making government-to-government mutual legal assistance requests for such data (→[Daskal, “Unpacking the CLOUD Act”, eucrim 4/2018, 220–225](#)).

The DAA obliges each party to ensure their laws permit a telecommunications operator to lawfully respond to direct requests for covered data made by a relevant public authority in the other party's jurisdiction. It requires that all DAA requests are compliant with the relevant existing domestic obligations

the issuing public authority is bound by.

Data covered by the agreement are the content of an electronic or wire communication; computer data stored or processed for a user; traffic data or meta-data pertaining to an electronic or wire communication or the storage or processing of computer data for a user. The Agreement also recognises that requests can be made for subscriber information.

Orders for data can only be made under the Agreement for the purpose of the prevention, detection, investigation or prosecution of a serious crime (including terrorism). A serious crime is defined as one which could result in a custodial sentence with a maximum possible term of at least three years. Other restrictions include:

- The order must target a specific account and a specific person, i.e. it must be particularised;
- When the UK is using the Agreement, they cannot request covered data on a US person or a person located in the US;
- DAA orders may not be used to infringe freedom of speech or for disadvantaging persons based on their race, sex, sexual orientation, religion, ethnic origin, or political opinions;
- The DAA cannot be used for orders on behalf of another government and the UK cannot make request on behalf of the US and vice versa. Permission must be obtained from the other party, if the requesting party wishes to share the data with another country or international organisation. Furthermore, there is no compulsion under the DAA to share data obtained under the Agreement with the other party or any third party;
- In the event that data obtained from a UK communication service provider is intended to be used as evidence in a case which could result in the death penalty, the US will obtain permission from the UK to use this data in evidence before doing so.

The Agreement will remain in force for five years, and can be extended by mutual agreement for five years (or any other period as may be agreed). It also

makes provision of a mutual periodic review of operation.

The Agreement was signed on 3 October 2019 ([→eucrim 3/2019, 180](#)). Human rights and civil liberties organisations tried to prevent the US Congress from approving the agreement ([→eucrim 3/2019, 180–181](#)). They criti-

cised that the DAA falls short to have included robust rights protections and they expressed their concerns that its low standard may serve as a template for other similar agreements under negotiation, such as the US-Australia agreement or the US-EU agreement (for the latter [→eucrim 3/2019, 179–180](#)). (TW)

omissions capable of constituting a violation of the ECHR, provided that they occurred before 16 September 2022. There are currently 17,450 such applications against the Russian Federation pending before the Court and another 2129 judgments and decisions still pending before the Committee of Ministers, which have yet to be fully implemented by Russia. Details in this regard are provided in [factsheets](#) on the Russian Federation that are available on the CoE website.

In a [Resolution](#) adopted at its plenary session on 5 September 2022, the ECtHR also noted that, due to the fact that the Russian Federation has ceased to be a High Contracting Party to the Convention on 16 September 2022 and in accordance with Arts. 20 and 22 ECHR, the office of the Russian judge at the Court also ceased to exist.



## Council of Europe

Reported by Dr. András Csúri

### Foundations

#### European Court of Human Rights

##### ECtHR: First Female President Elected

On 19 September 2022, the Irish judge *Síofra O’Leary* was elected as the new President of the ECtHR, the first woman to hold this position. Judge O’Leary, who succeeds *Robert Spano* (Iceland), took up office on 1 November 2022.

O’Leary holds a PhD from the European University Institute in Florence and served as *Référéndaire*, *Chef de Cabinet* and *Head of Unit* at the Court of Justice of the European Union prior to her career at the ECtHR. She has been a judge for the ECtHR in respect of Ireland since 2 July 2015, *President of Section* since 1 January 2020, and *Vice-President of the Court* since 2 January 2022.

On 19 September 2022, the Court also elected two new *Vice-Presidents*: Judges *Georges Ravarani* (Luxembourg) and *Marko Bošnjak* (Slovenia). In addition, two new *Section Presidents* – judges

*Pere Pastor Vilanova* (Andorra) and *Arnfinn Bårdsen* (Norway) were elected. All elected judges took up their duties on 1 November 2022.

#### Human Rights Issues

##### Russian Federation Ceased to Be a Party to the ECHR

On 16 September 2022, in accordance with [Resolution CM/Res\(2022\)2](#) on cessation of the membership of the Russian Federation to the CoE (adopted by the Committee of Ministers on 16 March 2022) and pursuant to the [Resolution](#) on the consequences of the cessation of membership of the Russian Federation to the CoE in light of Art. 58 ECHR (adopted by the ECtHR sitting in plenary sessions on 21 and 22 March 2022), the Russian Federation ceased to be a High Contracting Party to the Convention ([→eucrim 1/2022, 37-38](#)).

The ECtHR remains competent to deal with applications against the Russian Federation in relation to acts or

### Specific Areas of Crime

#### Money Laundering

##### Moneyval: Fifth Round Evaluation Report on Liechtenstein

On 29 June 2022, MONEYVAL published its [fifth round evaluation report](#) on Liechtenstein. The fifth evaluation round builds on previous MONEYVAL assessments by strengthening the examination of how effectively Member States prevent and combat money laundering (ML) and terrorism financing (TF).

MONEYVAL acknowledges for Liechtenstein a substantial level of effectiveness, including the following:

- Understanding of ML/TF risks;
- Setting national AML/CFT policies and co-ordination;
- Use of financial intelligence;
- Confiscation of proceeds of crime;
- TF investigations and prosecution;
- International cooperation.

However, it calls for further improvements in enhancing supervision, application of AML/CFT preventative measures by the private sector, transparency

of beneficial ownership (BO) of legal persons and legal arrangements, money laundering investigation and prosecution, and implementation of targeted financial sanctions.

Overall, the authorities have a good understanding of the key ML and TF risks. Nevertheless, some threats and important inherent risks have not been fully assessed. These include an estimate of the extent to which the Liechtenstein financial sector could be used to launder the proceeds of tax crimes committed abroad and of information on the types/location of non-bank assets held by trust and company service providers. Despite the success in addressing TF risk by means of national AML/CFT policies, there are still exemptions that are not supported by a country risk assessment, such as the widely used exemption for investment funds.

The Financial Intelligence Unit (FIU) in Liechtenstein is an important source of financial information and its analytical reports are an inevitable part of any investigation/operational activity carried out by law enforcement authorities. Suspicious Activity Reports (SARs)/ Suspicious Transaction Reports (STRs) submitted by persons subject to the Due Diligence Act (DDA) are generally commensurate with the prevalence of revenue-generating crimes in the country, although they have rarely targeted some of the higher risk predicate offences, such as tax offences. Although the FIU has so far produced several comprehensive strategic analysis reports, further reports on TF, the laundering of proceeds of foreign tax crimes, and the adequacy of SAR/STR reporting on these crimes could be useful.

The country's legal and institutional framework allows for the effective investigation and prosecution of all types of ML. The authorities are largely aware of the need for consistent prosecution of all ML-related activities but are lacking in investigations involving potentially complex legal structures established and managed in Liechtenstein.

The risks and threats identified in the national risk assessment reflect the typologies already observed in the country, with the exception of threats posed by tax offences committed abroad. There have been convictions for all types of ML, of which self-laundering of proceeds from foreign fraud remains predominant, as opposed to third-party ML and prosecution of stand-alone ML cases.

Liechtenstein has introduced and applies criminal law measures in the form of non-conviction based confiscation and addresses failure to report suspicious transactions by a person subject to the DDA, where, for justifiable reasons, a ML conviction cannot be secured. However, the sanctions imposed are not sufficiently dissuasive and proportionate. Confiscation of the proceeds of crime is pursued as a policy objective in Liechtenstein and confirmed through a comprehensive legal framework. The outcome of the authorities' actions, both in terms of assets seized and assets confiscated, is generally in line with the country's risk profile.

The lack of TF prosecutions in Liechtenstein is in line with the country's risk profile. Although there was only one prosecution in this respect but this confirmed the competent authorities' skills and knowledge on how to detect the collection, movement, and use of funds for TF purposes. The initiatives taken in the area of CFT demonstrate a sufficient level of commitment, even in the absence of a specific counter-terrorism strategy.

The non-profit organisations (NPOs) that the experts met "on the spot" showed a good awareness of the risks they face. This was not the case for NPOs operating as associations, as the one organisation the experts met on site was not aware of its obligations in relation to CFT measures and how associations can be misused for TF.

The understanding of ML/TF risks and liabilities in the private sector is now generally good. Banks and large trust and company service providers

(TCSPs) have the best understanding of the risks associated with private banking and wealth management and have put in place sophisticated measures to mitigate them. In general, risk mitigation measures are now effectively applied and proportionate to the existing risks, although, until recently, less attention was paid to the identification and confirmation of source of wealth and source of funds and the possible illicit use of "shell" companies.

The authorities are well aware of the risk that legal persons (and legal arrangements) can be used to launder the proceeds of crime. However, they generally have a less detailed and documented knowledge of TF. A number of effective measures are in place to prevent misuse, including the obligation for legal entities (around 80% of legal entities), which are predominantly non-trading and wealth management structures, to appoint a "qualified member" (TCSP) to the governing body. Timely access to basic and BO information on legal entities and legal structures did not cause any difficulties. The basic information held by these sources is generally accurate and up to date. However, there is no evidence that this is the case for BO information.

Compliance with reporting obligations was limited, and fewer tax offences were reported than expected. Many persons subject to the DDA never filed SAR/STRs, e.g. some TCSPs and asset managers and some banks and TCSPs were reported to the Office of the Public Prosecutor for failure to report.

International cooperation is an important part of Liechtenstein's AML/CFT scheme, given that the predicate offences for ML are predominantly committed abroad. Certain issues relating to the double criminality requirements for tax evasion and the obligation to hear the eligible party before providing evidence to a foreign jurisdiction may have an impact on effective cooperation. In recent years, however, a number of measures have minimised the risks posed by these legal provisions.

## Procedural Criminal Law

### European Commission for the efficiency of justice (CEPEJ)

#### CEPEJ: 2022 Report on European Judicial Systems

On 5 October 2022, CEPEJ published its [ninth biennial evaluation report](#) on the efficiency and quality of justice in Europe. The report is based on data from 2020 on the major trends in the judicial systems of 44 CoE Member States (Liechtenstein and San Marino were again unable to provide data) and three observer states (Morocco, Israel, and Kazakhstan). It includes country profiles as well as numerous tables and graphs ([→ eucrim 3/2018, 164 and eucrim 4/2020, 299–300](#)).

As with previous reports, CEPEJ stressed the methodological difficulty of comparing quite diverse legal systems (e.g. the various approaches to the organisation of courts or the different statistical classifications). The methodology therefore relied heavily on the [CEPEJ Scheme for Evaluating Judicial Systems](#) (in the form of a questionnaire) and on support from CEPEJ's national correspondents and other specific actors.

The report pointed out the significant impact the pandemic has had on European judicial systems, such as limiting the presence of parties and postponing hearings or resorting to remote working; these developments also had an impact on the specific data presented in the report. This can lead to large discrepancies when comparing the data for 2020 with that of previous years. CEPEJ expects that the impact of the pandemic on various efficiency indicators will gradually settle with the easing of the anti-COVID measures, but the technological aspects of the day-to-day running of the courts and the way in which they communicate with court users has been irreversibly changed and transformed by the impact of the pandemic.

