eucrim 2024 / 2
European Law Forum: Prevention • Investigation • Prosecution

## Protection of the Environment
## La protection de l'environnement
## Umweltschutz

eucrim also serves as a platform for the Associations for European Criminal Law and the Protection of Financial Interests of the EU – 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. More information about the Associations is available at https://eucrim.eu/associations/.

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### Protection of the Environment

# Guest Editorial

Dear Readers,

Breaches of environmental laws often cause substantial damage to people's health and the environment. Unlawful pollution, waste dumping and trafficking, violations of wildlife protection, and illegal mining without development permission can have devastating effects. Moreover, environmental offences distort the level playing field for honest businesses and cause both direct and indirect losses to public finances (e.g., higher health expenditure). For the perpetrators, such offences are lucrative and for enforcement authorities not always visible while technically complex, which makes them difficult to investigate. For this reason, environmental transgressions – including environmental crimes – are on the rise.

Given their complex nature, a holistic approach is called for when tackling environmental offences. During its 2019–2024 mandate, the European Union made major progress in dealing with environmental crime by means of both administrative and criminal law. This "toolbox-approach" has aimed to put forward a range of criminal and non-criminal measures that enable tailored responses to each breach of environmental law.

First, a number of revised or new EU laws contain new provisions strengthening administrative enforcement against breaches of environmental law. In this context, provisions on penalties were also changed and revised. In the past, EU environmental laws usually provided for general provisions requiring "proportionate, dissuasive and effective" penalties. Several new laws, however, now include requirements for factors to be considered when applying penalties, and some of them even contain concrete types of penalties. For example, provisions which set out factors for setting penalties and provide for certain types of penalties are provided in the revised Industrial Emissions Directive. The new laws also build on past experience and provide detailed, new provisions strengthening administrative enforcement. For example, the new Waste Shipment Regulation contains detailed provisions on inspections and will enable OLAF to carry out several investigative actions in the context of environmental offences. Detailed provisions on enforcement are also in the new regulations on substances that deplete the ozone layer as well as on fluorinated gases, the amended Ambient Air Directive, and others.

Vita Juknė

Second, the protection of the environment through criminal law will be strengthened in the future, thanks to the new Environmental Crime Directive which entered into force in May 2024. This Directive aims to improve the effectiveness of criminal law enforcement against the most serious environmental offences. It updates and complements the list of the most severe breaches of EU environmental law that need to be criminalised in EU Member States (except for Denmark, due to its opt out on EU criminal law policy, and for Ireland, which did not opt in to participate in this Directive). The new Environmental Crime Directive also establishes qualified offences for cases in which serious damage to or destruction of the environment is caused by commission of one of the offences defined in the Directive. It provides for types and levels of penalties for natural and legal persons who commit environmental offences. And, ultimately, the Directive aims to strengthen law enforcement and to support members of civil society who report environmental offences and cooperate with representatives of law enforcement.

The challenge that lies ahead is to make these new laws effective on the ground. The European Commission certainly has this in mind, because – in the spirit of the Political Guidelines 2024–2029 – better enforcement and implementation is one of its key priorities.

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* The information and views set out in this article are those of the author and do not necessarily reflect the official opinion of the European Commission.

# News

## Actualités / Kurzmeldungen*

## European Union

*Reported by Thomas Wahl (TW), Cornelia Riehle (CR), Dr. Anna Pingen (AP)*

### Foundations

#### Rule of Law

##### Commission's 2024 Rule of Law Report

On 24 July 2024, the Commission published its 5th Rule of Law Report. The Rule of Law Report includes 27 country chapters and examines developments – both positive and negative – across all EU Member States in four key areas for the rule of law:

- The justice system;
- The anti-corruption framework;
- Media pluralism and freedom;
- Other institutional issues related to checks and balances.

The first Rule of Law Report was presented on 30 September 2020 (→eucrim 3/2020, 158–159); the second report on 20 July 2021 (→eucrim 3/2021, 134–135); the third on 13 July 2022 (→eucrim 3/2022, 166–167); and the fourth on 5 July 2023 (→eucrim 2/2023, 110–111).

Key highlights from the 5th Rule of Law Report include:

➤ *Justice System*

Many Member States made strides in enhancing judicial independence and efficiency. The report notes that the majority of the 2023 recommendations had been partially or fully implemented. However, challenges remain in some states, particularly regarding the appointment and dismissal of judges, access to courts and legal aid, and ensuring adequate resources for judicial systems.

➤ *Anti-Corruption Efforts*

The report acknowledges improvements in the institutional frameworks to combat corruption. Almost all Member States have national anti-corruption strategies in place, although with varying comprehensiveness. For instance, Croatia improved its institutional capacity to combat corruption by increasing resources for law enforcement agencies and enhancing the transparency of public procurement processes. The report also commends Lithuania and Latvia for their efforts in implementing stricter conflict-of-interest rules and reinforcing asset declaration obligations for public officials. Despite these positive developments, the report raises concerns about the effectiveness of anti-corruption measures in countries like Slovakia and Malta. In Slovakia, the proposed legislative amendments to the Criminal Procedure Code and the Criminal Code may have potentially weakened the country's ability to detect and prosecute corruption, particularly in cases involving high-level officials. Malta has also faced ongoing scrutiny over the lack of progress in addressing corruption at the highest levels of government, with public trust in anti-corruption efforts remaining low.

➤ *Media Freedom and Pluralism*

The report underscores the vital role of media freedom and pluralism in upholding the rule of law and democratic values across the EU. It highlights positive developments in several Member States, including France and Germany, where new measures were introduced to protect journalists from violence and intimidation. The European Media Freedom Act, set to be fully applicable by August 2025, is expected to further strengthen the legal framework for safeguarding media freedom and ensuring a pluralistic media environment across the Union. However, the report also identifies ongoing concerns in countries such as Hungary, Poland, and Slovenia, where the independence and financial stability of public service media remains under threat. In Hungary, the government's control over media outlets continues to un-

* Unless stated otherwise, the news items in the following sections cover the period 1 May 2024 – 15 September 2024. Have a look at the eucrim website (https://eucrim.eu), too, where all news items have been published beforehand.

dermine press freedom, with state advertising disproportionately favoring pro-government media. Similarly, in Poland, the concentration of media ownership and political influence over public broadcasters has raised alarms about the erosion of media pluralism. The report also points to challenges in Slovenia, where recent government actions have sparked concerns about media independence and the transparency of media ownership.

➤ *Institutional Checks and Balances*

The 2024 Rule of Law Report highlights the importance of robust institutional checks and balances in maintaining the rule of law across the EU. Many Member States have made progress in strengthening the role of independent institutions, such as ombudspersons and national human rights bodies. In countries like Denmark and Sweden, the report notes positive steps in enhancing the autonomy and resources of these institutions, ensuring that they could effectively oversee government actions and protect citizens' rights. However, challenges remain in several Member States, including Poland, Hungary, and Greece. In Poland, the excessive use of accelerated legislative procedures has raised concerns about the quality of law-making and the marginalization of stakeholder consultations. Hungary continues to face criticism for restricting the operations of civil society organisations, particularly those advocating for human rights and transparency. The report also highlights the shrinking space for civil society in Greece, where legal restrictions and financial constraints hamper the work of NGOs and human rights defenders.

➤ *Perspectives*

In this year's edition, for the first time, the report includes chapters on four enlargement countries — Albania, Montenegro, North Macedonia, and Serbia — reflecting their progress in the EU accession process. The inclusion of these countries aims to support their reform efforts and ensure that they met EU standards before accession.

In its conclusion, the Commission encourages Member States and enlargement countries to continue addressing the identified challenges and to implement the recommendations provided in the report. The Commission also invites the European Parliament, national parliaments, civil society, and other stakeholders to engage in dialogue on the rule of law, both at the national and European levels. The report's findings will continue to inform the EU's broader efforts to promote and protect the rule of law, including through mechanisms like the Conditionality Regulation and the Recovery and Resilience Facility. (AP)

### ECJ: No Right for Judicial Associations to Challenge Prosecutor Appointments

In the case of *Asociaţia "Forumul Judecătorilor din România"* (Associations of Judges) v. Romania (Case C-53/23), the Court of Justice of the European Union (ECJ) ruled that EU law does not require professional associations of judges to be granted the right to challenge decisions related to the appointment of prosecutors.

The case originated with a contestation by a Romanian association of judges of the appointment of specific prosecutors tasked with investigating instances of corruption in Romania. The basis for the contestation was the assertion that the national legislation governing these appointments was incompatible with EU law.

The Court of Appeal of Pitești, Romania, sought clarification from the ECJ on the question of whether Romanian procedural rules, which essentially prevent judges' associations from challenging prosecutor appointments due to the requirement of demonstrating a legitimate private interest, were in compliance with EU law (Art. 2 and Art. 19(1) TEU, read in combination with Arts. 12 and 47 of the Charter of Fundamental Rights of the European Union).

In its judgment of 8 May 2024, the ECJ ruled that EU law does not preclude national legislation that effectively prevents professional associations of judges from challenging such appointments. It emphasised that while Member States have the discretion to decide who may bring actions before the courts, this discretion must not be exercised in a way that undermines the right to effective judicial protection. While EU law does on occasion require Member States to permit representative associations to initiate legal proceedings in specific domains, such as environmental protection or anti-discrimination, it does not require that professional associations of judges be granted the right to contest national measures pertaining to the status of judges.

The ECJ also examined whether the principle of the indpendence of the judiciary merited another result. It concluded that the mere fact that national legislation does not permit these associations to contest appointments does not, in and of itself, give rise to legitimate concerns among the public regarding the independence of Romanian judges.

In the light of the answer given to the judicial review, the ECJ did not answer the second question whether EU law precluded Romanian legislation which limits the competence of the national anti-corruption directorate by conferring exclusive competence to investigate corruption offences (in a broad sense) committed by judges and prosecutors upon specific prosecutors who are appointed for that purpose by the Prosecutor General, acting on a proposal of the general assembly of the Supreme Council of the Judiciary and the Public Prosecutor's Office attached to Romanian High Court of Cassation and Justice ("the PICCJ"). (AP)

## Area of Freedom, Security and Justice

### 2024 EU Justice Scoreboard with New Indicators

spot light

On 11 June 2024, the Commission published the 2024 EU Justice Scoreboard, which provides an overview on the effective functioning of the Member States' judicial systems with objective, reliable, and comparable data. The EU Justice Scoreboard traditionally contains data on three key elements measuring the effectiveness of national judicial systems: efficiency, quality, and independence (for the 2023 Scoreboard →eucrim 2/2023, 114; for the 2022 Scoreboard →eucrim 2/2022, 86–87).

In response to the need for additional comparative data, the 12th edition (2024) incorporates a series of novel indicators: statistics on the accessibility of justice for children in civil and criminal proceedings; an overview of notaries and their powers in succession procedures; and information on the salaries of judicial and prosecutorial expert staff. In addition, this edition provides an overview of the authorities involved in the appointment of court presidents and prosecutors; updated information on the composition of national councils for the judiciary; and an overview of the powers of national bodies involved in the prevention of corruption, with a specific focus on asset declarations.

The Scoreboard uses various information sources and covers different periods in time. The data on efficiency of justice systems cover the period from 2012 to 2022, the ones on quality and independence cover the period 2012–2023.

The key findings can be summarised as follows:

➤ *Efficiency*

■ The efficiency-related indicators for 2022, in particular the number of incoming cases, clearance rate, and disposition time, demonstrated the initial outcomes of the recovery efforts after the SARS-CoV-2 pandemic, which impacted Member States to varying degrees.

■ In 2022, the majority of civil and commercial cases were concluded in less than one year across the majority of Member States. Furthermore, the duration of legal proceedings decreased in 17 Member States compared to the preceding year.

■ Nine Member States have encountered difficulties in relation to the duration of proceedings in first-instance courts. Conversely, higher instance courts in the aforementioned Member States have been observed to operate with greater efficiency.

■ The data for money laundering shows that, while first instance court proceedings take up to a year on average in 12 Member States, they take up to 2 years on average in five Member States, and up to 3.5 years on average in four Member States.

■ Regarding the duration of judicial proceedings pertaining to bribery cases, an analysis of the 2022 data reveals that proceedings are concluded within approximately one year in 11 Member States, whereas (where data are available), proceedings can last up to two years in the remaining seven.

➤ *Quality*

There is no single way to measure the quality of justice systems. The 2024 EU Justice Scoreboard continues to examine factors that are generally accepted as relevant for improving the quality of justice. They fall into four categories: access to justice for the public and businesses; adequate financial and human resources; putting in place assessment tools; and digitalisation.

■ Access to justice: In three Member States, people whose income is below the Eurostat poverty threshold may not receive legal aid. The level of court fees has remained largely stable since 2016, with the exception of six Member States in which court fees were higher in 2023 than in 2022, particularly for low-value claims.

■ The 2024 Justice Scoreboard marks the first year in which the specific provisions designed to facilitate the involvement of individuals with disabilities as professionals within the justice system have been assessed. 20 Member States have implemented specific measures to enhance the accessibility of employment opportunities within the justice system for individuals with disabilities, which may extend beyond the scope of general provisions pertaining to the employment of such persons.

■ For the first time, this year's Scoreboard also presents the rate of legal aid paid to criminal defence lawyers in a certain criminal case. A significant discrepancy exists among the Member States in the amounts lawyers would receive from the public budget, with the lowest rate of legal aid received by a Cypriot defence lawyer and the highest by defence lawyers from the Netherlands.

■ Rescources: The proportion of female judges at the supreme court level remains under 50% in 20 Member States. Conversely, in seven Member States, the number of female judges at this level is equal to or exceeds 50%. In order to enhance communication with vulnerable groups, all Member States offer training on effective communication with asylum seekers and/or individuals from diverse cultural, religious, ethnic, and linguistic backgrounds.

■ Assessment tools: The utilisation of surveys among court users and legal professionals experienced a decline in 2023 in comparison to preceding years. This was evidenced by the fact that 13 Member States did not conduct any surveys.

■ Digitalisation: The data indicates that Member States are not fully utilising the potential of their procedural rules. Member States' courts, prosecutors, and court staff have access to a

range of digital tools, including case management systems, videoconferencing systems, and teleworking arrangements.

- Further advancement could be made in the implementation of electronic case allocation systems, however, with automatic distribution based on objective criteria.
- The accessibility of online court judgments has remained consistent when compared to data from the previous year. Judgments from the highest instances are predominantly accessible online.

➤ *Judicial independence*

Since 2016, findings on independence include two annual Eurobarometer surveys on the perception of judicial independence among the general public and businesses. The main results of the eighth Eurobarometer survey in this regard indicates the following:

- In comparison to the results obtained in 2016, the general public's perception of judicial independence has improved or remained stable in 19 Member States, including four of the Members States facing systemic challenges to judicial independence. Similar results can be taken from the survey with the businesses.
- The most frequently cited reason for the perceived lack of judicial independence was the influence of government and politicians, followed by pressure from economic/other specific interests.
- Looking at appointments and dismissals, the 2024 Justice Scoreboard found that in 14 Member States either the independent prosecutorial councils or prosecution service itself appoints prosecutors.
- 20 Member States give the executive or parliament the power to dismiss the Prosecutor General (in five of them on a proposal by the Council for the Judiciary), and in six Member States this power is given to the Council for the Judiciary.

The 2024 Justice Scoreboard concludes that efforts to improve the efficiency, quality and independence of the justice systems are underway in many jurisdictions. However, challenges remain to ensure the public's full trust in the legal systems of all Member States. The Scoreboard is an important information source that the Commission also uses for other purposes. It, *inter alia*, feeds the Commission's Rule of Law Report and is the basis for monitoring the national recovery and resilience plans to overcome the COVID-19 crisis. (AP)

### Strategic Agenda 2024–2029

At its meeting in Brussels on 27 June 2024, the European Council agreed on the Strategic Agenda for the years 2024–2029. For the years 2024 to 2029, the Strategic Agenda envisages a free and democratic Europe, a strong and secure Europe, and a prosperous and competitive Europe.

The strategic agendas set the EU's priorities and its strategic orientations every five years. They are issued by EU leaders in connection with the European Parliament elections and ahead of the appointment of each European Commission. As such, the respective agenda guides the work of the EU institutions: the European Parliament, the Council, and the Commission are invited to put them into action during the next institutional cycle. Furthermore, the next Multiannual Financial Framework for the Union will reflect the priorities set out in the agenda. For the Strategic Agenda for the period 2019–2024 →eucrim 2/2019, 86–87.

To achieve freedom and democracy, the 2024–2029 agenda promotes European values within the Union, namely upholding respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. The EU also continues to support these values on a global level.

To ensure a strong and secure Union, the European Council is committed to ensuring coherent and influential external action. To strengthen the Union's security, strategic dependencies shall be reduced, capacities scaled up, and European defence strengthened.

To strengthen the inner security of the EU in the field of criminal law, the agenda sets out the following aims:

- Fighting crime offline and online;
- Preventing and tackling corruption;
- Combatting organised crime and disrupting the flow of illicit profits from cross-border criminal activity;
- Countering attempts to sow division;
- Opposing radicalisation, terrorism, and violent extremism.

To do so, the Union shall use all the law enforcement and judicial cooperation tools at its disposal.

In the field of migration, the EU aims to pursue a comprehensive approach to migration and border management. Irregular migration shall be prevented and countered, and solutions found to thwart the security threat posed by instrumentalised migration.

As regards the EU's potential enlargement, the Strategic Agenda foresees a merit-based approach to accession with tangible incentives.

Lastly, to achieve its aim of a prosperous and competitive Europe, the agenda would like to bolster the EU's competitiveness by, for instance, furthering and deepening the Single Market, achieving the Capital Markets Union, and completing the Banking Union. The promotion of an innovative and business-friendly environment will enhance the green and digital transitions. It is also planned to mutually advance the social dimension of the EU. (CR)

### Council Conclusions on Future of EU Criminal Law

At its meeting on 13/14 June 2024, the Justice and Home Affairs Council

approved conclusions on "The future of EU criminal law: recommendations on the way forward". The conclusions address the quality of EU criminal legislation and how it can be enhanced. They clarify that EU criminal legislation should be guided by the following three considerations:

- Respecting the commonly agreed principles of criminal law, such as the principle of legality and the principle that criminal law should only be used as a last resort (ultima ratio), and the protection of fundamental rights in general;
- Ensuring consistency of the EU criminal law acquis;
- Providing sufficient flexibility for the Member States in the implementation of criminal law instruments, thus respecting the different legal systems and traditions of the Member States.

Against this background, the Council will initiate work on the establishment of modernised model provisions for EU criminal law, in particular as regards minimum rules on penalties for natural and legal persons, liability of legal persons, aggravating and mitigating circumstances, incitement, aiding and abetting and attempt, jurisdiction, limitation periods, the availability at national level of effective and proportionate investigative tools, and statistical data. These model provisions should be included in future European legislation, to the extent it is considered necessary to address each individual subject-matter covered by them in a specific legislative instrument.

As regards institutional aspects, the Commission is called on to ensure the *ultima ratio* principle in its proposals and to draw up thoroughly prepared and detailed impact assessments. The Member States' need to ensure consistency and maintain the basic principles of their national legal orders must be taken into account by the Union legislature in future legislative negotiations. (TW)

### Political Guidelines for the Next European Commission 2024–2029

In her political guidelines of 18 July 2024, *Ursula von der Leyen*, candidate for a second term of European Commission President, set out her priorities for the next European Commission for the years 2024 to 2029. Under the motto "Europe's choice", the guidelines emphasise the European Union's choice to unite its societies and values, to ensure democratic values, to face new realities, and to be bold and ambitious. They outline the EU's priorities together with ideas and proposals on how to achieve them.

According to the guidelines, in order to face the new era of European Defence and Security, the European Defence Union will be brought to life, the Union's preparedness will be enhanced, common borders will be strengthened, and fair and firm stands on migration will be taken to achieve a safer and more secure Europe. To accomplish the latter, the guidelines underline the need for the following measures in the field of cooperation in criminal matters:

- Fighting organised crime and dismantling high-risk criminal networks and their ringleaders;
- Proposing a new Internal Security Strategy to ensure that security is integrated in EU legislation and policies by design;
- Providing law enforcement with adequate and up-to-date tools for lawful access to digital information, while safeguarding fundamental rights;
- Further developing Europol into a truly operational police agency;
- Reflecting on areas in which the European Public Prosecutors' Office will need more powers;
- Strengthening the impact of the European Arrest Warrant;
- Putting forward a European action plan against drug trafficking;
- Supporting a wider EU Port Strategy focusing on security, competitiveness, and economic independence as well as building on the work of the European Ports Alliance;
- Drafting a new Counter-Terrorism Agenda to address new and emerging threats;
- Developing a new European Critical Communication System to be used by public authorities in charge of security and safety.

Looking at ideas on how to support citizens as well as strengthen the EU's societies and social model, the guidelines support social fairness in the modern economy, reuniting the EU's societies, supporting young people, and striving for a Union of equality.

The guidelines also address ways to sustain the quality of life, food security, water, and nature. They prioritise protecting Europe's democracy, upholding its values, and strengthening the rule of law for citizens. From a global perspective, Europe is called on to leverage its power and partnerships, further its enlargement, and find a more strategic approach to its neighbourhood. Importantly, a new approach for a modern and reinforced EU budget has been suggested to make the new, long-term budget more focused, simpler, and impactful.

The guidelines conclude with the express requirement to take measures to strengthen the partnership between the European Commission and the European Parliament. In sum, they underline the need for a team effort on the part of all institutions and Member States to deliver the programme together and prepare the Union for the future. *Von der Leyen* sees the need for an ambitious reform agenda to achieve the aims set out in the guidelines. (CR)

### Berlin Regional Court's EncroChat Battle – Third Round

In an order of 4 July 2024, the ECJ dealt with procedural effects of the EncroChat case. The reference for preliminary ruling (Case C-288/24, *M.R. v Staatsanwaltschaft Berlin or*

"*Stegmon*") only indirectly concerns the criminal investigations related to EncroChat. The question was rather whether the refusal by the referring court to continue the criminal proceedings on the substance of the case until the response of the ECJ has been provided was legal. Thus, the question at issue actually concerns the interpretation of Art. 267 TFEU – the provision in the Treaties on the preliminary ruling mechanism.

➤ *Background of the reference for preliminary ruling and key question*

The EncroChat case became famous because law enforcement authorities In France and the Netherlands were able to crack the end-to-end encryption communication provided by EncroChat devices. This revealed chats between criminals that led to a series of follow-up criminal prosecutions in the EU Member States, including Germany (→eucrim 1/2021, 22–23).

The Regional Court of Berlin (*Landgericht Berlin*), Germany, is one of the few courts that has opposed the law enforcement approach and questioned admissibility of the detected chats as evidence in criminal proceedings. It filed two references for a preliminary ruling to the ECJ seeking guidance on the compatibility of the EncroChat law enforcement operation with the Directive regarding the European Investigation Order in criminal matters. The first reference (Case C-670/22, *M.N.*) was lodged in 2022 (→eucrim 3/2022, 197–198) and decided by the ECJ on 30 April 2024 (→eucrim 1/2024, 40–43). The second reference was lodged in November 2023 and entered into the CJEU's register as Case C-675/23 (*M.R. v Staatsanwaltschaft Berlin or "Staatsanwaltschaft Berlin II"* →eucrim 1/2024, 44).

This latter reference is indirectly the subject of the reference for preliminary ruling at issue (Case C-288/24, *Stegmon*). The referring Regional Court of Berlin defends itself against a request for recusal of the presiding judge of the chamber that decides on the criminal charge of M.R. – an accused person following the EncroChat hack. This request was brought forward by the Berlin Public Prosecutor's Office (*Staatsanwaltschaft Berlin*). It argued that the presiding judge of the court chamber failed to schedule a date for a trial hearing and persistently ignored orders by the appeal court (the Higher Regional Court of Berlin – *Kammergericht Berlin*) to proceed with the criminal proceedings against M.R. on the substance and put an arrest warrant against him into effect.

In contrast, the referring Regional Court of Berlin argued that, in accordance with CJEU case law, it is obliged to stay the proceedings during the preliminary ruling procedure and take procedural steps to safeguard the person's rights, including the suspension of arrest warrants. This must also apply to criminal proceedings despite the duty under German law that such proceedings should be proceeded expeditiously. The referring court wished that the ECJ clarifies that the instructions of the Higher Regional Court and the requests by the Berlin Public Prosecutor's Office are contrary to Art. 267 TFEU.

➤ *The ECJ's decision*

In its order of 4 July 2024, the ECJ confirms the following:

- Art. 267 TFEU precludes a national court from continuing the main proceedings pending the ECJ's reply to questions referred by the national court, by carrying out procedural steps which have a connection with the questions referred for a preliminary ruling.
- Art. 267 TFEU precludes a recusal in respect of a judge from being obtained on the sole ground that that judge is awaiting the decision of the ECJ in relation to the request for a preliminary ruling which that judge has brought before it where the main proceedings concern a person in custody.

➤ *Put in focus*

The ECJ confirmed that the Regional Court of Berlin was right when it stayed the national criminal proceedings and adopted alternative measures to detention as long as a reference for preliminary ruling before the CJEU is pending. The ECJ made clear that its settled case law on the consequences of references for preliminary rulings is equally applicable in criminal matters.

In addition, the ECJ clarified that neither appeal courts nor public prosecution offices can call into question such references, e.g. by pursuing recusal proceedings against the judges of the referring court.

The case encourages the judges at the Regional Court of Berlin to continue its struggle against the phalanx of the Federal Court of Justice and Higher Regional Courts in Germany which have ruled that the EncroChat law enforcement operation does not pose problems on the admissibility of the gathered evidence and criminals must be convicted (→eucrim 1/2021, 22–23 and eucrim 1/2022, 26–37).

The decision in *Stegmon/"M.R. II"* nevertheless led the Regional Court of Berlin to withdraw its underlying reference for preliminary ruling – the second one in the EncroChat case (Case C-675/23, *"M.R. I"* →eucrim 1/2024, 44). Hence, the court must deduce the consequences for the criminal case before it from the ECJ's first judgement in EncroChat handed down on 30 April 2024 (→eucrim 1/2024, 40–43). (TW)

## Security Union

### Progress Report on the Implementation of the EU Security Union Strategy

spot light

In 2020, the Commission adopted a new EU Security Union Strategy for the period 2020–2025 (→eucrim 2/2020, 71–72). The 2024 Seventh Progress Report on

the implementation of the EU Security Union Strategy, presented on 15 May 2024, provides a comprehensive overview of the progress and achievements since the Strategy's adoption with a focus on five key areas: the protection of the EU's physical and digital infrastructure; the fight against terrorism and radicalisation; the fight against organised crime; the strengthening of law enforcement and judicial cooperation; and cooperation with international partners. The final two chapters deal with the proper implementation of the Security Union and provide an outlook on the security concept after 2025.

➤ *Strengthening physical and digital infrastructure*

The report emphasizes the need for increased protection and resilience of critical infrastructure in the face of rising hybrid attacks, particularly following the geopolitical instability caused by Russia's war of aggression against Ukraine. Significant strides have been made with the adoption of new directives, such as the Directive on the Resilience of Critical Entities and the Directive on Network and Information Security (NIS II), which came into force in January 2023. The report also highlights the importance of cybersecurity, noting the introduction of the Cyber Resilience Act and the Cyber Solidarity Act to enhance the EU's cybersecurity framework and response capabilities.

➤ *Fighting terrorism and radicalisation*

The EU has strengthened its ability to combat terrorism through various initiatives. The EU Agenda on Counter-Terrorism, adopted in 2020, has equipped the EU to better anticipate, prevent, protect, and respond to terrorist threats. The Directive on combating terrorism, implemented across all Member States, criminalizes actions such as training and financing terrorism. However, the report also notes the ongoing challenge of foreign terrorist fighters returning to the EU, with significant efforts being made to address this issue, including systematic checks in the Schengen Information System.

Protecting public spaces from terrorist threats remains a priority. The EU Protective Security Advisor Programme has mobilized experts to assess and enhance the security of public spaces, high-risk events, and critical infrastructures. The EU has also increased funding for protecting places of worship, particularly in response to rising antisemitism.

Preventing radicalisation is seen as the first step in preventing terrorist attacks. The Radicalisation Awareness Network (RAN) plays a crucial role in bringing together policymakers, law enforcement, and researchers to develop best practices to address violent extremism. The creation of the EU Knowledge Hub for the Prevention of Radicalisation in June 2024 is expected to further enhance collaboration among stakeholders. The EU has also established the EU Centre of expertise for victims of terrorism, which provides guidance and support to national authorities and victim support organisations. This center ensures that EU rules on victims of terrorism are correctly applied and promotes the exchange of best practices.

➤ *Combating organised crime*

Significant progress in the fight against organised crime has been made with the launch of initiatives such as the EU Strategy to Tackle Organised Crime 2021–2025 and the EU Drugs Strategy 2021–2025. New measures have been introduced to fight drug trafficking, enhance law enforcement cooperation, and improve cybersecurity. The European Public Prosecutor's Office has also been instrumental in investigating organised crimes affecting the EU budget.

➤ *Enhancing law enforcement and judicial cooperation*

The Commission has strengthened tools for cross-border cooperation, including the legal framework on police cooperation adopted in 2024. It includes new rules on information exchange, the revision of the Prüm framework, and new regulations for handling electronic evidence in criminal cases. These efforts aim to enhance the EU's capacity to prevent, detect, and prosecute serious crimes. The EU has emphasized strengthening the tools available for effective cooperation and information exchange among police and judicial authorities across EU Member States, which is crucial for maintaining security and managing migration effectively.

To further strengthen cooperation, a new regulation has established a platform for joint investigation teams, providing secure means of communication and information exchange. The introduction of new rules on the transfer of proceedings in criminal matters will help avoid duplication and ensure that cases are prosecuted effectively across borders. Finally, the Digital Justice Package will enable secure and efficient communication between courts, facilitating better judicial cooperation and the fight against crime in the EU.

➤ *Enhancing security cooperation with international partners*

The EU's swift response to internal security threats from Russia's invasion of Ukraine included establishing structured dialogues on internal security with Ukraine and Moldova and strengthening cooperation on cyber resilience and border management. The EU has also intensified its cooperation with the Western Balkans, especially in counter-terrorism, and has engaged in dialogues with the Middle East, Afghanistan, Central Asia, and other regions to address security challenges. Cooperation with NATO has intensified, focusing on resilience, critical infrastructure, and countering hybrid threats. The EU has also enhanced its cybersecurity efforts, launching dialogues with the USA, Japan, India, and the United Kingdom. Additionally, the EU has reinforced its commitment to

counter-terrorism and organised crime through multilateral cooperation with organisations like the UN, NATO, and the Global Coalition against Da'esh. The EU also took steps to protect its internal security from foreign interference, particularly in the context of the European elections, and has addressed the growing impact of climate change on peace and security. The Defence of Democracy package, introduced in December 2023, aims to protect EU democracies from covert interference and to tackle disinformation.

➤ *Implementing the Security Union*

The report notes that implementation by Member States of EU legislation in the Security Union area is mostly satisfactory, however, the Commission has been vigilant with regard to gaps that triggered infringement proceedings.

The report emphasizes the essential role of EU agencies and bodies, such as Europol, Eurojust, ENISA, and Frontex, in implementing the EU's security policies. These agencies have expanded their roles and capabilities in recent years. For example, ENISA has bolstered the EU's cybersecurity efforts, while Europol's reinforced mandate now allows it to better support Member States in combating terrorism and organised crime, including the direct receipt of data from private parties. Eurojust has enhanced its capacity to coordinate terrorism investigations across Member States and third countries. Frontex, in cooperation with Europol and other agencies, continues to play a significant role in managing EU borders and dealing with cross-border crimes such as migrant smuggling.

➤ *Outlook*

The report concludes that the concept of security is no longer centred on military and home affairs anymore; security aspects must be embedded in all EU policies and decision-making processes. Economic security will be a key element in the future. In addition, future reflections on security will need to explore how law enforcement can make use of digital technologies, while ensuring that fundamental rights are fully respected when it comes to access to data in areas such as quantum communication infrastructure, Artificial Intelligence and advanced surveillance technologies.

Finally, the report states that the Commission has delivered on all commitments under the Security Union Strategy 2020–2025. Four years into its implementation, the Strategy has consolidated the EU's security toolbox and now provides a powerful foundation for the protection of Europeans in the future. (AP)

## Schengen

### First Report of ETIAS Fundamental Rights Guidance Board Available

The Fundamental Rights Guidance Board of the European Travel Information and Authorisation System (in short: the ETIAS Fundamental Rights Guidance Board) is composed of the Fundamental Rights Officer of Frontex, the Consultative Forum on Fundamental Rights of Frontex, the European Data Protection Supervisor (EDPS), the European Data Protection Board (EDPB), and the European Union Agency for Fundamental Rights (FRA). With regard to fundamental rights issues – in particular to privacy, protection of personal data, and non-discrimination – the ETIAS Fundamental Rights Guidance Board has the task of performing regular appraisals, making recommendations to the ETIAS Screening Board, and, when consulted, of supporting the ETIAS Screening Board in the execution of its tasks (→eucrim 3/2018, 149).

On 14 August 2024, the ETIAS Fundamental Rights Guidance Board published its first Annual Report providing an overview of its composition and organisation, its work programme, and its main areas of focus in 2023.

In 2023, the work programme of the Board focused on building internal capacity and supporting the initial technical and organisational implementation of ETIAS, including developing the screening rules, establishing the ETIAS watchlist, and providing procedures for processing applications. Meetings and consultations took place to set up the ETIAS Screening Board, the Working Group on Risk Screening Operations, the ETIAS National Units, and the ETIAS Central Unit. In its capacity as a member of the ETIAS Fundamental Rights Advisory Board, the Fundamental Rights Agency presented its project on the risk of discrimination in the ETIAS risk screening algorithm. It also presented its training activities on ETIAS and fundamental rights during the training sessions organised by Frontex for the ETIAS National Units.

Starting in mid-2025, individuals from more than 60 visa-free countries will be required to obtain an authorisation before travelling to Europe for a short stay. The authorisation will be processed through the European Travel Information and Authorisation System (ETIAS). The aim of ETIAS is to carry out a pre-travel screening of visa-free travellers to determine whether they pose a security, illegal immigration, or public health risk (→eucrim 2/2018, 82). While the ETIAS Central Unit is hosted by Frontex, the ETIAS National Units are located in 30 European countries. The ETIAS information system is developed and maintained by eu-LISA. The ETIAS Screening Board, which is composed of representatives of the ETIAS National Units, Frontex and Europol, plays an advisory role. (CR)

## Ukraine Conflict

### CJEU: Recent Rulings on EU's Restrictive Measures against Russia

In September/October 2024, the Court of Justice of the European Union issued several judgments on the inter-

pretation of the EU's legal regime of restrictive measures in response to Russia's war in Ukraine. The following overview summarises these judgments in reverse chronological order:

■ 2 October 2024: The General Court (GC) dismisses actions for annulment brought by several bar associations against the ban to provide legal advisory services to the Russian Government and entities established in Russia. The ban was introduced by the EU's 8th sanctions package in October 2022 (→eucrim 3/2022, 170–171). According to this, EU regulations prohibit any person in a position to provide legal advisory services (practising, in particular, in the territory of the European Union) from directly or indirectly providing such services to the Russian Government or to legal persons, entities or bodies established in Russia. This prohibition is not absolute: the regulations include some exceptions and limits, and the ban does not apply to legal advice and legal representation in connection with judicial, administrative or arbitral proceedings. The applicants argued, inter alia, that the prohibition interferes with the right of access to legal advice from a lawyer, as well as with legal professional privilege and the independence of the lawyer. Furthermore, it is disproportionate and lacks legal certainty (Cases T-797/22, Ordre néerlandais des avocats du barreau de Bruxelles and Others v Council; T-798/22, Ordre des avocats à la cour de Paris and Couturier v Council; and T-828/22, ACE v Council →eucrim 1–2023, 9–10). The GC rejects all these arguments. It underlines the importance of the fundamental right of all persons to be advised by a lawyer for the purposes of conducting, pre-empting or anticipating judicial proceedings. However, given that the scope of application is limited (legal advise with link to judicial proceedings and vis-à-vis natural persons still permissible), the rights of access to a lawyer and effective judicial protection is not called into question. The prohibition at issue, as delimited by the derogation provisions, does pursue objectives of general interest, without impairing the very essence of the fundamental role of lawyers in a democratic society. Lawyers criticise the ruling arguing that legal advice and legal representation before courts and authorities were often closely related. Both advice and representation by a lawyer of one's choice should be open to everyone, in view of the rule of law's requirement of access to justice. The GC's judgment of 2 October 2024 can be appealed to the Court of Justice (ECJ).

■ 11 September 2024: The GC dismisses actions brought by individuals who sought annulment of reporting and cooperation obligations designed to counteract the circumvention of restrictive measures. The applicants were included on the lists of persons subject to restrictive measures due to Russia's invasion of Ukraine. They oppose the obligation introduced in July 2022 by a Council Regulation that designated persons and entities with assets within the jurisdiction of an EU Member State must report these assets and cooperate with the competent authority. Failure to respect this obligation would constitute a circumvention of the freezing of assets and would be subject to penalties in accordance with the national law of the Member States. The applicants argued, in essence, that there had been no legal basis for introducing such obligations and the Council unlawfully acted as a legal authority in criminal matters (Cases T-635/22, Fridman and Others v Council and T-644/22, Timchenko and Timchenko v Council). The GC rejects these arguments. It first states that the obligations are not restrictive measures as such but measures to ensure the effective and uniform implementation of restrictive measures. Therefore, the contested provisions could correctly be adopted on the basis of Art. 215(2) TFEU. The GC does also not see a violation of the fundamental right to privacy or a breach of the principle of legal certainty. Second, the GC argues that the Council did not act as a legal authority in criminal matters because Member States retained their power to decide about the consequences of circumvention activities; penalties could be attached as criminal, civil or administrative in nature.

■ 11 September 2024: In the case T-494/22, the GC dismisses an action by the Russian non-bank financial entity NSD against its maintenance on the Council's list of entities which are subject to restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. NKO AO National Settlement Depository (NSD) provides securities record-keeping and custody services as a central depository as well as other financial services, such as bank settlement services. The GC rules that the Council could validly consider that, from both a quantitative and a qualitative perspective, NSD was significantly supporting, materially or financially, the Russian Government, by enabling it in its financial resources with the aim of pursuing its actions to destabilise Ukraine. The GC clarifies, however, that the decisive criterion is the material or financial support: the finding that the applicant is under the control of the Russian Government cannot be decisive in justifying the inclusion of the applicant on the lists at issue. The GC also examines NSD's argument that the restrictive measures imposed on it entailed the freezing of funds and economic resources belonging to its customers – who are not subject to those measures – and, therefore, the infringement of their right to property. In this context, the GC clarifies that it has no jurisdiction to carry out a review of the lawfulness of decisions adopted by national authorities; however, when deciding on a request for release of frozen funds

pursuant to the derogations laid down in the EU regulations, the competent national authority must ensure that the interference with the right to property of the customers of an undertaking subject to those measures complies with the Charter of Fundamental Rights of the EU.