The report evaluated the efficiency of justice systems based mainly on the following indicators:

- The availability and allocation of resources;
- The situation of prosecutors and judges;
- The organisation of courts, the focus on court users, and the development and proper use of information and communication technology (ICT);
- The performance of the judicial systems.

In this context, the 2022 report especially observed the following trends:

#### ► *Budgets allocated to justice*

- Between 2010 and 2020, the budget of the judicial system grew steadily but unevenly. The smallest increase occurred between 2012 and 2014 and the largest between 2016 and 2018. On average, European countries spent nearly €1.1 billion on their judicial systems, equal to €79 per capita (€7 more per capita than in 2018) and 0,35% of GDP;
- As in the previous assessment, countries with higher GDP per capita invested more in their justice systems, but less wealthy countries made greater budgetary efforts for their justice systems, as they had to allocate more budgetary resources as a percentage of GDP;
- Almost two thirds of the budget of the judicial system was allocated to the courts, about 25% to the prosecution services and the remainder to legal aid. Eastern European countries traditionally spend more on prosecution services, while Northern European and common law countries spend more on legal aid. The most significant percentage increase between 2018 and 2020, averaging 12%, was registered for the public prosecution budget;
- The COVID-19 pandemic did not lead to large variations in the overall budget. However, some changes can be observed, e.g. a decrease in the budget for the maintenance of court buildings, judicial expenditure, and training and an increase in the IT budget.

#### ► *Justice professionals and the courts*

- The trends and conclusions show

that there are still significant differences in the number of professional judges, which can be partly explained by the diversity of judicial organisations, geographical factors, and/or the development of European legal systems. Their numbers increased slightly between 2010 and 2020, but the regional disparities already observed in previous reports persisted;

- Since 2010, there has been a strong European trend towards an increase in the proportion of women appointed as professional judges and prosecutors, with a higher ratio of female judges and prosecutors to male judges and prosecutors for several years now. The ratio for women as prosecutors has been stable since 2012. However, women remain under-represented in the highest positions. That said, the report underlined promising developments that encourage further measures to facilitate women's careers and promote gender balance in higher and top judicial functions;

- Part-time work for judges and prosecutors is possible in the majority of states and entities, the proportion of which decreases from instance to instance and approaches zero at the highest level for both judges and prosecutors;

- For the most part, the COVID-19 pandemic did not have a noticeable structural impact in the field of judicial professionals, but there was significantly less in-person training in 2020 compared to 2018;

- Institutions and bodies that give opinions on ethical issues related to the conduct of judges and prosecutors (e.g. on political participation, the use of social media, etc.) are largely established in Europe, but their role varies widely. Their opinions are publicly available in the vast majority of cases, which provides a high degree of transparency for judges and prosecutors;

- The salaries of judges and prosecutors still vary widely between states and entities, but also between institutions, and their development is not uniform. Although the ratio of average salaries

of judges and prosecutors to average gross salaries has increased overall since 2010, the ratio has actually decreased in a number of states;

- The number of lawyers continues to grow in Europe, with significant variations between countries and entities. The increase is also largely due to economic growth. Unlike judges and prosecutors, European lawyers are still predominantly male. However, there have also been shifts in favour of women.

➤ *Information and communication technology (ICT)*

- The growing role of ICT in supporting the work of courts and the increased transfer of human activities to technological tools requires ever greater attention to their evaluation and impact. The corresponding share of court budgets is also evidence of their growing importance. Many states and entities, however, are still unable to provide basic information on their judicial budget spending on ICT;

- The challenges posed by the COVID-19 pandemic have provided an opportunity to experiment more widely

and rapidly with the potential of ICT for communicating and sharing judicial documents and data between all parties involved in the administration of justice;

- At the height of the pandemic, much could and should have been learned from sheer action. The report recommends that Member States make use of these new possibilities, but they should be brought as close as possible to the requirements of a fair trial in non-emergency situations;

- The need to ensure access to justice in times of lockdown has been met with the rapid development and deployment of ICT solutions and, in the case of videoconferencing, by the adoption of existing market solutions as an emergency measure in judicial practice. This has required much adaptation in order to balance the practical benefits of remote communication with respect for the core values of justice: ensuring fairness, transparency, and accountability; preventing procedural abuses; and avoiding compromising the public image and symbolic effect of justice.

➤ *Performance of legal systems*

- The 2022 evaluation cycle (based on data from 2020) has been heavily influenced by the COVID-19 crisis. The pandemic created problems for courts across Europe, and states and organisations tried to remedy the unprecedented situation primarily by relying on electronic services. This is also reflected in CEPEJ's 2021 Guidelines on Videoconferencing in Judicial Proceedings (→[eucrim 3/2021, 167](#)) and its 2022 Action Plan on Digitalization of Justice (→[eucrim 4/2021, 230–231](#)), which was adopted in December 2021;

- The first instance courts were affected by the pandemic most, and the second and third instances showed similar results in terms of disposition time compared to the previous cycle;

- Criminal law area is still considered the most efficient area; disposition time remains the highest in administrative cases. Prosecutors have improved the ratio of cases resolved to cases received, results which are likely to have been boosted by the decreasing inflow of cases.



# Articles

Articles / Aufsätze

## Fil Rouge

The protection of European citizens' legal interests, in particular that EU money is collected properly and spent correctly, necessitates the coordination and cooperation of a number of authorities. Due to the complex management of the EU budget, this holds especially true for cooperation between the authorities responsible for the application and enforcement of administrative law and those that are responsible for the enforcement of criminal law. However, there are still flaws in this field of cooperation, and uncertainties exist on how the flow of information is/should be regulated and is/should be organised. The following three articles in this issue demonstrate that effective cooperation between *administrative* and *law enforcement authorities* is of utmost importance. As exemplified here for the protection of the EU's financial interests (PIF), the authors' conclusions are also valid when it comes to questions of institutional cooperation in other fields of law.

In the first article, *Martine Fouwels* gives insight into the 2021 Agreement between the Commission and the European Public Prosecutor's Office (EPPO). Given the Commission's specific responsibility for managing the EU budget and the EPPO's status as the first ever EU body tasked with the criminal prosecution of PIF offences. *Fouwels* sets off

the Commission's initial negotiation objectives against the results of the Agreement and provides an outlook on future mutual cooperation between the Commission and the EPPO. In the second article, *Nicholas Franssen* tackles the question of how the EPPO can ensure the recovery of illegally obtained EU money in cross-border situations. He points out that Regulation 2017/1939 lacks a specific cooperation mechanism in this context, but that recourse could be made to existing cooperation instruments of mutual recognition. He examines practical and legal issues if several sets of legislation are to be applied in this regard.

In the third article, *Mirijana Jurić* outlines European cooperation between the authorities conducting administrative investigations and those conducting criminal investigations to protect the EU's financial interests. She states that the legal frameworks for conducting investigations, whether administrative or criminal, differ significantly from Member State to Member State and pleads for a stronger harmonisation of both criminal and administrative legislation at the level of the Member States.

Thomas Wahl, Managing Editor of eucrim

# Cooperation between the European Commission and the European Public Prosecutor's Office

## An Insider's Perspective

Martine Fouwels\*

The European Commission and the European Public Prosecutor's Office (EPPO) have a joint interest in effectively fighting, and mitigating the effects of, crimes against the EU's financial interests. In 2021, they concluded an agreement to translate this mutual interest into concrete cooperation measures. Their cooperation is unique in the EU's anti-fraud architecture, having regard to the Commission's specific responsibility for managing and protecting the EU budget and the EPPO's novel nature as the first EU body with criminal prosecution tasks. This article sets off the Commission's initial negotiation objectives against the results and future outlook of their mutual cooperation.

### I. Introduction

Article 103(1) of Regulation (EU) No 2017/1939<sup>1</sup> establishing the European Public Prosecutor's Office (hereinafter "the EPPO Regulation") provides that the EPPO "shall establish and maintain a cooperative relationship with the European Commission for the purpose of protecting the financial interests of the Union and shall conclude to that end an agreement setting out the modalities for their cooperation." It is no coincidence that the EPPO Regulation includes a specific provision dedicated solely to Commission-EPPO cooperation. It is equally telling that the EPPO Regulation envisages the conclusion of an "agreement" to this effect, rather than a mere "arrangement", as is the case for the other EU institutions, bodies, offices, and agencies.<sup>2</sup> These two aspects – at first sight formal, but also important – reflect the relevance of the Commission-EPPO partnership for fighting, and mitigating the effects of, financial crimes detrimental to the EU's financial interests. They spring from a recognition of the Commission's unique and specific responsibility for managing and protecting the EU budget, as reflected in Article 317 TFEU.

The technical negotiations on the envisaged agreement between the services of the Commission and those of the EPPO kicked off in December 2020. On the Commission side, a group made up of representatives from horizontal Commission services and chaired by the Secretariat-General led the working-level negotiations. An intense meeting schedule, both internally<sup>3</sup> and with the EPPO services, eventually resulted in the endorsement of a balanced text by the College of Commissioners and the EPPO. The Agreement<sup>4</sup> entered into force on 18 June 2021 upon signature by the European Chief Prosecutor and the Secretary-General of the Commission on behalf of the Commission.

### II. The Commission's Objectives during the Negotiations

The Commission's objectives were twofold:

- firstly, to *render its support to the EPPO* in its endeavours to investigate and prosecute crimes affecting the EU budget *as effective as possible*. This requires the prompt and systematic notification to the EPPO of instances of suspected fraud and other types of illicit behaviour falling under the EPPO's competence, which Commission services may come across in the course of their activities;
- secondly, and conversely, to *ensure that the Commission receives prompt information from the EPPO* on the (preliminary) results of its investigations, without prejudice to their confidentiality, in view of the following:
  - the adoption of appropriate administrative, financial, and disciplinary follow-up measures by the Commission, including the recovery of defrauded EU funds;
  - the adoption of precautionary measures to avoid further financial or reputational damage to the Commission, and the EU as a whole, pending the outcome of EPPO's proceedings. This includes the initiation of an "Early Detection and Exclusion System" (EDES) procedure, where appropriate, to ensure that possible fraudulent entities cannot continue accessing or applying for EU funds. It also covers managerial measures, in case of possible implication of a Commission staff member, such as temporarily relieving the staff member of certain tasks that present a potential risk;
  - the establishment of possible "rule-of-law" breaches and corresponding budgetary measures pursuant to the "conditionality mechanism";<sup>5</sup>
  - the Commission's participation as a civil party in judicial proceedings resulting from the EPPO's investigations and prosecutions, where necessary.

Underlying the negotiations was a strong awareness of mutual dependency in both bodies' efforts to protect the EU's financial interests. It would indeed be difficult to convince the general public that the EU institutions take the fight against fraud seriously if they were to fail to notify instances of fraud to the EPPO. This also holds true for cases in which the Commission continued insouciantly paying EU funds or sending sensitive information to organisations or individuals under serious suspicion of fraud or other illegal activities affecting the EU budget, even though precautionary measures could have been taken. The common interest in establishing prompt and useful information flows to operationalise the cooperation envisaged in Article 103(1) of the EPPO Regulation was therefore at the heart of the negotiations.

### III. The Commission-EPPO Agreement

The Agreement that the Secretary-General of the Commission and the European Chief Prosecutor signed on 18 June 2021 fulfils the above-mentioned objectives. It specifies the following:

- the specific types of information to be transmitted in each case;
- the relevant contact points;
- the applicable procedures, communication tools, templates, and deadlines;
- the conditions under which the EPPO can, under certain conditions, access specific relevant databases managed by the Commission;
- training measures and awareness-raising actions.