■ 10 September 2024: Upon a request for preliminary ruling brought by the Regional Court of Bucharest, Romania, the ECJ specifies its jurisdiction over decisions taken in Common Foreign and Security Policy (CFSP) matters and rules on the scope of the prohibition on providing brokering services in relation to military equipment laid down in Art. 2(2)(a) of Decision 2014/512/CFSP. This Decision concerns restrictive measures adopted by the Council of the European Union in view of Russia's actions destabilising the situation in Ukraine. The case at issue (Case C-351/22, Neves 77 Solutions) arose from a lawsuit by a Romanian company which opposes the confiscation of amounts for brokering services and a fine. It put forward that it brokered the sale of Russian radio sets between an Ukrainian and Indian company, while the goods have never been imported into the EU. The ECJ first clarified that it has jurisdiction to interpret a measure of general scope of a CFSP decision which forms the basis for national sanctions imposed on an undertaking. Second, the ECJ ruled that the prohibition on providing brokering services in relation to military equipment to an operator in Russia applies even if those goods were never imported into a Member State. Third, the ECJ confirms that EU law permits the automatic confiscation of the full amounts received in relation to the provision of brokering services concerning military equipment to an operator in Russia.

■ 5 September 2024: The ECJ rules on the question as to whether a notary's authentication of a contract for the sale of immovable property belonging to a legal person established in Russia is covered by the ban to provide legal advisory services as established by the 8th sanctions package (see above). In the case at issue (C-109/23, Jemerak), a German notary had refused to authenticate a purchase contract for a Berlin apartment belonging to a Russian company because he could not rule out the possibility of violating the ban. To clarify this question, the Berlin Regional Court referred it to the ECJ for a preliminary ruling. The ECJ concludes that the notary does not breach the sanctions against Russia by the authentication. It reasons that the German notary performs, independently and impartially, a public function entrusted to him or her by the State if he/she authenticates a contract on immovable property. It does not appear to provide, beyond that authentication, legal advice intended to promote the specific interests of the parties. Moreover, the notary's activities that secure the execution of the authenticated contract (e.g. the transfer of the amount of the purchase price to the vendor) do not constitute legal advice. Lastly, the ECJ clarified that an interpreter acting in the context of notarial authentication does not provide legal advice, so that his/her services are not covered by the prohibition at issue either. (TW)

### EU Reactions to Russian War against Ukraine: Overview July – September 2024

This news item continues the reporting on key EU reactions following the Russian invasion of Ukraine on 24 February 2022: the impact of the invasion on the EU's internal security policy, on criminal law, and on the protection of the EU's financial interests. The following overview covers the period from July 2024 to the end of September 2024. For overviews of the developments from February 2022 to mid-July 2022 →eucrim 2/2022, 74–80; for the developments from the end of July 2022 to the end of October 2022→eucrim 3/2022, 170–171; for the developments from November 2022 to December 2022 →eucrim 4/2022, 226–228; for the developments from January 2023 to June 2023 →eucrim 1/2023, 6–9; for the developments from July 2023 to September 2023 →eucrim 2/2023, 116–117; for the developments from October 2023 to January 2024 →eucrim 4/2023, 313–315; from January 2024 to June 2024 →eucrim 1/2024, 9–11.

■ 12 July 2024: Eurojust and the United States Department of Justice organise a key meeting that addresses the question on the effective fight against the illicit export of goods to Russia in light of its ongoing war of aggression against Ukraine. Participants particularly discuss the threats posed by the acquisition of sensitive technology by non-allied nations.

■ 17 July 2024: The newly elected European Parliament reaffirms its strong support for Ukraine amidst Russia's ongoing war. In a resolution passed on 17 July 2024, MEPs emphasised the EU's commitment to providing military support to Ukraine as long as, and in whatever form, is necessary. The resolution also calls for maintaining and extending EU sanctions against Russia and Belarus as well as systematically tackling the circumvention of these sanctions by EU-based companies, third parties, and non-EU countries. MEPs welcome recent EU efforts to use Russian assets frozen by the EU in support of Ukraine. They call for a "sound legal regime for the confiscation of Russian state-owned assets frozen by the EU". The Commission is urged to propose long-term financial assistance for Ukraine's reconstruction, building on the experience of the newly established Ukraine Facility. The resolution also condemns Hungarian Prime Minister Viktor Orbán's recent visit to Russia, labeling it a "blatant violation of the EU treaties and and common foreign policy". According to the

text, Hungary should face repercussions for these actions.

■ 26 July 2024: The EU gives green light for the first payment of €1.5 billion to Ukraine that was generated from immobilised assets of the Russian Central Bank. These extraordinary revenues were generated by EU operators and held by central securities depositories (CSDs) from immobilised Russian sovereign assets. They were made available by Euroclear to the Commission as a first instalment on 23 July. The money will now be channelled through the European Peace Facility and to the Ukraine Facility to support Ukraine's military capabilities as well as to support the country's reconstruction. The underlying legal acts enabling the use of the CSDs' profits for Ukraine were adopted by the Council on 21 May 2024 (→eucrim 1/2024, 9).

■ 6 August 2024: The Council approves the first (regular) payments of grants and loans under the EU's Ukraine Facility. Ukraine is now set to receive almost €4.2 billion from the EU. The Council concluded that Ukraine had satisfied the necessary conditions and reforms envisaged in the Ukraine Plan for receiving the funds. The Ukraine Facility was agreed upon at the beginning of 2024 and foresees up to €50 billion of stable financing, in grants and loans, to support Ukraine's recovery, reconstruction, and modernisation for the period 2024 to 2027 (→eucrim 1/2024, 9).

■ 13 August 2024: The Commission disburses €4.2 billion as first regular payment under the Ukraine Facility. The disbursement was endorsed by the Council on 6 August (see above). Initial payments under the Facility were already made beforehand: €6 billion in bridge financing and €1.9 billion in pre-financing.

■ 24 August 2024: On occasion of Ukraine's independence day, the EU is reconfirming its unwavering support to Ukraine as it defends itself against Russia. "Europe will always be at Ukraine's side, because Ukraine is Europe," says European Commission President Ursula von der Leyen in her video message. She also points out that the EU and its Member States have made available €114 billion to Ukraine so far. The Ukraine flag is unfurled in front of the European Parliament and several EU buildings in Brussels are illuminated in Ukrainian colours.

■ 10 September 2024: The seven members of the Eurojust-supported Joint Investigation Team (JIT) on alleged core international crimes committed in Ukraine (→eucrim 1/2024, 8–9) agreed to amend the JIT Agreement to enhance investigations into crimes of torture, ill-treatment, and filtration. The JIT, which was set up in 2022, today consists of Ukraine, six EU Member States (Lithuania, Poland, Estonia, Latvia, Slovakia, and Romania), the International Criminal Court (ICC), and Europol. The work of the JIT is additionally supported by the Core International Crimes Evidence Database (CICED), which was launched by Eurojust in February 2023, and by the International Centre for the Prosecution of the Crime of Aggression Against Ukraine (ICPA). So far, the CICED has received thousands of files for preservation and analysis from various countries, including Ukraine.

■ 11 September 2024: The "United for Justice Conference" in Kyiv discusses the urgent need to investigate and prosecute war crimes involving the targeting of civil objects by Russia in Ukraine. Participants also exchange ideas on how to mobilise resources to deter the commission of these crimes and effectively deal with their consequences.

■ 19 September 2024: Considering the latest developments of Russia's invasion of Ukraine, an EP resolution calls on EU Member States to continue their financial and military support to Ukraine. The resolution follows the resolution of 17 July 2024 (see above) and mainly addresses the EU Member States. The EP underlines that Ukraine must have the possibility to defend itself fully and deplores the declining volume of bilateral military aid to Ukraine by EU countries. EU Member States should maintain and extend the Council's sanctions policy against Russia, Belarus, and non-EU countries and entities providing Russia with military and dual-use technologies. More Chinese individuals and entities should be added to the EU sanctions list. MEPs reiterate their demands that tougher measures must be taken to systematically tackle the issue of sanctions circumvention. In addition, the EU must establish a sound legal regime for the confiscation of Russian state-owned assets frozen by the EU as part of efforts to compensate Ukraine for the massive damage it has suffered (see also above).

■ 24 September 2024: OLAF hosts a meeting of the G7 Sub-Working Group on Export Control Enforcement. Experts discuss the latest developments in the fight against the circumvention of sanctions and export controls that restrict Russia's access to technologies and other materials required to sustain its military operations. The group agreed on a joint guidance for industry that aims to facilitate the identification of circumvention practices. (AP/CR/TW)

## Artificial Intelligence

### Final Approval and Publication of the AI Act

After the Council's final green light on 21 May 2024, the pioneering Artificial Intelligence (AI) Act, establishing the first comprehensive global regulatory framework for AI, was published in the EU's Official Journal on 12 July 2024 (Regulation (EU) 2024/1689). The AI Act prohibits certain AI practices and sets forth regulations pertaining to "high-risk" AI systems, AI systems that

pose transparency risks, and general-purpose AI (GPAI) models. For the agreement between the EP and Council →eucrim 4/2023, 316–317.

The regulations set forth in the AI Act will be implemented in stages. The regulations pertaining to prohibited practices will take effect in February 2025, while those concerning obligations on GPAI models will become applicable in August 2025. Finally, the regulations pertaining to transparency obligations and those concerning high-risk AI systems will come into effect in August 2026.

It should be noted, however, that exceptions have been made for high-risk AI systems and GPAI models that have already been placed on the market. With regard to high-risk AI systems that will have been placed on the market or put into service in the EU prior to August 2026, the AI Act will only apply in the event of "significant changes" to their design after that date. Similarly, with respect to GPAI models that will have been placed on the market in the EU prior to August 2025, the AI Act's rules will not apply to them until August 2027.

The AI act is designed to be key for the EU's policy to foster the development and uptake across the single market of safe and lawful AI that, at the same time, respects fundamental rights. (AP)

### EUIs Using Generative AI Systems: EDPS Guidelines

On 3 June 2024, the EDPS published guidelines on generative Artificial Intelligence and personal data for EU institutions, bodies, offices and agencies (EUIs). When using or developing generative AI tools, the guidelines will help EUIs comply with the data protection obligations set out in Regulation (EU) 2018/1725 on the protection of natural persons with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data (EUDPR). The guidelines address the following questions:

- What is generative AI?
- Can generative AI be used by EUIs?
- What is the role of DPOs in the process of developing or deploying a generative AI system?
- Is there a need to conduct a data protection impact assessment (DPIA)?
- What constitutes the lawfulness of processing personal data during the design, development, and validation of generative AI systems and automated decision-making?
- How can the principles of data minimalism, data accuracy, fair processing, data security, information and transparency policies be ensured?
- How can individual rights be exercised in the use of generative AI systems?

Overall, the EDPS does not oppose the use of generative AI technologies by EUIs but emphasises the need to carefully consider when and how generative AI can be used responsibly and beneficially for the public good:

- All stages of the generative AI solution lifecycle should operate in accordance with the applicable legal frameworks, including the GDPR, when the system involves the processing of personal data;
- The development and deployment of a generative AI system should involve all stakeholders throughout its lifecycle;
- Regular, systematic, and continuous monitoring are crucial for the use of generative AI systems;
- Throughout the lifecycle of the generative AI systems, EUIs should carefully assess the accuracy of the data and reconsider the use of such systems if the accuracy cannot be maintained.

The processing of personal data in the context of generative AI systems requires a solid legal basis in line with the EUDPR. Regular monitoring and the implementation of controls at all stages can help verify that there is no processing of personal data where it is not intended by the model. When using generative AI systems that process personal data, EUIs must provide individuals with all the information required by the EUDPR and GDPR. The information made available to individuals must be updated as necessary to ensure that the data subjects are properly informed and remain in control of their own data. Ultimately, where generative AI systems are to support decision-making processes, EUIs will need to carefully consider whether to deploy them – in respect of both their legality and their potential to produce unfair, unethical, or discriminatory decisions. (CR)

## Digital Space Regulation

### New Report on Encryption by EU Innovation Hub

spot light

At the beginning of June 2024, the EU Innovation Hub for Internal Security published its first Report on Encryption. The report analyses the topic of encryption from legislative, technical, and developmental points of view.

Against the background of the ever-increasing presence of encrypted data in criminal investigations, access to such information by law enforcement authorities has been the subject of a long-standing discussion about how the privacy rights of individuals and collective security must be balanced: how can lawful interception coexist with encryption without undermining cybersecurity and/or privacy?

According to the report, a framework to access encrypted communications is steadily taking shape in the EU. Although the newly adopted e-evidence package (→eucrim 2/2023, 165–168) is a step in the right direction, namely towards enhancing law enforcement access to electronic evidence, many questions remain concerning the admissibility of evidence gathered from

encrypted communication channels and the challenges arising from various technologies. Next to the national, European, and international legislation on encryption, the report also looks at encryption challenges and opportunities in relation to, for instance, quantum computing, cryptocurrencies, biometric data, the Domain Name System (DNS), telecommunication technologies, artificial intelligence (AI), and large language models (LLMs). The report draws the following conclusions:

- Some EU Member States have recently made amendments to existing national legislation in areas relevant for bypassing encryption. Extended search capabilities and means for targeted lawful access could be beneficial in capturing encrypted data.
- Differences in data retention periods between the EU Member States (which the report estimates as problematically short in some cases) might be slightly outbalanced by the possibilities to transmit requested data faster under the new EU e-evidence package.
- A wider debate on the introduction/use of alternative means of bypassing encryption (e.g. client-side scanning) is necessary.
- The problems created by home routing in 4G and 5G networks (individuals within national borders that use a foreign SIM card cannot be intercepted unless the foreign service provider cooperates with the domestic provider), may – for the moment – require that privacy-enhancing technologies be disabled in home routing.
- Interception technologies for user identification should be a legal requirement for the next generation of mobile networks (5G and 6G).
- From a technical perspective, there is a need for further research to reach a solution where both individual privacy and lawful interception are respected.
- In order to identify criminals using cryptocurrencies, collaboration with academia and private industry is needed, so that technological trends can be monitored and novel tools can be created.
- There is a need for DNS encryption, which, if implemented, would allow law enforcement to access and process suspects' DNS traffic.
- The need exists for a legal framework on the use of artificial intelligence and large language models, underpinned by robust and adequate data protection safeguards, in which law enforcement authorities can leverage the same modern technologies as other stakeholders in the private sector and academia.
- Quantum computing can significantly improve the investigative capabilities of law enforcement.
- Ultimately, relevant stakeholders in the JHA domain must be made aware of these developments and be provided with the means to stay on top of these technological advancements.

The encryption report was produced by the following members of the EU Innovation Hub for Internal Security: Europol, Eurojust, the European Commission's Directorate-General for Migration and Home Affairs (DG HOME), the European Commission's Joint Research Center (JRC), the European Council's Counter-Terrorism Coordinator, and the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (EU-LISA). Hosted at Europol, the Hub is a network that works on innovative tools and effective solutions to support internal security actors in the EU and its Member States. The Hub team is composed of staff from different EU Agencies and Member States. Work on encryption/decryption technologies is one of the Hub's top priorities. (CR)

### Overview of the Latest Developments Regarding the Digital Services Act

Eucrim has regularly reported on the EU's new major legislation regulating the digital space, i.e., the Digital Services Act and the Digital Markets Act (→eucrim 1/2024, 12–13 with further references). The Digital Services Act (DSA) is designed to foster a safer, fairer, and more transparent online environment (→eucrim 4/2022, 228–230). It establishes new obligations for online platforms, thereby ensuring that EU users are safeguarded against the dissemination of illicit goods and content and that their rights are respected when they engage in interactions, share information, or make purchases online. The DSA is also highly relevant for law enforcement purposes (→eucrim 1/2024, 13). This news item continues the reporting on the latest developments concerning the DSA in the form of a chronological overview.

- 21/23 April 2024: Adult entertainment platforms Pornhub, Stripchat, and XVideos have been designated Very Large Online Platforms (VLOPs) and now face the strictest obligations under the Digital Services Act (DSA). These platforms must submit risk assessment reports to the Commission, implement measures to mitigate systemic risks associated with their services, comply with enhanced transparency obligations, including those related to ads, and provide data access for researchers.
- 26 April 2024: The Commission has designated Shein, a prominent online fashion retailer, as a Very Large Online Platform (VLOP) under the DSA, based on the company's average of over 45 million monthly users in the EU. This designation necessitates that Shein comply with rigorous regulations within four months. These regulations focus on enhanced user protection, particularly for minors, and diligent oversight of illegal products. Consequently, Shein is required to evaluate and mitigate the risks associated with the sale of illicit products, including counterfeit items, and to enhance its moderation processes and algorithms to prevent the promotion of prohibited items. Next to addressing risks to con-

sumer health and safety, Shein must also undergo annual independent audits, publish repositories of advertisements served on its interface, provide data access to researchers, and issue transparency reports every six months.

■ 30 April 2024: The Commission initiates formal proceedings against Meta, the parent company of Facebook and Instagram, to assess whether it violates the DSA. The investigation focuses on several suspected infringements, including Meta's handling of deceptive advertisements, disinformation, and political content. Additionally, the Commission is concerned about Meta's decision to phase out its real-time election-monitoring tool, CrowdTangle, without providing an adequate replacement, potentially jeopardizing the transparency of civic discourse and electoral processes. The Commission also questions the adequacy of Meta's mechanisms for flagging illegal content and handling user complaints. If these suspicions are confirmed, Meta could be found in breach of multiple DSA articles, leading to potential penalties.

■ 31 May 2024: The Commission designates Temu as a VLOP under the DSA. Temu is a Chinese online marketplace with over 45 million monthly users in the EU. The company is now obligated to comply with the strictest DSA rules within four months. These obligations include thorough risk assessments and measures to address the sale of illegal or unsafe products, particularly those that might harm minors. Temu is to enhance consumer protection by adjusting its platform's design and algorithms. Additionally, the company must ensure transparency and accountability through annual independent audits, regular risk assessments, and public reporting on content moderation and systemic risks.

■ 7 June 2024: The European Commission acknowledges LinkedIn's decision to fully disable the functionality that allowed advertisers to target users based on their membership in LinkedIn Groups within the EU Single Market. This change follows a request for information from the Commission after a complaint from civil society organisations. They raised concerns about the business and employment-focused social media platform LinkedIn potentially enabling advertisers to target users based on sensitive personal data, such as racial or ethnic origin, political opinions, religious beliefs, or trade union membership – in violation of the DSA.

■ 10 July 2024: The Commission designates XNXX as VLOP under the DSA. XNXX is a pornographic video sharing and viewing website with over 45 million monthly users in the EU; thus, XNXX surpasses the DSA threshold for this designation. As a VLOP, XNXX must comply with the strictest DSA rules (see also above) within four months, by mid-November 2024.

■ 12 July 2024: The Commission informs X (formerly Twitter) of its preliminary view that it breaches the DSA in areas related to dark patterns, advertising transparency, and data access for researchers (for the opening of the investigation →eucrim 3/2023, 245–246). Following an in-depth investigation, the Commission found first that X designs and operates its interface for "verified accounts" with the "blue checkmark" in a way that deviates from industry practice and deceives users. Since anyone can subscribe to obtain this "verified" status, it negatively impacts users' ability to make free and informed decisions about the authenticity of accounts and content. Malicious actors are abusing the "verified account" to deceive users. Second, X does not meet the required transparency on advertising, as it fails to provide a searchable and reliable advertisement repository. Instead, it implements design features and access barriers that render the repository unfit for transparency purposes. This design flaw hinders the required supervision and research into emerging risks associated with online advertising. Third, X fails to provide researchers with access to its public data, as required by the DSA. Specifically, X prohibits eligible researchers from independently accessing public data, such as by scraping, as outlined in its terms of service. Additionally, X's process for granting access to its application programming interface (API) discourages researchers from pursuing their projects or forces them to pay disproportionately high fees. X now has the opportunity to exercise its right of defense by reviewing the Commission's investigation file and responding in writing to these preliminary findings. The European Board for Digital Services will also be consulted.

■ 5 August 2024: The Commission makes legally binding TikTok's commitment to permanently withdraw the TikTok Lite Rewards programme from the EU and not to launch any other programme that would circumvent this withdrawal. This commitment addresses concerns raised by the Commission in formal proceedings initiated on 22 April 2024, ensuring compliance with the DSA. Any breach would immediately constitute a violation of the DSA, potentially leading to fines. This case marks the first instance where the Commission accepts commitments from a designated online platform under the DSA and closes formal proceedings as a result. Another proceeding against TikTok under the DSA (opened in February 2024) linked to the protection of minors, advertising transparency, and data access for researchers is ongoing. (AP)

### DMA: Bytedance (TikTok) Remains a Gatekeeper

In the case of *Bytedance (TikTok) v. Commission* (Case T1077/23), the General Court (GC) dismissed the action brought by Bytedance, the company behind TikTok, challenging the

European Commission's decision to designate it a "gatekeeper" under the Digital Markets Act (DMA). The Commission had made this designation on 5 September 2023, and Bytedance sought to have the decision annulled in November 2023. The Court adjudicated the case via an expedited procedure, delivering its judgment eight months later on 17 July 2024.

The DMA aims to contribute to a contestable and fair market in the digital sector. It, *inter alia*, establishes obligations and limits powers of undertakings providing core platform services ("gatekeepers"). Non-compliance with the DMA's obligations can lead to fines and periodic penalty payments (→eucrim 4/2022, 228–230).

The GC upheld the Commission's assessment of Bytedance as a gatekeeper, observing that the company satisfied the quantitative criteria set forth in the DMA, including its substantial global market value and the considerable number of TikTok users in the EU. The arguments presented by Bytedance were deemed inadequate to challenge the presumption of its considerable influence on the internal market, the pivotal role of TikTok as a conduit for business users, and the company's well-established and enduring position.

The Court rejected Bytedance's claims that its global market value, which is primarily driven by activities in China, indicated a lack of significant impact on the EU market. Furthermore, the judges in Luxembourg rejected the argument that TikTok's comparatively limited scale and the absence of an ecosystem or network effects meant it was not a crucial gateway for businesses. They emphasised the rapid growth and high engagement rates among users in the EU, particularly young people, of the platform known as TikTok.

Moreover, the GC rejected Bytedance's assertion that it did not occupy an entrenched and durable market position. Despite competition from similar services, such as Reels and Shorts, launched by Meta and Alphabet, TikTok has consolidated and strengthened its position.

In conclusion, the GC determined that the Commission's standard of proof was appropriate and that any errors made in assessing Bytedance's arguments did not affect the legality of the decision. Furthermore, Bytedance's claims of infringement of its rights of defence and unequal treatment were rejected.

The GC's decision is subject to an appeal, limited to points of law, that may be brought before the Court of Justice (ECJ). Bytedance lodged this appeal on 26 September 2024. The appeal is registered under Case C-627/24 P. (AP)

## Legislation

### New Pact on Migration and Asylum

After three years of hard and complex negotiations, the European Parliament and the Council formally adopted the new Pact on Migration and Asylum in May 2024. It is one of the most important EU legislations in the area of home affairs in the recent years. The Pact consists of a set of new rules concerning the management of migration, the security at the EU's external borders and the EU's common asylum system. In detail, the legal acts (all published in the EU's Official Journal of 22 May 2024) are as follows:

- The Asylum and Migration Management Regulation (AMMR) replacing the current "Dublin III Regulation";
- The Asylum Procedure Regulation and the Return Border Procedure Regulation;
- The Crisis and Force Majeure Regulation;
- The recast of the Eurodac Regulation;
- The new Screening Regulation;
- The Qualification Regulation replacing the Qualification Directive;
- The revised Reception Conditions Directive;
- The Union Resettlement and Humanitarian Admission Framework Regulation.

The Pact follows a holistic approach: introducing a new legislative framework on migration and asylum while supporting Member States through operational and targeted actions. It also focuses on working with partner countries to address the root causes of migration/migrant smuggling and to promote legal pathways.

In order to manage migration at the EU's borders, the Pact introduces new procedures and reforms existing procedures in four categories:

- Robust screening;
- The Eurodac asylum and migration database;
- Border procedure and return;
- Crisis protocols and action against instrumentalisation.

In the area of robust screening, the new rules aim to ensure that those not fulfilling the conditions to enter the EU will be registered and subject to identification, security, and health checks. Through a reform of the Eurodac Regulation, the Eurodac asylum and migration database (the EU's biometric information system for the identification of asylum seekers and illegal border-crossers) will be turned into a full-fledged asylum and migration database, ensuring clear identifications. In the field of border procedure and return, a mandatory border procedure will apply for asylum applicants who are unlikely to need protection, mislead the authorities, or present a security risk. Efficient returns with reintegration support will apply for those not eligible for international protection. Lastly, the Crisis Regulation will provide quick crisis protocols, with operational support and funding, in emergency situations.

In order to ensure fast and efficient procedures, the Pact builds on the following measures:

- Clear asylum rules;

- Guaranteeing people's rights;
- EU standards for refugee status qualifications;
- Preventing abuses.

The Asylum Migration Management Regulation aims to ensure effective determination of which EU country is to be responsible for handling an application for asylum. The Reception Conditions Directive will establish harmonised standards across the EU, ensuring adequate living conditions for asylum seekers, while strengthening safeguards and guarantees and improving integration processes. The Qualification Regulation shall strengthen and harmonise criteria for international protection and clarify the rights and obligations of beneficiaries. To prevent abuse, the Asylum Procedure Regulation sets out clear obligations of cooperation for asylum seekers, providing for consequences in cases of non-compliance.

Another objective of the Pact is to establish an effective system of solidarity and responsibility. As a result, a permanent solidarity framework must be created to ensure that EU countries receive the solidarity needed. Under the framework, EU countries can choose how they will participate: relocations, financial contributions, operational support, request deductions, and "responsibility offsets". In order to ensure operational and financial support, EU countries will be supported by the relevant EU Agencies and dedicated EU funds. Clearer rules on responsibility for asylum applications are to enhance the criteria determining the EU country responsible for assessing an asylum application. Lastly, to prevent secondary movements, asylum seekers must apply for international protection in the EU country of first entry and remain there until the country responsible for their application is determined.

To embed migration in international partnerships, the Pact foresees measures to prevent irregular departures by, for instance, strengthening the capacities of border management authorities in priority partner countries. To fight migrant smuggling, dedicated and tailor-made Anti-Smuggling Operational Partnerships with partner countries and UN agencies are being established, tackling smuggling in key locations. Cooperation on return and readmission shall go hand in hand with the development of legal migration. To promote legal pathways, an EU Talent Pool will be established as the first EU-wide platform to facilitate international recruitment and Talent Partnerships will allow non-EU citizens to work, study, and train in the EU.

Following the Pact's entry into force on 11 June 2024, the European Commission adopted a Common Implementation Plan for the Pact on Migration and Asylum on 12 June 2024, setting out the key actions required to translate the new rules on migration into practice. These key actions are grouped into 10 building blocks covering the following areas:

- A common migration and asylum information system;
- A new system to manage arrivals at the EU's external borders;
- Rethinking reception;
- Streamlining the decision-making process on asylum applications at the EU level;
- Expediting return processes;
- Activating the new responsibility criteria;
- Enforcing solidarity;
- Reducing the risks of crisis situations;
- Protecting the right to asylum and human dignity;
- Resettlement, inclusion, and integration.

As a next step, the EU Member States shall prepare their National Implementation Plans by December 2024. Ultimately, the new migration and asylum legal framework shall enter into force by mid-2026.

Looking at its role within the framework of the new Pact on Migration and Asylum, Frontex identified two main areas of action regarding the building blocks of a new system to manage arrivals and expedite return processes. For the new screening procedure (which shall include a preliminary vulnerability check, verification of identity, the collection and transmission of biometric data, a security check, and filling out a screening form), Frontex will deploy trained border guards to support Member States. Frontex also wants to play a crucial role in the training of the border and coast guard community, spreading the best practices on how to manage external borders in respect of fundamental rights. To guarantee efficient and fair returns, Frontex will cooperate closely with EU Member States in order to facilitate returns as well as reintegration in the country of origin. The Agency should offer support in all return phases, including in identification and return counselling, as well as through the EU Reintegration Programme. (CR)

## Institutions

### Council

#### Programme of the Hungarian Council Presidency

Under the motto "Make Europe Great Again", Hungary assumed the Presidency of the Council of the EU for the period from 1 July 2023 to 31 December 2024.

A special feature of the Hungarian Presidency is the timeframe that coincided with the start of a newly established European Parliament and European Commission as well as the start of the implementation of the Strategic Agenda 2024–2029 (→news item above, p. 85), setting out the long-term guidelines for the EU's future work.

In its programme, Hungary defined the following priorities for its Presidency:

- Adopting a new European Competitiveness Deal;
- Reinforcing European defence policy;
- Stemming illegal migration;
- Shaping the future of cohesion policy;
- Addressing demographic challenges;
- A farmer-oriented EU agricultural policy;
- A consistent and merit-based enlargement policy.

In the domain of Justice and Home Affairs, a focus of the Hungarian Presidency is, *inter alia*, on strong European borders with a crisis-resilient system and a secure Europe.

The Presidency's aim is to strengthen the resilience of the Schengen Area to crises and to facilitate the finalisation of the Schengen enlargement process. It wishes to improve the resilience of the Common European Asylum System and to encourage Member States to exchange views on innovative solutions in the field of asylum. It also envisages stepping up measures for the effective implementation of returns. It further aims to continue legislative negotiations on revision of the visa suspension mechanism and to initiate a comprehensive review of the European visa waiver regime.

To ensure a secure Europe, the Hungarian Presidency is paying particular attention to the fight against terrorism and organised crime and to operational law enforcement cooperation. It is committed to strengthening law enforcement and judicial cooperation in the prevention, detection, and investigation of smuggling and trafficking of human beings (THB) and to increasing the effectiveness of information exchange.

Next to THB, the Presidency is focusing on the fight against drug trafficking: it will promote the implementation of the EU Drugs Strategy and Action Plan and the EU Roadmap for combating drug trafficking and organised crime.

Other priorities of the Presidency include the fight against illicit trafficking of cultural goods and environmental crime. Regarding cybercrime, the Hungarian Presidency is continuing to work on a long-term legislative solution to prevent and combat online child sexual abuse and on revision of the directive against sexual exploitation of children.

In the field of criminal justice cooperation, the Presidency is continuing to prioritise victim support and the fight against corruption. The continuation of the debate on the future of criminal law and the development of model provisions are another priority of the Hungarian Presidency's term. (CR)

## Court of Justice of the EU

### Accession to the EU: 20th Anniversary for Ten Member States Celebrated at CJEU

On 1 May 2004, the EU experienced its largest single enlargement in terms of countries and people – with the accession of ten new Member States: Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovakia, and Slovenia.

To mark the 20th anniversary of the accession of these States, the CJEU hosted a conference on 2–3 May 2024 in celebration of this constitutional moment for Europe. The conference looked back on the history of the enlargement, the pre-accession context, and the criteria that candidate States had to meet. In a next segment, the conference participants analysed the contribution of the 2004 enlargement to the development of the EU as a "Union of values". The retrospective analysis also explored how, over the course of the past 20 years, EU law has ensured the cohesion and convergence of the national economies of the new Member States in the EU – under the supervision of the EU Courts. (CR)

### Reform of CJEU Statute: Amendments to the Rules of Procedure in Force

On 1 September 2024, following the reform of the Statute of the Court of Justice of the EU (→eucrim 1/2024, 16), amendments to the respective Rules of Procedure of the Court of Justice and of the General Court entered into force. The amendments modernise and simplify the procedures before the two courts. In particular, the provisions lay down new rules enabling the transfer of part of the jurisdiction to hand over preliminary rulings from the Court of Justice to the General Court. The provisions have been applicable since 1 October 2024.

Jurisdiction is given to the General Court of the EU in the following six specific areas:

- The common system of value added tax;
- Excise duties;
- The customs code;
- The tariff classification of goods under the combined nomenclature;
- Compensation and assistance to passengers in the event of denied boarding or delay or cancellation of transport services;
- The system for greenhouse gas emission allowance trading.

The amendments to the Rules of Procedure of the Court of Justice lay down detailed rules for the initial processing of requests for a preliminary ruling submitted to the Court of Justice in order to determine which court has jurisdiction to deal with them. In addition, new provisions ensure that requests for a preliminary ruling – which the General Court refers to the Court of Justice on the ground that they require a decision of principle likely to affect the unity or consistency of Union law – are dealt with swiftly. The amendments also lay down detailed rules for written observations submitted by interested persons in preliminary ruling cases that will be the subject of a decision from 1 September 2024, un-

less such person objects, and specifies online publication within a reasonable time after the closing of the case. In this regard, the new "Practice Directions to parties concerning cases brought before the Court of Justice" provide details on how to raise such objections. Further to the new rules on preliminary rulings, the amended Rules of Procedure of the Court of Justice now also include the following:

- The possibility, for the parties or their representatives, to make oral submissions by means of videoconference, in compliance with the legal and technical requirements laid down in the Practice Directions to Parties;
- Clarified rules on the protection of personal data and on the methods of lodging/service of procedural documents;
- A new provision setting out the arrangements for the broadcasting of hearings and for the delivery of judgments and opinions before the Court of Justice.

The amendments to the Rules of Procedure of the General Court first concern certain aspects of the structure and organisation of the General Court:

- They provide for the creation of an Intermediate Chamber between chambers of five judges and the Grand Chamber sitting with fifteen judges. The Intermediate Chamber is composed of nine judges and presided over by the Vice-President of the General Court.
- Requests for a preliminary ruling are assigned to chambers (sitting with five judges) with particular responsibility for hearing and determining these cases without prejudice to the possibility of referring them to another court formation, depending on the difficulty and importance of the case.
- Judges called upon to perform the duties of an Advocate General in preliminary ruling cases and those called upon to replace them if they are prevented from acting are elected by the General Court. They assist the court formation responsible in all preliminary ruling cases, mirroring the participation of Advocates General in proceedings before the Court of Justice.

Secondly, the new rules lay down the procedures under which requests for a preliminary ruling transmitted by the Court of Justice are dealt with by the General Court. To provide the same safeguards as those applied by the Court of Justice, the General Court has largely reproduced the relevant provisions of the Rules of Procedure of the Court of Justice.

Additionally, further amendments to the Rules of Procedure of the General Court include the following:

- Removal of registry charges for extracts from the register of the Registry, copies of procedural documents, and authenticated copies of orders and judgments;
- Modernisation of the rules concerning the methods of lodging/service of procedural documents;
- Possibility to proceed via simple decision in order to take procedural measures, which hitherto required the adoption of an order (reopening of oral part and joinder of cases in the absence of a request for confidential treatment);
- Limitation period for lodging a modification of the application where the annulment of a measure is sought or it is replaced or amended by another measure with the same subject matter;
- Possibility of a direct measure of inquiry requesting information or the production of material without prior adoption of a measure of organisation of procedure;
- Clarification and streamlining of the rules on assignment to a court formation regarding ancillary claims (rectification, failure to adjudicate, setting aside judgments by default, third-party proceedings, interpretation, revision, dispute on costs);
- Broadcasting of hearings before the General Court, which will be possible only after the entry into force of an implementing decision.

Lastly, the new Rules of Procedures are accompanied by new Practice Rules of the General Court that explain and detail the provisions of the Rules of Procedure of the General Court as regards, *inter alia*, the handling of preliminary ruling requests before the General Court, the protection of personal data, the confidential treatment of certain data in direct actions, the submission of procedural documents and their annexes, and participation in hearings, including per videoconference. (CR)

## OLAF

### OLAF's 25th Anniversary

On 1 June 2024, OLAF celebrated its 25th anniversary. On 1 June 1999, Regulations (EC) No 1073/1999 and (Euratom) No 1074/1999 concerning investigations conducted by the European Anti-Fraud Office entered into force. They created a new independent body with strengthened powers to investigate fraud and irregularities damaging the EU budget. OLAF replaced UCLAF – a unit within the Secretariat-General of the European Commission. UCLAF worked alongside national anti-fraud departments and provided the coordination and assistance needed to tackle transnational organised fraud. The need for a new institutional architecture in combating and preventing fraud at the EU level emanated from the resignation of the Santer Commission which was confronted with corruption allegations.

Over the past 25 years, OLAF has closed a total of over 6000 investigations and uncovered around €16 million of irregularities and fraud. OLAF's main activities include:

- Detecting smuggling networks that evade customs duties and VAT or circumvent EU anti-dumping duties;

- Tracing fraudsters in a wide range of areas, such as agriculture, infrastructure, health, education, research, energy, the environment and digitisation;
- Tracking down counterfeit products, including toys, medicines, food and beverages, and cigarettes causing harm to European consumers;
- Uncovering scams in relation to the COVID-19 pandemic;
- Investigating misconduct by EU staff or MEPs thus ensuring accountability and trust in the European institutions;
- Issuing recommendations in view of the recovery of money, the launch of criminal proceedings, and the initiation of disciplinary actions;
- Giving expertise on anti-fraud legislation and strategies;
- Developing policies for the prevention of fraud.

On the occasion of the Office's 25th anniversary, OLAF Director-General *Ville Itälä* emphasised that OLAF was the first central entity in Brussels that has succeeded in establishing networks with authorities in the EU Member States and third countries and building up close cooperative relationships with international agencies and other relevant EU bodies and agencies, thus hampering criminals to operate across borders. He also said:

"Today is both a moment to glance back with pride at our achievements and a time to look forward into the future. We have shown that investing in the fight against fraud pays off – for every euro that OLAF's operations cost, we tracked down at least 10 euro to be recovered to the EU's budget. And this is without counting all the money that we have prevented from being diverted in the first place. [...] It is our job to keep up even as we face the challenge of matching a more complex, increased workload with the same resources. I want the key words for OLAF's future to be: enhanced investigations through data analysis and artificial intelligence, targeted fraud prevention and strong cooperation."

A dedicated website on OLAF's 25 anniversary provides an overview of the key milestones in the Office's development and the Union's fight against fraud. For the 10th anniversary of OLAF →special eucrim issue 3–4/2008. (TW)

### The OLAF Report 2023

In 2023, OLAF recommended the recovery of €1.04 billion to the EU budget and prevented €209.4 million from being unduly spent from the EU budget. The Office closed 265 investigations and issued 309 recommendations for follow-up to the relevant national and EU authorities. In addition, 190 new investigations were opened after having analysed nearly 1180 reports on fraud and irregularities. Cooperation with the EPPO resulted in 79 cases that OLAF reported as they may give rise to criminal prosecutions. These are the key figures of OLAF's annual report for the year 2023 which was presented on 18 June 2024. The report informs about the following issues:

- OLAF's investigative performance and fraud trends in 2023 with regard to both EU expenditure and revenue;
- Impact of OLAF investigations;
- Anti-fraud policies;
- Cooperation with partners and communication;
- Human resources, staff management and budget.

The report is accompanied by statistical data that include developments in the period 2019–2023.

In 2023, OLAF started first investigations into fraud in relation to the Recovery and Resilience Facility (RRF) that saw distributions of €300 billion to the Member States. Russia's aggression against Ukraine further determines OLAF's activities: OLAF continued to support the Member States in detecting and investigating attempts to circumvent the EU sanctions. The Office also took several efforts in protecting the assistance to Ukraine that amounted to €19.5 billion in 2023. OLAF provided training for Ukrainian anti-fraud authorities and carried out some investigations in Ukraine into potential fraud involving EU funds.

Trends from previous years became apparent in 2023: More fraud and irregularities are committed digitally and fraudsters increasingly abuse customs transit procedures by artificially creating cross-border situations and undervaluing goods.