The Agreement does not in any way modify or interfere with the existing legal frameworks governing the Parties and their independence. It renders the cooperation required under this framework operational and identifies practical ways for its day-to-day implementation. A specific section provides the necessary data protection safeguards by complementing the extensive protection provided under each Party's own legal framework.

As specified in the Agreement, the cooperation is without prejudice to the operational cooperation between the EPPO and the European Anti-Fraud Office (OLAF) when the latter exercises its independent investigative function<sup>6</sup> pursuant to "OLAF Regulation" (EU, Euratom) No 883/2013.<sup>7</sup>

### IV. Implementation and Future Challenges

As with any negotiated solution, the real challenge, once the dust has settled, lies in rendering the Agreement operational on a daily basis. In other words, the provisions have to be efficiently translated into concrete actions.

A specific challenge in this respect is the novel and unique nature of the EPPO – the first-ever EU body with criminal prosecution tasks – in the EU's anti-fraud architecture. On the one hand, the Commission has to adapt itself to the EPPO's specific needs, working methods, and procedural requirements. On the other hand, the EPPO's set-up is, to a large extent, decentralised, with an important role falling to the European Delegated Prosecutors in the Member States who come from the national prosecution systems. The newly established and unique cooperation between both bodies therefore requires targeted awareness-raising and training efforts, geared towards all those involved in processing the following types of information:

- information from the EPPO allowing the Commission to adopt (precautionary or final) administrative, financial, budgetary, or disciplinary follow-up measures resulting from the EPPO's investigations and prosecutions;
- information from the Commission obtained while (co-) managing EU-funded programmes, actions, or contracts, warranting a transmission to the EPPO, as it points to potentially criminal behaviour falling under the EPPO's competence.

At an even more practical level, the cooperation necessitates the adaptation of relevant IT systems, databases, and tools, to ensure that each Party's information needs are taken into account at the appropriate level and moment.

Annual high-level reviews, complemented by regular working-level consultations, will serve to further fine-tune the cooperation mechanisms and tools, where needed. The adequacy of the Agreement will eventually find its reflection in the number of cases successfully concluded by the EPPO, with the help of information from the Commission, but it will also be reflected in the effectiveness with which the Commission is subsequently able to safeguard the EU budget, its administration, and its values from financial or reputational damage thanks to timely information received from the EPPO. In other words, the *common interest* in safeguarding taxpayers' money and the EU's reputation will now have to be translated into *common successes*. The first signs are encouraging in this respect.

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\* The information and views put forth in this article are those of the author and do not necessarily reflect the official opinion of the European Commission

1 [Council Regulation \(EU\) 2017/1939](#) of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (hereinafter "the EPPO"), *O.J.* L283, 31.10.2017, 1.

2 Under Article 99(3) of the EPPO Regulation.

3 Including meetings with the various services managing the – over 30 – databases listed in Annex VIII to the Commission-EPPO Agreement, to which the EPPO can, under certain conditions, have direct or indirect reading access.

**Martine Fouwels**

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4 Agreement establishing the modalities of cooperation between the European Commission and the European Public Prosecutor's Office (the EPPO), available at: <[https://www.eppo.europa.eu/sites/default/files/2021-09/2021.073\\_Agreement\\_EPPO\\_European\\_Commission\\_Final\\_signed\\_version.pdf](https://www.eppo.europa.eu/sites/default/files/2021-09/2021.073_Agreement_EPPO_European_Commission_Final_signed_version.pdf)> accessed 27 September 2022. See also the summary in eucrim 3/2021, 145.

5 Article 4(2)(g) of Regulation (EU, Euratom) No 2020/2092 (the “Rule of Law Conditionality Regulation”) lists a participating Member State’s

cooperation with the EPPO among the relevant factors for establishing possible rule-of-law breaches. Recital 16 of the same Regulation lists the EPPO’s reports among the sources that the Commission should take into account in its assessment of whether breaches of the principles of the rule of law have occurred. Accordingly, the Commission–EPPO Agreement of 18 June 2021 specifies that the EPPO “may send” to the Commission information on individual or systemic issues that are relevant for the Rule of Law Conditionality Regulation. For examples of such information, see eucrim 1/2022, 16–17 and eucrim 1/2022, 22.

6 The latter is the subject of a separate “Working Arrangement between the European Anti-Fraud Office” (OLAF) and the European Public Prosecutor’s Office (EPPO)” signed on 5 July 2021 pursuant to Article 101 of the EPPO Regulation and Articles 1(4)(a) and 12(g) of the OLAF Regulation.

7 Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, *O.J. L* 248, 18.9.2013, 1–22, as amended by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020, *O.J. L* 437, 28.12.2020, 49–73.

# Every Euro Counts ... and So Does Every Second

## The EPPO and Cross-Border Cooperation in Relation to Seizure and Freezing in the 22 Participating Member States

Nicholas Franssen\*

The European Public Prosecutor’s Office (EPPO), operational since 1 June 2021, has not just been established to bring the perpetrators of EU fraud to justice but also to help recover the criminal profits they have acquired in the process. Thus, its *raison d’être* not only matches the traditional political axiom that crime does not pay but equally serves another goal formulated by European politicians across the board: money spent under the EU budget should not end up in the wrong hands. From a taxpayers’ viewpoint, this understandable ambition has not proved to be self-fulfilling over time, and this is where the EPPO could well take up its role as the ultimate remedy in the EU’s antifraud chain. The risk of major fraud involving EU money particularly came to the fore after adoption of the Recovery and Resilience Facility in 2021, as it encompasses a staggering €800 billion that will undoubtedly attract well-organised fraudsters. By definition, an effective recovery policy requires swift seizure of criminal proceeds at an early stage of the criminal investigation in order for there to be any realistic chance of returning them to the EU budget following a final conviction, which may take time. Swift seizure is particularly challenging in a situation involving several countries, as is usually the case with VAT fraud or other complex fraud schemes. This article examines the possibilities that the EPPO has under Regulation 2017/1939 to undertake cross-border measures relating to seizure and freezing. It concludes that, in the absence of a specific mechanism in the Regulation, some of the issues that may arise in practice could be solved by resorting to existing EU cooperation instruments on seizure and confiscation. However, questions, in particular as to the legal relationship or hierarchy between the Regulation and these other EU instruments will need to be addressed, ideally in the not too distant future and in the context of a fresh look at Art. 31 of the Regulation.

### I. Introduction

The European Public Prosecutor’s Office (EPPO), a relatively new European body that started its operational activities on 1 June 2021, has mainly been set up to address a law enforce-

ment gap, certainly one perceived strongly by the European Commission and OLAF,<sup>1</sup> in relation to the protection of the financial interests of the EU. Members of the current European Commission, such as Vice-President for Values and Transparency, *Věra Jourová*,<sup>2</sup> and Commissioner for Justice, *Didier*

*Reynders*,<sup>3</sup> as well as former Vice-President *Viviane Reding* of the previous Commission,<sup>4</sup> have, on various occasions, highlighted the need for perpetrators of EU fraud to be brought to justice. Moreover, and equally importantly, the principle that every single euro in the EU budget be well spent and respectively received as a contribution to that budget in the first place, is paramount. Its importance was again recently emphasized by Commissioner for Budget and Administration *Johannes Hahn*.<sup>5</sup> The same principle is also supported by the European Parliament.<sup>6</sup> Furthermore, the Commissioners have underlined that if, for some reason, perhaps inherent to the criminogenic nature of the system of EU subsidies,<sup>7</sup> perpetrators were to use these funds for less legitimate purposes, the money involved should then somehow be fully recovered, if need be with the assistance of the EPPO. It goes without saying that this principle equally applies to fraud cases related to other financial interests of the Union, for instance relating to its traditional own resources.<sup>8</sup> Particularly where recovery through administrative means may have proven impossible to achieve, the EPPO could act as an instance of last resort. *Laura Codruța Kövesi*, the European Chief Prosecutor, highlighted the important role the EPPO fulfills in this respect in a recent interview with *Die Presse*.<sup>9</sup> As a matter of fact, the EPPO College has recently adopted a decision to establish the Asset Recovery and Money Laundering Advisory Board in order to underline that an effective and harmonised asset recovery approach is of critical importance to the EPPO.<sup>10</sup> The acute awareness of the need to effectively tackle EU fraud has increased strongly following approval of the new multi-annual financial framework (MFF) 2021–2027 and of the Recovery and Resilience Facility by the European Council in July 2021.<sup>11</sup> The staggering amounts<sup>12</sup> involved would make it naïve if not foolish to do anything other than step up the efforts in this field. Europol,<sup>13</sup> OLAF,<sup>14</sup> and the European Court of Auditors<sup>15</sup> have all publicly drawn attention to the considerable risks of fraud at stake.

According to the EPPO's first annual report covering the first seven months of its operation:<sup>16</sup>

“81 recovery actions took place in 12 of the participating Member States (Italy, Belgium, Germany, Romania, Czechia, Croatia, Finland, Latvia, Luxembourg, Spain, Lithuania, Portugal). In total, the EPPO requested more than €154 million to be seized, and the seizure of more than €147 million was granted. This represents over three times the budget of the EPPO in 2021.”

The annual report does not specify quite how much of the aforementioned amounts were actually related to cross-border investigations but, given the nature of complex EU fraud schemes, particularly VAT fraud, one may very well assume that a considerable percentage is concerned. Again, quoting from the EPPO's annual report on 2021:<sup>17</sup>

[T]he first seven months of operations also amply demonstrated that the EPPO brings a decisive advantage to law enforcement in cross-

border investigations. Without cumbersome mutual legal assistance formalities, organising coordinated searches or arrests across borders has been a matter of weeks, instead of months. Unprecedented access to operational information through its Case Management System allowed the EPPO to establish connections between different investigations (and subsequently merge them), to identify more evidence to be secured and assets to be seized. In the first seven months, European Delegated Prosecutors assigned altogether 290 assisting measures to each other.

Evidently, the idea behind the ambition to ensure that every euro counts closely follows the old adage that crime does not pay,<sup>18</sup> or, perhaps better put from a policy perspective: crime should not pay, which is particularly appropriate in this context, given the fact that the average taxpayer would indeed expect that all money from the EU budget is in fact correctly spent. Whether criminals are actually deterred by an active confiscation and asset recovery policy has yet to be empirically established, though.<sup>19</sup> For many years now, OLAF has been unable to indicate to what extent its financial recommendations to Directorates-General in the Commission, to national authorities, and to other stakeholders have actually led to the money involved being fully recovered. OLAF is still trying to gain a better picture, which begs the question of how effective the recovery efforts are, a concern also expressed by the European Court of Auditors back in 2019.<sup>20</sup> Assuming, though, for the sake of argument, that an effective recovery policy does actually deter criminals, conventional wisdom in the law enforcement community<sup>21</sup> tends to be: the sooner the goods or property of suspects are seized, the more likely that (following their final conviction) the authorities can actually recover the perpetrators' illicit gains.<sup>22</sup> This approach is considered to be preferable to, for example, starting a potentially fruitless post-conviction search, using lengthy and cumbersome mutual legal assistance procedures, in order to locate proceeds of crime in an exotic location perhaps best known for its facilities to launder money or to locate them online in the impenetrable domain of servers in obscure locations. Worse still, all the proceeds of crime may already have been spent by that point in time. In her critical analysis of EU cross-border financial asset recovery policy, *Ariadna Helena Ochnio* therefore rightly points to the importance of securing continuity throughout the entire process preceding actual recovery, which necessarily starts with the timely identification of assets and freezing them so as to avoid their concealment.<sup>23</sup> After all, if carried out properly as part of the investigation before trial and conviction, this will make the actual execution much easier and ultimately more effective.