Looking at anti-fraud policy, OLAF coordinated the new action plan of the European Commission's Anti-Fraud Strategy in 2023. OLAF's network expanded as well: new agreements were signed in 2023 with authorities in the U.S., in Ukraine, and with the World Bank Group.

As regards the publication format, OLAF continued the approach that started in 2022: the full report is provided in digital format and a short version is provided in pdf format at OLAF's website. (TW)

### General Court Ruled on Irregularities by Former EU Auditor

On 11 September 2024, the General Court (GC) ruled for the first time on the legality of procedures of the European Court of Auditors (ECA) and OLAF vis-à-vis alleged irregularities committed by a former ECA member.

The GC largely upheld the ECA's decision on the recovery of undue expenditure and also backed OLAF's investigations in the case at issue (Case T-389/19, *CQ v Court of Auditors* – full judgment only in French, press release also in English).

The case concerned several serious irregularities attributed to the former ECA member (CQ) for potentially undue expenditure being charged to the EU budget. Indeed, an OLAF investigation found that there had been a certain number of abuses of the ECA's resources in the context of activities unrelated to CQ's functions,

that confidential information had been transmitted and that there had been a conflict of interests. The ECA ordered the recovery of the undue amounts. CQ paid the amount claimed by the ECA, whilst bringing an action before the GC for annulment of that decision and making a claim for compensation for the non-material damage which he claimed to have suffered.

The GC largely dismissed CQ's arguments and claims. It concluded, *inter alia*, that OLAF neither unlawfully extended the subject matter of the investigation initially opened nor infringed the defendant's right to respect his private life and the right of defence. In addition, the GC ruled that ECA's decision to recover certain amounts was sufficiently reasoned and largely well founded. However, the GC annuls the recovery decision insofar as first, a very limited number of claims were time-barred and, second, certain expenses were legitimate. Lastly, the GC dismissed CQ's claim for compensation in respect of the non-material damage because CQ did not establish that the alleged damage was the direct consequence of an act attributable to the ECA. (TW)

### OLAF's Operational Work July – September 2024

This news item summarises OLAF's operational work between 1 July and 30 September 2024 in reverse chronological order. It follows the reports on operations supported by OLAF in →eucrim 1/2024, 17–18.

■ 24 September 2024: Experts from G7 countries and OLAF investigators discuss the latest developments in the fight against the circumvention of sanctions and export controls that restrict Russia's access to technologies and other materials required to sustain its military operations. The group updated and published a guidance paper for industry that aims to assist industry in identifying Russian evasion practices and complying with controls carried out by a global export coalition. The guidance paper contains a list of items which pose a heightened risk of being diverted to Russia, updated red flag indicators of potential export control and/or sanctions evasion, best practices for industry to address these red flags, and screening tools and resources to assist with due diligence.

■ 12 August 2024: A joint operation led by OLAF, the Spanish National Police, the Spanish Tax Agency Customs Surveillance and the Italian Guardia di Finanza leads to the seizure of over 900,000 counterfeit razor blades of a well-know brand. A criminal network imported the counterfeit products from Chinese suppliers and distributed them to wholesalers in Spain and Italy who sold the goods as genuine products of the brand. OLAF supported the operation inter alia by tracking the suspicious shipments, identifying the recipient companies across the EU, informing the involved countries, and coordinating the investigations related to the case.

■ 1 August 2024: OLAF informs about the preliminary results of customs operations against counterfeit products related to the EURO 2024 Football Championship in Germany and the Olympic Games in Paris. Concerted actions led by OLAF, the French customs and the German Customs Investigation Office (ZKA) have already led to over 630,000 items seized, including sportswear, sports shoes, toys, and sporting equipment. As a result, not only illegitimate businesses but also dangers to the citizens' health and safety could be avoided.

■ 17 July 2024: An OLAF investigation leads to the successful dismantlement of a criminal network that established a large-scale smuggling scheme with counterfeit premium vodka and whisky. Almost 400,000 bottles with an estimated value of €14 million were seized. OLAF acted as the main coordination point for exchange of information among various EU and non-EU authorities, collected, analysed and disseminated critical operational intelligence related to the smuggling network, and provided specialised knowledge and technical assistance.

■ 4 July 2024: OLAF supports "Operation Dashboard". The Operation targeted a criminal network that imported scrap vehicles from the United Kingdom to Spain by circumventing the EU rules on hazardous waste. The criminal activities also involved Germany and France. The operation, executed by the Spanish Guardia Civil, led to seven detainees and five individuals under investigation for charges that include alleged crimes against natural resources and the environment, falsification of certificates, money laundering, tax fraud, and membership in a criminal group. It is estimated that over 600,000 kilo of scrap has been illegally imported into the EU since January 2021. OLAF joined the dots and brought the national law enforcement authorities of the involved countries together. (TW)

## European Public Prosecutor's Office

### Sweden Joins EPPO

On 16 July 2025, the Commission adopted the decision confirming Sweden's participation in the European Public Prosecutor's Office (EPPO). The EPPO will be operational in Sweden 20 days after the appointment of the European Prosecutor from Sweden, which is expected in autumn 2024. Sweden had formally notified the Commission of its intention to join the European Public Prosecutor's Office on 5 June 2024.

On 29 February 2024, the Commission formally confirmed Poland's participation in the enhanced cooperation scheme of the EPPO (→eucrim 1/2024, 18). Hence, by the end of 2024, the EPPO will be able to investigate and prosecute fraud affecting Union funds

in 24 EU countries. At this stage, only Denmark, Ireland, and Hungary do not participate in the EPPO. (CR)

### European Chief Prosecutor Criticised Amendment of Austrian Criminal Procedure Code

On 14 June 2024, in the aftermath of a ruling by the Austrian Constitutional Court, the Austrian Ministry of Justice proposed an amendment to the Austrian code of criminal procedure making the seizure of data and data storage devices a prerogative of the police. At the end of June 2024, European Chief Prosecutor *Laura Kövesi* published a statement on the proposal for the amendment to the Austrian code of criminal procedure.

According to the EPPO, the envisaged change in Austria would undermine the competences of the European Delegated Prosecutors as outlined in the EPPO Regulation. Under the EPPO Regulation, European Delegated Prosecutors must be able to undertake investigative measures themselves or to instruct the competent national authorities accordingly. For offences with a maximum penalty of at least four years of imprisonment, European Delegated Prosecutors themselves must be able to order searches of computer systems as well as obtain the production of stored computer data in their original or another specified form or request such investigative measures from the court. In her statement, *Kövesi* emphasized that alterations to this competence would have a negative impact on the independence, effectiveness, and expediency of EPPO investigations in Austria as well as on cross-border investigations involving Austria. The entire EPPO zone would be affected. (CR)

### Overview of Convictions in EPPO Cases: April – June 2024

The following overview highlights court verdicts and alternative resolutions in EPPO cases. It breaks down the EPPO's news reports from April to June 2024 and continues the overview published in →eucrim 1/2024, 20–21. The overview is in reverse chronological order.

- 20 June 2024: The Regional Court of Vilnius (Lithuania) convicts a former director of the National Food and Veterinary Risk Assessment Institute of Lithuania. The court found him guilty of bribery, money laundering, illegal enrichment, document forgery, and fraudulent financial accounting. According to the court, the former director accepted bribes in return for granting public procurement contracts – financed by EU and national funds – by using a company established by himself and his wife, together with 15 other related companies. His sentence comprises two years of imprisonment, a fine of €18,000 and a ban on holding public service positions for five years.
- 19 June 2024: The Berlin Regional Court (Germany) convicts five individuals of serious VAT fraud, commercial document forgery, and aiding and abetting tax fraud (→eucrim 2/2023, pp. 124–128), with sentences ranging from two to ten years. It additionally issues confiscation orders for the proceeds derived from the crimes – totalling €27.4 million. This conviction is already the second in a series of several similar convictions in relation to a major VAT fraud scheme having involved luxury cars and medical face masks as part of a criminal organisation. The first conviction was handed down against a former notary on 2 February 2024 (→eucrim 1/2024, 20).
- 17 June 2024: Based on a plea agreement, the Specialised Criminal Court in Bratislava (Slovakia) convicts two individuals to three years of imprisonment (with a probationary period of three years) for EU funding fraud to the detriment of the European Regional Development Fund (ERDF). Additionally, the two convicted persons are prohibited from participating in subsidy procedures for three years. The company is fined €5000 and banned from receiving EU subsidies for four years.
- 11 April 2024: The Correctional Chamber of the Court of First Instance in Antwerp (Belgium) finds one person and two companies guilty of evading customs duties on imported e-bikes. According to the Court, the defendants are guilty of presenting incorrect customs declarations with the aim of evading anti-dumping and countervailing duties. Alongside a prison sentence (suspended on probation) and fine issued for the individual, the Antwerp court orders the French and Belgium companies to pay the value of the imported goods (approximately €4.4 million) as well as the taxes and duties evaded (amounting to a total of €3.1 million). (CR)

### EPPO's Operational Activities: April – June 2024

This news item provides an overview of the EPPO's main operational activities from 1 April to 31 June 2024. It continues the periodic reports of previous issues →eucrim 1/2024, 20–21 and is in reverse chronological order.

- 28 June 2024: An investigation by the EPPO in Brussels (Belgium) into a customs fraud case involving biodiesel imports of US origin into the EU, while fraudulently declaring their origin as Morocco, leads to the arrest of two suspected ringleaders. The biofuel was being transited via non-EU countries to avoid the application of anti-dumping duties that apply to the importation of biodiesel produced in the USA. As the EU applies a preferential tariff to goods originating from Morocco, the biodiesel was ostensibly being imported from there at a preferential import duty rate of 0%. The estimated damage amounts to €3.1 million.
- 26 June 2024: The EPPO in Paris (France) investigates complex customs fraud involving the importation of eyeglasses from China into several EU countries. The eyeglasses were being sold online at a lower market price

on a massive scale within the EU. The fraud allegedly consisted of illicitly undervaluing the price of the glasses to avoid paying import taxes. Consequently, the scheme led to savings in customs duties and taxes and allowed the glasses to be sold at a lower market price, which is unfair to market competitors.

■ 24 June 2024: As part of an ongoing investigation reported to the EPPO by OLAF, the European Investment Bank (EIB) accepts the request of the EPPO to lift the immunity of two of its former employees and the inviolability of its premises, buildings, and archives in Luxembourg. The individuals are suspected of corruption and abuse of influence as well as the misappropriation of EU funds.

■ 18 June 2024: The investigation code-named "Stop the Carousel" by the EPPO in Bologna (Italy) leads to the arrest of three suspected ringleaders of a criminal organisation created to obtain funds – mostly through letterbox companies – from the Recovery and Resilience Facility (RRF). The investigation uncovered at least 15 instances of aggravated fraud to obtain public funds, involving requests for public funding amounting to €15 million.

■ 10 June 2024: The EPPO in Hamburg (Germany) informs the public that its investigation "Goliath" led to the arrest of a suspected ringleader of an €85 million VAT fraud in Nairobi (Kenya) end of May 2024. The arrest took place after police surveillance over six months enabling to find out the location of the suspect. The Danish citizen is the second ringleader arrested after an action targeting an international criminal ring; the action already took place in November 2023 (→eucrim issue 4/2023, pp. 322–324). The criminal organisation was active in international trade with consumer electronics (mainly AirPods) and suspected of evading tax by means of a VAT carousel fraud. Investigation Goliath has been supported by Europol, German tax agencies, and several national police forces stretching across Denmark, France, Germany, Hungary, Lithuania, the Netherlands, Sweden, and Switzerland.

■ 7 June 2024: An investigation by the EPPO in Bucharest (Romania) concerning procurement fraud involving EU funds for the modernisation of water infrastructure and the improvement of energy efficiency leads to searches in Romania and Spain. To compensate the damage to the EU budget, the EPPO also ordered the seizure of assets worth up to €10 million.

■ 6 June 2024: The EPPO in Bologna (Italy) requests the freezing of over €6.8 million against four individuals and one company suspected of VAT fraud relating to the illegal importation of fabric from China. The investigation, under which searches were already conducted in April, targets eight individuals and seven companies suspected of evading VAT on the import of over 13,600 tonnes of textiles, worth around €63 million, from China into the EU. This scheme caused an estimated VAT loss of over €13 million, leading to the freezing of assets worth €7.3 million in April and €6.8 million in June 2024.

■ 3 June 2024: An investigation by the EPPO in Rome (Italy) concerning VAT fraud involving the trade of alcoholic and non-alcoholic beverages leads to the arrest of seven individuals for participation in a criminal organisation, VAT fraud, and self-money laundering. The individuals are suspected of having used Italian and Bulgarian companies, the latter acting as missing traders, to evade VAT payment. By means of forged documents, the beverages appeared to pass through Bulgaria but were in fact distributed directly in Italy, resulting in VAT losses amounting to €18 million.

■ 24 May 2024: Investigation "Kingdom" by the EPPO in Brussels (Belgium) leads to seven arrests in the Netherlands. The arrested persons allegedly controlled a Dutch company functioning as a missing trader, defrauding the Belgian Treasury of €13 million in VAT refunds. While several luxury goods could be seized in the Netherlands, a substantial part of the illicit gains had already been transferred to the United Arab Emirates.

■ 24 May 2024: At the request of the EPPO in Palermo (Italy), the judge for preliminary investigations of the Court of Palermo issues a freezing order for over €15 million, real estate, and company shares together with restrictive measures against seven individuals and five companies suspected of defrauding the European Regional Development Fund (ERDF), self-money laundering, and tax evasion. According to the investigation, the suspects falsified documents to obtain EU funds in order to build a fuel distribution system, a farm with stables, and a vineyard with an enclosed cellar, and they issued and used invoices for non-existent operations.

■ 14 May 2024: The EPPO in Bucharest (Romania) carries out searches to investigate an €8 million fraud involving EU funds for the purchase of medical equipment (protective masks, disinfectants, and other medical supplies for hospitals, schools, and other municipal state facilities) during the COVID-19 pandemic. The supply of the medical equipment was funded by the programme Recovery Assistance for Cohesion and the Territories of Europe (REACT-EU). The criminal network is suspected of having manipulated the public procurement procedure to benefit predetermined suppliers.

■ 7 May 2024: Italian and Latvian authorities arrest 14 individuals, seize 470 tonnes of lubricating oil, and execute a freezing order of €15.4 million against suspects in Operation "Greasy Hands". The operation, led by the EPPO in Turin (Italy), targets an international criminal network alleged to have imported vehicle lubricants

to the Italian market while systematically evading VAT and the payment of excise duties. The criminal group is further suspected of counterfeiting motor oil brands and laundering the illicit profits gained.

- 15 April 2024: The EPPO in Rome (Italy) requests that the Italian Financial Police (Guardia di Finanza) in Bari carry out searches in an investigation into an €8.8 million fraud in the training sector. The suspects received public funds under the Youth Guarantee Programme to conduct training activities, which presumably did not take place.
- 4 April 2024: 22 individuals are arrested in Italy, Austria, Romania, and Slovakia. They are suspected of defrauding tax credits from the Italian authorities and funding from the Italian National Recovery and Resilience Plan (NRRP). The NRRP is part of the EU's Recovery and Resilience Facility (RRF) for Italy. The RRF is the main pillar of the NextGenerationEU recovery plan (→eucrim 1/2024, 26–27). The investigation code-named "Resilient Crime" pursues a criminal association suspected of orchestrating a fraud scheme to obtain non-refundable funds from the Italian National Recovery and Resilience Plan (NRRP). A network of accountants, service providers, and public notaries allegedly supported the suspects in creating false corporate balance sheets showing active and profitable companies that are, in fact, non-active and fictitious. The total potential damage to both the Italian and EU budgets is estimated €600 million. The international large-scale investigation is led by the EPPO in Venice (Italy). (CR)

## Europol

### 25 Years of Europol

2024 marks the year in which Europol celebrates its 25th anniversary. What originally began as the European Drugs Unit in 1994 has, over the last 25 years, grown into Europol: an organisation with more than 1700 staff members and 295 liaison officers working at its headquarters in The Hague. Europol Europol became operational on 1 July 1999, following the ratification and adoption by all then EC Member States of the legal acts provided for in the 1995 Europol Convention. On 1 January 2010, Europol turned into an EU agency on the basis of the Lisbon Treaty.

Successful launches at Europol include: the European Cybercrime Centre at Europol (EC3) in 2013; the European Counter Terrorism Centre (ECTC) in 2016; the European Financial and Economic Crime Centre (EFECC) in 2020; and the Digital Forensics Unit in 2022. Other milestones include the initiation of the annual European Police Chiefs Convention (EPCC) in 2011, the launch of Europe's Most Wanted Fugitives website in 2016, the 2019 mandate to create an Innovation Lab, and the appointment of the agency's first Artificial Intelligence Officer in 2024.

Over the years, Europol has supported national authorities in large-scale investigations, such as the take-down of Sky ECC. In 2024, over 3000 law enforcement authorities from more than 70 countries and international entities were connected to Europol through the Secure Information Exchange Network Application (SIENA).

As part of its silver jubilee, the agency will be offering numerous events and activities throughout the year, which started with a conference entitled EU Versus Crime that took place on 28 May 2024. (CR)

### Europol and New Zealand: Cooperation Agreement Applies

On 15 August 2024, the agreement between the EU and New Zealand on the exchange of personal data between Europol and New Zealand authorities entered into application. For the way to the agreement →eucrim 3/2019, 165, →eucrim 2/2022, 100, and →eucrim 1/2023, 22). The agreement aims to enhance the parties' abilities to combat serious organised crime and terrorism. It extends the existing Working Arrangement of 2019 (→eucrim 2/2019, 89), and it is the first agreement that allows Europol to transfer personal data to an authority of a third country on the basis of an international agreement pursuant to the 2016 Europol Regulation.

The EU-New Zealand cooperation agreement includes provisions on the following:

- The exchange of information and data protection;
- The rights of data subjects;
- The establishment of a supervisory authority;
- Administrative and judicial redress.

Cooperation between Europol and the New Zealand police has been intensified in the aftermath of the Christchurch attacks in 2019. New Zealand has access to Europol's secure communication channel and has a Liaison Officer stationed at Europol's headquarters in The Hague. (CR)

## Eurojust

### Eurojust Annual Report 2023

At the end of May 2024, Eurojust published its Annual Report for the year 2023. In a year 2023 marked by responses to the continuing war of aggression against Ukraine, Eurojust provided support in a record number of 13,164 cases and hosted 577 coordination meetings on ongoing investigations. Other important issues of Eurojust's work in 2023 include:

- The Core International Crimes Evidence Database (CICED) and the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) were launched to further respond to the continuous war of aggression against Ukraine (→eucrim 2/2023, 116);

- The total number of cases receiving agency support increased 14% compared to the previous year: 5710 cases were new and 7454 were ongoing cases from previous years;
- As in previous years, the majority of new cases concerned swindling and fraud (1734), drug trafficking (1137), and money laundering (835);
- Eurojust contributed to the arrest of more than 4000 suspects, the seizure and/or freezing of criminal assets worth almost €1.1 billion, and the seizure of drugs worth almost €25,6 billion;
- Eurojust provided assistance in 3743 mutual legal assistance cases;
- The agency provided operational guidance on the application of EU judicial cooperation instruments, particularly with regard to the European Arrest Warrant (1252 cases) and the European Investigation Order (6299 cases);
- It assisted 288 Joint Investigation Teams (JITs) and provided €1.94 million in JIT funding;
- It also continued its efforts in setting up the JITs collaboration platform to facilitate the coordination and management of a JIT (→eucim 2/2023, 164);
- In 2023, the agency held international/cooperation agreements with 13 third countries and was actively connected with over 70 jurisdictions worldwide. A prosecutor from the Republic of Moldova joined the network of liaison prosecutors from third countries. In May 2023, the Western Balkans Criminal Justice (WBCJ) Project was launched (→eucrim news of 2 June 2023).
- The agency also actively cooperated with players in the EU criminal justice area, such as Europol, OLAF, EPPO, eu-LISA, FRA, EUIPO, and the ICC;
- The agency made progress towards digitalisation by launching its Digital Criminal Justice (DCJ) programme to further strengthen operational efficiency and support to Eurojust's National Desks;
- Eurojust published several reports such as its first Report on the transfer of proceedings in the European Union (→eucrim 1/2023, 40–41);
- Overall, Eurojust continued to anchor the rights of victims in all its operational casework and helped deliver justice to more than 375,000 victims of all forms of serious, cross-border crime.

Eurojust's annual report 2023 is published both as a pdf version for download and as an online version. (CR)

### European Judicial Organised Crime Network Launched

Figures show that 76% of criminal groups in the EU are active in two to seven countries. Their profits from illicit activities are estimated at around €139 billion annually. To enhance the fight against organised crime, a new network was launched at the beginning of September 2024. The European Judicial Organised Crime Network (EJOCN), hosted at Eurojust, is mandated to combat organised crime by strategically focusing on horizontal issues that arise in the investigation and prosecution of high-risk criminal networks. The network is composed of specialised prosecutors from all 27 EU Member States. Given the increasing availability of illicit drugs and the fact that 70% of drug seizures carried out by customs take place in ports, the EJOCN will put its focus on combatting drug-related organised crime connected to European ports and other logistic hubs as a first step. (CR)

### Sweden and Hungary: New National Members Appointed at Eurojust

In May 2024, two new National Members were appointed at Eurojust. They represent Sweden and Hungary.

Mr *Erik Fågelsbo* was formally appointed for a five-year term as new National Member for Sweden, a position he had already been holding as acting National Member since July 2023. His long-standing career in international judicial cooperation comprised various positions, the last one as temporary judge in the Svea Court of Appeal in Stockholm. Prior to that, he represented Sweden to the EU in Brussels and served as legal advisor to the Swedish Ministry for Justice, as seconded national expert and assistant to the National Member for Sweden at Eurojust, and as public prosecutor in the Swedish National Unit Against Corruption. Mr Fågelsbo succeeds Ms *Marie Lind Thomsen*.

Ms *Eszter Mária Köpf* was appointed new National Member for Hungary. Prior to joining Eurojust, Ms Köpf served as head of the division for international legal assistance cases of the Hungarian Office of the Prosecutor General. She started her career in the Hungarian prosecution service in 1996. She succeeds Mr *László Venczl* who has worked at Eurojust since 2012. (CR)

### New Swiss Liaison Prosecutor at Eurojust

On 2 September 2024, Mr *Philip Schotland* took up his duties as the new Liaison Prosecutor for Switzerland at Eurojust. Prior to taking on this position, Mr Schotland served as Deputy Liaison Prosecutor (since July 2022). Before that, he was a public prosecutor in Basel-City, specialising in serious crimes and investigations into organised crime groups. Mr Schotland succeeds *Mr Sébastien Fetter*. (CR)

## Frontex

### Frontex Annual Risk Analysis 2024/2025

In its Annual Risk Analysis for the years 2024/2025 (released on 18 July 2024), Frontex looks at the evolving risks and challenges at the EU's external borders. The report is intended to serve as a strategic guide for poli-

cymakers, operational leaders, and partners both inside and outside the EU (for reports relating to previous years →eucrim 2/2023, 132–133 and eucrim 3/2022, 181). The 2024/2025 issue focuses exclusively on risks that may arise upon entry to the EU within one year. It concludes with an analysis of overarching risks. The report also provides a comprehensive picture of future challenges and threats, including cross-border crime and terrorism, which could affect the security and functioning of the EU's external borders.

The strongest determinant of migration is at the eastern borders, where threats to European Integrated Border Management (EIBM) are highly unpredictable, reflecting opaque decision-making at the political level. At the south-eastern border, the Western Balkan migration route will continue to largely reflect developments in the Eastern Mediterranean, as non-regional migrants are mostly unable to enter the Western Balkan region by air. On the Eastern Mediterranean route, host country pressures on Afghan and Syrian migrant populations, the risk of regional escalation of the conflict in Gaza, and protracted conflicts and economic downturns in neighbouring regions are likely to be the main drivers of migration. At the southern borders, the Central Mediterranean route will be affected by several large-scale displacements in the sub-Saharan region. Finally, on the south-western borders, the prevention efforts of the North African partners and the prosecution of smugglers are keeping migration pressure in the Western Mediterranean moderate and stable. However, adverse developments in the Sahel are likely to lead to further peaks in migrant arrivals along the West African route.

Key findings of the report include the following:

- Irregular migration will continue to be the main risk, given geopolitical developments in Europe's immediate neighbourhood with potential implications for European border management, particularly on the eastern and southern borders;
- In times of polarisation of European societies, high-risk individuals pose an increasing threat of terrorism;
- Efforts to improve the security of the green borders as well as the introduction of the Entry/Exit System (EES) and the subsequent European Travel Information and Authorisation System (ETIAS) may divert pressure to border crossing points and increase clandestine entry attempts;
- Cross-border crime is driven by market forces, with organised crime groups showing flexibility in matching supply and demand across borders.

The report concludes by stressing the need for effective international cooperation, the signing of agreements with major transit countries, and prevention activities. Adequate resources and border control capacities as well as a well-trained European Border and Coast Guard are also key to border management. (CR)

### 2023 Annual Report of the Frontex Fundamental Rights Officer

On 10 July 2024, the Frontex Fundamental Rights Officer released its Annual Report for the year 2023.

In the first chapter, the report presents the main findings of the Fundamental Rights Officer's monitoring of Frontex in different thematic areas, e.g., return operations. In 2023, the Fundamental Rights Office conducted in excess of 1,600 days in the field, visited 24 countries and monitored almost 50 return operations – an increase of more than 70% compared to 2022. The Office played an important role in monitoring the pilot project on the new chain of command (→eucrim 2/2023, 133).

The second chapter examines the reporting and accountability mechanisms and fundamental rights safeguards that guide the work of the Fundamental Rights Office. It also provides a statistical overview of the number and type of serious incident reports and complaints received. In 2023, out of a total of 217 reported incidents of alleged violations of fundamental rights, 55 serious incident investigations were launched, the majority in Greece. The main types of alleged violations of fundamental rights were related to collective expulsions and to inhuman and degrading treatment. Challenges related to the submission and follow-up of serious incident reports included the reluctance of national authorities to provide access to relevant data for the purpose of investigations and the default denial of any involvement in fundamental rights violations as well as reluctance to investigate or follow up cases. The Office also observed a significant underreporting of cases due to lack of awareness or knowledge, peer pressure, or fear of retaliation. The limited presence of Frontex in certain locations may also contribute to underreporting of possible fundamental rights violations.

Lastly, the report looks at the Office's policy, strategy, and capacity building during the past year. It summarises the recommendations made by the Fundamental Rights Office to the European Border and Coast Guard Community on rights-based border management, including those made in the past by the European Ombudsman, the European Parliament's Frontex Working Group (FSWG), and the Working Group on Fundamental Rights and Legal and Operational Aspects of Operations (FRa-LO). The setting of the Office's priorities for the year 2024 is also documented. (CR)

### Frontex Consultative Forum Annual Report 2023

On 23 May 2024, the Frontex Consultative Forum on Fundamental Rights published its annual report for the year 2023. It outlines the Forum's main

observations and recommendations shared with Frontex and its Management Board, with the aim of strengthening fundamental rights protection in Frontex activities. As a novelty, the 2023 report also contains an overview of the Frontex-related case law of the CJEU, decisions adopted by the European Ombudsman in relation to Frontex's activities, and the activities of the Frontex Scrutiny Working Group (FSWG). Key activities of the Consultative Forum in 2023 included the following:

- The submission of an opinion to the European Commission concerning the 2022–2023 evaluation of the European Border and Coast Guard Regulation;
- Advice on the identification of vulnerable persons in Frontex's VEGA operations;
- Visits to Frontex operations in Italy and Serbia;
- Fundamental rights advice on the European Travel Information and Authorisation System (ETIAS). (CR)

### European Guidelines for Border Surveillance

In May 2024, Frontex published Guidelines for European Common Minimum Standards for Border Surveillance (CMS). The guidelines have identified commonalities concerning air, land, and maritime border surveillance; they address the main process phases – preparedness, prevention, and reaction – that make up border surveillance in the Member States. The Guidelines are designed to support the harmonisation of border surveillance practices within EU Member States and Schengen Associated Countries. In this way, the CMS will contribute to the development of standards and concepts for border surveillance for Member States to consider in the following areas:

- Border surveillance capabilities;
- Border surveillance capacities;
- Principles and mechanisms of national border surveillance strategies;
- Intra-service, intra-agency, and international cooperation;
- National operational models including practices regarding data management, risk analysis, crisis management, security, asset management, and patrolling.

With these guidelines, Frontex is fulfilling a mandate under Art. 10(1) lit. z) of Regulation (EU) 2019/1896 on the European Border and Coast Guard. (CR)

## European Data Protection Supervisor (EDPS)

### EDPS Celebrates 20th Anniversary

This year, the European Data Protection Supervisor (EDPS) celebrates its 20th anniversary. Throughout the year, different events and activities have been marking this event.

One key undertaking is the release of 20 initiatives in 2024 in the form of commitments and actions to promote new approaches and innovations that will bolster individuals' rights to privacy and data protection:

- A concept paper on the essence of fundamental rights to privacy and the protection of personal data;
- The EDPS becoming a leading employer for talents in the EU;
- An initiative introducing the public to the faces behind the EDPS: "Meet Team EDPS";
- The launch of a pilot campaign to improve privacy on EU institutions' websites;
- Orientations on "Generative Artificial Intelligence and personal data protection";
- A concept paper on the use of Artificial Intelligence (AI) in the field of criminal justice and law enforcement in the EU;
- The launch of a Data Protection Officer Certification Course for EU Institutions, Bodies, Offices and Agencies (EUIs);
- A campaign to raise EUIs' awareness of how to manage personal data breaches;
- A position paper on the future of cross-regulatory cooperation;
- A series of five videos: "Data Protection ExPLAINed";
- A compendium of major EDPS interventions before the Court of Justice of the EU (CJEU);
- Expansion of the EDPS' capabilities in technology monitoring and foresight;
- Improved public access to the EDPS' data protection audit and inspection reports;
- Evaluation and disclosure of previously unreleased documents from the last two decades;
- Co-hosting the 2024 edition of the International Organisations Workshop on Data Protection;
- Strengthened data protection through stronger cooperation between the Data Protection Officers (DPOs) of the European institutions, bodies, offices and agencies (EUIs);
- Stronger supervision of the justice and home affairs interoperability framework;
- Guidance for co-legislators on key elements of legislative proposals;
- A call for applications to support independent research projects on privacy and data protection;
- A more transparent window into data protection complaints and resolutions.

Another key event in the anniversary year was the European Data Protection Summit organised by the EDPS in Brussels on 20 June 2024. It brought together privacy experts, technology specialists, policymakers, and other influential voices to discuss how data protection can safeguard democratic society. Under the title "Rethinking Data in a Democratic Society", the summit discussed the role of data protection, its possibilities and limitations as well as its successes and missed opportunities in contributing to the development of the foundations of democratic societies.The debate was steered by five concept questions on modern data protection. (CR)

### Agency for Fundamental Rights (FRA)

#### FRA Fundamental Rights Report 2024

The FRA's most recent Fundamental Rights Report (published in June 2024) analyses last year's developments in fundamental rights. True to its name "Towards a democracy anchored in fundamental rights", the report focuses on key developments and shortfalls of fundamental rights protection in 2023. In addition, the report explores the application and implementation of the EU Charter of Fundamental Rights.

According to the report, developments and shortfalls in the EU include the impact of the cost-of-living crises and rising poverty in the EU, threats to democracy and civic space, rising antisemitism, increasing intolerance, wider digital divides, and – despite stronger rights protection at EU borders – new risks in the wake of new migration rules.

In a second part, the report contains a series of FRA opinions related to the key developments and shortfalls identified. The opinions outline evidence-based, timely, and practical actions for consideration by EU bodies and national governments. These include the following:

- Cost-of-Living crisis and poverty: Ensuring that poverty and energy reduction measures, including social and housing assistance, reach disadvantaged groups;
- Migration: Strengthening fundamental rights safeguards at borders by, for instance, improving search and rescue practices to save lives at sea; by providing safer conditions for processing new arrivals; and by establishing independent rights monitoring at the EU's external borders;
- Addressing threats to democracy and civic space: Monitoring and recording civic space restrictions; taking action to protect human rights defenders and media freedom; systematically calling on civil society expertise; allowing meaningful time for effective consultation;
- Confronting racism and forms of intolerance: Taking a firm stand against all forms of racism and related intolerance: acknowledging and countering systemic and deeply rooted racism and related intolerance in our societies; continuing to monitor and collect evidence-based data to feed into EU and national anti-racism and anti-semitism laws and policies; providing a safer online space for everyone and acting against online hatred.

When presenting the report on 5 June 2024, FRA Director *Sirpa Rautio* said: "Polarisation across Europe is leading to widespread intolerance, creating divided societies with many groups suffering. Rising poverty and democratic threats are further fuelling uncertainty and societal tensions. But Europe also has a strong foundation in human rights which can guide our actions. We should all pull together and work to our strengths to ensure a secure and inclusive future that respects the rights of all where everybody feels safe to be who they are." (CR)

## Specific Areas of Crime

### Protection of Financial Interests

#### 35th Annual PIF Report

spot light

On 25 July 2024, the European Commission adopted the 35th Annual Report on the protection of the European Union's financial interests and the fight against fraud in 2023 (PIF Report). The report fulfils the obligation laid down in Art. 325(5) TFEU that the Commission, in cooperation with Member States, shall each year submit to the European Parliament and to the Council a report on the measures taken to counter fraud and any other illegal activities affecting the financial interests of the Union. In detail, the PIF report provides information on:

- The key measures to prevent and fight fraud at the EU level;
- Member States' measures to protect the EU's financial interests;
- Data on and the main analytical findings of the fight against fraud, corruption, conflicts of interest and other irregularities that affect the EU budget, including information on investigations conducted by the European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO);
- Conclusions and recommendations.

The report also outlines the similarities and differences between the various existing reports addressing the protection of the EU's financial interests, i.e., the Commission's PIF report, the OLAF annual report and the EPPO's annual report.

As regards the key measures at the EU level in 2023, the report highlights the Commission's legislative package on various anti-corruption measures (→eucrim 2/2023, 139–141) and the political agreement on the recast of the Financial Regulation (which aims at strengthening transparency in the use of the EU funds, digitalisation of the fight against fraud and fraud risk management). The PIF Report also points out the new 2023 action plan to implement the EU anti-fraud strategy of 2019 with a focus on the use of IT tools for preventing and fighting fraud. Moreover, the Commission stressed the importance of the Whistleblower Protection Directive (→eucrim 4/2019, 238–239) where 24 Member States notified transposition into their legislations by the end of 2023.

Looking at anti-fraud measures taken at the national level in 2023, 21 out of 27 Member States indicated that they have an anti-fraud strategy in place for the protection of the EU's financial interests. However, the approach taken by the 21 Member States varied widely, with 10 countries adopting a national anti-fraud strategy and the others relying on other types of strategies (sectoral, regional, programme-related). The Commission also acknowledged that

Member States have made progress with regard to the three main recommendations from the 2022 PIF report, i.e., (1) the improvement of detection, reporting and follow-up of suspected fraud; (2) the need to digitalise the fight against fraud; and (3) the reinforcement of anti-fraud governance.

From an operational point of view, the Commission reports that the number of cases of fraud and irregularities reported by the competent EU and national authorities – 13,563 in total – increased in 2023 compared to 2022 (+8.9%); the irregular amounts related to these cases increased to €585.8 million (+103% compared to 2022, which is mainly due to individual large-scale fraud cases).

In its conclusion, the PIF Report stresses that the fraud landscape constantly evolves and new challenges emerge, which is why also the EU's response needs to be adapted continuously. Pivotal are seen the following three recommendations:

- Improving the data quality (data on fraud and irregularities must be complete, reliable and up-to-date);
- Accelerating the digitalisation of the fight against fraud, including the further development of the Commission's risk scoring and data mining tool;
- Reinforcing anti-fraud governance in the Member States, including the adoption of all necessary strategies to fight fraud.

As in the previous years, the annual report on the protection of the EU's financial interests is accompanied by several other documents addressing specific issues of the PIF report in more detail:

- Annex with the number of non-fraudulent and fraudulent irregularities reported by each Member State in 2023;
- Annual overview with information on the results of the Union anti-fraud programme in 2023;
- Commission Anti-Fraud Strategy (CAFS) Action Plan implementation monitoring (state of play 31 May 2024);
- Early-Detection and Exclusion System (EDES) – Panel referred to in Article 143 of the Financial Regulation;
- Follow-up by Member States to the recommendations of the PIF Report 2022;
- Measures adopted by the Member States to protect the EU's financial interests (implementation of Article 325 TFEU);
- National anti-fraud strategies (NAFS): state of play and assessment;
- Statistical evaluation of irregularities reported for 2023: own resources, agriculture, cohesion and fisheries policies, pre-accession and direct expenditure.

For the annual reports of previous years →eucrim 2/2023, 135 with further references. The PIF Report is designed to allow assessment on the areas that are most at risk of fraud, so that action at both EU and national level can be better streamlined. On the basis of the report, the European Parliament adopts its annual motion for a resolution on the protection of the EU's financial interests and the fight against fraud (for 2022 →eucrim 1/2024, 27–28). (TW)

## ECJ Clarifies Member States' Obligation to Establish EU's Own Resource Entitlements

On 5 September 2024, the Court of Justice of the European Union (ECJ) delivered an important judgment on the obligations of EU Member States to pay own resources to the European Union (Case C-494/22 P, *European Commission v Czech Republic*).

➤ *Background of the case*

The case refers back to an OLAF investigation into the circumvention of anti-dumping duties against China by a Laotian company importing pocket lighters into the EU. The investigation included an external mission in Laos and Thailand by OLAF, with customs officers from the Czech Republic, the United Kingdom, and Germany (the three EU Member States mainly concerned by the illicit traffic). The Czech Republic claimed before the European courts that it was exempt from paying certain amounts of own resources to the Commission's account. The Czech Republic argued that it had proven impossible to recover the customs duties from the Laotian company (because the OLAF report including recommendations for recovery and follow-up measures came too late), and the Laotian company had ceased its activity in the Czech Republic in the meantime.

While the General Court upheld, in part, the Czech Republic's action against the Commission for unjust enrichment (Case T-151/20, judgment of 11 May 2022), the ECJ dismissed the action upon appeal by the Commission. The Commission put forward two grounds of appeal:

➤ *Obligation to establish the Union's entitlements (time limits and exemptions)*

The ECJ first interpreted the EU law on own resources, in particular Arts. 2, 6(3)(b) and 17(2) of Council Regulation 1150/2000 (valid at the time of the events). It stressed that, as EU law currently stands, the management of the system of own resources of the EU is entrusted to the EU Member States and is their responsibility alone. Hence, Member States are, in principle, obliged to make own resources available to the Commission.

The time limit for the entry of established entitlements in the accounts for own resources is to be assessed from the date on which the entitlements must or should have been established, under Art. 2 of Regulation 1150/2000, and not (as the General Court found) from the date on which the entitlements have actually been established.

The conditions under which a Member State shall be released from the obligation to place at the disposal of the Commission the amounts correspond-

ing to established entitlements that prove irrecoverable (Art. 17(2) of Regulation 1150/2000) must be interpreted narrowly. In the present case, the Czech Republic did not demonstrate that its late entry of the entitlements in the accounts was in line with the Regulation, and therefore the country must pay the own resources due by the Laotian company to the Commission.

➤ *Obligation to request evidence soon*

Second, the ECJ dealt with the Czech Republic's argument that it was late in establishing and entering the EU entitlements, in the particular circumstances of this case, because it waited for OLAF's mission report.

The ECJ found that a Member State, which is aware of a serious risk of fraud concerning specific imports, cannot limit itself to waiting for several months for the release of OLAF's final report. In particular, the Czech representative of the EU mission to Laos was obliged to request the prior communication of gathered evidence during the mission, because OLAF is obliged to respond to such requests under the OLAF Regulation. In sum, it is up to the Member State to take all effective measures to enable it to gather the information needed to fulfil the Union's rights at issue.

As a consequence, the General Court's judgment under appeal must be set aside. The Czech Republic owes the Commission the (non-recovered) own resources of the customs duties. (TW)

### ECA: Achievements of Recovery and Resilience Facility at Risk

In a special report on the Recovery and Resilience Facility (RRF), the European Court of Auditors (ECA) warned that EU Member States might not be able to draw down or absorb the funds in time and complete their planned measures before the RRF expires in August 2026. As a result, the expected economic and social benefits might not be achieved.

The RRF is a novel method of financing EU Member States with EU money. It was designed to overcome the negative economic and social consequences following the COVID-19 pandemic and has a total of nearly €724 billion (in current prices). The spending is based on the achievement of milestones and targets based on national recovery and resilience plans by the Member States. These plans are evaluated and approved by the EU institutions (→eucrim 1/2021, 151).

In its Special Report no. 13/2024, which was presented on 2 September 2024, the ECA assessed whether RRF funds had been disbursed as planned; the actions taken by the Member States and the European Commission have ensured that funds were absorbed as planned; and there are inherent risks with regards to absorption and completion of measures in the second half of the RRF's implementation.

The ECA found that the absorption of funds is progressing with delays. The key findings include the following:

- By the end of 2023, only €213 billion had been disbursed from the Commission to the Member States;
- Almost half of the RRF funds disbursed to 15 Member States had not yet reached final recipients, such as private businesses, public energy companies, and schools;
- Seven Member States had not received any funds for the satisfactory fulfillment of milestones and targets from the RRF by the end of 2023.

The reasons for the delays are manifold and vary among the Member States. The most common ones are changes in external circumstances (e.g. inflation or supply shortages), underestimation of the time needed to implement measures, uncertainties regarding specific RRF implementation rules (e.g. environmental rules), and insufficient administrative capacity in the Member States.

The ECA acknowledged that the Commission and Member States took actions to address the delays in 2023; however, it is too early to assess their positive impact. It is stressed that several challenges remain: A significant number of milestones and targets remain to be fulfilled and they may be more difficult to achieve. In addition, the shift from reforms to investments is likely to further increase the risk of delays. Lastly, the ECA criticised that there is no provision on whether funds can be recovered if measures are not completed even though milestones and targets are already fulfilled.

Against this background, the ECA makes recommendations to the Commission, *inter alia*:

- Providing Member States with additional guidance and support;
- Monitoring and mitigating the risks of non-completion of measures and the financial consequences;
- Strengthening the design of future similar instruments regarding absorption. (TW)

### ECA: EU's Control System on Cohesion Spending Is Not Working

In a report, published on 8 July 2024, the European Court of Auditors (ECA) found that the EU's control system on cohesion spending is not working. Based on audits carried out during the 2014–2022 programming period and on information made available by the Commission, the ECA reviewed the management and control mechanism for cohesion spending. Cohesion policy is the major spending area in the EU accounting for more than a third of the EU budget. The aim of cohesion policy is to reduce economic and social disparities between EU countries and regions.

Since the cohesion spending is jointly managed by the Commission and the Member States, the EU established a pyramid control system. However, according to the EU auditors, shortcomings exist at all layers of the control system, i.e., the Member States' managing authorities, the

Member States' audit bodies and the European Commission.

Most cohesion spending errors have resulted from ineligible expenditure and projects, followed by non-compliance on the part of funding recipients with state aid and procurement rules. The main three root causes of errors are: (1) Member States' inadequate administration, including inappropriate decision-making and inefficient verifications by managing authorities; (2) negligence or (suspected) intentional non-compliance by beneficiaries; and (3) issues with interpreting the rules.

The ECA stated that its audit results have consistently shown error levels above the 2 % materiality threshold, both annually and from a multiannual perspective (with a recent peak of 6.7% in 2022). As a consequence, there is a pressing need to strengthen the way the assurance framework for 2021–2027 cohesion spending is implemented. This process must be steered by the Commission given that it is ultimately responsible for implementing the EU budget. (TW)

### ECA: Recovery in EU Should be Faster

In its Special Report 07/2024, the European Court of Auditors (ECA) blamed that recovery of misspent EU money takes too long and deficiencies exist in some areas, such as expenditure for external action.

The ECA examined how the recovery process of misspent EU funding is managed and how effective it is. It found that getting back money which was irregularly spent could be faster and more effective. At the same time, the ECA acknowledged that the accurate and prompt recording of irregular expenditure (under direct and indirect management) by the European Commission is good.

The EU auditors noted that it typically takes 14–23 months from the end of the funded activities until a repayment request is even issued, and a further 3–5 months before the funds are retrieved. 1–8% of the funds are simply waived. Hence, the long delay between the identification of a financial irregularity and the issuance of a recovery order is one of the reasons of the deficiencies. Problematic is also the recovery in the field of external actions where the Commission does not follow up potentially systemic irregular expenditure in the same way as it does for internal policies. In addition, information that the Commission provides on irregular expenditure and subsequent corrective measures is not always complete and consistently presented which diminishes the usefulness of the information.

Considering that the rate of misspending increased from 3% to 4.2% of the budget between 2021 and 2022, the ECA stressed that the effective recovery of EU funds is an increasingly pressing need. The ECA makes the following recommendations to the Commission in order to make the recovery of misspent EU funds more effective:

- Examining the financial impact of systemic irregularities in the area of external actions;
- Improving the planning of audit work in the area of external actions to reduce the time taken to establish irregular expenditure;
- Assessing the need for additional incentives for Member States to improve the rates of recovery of irregular expenditure in agriculture;
- Providing complete information on established irregular expenditure and corrective measures taken. (TW)

## Corruption

### New Ethics Body Set Up to Develop Common Ethics Culture in EU Institutions

spot light

On 15 May 2024, eight EU institutions signed an agreement that sets up an EU ethics body. The agreement is designed to foster cooperation on ethical standards for the members of the parties to the agreement and to develop a common culture of integrity and ethics for the European Union's institutions. It is also seen as a step to avoid corruption scandals, such as Qatargate (→eucrim 4/2022, 242–243).

➤ *Parties*

Parties to the Agreement are: the European Parliament, the Council of the EU, the European Commission, the Court of Justice of the EU, the European Central Bank, the European Court of Auditors, the European Economic and Social Committee, and the European Committee of the Regions. The European Investment Bank has the opportunity to join the agreement upon its request.

Union bodies, offices or agencies, other than the parties to the Agreement, may voluntarily choose to apply the entire set of common minimum standards developed and to be developed by the Ethics Body, in relation to staff members, who hold a function similar to those of the members of the parties to this Agreement.

The European Council does not participate in the Agreement. Furthermore, with regard to the Council of the EU, Member States declared that they do not see a legal basis in the Treaties allowing the Council to establish a harmonised set of rules on ethical behaviour of the representatives of Member States within the Council. As a consequence, the representatives of the Member States' governments cannot be subject to the common ethical standards to be developed by the interinstitutional body. However, each Member State may, by means of voluntary and individual national declarations, make publicly available on the website of the interinstitutional body, during their term of office as Presidency of the Council and in the six months preceding and following this term, the information on either their national rules, standards or practices on ethical behaviour for the members of their

governments which are relevant for the exercise of their role as Presidency of the Council. The Belgian Council Presidency agreed on this commitment and published the Belgian ethical framework on 15 May 2024.

➤ *Structure*

The interinstitutional Ethics Body will be structured as follows: The participating institutions will each be represented by one senior member. The position of chair will rotate every year between the institutions. Five independent experts will support the body's work and can be consulted by any party to the agreement on declarations of interest or other standardised written declarations.

➤ *Tasks and powers*

The Ethics Body is mandated to promote a common culture of ethics and transparency amongst the parties, in particular by developing common minimum standards and by fostering the exchange of best practices on the matter. Its tasks shall be as follows:

- Developing common minimum standards for the conduct of the members of the parties in certain areas, such as financial and non-financial interests to be declared, external activities during the terms of office, and acceptance of gifts/awards;
- Updating the common minimum standards;
- Holding an exchange of views on the basis of each Party's self-assessment or the self-assessment of a voluntarily involved Union body, office or agency as regards the alignment of its own internal rules with the common minimum standards;
- Providing the parties with an abstract interpretation of common minimum standards;
- Promoting cooperation among the parties and with any other relevant European, national or international organisation;
- Issuing an annual report.

A critical point during the negotiations was whether the Ethics Body can (also) examine individual cases and potential breaches of ethical rules as well as recommend sanctions. The compromise now found is that each party may, if deemed relevant, consult the individual experts and pose specific questions to them; the experts can respond by confidential and non-binding written opinions.

➤ *History*

Discussions on an ethics body at the EU level go back to 2019 when the European Court of Auditors pushed for a better interinstitutional ethics framework. In 2021, the European Parliament underlined its plea for a powerful, single and independent EU ethics body. In June 2023, the Commission tabled a proposal for the establishment of an interinstitutional ethics body which was, however, criticised by some institutions as being too unambitious.

➤ *Statements*

German MEP *Daniel Freund* (Greens/EFA) who was one of the main initiators of the interinstitutional ethics body from the part of the European Parliament commented on occasion of the EP's vote in favour of the agreement: "Today, we are creating more transparency, laying the foundation for greater citizen confidence in European democracy".

President of the European Court of Auditors, *Tony Murphy*, said: "The principles of accountability, transparency and ethics stand as indispensable pillars of our Union, and are essential to its democratic, legitimate, and effective governance. This interinstitutional initiative demonstrates that there is a commitment to work together towards a common culture on ethics, which will also further increase citizens' trust in the EU institutions."

By contrast, *Shari Hinds* from Transparency International EU criticised that the new body is "without the necessary powers to address existing loopholes in the integrity systems of the European institutions. [It] is an ethics body in name only." (TW)

### Eurobarometer: Citizens and Businesses Remain Concerned over Corruption

On 24 July 2024, in parallel to its 2024 Rule of Law Report (→see above p. 82), the Commission released the results of two Eurobarometer surveys on the perception of corruption in the EU:

- Special Eurobarometer 548 – Citizens' attitudes towards corruption in the EU (2024);
- Flash Eurobarometer 543 – Businesses' attitudes towards corruption in the EU (2024).

The first survey found that European citizens remain sceptical about national governments' efforts to address corruption: 65% of citizens believe that high-level corruption cases are not sufficiently pursued, and only 57% think that government efforts to combat corruption are ineffective. 68% of citizens consider corruption to be widespread in their Member States. However, responses widely differ from country to country. Whereas 98% of Greeks consider corruption to be widespread in their country, only 18% of Finns do so. A majority of Europeans (61%) continue to view corruption as unacceptable, although this represents a decline of 3% compared to the survey conducted in 2023. A growing number of citizens believe that there is a lack of protection for whistleblowers.

The second survey on businesses' attitudes found that 51% of EU-based companies think that people or businesses engaging in corrupt practices are caught by or reported to the authorities. Of these companies, more than three quarters think that too close links between business and politics lead to corruption (79%) and that favouritism and corruption undermine business competition (74%). 64% of EU-based companies consider corruption to be widespread in their Member States. More than half of the respondents view corruption as prevalent in public procurement, with 27% stating that it has prevented them from se-

curing contracts. Over 50% doubt the effectiveness of corruption investigations and sanctions.

The annual Eurobarometer surveys feeds the Commission's rule of law report. They also serve the Commission for identifying specific anti-corruption support needs at national level. (TW)

## Money Laundering

### Comprehensive AML/CFT Reform Finalised

spot light

On 19 June 2024, several pieces of legislation with new rules fighting money laundering (ML) and the financing of terrorism (FT) were published in the Official Journal of the EU. The new rules follow the proposals tabled by the Commission in 2021 (→eucrim 3/2021, 153–156). The overall aim of the general overhaul of the EU's legal framework on anti-money laundering (AML) and countering financing of terrorism (CFT) was to establish a robust and future-proof enforcement system, which will improve detection of money laundering and terrorism financing in the EU and close existing loopholes that are used by criminals to launder illicit proceeds of crime.

The European Parliament and the Council reached provisional agreement on the contents of the proposed laws in January/February 2024 and adopted the legal acts in April 2024. The AML/CFT package published now consists of the following acts:

- A Regulation establishing the EU Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA);
- A new Regulation on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing ("the Single Rulebook Regulation");
- The Sixth Anti-Money Laundering Directive replacing the existing AML Directive (Directive 2015/849 as amended by Directive 2018/843);
- A Directive regulating access by competent authorities to centralised bank account registries.

These acts will be presented in detail in separate news below.

The package is complemented by the recast of the 2015 Regulation on information accompanying transfers of funds. This new Regulation (2023/1113) was already passed in May 2023. It lays down rules on the information on payers and payees accompanying transfers of funds, in any currency, and on the information on originators and beneficiaries accompanying transfers of crypto assets, along with rules on internal policies, procedures and controls to ensure implementation of restrictive measures (→eucrim 2/2023, 143).

In sum, the reform will bring about the following novelties:

- AML/CFT obligations for the private sector are shifted from the AML/CFT Directive to the directly applicable AML/CFT Single Rulebook Regulation, such as due diligence obligations and beneficial ownership transparency requirements;
- The AML Directive from now on will only deal with issues requiring transposition, particularly the organisation of national competent authorities fighting against money laundering and countering the financing of terrorism;
- New sectors are brought into the scope of the AML/CFT framework, in particular crypto-asset service providers, residence scheme operators, crowdfunding operators, football clubs and football agents;
- The monitoring of crypto-asset service providers is significantly enhanced in alignment with the MiCA Regulation (→eucrim 2/2023, 143);
- Tighter due diligence requirements for all obliged entities, and improved harmonised approach to identification of beneficial ownership;
- Strengthened requirements for the organisation of national anti-money laundering systems, including clearer rules on how financial intelligence units (FIUs – the national bodies which collect information on suspicious or unusual financial activity in Member States) and supervisors work together;
- Harmonisation of the set of information to which all FIUs should have access as well as establishment of joint FIU analyses;
- A new European Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA) established in Frankfurt a.M. (Germany) with direct and indirect supervisory powers over high-risk obliged entities in the financial sector and with the power to impose pecuniary sanctions on selected obliged entities;
- Creation of AML/CFT supervisory colleges;
- Harmonisation of bank statement formats;
- Obligation for Member States to make available information from centralised bank account registers – containing data on who has which bank account and where –through a single access point that will provide access to both FIUs and national law enforcement authorities.

The application of the new rules will be progressive. The AML Regulation will, in principle, apply from 10 July 2027. Member States will have two years to transpose some parts of the AML directive and three years for others. The establishment of the AMLA already started. It is planned that the new EU body will be operational by mid-2025. (TW)

### Tasks, Powers and Structures of the New EU Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA)

spot light

After having reached a provisional agreement on the tasks, powers and structure of the new Authority for Anti-Money Laundering and Countering the Financing of Terrorism (AMLA) in December 2023, the final text of Regulation (EU)

2024/1620 establishing the Authority was published in the EU's Official Journal of 19 June 2024. On 22 February 2024, the European Parliament and the Council selected Frankfurt am Main, Germany, as the seat of the new EU body.

The AMLA Regulation is part of a comprehensive overhaul of the EU's anti-money laundering rules and a centrepiece of the Commission's proposals for this reform tabled in July 2021 (→eucrim 3/2021, 153–154). The new authority is *designed to overcome the existing deficiencies in the quality and effectiveness of AML/CFT supervision* in the EU and contribute to better convergence of high supervisory standards. It will also be responsible for contributing to the implementation of the newly created harmonised AML/CFT rules through the Single Rulebook (→following news item).

➤ *AMLA's tasks:*

AMLA's *tasks* are basically *twofold*: AML/CFT supervision and support of the Member States' Financial Intelligence Units (FIUs).

*Supervisory tasks* include direct and indirect supervisory competences. Direct supervision is limited to selected obliged entities in the financial sector that are exposed to high risk of money laundering and terrorism financing. In addition, the AMLA will be responsible for ensuring supervisory convergence and creating a common supervisory culture, and it will have a coordination and convergence role in the non-financial sector.

Concerning its *support function*, the AMLA will facilitate cooperation, information exchange and identification of best practices among FIUs. It will also have several tasks in setting technical and methodical standards.

➤ *Size of the Authority*

It is envisaged that the AMLA will reach over *430 staff members* over a horizon of four years. Of these, over 200 staff members will work on direct supervision of certain obliged entities. They will work in joint supervisory teams that will include staff of the relevant national supervisors of these entities.

➤ *The supervisory system*

The Regulation establishes an *integrated AML/CFT supervisory system*. This means that national supervisors (and FIUs) will remain in place as key elements of the EU's AML/CFT enforcement system but will closely work together with the AMLA. The AMLA will ensure the effective and consistent functioning of the system. It will only replace national supervisors for a limited number of cross-border financial sector entities in the highest risk category (see above). Apart from this, the AMLA primarily fulfils coordination and supporting functions. In order to effectively implement these functions, the supervisory authorities must, at the request of the AMLA, provide the Authority with all information concerning obliged entities that remain directly supervised at national level and they must provide information on specificities of their respective national legal framework.

In cooperation with the supervisory authorities, the AMLA will develop and maintain an *up-to-date and harmonised AML/CFT supervisory methodology* detailing the risk-based approach to supervision of obliged entities in the Union. That methodology will comprise guidelines, recommendations, opinions and other measures and instruments as appropriate, including in particular regulatory and implementing technical standards.

The integrated supervisory system includes several *forms of mutual assistance*. If, for instance, a supervisory authority faces specific challenges vis-à-vis an enhanced ML/TF risk or due to a lack of resources, it can seek assistance from the staff of the Authority, the staff of one or more supervisory authorities, or a combination thereof. Mutual assistance also includes exchange and secondments of personnel, training activities and exchanges of best practices.

An important tool within the supervisory system will be a *central database* established and kept up by the AMLA that collects a number of AML/CFT-related information, e.g., on supervisory actions and measures, statistics, assessments of ML/FT risks etc. Information from the database will be made available to any supervisory authority and non-AML/CFT authority on a "need-to-know basis".

➤ *Direct supervision by the AMLA*

With the objective of ensuring more effective and less fragmented protection of the Union's financial framework, a *limited number of the riskiest obliged entities operating in the financial sector* will be *directly supervised* by the AMLA. Direct supervision can be *triggered* in three ways:

- The AMLA itself selects credit institutions and financial institutions being active in at least six Member States and having been qualified, on the basis of a harmonised (yet to be developed) methodology, as having a high ML/TF risk profile. The list will be reviewed periodically every three years. The first selection process will be carried out in 2027, with the selected entities transferred to EU-level supervision as of 2028. In this first phase, the AMLA will not supervise more than 40 entities.
- The AMLA can request a Commission decision to place a financial sector obliged entity under its direct supervision for a limited period of time, irrespective of the objective criteria under the methodology described above. This request can be made, for instance, if an entity is systematically failing to meet the AML/CFT requirements or if a national supervisor is unable to implement recommendations made by the AMLA against the entity.
- A national financial supervisor can request the transfer of supervision to the AMLA in exceptional circumstances. In this case, it is for the AMLA to decide on the necessity of the transfer

and assume direct supervision of the obliged entity, e.g., if the integrity of the AML/CFT system so require.

Direct supervision is carried out by *Joint Supervisory Teams* (JSTs) led by a staff member of the AMLA ("JST coordinator") and including staff of the relevant national supervisors. AMLA's *powers* in the context of direct supervision include the following:

- The AMLA can require internal documents and all necessary information from selected obliged entities, natural persons employed by it, legal persons belonging to it and third parties to whom the selected obliged entities have outsourced operational functions or activities.
- The AMLA can conduct all necessary investigations, i.e., require the submission of documents; examine the books and records of the persons concerned; obtain access to internal audit reports, and any software, databases, IT tools or other electronic means of recording information; obtain access to documents and information relating to decision-making processes, including those developed by algorithms or other digital processes; obtain written or oral explanations from any person referred to above; interview any other person who consents to being interviewed for the purpose of collecting information relating to the subject matter of an investigation.
- The AMLA can conduct all necessary on-site inspections at the business premises of the natural and legal persons concerned; it is also empowered to apply for judicial authorisation if the national law of the Member State concerned so requires.

If the selected obliged entity is found to be in breach of the Union AML/CFT rules, the AMLA has sufficient and demonstrable indications that the selected obliged entity is likely to breach them, or the AMLA determines that the internal policies, procedures and controls in place in the selected obliged entity are not commensurate to the risks of money laundering, its predicate offences or terrorist financing to which the selected obliged entity is exposed, the AMLA can take various *administrative measures*. These measures include:

- Ordering obliged entities to comply and to implement specific corrective measures;
- Restricting or limiting the business, operations or network of institutions comprising the selected obliged entity;
- Requiring changes in the governance structure (including removal of member of the management body).

In addition to these administrative measures, the AMLA can *impose pecuniary sanctions* for serious, repeated or systematic breach of directly applicable requirements of the AML/CFT legal framework by the selected obliged entities. The Regulation lays down the basic amount of the pecuniary sanctions taking into account the nature of the requirements that have been breached. For example, basic amounts can be up to €2 million or 1% of the annual turnover (whichever is higher) for serious, repeated or systematic breaches of one or more requirements related to customer due diligence, group-wide policies, procedures and controls or reporting obligations that have been identified in two or more Member States where a selected obliged entity operates. Adjustments to the basic amount will be made in consideration of aggravating or mitigating circumstances.

The Executive Board of the AMLA an also adopt *periodic penalty payments* if an obliged entity fails to comply with certain administrative measures or a person fails to cooperate. The Regulation further details the publication of administrative measures, pecuniary sanctions and periodic penalty payments, the enforcement of pecuniary sanctions and periodic penalty payments, and procedural rules for taking supervisory measures and imposing pecuniary sanctions and periodic penalty payments.

The *CJEU* will have *unlimited jurisdiction to review* decisions of the Authority imposing a pecuniary sanction or a periodic penalty payment. It may annul, or reduce or increase the amount of, the pecuniary sanction or periodic penalty payment imposed.

➤ *Indirect supervision*

For *non-selected obliged entities in the financial sector*, the AML/CFT supervision remains primarily at national level, i.e., direct supervision is exercised by competent national authorities in their full responsibility and accountability. However, the Union legislator entrusted the AMLA with various *indirect supervisory powers* to ensure consistency and high quality of supervisory actions across the Union. These powers include:

- The AMLA will perform periodic assessments of some or all of the activities of one, several, or all financial supervisors, as well as of their tools and resources. These "assessments of the state of supervisory convergence" will be carried out in cycles on the basis of a uniform (yet to be developed) method that allows for a consistent assessment of, and comparison between, the financial supervisors reviewed. The AMLA can adopt follow-up measures in the form of guidelines and recommendations, including individual recommendations addressed to financial supervisors as a result of the assessment. Financial supervisors "shall make every effort to comply with the specific follow-up measures addressed to them".
- The AMLA will also be able to settle disagreements between financial supervisors concerning the measures taken against a non-selected obliged entity. The AMLA can adopt binding decisions requiring supervisors to take specific action or to refrain from certain action if an agreement failed during a conciliation phase.
- If there are indications of serious, repeated or systematic breaches of AML/CFT requirements by a non-se-

lected obliged entity, the AMLA can request the local financial supervisor to take specific measures, including the imposition of financial sanctions or other coercive measures. The local supervisor must comply with any request addressed to it and must inform the AMLA at the latest within 10 working days of the day of the notification of such request, of the steps it has taken or intends to take to comply with that request. If the supervisor fails to react adequately, the AMLA may request the Commission to grant transfer of supervision to it for a limited period of time (see also above).

- The AMLA can investigate systematic failures of supervision if financial supervisors do not or improperly apply the Union's AML/CFT law. In this scenario, the AMLA can issue a recommendation to a supervisor, setting out the action necessary to comply with Union law. If the supervisor does not comply with the recommendation within one month, the Commission can issue a formal opinion requiring the supervisor to comply.

➤ *Oversight of the non-financial sector*

In the non-financial sector, AMLA's supervisory powers are less far-reaching:

- In order to strengthen consistency and effectiveness in supervisory outcomes, the AMLA will carry out periodical peer reviews of non-financial supervisors, which will include peer reviews of public authorities overseeing self-regulatory bodies.
- The AMLA can investigate possible breaches or incorrect application of AML/CFT requirements by supervisors in the non-financial sector or public authorities overseeing self-regulatory bodies. If the AMLA establishes that a breach exists, it can address a recommendation to the supervisor or public authority concerned setting out the action necessary to remedy the identified breach. If no appropriate action has been taken within one month, the AMLA can issue a warning to the relevant counterparties of the supervisor or public authority. This power to issue warnings exists alongside the Commission's power to launch infringement procedures against Member States for not or poorly having implemented Union AML/CFT law.
- Similar to indirect supervision in the financial sector, the AMLA can settle disagreements between non-financial supervisors concerning measures to be taken in relation to an obliged entity in the non-financial sector. By contrast to the financial sector, the AMLA can only issue an "opinion" (not a binding decision) on how to settle the disagreement if the conflict could not be resolved during a conciliation phase.

➤ *Support and coordination mechanisms for FIUs*

The AMLA is not a "European central FIU". It rather has a *support and coordination role* within the network of FIUs. This role consists of the following:

- The AMLA supports and coordinates joint analyses of cross-border suspicious transactions or activities. It cannot force a FIU to participate in a joint analysis, but the FIU concerned must explain the reasons to the AMLA if it refuses. In the course of joint analyses, the staff of the AMLA is authorized to cross-match, on a hit/no-hit basis, the data of the participating FIUs with the information made available by other FIUs and Union bodies, offices and agencies, such as Europol. In the case of a hit, the AMLA shares the information that generated a hit with the FIUs involved and the Union body, office and agency that triggered the hit.
- The FIUs support the AMLA by delegating one or more staff members to AMLA's central office in Frankfurt.
- Other than joint analyses, the AMLA encourages and facilitates various forms of mutual assistance between FIUs, such as training and staff exchanges.
- The AMLA will manage, host, maintain and keep up-to-date the FIU.net – a decentralized system by which FIUs share information and analyses in an anonymized form. The AMLA ensures that the most advanced and secure technology available is used for FIU.net, subject to a cost-benefit analysis.
- The AMLA will set up a peer review process of the activities of FIUs.

➤ *Governance*

The AMLA's administrative and management structure comprises:

- A General Board;
- An Executive Board;
- A Chair of the Authority;
- An Executive Director;
- An Administrative Board of Review.

The *Executive Director* will be responsible for the day-to-day management of the Authority and ensures the functioning of the body, e.g., budget implementation and administration of resources, staff, and procurement.

The *Chair* will represent the Authority and runs the two collegial bodies: the General Board and the Executive Board.

The *General Board* has two alternative compositions:

- A supervisory composition with heads of the supervisory authorities of obliged entities in each Member State;
- A FIU composition with heads of FIUs in the Member States.

The *General Board in supervisory composition* takes all decisions in relation to the AML/CFT supervisory system. It decides on draft regulatory and implementing technical standards, guidelines and similar measures for obliged entities. It also provides its opinion to the Executive Board on draft decision in relation to individual selected obliged entities proposed by the Joint Supervisory Teams.

The *General Board in FIU composition* adopts acts relevant for FIUs, such as draft regulatory and implementing technical standards, guidelines and similar measures for FIUs.

The *Executive Board* is composed of the Chair of the Authority and five permanent independent members appointed by the European Parliament

and the Council. The Executive Board is in charge of the planning and execution of all tasks of the AMLA (if specific decisions are not expressly allocated to the General Board) and takes all binding decisions towards individual obliged entities or individual supervisory authorities.

The Executive Board also designates a *Fundamental Rights Officer* who advises the Authority and its staff on compliance with fundamental rights.

Natural and legal persons against whom decision under the direct supervision powers conferred on the AMLA were taken or which concern them directly and individually can request an *internal administrative review*. For this purpose, the *Administrative Board of Review* is established which is composed of five independent and suitably qualified persons. If the Board holds the request for review admissible, it can adopt opinions and remit the case for preparation of a new decision to the Executive Board.

➤ *Cooperation with other Union bodies, offices and agencies*

The AMLA will have to be integrated in the existing security and law enforcement structure both at the Union and national levels. The Regulation provides for the framework in which the AMLA should cooperate in the future. This includes the possibility to conclude agreements or memoranda of understanding with the European Supervisory Authorities (ESAs) and with other national authorities and bodies competent for ensuring compliance with AML/CFT rules.

Conclusion of specific working arrangements or memoranda of understandings is also foreseen with regard to *OLAF*, Europol, Eurojust and the *EPPO*. With these bodies close relationships should be established and maintained. The Regulation specifically foresees that results of joint analyses of cross-border cases are reported to the EPPO and OLAF where the results indicate offences/fraud within the remit of the EPPO or OLAF. The AMLA is also enabled to exchange strategic information, such as typologies and risk indicators, with the EPPO, OLAF, Europol, and Eurojust.

➤ *External cooperation*

The AMLA will also take an active role in external cooperation. Specifically, the Authority is empowered to develop contacts and enter into administrative arrangements with authorities in third countries that have regulatory, supervisory and FIU-related competences.

➤ *Timing*

After the publication of the Regulation in the Official Journal, the AMLA is established in the course of 2024. The aim is that the Authority can *start most of its activities in mid-2025*. Full staffing is to be reached in 2027. Direct supervision of certain high-risk financial entities should begin in 2028. (TW)

### The EU's New AML Single Rulebook Regulation

spot light

Obligations for private entities to prevent the use of the financial system from money laundering and terrorist financing are now prescribed in a directly applicable Regulation. Regulation (EU) 2024/1624, published in the Official Journal of the EU of 19 June 2024. It replaces the system to date that has regulated said obligations in Directives. These directives evolved over three decades but the directive-led approach has had the disadvantage of having produced diverging results after transposition into the national laws of the Member States, thus leading to inconsistent application of anti-money laundering (AML) and countering the financing of terrorism (CFT) rules. The last one of these so-called Anti-Money Laundering Directives (AMLDs) is the fourth AMLD of 2015 as amended by the fifth AMLD of 2018.

The sixth AMLD, which was adopted in parallel to the AML Regulation, now only deals with organisational and institutional issues that require transposition at the national level (→following news item). Therefore, the bulk for the preventive AML/CFT framework is set out in the Regulation (also called the "single rulebook" Regulation).

The comprehensive reform aiming at establishing a single rulebook on AML/CFT was proposed by the Commission in July 2021 (→eucrim 3/2021, 154–155)

The Regulation lays down rules concerning:

- The measures to be applied by obliged entities to prevent money laundering and terrorist financing;
- Beneficial ownership transparency requirements for legal entities, express trusts and similar legal arrangements;
- Measures to limit the misuse of anonymous instruments.

The main novelties of the Regulation compared to the current AMLD include the following:

➤ *Extension of the list of obliged entities*

Obliged entities are required to put in place internal policies, procedures and controls to mitigate and manage effectively the risks of money laundering and terrorist financing identified, they must carry out customer due diligence on clients, and report suspicions to FIUs. They are the gatekeepers in the AML/CFT framework as they have a privileged position to detect suspicious activities. In addition to the current list, which includes almost all financial institutions and various types of non-financial entities and operators (e.g., lawyers, accountants, reals estate agents, casinos, and certain types of crypto-asset service providers), the Regulation takes up new bodies:

- All types and categories of crypto-asset service providers – crypto-asset service providers will be considered as financial institutions with the same obligations;
- Crowdfunding platforms;
- Mortgage credit intermediaries and

consumer credit providers that are not financial institutions;
- Operators working on behalf of third country nationals to obtain a residence permit to live in an EU country;
- Traders of high-value goods, such as jewelers, horologists and traders of luxury cars, airplanes and yachts as well as cultural goods (like artworks);
- Professional football clubs and agents if they carry out certain transactions (whereby the Member States also have the possibility to remove football clubs with low risk from the list).

➤ *Strengthened AML/CFT rules*

The Regulation introduces specific enhanced due diligence measures for cross-border correspondent relationships for crypto-asset service providers. Furthermore, credit and financial institutions must undertake enhanced due diligence measures when business relationships with very wealthy (high net-worth) individuals involve the handling of a large amount of assets. There will also be an EU-wide maximum limit of €10,000 for cash payments.

➤ *Beneficial ownership*

The obligation to identify and report beneficial owners – i.e., persons who actually control or enjoy the benefits of a legal entity, a trust or similar legal arrangement, although the title or property is in another name – was introduced by the 2015 AMLD. The Regulation includes more detailed and harmonised rules in this regard. It clarifies that beneficial ownership can be based on two components – ownership interest and control – which must be assessed independently and in parallel. Identification of ownerships in multi-layered or complex structures are made easier. Legal entities established outside the EU are required to register their beneficial ownership in the central registers when they have a link with the EU, e.g., if they own real estate in the Union; registration is required retroactively until 1 January 2014.

➤ *High-risk third countries*

The Regulation further harmonises the EU's approach towards external threats to the Union's financial system. The definition of consequences attached to listed countries on a risk-sensitive basis is now more granulated. The Commission will make an assessment of the risk emanating from third-countries' legal and institutional systems, taking into account as a baseline the assessments made by the Financial Action Task Force (FATF) as international standard setter in AML. However, the Commission can also make autonomous assessments.

Third countries that are "subject to a call for action" by the FATF are likely to pose a high risk to the Union's financial system ("black listed countries"). Obliged entities are required to apply the whole set of available enhanced due diligence measures to occasional transactions and business relationships involving those high-risk third countries to manage and mitigate the underlying risks. Furthermore, the high level of risk justifies the application of additional specific countermeasures, whether at the level of obliged entities or by the Member States.

Third countries that are subject to "increased monitoring" by the FATF have compliance weaknesses that justify a less severe response (grey list). Here, obliged entities should apply enhanced due diligence measures to occasional transactions and business relationships when dealing with natural persons or legal entities established in those third countries that are tailored to the specific weaknesses identified in each third country. Beyond that, the AMLA will identify ML/TF risks, trends and methods at global level and will issue guidelines to inform obliged entities about these risks.

➤ *Timing*

The single rulebook Regulation will apply from 10 July 2027, except for the provisions which include football clubs and agents into scope as obliged entities – those provisions will apply from 10 July 2029. (TW)

### New Anti-Money Laundering Directive (AMLD 6)

Next to the anti-money laundering Regulation (→preceding news item), the sixth anti-money laundering Directive (AMLD 6) is another important building block in the new AML/CFT legal framework of the EU. "Directive (EU) 2024/1640 of 31 May 2024 on the mechanisms to be put in place by Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing" was published in the Official Journal of the EU of 19 June 2024. While the directly applicable Regulation contains the obligations for obliged entities in the private sector to take appropriate measures preventing money laundering and terrorist financing detrimental to the EU's financial system, the Directive mainly deals with organisational and institutional issues of the preventive framework that are addressed respectively to the Member States, their supervisory authorities, and Financial Intelligence Units. For the Commission's proposal on AMLD 6 →eucrim 3/2021, 155.

AMLD 6 lays down rules which need transposition at the national level on the following issues:
- The measures applicable to sectors exposed to money laundering and terrorist financing, at national level;
- The requirements in relation to registration of, identification of, and checks on, senior management and beneficial owners of obliged entities;
- The identification of money laundering and terrorist financing risks at Union and Member State level;
- The set-up of and access to beneficial ownership and bank account registers and access to real estate information;
- The responsibilities and tasks of Financial Intelligence Units (FIUs);
- The responsibilities and tasks of

bodies involved in the supervision of obliged entities;
- Cooperation between competent authorities and cooperation with authorities covered by other Union legal acts.

Key issues regulated in AMLD 6 are as follows:

➤ *Beneficial ownership registers*

A major revision was made in relation to central registers holding data on beneficial ownership. The new rules aim to ensure that information submitted to the central registers is more adequate, accurate and up-to-date. Entities in charge of the central register are empowered to verify the data, including the power to carry out inspections at the premises of legal entities in case of doubts regarding the accuracy of the information in their possession.

Competent authorities, including the EPPO and OLAF, will have immediate, unfiltered, direct and free access to registers across the Union. In addition, persons of the public with legitimate interest can access this information as well. Such persons include, for instance, journalists, civil society organisations, and third country competent authorities. The rules on access to persons of the public implement the CJEU judgment of 22 November 2022 in Joined Cases C-37/20 and C-601/20 (WM and Sovim SA v Luxembourg Business Registers →eucrim 4/2022, 144–145.

➤ *Real estate registers*

Member States will also be obliged to make accessible real estate registers to FIUs and other competent authorities through a single access point. The registers must contain data on the property, the ownership (including the price at which the property has been acquired), the history of the property and encumbrances like mortgages, judicial restrictions and property rights.

➤ *FIUs*

The new rules aim to improve the use of financial intelligence to prevent and combat money laundering, its predicate offences and terrorist financing. The analytical capabilities of FIUs will be broadened. It must be ensured that they have immediate and direct access to a wide range of administrative, financial and law enforcement information, such as tax information, information on funds and other assets frozen pursuant to targeted financial sanctions, information on transfers of funds and crypto-assets, national motor vehicles registers, customs data, and national weapons and arms registers.

The Directive also clarifies the provision of information by FIUs to investigative authorities and supervisors. FIUs will have new powers, such as to timely stop illicit flows, e.g., to suspend a business transaction or alert obliged entities of information relevant for the performance of customer due diligence.

Cooperation among FIUs across the EU will be strengthened by setting deadlines for replying to information requests, establishing a clear legal basis for the functioning of the FIU.net system which will also be upgraded to ensure fast dissemination of cross-border reports. In addition, joint analyses in cross-border cases is enabled – an area where the new AMLA will provide crucial operational support (→news item above, p. 113 ff.).

Fundamental rights should become an integral part of FIU's work and decision-making processes. The Directive obliges that FIU's have a Fundamental Rights Officer who will be tasked with monitoring and promoting the FIU's compliance with fundamental rights, providing advice and guidance to the FIU on fundamental rights implications of its policies and practices, scrutinising the lawfulness and ethics of the FIU's activities and issuing non-binding opinions.

➤ *Supervisors*

A major part of AMLD 6 is dedicated to AML supervision. Each Member States must ensure that all obliged entities established in its territory is subject to adequate and effective supervision by one or more supervisors. Supervisors must report suspicions to the FIUs.

Cross-border cooperation between national supervisors is strengthened. The Directive enables the set-up of supervisory colleges in both the financial and non-financial sector, e.g., for joint supervision of obliged entities operating in several Member States or as a cross-border group. Further support for supervisory colleges is provided by the AMLA which will develop regulatory technical standards for proper functioning of the colleges.

➤ *Risk assessment*

The Directive includes clearer rules for the risk-based approach to prevent money laundering and terrorist financing. It is acknowledged that this is to be done at both the EU and national levels. At the EU level, the Commission will conduct an assessment of ML/TF risks and draw up recommendations to Member States on measures they should follow. At national level, Member States need to carry out own risk assessments and commit to effectively mitigating the risks identified in the national risk assessment. Member States must also assess the potential to bring additional sectors in the scope of the AML Regulation.