In this article, I will explore the legal framework for cross-border cooperation in relation to freezing and seizing under the auspices of the EPPO. I will argue that a number of lacunae may give rise to problems in practice and could perhaps best be solved by applying relevant existing EU instruments on cross-border seizure and freezing by analogy. In so doing,

I will also list several issues that need to be addressed by the EU legislator following the evaluation of Regulation 2017/1939 as foreseen under Art. 119 of said Regulation. Although it is slightly tempting to do so, this article will neither endeavour to discuss cross-border cooperation in this field between the EPPO and non-participating Member States or between the EPPO and third countries<sup>24</sup> nor will it deal with confiscation following a conviction, this being a task that lies outside the mandate of the EPPO and is thus left to national authorities.<sup>25</sup>

## II. Legal Framework for Cross-Border Investigations in the EPPO Regulation

Regulation 2017/1939 does not contain a specific provision on the mechanism for cross-border seizing or freezing within the realm of the 22 Member States participating in the EPPO. It does have a more general provision on cross-border cooperation within the EPPO, be it that this provision is closely linked to the previous article in the Regulation on investigation and other measures. That general provision is Art. 31, the first two paragraphs of which read as follows:

### *Article 31 Cross-border investigations*

1. The European Delegated Prosecutors shall act in close cooperation by assisting and regularly consulting each other in cross-border cases. Where a measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor, the latter European Delegated Prosecutor shall decide on the adoption of the necessary measure and assign it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out.
2. The handling European Delegated Prosecutor may assign any measures, which are available to him/her in accordance with Article 30. The justification and adoption of such measures shall be governed by the law of the Member States of the handling European Delegated Prosecutor. Where the handling European Delegated Prosecutor assigns an investigation measure to one or several European Delegated Prosecutors from another Member State, he/she shall at the same time inform his supervising European Prosecutor.

The first sentence of Art. 31(2) refers to Art. 30 of Regulation 2017/1939 and thus creates a point of entry to bring freezing measures under the arrangement of cross-border cooperation within Art. 31 of the Regulation:

### *Article 30 Investigation measures and other measures*

1. At least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least 4 years of imprisonment, Member States shall ensure that the European Delegated Prosecutors are entitled to order or request the following investigation measures: (...)
  - (d) freeze instrumentalities or proceeds of crime, including assets, that are expected to be subject to confiscation by the trial court, where there is reason to believe that the owner, possessor or controller of those instrumentalities or proceeds will seek to frustrate the judgement ordering confiscation.

Interestingly, Art. 30(1)(d) does not explicitly mention seizure as one of the measures European Delegated Prosecutors are authorised to order or request, but the author assumes that, because seizure is a measure very similar in nature to freezing, this would imply that it falls equally, albeit implicitly, under the scope of this article. To illustrate this point, reference may be made here to Art. 2(f) of the 2000 UN Palermo Convention Against Transnational Organized Crime, which states:

“Freezing” or “seizure” shall mean temporarily prohibiting the transfer, conversion, disposition or movement of property or temporarily assuming custody or control of property on the basis of an order issued by a court or other competent authority[.]<sup>26</sup>

Similarly, and slightly closer to home, Art. 2(5) of Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU, stipulates:

“freezing” means the temporary prohibition of the transfer, destruction, conversion, disposal of movement of property or temporarily assuming custody or control of property[.]<sup>27</sup>

Still, even if a very strict reading of Art. 30(1)(d) of Regulation 2017/1939 were to imply that seizure measures do not technically fall within the scope of this provision, there would be a safety net under Art. 30(4), according to which European Delegated Prosecutors shall be entitled to request or order any other measures in their Member State that are available to prosecutors under national law in similar cases. Even though the meaning of the phrase “in their Member State” in Art. 30(4) is a bit ambivalent, I would argue that the aforementioned link to Art. 31 nevertheless allows a handling European Delegated Prosecutor to assign a seizure measure to an assisting European Delegated Prosecutor in another Member State if he/she is allowed to do so in his/her own Member State. This assumption is underpinned by the fact that Art. 13(1) equates European Delegated Prosecutors to national prosecutors in the sense that they have the same powers and he/she could do so as a national prosecutor anyway. In any event, Art. 31(2) encompasses all measures in Art. 30, including those in paragraph 4.

Art. 31(3) of Regulation 2017/1939 lays down the principle that, as a rule, the assisting European Delegated Prosecutor shall obtain judicial authorisation for a measure assigned to him/her if it is required under the law of the Member State of the assisting European Delegated Prosecutor and in accordance with that law. The pertinent question as to quite how wide, or alternatively, marginal the role of the judge in the Member State of the assisting European Delegated Prosecutor should actually be in this situation is the subject of the very first preliminary ruling question referred to the European Court of Justice on an EPPO matter in an Austrian case.<sup>28</sup> If the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation but the law of the Member State of the handling European Delegated

Prosecutor does, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment. Significantly, in this respect, recital 72 of Regulation 2017/1939 states that where judicial authorisation is required for such a measure, it should be clearly specified in which Member State the authorisation should be obtained; in any case, there should be only one authorisation.

Art. 31(4) of Regulation 2017/1939 stipulates that the assisting European Delegated Prosecutor shall undertake the measure assigned to him by the handling European Delegated Prosecutor unless he/she considers one of the situations mentioned in Art. 31(5) to apply:

- (a) the assignment is incomplete or contains a manifest relevant error;
- (b) the measure cannot be undertaken within the time limit set out in the assignment for justified and objective reasons;
- (c) an alternative but less intrusive measure would achieve the same results as the measure assigned;
- (d) the assigned measure does not exist or would not be available in a similar domestic case under the law of his/her Member State.

In these situations, the assisting European Delegated Prosecutor shall inform his/her supervising European Prosecutor and consult with the handling European Delegated Prosecutor in order to resolve the matter bilaterally.

Art. 31(7) and Art. 31(8) foresee a role for the Permanent Chamber if the European Delegated Prosecutors involved cannot resolve the matter within seven working days and the handling European Delegated Prosecutor maintains the assignment. The same applies if the assigned measure is not undertaken within the time limit set out in the assignment or within a reasonable time.

Lastly, mention must be made of the Guidelines on the application of Art. 31 of Regulation 2017/1939 adopted by the EPPO College on 26 January 2022.<sup>29</sup> The College notes, first of all, that freezing instrumentalities and proceeds of crime is not an investigation measure and is not aimed at gathering evidence. Instead, it is a tool to recover ill-gotten assets or their equivalent value and has nothing to do with an “investigation measure”. According to the College, it consequently falls under the notion of “other measures” from the title of Art. 30.<sup>30</sup> The Guidelines of the College further state:

In any case, *de lege lata*, the EPPO Regulation includes the order for freezing proceeds of crime in Article 31. Therefore, as a rule, the handling EDP should assign the measure of obtaining a freezing order to the assisting EDP in the participating Member State where the asset is located, and the latter should request the competent authority of his/her Member State to issue the order.<sup>31</sup>

Whether the latter excludes the possibility for the assisting European Delegated Prosecutor (or perhaps even the handling European Delegated Prosecutor) to issue the freezing order

himself/herself, which would seem far more efficient, and, if so, to what extent relevant EU law on freezing orders outside the EPPO Regulation will subsequently come into play if the competent authority issues it instead, is not immediately clear in the said Guidelines. The term “competent authority” in this context would *prima facie* appear to refer to the judicial authority in the Member State of the assisting European Delegated Prosecutor competent to either order or judicially authorise the freezing order, depending on the applicable national legislation.

As an interim conclusion, it follows from the above analysis of Arts. 30 and 31 of Regulation 2017/1939 that the EPPO’s legal framework itself does not contain very specific provisions on seizing and freezing assets in the situation of cross-border cooperation. The EPPO College’s Guidelines on the application of Art. 31 do offer some guidance but leave equally as many practical aspects untouched. This raises the question as to whether inspiration may perhaps be drawn from existing EU legislation, including that in the field of mutual recognition, in dealing with these specific issues.

### III. EU Legal Framework on Investigation Measures and Confiscation

Before embarking on the thinking exercise announced in the previous paragraph, we should tackle the preliminary question of whether Regulation 2017/1939 would allow the use of existing EU legal cooperation instruments, including those based on the principle of mutual recognition, in the first place. The affirmative answer may be found in Art. 31(6) of the Regulation. It permits the use of such measures, be it as an exception to the general arrangement for cross-border cooperation in Art. 31(1)–(5) and especially so given their inherently cross-border nature:

If the assigned measure does not exist in a purely domestic situation, but would be available in a cross-border situation covered by legal instruments on mutual recognition or cross-border cooperation, the European Delegated Prosecutors concerned may, in agreement with the supervising European Prosecutors concerned, have recourse to such instruments.

The exceptional nature of the use of instruments on mutual recognition or cross-border cooperation is underlined by recital 73 as follows:

The possibility foreseen in this Regulation to have recourse to legal instruments on mutual recognition or cross-border cooperation should not replace the specific rules on cross-border investigations under this Regulation. It should rather supplement them to ensure that, where a measure is necessary in a cross-border investigation but is not available in national law for a purely domestic situation, it can be used in accordance with national law implementing the relevant instrument, when conducting the investigation or prosecution.

The existing EU legal instruments that are most relevant to further exploring the argument in relation to freezing and seizing under the auspices of the EPPO would be the following:

- Directive 2014/42 of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union;<sup>32</sup>
- Regulation 2018/1805 of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders.<sup>33</sup>

In the next section, I will look into a number of legal and practical challenges in conjunction with cross-border cooperation in relation to seizure and freezing within the EPPO, which are not specifically covered by Regulation 2017/1939 but which may be resolved by resorting to the existing, aforementioned EU legal instruments. I have interpreted the term “measure” in Art. 31(6) in a broad sense, i.e., not just the measure as such but also the relevant aspects of the legal instrument it is based on.

#### IV. Challenges to Cross-Border Cooperation in Relation to Seizure and Freezing in the EPPO

##### 1. Practical challenges

In the following, I list several practical points where the EU legal cooperation instruments on freezing and confiscation mentioned in the previous section could, within the framework of Art. 31(6) of Regulation 2017/1939 (as set out above), complement the EPPO Regulation in order to optimize the seizure and freezing of illicit proceeds resulting from EU fraud.

- Directive 2014/42 foresees pre-trial freezing of property with a view to possible subsequent confiscation, including through urgent action when necessary to preserve property;<sup>34</sup>
- Directive 2014/42 also contains a provision to ensure adequate management of frozen property with a view to possible subsequent confiscation,<sup>35</sup> including the possibility to sell or transfer property where necessary.<sup>36</sup> In addition, Regulation 2018/1805 contains a provision on management of frozen property laying down that this shall be governed by the law of the executing state.<sup>37</sup> Furthermore, it contains an obligation to prevent depreciation in value of the frozen property and determines that frozen property and money obtained after being sold shall remain in the executing Member State until a confiscation certificate has been transmitted and the confiscation order has been executed.<sup>38</sup> On a side note, for the purpose of the EPPO Regulation, the term “executing state” should then, by analogy, be interpreted as the Member State of the assisting European Delegated Prosecutor.