➤ *Timing*

The provisions of the Directive must be transposed by different dates depending on the issue in question. In general, Member States must transpose the Directive by 10 July 2027. At this stage AMLD 4 as amended by AMLD 5 will be repealed. Comprehensive access to information of beneficial ownership of legal entities, trusts or similar arrangements (including access by persons with a legitimate interest) must be guaranteed already by 10 July 2025. Related provisions on the further development of beneficial ownership registers must be transposed by 10 July 2026. The requirements for

a single access point to real estate information must be transposed by 10 July 2029. (TW)

### New Directive: Access of National Authorities to Future Interconnection System of Bank Account Information

Directive 2024/1654 is the fourth legal act in the EU's AML/CFT package that was published in the Official Journal of 19 June 2024. The Directive complements the Anti-Money Laundering Directive (Directive 2024/1620 [AMLD 6] →preceding news item). It ensures that designated national authorities competent for the prevention, detection, investigation or prosecution of criminal offences are enabled to access and search the bank account registers' interconnection system (BARIS). BARIS is regulated in AMLD 6, which not only expands the scope of information to be included in the centralised bank account mechanisms but also lays down the obligation to interconnect those centralised automated mechanisms. BARIS will be developed and operated by the European Commission and has to be established two years after the Directive's transposition deadline, i.e., by mid-2029.

AMLD 6 only confers access to BARIS to the FIUs of the Member States, the national AML/CFT supervisory authorities and the future AMLA (for the purpose of joint analysis and direct supervision →news item above, p. 113 f.). Directive 2024/1654 revises Directive 2019/1153 and thus ensures that national authorities with competencies in the fight against serious crime have the power to directly access and search the centralised bank account registries of other Member States through the BARIS.

In addition, Directive 2024/1654 sets out measures to ensure that financial institutions and credit institutions across the Union, including crypto-asset service providers, provide transaction records in a uniform format that is easy for competent authorities to process and analyse. The exact format will be set out in a delegated/implementing act.

The Directive was proposed by the Commission on 20 July 2021 and implements the EU's strategy for investigators having swift access to financial information as key element to conduct effective financial investigations and successfully tracing and confiscating the instrumentalities and proceeds of crime. (TW)

### EBA: New Guidelines on "Travel Rule" to Tackle Money Laundering

The European Banking Authority (EBA) has published new guidelines on 4 July 2024 pertaining to the "travel rule", i.e. the information that should accompany transfers of funds and certain crypto assets. The rule aims to enhance the detection and prevention of money laundering and terrorist financing in the context of financial transfers and certain crypto assets.

The guidelines follow the enforcement of Regulation (EU) 2023/1113 in June 2023 (→eucrim 2/2023, 143). This Regulation aligns the EU's legal framework with the standards set by the Financial Action Task Force (FATF) by extending the obligation to include information about the originator and beneficiary to crypto-asset service providers (CASPs). Furthermore, the regulation subjects CASPs to the same anti-money laundering and counter-terrorism financing (AML/CFT) requirements as other financial institutions.

The objective of the new guidelines is to establish a consistent approach across the EU, thereby facilitating the tracing of transfers when necessary in order to prevent, detect, or investigate money laundering and terrorist financing. The guidelines elucidate the information that must accompany such transfers and delineate the measures that payment service providers (PSPs), intermediary PSPs, CASPs, and intermediary CASPs must undertake to detect and address any deficiencies in the information provided in these transfers.

The guidelines will come into force on 30 December 2024. Competent authorities are required to submit a report on compliance within a period of two months following the publication of the official EU language translations.

In addition to the guidelines on the "travel rule", the EBA has released additional guidelines for AML/CFT supervisors of CASPs and is currently finalising guidelines on internal policies for CASPs and other financial institutions to comply with restrictive measures. (AP)

## Tax Evasion

### ECJ Ruled on Reporting Obligations for Aggressive Tax Planning

In its judgment of 29 July 2024, the ECJ upheld the EU's system on reporting obligations for intermediaries to inform tax authorities of certain cross-border arrangements that could potentially be used for aggressive tax planning. The ECJ particularly did not consider that the underlying EU legislation is invalid.

➤ *Questions referred*

The case (C-623/22, *Belgian Association of Tax Lawyers and Others*) was referred by the Belgian Constitutional Court. Before this court, a number of associations and professionals, active in the field of legal, tax or consultancy services request annulment of the Belgian law implementing the EU rules due to lack of precision and the unlimited effects of the obligations. Insofar as the contested national provisions have their origin in EU legislation, the Belgian Constitutional Court posed several questions on the validity of the reporting system, as laid down in Directive 2011/16 on administrative cooperation in the field of taxation as amended by Directive 2018/822 (here-

inafter DAC-6). It was doubted that the Directive is in line with the fundamental rights of the Charter and other principles of EU law.

➤ *Infringement of equal treatment?*

First, the referring court asked whether the principles of equal treatment and non-discrimination are infringed, in so far as DAC-6 does not limit the reporting obligation to corporation tax, but makes it applicable to all taxes falling within its scope.

The ECJ found that the reference point for an assessment of a possible breach of these principles is that of the risk of aggressive tax planning and of tax avoidance and evasion in the internal market. The different tax types subject to the reporting obligations fall within comparable situations in the light of these objectives and the legislation is not manifestly inappropriate.

➤ *Infringement of legal certainty?*

Second, the referring court doubted that the terminology and concepts used in DAC-6 (e.g., "arrangement", "intermediary", "participant" etc.), which determine the scope and reach of the reporting obligation, as well as the starting point of the 30-day period prescribed for fulfilling the reporting obligation are not sufficiently clear and precise and thus infringe the principle of legal certainty, the principle of legality in criminal matters (Art. 49(1) of the Charter) and the right to respect for private life (Art. 7 of the Charter).

By defining the requirements of said principles and fundamental rights from the case law of the European courts and by examining the various aspects of the concepts used in DAC-6, the ECJ held that the degree of precision and clarity does not call into question the validity of DAC-6.

➤ *Breach of legal professional privilege?*

Third, the ECJ had to clarify the scope of its judgement of 8 December 2022 in Case C-694/20 (*Orde van Vlaamse Balies and Others*) on exemptions from notifying others from the reporting obligation. The dispute refers to the scheme that Member States may grant intermediaries a waiver from the obligation to report aggressive cross-border tax planning where it would breach legal professional privilege protected under its national law. In such circumstances, lawyer-intermediaries are however required to notify without delay any other intermediary, or the relevant taxpayer, of their reporting obligations vis-à-vis the competent authorities (subsidiary obligation), and thus third parties, such as tax authorities, would gain the information (Art. 8a(5) DAC-6).

In the 2022 judgment, the ECJ ruled that the notification obligation on a lawyer subject to legal professional privilege is not necessary and infringes the right to respect for communications with his or her client (Art. 7 of the Charter).

In the present case, the Belgian Constitutional Court asked the ECJ whether this case law also applies to intermediaries who are not a lawyer but authorised to ensure legal representation, such as tax consultants or university professors in certain Member States.

The ECJ clarified now that the solution adopted in the 2022 judgment applies only to persons who pursue their professional activities under one of the professional titles referred to in Art. 1(2)(a) of Directive 98/5, i.e., the lawyer must have a role in collaborating in the administration of justice. Thus, the invalidity of the subsidiary obligation in light of Art. 7 of the Charter does not extend to other professionals not having those characteristics, even though they are authorised by the Member States to ensure legal representation.

➤ *Breach of the right to organise one's private life?*

Fourth, the referring court raised the question whether the reporting obligation for intermediaries, and, in the absence of an intermediary subject to the reporting obligation, the relevant taxpayer (Art. 8a(6) and (7) DAC-6) infringes the right to respect for private life, understood as the right of everyone to organise his or her private life and activities. The Belgian Constitutional Court in particular pointed to situations in which an arrangement indeed pursues a tax advantage, but in a lawful and non-abusive manner. This would limit the taxpayer's freedom to choose, and the intermediary's freedom to design and advise that taxpayer on, the least taxed route.

The judges in Luxembourg acknowledged that the reporting obligation in respect of cross-border arrangements constitutes an interference with the right to respect for private life guaranteed in Art. 7 of the Charter, in so far as it results in revealing to the administration the result of tax design and engineering work relying on disparities between the various applicable national rules, carried out in the context of personal, professional or business activities by the taxpayer him or herself or by an intermediary. It is therefore liable to deter both that taxpayer and his or her advisers from designing and implementing cross-border tax-planning mechanisms.

However, the judges in Luxembourg conclude that such an interference is justified in the light of the objectives pursued by the amended Directive 2011/16. The interference does not adversely affect the essence of the right to respect for private life, and it does not outweigh the public interest objective of combating aggressive tax planning and preventing the risks of tax avoidance and evasion. It follows that the reporting obligation at issue does not infringe the right to respect for private life.

➤ *Put in focus*

In essence, the ECJ backs the system of reporting potentially aggressive tax arrangement from the part of privates to the tax administration, as introduced by the EU legislature in 2018. This also represents a kind of "para-

digm shift": the terms "tax evasion/avoidance" or "aggressive tax arrangement" are no longer defined *per se*, but now indicators submitted by privates are to enable tax authorities and legislators to close loopholes in taxation.

Another important point of the judgment is that it reiterates the specific protection of the relationship between a lawyer and his/her client as stated in the 2022 judgment in *Orde van Vlaamse Balies*. Clients will continue to be able to trust that their lawyer will not disclose to anyone without their consent that they are being advised by him and what the advice is about. However, the ECJ clarified that this comprehensible protection does not extend to other professionals subject to professional secrecy. It is limited to lawyers who exercise their profession in the general interest in the proper administration of justice reflecting their unique position accorded to the profession of lawyer within society.

Lastly: The case at issue is not only closely related to the case in *Orde van Vlaamse Balies* but also to Case C-432/23 (*F SCS and Ordre des avocats du barreau de Luxembourg*). In this case, further clarifications on the scope of the lawyer-client-privilege under DAC-6 are sought. (TW)

## Non-Cash Means of Payment

### Large-Scale Fraudulent Investment Scheme Taken Down

An action day on 11 June 2024 resulted in the takedown of a fraudulent pyramid scheme using an investment model that focused on the leasing and subleasing of cryptocurrency machines, such as exchange machines and hardware for mining. It promised returns of 70% before tax for the leasing of (non-existing) cryptocurrency products, involving alleged investments in server storage for internet cloud services and the subleasing of crypto exchange machines. Subsequently, a pyramid scheme was created, where most of the revenue for earlier investors came from more recent investors. The scheme targeted thousands of victims, causing losses of up to €113 million.

Authorities from Germany and Switzerland formed a Joint Investigation Team with the support of Eurojust as well as authorities from Austria, Czechia, Lithuania, and Liechtenstein. Through the action, six arrests and 29 searches were conducted as well as evidence seized and assets frozen. (CR)

## Organised Crime

### Council Sets Up European Judicial Organised Crime Network

At its meeting on 13/14 June 2024, the Justice and Home Affairs Council approved conclusions on "Fighting drug trafficking in organised crime: Setting up a European judicial organised crime network". The idea of such a network was presented by the Belgian Council Presidency at the informal JHA meeting on 26 January 2024 and subsequently further developed (→eucrim 1/2024, 30–31). The fight against drug trafficking and organised crime has been one of the priorities of the Belgian Council Presidency (→eucrim 4/2023, 317) and is in line with the Commission's EU Roadmap to fight drug trafficking and organised crime presented in October 2023 (→eucrim 3/2023, 257).

The Conclusions advocate setting up the network that will bring together mainly prosecutors and, depending on the national context, investigative judges and law enforcement officers who deal with drug trafficking and organised crime. The network is designed to be a hub of specialised national expertise with the aim to facilitate and enhance cooperation between competent authorities. It will operate in a continuous manner and Eurojust is invited to organise the network. The tasks of the network will be as follows:

- Facilitating the exchange of expertise, best practices and other relevant knowledge and experience in the investigation and prosecution of organised crime, including the practical application of current legal frameworks and relevant case law and effective cross-border judicial cooperation;
- Exchanging information about general developments and trends;
- Exchanging non-personal information, which can feed into and be used in the operational activities of Eurojust and national judicial authorities, in particular within Joint Investigation Teams (JITs);
- Fostering dialogue among different actors and stakeholders that have a role in fighting organised crime, such as Europol, Eurojust and the EPPO.

In the first operational phase, the network should focus on hubs for illegal trade in drugs, in particular sea ports and other logistic hubs used by organised crime groups to import illegal drugs and transport them through the Union. Thus the network will complement the European Ports Alliance (→eucrim 1/2024, 30).

Member States are requested to designate at least one expert to participate in the network. The experts will meet at least twice a year, with Eurojust hosting the meetings. (TW)

### Council Conclusions on Strengthening Judicial Cooperation with Third Countries in the Fight against Organised Crime

At the Justice and Home Affairs Council meeting held on 13/14 June 2024, ministers approved conclusions on strengthening judicial cooperation with third countries in the fight against organised crime. The conclusions come along with conclusions on setting up a European judicial organised crime network (→preceding news item). They are key elements of efforts taken by the Belgian Council Presidency in the

justice area to step up the EU's fight against drug trafficking and organised crime (→eucrim 4/2023, 317).

The Council calls on Eurojust and Member States to identify third countries with which reinforced cooperation is important for the fight against organised crime. A relevant criterion could be the number of "high value targets" located in third countries covered by requests for judicial cooperation. Other measures should include the following:

- Sharing of expertise and best practices among experts experienced in judicial cooperation with priority third countries, including liaison officers, liaison magistrates and diplomatic representations;
- Seconding Eurojust liaison magistrates to third countries in select cases;
- Eliminating difficulties in judicial cooperation with third countries, in particular extradition.

With regard to the latter aspect, the Commission is invited to prepare and regularly update a briefing package for engagement with priority third countries, including relevant data on the level of law enforcement and judicial cooperation. This briefing package can be used in diplomatic contacts with the respective third country. In addition, the Commission and Member States are invited to organise dedicated "Team Europe" dialogues with priority third countries, with the presence of high-level representatives of the Commission and relevant Member States, to specifically discuss how to improve judicial cooperation on all sides. (TW)

## Cybercrime

### IOCTA 2024

In July 2024, Europol published the 10th edition of its Internet Organised Crime Threat Assessment (IOCTA). For the 2023 report →eucrim 2/2023, 145–146.

The IOCTA 2024 offers an in-depth assessment of the key developments, changes, and emerging threats in cybercrime during the year 2023. The report's five chapters cover cryptocurrencies and the dark web, cyberattacks, child sexual exploitation, online payments and fraud, and what to expect in the near future.

Millions of victims across the EU are attacked and exploited online on a daily basis, with small and medium-sized enterprises (SMEs) being increasingly targeted, as they tend to have fewer cyber defences. According to the report, the following were the biggest threats over the past year:

- An ever-growing volume of online child sexual abuse material (CSAM) including cases of AI-assisted, AI-altered, and AI-generated CSAM;
- Investment, business email compromise (BEC), and romance fraud as well as digital skimming;
- AI-based tools and services becoming common tools for cybercriminals and a prominent commodity in the crime-as-a-service (CaaS) market, helping fraudsters to refine their social engineering capabilities;
- Ransomware groups splitting up and reorganising under different guises.

Key enablers of cybercrime include the dark web, cryptocurrencies and underground banking as well as cybercriminal abuse of legitimate end-to-end encryption (E2EE) messaging.

Looking at criminal actors, the report finds that the number of cybercriminals entering the market continues to grow steadily, comprising both lone actors and networks with various levels of expertise and capability. They operate from both within the EU and from third countries. Providers of ransomware-as-a-service (RaaS) compete for the services of high-level affiliates and developers, with some affiliates beginning to develop their own ransomware to lower their dependence on RaaS providers. Notably, the majority of criminals are young and unaware of the legal consequences of what they see as a mere challenge or game, even though their crimes have far-reaching implications for their own futures.

The report highlights the need for a renewed focus on offender prevention that addresses cybercrime at its core, leading to more sustainable and long-term solutions. It therefore recommends addressing the root causes that drive individuals to engage in cybercriminal activity, such as lack of awareness, financial incentives, and socio-economic factors. Cyber Offender Prevention (COP) is therefore seen as a key strategy, alongside investigative measures, in effectively combatting cybercrime. (CR)

### Council Conclusions on the Future of Cybersecurity

On 21 May 2024, the Council adopted a comprehensive set of conclusions aimed at strengthening cybersecurity across the EU, underlining the need for a more resilient and secure digital landscape. Recognizing the increasing scale, complexity, and frequency of cyber threats, exacerbated by global geopolitical tensions, the Council stressed the critical importance of cybersecurity for the functioning of modern society and the economy. The conclusions outline the future direction for EU cybersecurity, focusing on several key areas:

- Implementation and harmonisation: The Council emphasises the need for effective implementation of existing cybersecurity frameworks, in particular newly established rules such as the Directive on Network and Information Security (NIS II) and the Cyber Resilience Act. Harmonised standards and certifications are highlighted as crucial to reducing administrative burdens and ensuring consistent security measures across Member States. The Council cautions against the fragmentation of cybersecurity rules across

different sectors and calls for a coherent and unified approach to cybersecurity policy.

- Support for SMEs and innovation: Small and medium-sized enterprises (SMEs) often lack the resources to implement robust cybersecurity measures. The Council calls for measures to facilitate compliance, reduce administrative burdens, and provide practical guidance to help SMEs improve their cybersecurity standing. In addition, the Commission and relevant bodies are urged to stimulate investment in cybersecurity research and development, in particular through the European Cybersecurity Competence Centre (ECCC).
- International cooperation: The Council underscores the importance of international cybersecurity cooperation, in particular with third countries and international organisations such as NATO, the UN, and the Organisation for Security and Co-operation in Europe (OSCE). It points out the need for a strong external cybersecurity policy to complement internal efforts and emphasises the importance of transatlantic cooperation and initiatives such as the EU-US Joint Cyber Safe Product Action Plan. The Council also calls for increased engagement with countries outside the EU to combat cybercrime and improve global cyber resilience.
- Addressing emerging threats: The conclusions acknowledge the potential benefits that technologies such as artificial intelligence (AI), quantum computing, and 6G technology could bring to cybersecurity. But they also recognise the challenges posed by such emerging and potentially disruptive technologies, namely the need for careful risk management and the development of concrete initiatives to address these new threats. The transition to Post-Quantum Cryptography (PQC) is identified as a priority in order to protect sensitive information from future quantum threats.
- Strengthening institutional frameworks: EU cybersecurity institutions, such as the European Union Agency for Cybersecurity (ENISA), the ECCC, and the network of Computer Emergency Response Teams (CERTs) should be further strengthened. Reforms should include a clear delineation of roles and responsibilities between these bodies to avoid duplication and ensure effective coordination. The importance of sufficient funding and skilled cybersecurity experts to support these institutions is also emphasised.
- Cybersecurity crisis management: The conclusions address the need for a robust cybersecurity crisis management framework, building on existing structures and ensuring seamless coordination across sectors and borders. The Commission is invited to propose a revised Cybersecurity Blueprint that takes into account the current complex threat landscape, enhances cooperation, and breaks down silos between organisations.
- Private sector engagement: Recognising the key role of the private sector in securing digital infrastructure, the Council calls for greater cooperation between public authorities and private companies. This includes promoting information sharing, supporting SMEs, and developing joint initiatives to mitigate cyber threats.

The Council's conclusions that include important cybersecurity principles will be the basic framework for future action with the aim of strengthening the EU's collective ability to protect, detect, and respond to cyber threats/attacks. The Council invited the European Commission and the High Representative to review and update the 2020 EU Cybersecurity Strategy to ensure that it remains fit for purpose in light of the evolving threat landscape. (AP)

### Operation Endgame Takes Down Droppers

Between 27 and 29 May 2024, with the support of Europol and Eurojust, authorities from France, Germany, the Netherlands, and many more EU and non-EU States as well as private partners conducted the largest ever operation against botnets: Operation Endgame. The action included arrests, suspect interviews, searches, seizures, and takedowns of servers and domains. As a result, four persons were arrested, over 100 servers taken down worldwide, and droppers such as IcedID, SystemBC, Pikabot, Smokeloader and Bumblebee were shut down. Several cybercriminals were added on "Europe's Most Wanted" list.

Malware droppers are a type of malicious software designed to install other malware onto a target system. Droppers constitute the first step in an infection chain entering systems through various channels, such as email attachments, compromised websites, or bundled with legitimate software. The dropper subsequently installs the malware onto the victim's computer. The dropper itself is designed to avoid being detected by security software. Having "dropped" the malware, the dropper will either remain inactive or remove itself to evade detection, leaving the payload to carry out the intended malicious activities.

A dedicated website will continue reporting about the results and further actions of Operation Endgame.

The operation was part of the EMPACT cycle – the European permanent platform to identify, prioritise, and address threats posed by organised and serious international crime (→eucrim 1/2022, 35) (CR)

## Terrorism

### New EU Knowledge Hub on Prevention of Radicalisation

On 17 June 2024, the European Commission launched a significant new initiative aimed at preventing radicalisation: the EU Knowledge Hub on Prevention of Radicalisation. The creation of the EU Knowledge Hub was first outlined in the EU Counter-Terrorism

Agenda 2020. Building on the achievements of the Radicalisation Awareness Network (RAN), the Knowledge Hub is designed to support a wide range of stakeholders, including policymakers, practitioners, and researchers, by providing a collaborative platform for working together at the EU level.

The launch event was opened by Commissioner for Home Affairs, *Ylva Johansson*, and the Belgian Minister of the Interior, *Annelies Verlinden*. Several critical topics were discussed:

- The challenge of addressing lone actors dealing with mental health issues, emphasizing the need for a multi-stakeholder approach;
- The effect of geopolitical conflicts, such as Russia's war of aggression against Ukraine and the ongoing situation in the Middle East, on European societies;
- The radicalisation of minors, with a particular focus on the ways in which extremist groups exploit vulnerable youth, and the crucial role of families and schools in fostering a sense of belonging and inclusion.

The EU Knowledge Hub will engage in a range of activities that extend beyond mere awareness-raising. These activities include:

- Organising thematic panels for experts to collaborate on priority topics;
- Facilitating project-based collaborations led by Member States;
- Hosting workshops, study visits, and tailored support services;
- Offering training, mentoring, and job shadowing opportunities;
- Conducting research and foresight analysis.

The Knowledge Hub will facilitate EU cooperation in preventing radicalisation, thereby providing support to Member States and priority third countries in addressing this challenge. (AP)

### Actions against Terrorist Communication and Propaganda

In mid-June 2024, a major operation shared between law enforcement and judicial authorities across Europe and in the United States led to the takedown of numerous servers used for terrorist communication and propaganda as well as to the arrests of nine persons. The websites and communication channels – such as radio stations, a news agency, and social media – supported multiple media outlets linked to the Islamic State (IS). They were available in at least 30 languages and had a global reach.

Europol's European Counter Terrorism Centre supported the operation with its range of services and expertise and organised several operational meetings. Eurojust organised a dedicated coordination meeting and assisted with the execution of EIOs and MLA requests.

The joint action is the latest in a series of joint efforts, dating back to the year 2016, which aim to disrupt the online activities of the so-called Islamic State. (CR)

## Trafficking in Human Beings

### New Directive to Strengthen Anti-Human Trafficking

After negotiators from the European Parliament and the Belgian Council Presidency reached a provisional agreement in January 2024, the revised EU rules on preventing and combating human trafficking have been finalised: "Directive (EU) 2024/1712 of the European Parliament and of the Council of 13 June 2024 amending Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims" was published in the Official Journal on 24 June 2024. The proposal to update the EU law on the prevention and combat of trafficking in human beings was tabled by the Commission in December 2022 (→eucrim 4/2022, 249).

The Directive considerably changes or modifies the provisions of the EU's 2011 anti-human trafficking directive that set minimum rules for the definition of criminal offences and sanctions at the national level. The new rules are designed to further reinforce the fight against human trafficking across the EU by broadening its scope. The key features of Directive 2024/1712 are:

- Forced marriage, illegal adoption, and surrogacy are explicitly mentioned as forms of exploitation falling under the umbrella term "trafficking." The exploitation of women in surrogacy arrangements (i.e. a woman agrees to deliver a child on behalf of another person or couple to become the child's parent(s) after birth), whereby they are forced to act/misled into acting as surrogates, would henceforth be subject to penalties under EU law.
- Member States are obliged to make it a criminal offence if a person who uses the service provided by a trafficking victim knows that the person is a victim of trafficking. The intention is to reduce the demand that drives exploitation by holding users to account. In such cases, Member States need to ensure that this offence is punishable by effective, proportionate and dissuasive penalties.
- It is ensured that the new types of exploitation (forced marriage, illegal adoption and surrogacy) will fall under the penalty thresholds defined in Directive 2011/36 (maximum of at least five years of imprisonment and maximum of at least ten years of imprisonment for aggravated cases).
- Member States must regard two new situations as aggravating circumstances: a) the fact that the offence was committed by public officials in the performance of their duties; b) the fact that the perpetrator facilitated or committed, by means of information and communication technologies, the dissemination of images or videos or similar material of a sexual nature involving the victim (while Member States can also define this conduct as a separate criminal offence with more severe penalties).

■ Legal entities, such as companies, held accountable for trafficking offences, would be subject to more stringent penalties, including exclusion from public tenders, grants, concessions and licences, and the withdrawal of permits and authorisations to pursue activities which have resulted in committing the offence.

■ The possibilities of non-prosecution of and non-application of penalties to victims of trafficking are expanded. Hence, victims of trafficking should not, for instance, be held responsible for administrative offences related to prostitution, begging, loitering or undeclared work. This should encourage victims to report crimes and seek support or assistance.

■ The support provided to victims has been reinforced, requiring the establishment of national anti-trafficking coordinators and formal referral mechanisms. These measures would guarantee the prompt identification of victims and the delivery of assistance, particularly for the most vulnerable individuals, including women, children, and those requiring international protection.

Other novel issues of the Directive include improvements on the protection of victims of trafficking who may be in need of international protection and strengthened rules on the assistance and support of child victims of trafficking in human beings. Regarding compensation, victims of trafficking in human beings will have access to existing schemes of compensation to victims of violent crimes of intent. Member States may establish a national victims fund for paying compensation to victims. As regards prevention, Member States must take appropriate measures, such as education, training and campaigns, with specific attention to the online dimension.

Directive 2024/1712 entered into force on 14 July 2024. It is incumbent upon Member States to transpose the new rules into their national legislations by 15 July 2026.

The reform of the 2011 anti-human trafficking Directive has been one of the key priorities for the Commission, as laid down in the EU Strategy on Combatting Trafficking in Human Beings in the period of 2021–2025 (→eucrim 2/2021, 92). (AP/TW)

### EDPS Raises Concerns Over Planned Police Cooperation in Migrant Smuggling

The European Data Protection Supervisor (EDPS) published an Opinion on the proposed Regulation to enhance police cooperation to prevent, detect, and investigate the smuggling of migrants and the trafficking of human beings, and to reinforce the role of the EU Agency for Law Enforcement Cooperation (Europol) in preventing and combating these crimes.

The Commission made the proposal on 28 November 2023 (→eucrim 3/2023, 257–258); it aims to strengthen Europol's role in the fight against migrant smuggling and human trafficking by bolstering the European Centre Against Migrant Smuggling at Europol. It is part of a broader effort by the EU to modernize its approach to combating these crimes, given their growing complexity and cross-border nature.

However, while the EDPS acknowledges that the fight against migrant smuggling and trafficking in human beings represents significant public interest and justifies certain limitations on individual rights, it emphasizes that the necessity and proportionality of the proposed measures must be rigorously assessed.

➤ *The EDPS' key concerns:*

■ Processing of biometric data and facial recognition: The proposal includes provisions for Europol to support Member States in the effective processing of biometric data, including facial recognition technologies. The EDPS raises concerns about the expanded use of such sensitive data, particularly in terms of ensuring the strict necessity and proportionality of their use. Biometric data, by its nature, poses a high risk to privacy and personal security, and the EDPS underscores the need for clear, binding safeguards to prevent misuse. This includes mechanisms to ensure the quality of biometric data, especially when processed using automated systems like facial recognition, which may involve significant risks of error and bias.

■ Role of Frontex: The proposal seeks to strengthen cooperation between Europol and the European Border and Coast Guard Agency (Frontex), particularly in operations against migrant smuggling. The EDPS cautions against blurring the lines between Frontex's core tasks of border management and law enforcement activities. There is concern that, without clearer boundaries, Frontex could effectively become a law enforcement agency, a role for which it is not designed.

■ Data transfers to third countries: The proposal allows Europol to transfer personal data to third countries under certain conditions, even in the absence of an adequacy decision or appropriate safeguards, using derogations. The EDPS is particularly concerned about the risk of regular or systemic use of such derogations, which could undermine the protection of personal data when shared with countries that do not have equivalent data protection standards.

■ Investigative non-coercive measures: The proposal introduces new provisions that would allow Europol to carry out investigative non-coercive measures related to data processing, particularly when providing operational support to Member States. The EDPS stresses the importance of defining clear data processing responsibilities between Europol and the concerned Member States.

■ Absence of an impact assessment: One of the EDPS's primary concerns is the lack of an impact assess-

ment accompanying the proposal. Given the sensitive nature of the data involved, particularly biometric data, and the vulnerability of the individuals affected (e.g., migrants and victims of trafficking), the absence of such an assessment is problematic. The EDPS highlights that this omission makes it difficult to fully evaluate the necessity and proportionality of the proposed measures.

- Potential impact on fundamental rights: The EDPS notes that the proposal remains vague on the actual impact that the new provisions may have on fundamental rights, particularly the right to privacy and data protection. Although the proposal aims to combat serious crimes like human trafficking and migrant smuggling, it is essential that any measures taken do not disproportionately infringe upon the rights and freedoms of individuals.

➤ *Recommendations for mitigating data protection risks:*

The EDPS offers several recommendations to address the data protection risks posed by the proposal:

- Adopt clear, binding rules for biometric data processing: Mechanisms must be established to mitigate the risks associated with processing biometric data. These should include strict rules governing the necessity, proportionality, and quality of the data being processed, particularly by Europol.
- Clarify Frontex's role: The EDPS urges that Frontex's role in supporting Europol and Member States in combating migrant smuggling be clearly defined to prevent mission creep and ensure that Frontex does not become a law enforcement body.
- Limit the use of derogations for data transfers: The EDPS recommends modifying the proposal to prevent the systemic use of derogations for data transfers to third countries, ensuring that such measures remain the exception.
- Define responsibilities for data processing: Europol and Member States must clearly define their respective responsibilities when Europol is involved in operational support, ensuring accountability in data protection matters.
- Conduct an impact assessment: The EDPS strongly advises that an impact assessment be carried out to properly evaluate the potential effects of the proposal on fundamental rights, particularly given the sensitive nature of the data at stake.

While the EDPS acknowledges the importance of reinforcing Europol's role in combating migrant smuggling and human trafficking, it emphasizes that any expansion of powers must be balanced with adequate protections for the fundamental rights of individuals. The necessity and proportionality of new measures, particularly those involving biometric data processing and cross-border data transfers, must be carefully considered. By implementing the recommendations provided, the EU can ensure that its efforts to combat serious crime do not come at the expense of personal privacy and data protection. (AP)

## Procedural Law

### Procedural Safeguards

#### ECJ: Criminally Prosecuted Minors Must Have Lawyer's Assistance during First Police Questioning

In its judgment of 5 September 2024, the ECJ ruled that several provisions of the Polish Code of Criminal Procedure and legal practices are incompatible with the rights of minors charged with a criminal offence. These rights are mainly enshrined in Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings. Hence, a lawyer's assistance must be guaranteed during the first police hearings. The ECJ also clarified the consequences of infringements of rights for the criminal proceedings.

➤ *Facts of the case and questions referred*

In the case at issue (Case C-603/22, *M.S. and Others*), the District Court of Słupsk, Poland, referred several questions on the effectiveness of procedural guarantees and the conclusions to be drawn from possible incompatibility with EU rules in a criminal case involving three minors. Polish law enforcement authorities brought the three minors to court charging them with having broken into the buildings of a disused former holiday centre. At the material time the suspects were 17 years old. It was found that neither the minors nor their parents had been informed of the conduct of criminal proceedings, one minor only received a document with general information on the rights and obligation of a suspect in criminal proceedings without specific reference to the rights of children. The questionings by the police were conducted in the absence of a lawyer. The police also made no efforts to get benefits from a court-appointed lawyer in the pre-trial phase of the criminal proceedings.

Against this background, the referring court asked several questions on the correct transposition of the EU's procedural rights directives into Polish law, the consequences to be drawn from the failure to implement correctly EU law, given the direct effect of the provision in the directives, and the effectiveness of remedies to ensure protection of suspected or accused children.

➤ *Mandatory assistance by a lawyer during police questionings*

The ECJ first examined the scope of the guarantees for access to a lawyer included in Art. 6(1)-(3) of Directive 2016/800. The ECJ stated the following:

- Unlike Art. 9 of Directive 2013/48, which regulates access to lawyer by

suspects or accused persons who are not children, Directive 2016/800 does not provide for the possibility for children to waive their right to be assisted by a lawyer;

- The national law of the Member States must ensure in relation to legal aid guarantees the effective exercise of the right to be assisted by a lawyer (Arts. 18 and 6 of Directive 2016/800);
- Children who are suspects or accused persons must be afforded the practical and effective opportunity under national law to be assisted by a lawyer, before they are first questioned by the police or by another law enforcement or judicial authority and, at the latest, from the time of that questioning;
- A child must be entitled to a court-appointed lawyer who assists him/her during that questioning;
- Questionings cannot be carried out if the child concerned does not actually receive such assistance;
- The questioning of the child, or other investigative or evidence-gathering acts, must be postponed for a reasonable period of time in order to allow for the presence of a lawyer or, where the child has not nominated a lawyer, to arrange a lawyer for the child;
- Derogations from the right to be assisted by a lawyer as provided for in Art. 6(6)–(8) of Directive 2016/800 can only be justified if the particular circumstances of each case are taken into account in the best interest of the child.

Therefore, derogations, in a general and abstract manner, in the context of national legislation, from the right of children who are suspects or accused persons to be assisted by a lawyer in the pre-trial phase cannot be permitted. Against this background, the Polish legislation that does not provide for the mandatory presence of a lawyer for suspected children during their questioning (in particular at the pre-trial stage), foresees that children who are not detained must expressly request to be assisted by a lawyer, and allows the continuance of the questioning of children in the absence of such a lawyer are incompatible with Art. 6(1)-(3) of Directive 2016/800.

➤ *Access to lawyer for children becoming 18 years old during the proceedings*

Second, the ECJ examined the Polish court practice (based on Article 79(1)(1) of the Polish CCP) that the participation of a lawyer in the proceedings is no longer mandatory once the accused or suspected person has reached the age of 18, which has the effect of automatically releasing the court-appointed lawyer from his or her mandate.

The ECJ found that such an "automatic loss" of the rights conferred on minors by EU law would counter the provisions of the Directive that ensure that the benefits of the rights (in particular access to a lawyer) must continue if all the circumstances of the case, including the maturity and the vulnerability of the persons concerned, deem this necessary. Such assessment is not ensured by the Polish practice which is therefore incompatible with Directive 2016/800.

➤ *Right to information on lawyer's assistance*

Third, given that Polish law does not provide for specific rules on the information of suspected and accused children, the ECJ clarified the point in time, scope, and form of information on the rights that children who are suspects or accused persons in criminal proceedings, and the holder of parental responsibility, are to receive. The ECJ noted that minors must be informed of their procedural rights as soon as possible, at the latest before they are first questioned. The information must be communicated in a simple and accessible way, adapted to their specific needs. A standard document, intended for adults (as done in Polish practice), does not meet those requirements.

➤ *Consequences of incompatibility of the national law*

After having found that the Polish legislation does not comply with the procedural safeguards provided for in Directive 2016/800, the ECJ also gives guidance to the referring court on how it can ensure the effectiveness of the Union law. It reiterates its general case law that the principle of the primacy of Union law requires, *inter alia*, national courts to interpret, to the greatest extent possible, their national law in conformity with EU law. If it is impossible to interpret national legislation in compliance with the requirements of EU law, the national court, if necessary, must disapply of its own motion any national legislation or practice, which is contrary to a provision of EU law with direct effect. The national court is not obliged to request or await the prior setting aside of such national legislation or practice by legislative or other constitutional means. In view of the clear, precise and unconditional wording of the provisions of the Directive 2016/800 relevant in the case at issue, a direct effect can be affirmed.

➤ *Exclusion of evidence?*

Lastly, the ECJ answered the question as to whether the Member State's obligation to ensure that children who are suspects or accused persons in criminal proceedings have an effective remedy under national law in the event of a breach of their rights under Directive 2016/800 (Art. 19) allows a court to declare as inadmissible incriminating evidence contained in statements made by a child during questioning by the police in breach of the right of access to a lawyer (provided for in Art. 6 of Directive 2016/800).

Having regard on its previous case law, the ECJ stressed that the guarantee of an effective remedy does not imply exclusionary rules for evidence. It remains for national law alone to determine the rules relating to the admissibility of evidence obtained in breach of rights conferred by Union law. How-

ever, the deciding national court must be able to give specific expression to the fundamental rights to a fair trial and to respect for the rights of the defence; in particular, it must be able to assess the probative value of evidence obtained in contravention of the requirements of EU law.

➤ *Put in focus*

The new judgment from Luxembourg on the interpretation of the EU's rules conferring procedural rights strengthens the position of lawyers in criminal proceedings against minors. It stresses that minors must have concrete and effective opportunities to be assisted by a lawyer. Questionings by the law enforcement authorities without a lawyer are inadmissible. In addition, the protection granted by the EU's procedural safeguards does not end if the person concerned reaches the age of majority, but it is for the national authorities to ensure assessment of vulnerability and maturity. Lastly, the judges in Luxembourg stressed that minors (and their parents) must be informed of their procedural rights as soon as possible and at the latest before their first questioning. The relevant information must be provided in a simple and comprehensible form that is adapted to their specific needs.

However, the case also shows that obvious breaches of the guarantees conferred on children by Union law should entail uniform consequences in the EU. As Union law stands at the moment, this is not the case. Hence, the Union legislator is called upon to reinforce plans to harmonise the rules on the inadmissibility of evidence (→L. Bachmaier, Mutual Admissibility of Evidence and Electronic Evidence in the EU – A New Try for European Minimum Rules in Criminal Proceedings? *eucrim* 2/2023, 223–229). (TW)

## ECJ Ruled on Waiver of Right to Legal Representation

On 14 May 2024, the Court of Justice of the European Union (ECJ) issued a ruling clarifying the interpretation and application of Directive 2013/48/EU, which deals with the right of access to a lawyer in criminal proceedings.

The case (C-15/24 PPU, *Stachev*) concerned a Bulgarian national, *CH*, who had been arrested and accused of committing violent robberies. Upon his arrest, CH signed a statement waiving his right to a lawyer, despite being illiterate and not fully informed about the consequences of this waiver. During subsequent police interrogations and investigative actions, CH did not have legal representation, which raised concerns about the fairness of the proceedings.