- Regulation 2018/1805 contains an important provision on the costs involved.<sup>39</sup> One has to bear in mind that the costs of managing, maintaining, and protecting frozen property over a longer period of time can become very high. The main principle laid down in this provision is that each Member State shall bear its own costs resulting from the application of the Regulation (without prejudice to the provisions on the disposal of confiscated property in Art. 28). The provision foresees a possibility to share the costs if these are large or exceptional.<sup>40</sup>
- If these cost rules in Regulation 2018/1805 were to be applied in line with Art. 31(6) of the EPPO Regulation, an interesting question would then concern the tension associated with the provisions on the costs of operational expenditure in the EPPO Regulation itself.<sup>41</sup> Intriguingly, in its Guidelines of 26 January 2022,<sup>42</sup> the College seems to have ruled that, as a general principle, the costs in relation to the mechanism under Art. 31 will be covered by the EPPO anyway. Point 28 of the Guidelines states: “As the system established by Art. 31 of the EPPO Regulation is entirely new, those expenditures directly linked to the application of the assignment mechanism, although essentially of operational nature, should, in light of recital 113, be borne by the EPPO because they are caused only due to the EPPO having assumed responsibilities for investigation and prosecution.” At the same time, however, Point 30 of the Guidelines lays down that, in accordance with Art. 91(5) of the EPPO Regulation and without prejudice to Art. 91(6), the Member States shall remain responsible for the costs they would have incurred anyway if the measure were to have been executed under the mutual recognition or mutual legal assistance regime, such as costs incurred by any national authority during the execution of a measure on the territory of that Member State. How Points 28 and 30 are to be reconciled in practice may therefore require further clarification.
- Regulation 2018/1805 also contains a provision on reimbursement that covers the situation when the executing Member State is liable under its law for damage to an affected person resulting from the execution of a freezing order. The issuing Member State shall reimburse the executing Member State for any damages paid to the affected person unless they agree between themselves on the amount to be reimbursed if (part of) the damage was exclusively due to the conduct of the executing Member State.<sup>43</sup> As we have seen in the previous section in relation to costs, the EPPO Regulation itself has a specific provision on compensation for damage as a result of non-contractual liability.<sup>44</sup> Leaving aside the need to equate the assisting European Delegated Prosecutor with an executing Member State and the handling one with an issuing Member State as a condition for applying Regulation 2018/1805 in the first place, I tend to



think that the specific provision on non-contractual liability in the EPPO Regulation should overrule the arrangement in Regulation 2018/1805, as all European Delegated Prosecutors involved are employed by one and the same organisation in the end, namely the EPPO. Be that as it may, the potential tension between the two provisions might need to be clarified. This will need to be done at the very latest once the evaluation foreseen in Art. 119 of the Regulation is underway or as a follow-up to it.

## 2. Legal challenges

In addition to the aforementioned overview of mostly practical issues, I would like to raise two other points of a more legal nature that affect the legal relationship or hierarchy between the EPPO Regulation and the two EU legal cooperation instruments discussed here:

The first point concerns the application of grounds for non-recognition and non-execution of freezing orders. Regulation 2018/1805 has specific provisions on grounds for refusal.<sup>45</sup> As mentioned in section II above, Art. 31(5) mentions a limited number of situations in which the assisting European Delegated Prosecutor can inform the supervising European Prosecutor that it is not possible to undertake the assigned measure, which could eventually lead to involvement of the Permanent Chamber in order to find a solution. Here again, this potentially creates a tension between, the relevant provisions in the EPPO Regulation on the one hand, and the ones in the Regulation on freezing and confiscation orders on the other hand. This tension may well be used by criminal lawyers seeking to exploit unclarity caused by the wording of the EPPO Regulation. Given the fact that the mechanism for cross-border cooperation in the EPPO Regulation seeks to further develop the EU instruments on mutual cooperation, it would be beneficial to the efficiency of the mechanism if only the situations mentioned in Art. 31(5) pose an obstacle in practice. Nevertheless, without an explicit provision saying so, it may not be quite that simple to avoid the refusal grounds in Regulation 2018/1805 being invoked in court, particularly by lawyers representing the persons concerned.

The second point concerns the issue of judicial control and review. The two EU legal cooperation instruments on freezing and confiscation mentioned above contain provisions on (effective) legal remedies.<sup>46</sup> However, so does the EPPO Regulation. One can assume that the EPPO Regulation sets aside the provisions on legal remedies in the said instruments, since it can be considered as a *lex posterior* or *lex specialis*, respectively. Nonetheless, the EPPO Regulation remains silent on this relationship. The specific mechanism for judicial

authorisation in the context of cross-border investigations in Art. 31 of the EPPO Regulation has already been described in section II. The more general provision on judicial review for EPPO cases in the Member State of the handling European Delegated Prosecutor can be found in Art. 42 of Regulation 2017/1939. It stipulates that procedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties shall be subject to review by the competent national courts in accordance with the requirements and procedures laid down by national law. The same applies to failures of the EPPO to adopt procedural acts that are intended to produce legal effects vis-à-vis third parties and that it was legally required to adopt under this Regulation.<sup>47</sup> National courts therefore have a primary role during criminal proceedings at the national level, while the European Court of Justice has a more limited one.<sup>48</sup> That said, the European Court of Justice, in turn, evidently does have a vital role to play in ensuring a uniform interpretation of the applicable rules in the EPPO Regulation.

Against this backdrop, the person subject to a measure assigned in relation to seizure and freezing, or indeed any other measure under Art. 31 of the EPPO Regulation, is evidently entitled to exercise all the rights he/she has under the national law of the Member State(s) concerned. In my view, however, the court in the Member State of the assisting European Delegated Prosecutor should not (again) examine the substantive aspects of the assigned measure if judicial authorisation is obliged under the law of that Member State. The judicial control in the Member State of the assisting European Delegated Prosecutor should therefore ideally be limited to checking whether the formal requirements of its national law regarding execution of the measure are met. In so doing, the court in the Member State of the assisting European Delegated Prosecutor must rely on the admissibility of the measure and may rely on the adoption of such a measure in the Member State of the handling European Delegated Prosecutor to comply with the requirements laid down in Union law, in particular Art. 47 of the Charter. After all, Art. 31(2) of the EPPO Regulation specifically states: “The justification and adoption of such measures shall be governed by the law of the Member States of the handling European Delegated Prosecutor.” The judgment of the European Court of Justice in Case C-281/22<sup>49</sup> will eventually be an indication as to whether that view is legally tenable or not. If the Court were to decide otherwise, cross-border cooperation under Art. 31 runs the risk of becoming much less efficient and much slower, and that may make quick cross-border seizure and freezing of illicit gains resulting from EU fraud far more difficult in practice – and the EPPO’s task of recovering that money quite daunting. To be very clear, the risk of less effective cross-border cooperation will arise, even if the preliminary assumption that Art. 31(6) would allow for the use of existing EU instruments on seizure and freezing is

ultimately upheld. However, if the application of these existing EU instruments were in itself considered to be impossible under Art. 31(6) from the very outset, the challenges for the EPPO in this field would likely become even greater. This direct consequence of the absence of a specific mechanism for cross-border seizure and freezing in the EPPO Regulation would then become very tangible. Even so, such an interpretation of Art. 31(6) would arguably also go against the trend in the development of judicial cooperation based on mutual recognition, whereby direct acceptance of a decision issued by a judicial authority by the executing authority has become the standard rule.

## V. Conclusion

The EPPO has not only been created to bring the perpetrators of EU fraud to justice but also, equally importantly, to help recover the criminal profits thus acquired. This will enable proper spending of money within the framework of the EU budget and ensure the availability of the Union's own resources respectively. Against this background, it is vital to seize and freeze the money or property involved as early as possible during a criminal investigation undertaken by the EPPO. This is absolutely crucial to achieve the second political ambition, which would otherwise remain mere rhetorical wishful thinking. Particularly in cross-border investigations, speed and efficient cooperation among European Delegated Prosecutors themselves as well as between European Delegated Prosecutors and competent national authorities in the Member States concerned are therefore of essence. The EPPO Regulation has conveniently brought freezing and, as argued in section II, seizure measures under the new mechanism for cross-border cooperation in Art. 31 via its link with Art. 30. The wording of the Regulation itself as well as the College's Guidelines on Art. 31, however, leave various practical aspects of this aspect of the EPPO's work open.

The lacunae that result from this approach taken by the EU legislator may well be filled by resorting to (elements of) existing EU instruments, including one on mutual recognition,

which specifically address some of the practical aspects related to seizing and freezing, such as the management of frozen property. This would be possible, in theory, based on a broad interpretation of Art. 31(6) of the EPPO Regulation: if generally condoned, this interpretation would allow for the use of said instruments as an exception to the main rule in Art. 31(1) to 31(5). In so doing, however, it would still be necessary to strike a fine balance between the general mechanism for cross-border cooperation foreseen in Art. 31 and the specific provisions in the said EU instruments. This particularly means that the latter should only be applied as measures to supplement the EPPO Regulation where this is deemed useful. Their use ideally should not generate additional obstacles for effective cross-border cooperation within the EPPO regime, e.g., by opening the door to additional refusal grounds or adding extra layers to the proceedings. Indeed, an entirely different reading of Regulation 2017/1939 in combination with these instruments would imply that cross-border cooperation within the EPPO would be rendered more difficult and more time-consuming rather than easier, which is difficult to defend in light of the EPPO's *raison d'être* and ambitions. For this very reason, however, the exact legal relationship between the EPPO Regulation and the existing EU instruments relevant to cross-border freezing and seizing ought to be urgently reviewed – at the very least as an aspect of the evaluation foreseen under Art. 119 of the EPPO Regulation. It may very well entail refinement of the EPPO Regulation here and there in the process.

By contrast, if, in the end, Art. 31(6) were to somehow prohibit the use of existing EU instruments in relation to cross-border freezing and seizure, there is a genuine risk that the EPPO would face more practical obstacles in its efforts to recover EU money in the 22 participating Member States than it would if it could resort to these existing instruments. It would then be ironic that it has that very possibility in relation to non-participating Member States, based on the notifications made by participating Member States under Art. 105(3) of the EPPO Regulation.<sup>50</sup> Such an outcome would be more than unsatisfactory and effectively hamper the objective of recovering EU money that has found a destination other than what it was originally destined for.

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1 See, *inter alia*, the Explanatory Memorandum to the 2013 Commission proposal for the EPPO, COM(2013) 534 final, p. 2 and p. 51.

2 See Commission press release IP/21/2591 of 26 May 2021 on the eve of the operational start of the EPPO in which Věra Jourová is quoted as having said "From 1 June onwards, European prosecutors, under the strong leadership of Laura Kövesi, will clamp down on criminals and make sure no euro is wasted on corruption or fraud".

3 In his speech in Luxembourg on the occasion of the first anniversary of the EPPO, Commissioner for Justice Didier Reynders put it like this: "You

[the EPPO] are helping to get this money [an estimated damage to the EU budget in 2021 of 5.4 billion euro]” and “The work of the EPPO, to ensure no single euro is lost to fraud, is more crucial than we could have ever imagined”.