The Sofia District Court posed several questions to the ECJ on the compatibility of the waiver of the right of access to a lawyer with the Directive and the consequences of the waiver. The ECJ addressed these issues as follows:

- Non-transposition of directive provisions: The ECJ ruled that national authorities cannot rely on Art. 3(6)(b) of Directive 2013/48/EU, which allows for temporary derogation from the right to a lawyer in exceptional circumstances, if that provision has not been properly transposed into national law. In this case, the Bulgarian authorities could not invoke this derogation because it was not part of Bulgarian law.
- Validity of the waiver: The ECJ found that CH's waiver of his right to a lawyer was invalid. For a waiver to be valid under Art. 9(1) of Directive 2013/48, the suspect must be fully informed, in clear and understandable language, about the content of the legal right and the possible consequences of waiving it. Additionally, the waiver must be documented properly. In CH's case, these conditions had not been met, particularly because of his illiteracy and the lack of an adequate explanation of the consequences.
- Requirement to re-inform: The ECJ also held that if a vulnerable person, such as CH, waives their right to a lawyer, authorities must remind them of the possibility to revoke this waiver before each significant investigative act, particularly those that could have a substantial impact on the person's rights and interests.
- Assessment of evidence: The ECJ emphasised that national courts must have the ability to assess whether evidence obtained in violation of the right to a lawyer was used in the proceedings. Specifically, when a court is deciding on the appropriateness of a pre-trial detention measure, it must consider whether any evidence was obtained in breach of Directive 2013/48/EU. If such evidence was obtained, the court must ensure that the fairness of the proceedings is not compromised. The ECJ ruled that national case law preventing courts from excluding evidence obtained in violation of the Directive is incompatible with EU law.

In conclusion, the ECJ underscored the importance of ensuring that suspects' rights are fully protected, particularly in cases involving vulnerable individuals, and that any procedural breaches are appropriately addressed in order to maintain the fairness of criminal proceedings. (AP)

## ECJ Ruled on Right to Trial Participation via Videoconference

On 4 July 2024, the Court of Justice of the European Union (ECJ) issued its judgment in Case C-760/22 (*FP and Others*), addressing whether the participation of an accused person in a criminal trial via videoconference at his express request is precluded by EU law, in particular Art. 8(1) of Directive 2016/343 on the presumption of innocence and the right to be present at the trial in criminal proceedings.

➤ *Background of the case*

The case arose out of criminal proceedings in Bulgaria, in which several individuals were accused of participating in a criminal organisation involved in tax fraud. One of the defendants participated in the initial trial hearings via

videoconference, because he lived and worked in the United Kingdom. Bulgarian law permitted remote participation during the COVID-19 pandemic, but the relevant provision had expired by the time the defendants requested continued participation via videoconference.

The Sofia City Court referred to the ECJ the question of whether allowing to participate in the hearings of the trial via videoconference at the accused person's express request is precluded by Art. 8(1) of Directive 2016/343 which guarantees the right to be present at one's trial.

➤ *The ECJ's decision*

The ECJ first noted that the right to be present at trial is a fundamental aspect of a fair trial, as set out in the Directive and corresponding provisions of the European Convention on Human Rights (ECHR). The Court emphasised that the Directive does not fully harmonise all aspects of criminal procedure throughout the EU, but instead sets minimum standards.

Second, the ECJ clarified that, while the Directive guarantees the right to be physically present at trial, it does not explicitly prohibit the use of videoconferencing if the defendant so wishes. Therefore, the Directive does not prevent Member States from allowing participation via videoconference in accordance with national law, provided that the fairness of the trial is maintained.

In their reasoning, the judges in Luxembourg referred to the ECtHR, which has held that videoconferencing can be compatible with the right to a fair trial, provided that the applicant is able to follow the proceedings and be heard without technical hindrance and that effective and confidential communication with a lawyer is provided for.

➤ *Put in focus*

The ECJ concluded that Art. 8(1) of Directive 2016/343 does not preclude an accused person from participating in his or her trial by videoconference if he or she expressly requests to do so, provided that all necessary safeguards are in place to ensure that the trial remains fair. This interpretation allows for flexibility as to the way in which Member States implement the right to be present at trial – taking into account modern technologies while respecting fundamental rights.

The ECJ judgment reinforces the principle that, although EU law sets certain minimum standards for procedural rights, it allows Member States to use different methods, such as videoconferencing, as long as the fundamental rights of the accused are protected. (AP)

### ECJ: No Ruling on Defendant's Right to Participate via Videoconference in Cross-Border Cases

In its judgment in the Joined Cases C-255/23 and C-285/23 (*AVVA and Others*), the ECJ clarified on 6 June 2024 that it will not rule on the question whether Union law confers defendants a right to participate at trial remotely via videoconference. The requests for a preliminary ruling stem from the Economic court in Lativa which tries offences of organised large-scale fraud and money laundering. The court requested interpretation of Directive 2014/41 regarding the European Investigation Order (EIO) and Directive 2016/343 on the presumption of innocence because defendants in the main criminal proceedings, who reside in Lithuania and Germany respectively, claimed that they have a right to participate at trial via videoconference (without an EIO being issued).

Given that the referring court continued the hearings against the defendants in the main proceedings after the launch of the reference for preliminary ruling, the ECJ found that there is no need to rule on the request anymore. After the reference for a preliminary ruling, national courts can only continue the main proceedings to carry out procedural acts which concern aspects not linked to the questions referred. However, the procedural steps taken by the Economic court at issue have been steps that prevent the court from complying with a possible ECJ judgment. (TW)

## Data Protection

### ECJ Ruled on Data Retention of IP Addresses in Piracy Cases

spot light

In its landmark judgment of 30 April 2024, the ECJ specified the requirements for the access to retained identification data on the basis of IP addresses. With this judgment, the ECJ partly deviates from its strict approach on data retention and admits law enforcement access to identity data in order to combat criminal offences of piracy in the internet. The case is officially referred as *C-470/21, La Quadrature du Net and Others – and lutte contre la contrefaçon* and unofficially as "La Quadrature du Net II".

➤ *The complaints before the French courts*

The case relates to complaints by four data protection associations before French courts seeking annulment of a French decree that allows data processing operations in favour of or by 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"). These operations are considered necessary to effectively combat copyright offences committed in the internet.

The proceedings in France have two peculiarities: First, the data processing operations are twofold: In a first operation, rightholder organisations collect IP addresses which appear to have been used on peer-to-peer websites to commit offences against the protected works in the internet; after referral of these IP addresses to Hadopi, Hadopi requests the internet service

providers to match the IP addresses with civil identity data of its holder (second operation).

The second peculiarity is that these identity data are used by Hadopi for a "*graduated response*" in an administrative procedure: Hadopi first sends "recommendations" to the copyright offender (subscriber), which are similar to warnings; in case of a repetition of the offending conduct detected, Hadopi notifies the subscriber that the conduct is liable to constitute a copyright offence of "gross negligence"; and lastly, Hadopi can refer a case to the public prosecution service of conduct that may constitute such an offence of counterfeiting.

It is also noted that the French decree has not included a prior review by a judge or an authority offering guarantees of independence and impartiality.

➤ *The questions referred by the Conseil d'État*

The Conseil d'État, France, asked the ECJ whether the data processing operations are in line with EU law, in particular Art. 15 of Directive 2002/58/EC (Directive on privacy and electronic communications/e-privacy Directive), read in the light of the Charter of Fundamental Rights of the European Union ("the Charter"). Doubts mainly arose as to whether the French legislation falls within one of the exceptions to the ban of the retention of personal data in a general and indiscriminate manner. Such exceptions were mainly established in the ECJ's judgment of 6 October 2020 in *La Quadrature du Net and Others* (→eucrim 3/2020, 184–186), in which the ECJ decided, *inter alia*, that 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.

Furthermore, the Conseil d'État referred to the ECJ'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. However, the French court also points out that, in the present case, such prior review is nearly impracticable considering the high volume of civil identity data that Hadopi as competent authority collects each year.

➤ *Further background of the case*

For more background information, see also the two opinions by Advocate General *Szpunar*, summarised in eucrim 3/2022, 190–191 and eucrim 2/2023, 150. The second opinion had to be issued after the case was referred from the Grand Chamber to the Full Court of the ECJ (i.e., all 27 judges) and the Full Court decided to reopen the oral part of the procedure.

➤ *The ECJ's first approach in the judgment*

The ECJ, sitting as Full Court, first reiterates its previous case law on the retention of data relating to civil identity and the associated IP addresses. The ECJ states that the general and indiscriminate retention of IP addresses does not necessarily constitute, in every case, a serious interference with the rights to respect for private life, protection of personal data and freedom of expression guaranteed by the Charter.

The obligation to ensure such retention may be justified by the objective of combating criminal offences in general, if it is genuinely ruled out that that retention could give rise to serious interferences with the private life of the person concerned due to the possibility of drawing precise conclusions about that person. This could happen, *inter alia*, bylinking those IP addresses with a set of traffic or location data. Accordingly, a Member State can impose a respective obligation of data retention on providers of electronic communications services, but it must implement certain arrangements for the retention of those data ruling out the possibility that precise conclusions could be drawn about the private lives of the persons concerned.

The judges in Luxembourg then specify the requirements necessary for both the *retention of data* and *access to data* relating to civil identity and associated IP addresses retained by providers of electronic communications services.

➤ *Requirements surrounding the retention of data relating to civil identity*

With regard to the retention of data, the ECJ requires that national rules provide for the following:

- Ensuring that each category of data, including data relating to civil identity and IP addresses, is kept completely separate from the other categories of data retained;
- Ensuring, from a technical point of view, the genuinely watertight separation of the various categories of retained data, in particular data relating to civil identity, IP addresses, the various traffic data other than IP addresses and the various location data, by means of a secure and reliable computer system;
- Permitting the linking of the retained IP addresses with the civil identity of the person concerned only through the use of an effective technical process which does not undermine the effectiveness of the watertight separation of those categories of data;
- Subjecting the reliability of the watertight separation to regular review by a public authority other than that which seeks to obtain access to the personal data retained by the providers of electronic communications services.

The ECJ clarifies in this context that in so far as the applicable national legislation provides for such strict requirements, the interference resulting from that retention of IP addresses cannot be categorised as "serious".

➤ *Requirements surrounding access to data relating to the civil identity*

As regards access to data, the ECJ requires that the national legislation

must prohibit the public officials having access to the data retained in the above-described manner to do the following:

- No disclosure in any form whatsoever of information concerning the content of the files consulted by the IP address holders except for the sole purpose of referring the matter to the public prosecution service;
- No tracking in any way of the clickstream of those holders;
- No use of those IP addresses for purposes other than the adoption of those measures.

In that context, the Court notes *inter alia* that, even though the freedom of expression and the confidentiality of personal data are primary considerations, those fundamental rights are nevertheless not absolute. In balancing the rights and interests at issue, those fundamental rights must yield on occasion to other fundamental rights or public-interest imperatives, such as the maintenance of public order and the prevention of crime or the protection of the rights and freedoms of others. This is notably the case where the weight given to those primary considerations is such as to hinder the effectiveness of a criminal investigation, in particular by making it impossible or excessively difficult to identify effectively the perpetrator of a criminal offence and to impose a penalty on him or her.

According to the Court, it is exactly in the context of combating criminal offences infringing copyright or related rights committed online that access to IP addresses may be the only means of investigation enabling the person concerned to be identified. This is why the retention of and access to those addresses is strictly necessary for the attainment of the objective pursued and therefore meets the requirement of proportionality. Moreover, not to allow such access would carry a real risk of systemic impunity for criminal offences committed online.

➤ *The question of (judicial/quasi-judicial) control*

As to the question of adequate control, the ECJ distinguishes between (1) the requirements of a *prior review* by a court or an independent administrative body *before* a public authority accesses data relating to the civil identity associated with an IP address and (2) the requirements of *control against the risks of abuse* and against any unlawful access to / use of those data as well as of respective substantive and procedural safeguards.

➤ *Prior review by court or independent body*

Looking at the prior review, the judges in Luxembourg establish the following principles with regard to civil identity data associated with an IP address:

- Prior review is only necessary if access carries the risk of a serious interference with the fundamental rights of the person concerned; this means if a public authority is able to draw precise conclusions about the private life of that person and/or to establish a detailed profile of that person;
- Conversely, the requirement of prior review is not intended to apply where the interference with fundamental rights cannot be classified as serious;
- If a retention framework is in place that ensures a watertight separation of the various categories of retained data (see above), access by the public authority to the data relating to the civil identity associated with the IP addresses does, as a general rule, not constitute a serious interference with fundamental rights and is therefore not, in principle, subject to the requirement of a prior review.
- However, national rules must provide for a prior review if in atypical situations there is a risk that, in the context of a procedure, the public authority may be able to draw precise conclusions about the private life of the person concerned.

Applying these principles to the concrete case, the judges in Luxembourg identified such a risk if Hadopi must decide whether or not to refer the matter to the public prosecution service with a view to the prosecution of that person. This concerns cases in which a subscriber repeatedly shows an activity of infringing copyright or related rights. This means that a review by a court or an independent administrative body must be incorporated at the third stage of the graduated response procedure. By contrast, it does not apply to the previous stages of that procedure; this is justified, inter alia, because of reasons of practicability.

➤ *Manner of prior review: no automatisation*

As regards the manner in which that prior review is to be carried out, the ECJ clarifies that a prior review may in no case be entirely automate. The reason is that, in the case of a criminal investigation, such a review requires a balancing between, on the one hand, the legitimate interests relating to combating crime and, on the other hand, respect for private life and protection of personal data. That balancing requires the intervention of a natural person, all the more so where the automatic nature and large scale of the data processing in question poses privacy risks.

➤ *Control of abuse and data protection safeguards*

As regards the means of control of potential abuses by the public authority, the ECJ requires that the data processing system used by the public authority must be subject, at regular intervals, to a review by an independent body. The purpose of that control is to verify the integrity of the system and the reliability in detecting potential offending conduct.

The ECJ adds that the processing in question must comply with the specific rules for the protection of personal data laid down by Directive 2016/680 ("the "Law Enforcement Data Protection Directive – LED"). In the present case, even if the public authority

(Hadopi) does not have decision-making powers of its own in the context of the "graduated response" procedure, it must be classified as a "public authority" involved in the prevention and detection of criminal offences and therefore falls within the scope of the LED. Thus, the persons involved in such a procedure must enjoy a set of substantive and procedural safeguards referred to in the LED. It is for the referring court to ascertain whether the national legislation provides for those safeguards.

➤ *Put in focus*

The ECJ seized the opportunity to specify the admitted exceptions for the retention of data if it comes to IP addresses and civil identity data. The ECJ particularly stated that IP addresses constitute traffic data for the purposes of Directive 2002/58, but they are distinct from other categories of traffic data and location data. Hence, it held that data retention in relation to IP addresses is, in principle, far less intrusive into fundamental rights than the other categories of data. This was already indicated in its previous judgments on data retention, in particular the first La Quadrature du Net case (→eucrim 3/2020, 184–186).

However, the judges in Luxembourg made bluntly clear that they also see risks and strict rules must apply if the data can be used or linked in order to draw precise conclusions about the private life of the persons whose data were concerned, for example by establishing a detailed profile of that person. This consequently leads to a serious interference with the fundamental rights enshrined in Arts. 7 and 8 of the Charter, concerning the protection of the privacy and personal data of those persons, and in Art. 11 of the Charter, concerning their freedom of expression. Here, the national legislator is obliged to provide the necessary arrangements to avoid that such scenarios can emerge.

With regard to control mechanisms, the judges in Luxembourg clarified that a system of two layers is in principle required: prior review by a court or independent administrative body *and* regular oversight by independent bodies (e.g., data protection supervisors) over the public law enforcement authority with regard to integrity and reliability of the used data processing system. Problematic may be that prior review is no longer required in all data retention cases where the ECJ takes account of the collection of mass data by the French anti-piracy authority Hadopi. Here, it follows the AG *Szpunar's* opinion who advocated a "pragmatic adaptation" of the case law on data retention. It remains to be seen whether the solution found for the French case also applies to law enforcement authorities in other EU Member States.

With regard to judicial control, the judges in Luxembourg interestingly made statements on automatization. They deny any computer system who takes automated decisions in a judicial review procedure linked to criminal investigations. This can be interpreted as a first and clear objection against tendencies to introduce "artificial intelligence judges" in standardised data processing operations. If fundamental rights or questions of privacy are at stake, intervention by a natural person ("the human judge") is required (see also →*Marcin Górski*, Why a Human Court?, eucrim 1/2023, 83–88).

➤ *Statements*

Nonetheless, media and data privacy advocates reacted on the judgment with disappointment. They see in the judgment a "turning point" and argue that the ECJ has changed its previously fundamental rights-friendly stance on data retention, now even allowing for unprovoked surveillance in the case of copyright infringements.

The German Bar Association (DAV) criticised that the ECJ has now made the access to data by law enforcement authorities subject to a court decision only in exceptional cases.

La Quadrature du Net, one of the civil rights organisations that brought the case to court, commented: "The CJEU has considerably watered down its previous case law, with impacts beyond the Hadopi case. With this new ruling, access to IP addresses is no longer considered a serious interference with fundamental rights by default. As a result, the Court allows the possibility of mass surveillance of the Internet. [...] More generally, this decision from the CJEU has, above all, validated the end of online anonymity." (TW)

## ECJ: Requirements for Access to Telephone Connection Data for the Purpose of Identifying Offenders

spot light

In its judgment of 30 April 2024, the ECJ clarified under which conditions law enforcement authorities can have access to a set of traffic and location data in the context of criminal investigations. The ECJ held that, in principle, the Italian legislation implementing a certain level of punishment of the offence for which access is sought compatible with Union law.

➤ *Facts of the case and question referred*

In the case at issue (Case C-178/22, *Procura della Repubblica presso il Tribunale di Bolzano*), the judge in charge of preliminary investigations at the District Court, Bolzano, Italy, objected a request by the public prosecutor who had sought judicial authorisation to obtain the records of stolen telephones from all the telephone companies in order to identify the thieves. The public prosecutor qualified the criminal investigations as "aggravated theft" and pointed to the Italian legislation (Article 132(3) of the Legislative Decree No 196, establishing the Personal Data Protection Code) which, *inter alia*, would allow access to all data concerning the telephone conversations

and communications and the connections made with those telephones if law prescribes the penalty for the offence under investigation with a maximum term of imprisonment of at least three years.

The judge at the District court (the referring court) argued that the Italian legislation would allow law enforcement access to personal data for offences which cause only a limited social disturbance, such as low-value thefts like mobile phones or bicycles. In addition, Italian courts have no margin of discretion to assess the actual seriousness of the offence concerned and cannot refuse authorisation under this aspect.

Hence, the referring court doubted compatibility of the Italian legislation with Art. 15(1) of Directive 2002/58/EC, read in the light of the Charter of Fundamental Rights of the European Union, and as interpreted by the ECJ case law. This case law only allows exceptions from the obligation to ensure confidentiality of electronic communications under narrow conditions.

➤ *The ECJ's decision: "Seriousness" of interference affirmed*

The ECJ, sitting in for the Grand Chamber, held first that the interference with the fundamental rights to privacy and the protection of personal data (Arts. 7, 8 of the Charter), caused by access to telephone records, is likely to be classified as serious. In this context, neither the short periods for data collection as requested by the public prosecutor (for less than two months) nor the fact that the requests targeted not the owner of the mobile phones but the assumed offenders are relevant to come to an opposite assessment.

➤ *Justification: Requirements for national law on access to retained data*

Consequently, such access can be justified only by the objectives of combating serious crime or preventing serious threats to public security (in accordance with previous case law).

The ECJ clarified that it is for the Member States to define "serious offence" for the purpose of applying the exceptions allowed by the EU Directive. Criminal legislation falls within the competence of the Member States in so far as the EU has not legislated in that field.

However, Art. 15(1) of Directive 2002/58 in connection with Arts. 7, 8 and 11 and Art. 52(1) of the Charter sets limits for the Member State's discretion for definitions. In material terms, these limits are:

- The definition given in national law cannot be so broad that access to data (allowing precise conclusions to be drawn concerning the private lives of the persons concerned) becomes the rule rather than the exception;
- The Member State's measure must comply with the general principles of EU law, which include the principle of proportionality, and ensure the fundamental rights of respect for private life and protection of personal data.

In procedural terms, the ECJ requires:

- A court or an independent administrative body must be able to prior review that there is no distortion of the concept of "serious offence".

➤ *Conclusions for the "Italian" case*

With regard to the concrete rules of the Italian legislation, the ECJ observed that it makes access to traffic and location data subject to the twofold condition that there must be "sufficient evidence of the commission of an offence" and that those data be "relevant to establishing the facts". Furthermore, the condition that access to data by law enforcement authorities may be granted for offences for which the maximum term of imprisonment is at least equal to a period determined by law is an objective criterium that defines the circumstances and conditions. Given the concrete requirements of the Italian law, in particular the minimum period fixed by reference to a maximum term of imprisonment of three years, do not set the "seriousness of the offence" to an excessive low level and does not appear to be disproportional.

However, the court or independent administrative body, acting in the context of a prior review carried out following a reasoned request for access, must be entitled to refuse or restrict that access where it finds that the interference with fundamental rights which such access would constitute is serious even though it is clear that the offence at issue does not actually constitute serious crime. Only such a review enables to strike a fair balance between, on the one hand, the legitimate interests relating to the needs of the investigation in the context of combating crime and, on the other hand, the fundamental rights to privacy and protection of personal data of the persons whose data are concerned by the access. It is finally for the Italian court to determine whether the Italian legislation complies with these requirements.

➤ *Put in focus*

The judgment of 30 April 2024 further develops the ECJ's case law on law enforcement access to retained data. It clarifies two aspects of the judgment in Prokuratuur: the concept of "serious crime" and the scope of the prior review that a court must carry out under a provision of national law that requires it to authorise access to data retained by providers of electronic communications services. In Prokuratuur (Case C-746/18 →eucrim 1/2021, 28–30), the ECJ held that access to data that enables precise conclusions to be drawn concerning a user's private life, pursuant to measures adopted under Art. 15(1) of Directive 2002/58, constitutes a serious interference with the fundamental rights and principles enshrined in Arts. 7, 8 and 11 and Art. 52(1) of the Charter. Such access may not be authorised for the purposes of the prevention, investigation, detection and prosecu-

tion of "criminal offences in general". It may be granted only in procedures and proceedings to combat "serious crime" and must be the subject of a prior review by a court or independent administrative body in order to ensure compliance with that requirement.

Under the new case law, the ECJ limits the Member States' discretion to define the "seriousness" of the offence for which access to retained telecommunications data is allowed to a minimum. Protection is rather to be assured by prior court review. However, this review is more or less seen as a control against abuse ("ascertain that there is no distortion of the concept of serious offence"). (TW)

### EDPB Opinion on Facial Recognition Technology at Airports

On 24 May 2024, the European Data Protection Board (EDPB) issued an opinion on the use of facial recognition technology by airport operators and airline companies for biometrically enabled authentication or identification of passengers. The opinion assessed the compatibility of such processing with Art. 5(1)(e) and (f) and Arts. 25 and 32 of the General Data Protection Regulation (GPDR) for the specific purpose of streamlining the passenger flow at airports at four specific checkpoints: security checkpoints, baggage drop-off, boarding, and access to the passenger lounge.

There are four specific scenarios for passenger authentication at the above-mentioned airport checkpoints, which involve the storage of an enrolled biometric template:

- In the hands of the individual, for example, on their individual device, under their sole control in order to authenticate (1:1 comparison) the passenger;
- In centralised storage, within the airport, in encrypted form with a key/secret held solely in the passenger's hands (1:1 comparison). The enrolment could be valid for a given period, for example up to one year after the last flight was taken until the passport expiry date;
- In centralised storage, within the airport, in encrypted form under the airport operator's control (1:N comparison). The storage period in this scenario is typically 48 hours, and the data is deleted once the plane has taken off;
- In centralised storage, in a cloud, in encrypted form under the control of the airline company or its cloud service provider (1:N comparison). The storage period in this scenario could potentially be for as long as the customer holds an account with the airline company.

In its conclusion, the EDPB rejects the last two scenarios as incompatible with Art. 5(1)(e) and (f), and Arts. 25 and 32 GDPR. According to the board, these scenarios go beyond what is strictly necessary and proportionate for processing purposes. Nonetheless, the EDPB holds that the forms of processing envisaged under the first and second scenarios could, in principle, be considered compatible with Arts. 5(1)(e), 5(1)(f), 25, and 32 GDPR, subject to the implementation of appropriate safeguards. Such safeguards should entail, for instance, the following:

- The execution of a Data Processing Impact Assessment (DPIA) by the controllers;
- Accountability and compliance measures;
- Technical safeguards for access, infrastructure and network, data security and management;
- Training and testing.

Safeguards that can be implemented by controllers include, for example, the following:

- Human oversight and intervention to mitigate any biases and ensure that there is no stigmatisation or profiling of passengers though algorithms;
- Transparent processing of data;
- Measures to comply with the purpose limitation principle;
- No capturing of photos or videos from individuals who do not consent to facial recognition and viable alternatives or back-up solutions for such passengers;
- Deletion possibilities.

The EDPB opinion arose from a request by the French Supervisory Authority. Overall, the EDPB recalled that the use of biometric data and in particular facial recognition technology entails heightened risks to data subjects' rights and freedoms. (CR)

### GDPR in Practice: Experiences of Data Protection Authorities

On 24 June 2024, the EU Agency for Fundamental Rights (FRA) published a report looking at the experiences – in practice – of data protection authorities (DPAs) with the General Data Protection Regulation (GPDR). It comes in response to a request from the European Commission seeking data on implementation experiences, challenges, and practices.

For this purpose, FRA conducted 70 qualitative interviews with DPA representatives from all 27 EU Member States between June 2022 and June 2023. Interviewees were asked about their experiences in areas such as DPA independence, the institutional capacity of DPAs, modern technological challenges, raising public awareness, DPA investigatory powers, sanctions for GDPR violations, cooperation between EU DPAs and the GDPR consistency mechanism, cooperation with other national regulators, and the protection of personal data and competing fundamental rights.

Some of the key findings of the report include the following points:

- Inadequate resources can undermine the implementation of DPAs' mandates and their independence: While DPAs are given more tasks and powers under the GDPR and other related EU legislation, their funding and human resources are not increasing at the same rate, which may hamper their

ability to provide independent oversight. It also undermines their ability to conduct investigations on their own initiative, to properly supervise governments and public authorities acting as data controllers, and to contribute effectively to the European Data Protection Board (EDPB). In addition, the recruitment of professionals with appropriate legal and technical expertise is reported to be a challenge, especially in view of competition with the private sector for skilled personnel.

- Obstacles hamper the DPA's supervision: While supervision is considered to be a core function of DPAs, there is a need for additional tools to strengthen their supervisory capacity.
- The large number of complaints: This is a major challenge and should be addressed as a matter of priority.
- A large number of trivial or unfounded complaints: The awareness of the general public of the existence of data protection laws does not necessarily mean that they are truly understood. DPAs also receive very few requests for consultation from data controllers in advance, suggesting that even data controllers may not be aware of data protection risks, much less fully understand what those risks entail or what they can do to identify and prevent them.
- Due to mistrust and misunderstanding about the competences of DPAs, advising and supervising public authorities acting as data controllers remains a challenge.
- While the majority of DPAs believe that the requirements and tools provided in the GDPR are adequate in theory, most respondents highlighted that the GDPR remains ill-equipped to regulate new technologies in practice.
- While the work of the EDPB is generally viewed positively, it creates additional work for the DPAs, which could be reduced by restructuring the way in which the EDPB works and its internal procedures.

To address these issues, the report describes some promising practices and outlines a number of views on how the EU legislator, the European Commission, the EU institutions, the EU Member States, and the EDPB could assist DPAs.

The Commission is currently preparing its second evaluation report on the GDPR. (CR)

## Victim Protection

### General Court Ruled on Necessary Protective Measures for Whistleblower in the EP

In a judgment of 11 September 2024, the General Court (GC) strengthened the rights of whistleblowers who brought to light incidents within European institutions. The GC clarified the scope of protective measures to be provided by the institution.

➤ *Background of the case*

The case (T-793/22, *TU v Parliament*) concerns a parliamentary assistant (TU) who reported cases of harassment involving a Member of the European Parliament (MEP). He also reported financial irregularities allegedly committed by the same MEP to OLAF. The European Parliament (EP) reacted by transferring TU to another MEP, then, following alleged retaliation, he was discharged from his duties. However, his contract was not renewed. The EP also denied his request to extend his contract so that he can cooperate with the EP and with OLAF in the ongoing investigations.

TU challenged the decision not to renew his contract and the implied refusal to recognise his status as an informant and to adopt protective measures in addition to the measure discharging him from his duties. TU also sought compensation for the damage suffered.

➤ *The General Court's decision: duties of the institution*

First of all, the GC observes that the Parliament was not required to adopt a decision recognising that the applicant had the status of informant. The protection provided for in Art. 22a(3) of the Staff Regulations is granted, without any formalities, to officials who have provided information about facts which give rise to a presumption of the existence of illegal activity. Hence, it is simply by virtue of having provided that information that staff members must be considered as informants. The GC further stressed that this finding is, however, without prejudice to the need for the institution to respect the rights arising from the status of the person concerned as an informant.

In this context, the GC establish the principal duties for the institution vis-à-vis the informant in accordance with the Staff Regulation, including:

- The informant must be informed of the action taken on his reports;
- The institution must demonstrate that it fulfilled its duty to protect the informant by adopting adequate measures so that he does not suffer harm or further retaliation;
- The institution must take all the necessary measures to ensure the applicant receives balanced and effective protection against any form of retaliation.

➤ *Application of the principles to the specific case*

With regard to the obligations in the concrete case, the GC found first, that the EP was, indeed, not obliged to renew the contract because MEPs can freely choose with whom they wish to continue to work. The GC found second, however, that this finding has no bearing effect on the EP's duty to take the necessary protective measures. These were clearly insufficient in the case at issue. The EP did not inform TU of actions taken in response of his complaints. It also failed to fulfil its duties by merely informing TU that the discharge from his duties was the only conceivable protective measure. The EP had been required to provide the applicant with advice and assistance, and to support him

by attempting to help him find a solution in addition to the discharge. Lastly, the EP infringed its duty of confidentiality by disclosing without permission TU's status as an informant, thereby exposing him to retaliation.

➤ *Result*

As a result, the GC annuls the EP's decision not to grant him a further protective measure in addition to discharging him from his duties. The GC also awards TU compensation for non-material damage in the amount of €10,000. (TW)

## Cooperation

### Judicial Cooperation

#### ECJ Ruled on Fundamental Rights Test for Surrenders to the United Kingdom

spot light

On 29 July 2024, the ECJ, sitting as Grand Chamber, delivered an important judgment on the conditions under which surrender of a person can be granted by a EU Member State to the United Kingdom (UK). The Court interpreted the fundamental rights clause enshrined in the Trade and Cooperation Agreement (TCA) between the European Union and the United Kingdom and held that the surrender mechanism under the TCA differs from the one provided by the EU's Framework Decision on the European Arrest Warrant (EAW).

➤ *Background of the case and question referred*

The case at issue (Case C-202/24, *Alchaster*) concerns the execution of arrest warrants by Irish courts against a person suspected of having committed terrorist offences. The arrest warrants were issued by a district judge of the Magistrate Court of Northern Ireland (United Kingdom). The person concerned argued that his surrender would be incompatible with the principle that offences and penalties must be defined by law because the UK unfavourably changed the system of release on licence. While at the date of the alleged commission of the offences the system in place granted automatic release on licence after half of the sentence had been served, the new regime provides that release on licence is approved by a specialised authority after having served two thirds of the sentence.

The referring Supreme Court of Ireland stated that the Supreme Court of the UK found that the change of the system of release on licence does not infringe the legality principle enshrined in the European Convention on Human Rights (Art. 7 ECHR). In addition, also the Irish Supreme Court denied that a risk of violation of the ECHR by the new UK system could be a reason not to surrender.

However, the Irish Supreme Court wondered whether the same conclusion can be drawn if the legality principle enshrined in the Charter of Fundamental Rights of the European Union ("the Charter") is applied. In this context, the Irish Supreme Court also sought guidance on how an examination of a potential fundamental rights risk in the requesting/issuing State (UK) is to be carried out.

➤ *Different fundamental rights test in UK cases than European Arrest Warrant cases*

As a consequence, the judges in Luxembourg had to rule whether the same test applies for the TCA as for the FD EAW if a person submitted that he/she will run a real risk of a breach of fundamental right in the requesting/issuing State. For the FD EAW, the ECJ applies a very stringent two step-test as established in *Aranyosi and Căldăraru* (→eucrim 1/2016, p. 16). It has also repeatedly stressed that refusal of executing an EAW for fundamental rights reasons can only happen in exceptional circumstances.

The judges in Luxembourg denied a transfer of the rules applicable to the FD EAW to the TCA surrender mechanism. They point out essential differences between the two extradition schemes. They argue that the TCA does not establish a special relationship between the UK and the EU which is characteristic for the EAW, especially since the UK is not part of the European area without internal borders. The TCA does also not present cooperation as being based on the preservation of mutual trust. And finally, the provisions on surrender in the TCA substantially differ from those in the FD EAW, e.g., with regard to political offences and the surrender of nationals. Similarly, in contrast to the FD EAW, the TCA includes a fundamental rights clause in Art. 604(c): if there are substantial grounds for believing that there is a real risk to the protection of the fundamental rights of the requested person, the executing judicial authority may require, as appropriate, additional guarantees as to the treatment of the requested person after the person's surrender before it decides whether to execute the arrest warrant.

➤ *Manner of the test*

As regards the manner of the test, the ECJ clarified that the executing judicial authority must carry out a specific and precise examination of the person's situation, that there are valid reasons for believing that that person would run a real risk to the protection of his or her fundamental rights if that person were surrendered to the United Kingdom. In determining such a real risk, the executing authority must take into account the following:

- Examining all the relevant factors in order to assess the foreseeable situation of the requested person if he/she is surrendered to the UK;
- Unlike the two-step examination for European Arrest Warrants (see above), the examination takes into account simultaneously the rules and practices that are generally in place in the issuing country, and the specific features of the person's individual situation;

- Carrying out an independent assessment in the light of the provisions of the Charter (without merely taking into account the case-law of the UK Supreme Court of the United Kingdom, or the general guarantees provided by the judicial system of that State);
- The finding of a real risk must be based on objective, reliable, specific and properly updated information;
- Making full use of the instruments provided for in the TCA in order to foster cooperation, i.e., before taking the decision on surrender, the executing authority must seek supplementary information from the issuing State as well as request additional guarantees that may rule out a possible fundamental rights breach.

➤ *Breach of the legality principle?*

With regard to a potential breach of the legality principle in Art. 49(1) of the Charter, the ECJ points out that, in parallel to Art. 7 ECHR, a distinction must be made between "penalty" and "execution/enforcement" of the penalty. In the case of "execution" retroactive measures do not infringe the fundamental rights.

The retroactive imposition of a heavier penalty (which would be incompatible with the legality principle) is regularly not the case if the measure merely delays the eligibility threshold for release on licence. The position may be different, however, if the measure essentially repeals the possibility of release on licence or if it forms part of a series of measures which have the effect of increasing the intrinsic seriousness of the sentence initially provided for. It is for the referring court to examine the situation in the UK and decide, on this basis, on a possible refusal of surrender because of a violation of the fundamental right in Art. 49(1) of the Charter.

➤ *Put in focus*

The judgment in *Alchaster* marks the beginning of a new chapter in the lengthy debate on the extent to which extraditions can be denied if the requesting state does not uphold certain fundamental rights standards (debate on the *ordre public* refusal ground). Case law by both the ECJ and ECtHR has established very strict conditions for the member states in the respective blocs and allows non-surrender only in exceptional circumstances of fundamental rights violations.

In this latest ruling, the ECJ seems to lower the threshold for judicial cooperation between EU Member States and the United Kingdom. It clearly states that the principles developed for the EU's surrender system based on the European Arrest Warrant and the underlying principles of mutual trust and mutual recognition should definitively not apply to other surrender agreements. This appears to pave the way for a "simple" test assessing whether a UK measure complies with the fundamental rights of the Charter.

In consequence, the judgment raises the following questions:

- Is the threshold for extraditions from the EU to the UK even lower than stipulated by the flagrant denial test that the ECtHR applies, for instance, for extraditions from a Council of Europe party to the USA?
- Will the ECJ test applied in Alchaster have an impact on other similar surrender arrangements, in particular the EU's surrender agreement with Norway and Iceland that follows a similar model than the one with the UK (though Norway and Iceland are members of the Schengen free-travel zone)?

Either way, it is already clear that the ECJ's new judgment on extradition and fundamental rights will spark further debate. (TW)

### ECJ Ruled on Mutual Recognition of Refugee Status in Extradition Proceedings

spot light

On 18 June 2024, the ECJ ruled that an EU Member State cannot extradite a third-country national to his country of origin if he has been granted refugee status by another EU Member State. As long as this status has not been revoked or withdrawn, extradition may not take place, as this would violate the protection rights under Art. 21 of the Qualification Directive 2011/95/EU in conjunction with Arts. 18 and 19 (2) of the Charter of Fundamental Rights of the EU. Furthermore, the EU Member States involved must cooperate.

➤ *Background of the case and question referred*

In the case at issue (Case C-352/22, *Generalstaatsanwaltschaft Hamm (Demande d'extradition d'un réfugié vers la Turquie)*), a Turkish national of Kurdish origin had been recognized as a refugee by Italian authorities in 2010. The reason was that he was at risk of political persecution in Turkey because of his support of the Kurdistan Workers' Party (PKK). He had been in Germany since 2019. Germany received an extradition request from Turkey where he was suspected of murder.

The referring Higher Regional Court of Hamm, Germany, which has to decide on the Turkish extradition request, asked the ECJ whether, under EU law, it is bound by the Italian decision granting refugee status to the person concerned, so that it is obliged to refuse the extradition sought by the country of the refugee's origin (Turkey).

The referring court pointed out that interpretation of EU legislation is under dispute in German legal literature. One approach argues that it follows from Art. 9(3) of the EU Asylum Procedures Directive 2013/32 that extradition to a third country is precluded if a person is recognised refugee status by a final decision in an EU Member State. If the extradition authority granted extradition, rules and procedures for the cessation, exclusion and ending of refugee status would risk being circumvented.

According to a second approach (which is shared by the referring court), EU legislation does not contain any provision stipulating a binding effect

of a Member State's decision granting refugee status for extradition purposes. Consequently, an authority in another EU Member State can make an own assessment of the risk of political persecution and decide independently on granting extradition to the country of origin.

For more background information on the case →eucrim 3/2023, 263–264.

➤ *The ECJ's approach: EU legislation unclear*

The ECJ, sitting as the Grand Chamber, first pointed out that Union law is indeed unclear: On the one hand, recognition by a Member State of refugee status is declaratory, thus the refugee is entitled to all the rights and benefits laid down in Directive 2011/95. On the other hand, the EU legislature has not established yet a principle that Member States are obliged to recognise automatically the decisions granting refugee status that have been adopted by another Member State. Furthermore, Art. 9 of Directive 2013/32, which regulates the right to remain in the Member State, only governs cases of extradition *during* the procedure for examining an application for international protection; the article does not, however, govern the situation at issue, in which extradition is sought *after* such protection has been granted by a Member State.

➤ *ECJ: Extradition would de facto end effective enjoyment of refugee's rights*

Therefore, the solution must be deduced from Art. 21(1) of Directive 2011/95, which includes the Member States' obligation to respect the principle of non-refoulement, as well as from Art. 18 of the Charter, which guarantees the right to asylum, and Art. 19(2) of the Charter, which prohibits in absolute terms the removal of a person to a State where there is a serious risk that he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment.

According to the ECJ, the Common European Asylum System acknowledges the principle of mutual trust and includes a specific procedure for revoking or withdrawing refugee status. Those provisions and the procedure would be circumvented if the requested Member State could extradite a third-country national who had been granted refugee status by another Member State to his or her country of origin, since, *de facto*, such an extradition would effectively end that status and deprive the person concerned of the effective enjoyment of the protection afforded by Art. 18 of the Charter, of the rights and benefits provided for by Chapter VII of Directive 2011/95, and of the guarantees set out in Art. 45 of Directive 2013/32.

➤ *ECJ: Member States must cooperate*

From a procedural point of view and considering the principle of sincere cooperation, the ECJ adds that the competent extradition authority (here: the German judicial authorities) must, as soon as possible, exchange information with the authority of the other Member State which granted the requested individual refugee status (here: the Italian asylum authority). On this basis, the extradition authority is required to inform the asylum authority of the request for extradition relating to that individual, to send it its opinion on that request and to obtain from it, within a reasonable period, both the information in its possession that led to refugee status being granted and its decision as to whether or not it is necessary to revoke or withdraw that individual's refugee status. This mechanism allows both authorities to have a sound information basis for their respective decisions.

If the asylum authority revokes or withdraws refugee status, the extradition authority must nevertheless itself examine whether the person concerned is no longer a refugee, because formal recognition of refugee status is only declaratory (see above). In addition, the extradition authority must satisfy itself that there is no serious risk that the person concerned would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment in the requesting country (here: Turkey).

➤ *Put in focus*

The question of the binding effect of decisions in asylum proceedings for extradition purposes has been the subject of heated debate for decades. The ECJ has now provided a clear guideline for one constellation of cases. If refugee status is recognised by an authority of an EU Member State, the authorities of another EU Member State that have to decide on the extradition of a fugitive must also comply with it. Such a binding effect has so far been rejected in German extradition practice, mainly based on a ruling by the Federal Constitutional Court in 1979. It was merely recognised that a positive asylum decision in another EU Member State is a strong indication of whether the obstacle of political persecution exists, but a binding effect was denied.

Little consideration has been given to the fact that the EU legal situation has changed considerably in the meantime. And the ECJ's decision is also based on this.

The ECJ's decision strengthens the position of refugees who are wanted in their home country for criminal offences. Above all, the ECJ emphasises the *effet utile* of safeguards and the idea of circumvention: the extraditing authority would circumvent the protection and procedural rights that the asylum procedure grants the individual. The EU country that granted refugee status is to be given the right of first refusal. It must decide on the revocation of refugee status, if necessary. This not only recognises the binding effect of asylum decisions of other Member States but also establishes the princi-

ple of mutual recognition of such decisions within the bloc.

In doing so, the ECJ is deviating from its decision in Case C-753/22, also handed down on 18 June 2024. This case concerned the recognition of refugee status in two asylum procedures, and the ECJ ruled that a Member State is not obliged to automatically recognise refugee status granted in another Member State.

In practice, a distinction must therefore be made between two sets of circumstances regarding the binding effect of asylum decisions: those for conflicts in between asylum proceedings and those for conflicts between extradition and asylum proceedings.

This is also interesting in view of the fact that the Advocate General (AG) in the case of the Higher Regional Court of Hamm concurred with the opinion that a binding effect should be rejected (→eucrim 3/2023, 263–264). The judges in Luxembourg differed from this opinion and preferred another reading of the relevant EU asylum provisions. They focused more on the implications of the guarantees in the Charter on the individual's situation and the principle of non-refoulement than the AG did.

Finally, what is interesting about the ECJ decision is that the Luxembourg judges once again emphasise the need for cooperation between the authorities. Similar to the case law on the extradition of EU citizens to third countries (key word: "*Petruhhin*" →eucrim 3/2016, 131), the ECJ requires the authorities involved to exchange information and discuss the case together. In practice, this can lead to implementation difficulties because there is no network to facilitate cooperation between the law enforcement authorities that decide on extradition and the administrative authorities that are responsible for the asylum procedure. This case may therefore provide an opportunity to consider a European Judicial Network 2.0. (TW)

### Draft Bill for New German Law on International Cooperation in Criminal Matters

On 11 September 2024, the German Federal Ministry of Justice presented a draft for a recast of the German Act on International Mutual Assistance in Criminal Matters (*Gesetz über die Internationale Rechtshilfe in Strafsachen – IRG*). The draft revises, restructures and modernises the current Act. A main objective is to reinforce the rights of the individual in transnational criminal proceedings. At the same time, the draft transposes recent EU legislation in the field of cooperation in criminal matters and implements case law of the Court of Justice of the European Union and the German Federal Constitutional Court. In detail, the draft includes the following:

- Clarifying the structure of the law and making it more workable;
- Strengthening new forms of cooperation, including, for the first time, rules on police cooperation and transfer of criminal proceedings;
- Improving the individuals' legal protection and guaranteeing a high level of data protection in transnational proceedings in criminal matters; this includes laying down important procedural safeguards and highlighting the limits of admissibility of mutual assistance;
- Adapting the German law on requirements of Union law, including the implementation of Regulation 2023/2844 on the digitalisation of judicial cooperation (→eucrim 4/2023, 331–332) and Directive 2023/977 on the exchange of information between the law enforcement authorities of Member States and repealing Council Framework Decision 2006/960/JHA (→eucrim 1/2023, 36–39).

The draft was forwarded to the federal states and stakeholders who can submit their statements to the Federal Ministry of Justice before the draft will be submitted to the German Parliament. It is accompanied by a synopsis juxtaposing the rules of the new draft and the current ones. The draft was prepared by working groups in which scholars as well as representatives from legal practice (courts, prosecution offices, attorneys) and justice ministries of the federal states participated. (TW)

## European Arrest Warrant

### New Factsheet: The EAW Under the Case Law of the CJEU and ECtHR

In June 2024, the Fundamental Rights Agency (FRA), together with the Registry of the European Court of Human Rights (ECtHR), prepared a factsheet on the European Arrest Warrant (EAW) and the EU Member States' obligations to respect fundamental rights. The factsheet highlights jurisprudence in selected areas in which EU law and that of the European Convention on Human Rights (ECHR) interact. Such interaction may arise when courts of the EU Member States receive a substantiated complaint to the effect that the protection of a right of the ECHR is "manifestly deficient" and the situation cannot be remedied by EU law. In this situation, the courts may not refrain from examining said complaint solely because they are applying EU law; instead, they must read and apply the rules of EU law in conformity with the ECHR. Over the past several years, a number of cases regarding the issuing and execution of EAWs have been dealt with by the ECtHR and CJEU. They addressed the following concerns:

- The positive procedural obligation to cooperate;
- The risk of inhuman or degrading treatment;
- The lawfulness of deprivation of liberty;
- The right to a fair trial and right to an effective remedy;
- The respect for private and family life;
- The principle of ne bis in idem.

The factsheet aims to help lawyers and policymakers in understanding and applying the jurisprudence in EAW cases.and recognising overlaps between EU and ECHR law. (CR)

# Council of Europe

*Reported by Thomas Wahl*

## Specific Areas of Crime

### Corruption

#### GRECO Celebrates 25th Anniversary

On 20 June 2024, GRECO officially celebrated its 25th anniversary during its plenary meeting in Strasbourg. Speakers highlighted that GRECO has been an important driving force in countering corruption in its member states since its establishment in 1999. Today, GRECO includes the 46 Council of Europe member states, the United States of America and Kazakhstan.

#### GRECO: Fifth Round Evaluation Report on Andorra

On 3 July 2024, GRECO published its 5th Round Evaluation Report on Andorra. GRECO acknowledged progress in enhancing transparency, but called for enhanced efforts especially for the prevention of corruption in respect of persons with top executive functions (PTEFs).

GRECO noted, among other things, the lack of rules requiring integrity checks prior to appointments of PTEFs as well as of regulations on lobbying and PTEFs' post-employment restrictions. The Public Prosecutor's Office should be given sufficient human resources and powers to conduct effective prosecutions in relation to corruption-related offences involving PTEFs.

Looking at the Police Corps, a full assessment of corruption risks in policing areas should be conducted. The practice of paying fines to police officers directly in cash should be abandoned. The 2023 Code of Ethics of the Police Corps, should be supplemented with practical guidelines and specific examples.

#### GRECO: Fifth Round Evaluation Report on Georgia

On 9 July 2024, GRECO published its 5th Round Evaluation Report on Georgia, in which the country is urged to take determined measures to prevent corruption in respect of persons with top executive functions (PTEFs) and law enforcement officials.

GRECO stated that Georgia has taken only a few positive steps in recent years, e.g., the adoption of the Law on Combatting Corruption. Georgia should adopt several measures, e.g. a specific strategy to prevent corruption within the executive, a specific code of conduct for PTEFs, guidelines on conflicts of interest, and ensuring operational independence of the newly established Anti-Corruption Bureau.

Recommendations with regard to law enforcement include the establishment of an operational anti-corruption strategy and the introduction of regular background checks/vetting on police officers' exposure to corruption risks.

#### GRECO: Fifth Round Evaluation Report on Monaco

In its 5th round evaluation report on Monaco, published on 24 July 2024, GRECO sees room for improvements with regard to transparency and integrity of persons with top executive functions (PTEFs) and the police. This includes that some transparency and integrity rules should be made applicable to the Sovereign Prince who actually performs key executive functions. The persons who work most closely with ministers, the Secretary of State for Justice and the Prince's advisers should be subject to the rules of ethics and the obligation to declare interests and assets. There is also a need to catch up with an overall anti-corruption strategy, the access to information, and the protection of whistleblowers.

### Money Laundering

#### MONEYVAL: Fifth Round Evaluation Report on Jersey

In its 5th round mutual evaluation report on the UK Crown Dependency of Jersey (published on 24 July 2024), MONEYVAL attested a good level of compliance with the international AML/CFT standards.

Jersey has achieved a high level of effectiveness for its understanding of ML/TF risks and implementing adequate AML/CFT policies and strategies to mitigate them. The operational independence and resources of Jersey's FIU have significantly improved since 2015, but its strategic analysis capabilities are still limited. Understanding of ML risks and AML/CFT obligations is generally good across all sectors (especially banks), while understanding of TF risk is less developed. The report found, however, that Jersey's authorities only modestly imposed sanctions in the context of compliance with AML/CFT obligations.

The Jersey authorities' understanding of ML risks with legal persons and arrangements is welcomed, as are their activities in seeking and providing mutual legal assistance and other forms of international co-operation.

# Articles

## Articles / Aufsätze

### Fil Rouge

In this special issue on "The Protection of the Environment ", we are very honored to be able to publish several very topical contributions on various aspects related to the EU's efforts to prevent and combat environmental damage.

In our guest editorial, *Vita Jukné* (European Commission) outlined the efforts and highlighted the new priorities of the 2024–2029 Commission, which include better enforcement and implementation of environmental standards. This notion of improved enforcement is picked up by several articles, posing the question of how the EU can be a more effective actor.

Against this background, this issue is structured around two key themes: first, new roles in the fight against environmental crime for EU bodies that have been leading forces in protecting EU financial interests; second, the legal implications of the new Directive on the protection of the environment through criminal law, which was adopted in April this year.

As part of the first theme, *Selina Grassin* and *Luigi I. Garruto* discuss the possible new role of the European Anti-Fraud Office (OLAF) in relation to the new Waste Shipment Regulation. They outline the EU's mandate to carry out inspections in cross-border cases of illegal waste shipments, which will be entrusted to OLAF. The authors argue that the new Waste Shipment Regulation sends strong signals and holds the potential to contribute to the protection of human health and the environment.

Considering the modernisation of the system to fight environmental crime, *Mar Jimeno-Bulnes* examines the potential impact of extending the competences of the European Public Prosecutor's Office (EPPO) to include environmental crimes. While the author concedes that environmental crimes cover many different forms of environmental harm, she does see such an extension as justified in line with the new Environmental Crimes Directive.

This very 2024 Environmental Crimes Directive as a game changer finds itself at the center of the second theme, starting with an article by *Michael Faure*. *Faure* looks at why the new Directive was adopted and lists the shortcomings of its predecessor from 2008. He shows that one of the most interesting aspects of the new Directive is the inclusion of ecocide. Without actually mentioning the term as such (except for in recital 21), the Directive refers to crime that seriously destroys the ecosystem – echoing the definition of ecocide. Specifically, recital 21 refers to criminal offences which can encompass conduct comparable to "ecocide", which is already covered by the law of certain Member States and which is being discussed in international fora. Faure also turns the spotlight on a possible combination of administrative and criminal law sanctions in the Directive as forming part of the enforcement toolbox as well as evidence-based enforcement and what that might mean in practice.

Next up, *Ricardo Pereira* focuses on some critical aspects of the Environmental Crimes Directive. He retraces the evolution of environmental criminal law, starting with a 2005 case (CJEU, C-176/03, Commission v Council) through to the latest Directive adopted in 2024. According to him, this new Environmental Crimes Directive was needed to reflect the complexity of effectively responding to environmental crime while upholding fundamental rights. Pereira sees multiple enforcement challenges ahead despite a considerably updated regulatory regime.

Last but not least, *Christina Olsen Lundh* analyzes challenges and opportunities of the new Directive in the EU Member States, giving Sweden as an interesting example. Drawing on some recent examples from Swedish courts, she illustrates several points, including the relationship between administrative law and criminal law, and ways of ensuring legality. From this perspective, the new Environmental Crimes Directive can hopefully help the Member States to be clearer in their legislation. In her conclusions, *Olsen-Lundh* discusses the important issue of detecting environmental crime, arguing that public awareness is crucial.

Overall, this special issue deals with highly important societal questions about the protection of the environment and the role criminal law plays in this context.

*Prof. Dr. Ester Herlin-Karnell,* University of Gothenburg & eucrim editorial board member

# Fighting Waste Trafficking in the EU: A Stronger Role for the European Anti-Fraud Office

## The Reviewed Waste Shipment Regulation and its Enforcement Provisions

Selina Grassin and Luigi I. Garruto*

**On 20 May 2024, the new Waste Shipment Regulation (WSR) entered into force. The Regulation aims to better ensure that waste exported outside the EU is properly managed and to modernise shipment procedures to reflect the objectives of a circular economy and climate neutrality.**
**The new provisions include a mandate to the European Commission to carry out inspections in complex cross-border cases of illegal waste shipments. The Commission will entrust OLAF with implementing these enforcement powers. This will reaffirm and extend the role that the Office and its investigators have been playing in recent years under existing legal frameworks. In the future, OLAF will be able to act on its own initiative, not only in the case of illegal waste shipments entering, transiting or leaving the EU, but also for intra-EU shipments. The new rules will allow for a better fight against waste trafficking, contribute to the protection of the environment and human health and improve the overall enforcement of the WSR. These OLAF-related provisions will be applicable from 21 May 2026.**

### I. Introduction

The protection of the environment is one of the main priorities of the European Commission. Climate change and environmental degradation are existential threats not only to Europe but also globally.

Consequently, environmental crime is becoming an increasingly significant concern. Criminal organisations have been expanding into the sector, which is extremely lucrative and relatively low risk, as sanctions imposed for such activities are significantly milder when compared to other, more 'traditional' criminal offences, such as drug trafficking. According to Interpol and the United Nations Environment Programme, environmental crime represents one of the four most prevalent criminal activities in the world, together with drug trafficking, human trafficking and counterfeiting.[1] According to Europol, environmental crime can be as profitable as illegal drug trafficking. The comparatively low sanctions imposed for environmental crime in comparison to, for instance, drug trafficking and difficulties to detect such crimes,[2] lead to a substantial increase of such illegal activities. Environmental crime, therefore, became one of the EU's priorities in the fight against serious and organised crime.[3]

Illegal waste shipments are among the most serious forms of environmental crime. Due to their high profitability, they can often be linked to organised crime and even terrorist financing.[4] According to estimates, 15% to 30% of all waste shipments might be illegal; the value of this trade could reach up to € 9.5 billion annually. The Illicit shipment of waste across national borders can pose a significant risk to human health and the environment. With 67 million tonnes of waste shipped per year within the EU alone and nearly 35.1 million tonnes of waste exported from the EU to non-EU countries in 2023,[5] it is of utmost importance to control these shipments effectively and efficiently.

In response to these concerns, the European Commission recently adopted the new Waste Shipment Regulation[6] (hereinafter WSR). The new rules aim to better ensure that waste exported outside the EU is properly managed and to modernise shipment procedures to reflect the objectives of a circular economy and climate neutrality. It will, for example, implement the use of an EU electronic system for the submission and exchange of information. Furthermore, the enforcement of the WSR and the fight against illicit shipments of waste will be reinforced by improving the traceability of the shipments and by supporting more efficient cross-border coordination.

The new provisions include a mandate to the European Commission to carry out inspections in complex cross-border cases of illegal waste shipments. The Commission will entrust the European Anti-Fraud Office (OLAF) with implementing these enforcement powers[7]. This will reaffirm and extend the role that the Office and its investigators have been playing in recent years under existing legal frameworks.[8]

## II. OLAF's Current Work on Illegal Waste Shipments

The work on illegal waste shipments is not new to OLAF. Indeed, the Office has long-standing experience in tracking down illicit cross-border traffic of dangerous substances, including illicit waste. OLAF's work in the domain of illicit refrigerant gases, for example, has been recognised by a prestigious international award in 2023, the Montreal Protocol Award for Customs and Enforcement Officers.[9]

Its activity is based on Regulation (EC) 515/97 on mutual administrative assistance in the customs area.[10] As such, OLAF's activities and the support it provides to Member States are currently focused on illicit exports outside the EU.

In 2021, for example, OLAF's alerts and intelligence helped Italian customs block attempts to smuggle 800 tonnes of plastic waste to Malaysia.[11] In two different cases, the waste was falsely declared as raw material, and OLAF helped establish that the procedures of export of waste had not been respected and that the exporters did not hold the necessary permits.

OLAF's investigative strategy in this domain is based on in-depth analysis of customs and trade data, customs declarations and commercial documents. Through the so-called Rapid Alert System, managed by OLAF, the Office can relay intelligence to national authorities on suspicious exports of waste or suggest controls in the countries of destination. OLAF monitors the original shipments and the returns of refused containers to ensure that they are not diverted on their way back to the EU source country.

Furthermore, OLAF serves as a bridge and coordinator when requested, and has established cooperation with affected third countries. In 2023, for instance, OLAF led the Joint Customs Operation (JCO) NOXIA[12]in collaboration with ASEM[13] countries. This JCO targeted deep-sea containers in EU and Asian ports and placed them under surveillance, with the objective of preventing dangerous substances from being smuggled. Operation NOXIA resulted in the seizure of over 1,191 tonnes of illicit waste, 27,469 litres and 5 tonnes of illicit pesticides as well as over 67 million cigarettes and 10 tonnes of tobacco.[14]

## III. A New Role for OLAF

Articles 67 to 71 of the new WSR allow the European Commission to carry out inspections in complex cross-border cases of illicit waste shipments. Given its expertise and long-standing experience, the Commission will entrust OLAF with implementing these enforcement provisions. In practice, the new rules will facilitate the cooperation between OLAF and the competent authorities of the Member States, thereby strengthening the operational support that OLAF can provide. OLAF will be able to act on its own initiative, at the request of the authorities of one or more Member States or in response to a complaint. This will apply not only to waste shipments entering, transiting or leaving the EU but also to intra-EU movements.

Art. 68 WSR empowers the Commission, thus OLAF, to do the following:

- Access any premises and means of transport;
- Examine any relevant documents;
- Ask for explanations;
- Take and record statements;
- Physically check the waste and take samples.

A variety of actors are involved in this process, including the notifier, the person who arranges the shipment, the waste producer, the waste holder, the waste carrier, the consignee and the facility that receives the waste. These actors are subject to inspections and are obliged to cooperate. Furthermore, Art. 69 WSR allows and regulates the possibility to interview any person who consents to be interviewed.

Procedural guarantees designed to ensure the protection of individuals' rights are defined in Art. 70 WSR. These rights include, among others, the right not to make self-incriminating statements, to be assisted by a person of choice and to use any of the official languages of the Member State where the inspection takes place.

An investigation will only be conducted by OLAF in cases in which there is sufficient suspicion for an illegal shipment of waste potentially having serious adverse effects on human health or the environment, and in which the investigation in question has a cross-border dimension (Art. 67, paragraphs 1–2 WSR). This allows for an efficient use of available resources, as OLAF's expertise lies in the cross-border dimension of such operations.

After the completion of each action, OLAF will draw up a report, which can include recommendations for further action of an administrative or judicial nature, to the competent authorities in the Member State(s). If the conclusion shows that the shipment of waste has been illegal, OLAF will inform the competent authorities of the country or countries concerned by the shipment accordingly (Art. 67, paragraphs 4–5).

## IV. Conclusion

The new EU Regulation on shipments of waste is an important step to tackle illegal waste. New provisions empower OLAF to act on the ground and to support Member States even more efficiently with regard to suspicious movements of waste. This improved cooperation sends a strong message against waste trafficking. It not only strengthens the fight against illegal shipments of waste but also contributes to the protection of human health and the environment.

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* The views expressed in this article are exclusively those of the authors and cannot be attributed to the institution that employs them.

1 UNEP-INTERPOL Rapid Response Assessment: The Rise of Environmental Crime – A Growing Threat To Natural Resources Peace, Development And Security, June 2016, available at <https://www.unep.org/resources/report/rise-environmental-crime-growing-threat-natural-resources-peace-development-and>. Ally hyperlinks in this article were last accessed on 24 September 2024.

2 Europol, "Environmental Crime" <https://www.europol.europa.eu/crime-areas/environmental-crime>.

3 For more information see, Europol, "EU Policy Cycle - EMPACT: EMPACT 2022+ Fighting crime together" <https://www.europol.europa.eu/crime-areas-and-trends/eu-policy-cycle-empact>.

4 Europol, "Environmental Crime", *op. cit.* (n. 2).

5 See European Commission, "Waste shipments" <https://environment.ec.europa.eu/topics/waste-and-recycling/waste-shipments_en>.

6 Regulation (EU) 2024/1157 of the European Parliament and of the Council of 11 April 2024 on shipments of waste, amending Regulations (EU) No 1257/2013 and (EU) 2020/1056 and repealing Regulation (EC) No 1013/2006, OJ L, 2024/1157, 30.4.2024.

7 https://environment.ec.europa.eu/topics/waste-and-recycling/waste-shipments_en.

8 In fact, EU (and, respectively, EC and EEC) legislation on transborder shipments of waste looks back on a 40-year history. Milestones were Council Directive (EEC) No 631/84, Council Regulation (EEC) No 259/93 and EP/Council Regulation (EC) No 1013/2006, which is now being replaced by the new WSR.

9 See OLAF press release of 31 March 2023, "OLAF awarded for its work against smuggling in climate-damaging gases" <https://anti-fraud.ec.europa.eu/media-corner/news/olaf-awarded-its-work-against-smuggling-climate-damaging-gases-2023-03-31_en>. See also the eucrim news of 13 July 2022 (https://eucrim.eu/news/operation-dismantles-criminal-organisation-trading-illicit-refrigerant-gases/) with further references.

10 Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, OJ L 82, 22.3.1997, 1.

11 See OLAF press release of 2 September 2021, "OLAF's work against waste trafficking helps Italian authorities stop illicit waste" <https://anti-fraud.ec.europa.eu/media-corner/news/olafs-work-against-waste-trafficking-helps-italian-authorities-stop-illicit-waste-2021-09-02_en>.

12 Code-named in reference to the English word "noxious" which means harmful, poisonous due to its focus on dangerous substances.

13 "ASEM" stands for Asia-Europe Meeting. It is an informal platform for dialogue and cooperation between Asia and Europe on the big challenges of a fast-changing world, including security issues. ASEM comprises 51 partner countries.

14 See OLAF press release of 16 October 2023, "Operation NOXIA: OLAF leads operation against dangerous substances" <https://anti-fraud.ec.europa.eu/media-corner/news/operation-noxia-olaf-leads-operation-against-dangerous-substances-2023-10-16_en>.

# The European Public Prosecutor's Office and Environmental Crime

## Further Competence in the Near Future?

Mar Jimeno-Bulnes*

**This article envisages the possible extension of the European Public Prosecutor's Office's competences in the field of environmental protection. The author first presents an overview of the Office's competences under the current legislation and, second, analyses suggestions on extending these competences specifically to the field of environmental crime. The case is made that a stronger, more comprehensive scope of competence for the EPPO would strengthen its position in the EU. This warrants an extension of the Office's jurisdiction to other types of crime, especially in the fight against cross-border crime such as environmental crime.**

### I. Introduction

As is often stressed, Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO)[1] established a new player in European criminal policy that revolutionised the European criminal justice scene in several respects.[2] It was the first time that a vertical cooperation model was adopted in the form of this supranational body,[3] as opposed to the classic horizontal cooperation that had taken place until then, through agencies like Eurojust.[4] It was rightly put that a "new sheriff in the city"[5] was operating – with an impact not only at the European but also at the national level, as the EPPO must prosecute and bring cases before the national courts of the EU Member States. More than 20 years after the *Corpus Iuris* project,[6] the EPPO, at long last, became a reality, having assumed operations more than three years ago.

Indeed, since the establishment of the EPPO, one of the most hotly debated issues has been the limitation of this body's competence.[7] Since the EPPO was designed to prosecute offences against the financial interests of the European Union, some authors have pointed out that the EU had created a body to protect solely "its" economic interests, which was "reductionist" at the time.[8] Some argue that this limited EPPO competence somehow "weakened" the body to a certain extent and caused disappointment over the missed opportunity to cover other crimes with a clear cross-border component.[9] I also believe that a stronger, more complete competence for the EPPO would strengthen its position in the EU, especially in the fight against crime. Against this background, this article examines the possibility of extending the EPPO's competence to other crimes, in particular environmental crimes, which may call for its extension, due to the recurring cross-border nature of these crimes.[10]

First, background information is given on how the current EPPO's competences have been organised thus far. Secondly, the possible extension of the EPPO's competence and, if viable, the requirements for doing so will be analysed in order to set out a future proposal for the extension of such competence to environmental offences. However, I would like to start by saying the following: this does not seem to be an idea at present[11] if there are any plans to modify the EPPO's competence at the European level, which also seems highly doubtful, at least to date.

### II. Current Competence of the EPPO

The former Spanish European Prosecutor, *Maria Concepción Sabadell Carnicero*, described the EPPO's (material) competence as "remarkably complex, mainly due to its regulation based on EU legislation to be transposed by the Member States and on EU concepts."[12] Cross-reference to other EU legislation to be implemented in the EU Member States is already laid down in Art. 4 of the EPPO Regulation, which describes EPPO's basic objective and tasks and which reads as follows:

> The EPPO shall be responsible for investigating, prosecuting and bringing to judgment the perpetrators of, and accomplices to, criminal offences affecting the financial interests of the Union which are provided for in Directive (EU) 2017/1371 and determined by this Regulation.

Another premise of the EPPO Regulation is that "bringing to justice" must be done before the appropriate national courts of the Member States, because – against contrary suggestions made in literature[13] – the Union legislature neither established a specific European jurisdiction nor attributed a respective power to the Court of Justice of the European Union (CJEU) in this regard.

The organisation of EPPO's competences is closely related to Art. 325 TFEU, the Treaties' core provision on combatting fraud and other illegal activities affecting the financial interests of the Union. A direct effect of Art. 325 TFEU was expressly recognized by the CJEU at the time[14] as part of EU primary law, which leaves room for further enactment of substantive and procedural EU legislation as part of secondary EU law.[15] Inasmuch the birth of the EPPO can be attributed to the "procedural dimension"[16] of Art. 325 TFEU, this provision is also the legal basis for the "substantive" criminal law precept referred to in Art. 4 EPPO Regulation[17]. The latter was sharpened by Directive (EU) 2017/1371 – the PIF Directive.[18] The fact that both rules of EU secondary legislation for the fulfilment of the objective set out in primary EU law were contemplated, namely the PIF Directive and the EPPO Regulation, gives rise to such a double – substantive and procedural – dimension of the regulation in this sense within the context of EPPO.

Art. 325 TFEU implies a shared competence between the EU and the Member States. This was corroborated by the CJEU in the famous "Greek Maize" judgment clarifying that the Member States must adopt the same measures to protect the EU's financial interests as those taken to protect national financial interests.[19] It was actually this inactivity – showing less efforts in the protection of the EU's financial interests than in protecting national financial interests – that justified the creation of the EPPO at the time.[20] As a result, the Union legislature decided[21] to attribute to the EPPO a single competence to be shared with the Member States, i.e. Member States would also be responsible for investigating and prosecuting the relevant economic crimes against the EU budget in coordination with EPPO (model of complementarity).[22] On the one hand, this feature should be kept in mind when we discuss a possible further extension of the EPPO's competence. On the other hand, this scenario is another reason for the complexity of the material competence attributed to the EPPO, since the Office's competence is certainly preferential but does not exclude the competence of corresponding national authorities.[23]

More specifically, the EPPO Regulation governs the EPPO's competence in Section 1 of Chapter IV, including Arts. 22 and 23. Three classic allocation criteria are used: material (Art. 22), territorial, and personal (both in Art. 23) competence. Art. 22(1) concretely provides for the above-mentioned reference to the PIF Directive, i.e. the EPPO Regulation does not include an independent and fully-fledged substantive criminal legislation.[24] Another important issue in this regard is that the reference to the PIF Directive must be understood with reference to the transposing national laws. This results in an additional layer of complexity when determining material competence, because the Directive's implementation, which differs from Member State to Member State, must be taken into account.[25]

Other important characteristics of the regulation on the EPPO's material competence are the following:

- An initial and "dynamic" reference[26] to the general offences set out in the PIF Directive, namely (a) subsidy or aid fraud; b) tax offences; c) money laundering; d) active and passive bribery; embezzlement and smuggling);[27]
- A specific reference with specific requirements in the case of VAT fraud (Art. 22(1) in connection with Art. 3 (2)(d) PIF Directive, requiring the involvement of two or more Member States[28] and a minimum damage of €10 million);
- A particular attribution to competences concerning "offences regarding participation in a criminal organisation" (Art. 22(2) with reference to Framework Decision 2008/841/JHA" of 24 October 2008 on the fight against organised crime[29]);
- A particular attribution to "inextricably linked" offences (Art. 22(3), which is difficult to interpret[30] and thus to determine the degree of connection required for such ancillary competence despite the recital's effort to provide some clarification in this regard[31]);
- A negative competence for criminal offences in respect of national direct taxes (Art. 22(4), inasmuch the competence here is generally attributed to national authorities[32]).

As regards the EPPO's territorial and personal competence in Art. 23, the EPPO Regulation is easier to handle, since no references to other legislation are made. The Regulation prioritises the territorial criterion over that of personality.[33] This is in line with the principle of territoriality that governs the application of criminal law in the nation state. Thus, the competence of the EPPO is generally determined for all offences referred to in Art. 22 if "committed in whole or in part within the territory of one or several Member States." This norm requires the simultaneous jurisdiction of the respective Member State, since its courts will be responsible for the actual trial.[34] Regarding the personality criterion, competence to the EPPO is attributed to those offences listed in Art. 22 of the EPPO Regulation when "committed by a national of a Member State, provided that the respective Member State has jurisdiction for such offences when committed outside its territory". This general framework is supplemented by a specific provision for EU staff and employees (that includes the same procedural requirements).

## III. Possible Extension of the EPPO's Competence to Environmental Crime

### 1. Legal basis for extension

The extension of EPPO's competences is already envisaged in Art. 86(4) sentence 1 TFEU:

> The European Council may, at the same time or subsequently, adopt a decision amending paragraph 1 in order to extend the powers of the European Public Prosecutor's Office to include serious crime having a cross-border dimension and amending accordingly paragraph 2 as regards the perpetrators of, and accomplices in, serious crimes affecting more than one Member State.

Thus, primary Union law sets out two basic conditions for the extension of EPPO's "mandate",[35] i.e. (1) the concept of authorship (the same as for the current competence in relation to offences affecting the financial interests of the Union) and (2) the cross-border character of the crime.[36] In addition, Art. 86(4) sentence 2 TFEU determines the corresponding legislative procedure for the extended mandate:

> The European Council shall act unanimously after obtaining the consent of the European Parliament and after consulting the Commission;

This second sentence of Art. 86(4) raises some questions: What is meant by unanimity? In other words: Does "unanimity" only refer to the Member States participating in the enhanced cooperation of the EPPO or also to the non-participants in the EPPO scheme?[37]

### 2. General approaches and concrete proposals

The essential question remains, however, as to which new offences the EPPO should investigate and prosecute. As a starting point, the question arises as to whether an extension should only cover those cross-border offences that are defined as "the so-called euro-crimes" [38] in Art. 83(1) TFEU, e.g. trafficking in human beings. A second approach could be to take recourse to the broader list of offences defined in instruments of mutual recognition of judicial decisions in criminal matters exempting the examination of double criminality, such as Art. 2(2) of the Council Framework Decision on the European Arrest Warrant (EAW).[39] Yet a third approach would be to include other criminal offences with a typical cross-border dimension beyond said norms, such as offences relating to market abuse and/or infringements of competition law.[40]

So far, the European Commission has launched one concrete initiative for the specific area of terrorism (in 2018),[41] following announcements by former Commission President *Jean-Claude Juncker* to strengthen the "Security Union". However, this initiative has not been followed up on yet.[42]

At the moment, other fields, in particular the violation of restrictive measures imposed by the EU, are being more widely supported. In fact, this idea had already been put forward by a group of Member States precisely in the context of the negotiations taking place in this area on the basis of the proposal presented at the time by the European Commission for the violation of Union restrictive measures,[43] which became Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024.[44] Indeed, the current political context, such as the Russian war of aggression against Ukraine, plays a large and decisive role today, as can be seen in the European institutions themselves in the light of the debates taking place within them.[45] The same favourable opinion on the *extension of the EPPO's competence to the violations of EU restrictive measures* is not only held by (some) Member States[46], but also by the EPPO itself.[47]

### 3. Discussion on extension of competence to environmental crime (pros and cons)

In the midst of these debates, the area of environmental crime has also gained attention. In particular, *Francesco De Angelis* considered environmental crime a suitable field for extending the EPPO's competence :[48]

EU environmental law represents a relevant corpus of detailed norms and constitutes an extraordinary laboratory of European integration.

The peculiarity of "environmental criminal law" is that it covers many different forms and means of environmental harm, including pollution (air, sea, water, etc.) as well as climate change.[49] Infringements of environmental laws are regulated in both administrative and criminal law, entailing a risk of overlapping or differing classifications in the different EU Member States.[50] An important game changer could be the recently enacted Directive (EU) 2024/1203 on the protection of the environment through criminal law.[51] Notwithstanding this development, we can observe parallels between environmental crimes and PIF crimes:[52]

- Both are often serious crimes with a cross-border dimension;
- Similar to PIF offences, environmental offences also do not seem to be a priority for the national authorities of the Member States;[53]
- Both areas of crime are "victimless", and the environment, like the EU budget, can be considered a "European good";[54]
- Like the protection of the EU's financial interests, environmental protection represents "one of the Community's essential objectives".[55]

With regard to the last point, I wish to reiterate that it was precisely a landmark judgment that gave rise to the birth of European criminal law in the former first pillar related to environmental matters: the ECJ's judgment of 13 September 2005, *European Commission v. Council of European Union*[56] established the obligation for the EU Member States to enact criminal sanctions for violations against environmental protection, despite the lack of EU competence to do so in the first pillar.

In contrast, an important counter-argument with regard to the extension of the EPPO's jurisdiction to environmental crime is that a sound definition of environmental crime is still lacking. In the absence of a common European definition,[57] its definition at the national level by the Member States is not helpful, as the regulations in this respect are also diverse.[58]

### 4. Perspectives

Coming back to the general approaches described above, environmental crimes are certainly not covered by Art. 83 TFEU, but they are enumerated in the list of 32 crimes for which double criminality checks are exempted with regard to the mutual recognition of judicial decisions in criminal matters. Moreover, the importance of the environment within the Union derives from the regulation of the Treaties themselves, namely the express mention of environmental protection in Art. 3(3) TEU.[59] The need for specific criminal law protection in environmental matters and part of the European agenda is its inclusion in the Commission Communication of 20 September 2011 "Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law".[60]

Lastly, the European institutions themselves have also been sensitive to promoting the extension of the EPPO's competence to environmental crime. In a resolution of 20 May 2021 on the liability of companies for environmental change, the European Parliament "calls on the Commission to explore the possibility of extending the mandate of the European Public Prosecutor's office (EPPO), once it is fully established and fully functional, to cover environmental offences."[61] Moreover, in the light of the negotiations on the Environmental Crime Directive, the EP's Committee on Legal Affairs proposed including a recital on the possible extension of the EPPO's competence to environmental offences of a cross-border dimension.[62] Nonetheless, these parliamentary initiatives have not yet fallen on fertile ground, so it appears that there is currently no political will at the Union level for extending EPPO's competences to the field of environmental crime.

In sum, considering the importance of environmental protection within the EU, together with the seriousness and cross-border nature of many of environmental offences, the inclusion in the core competence of the EPPO can be justified.[63]

## V. Concluding Remarks

The current EPPO's competence is limited to criminal offences affecting the EU' financial interests. This reflects a reductionist, probably "selfish", view on the part of the Union. And this is why the possibility of extending the competence of the EPPO to other areas of criminal law was proposed even before the body became operational in 2021. The greatest support was obtained for the crime of terrorism at that time, in particular given that EU Member States wished to show strong political commitment following various terrorist attacks in Europe.[64]

Even though there are many reasonable arguments that a future extension of the EPPO's competence to offences other than those relating to the protection of the Union's financial interests must take place, it is currently rather unlikely that this extension will cover environmental offences, at least not in the near future. As mentioned above, other areas have so far attracted closer attention of the European Union for a possible extension of EPPO's competence. Thus, the most imminent case seems to be the field of violation of restrictive measures imposed by the EU – an area currently more widely supported in the Union's policy, given that this idea has already been put forward by a group of EU Member States. Thus, the belief is justified that the EPPO's competence will be extended to this sphere and not to that of environmental crime. *On verra!*

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1 OJ L 283, 31.10.2017, 1.

2 In these words: L. Seiler, "Le parquet européen: une revolution sans bouleversements", (2019) 99 (11–12) Revue de droit penal et de criminology, 1188. Also in a similar context, A. Fiodorova, "Fiscalía Europea: un nuevo actor en la persecución por delitos", in: E. Ortega Burgos et al. (eds.), Derecho Penal 2020, 2020, p. 197. For the EPPO in general, see e.g., L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office. The challenges ahead*, 2018; M. Jimeno Bulnes, "La estrategia de la cooperación judicial penal europea en materia de intereses financieros", in: I. Berdugo Gómez de la Torre and N. Rodriguez-García (eds.), *Decomiso y recuperación de activos. Crime doesn't pay,* 2020, p. 267 and "La Fiscalía Europea: un breve recorrido por la 'institución'", in: A. Miranda Rodrigues et al. (eds.), *Procuradoria europeia e criminalidade económico-financiera / La fiscalía Europea ante la delincuencia económica y financiera*, 2023, p. 113.