4 See Communication from the Commission, “Better protection of the Union’s financial interests: Setting up the European Public Prosecutor’s Office and reforming Eurojust”, COM (2013) 532 final, p. 3: “The Union and the Member States have a duty to ‘counter fraud and any other illegal activities affecting the financial interests of the Union’ and ‘afford effective protection’ to those interests. This duty is particularly relevant in times of fiscal consolidation where every euro counts”. See also Commission press release IP/13/709 of 17 July 2013 in which former Vice-President *Viviane Reding* is quoted as saying “When it comes to taxpayers’ money, every euro counts – even more so in today’s economic climate”.

5 See Commission press release 11/2022 on the 2021 PIF report: *reinforcing the protection of EU’s finances*: “The amounts at stake and the different players involved require strong cooperation so that together we ensure that EU money reaches its intended beneficiaries.”

6 See European Parliament resolution of 7 July 2022 on the protection of the European Union’s financial interests – combating fraud – annual report 2020 (2021/2234(INI)), point 83: “[...] reminds the Commission and the Council that every euro spent on monitoring and investigation returns to the EU budget.”

7 See Durdević, who is quoted in the impact assessment of the 2013 Commission proposal for the EPPO, SWD(2013) 274, p. 86: “The EU budget can be characterised as a subsidy budget, and according to criminological investigations, subsidies are a highly criminogenic financial instrument and very subject to criminal behaviour’ and “apart from the criminogenicity of subsidies, the European system of managing and allocating subsidies has a criminogenic effect’ due to the vast and complicated managing and control system of the EU funds that comprehends the EU level and authorities in the MSs at national, regional and local level and is complicated by numerous specific EU and national regulations”.

8 See Arts. 3 and 4 of Directive 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law, *O.J. L* 198, 28.7.2017, 29.

9 “Wir holen das Geld zurück, das den EU-Finanzministern durch die Lappen geht”, *Die Presse*, 2 September 2022.

10 See College Decision 042/2022 of 28 September 2022.

11 See point 24 of the conclusions of the special meeting of the European Council on 17–21 July 2021 in Doc. EUCO 10/20: “The Commission is invited to present further measures to protect the EU budget and Next Generation EU against fraud and irregularities. This will include measures to ensure the collection and comparability of information on the final beneficiaries of EU funding for the purposes of control and audit to be included in the relevant basic acts. Combatting fraud requires a strong involvement of the European Court of Auditors, OLAF, Eurojust, Europol and, where relevant, EPPO, as well as of the Member States’ competent authorities”.

12 Together, the MFF 2021–2027 and EU NextGeneration add up to more than €1,800 billion (in 2018 prices).

13 See Europol, European Union Serious Organised Crime Threat Assessment (SOCTA) 2021, p. 96.

14 “Fraud chief warns of ‘big risk’ in policing 800bn EU recovery funds”, *Financial Times*, 21 June 2021.

15 “European Auditors Warn of High Fraud Risk related to EU Recovery Fund”, *Novinite.com*, 2 April 2021. See also ECA Special Report 21/2022 of 8 September 2022 *The Commission’s assessment of national recovery and resilience plans: overall appropriate but implementation risks remain*, available online at <[https://www.eca.europa.eu/Lists/ECADocuments/SR22\\_21/SR\\_NRRPs\\_EN.pdf](https://www.eca.europa.eu/Lists/ECADocuments/SR22_21/SR_NRRPs_EN.pdf)>, accessed 6 October 2022, p. 6.

16 See EPPO, 2021 Annual Report, available online at: <[https://www.epppo.europa.eu/sites/default/files/2022-03/EPPO\\_Annual\\_Report\\_2021.pdf](https://www.epppo.europa.eu/sites/default/files/2022-03/EPPO_Annual_Report_2021.pdf)>, accessed 4 October 2022, p. 62.

17 *Ibid.*, p. 10.

18 See, e.g., Report from the Commission to the European Parliament and the Council, “Asset recovery and confiscation: Ensuring that crime does

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not pay”, COM(2020) 217 final and the recent Commission proposal for a directive on asset recovery and confiscation, COM(2022) 245 final. Art. 28 of that proposal specifically deals with cooperation between asset recovery offices and the EPPO.

19 See C. Atkinson, S. Mackenzie and N. Hamilton-Smith, *What works: crime reduction systematic review series – No 9. A systematic review of the effectiveness of asset-focussed intervention against organised crime*, University of Glasgow, April 2017, available online at: <[https://dspace.stir.ac.uk/bitstream/1893/26091/1/Organised\\_crime\\_SR.pdf](https://dspace.stir.ac.uk/bitstream/1893/26091/1/Organised_crime_SR.pdf)>, accessed 4 October 2022. See also the 2020 Europol report *Enterprising criminals Europe’s fight against the global networks of financial and economic crime*, available online at: <<https://www.europol.europa.eu/publications-events/publications/enterprising-criminals-%E2%80%93-europe%E2%80%99s-fight-against-global-networks-of-financial-and-economic-crime>>, accessed 6 October 2022, p. 19: “Today, more than 98% of criminal assets are still not recovered.”

20 See the OLAF report 2021, p. 45 and the ECA’s Special Report 1/2019 entitled *Fighting fraud in EU spending: action needed*, pp. 42–49.

21 See, e.g., FATF, *International standards on combating money laundering and the financing of terrorism and proliferation*, recommendation 38: “Countries should ensure that they have the authority to take expeditious action in response to requests by foreign countries to identify, freeze, seize and confiscate property laundered; [...]” and the 2021 OECD publication *Fighting tax crime – The Ten Global Principles*, second edition, point 75: “Speed can be essential when it comes to freezing and seizing assets, as criminals can quickly transfer funds out of the agencies’ reach or dispose of property if they become aware that the criminal investigation agencies are investigating them. The legal authority and operational capacity to freeze assets rapidly in urgent cases is relevant, for example, where the loss of property is imminent. Agencies should generally be able to execute rapid freezing orders within 24 and 48 hours.”

22 See Art. 38 of Regulation 2017/1939, regarding the disposition of confiscated assets after involvement of the EPPO.

23 A.H. Ochnio, “The Tangled Path from Identifying Financial Assets to Cross-Border Confiscation. Deficiencies in EU Asset Recovery Policy”, (2021) 29 *European Journal of Crime, Criminal Law and Criminal Justice*, pp. 218–240.

24 See, more generally, on this topic N. Franssen, “The Future Judicial Cooperation between the EPPO and Non-Participating Member States” (2018) 9 *NJECL*, 291; id, “Judicial Cooperation between the EPPO and Third Countries – Chances and Challenges”, (2019) *eu crim*, 198–205.

25 See Art. 4 of Regulation 2017/1939 that defines the EPPO’s tasks as being “responsible for investigating, prosecuting and bringing to judgment”, in other words not for the execution of any sentence.

26 The 2021 OECD publication *Fighting tax crime – The Ten Global Principles*, second edition further explains in point 68 that “Freezing or seizing of assets involves “temporarily prohibiting the transfer, conversion, disposition or movement of assets or temporarily assuming custody or control of assets on the basis of an order issued by a court or other competent authority” [...]. Freezing is an action that temporarily suspends rights over the asset and for example, may apply to bank accounts which are fungible. Seizure is an action to temporarily restrain an asset or put it into the custody of the government and may apply to physical assets such as a vehicle.

Generally, these measures are used to temporarily prevent the movement of assets pending the outcome of a case.”

27 In addition, Art. 2(1) of Regulation 2018/1805 on the mutual recognition of freezing orders and confiscation orders defines a freezing order as “a decision issued or validated by an issuing authority in order to prevent the destruction, transformation, removal, transfer or disposal of property with a view to the confiscation thereof.” See also Ochnio, *op. cit.* (n. 23), pp. 229–230.

28 Cf. Case C-281/22, brought forward by the Oberlandesgericht Wien. On this, see T. Wahl, “First EPPO Case before CJEU”, (2022) *eu crim*, 96.

29 Available at: <[https://www.eppo.europa.eu/sites/default/files/2022-02/2022.006\\_Decision\\_adopting\\_Guidelines\\_on\\_the\\_application\\_of\\_article\\_31\\_of\\_the\\_EPPO\\_Regulation.pdf](https://www.eppo.europa.eu/sites/default/files/2022-02/2022.006_Decision_adopting_Guidelines_on_the_application_of_article_31_of_the_EPPO_Regulation.pdf)> accessed 4 October 2022>.

30 See point 24 of the Guidelines on the application of Art. 31.

31 See point 25 of the Guidelines on the application of Art. 31.

32 *O.J. L* 127, 29.4.2014, 39. Note: Regarding the scope of the Directive in the “PIF sector”, its Art. 3(a) only mentions the EU Convention on the fight against corruption involving officials, but Art. 10 of the later Directive 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law refers to Directive 2014/42.

33 *O.J. L* 303, 28.11.2018, 1.

34 See Art. 7 of Directive 2014/42.

35 On the importance of efficient management of frozen and seized goods, see the 2012 FATF publication, *Best practices on confiscation (recommendations 4 and 38) and a framework for ongoing work on asset recovery*, pp. 9–10.

36 See Art. 10 of Directive 2014/42.

37 See Art. 28(1) of Regulation 2018/1805.

38 See Art. 28(2) and (3) of Regulation 2018/1805.

39 See Art. 31(1) of Regulation 2018/1805. Cf. also Arts. 19 and 20 of the recent Commission proposal on asset recovery and confiscation, *op. cit.* (n. 19), which deal with the costs of management and maintenance of frozen property.

40 See Art. 31(2) of Regulation 2018/1805.

41 See Art. 91(5) in combination with recital 113 of Regulation 2017/1939.

42 *Op. cit.* (n. 29).

43 See Art. 34 of Regulation 2018/1805.

44 See Art. 113(3) and (4) of Regulation 2017/139.

45 See Art. 8 of Regulation 2018/1805.

46 See Art. 8 of Directive 2014/42 and Art. 33 of Regulation 2018/1805.

47 See Art. 42(1).

48 See Art. 42(2)–(8).

49 *Op. cit.* (n. 28).

50 See, on this, Council document 10644/5/21 REV 5 EPPO 33 et al. of 10 October 2022.

# The Players in the Protection of the EU’s Financial Interests

## European Cooperation between Authorities Conducting Administrative Investigations and those Conducting Criminal Investigations

Mirjana Jurić\*

Cooperation between authorities conducting administrative investigations and those conducting criminal investigations at both the EU and Member State levels is essential to ensure a high level of protection in view of the EU’s financial interests. However, the legal framework governing the role and competences of individual authorities at the EU level seems much clearer than the corresponding national legal frameworks of the Member States. Indeed, at the Member State level, the legal frameworks for conducting investigations, whether administrative or criminal, significantly differ from Member State to Member State. Likewise, there is no clear legal framework at the EU level that defines and sets standards regarding the mandatory control mechanisms that must be established at the level of the entire system for the protection of the EU’s financial interests in the Member States. This also applies in relation to the players that need to be involved in the protection of the EU’s financial interests. The article tackles the issue of the necessity to harmonise both criminal and administrative legislation at the level of Member States as well as the need for a clear definition of which players should be involved in the protection of the EU budget.

### I. Introductory Remarks

Today, when the EU Member States (and the whole world) are faced with the challenges of the COVID-19 pandemic, natural disasters, and war conflicts, an unprecedented amount

of money is provided to overcome these crises. This creates opportunities to commit serious irregularities, frauds and corruption. It is therefore, more than ever before, important to clearly define sustainable and efficient control framework and the key players involved in the protection of the EU’s financial interests

On 17 December 2020, following the European Parliament's consent, the Council adopted the Regulation laying down the EU's multiannual financial framework (MFF) for 2021–2027.<sup>1</sup> The Regulation provides for a long-term EU budget of €1.074 trillion (in 2018 prices) for the 27 EU Member States.<sup>2</sup> Together with the NextGenerationEU recovery instrument of €750 billion (in 2018 prices),<sup>3</sup> the EU will provide an unprecedented €1.8 trillion of funding over the coming years to support recovery from the COVID-19 pandemic and implementation of the EU's long-term priorities across different policy areas. For the European Commission, a major priority is to protect the taxpayers' money and to ensure that every Euro from the EU budget is spent in line with the rules and generates added value. In this sense, the Commission works closely with the Member States and other respective EU institutions towards these objectives.

Against this background, the present article will illustrate which key players (both those that conduct administrative investigations and those that conduct criminal investigations) are involved in the protection of the EU's financial interests and which control mechanisms are available to protect them, both at the EU and national levels. By way of a preliminary remark, we should bear in mind a number of important aspects: First, the players involved in the protection of the EU's financial interests handle both EU revenue and expenditure; the protection of the EU's financial interests is equally ensured within the legal framework for administrative proceedings and that for criminal proceedings. Second, the legal frameworks for conducting investigations, whether administrative or criminal, are significantly different from Member State to Member State, which often affects the efficiency of investigations and cooperation between the states. Third, the legal framework governing the role and competences of individual authorities at the EU level, which prescribes their mandate, the manner of proceedings, and obligations for mutual cooperation, communication, and the exchange of information seems much clearer than the corresponding national legal frameworks of the Member States. This is especially true when it comes to the recognition and understanding of the functioning of the legal framework for administrative proceedings.

## II. Setting the Scene I: Cooperation between Authorities Conducting Administrative Investigations and those Conducting Criminal Investigations at the EU Level

At the EU level, several EU bodies are involved in the protection of the EU's financial interests. This includes the European Anti-Fraud Office (OLAF), the EU Agency for Criminal Justice Cooperation (Eurojust), the EU Agency for Law

Enforcement Cooperation (Europol), the European Court of Auditors (ECA), the European Court of Justice (CJEU), and the recently created European Public Prosecutor's Office (EPPO). Many experts believed that the EPPO was the missing link in strengthening the fight against fraud and corruption in the EU, especially due to OLAF's limited powers. At the heart of the protection of the EU's financial interests are obviously OLAF and the EPPO. However, OLAF conducts administrative investigations at the EU level, while the EPPO conducts criminal investigations and prosecutes criminal offences falling under its competence before the national courts. It is important to emphasise that OLAF has maintained its operational independence, even in relation to the EPPO, and its field of operation is larger than that of the EPPO, because its competence extends to the entire EU, whereas the EPPO has only competence within the participating Member States.

The EPPO's and OLAF's fields of operation are nonetheless closely linked. The common aim of both bodies is to increase fraud detection at the EU level, to avoid duplication of work, to protect the integrity and efficiency of criminal investigations, and to maximise the recovery of damages to the EU budget. In addition, both bodies are combining their investigative and other capacities to improve the protection of the EU's financial interests. In this context, Art. 12e(3) of the amended OLAF Regulation<sup>4</sup> is worthy of mention: it obliges OLAF to observe the applicable procedural safeguards of the EPPO Regulation<sup>5</sup> if OLAF performs supporting measures requested by the EPPO. This is an important step forward in ensuring the admissibility of evidence as well as fundamental rights and procedural guarantees.

Consequently, the working arrangement between OLAF and the EPPO<sup>6</sup> is of utmost importance for their relationship. It specifically sets out how the two bodies will cooperate, exchange information, report to each other, transfer potential cases, and support each other in their investigations. It also covers the way in which OLAF will conduct complementary investigations, if needed. Last but not least, it ensures that the two bodies regularly share information on fraud trends, carry out joint training exercises, and carry out staff exchange programmes.

Currently, it seems that the cooperation between OLAF and the EPPO is proceeding smoothly and that all obstacles, if any, are being resolved without major problems. It is evident from OLAF's activity report for 2021 that OLAF's investigators provided support to the EPPO by serving as expert witnesses in complex cases, and they provided forensic analysis of and substantial documentation on relevant EU projects and programmes.<sup>7</sup>

In addition, in its first annual report,<sup>8</sup> the EPPO gives an account of the initial seven months of its operational activity; it contains information on cooperation with other institutions, bodies, offices and agencies of the EU, including OLAF. Accordingly, the EPPO received and processed 2832 reports related to various cases of economic fraud in the EU and opened 576 investigations, 515 of which were still active on the last day of 2021. In these first seven months of the EPPO's operational activity, OLAF contributed considerably to the opening of criminal investigations conducted by the EPPO: some 85 criminal investigations were opened by the EPPO based on OLAF's investigative reporting.

In Croatia, the EPPO is currently conducting eight active investigations in which the estimated damage is €30.6 million and €270,000 have been seized so far. During complementary investigations and in close cooperation with the EPPO, OLAF conducted two on-the-spot checks combined with digital forensic operations in Croatia. In November 2021, four suspects were arrested at the request of the EPPO.

### III. Setting the Scene II: Cooperation between Authorities Conducting Administrative Investigations and those Conducting Criminal Investigations at the Level of the EU Member States

When it comes to the players involved in the protection of the EU's financial interests at the level of the Member States, there are some inconsistencies compared to the players at the EU level.

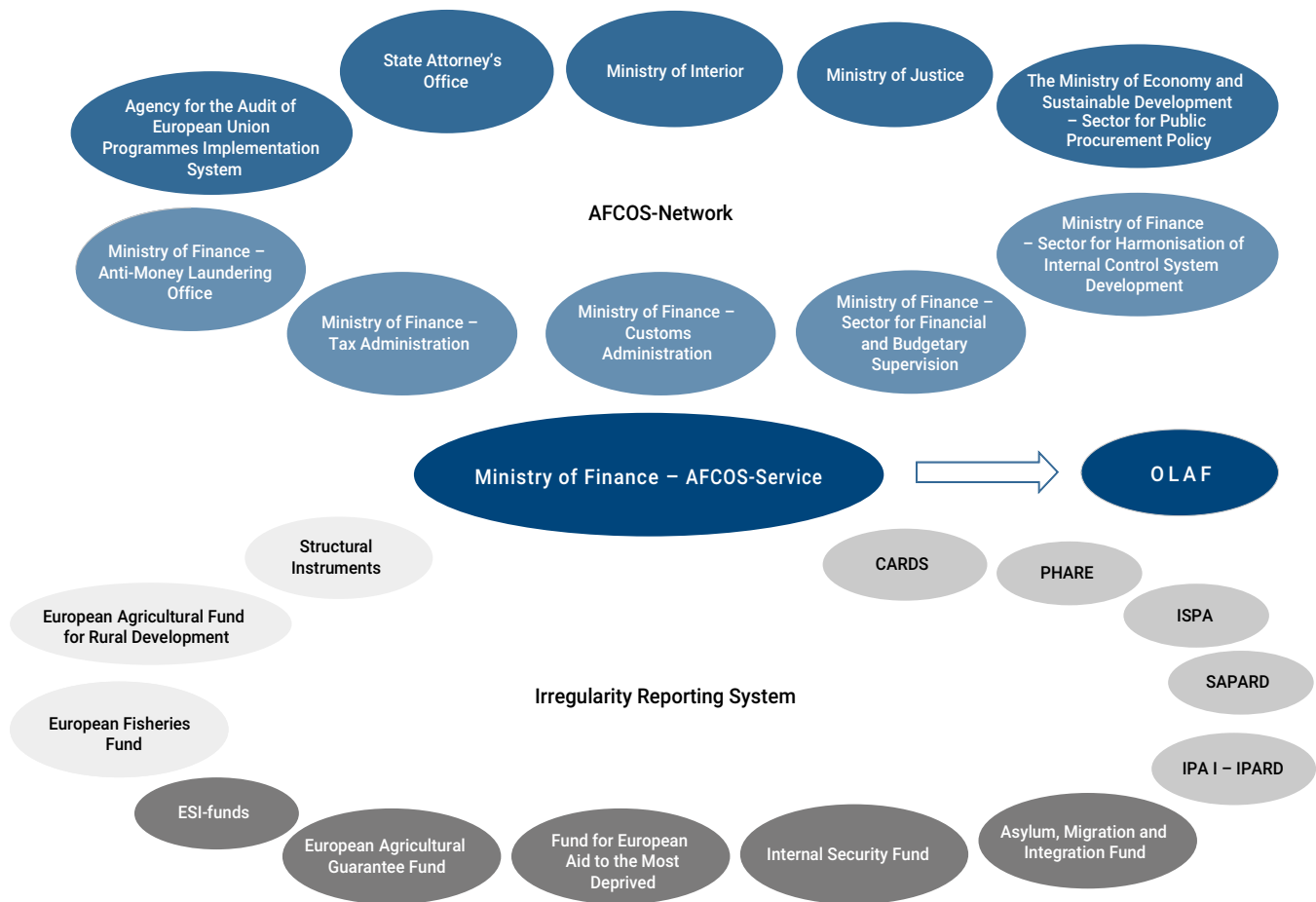
With regard to *criminal investigations*, the first observation is that the question of which authorities are recognised as conducting criminal investigations at the level of the Member States is clear. The authorities competent for conducting criminal investigations and prosecutions of offences against the EU's financial interests are (most often) police forces, and – clearly identified – judicial bodies, or sometimes also specialised (anti-fraud) bodies.

Questions arise by virtue of significant differences in national criminal legal frameworks. Their application varies considerably among the criminal investigation and prosecution authorities of the Member States. This also includes the unequal compliance of the national criminal legislations of the Member States with the PIF Directive.<sup>9</sup> In this sense, significant efforts should be made to harmonise criminal legislation as much as possible at the level of the Member States, such that criminal investigation and prosecution authorities in all EU Member States have the same mandate and legal basis for the performance of their duties concerning the protection of the EU's financial interests.

By harmonising the description of criminal offenses against the EU's financial interests and the way of their prosecution and penalisation at the level of the Member States, it would be possible to largely remove the existing obstacles for mutual cooperation, communication, and the exchange of information between competent authorities in the Member States, including obstacles and inequalities that exist in relation to their cooperation with the EPPO and other relevant institutions at the EU level in the field of criminal investigations/prosecutions against and sanctions for perpetrators of EU fraud. Such strengthened harmonisation efforts would contribute to individual acts being treated in the same way and preclude the fact that acts pertaining to the same factual situation represent a criminal offense in one Member State, while they are not even considered a misdemeanour in another. Likewise, it is very important to understand that the EPPO applies and operates within the framework of the national criminal legislation of the participating Member States. Any differences in national criminal legislation at the level of the Member States is also reflected in the different approach of the EPPO to cases containing the same facts, depending on how the protection of the EU's financial interests is regulated by the criminal legislation in an individual Member State.

With regard to *administrative investigations*, the landscape of authorities at the level of the Member States that are competent for or participate in the protection of the EU's financial interests is much sketchier than in the criminal law field. So-called country profiles, which would provide knowledge in this sense, have not yet been prepared, as far as can be seen. It is therefore very difficult at the moment to discern which authority/-ies in each Member State is/are involved in the protection of the budget and which legal framework for their cooperation, communication, and exchange of information, particularly with the authorities responsible for criminal investigations and prosecutions, applies. What can be stated at this stage is that the national systems protecting the EU's financial interests by means of administrative law significantly differ from Member State to Member State. Next to the complexity of the matter and the process itself, the sufficiency, quality, and effectiveness of the different existing systems have never been compared.<sup>10</sup>

The complexity of the system of authorities involved in the protection of the EU's financial interests can be demonstrated with the chart at p. 217 giving an overview of the situation in Croatia. In this context, a closer look at the audit system merits closer inspection: National and European audit authorities carry out regular audits on the management and control system of the EU funds (so-called system audits), but they do not perform audits on the entire system for the protection of the EU's financial interests. In addition to the management and control



### AFCOS-System in the Republic of Croatia

system of the EU funds, it should be considered whether audits need also include the authorities that perform administrative and criminal investigations (i.e. those authorities that are outside the management and control system of the EU funds), including the anti-fraud coordination services (AFCOS),<sup>11</sup> in order to check whether these authorities perform duties within their competence or not. If an audit on the part of the authorities participating in the protection of the EU financial interests, which are outside the management and control system of the EU funds, is not carried out, how we will gain insight into the effectiveness of the cooperation between the authorities that conduct administrative investigations and those that conduct criminal investigations?

Until then, our conclusions about the effectiveness of cooperation between authorities that conduct administrative investigations and those that conduct criminal investigations, and about the functioning of the entire system for the protection of the EU's financial interests in the individual Member

States, are based primarily only on the number of successfully resolved cases regarding established irregularities and fraud and the amount of recovered money. As a result, there is currently no valid, uniform basis by which to discern whether there is sufficient staffing, quality, efficiency, and effectiveness in terms of the role and work of other players involved in the protection of EU's financial interests, apart from the authorities that are responsible for the management and control system of the EU funds (i.e. authorities that conduct administrative and criminal investigations, including AFCOS Service).

In order to ensure a high level of protection of the EU budget, we should strive for a clearer overview of which "administrative players" are involved in the protection of the EU's financial interests at the level of the Member States. What is their status? What is and what should their role be in the protection system? What would be the best approach for the audit of such a system, so that it is not limited only to the authorities responsible for the management and control system of the EU funds?).

#### IV. Challenges and Open Issues

In the previous section, we have already identified that the significant differences in the national legal frameworks conducting investigations is a major challenge, which primarily affects the efficiency of investigations and cooperation between the EU Member States.

Another interesting challenge is posed by the fact that there is no common understanding of the meaning of several terms in relation to investigations, such as: “conducting on-the-spot checks”, “conducting administrative control”, and “conducting administrative investigation”. As also mentioned in the previous section, there is no common understanding of which (administrative) authorities are responsible for performing which type of control activities. Even the term “administrative body” is interpreted in different ways in the various Member States. Terminology has also not been harmonised at the EU level. It is unclear whether the term “administrative body” only covers authorities within the management and control system of the EU funds or also authorities that conduct administrative investigations/inspections that are outside of the management and control system of EU funds (e.g. tax, customs, and budget supervisory authorities).

To put it differently, on the one hand, the concept of on-the-spot controls carried out by the authorities operating within the management and control system of EU funds (i.e. managing authorities, paying agencies, and certifying bodies, cf. supra) is often associated with the exercise of administrative control. On the other hand, administrative control can also be perceived as the exercise of so-called *ex ante* control (in cases preceding payment), which can be carried out both by the authorities responsible for the management and control of EU funds and by individual administrative authority/-ies that is/are outside of the management and control system of the EU funds (cf. supra). Another layer in this context pertains to the fact that administrative authorities conducting inspections/investigations are by nature not designed to carry out *ex ante* but only *ex post* controls (in cases following payment). Consequently, the question arises as to which administrative authority at the national level of the Member States (outside of the management and control system of the EU funds) should be assigned *ex ante* controls or whether an authority should have the mandate to perform both *ex ante* and *ex post* controls like OLAF, which served as a model for instance for the Romanian Fight Against Fraud Department (DLAF).

This leads to the next question of whether it is necessary to ensure that the existing administrative inspection/investigation authority/-ies at the level of the Member States should have

the same scope of competences as OLAF. This would mean transposing the model at the EU level to the national level.

These issues cannot be left unresolved. First, answers are necessary in order to clearly determine the types of controls and control mechanisms that must be established at the level of the entire protection system. Second, they are necessary in order to facilitate the identification of the body/bodies that could act as an equal partner to OLAF and provide OLAF with adequate assistance in conducting its investigations. This would then be a huge contribution towards a much more effective implementation of Art. 12a of the amended OLAF Regulation on AFCOS. Likewise, this could contribute to the improvement of the legal framework under which administrative proceedings are regulated as well as to a much better cooperation, communication, and exchange of information between administrative investigative authorities.

We can turn to the 32nd Annual Report on the Protection of the European Union's Financial Interests<sup>12</sup> for an answer. Chapter 3 of the report reveals the complexity of the EU control framework with its multitude of players at the European and national levels. The report seemingly only considers managing authorities, paying agencies, audit authorities, and certifying bodies as part of the EU management and control system. Police forces, judicial authorities, and special (anti-fraud) bodies are listed as law enforcement authorities in the field of criminal prosecution. AFCOS is described as a coordinative authority that does not have investigative powers in most EU Member States.

For me as, a practitioner who has been involved in numerous discussions on the protection of the EU's financial interests for a long time, the essential questions are: Which of these bodies could actually be considered an equal partner to OLAF and which of them should assist OLAF in conducting its administrative investigations? Which of them could even, in exceptional cases, conduct an investigation on behalf of OLAF?

As part of the management and control system of the EU funds, managing authorities, paying agencies, and certifying bodies certainly do not perform either administrative investigations or inspections. It should be stressed that their work could be controlled by OLAF and other competent EU authorities at the EU level. Furthermore, alerts about suspected irregularities and fraud can relate to the work performed by these authorities and abuses of power by the responsible persons in these authorities.

Police forces, judicial authorities, and special (anti-fraud) bodies as law enforcement authorities in the field of criminal



prosecution can also not be fully considered equal partners to OLAF. They are set up to conduct *criminal* investigations and they are obviously more closely connected to the EPPO than to OLAF, which conducts administrative investigations only and operates within an administrative and non-criminal legal framework.

As regards the anti-fraud coordination services (AFCOS), it must be borne in mind that most services have an exclusive coordination role in their national systems and, as a rule, cannot also be considered to be an equal partner to OLAF at the national level. An exception may be constituted by the few services that were established in accordance with the OLAF model and that have the same scope of competence, including investigative powers, such as the Romanian DLAF.

The PIF report finally mentions customs authorities as a player in the EU's control framework at the national level. However, customs authorities should not be seen as the only authority that conducts administrative investigations, since they relate to the revenue side only and do not cover expenditure control.

Taking into account this landscape, there is all the more the need to develop a clear overview of who the players are and who the players should be in the protection of the EU's financial interests at the level of the Member States, in addition to determining what their role is and what it should be in the protection system. Moreover, it is important to clearly define which authority acts within the framework of administrative legislation and which authority acts within the framework of criminal legislation, since the boundaries can easily be crossed. Likewise, it is necessary to define a clear control framework for the EU's financial interests, with clearly defined control mechanisms that should be established at the level of the entire system for the protection of these interests. Undoubtedly, measures must be avoided that would lead to unnecessary administrative burdens and be contrary to the primary goal of achieving a high level of protection of the EU budget.

## V. Concluding Remarks

Challenging times are also marked by challenges for the EU and its 27 Member States, as they need to demonstrate their readiness and ability to respond to them adequately. At the same time, these challenges open up opportunities for progress in areas that have been so far been neglected and unexplored. In the field of the protection of the EU's financial interests, the room for progress is quite extensive. It is very important to put in place appropriate, effective, and efficient anti-fraud mechanisms at all levels. Serious irregularities and especially fraud affecting the EU's financial interests are complex, know no borders, and very often involve fraudsters operating in two or more Member States. The EU must show – and prove vis-à-vis its citizens – that it has established sufficient mechanisms to fight against all types of irregularities, fraud, and corruption, and that it is ready to continuously work on improving its anti-fraud policies. This necessitates adjustments to the time and the environment in which the policies are carried out, as well as compliance with the control mechanisms at the Member States' level.

Currently, national authorities have to deal with administrative and criminal law systems that (significantly) differ from one country to another, with lengthy procedures for administrative and judicial cooperation, language barriers, a lack of resources, different priorities, etc. In order to be able to establish an efficient system for the protection of the EU's financial interests, the competent national authorities need to have a robust understanding of the judicial and administrative frameworks in all EU Member States. In practice, this is regrettably not always the case.

The recent crises (the COVID-19 pandemic, natural disasters hitting individual Member States, and war conflicts), have shown quite plainly that the EU indeed needs to react quickly. However, we must keep in mind that our job is far from over at this point – there is still a lot to be done.

\* The views expressed in this article are solely those of the author and are not an expression of the views of her employer.

1 Council Regulation (EU, Euratom) 2020/2093 of 17 December 2020 laying down the multiannual financial framework for the years 2021 to 2027, *O.J.* L 433I, 22.12.2020, 11.

2 The budget includes the European Development Fund.

3 Council Regulation (EU) 2020/2094 of 14 December 2020 establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, *O.J.* L 433I, 22.12.2020, 23.

4 Regulation (EU, Euratom) No 883/2013 of the European Parliament

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and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, *O.J.* L 248, 18.9.2013, 1 as amended by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations, *O.J.* L 437, 28.12.2020, 49.

5 Chapter VI of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), *O.J.* L 283, 31.10.2017, 1.

6 Cf. <[https://www.eppo.europa.eu/sites/default/files/2021-07/Working\\_arrangement\\_EPPO\\_OLAF.pdf](https://www.eppo.europa.eu/sites/default/files/2021-07/Working_arrangement_EPPO_OLAF.pdf)> accessed 8 November 2022. See also *eucri*m 2/2021, 80.

7 The report is available at: <<https://anti-fraud.ec.europa.eu/system/>

[files/2022-09/olaf-report-2021\\_en.pdf](https://anti-fraud.ec.europa.eu/system/files/2022-09/olaf-report-2021_en.pdf)> accessed 8 November 2022. See particularly pp. 37 et seq.

8 Available at: <[https://www.eppo.europa.eu/sites/default/files/2022-03/EPPO\\_Annual\\_Report\\_2021.pdf](https://www.eppo.europa.eu/sites/default/files/2022-03/EPPO_Annual_Report_2021.pdf)> accessed 8 November 2022.

9 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, 28.7.2017, 29.

10 The European Commission makes detailed recommendations to candidate countries on the system for the protection of the EU's financial interests within the negotiation chapters. These recommendations are much broader than the legislative framework that is binding for the EU Member States.

11 The establishment and tasks of AFCOS are prescribed in Art. 12a of the amended OLAF Regulation, *op. cit.* (n. 4).

12 Available at: <[https://anti-fraud.ec.europa.eu/system/files/2021-11/pif\\_report\\_2020\\_en.pdf](https://anti-fraud.ec.europa.eu/system/files/2021-11/pif_report_2020_en.pdf)> accessed 8 November 2022.

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