3 In concrete terms: D. Brodowski, "Strafverfolgung im Namen Europas. Die Europäische Staatsanwaltschaft als Meilenstein supranationaler Kriminalpolitik", (2022) 169(8) *Goltdammer's Archiv für Strafrecht (GA)*, 421, 422, in particular qualifying the EPPO as "weltweit erste 'echte' supranationale Strafverfolgungsbehörde". Also W.M. Kühn, "The European Public Prosecutor's Office – The protection of the EU's financial interests as supranational integration project", (2023) 59 *Revista General de Derecho Europeo (RGDE),* 17. F. Vacas Fernández expressed greater doubt in "The European Public Prosecutor's Office: a major step towards political integration or another middle-ground European agency in the name of pragmatism", (2020) 51 *Revista General de Derecho Europeo (RGDE),* 252, 254.

4 On both roles and their coordination, see M. Luchtman and J. Vervaele, "European agencies for criminal justice and shared enforcement (Eurojust and the European Public Prosecutor's Office)", (2014) 10(5) *Utrecht Law Review*, 132, 134. In particular, on the latter cooperation: J. Espina Ramos, in: L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office. The challenges ahead*, *op. cit.* (n. 2), p. 87.

5 A. Ayala González, "Hay un nuevo sheriff en la ciudad: algunas notas sobre la Fiscalía Europea a propósito de la cuestión de competencia resuelta por el ATS núm. 20424/2022, de 9 de junio", (2022) 10147, *Diario La Ley*, <https://diariolaley.laleynext.es/content/Inicio.aspx>. All hyperlinks in this article were last accessed 14 October 2024.

6 See M. Mireille Delmas-Marty and J. Vervaele (eds.), *The implementation of the Corpus Iuris in the Member States*, 4 vols., 2000. Also on the impact of the *Corpus Iuris* at the time: A. Damaskou, "The European Public Prosecutor's Office. A ground-breaking new institution of the EU legal order", (2015) 6(1) *New Journal of European Criminal Law (NJECL),* 126, 128.

7 If one can use the term "competence" at all in the case of the Public Prosecutor's Office. I agree with the argument put forth by E. Pedraz Penalva, "De la jurisdicción como competencia a la jurisdicción como órgano", in: E. Pedraz Penalva (ed.), *Constitución, jurisdicción y proceso,* 1990, p. 43, *passim,* for whom the concept of competence is indissolubly associated with that of jurisdiction. For the purpose of simplification, however, and given that "competence" is the legal and doctrinal terminology used, I will also use it in the present context of the EPPO alongside the notion "jurisdiction"; the latter especially reflects the "judicial character" according to CJEU case law. See D. Ceccarelli, "Status of the EPPO: an EU judicial actor", 1 (2024) *eucrim*, 58–64.

8 In Spain G. Ormazábal Sánchez, "Hacia una autoridad de persecución criminal común para Europa (Reflexiones acerca de la conveniencia de crear una Fiscalía europea y sobre el papel de Eurojust", *La Ley Penal* 56 (2009), 12 <https://web.laley.es/revistas-laley/laley-penal/>.

9 See, e.g., D.C. Doreste Armas, "El espacio judicial europeo y la fiscalía europea como órgano de investigación y persecución penal versus modelo procesal español", (2017) 8981, *Diario La Ley*, 19 <https://diariolaley.laleynext.es/content/Inicio.aspx>.

10 In this context: C. Di Francesco Maesa, "EPPO and environmental crime: May the EPPO ensure a more effective protection of the environment in the EU?", (2018) 9(2) *New Journal of European Criminal Law (NJECL)*, 191, 194.

11 Same opinion voiced by C. Di Francesco Maesa, *op. cit.* (n. 10), 215.

12 C. Sabadell Carnicero, "La competencia material de la Fiscalía Europea", (2023) 10298, *Diario La Ley*, 1 <https://diariolaley.laleynext.es/content/Inicio.aspx> (author's translation). Sabadell Carnicero also mentions that the regulation already resulted in five conflicts of competence, three of them in Spain.

13 See G. Conway, "Holding to account a possible European Public Prosecutor Supranational governance and accountability across diverse legal traditions", (2013) 24(3) *Criminal Law Forum,* 371, 392; J.A. Espina Ramos, "¿Hacia una Fiscalía Europea?", in: C. Arangüena Fanego (ed.), *Espacio europeo de Libertad, seguridad y justicia: últimos avances en cooperación judicial penal*, 2010, p. 101, 119.

14 CJEU, 8 September 2015, C-105/14, *Criminal proceedings against Ivo Taricco and others,* ECLI:EU:C:2015:555, paras. 51–52.

15 See J. Vervaele, "Judicial and political accountability for criminal investigations and prosecutions by a European Public Prosecutor's office in the EU: the dissymmetry of shared enforcement", in: M. Scholten and M. Luchtan (eds.), *Law enforcement by EU authorities*, 2017, p. 247, pp. 252–255.

16 In particular E. Herlin-Karnell, "The establishment of a European Prosecutor's Office: between 'Better regulation' and subsidiarity", in W. Geelhoed et al., *Shifting perspectives on the European Public Prosecutor's Office,* 2018, p. 41, 48.

17 In relation to this legal basis: L. Kuhl, "The initiative for a Directive on the protection of the EU financial interests by substantive Criminal Law", (2012) 2 *eucrim*, 63, 64.

18 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, OJ L 198, 28.7.2017, 29. See C. Di Francesco Maesa, "Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of Criminal Law: a missed goal?", (2018) *European Papers* 3(3), 1455, 1466 concerning its relationship with the EPPO; from a critical perspective at the time of negotiations: R. Sicurella, "A blunt weapon for the EPPO? Taking the edge off the proposed PIF Directive", in: W. Geelhoed et al.,

*Shifting perspectives on the European Public Prosecutor's Office, op. cit.* (n. 16), p. 99.

19 CJEU, 21 September 1989, C-68/88, *Commission of the European Communities v. Hellenic Republic,* para. 24.

20 Critical A. Klip, "The substantive Criminal Law jurisdiction of the European Public Prosecutor's Office", (2012) 20(4) *European Journal of Crime, Criminal Law and Criminal Justice (EJCCLCJ)*, 367, 368–370.

21 In contrast to the Commission Proposal, which provided for an exclusive competence of EPPO, see Art. 11 (4) Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534. In favour of the centralisation of the EPPO's competence: L. Bachmaier Winter, "The potential contribution of a European Public Prosecutor in light of the Proposal for a Regulation of 17 July 2013", (2015) 23(2) *European Journal of Crime, Criminal Law and Criminal Justice (EJCCLCJ)*, 121, 131.

22 H. Satzger, "The European Public Prosecutor's Office and its coordination with the national Public Prosecutor's Office: the model of complementarity", in: L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office. The challenges ahead*, *op. cit.* (n. 2), p. 43ff., proposing this model of complementarity as alternative model to EPPO's centralized competence.

23 See Recital 58 EPPO Regulation, i.e., "the competence of the EPPO regarding offences affecting the financial interests of the Union should, as a general rule, take priority over national claims of competence so that it can ensure consistency and provide steering of investigations and prosecutions at Union level". On this opinion: A. Planchadell Gargallo, "La Fiscalía Europea en España: una cuestión de competencia", in: A. Miranda Rodrigues et al. (eds.), *Procuradoria europeia e criminalidade económico-financiera / La fiscalía Europea ante la delincuencia económica y financiera*, *op. cit.* (n. 2), p. 205, 214.

24 In this context: H.H. Herrnfeld, "Introduction", in: H.H. Herrnfeld et al. (eds.), *European Public Prosecutor's Office. Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'). Article-by-Article Commentary,* 2021, p. 1, 5; see also comments on Arts. 22 and 23 at p. 144 and p. 171.

25 Some authors therefore refer here to the "indirect" expansion of the EPPO's material competence, e.g., M.A. Pérez Marín, "La competencia de la Fiscalía Europea: criterios materiales y territoriales para su determinación", (2019) V(VIII) *Revista Internacional Consinter de Direito,* p. 255, pp. 266–267. See also criticism by R. Sicurella, "The EPPO's material scope of competence and non-conformity of national implementations", (2023) 14(1) *New Journal of European Criminal Law (NJECL)*, 18, 21–25 in reference to the "inherent weaknesses of the legal landscape of EPPO's material scope".

26 D. Vilas Álvarez, "The material competence of the European Public Prosecutor's Office", in: L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office. The challenges ahead*, *op. cit.* (n. 2), 25, 29.

27 It should also be borne in mind that the legislation applicable in each case must also be taken into account, e.g., in the field of money laundering the Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering on terrorism financing, OJ L 14, 5.6.2015, 73. See, J.P. Cortés, "Fiscalía Europea: competencia objetiva, territorial y conflictos de jurisdicción", (2023) 10369, *Diario La Ley*, 2 <https://diariolaley.laleynext.es/content/Inicio.aspx>.

28 To take into account which scenarios can be different, including Member States that participate in EPPO, others that do not, and even third countries, see specifically F. Giuffrida, "Cross-border crimes and the European Public Prosecutor's Office", (2017) *eucrim,* 149, 150, who contemplates "at least three scenarios".

29 OJ L 300, 11.11.2008, 42, again, "as implemented in national law" and when this offence is a means to commit any of the offences enumerated in Art. 22 (1) EPPO). See criticism at the time, precisely in relation to a lack of harmonization in Member States, despite its enactment, in: F. Calderoni, "A definition that could not work: the EU Framework Decision on the fight against organized crime", (2008) 16(3) *European Journal of Crime, Criminal Law and Criminal Justice (EJCCLCJ)*, 265, 278 ff.

30 An attempt at interpretation of this concept is made by L. Neumann, "The EPPO's material competence and the misconception of 'inextricably linked offences'", (2022) 12(3) *European Criminal Law Review (EuCLR)*, 235, 239 ff.

31 Recital 54 EPPO Regulation clarifying that "the notion of 'inextricably linked offences' should be considered in light of relevant case-law which, for the application of the *ne bis in idem* principle, retains as a relevant criterion the identity of the material facts (or facts which are substantially the same) understood in the sense of the existence of a set of concrete circumstances which are inextricably linked together in time and space". See E. Sitbon, "Ancillary crimes and *ne bis in idem* ", in: Geelhoed et al., *Shifting perspectives on the European Public Prosecutor's Office, op. cit.* (n. 16), p. 129, 138. See also A. Planchadell Gargallo, *op. cit*. (n. 23), 220–224 with reference to the indeterminacy of the competence criteria.

32 Of this opinion: D. Vilas Álvarez, *op. cit.* (n. 26), 36.

33 Both terms used in F. Vacas Fernández, *op. cit.* (n. 3), 271.

34 See J.P. Cortés, *op. cit.* (n. 27), 3.

35 Even though, from the literal wording of the precept, it only appears to be a possibility, i.e., "may establish"; cf. further W.M. Kühn, *op. cit.* (n. 3), 60.

36 Recall prior scenario proposed by F. Giuffrida, *op. cit.* (n. 28), 150.

37 It seems that most experts share the view that only the unanimity of the participants in enhanced cooperation will be necessary. See, W.M. Kühn, *op. cit.* (n. 3), pointing to Art. 330 TFEU as well as CJEU case law, e.g., CJEU, 16 April 2013, Joined cases C-274/11 and C-295/11, *Kingdom of pain and Italian Republic v. Council of the European Union,* ECLI:EU:C:2013:240, para. 35.

38 As stated by P. Csonka and O. Landwehr: "10 years after Lisbon. How 'lisbonised' is the substantive Criminal Law in the EU?", (2019) 4 *eucrim,* 261, 263.

39 OJ L 190, 18.7.2002, 1. See, in this context, M. Jimeno Bulnes, *La orden europea de detención y entrega,* 2024, pp. 167 ff.

40 See G. Ormazábal Sánchez, *op. cit.* (n. 8), 12; also D.C. Doreste Armas, *op. cit.* (n. 9), 19.

41 Communication from the Commission to the European Parliament and the European Council, "A Europe that protects: an initiative to extend the competences of the European Public Prosecutor's Office to cross-border terrorist crimes", COM(2018) 641 final. See A. Juszczak and E. Sason, "Fighting Terrorism through the European Public Prosecutor's Office (EPPO)? – What future for the EPPO in the EU's Criminal Policy?" (2019) *eucrim*, 66–74. See also Di Francesco Maesa, "Repercussions on the establishment of the EPPO via enhanced cooperation. EPPO's added value and the possibility to extend its competence" (2017) *eucrim,* 156, 158 ff.

42 See also: European Council Conclusions, 18 October 2018, <https://www.consilium.europa.eu/en/press/press-releases/2018/10/18/20181018-european-council-conslusions/>, para 9: "The Commission initiative to extend the competences of the

European Public Prosecutor's Office to cross-border terrorist crimes should be examined".

43 Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures, 2.12.2022, COM(2022) 684 final. See P. Csonka, "La directive relative à la violation des mesures restrictives de l'Union et le Parquet européen", (2023) 4 *Revue du droit de l'Union européenne,* 87, 97; incidentally, the author argues that the term "unanimity" in Art. 86(4) TFEU should be understood to cover not only the Member States participating in the European Public Prosecutor's Office but all of them.

44 OJ L, 2024/1226, 29.4.2024. See comments by T. Wahl, "New Directive criminalises violation/circumvention of EU restrictive measures", 1 (2024) *eucrim*, 14 with reference to prior literature.

45 For example, parliamentary questioning by *J.F. López Aguilar*, including the answer given by the Council representative, *Jessika Rosswall*, and the European Commissioner for Justice, *Didier Reynders*, during the European Parliament's debate on 14 June 2023, <https://www.europarl.europa.eu/doceo/document/CRE-9-2023-06-14-ITM-018_EN.html>.

46 See declarations by *E. Dupond-Moretti* and *M. Buschmann*, French and German Ministers of Justice, respectively: "Violations of EU sanctions must be prosecuted by the European Public Prosecutor's Office, *Le Monde*, 29.11.2022, <https://www.lemonde.fr/en/opinion/article/2022/11/29/violations-of-eu-sanctions-must-be-prosecuted-by-the-european-public-prosecutor-s-office_6006013_23.html>.

47 EPPO, "European Chief Prosecutor Laura Kövesi speaks at the Bundestag", 9.11.2022, <https://www.eppo.europa.eu/en/media/news/european-chief-prosecutor-laura-kovesi-speaks-bundestag> explicitly: *"Commissioner Reynders recently inquired about our expert opinion on the extension of our competence to the violations of EU restrictive measures. The answer of the College of the EPPO is straightforward: yes, it is feasible."*

48 F. De Angelis, "The European Public Prosecutor's Office (EPPO) – Past, present and future", (2019) *eucrim*, 272, 274.

49 To the point of justifying the creation of a kind of 'climate justice' at the international level with a civil and criminal dimension, cf. M. Torre-Schaub, "Vers une justice climatique transnationale et globale", (2023) 4 *Revue Internationale de Droit Comparé (RIDC),* 777, 786.

50 C. Di Francesco Maesa, *op. cit.* (n. 10), 203, 207.

51 OJ L, 2024/1203, 30.4.2024. See, for this Environmental Crime Directive, the contributions by *M. Faure*, *R. Pereira*, and *C. Olsen Lundh* in this issue.

52 See, for this in particular, De Angelis, *op. cit.* (n. 48), 275.

53 C. Di Francesco Maesa, *op. cit.* (n. 10), 193; also F. De Angelis, "*op. cit.* (n. 48), 275.

54 F. De Angelis, *op. cit.* (n. 48), 275.

55 See, for this argument, R. Sicurella, "4. Article 86", in: G. Grasso et al. (eds.), *Articles 82–86 of the Treaty on the Functioning of the European Union and Environmental Crime*, 2015, 42, 46, pointing out the maintained interests of European courts in this area since the 1980s (for instance, ECJ, 7 February 1985, case C-240/83, *Procureur de la République v.Association de défense des brûleurs d'huiles usages (ADBHU),* ECLI:EU:C:1985:59, para. 13 also reproduced in ECJ, 20 September 1988, case C-302/86, *Commission of the European Communities v. Kingdom of Denmark,* ECLI:EU:C:1988:421, para. 11).

56 Case C-176/03, ECLI:EU:C:2005:542. In this context: R. Pereira, "Environmental Criminal Law in the first pillar: a positive development for environmental protection in the European Union?", (2007) 16(10) *European Energy and Environmental Law Review,* 254.

57 Despite the attempts of the European institutions, e.g., Information provided by Council of the European Union, "How the EU fights environmental crime", <https://www.consilium.europa.eu/en/infographics/eu-fight-environmental-crime-2018-2021/>.

58 As a simple example, the definition and enumeration of offences provided by Europol in this field is worthy of mention here: Europol, *Crime areas: environmental crime* <https://www.europol.europa.eu/crime-areas/environmental-crime>. Also at the international level, the report elaborated by the United Nations Office on Drugs and Crime: Environmental Investigation Agency (EIA), "Environmental crime: a threat to our future" <https://www.unodc.org/documents/NGO/EIA_Ecocrime_report_0908_final_draft_low.pdf>.

59 It reads: "The Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance."

60 COM(2011) 573 final, pp. 10–11, explicitly: "In other harmonised policy areas, the potential role of criminal law as a necessary tool to ensure effective enforcement could also be explored further. Indicative examples could be: […] environmental protection, if the existing criminal law legislation in this area requires further strengthening in the future in order to prevent and sanction environmental damage".

61 2020/2027(INI), OJ C 15, 12.1.2022, 186, para. 33.

62 Antonius Manders, "Report on the Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC", Report-A9-0087/2023, 28.3.2023, available via <https://www.europarl.europa.eu/doceo/document/TA-9-2024-0093_EN.html>. See Amendment 35 in relation to Recital 30 a (new): "Given the high financial impact of environmental offences, their potential link with other serious financial crimes, as well as their cross-border nature, the European Public Prosecutor's Office would be best placed to exercise its competences on the most serious crimes with a cross-border dimension. The EPPO's competences being currently limited to financial crimes, the Commission should precise in a report the possibility for an extension of the competences of the EPPO in cooperation with Eurojust to include serious cross-border environmental crimes, and the arrangements for such an extension."

63 C. Di Francesco Maesa, *op. cit.* (n. 10), 199.

64 For example, the Italian Minister of Justice's statements following the terrorist attack in Barcelona, which even led him to address a letter to the Commissioner for Justice and Consumers, *Vera Jourová*, with a proposal to extend the EPPO's competence to such terrorist offences: "Guardasigilli Orlando: estendere la Procura Europea anche ai reati di terrorismo", *Diritto e Giustizia*, 23.8.2017, <https://www.dirittoegiustizia.it/#/documentDetail/9179050>.

# The Creation of an Autonomous Environmental Crime through the New EU Environmental Crime Directive

Michael Faure

**On 11 April 2024, the EU adopted a new environmental crime directive to replace Directive 2008/99 of 19 November 2008. This article discusses why a new Directive in the area of environmental crime had become necessary. It particularly argues that the introduction of an autonomous environmental crime and a qualified offence of ecocide constitute important changes. The article points out other novelties, e.g. with regard to minimum sanctions and the collection of statistical data. They may substantially improve the enforcement of European environmental law through criminal law.**

## I. Why a New Environmental Crime Directive?

The European Union already had a directive on the protection of the environment through criminal law: Directive 2008/99/EC of 19 November 2008.[1] The 2008 Directive forced the EU Member States to impose criminal sanctions for nine criminal offences, provided they were committed unlawfully, intentionally, or at least with serious negligence. Art. 5 of Directive 2008/99 obliged the Member States to impose effective, proportionate, and dissuasive penalties.

An evaluation of the 2008 Directive by the European Commission showed that there were serious problems with the criminal enforcement of environmental law generally within Member States.[2] In addition, two reports were commissioned by the European Parliament that both suggested a revision of the 2008 Directive. One report dealt with the liability of companies for environmental damage;[3] the other one dealt with "Tackling environmental crimes under EU law: the liability of companies in the context of corporate mergers and acquisitions".[4] This led the European Parliament to ask the Commission to revise the ECD 2008.[5] Moreover, in a research project labelled "European Union action to fight environmental crime" (EFFACE), commissioned by the European Commission[6] several suggestions were also formulated to revise the 2008 Directive.[7] Moreover, academic studies had been formulating various types of criticism on the 2008 Directive.[8] A first point of criticism addressed the definition of unlawfulness[9] in Art. 2(a) of Directive 2008/99:

> 'unlawful' means infringing (i) the legislation adopted pursuant to the EC Treaty and listed in Annex A; or (ii) with regards to activities covered by the EURATOM Treaty, the legislation adopted pursuant to the EURATOM Treaty and listed in Annex B; or (iii) a law, an administrative regulation of a Member State or a decision taken by a competent authority of a Member State that gives effect to the community legislation referred to in (i) or (ii).

Thus, the provision referred to a violation of either national legislation adopted pursuant to EU law (environmental directives or regulations contained in Annex A or Annex B) or domnestic (administrative) – environmental law implementing European environmental directives. In other words, the 2008 Directive offered no room for an autonomous approach to environmental crime, meaning that criminal liability could occur even in the absence of a violation of administrative obligations. Furthermore, the consequence of this definition of unlawfulness was that no criminal liability could be established as long as the conditions of an (administrative) permit are met.[10]

A second point of criticism of the 2008 Directive pertained to the fact that criminal law was considered the only means for an appropriate remedy for environmental harm; thus, the Directive completely ignored other remedies, such as administrative measures (including sanctions) or civil enforcement. Recital 3 of the Directive explicitly indicated that only criminal penalties "demonstrate a social disapproval of a qualitatively different nature compared to administrative penalties or compensation mechanisms in the civil law." As a result, the 2008 Directive was silent on administrative sanctions. This runs counter to a practice in many EU Member States to introduce the commonly known as "toolbox approach", i.e. making available a wide variety of different remedies to deal with environmental crime outside of the criminal law.[11]

A third point of criticism concerned the goal of the 2008 Directive to establish the Member States' obligation to criminalise the violation of national legislation implementing EU environmental law. This was considered important in order to deal with the "implementation deficit". The term describes the fact that a Member State could transpose environmental directives into its national law but could still

do very little to guarantee an effective application of that national legislation. As a result, no information was made available at the European level, for example, on the capacity available to monitor compliance with domestic environmental law implementing the European environmental *acquis*. Furthermore, information on the number of violations as well as the number of criminal cases dismissed, prosecuted, and adjudicated has also not been made available at the EU level. In other words: a Member State could opt for a formal transposition of EU environmental law into national law but there could subsequently be a huge difference between the Member States concerning the actual application of EU environmental law in practice.[12]

The new Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC (hereinafter Environmental Crime Directive – ECD)[13] responds to these points of criticism. It is not merely an amendment of its 2008 predecessor but also brings about fundamental changes. In some respects, one can say that it even marks a revolution. In the following, sections II-VI, I will illustrate the most important changes before conclusions are drawn in section VIII.

## III. Unlawfulness

First, the ECD provides for a different definition of unlawfulness. According to Art. 3(1) ECD, unlawfulness for the purpose of this Directive shall be conduct that breaches:

> Union law which contributes to pursuit of one of the objectives of the Union's policy on the environment as set out in Art. 191(1) TFEU; or
>
> A law, regulation, or administrative provision of a Member State or a decision taken by a competent authority of a Member State, which gives effect to the Union law referred to in point (a).

This differs from the approach taken in 2008. References to a long list of directives and regulations in the annex to the former Directive have been replaced by a broader substantive definition referring to Union law, which corresponds to the pursuit of one of the objectives of the EU policy on the environment.

The question as to whether compliance with an administrative permit excludes criminal liability is answered in Art. 3(1) subpara. 3 ECD:

> Such conduct shall be unlawful even where it is carried out under an authorisation issued by a competent authority of a Member State if such authorisation was obtained fraudulently or by corruption, extortion *or* coercion or if such authorisation is in manifest breach of relevant substantive legal requirements.[14]

This provision encompasses two situations in which an authorisation turns unlawful. The first situation pertains to a certain type of criminal behaviour (fraud, corruption, extortion, or coercion). Admittedly, it is questionable whether law enforcement authorities will actually be able to prove that the authorisation was obtained fraudulently in many cases.

The second situation will be more important in practice (when authorisation is in manifest breach of relevant substantive legal requirements). Such a clause could not be found in the original Commission proposal presented on 15 December 2021,[15] but it was introduced following intense debate in the European Parliament and during the trilogue negotiations. Members of the European Parliament (MEPs) realised that it is important to have the possibility to impose criminal liability under exceptional circumstances, even when the conditions of an administrative permit are followed by an economic operator. The wording "in manifest breach of relevant substantive legal requirements" establishes the possibility to introduce a truly autonomous environmental crime and will be revolutionary for most EU Member States.[16] An autonomous environmental crime signifies that criminal liability no longer depends upon the violation of administrative provisions. Moreover, compliance with administrative provisions (such as the conditions of an authorisation) will no longer exclude criminal liability. However, this criminal liability (even in case of compliance with an authorisation) can only be established in exceptional circumstances. Recital 10 ECD clarifies in this regard:

> in manifest breach of relevant substantive legal requirements" should be interpreted as referring to an obvious and substantial breach of relevant substantive legal requirements and is not intended to include breaches of procedural requirements or minor elements of the authorisation.

## III. Ecocide

Another important, novel issue is included in Art. 3(3) ECD. This provision obliges Member States to ensure that criminal offences relating to conduct listed in Art. 3 (2) constitute qualified criminal offences if the conduct causes one of the following:

> The destruction of, or widespread and substantial damage, which is either irreversible or long-lasting, to an ecosystem of considerable size or environmental value or a habitat within a protected site;
>
> Widespread and substantial damage, which is either irreversible or long-lasting to the quality of air, soil, or water.

Recital 21 ECD clarifies:

> those qualified criminal offences can encompass conduct comparable to 'ecocide', which is already covered by the law of certain Member States and which is being discussed in international fora.

Without using the word "ecocide" explicitly in the main text of the Directive itself, the introduction of the qualified offence of ecocide stemmed especially from pressure on the part of the Greens in the European Parliament. This criminalisation of ecocide (as a qualified offence), together with the possibility of an autonomous environmental crime as explained in section II., can undoubtedly substantially enlarge the scope of criminal liability, which in turn will raise the effectiveness of environmental criminal law.

The issue of ecocide is implicitly referred to in Art. 8(a) ECD, which obliges Member States to regard as an aggravating circumstance whether "the offence caused the destruction of, or irreversible or long-lasting substantial damage to, an ecosystem".

## IV. The Toolbox Approach

Although the new ECD stresses the significance of criminal law to protect the environment, the Directive's Recitals now also refer to possibilities of imposing administrative remedies.

Article 3(1) creates an obligation for Member States to determine 20 types of conduct (compared to nine in the 2008 Directive) that now constitute a criminal offence when committed intentionally and, for particular conduct referred to in paragraph 4 of Art. 3, when it is carried out with at least serious negligence. The Recitals do not explicitly refer to alternatives to the criminal law. For example, Recital (43) mentions that the Directive should not affect civil liability under national law or the obligation to compensate for harm or damage caused as a result of a given criminal offence defined in the Directive. Recital (45) mentions that the obligation provided for in the Directive to establish criminal penalties should not exempt Member States from the obligation to provide for administrative penalties and other measures in national law for breaches of Union environmental law. Generally, Recital (47) holds that judicial and administrative authorities in the Member States should have at their disposal a range of criminal and non-criminal penalties and other measures, including preventive measures, to address different types of criminal conduct in a tailored, timely, proportionate and effective manner. Moreover, the sanctions provided for in Art. 5 and Art. 7 include a wide variety of penalties for the judge to choose from. Art. 7(2) explicitly mentions that the penalties may include other criminal or non-criminal penalties or measures. The new Directive provides exactly the toolbox that was suggested in the literature. Art. 5 refers *inter alia* to the following penalties for natural persons:

- Obligation to restore the environment within a given period if the damage is reversible;
- Obligation to pay compensation for the damage to the environment if the damage is irreversible or the offender is not in a capacity to carry out such restoration;
- Exclusion from access to public funding, including tender procedures, grants, concessions, and licenses;
- Disqualification from holding, within a legal person, a leading position of the same type used for committing the offence;
- Withdrawal of permits and authorisations to pursue the activity that resulted in the relevant criminal offence;
- Temporary bans on running for public office.

Art. 7 also includes an impressive list of potential penalties for legal persons, some of which are similar to the ones for natural persons, but also including the following:

- Withdrawal of permits and authorisations to pursue activities that resulted in the relevant criminal offence;
- Being placed under judicial supervision;
- Judicial winding up;
- Closure of establishments used to commit the offence;
- Obligation to establish due diligence schemes for enhancing compliance with environmental standards.

Art. 10 ECD contains a provision on freezing and confiscation and holds that the Member States shall take the necessary measures to enable the tracing, identifying, freezing, and confiscating of instrumentalities and proceeds from the criminal offences referred to in Arts. 3 and 4.

## V. Minimum Sanctions

An important objective of the new ECD is to guarantee that offences would be punished with effective, proportionate, and dissuasive penalties in an equal way in all EU Member States, so that the above-mentioned implementation deficit can be eliminated. For this reason, Art. 5(2) introduced a series of concrete minimum sanctions applicable to natural persons. Some criminal offences must be punishable by a maximum term of imprisonment of at least 10 years if they cause the death of any person. For ecocide (Art. 3(3), see section III. above), the maximum term of imprisonment should be at least eight years; for yet other offences, it is either three or five years.

As far as legal persons are concerned, Art. 7(3) prescribes that when (either criminal or non-criminal) fines are warranted, the amount shall be proportionate to the gravity of the criminal conduct and to the individual, financial, and other circumstances of the legal person concerned. The provision continues that the maximum level of such fines may be no less than 5% of the total worldwide turnover of the legal person, either in the business year preceding the year in which the offence was committed or in the business year preceding that of the decision to impose the fine or an amount corresponding to €40 million. This applies to the criminal offences covered by Art. 3(2) points (a) to (l), and points (p), (s) and (t). For yet other offences (those covered by Art. 3(2), points (m), (n), (o), (q) and (r), the maximum level of the fine should be at least 3% of the worldwide turnover or an amount corresponding to €24 million. Above and beyond that, Member States can establish rules for cases in which it is not possible to determine the amount of the fine on the basis of the total worldwide turnover.

## VI. Statistical Data

In order to make evidence-based enforcement possible, Art. 22(1) ECD prescribes that Member States shall ensure that a system is in place for the recording, production, and provision of anonymised statistical data on the reporting, investigative, and judicial stages in relation to the criminal offences mentioned in the ECD.

Art. 22(2) provides that these data shall, as a minimum, refer to:

(a) The number of criminal offences registered and adjudicated by the Member States;

(b) The number of dismissed court cases, including those on the grounds of expiry of the limitation period for the criminal offence concerned;

(c) The number of natural persons that are:
  (i) prosecuted;
  (ii) convicted;

(d) The number of legal persons that are:
  (i) prosecuted;
  (ii) convicted and fined;

(e) The types and levels of penalties imposed.

Member States must also ensure that a consolidated review of their statistics is published at least every three years (Art. 22(3)). Each year, the Member States must transmit the data to the Commission (Art. 22(4)) in a standard format yet to be developed by the Commission in accordance with Art. 23 ECD.

## VII. Other Elements in the Enforcement of Environmental Criminal Law

The ECD includes other important elements aimed at improving the effective enforcement of environmental criminal law. Among others, these include the following:

- Art. 11 obliges the Member States to take necessary measures to provide for a limitation period that enables an effective investigation, prosecution, trial, and adjudication of the criminal offences contained in the ECD. Art. 11(2) prescribes minimum limitation periods.
- Art. 12 obliges the Member States to take the necessary measures to establish jurisdiction over the criminal offences contained in the Directive. The ECD in principle only applies to acts committed within the EU territory, but Member States are free to go further and expand their jurisdiction also to environmental crimes committed outside of the EU.
- Art. 13 obliges the Member States to take the necessary measures to ensure that effective and proportionate investigative tools are available for investigating or prosecuting the criminal offences contained in the ECD.
- Art. 14 obliges the Member States to take the necessary measures to ensure that any persons reporting the criminal offences contained in the ECD, providing evidence, or otherwise cooperating with competent authorities (whistleblowers) have access to support and assistance measures in the context of criminal proceedings in accordance with national law.
- Art. 16 obliges the Member States to take appropriate measures, such as information and awareness-raising campaigns, targeting relevant stakeholders from the public and private sectors in order to reduce the number and risk of environmental criminal offences.
- Art. 17 obliges the Member States to ensure that national authorities which detect, investigate, prosecute, or adjudicate environmental criminal offences have sufficient qualified staff and sufficient financial, technical, and technological resources for the effective performance of their functions related to the implementation of the ECD. Taking into account the constitutional traditions and structures of their legal systems, Member States should also estimate the need to increase the level of specialisation of these criminal enforcement authorities.
- Art. 18 obliges the Member States to take necessary measures to ensure that regular, specialised training is provided to judges, prosecutors, police, and judicial staff and to competent authorities' staff involved in criminal proceedings and investigations.

## VIII. Concluding Remarks

The new Directive on the protection of the environment through criminal law of 11 April 2024 can certainly be considered an important step in the development of environmental criminal law at the European level. The new Directive integrates a wide variety of suggestions put forward in the literature concerning the development of an effective environmental criminal enforcement system.

The Directive entered into force on 20 May 2024 (Art. 29 ECD); Member States have until 21 May 2026 (Art. 28 ECD) to implement the new regime. It will have important consequences for the effective application of environmental criminal law. The likely most revolutionary aspects are the introduction of a qualified offence of ecocide and an autonomous environmental crime if administrative authorisations were issued in "manifest breach of relevant substantive legal requirements." The Union legislature must be complimented for having resisted the undoubtedly strong lobbying by industry against the introduction of these provisions. Still, the new rule of "manifest breach of relevant substantive legal requirements" is, to some extent, only a first step, as these legal notions cannot simply be transposed into domestic legislation. The real work will now start at the level of the Member States, which must transpose the Directive into national law and, more specifically, turn these vague notions into a definition compatible with the legality principle. The ideal result will be a workable definition of an autonomous environmental crime.

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1 OJ L 328, 6.12.2008, 28.
2 See European Commission, Staff Working Document. Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (Environmental Crime Directive), SWD(2020) 259 final, 28.10.2020.
3 See https://www.europarl.europa.eu/RegData/etudes/STUD/2020/651698/IPOL_STU(2020)651698_EN.pdf, accessed 23 September 2024. See M. Faure, *Environmental Liability of Companies* (Study requested by the JURI Committee, PE651.698 – May 2020). Also published as M. Faure, 'Environmental Liability of Companies in Europe", (2022) 39 *Arizona J Int Comp L*, 1–152.
4 M. Faure, *Tackling Environmental Crimes under EU Law: The Liability of Companies in the Context of Corporate Mergers and Acquisitions*. Study requested by the JURI Committee of the European Parliament, PE-693.182 – June 2021, https://www/europarl.eu/RegData/etudes/STUD/2021/693182/IPOL_STU(2021)693182_EN.pdf, last accessed 23 September 2024.
5 As a result, in its 2021 work programme, the European Commission announced a revision of Directive 2008/99/EC on the protection of the environment through criminal law, see Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions*, A Union of Vitality in a World of Fragility*, COM(2020) 690 final.
6 See EFFACE, https://efface.eu/index/index.html, last accessed 23 September 2024.
7 See EFFACE, Conclusions and Recommendations, Deliverable No 7.4, ibid.
8 See inter alia M. Faure, "The Revolution in Environmental Criminal Law in Europe", (2017) 35 *Virginia Environmental Law Journal*, 321–356; G.M. Vagliasindi, "The EU Environmental Crime Directive", in: A. Farmer, M. Faure and G.M. Vagliasindi (eds.), *Environmental Crime in Europe*, 2017, pp. 31–55 and A. Di Landro, "Models of Environmental Criminal Law, between Dependence on Administrative Law and Autonomy", (2022) *European Energy and Environmental Law Review,* 272–297.
9 G.M. Vagliasindi, "The EU Environmental Crime Directive", in: A. Farmer, M. Faure and G.M. Vagliasindi (eds.), *Environmental Crime in Europe*, 2017, p. 41 and A. Di Landro, "Models of Environmental Criminal Law, between Dependence on Administrative Law and Autonomy", (2022) *European Energy and Environmental Law Review,* 283–284.
10 This was criticised inter alia in M. Faure, "Environmental Criminal Liability: The Long and Winding Road towards an Effective Environmental Criminal Law System in the EU", in: M. Peeters and M. Eliantonio (eds.), Research Handbook on EU Environmental Law, 2020, pp. 258–259 and in M. Faure, "The Revolution in Environmental Criminal Law in Europe", (2017) 35 Virginia Environmental Law Journal, 349.
11 This toolbox approach was suggested inter alia as a result of an interuniversity research project financed by the European Union, "European Union Action to Fight Environmental Crime" (EFFACE) (https://efface.eu/index/index.html).
12 M. Faure, "Environmental Criminal Liability: The Long and Winding Road towards an Effective Environmental Criminal Law System in the EU", in: M. Peeters and M. Eliantonio (eds.), Research Handbook on EU Environmental Law, 2020, p. 260.
13 OJ L, 2024/1203, 30.4.2024.
14 Emphasis added by author.
15 Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, COM(2021) 851 final.
16 On the meaning of this autonomous environmental crime, see M. Faure, "Autonomous Environmental Crimes and Ecocide", in: M. Luchtman et al. (eds.), Of Swords and Shields: Due Process and Crime Control in Times of Globalization. Liber Amicorum Prof.dr. J.A.E. Vervaele, 2023, pp. 195–204.

# A Critical Evaluation of the New EU Environmental Crime Directive 2024/1203

Ricardo Pereira

**After just over two years of negotiations, the EU Environmental Crime Directive 2024/1203 was finally published in April 2024. The Directive considerably improves on the text of the previous EU Environmental Crime Directive of 2008, which was introduced in the aftermath of the ECJ rulings on *Environmental Crimes* (2005) and *Ship-Source Pollution* (2007). The 2008 Directive has been subject to considerable criticism, including for the fact that it lacks detailed rules on criminal penalties or more advanced mechanisms for interstate cooperation to combat transboundary environmental crimes. In response, the 2024 Directive not only extends the number of environmental criminal offences in the EU Member States, but it also introduces specific types and levels of criminal penalties and specific rules on interstate cooperation in criminal matters. This article critically assesses to which extent the new EU rules improve the previous legal framework for combatting environmental crimes, in particular with the expansion of criminal offences and the introduction of specific criminal and non-criminal penalties.**

## I. Introductory Remarks

In December 2021, the European Commission published its long-awaited proposal on the recast Environmental Crime Directive (ECD).[1] This followed the consultation and evaluation of the 2008 Environmental Crime Directive[2] (hereinafter "2008 ECD") with several stakeholders from 2020 to 2021. The Commission proposal aimed to strengthen the implementation of EU environmental law by further harmonising environmental criminal law in several key areas, including the following:

- Criminal offences which had not been envisaged by the 2008 ECD, such as, illegal timber trade, illegal water extraction, illegal ship recycling, circumvention of an operator's obligation to conduct an environmental impact assessment (EIA), and introduction or spread of alien species;
- Specific types and levels of criminal penalties, including minimum–maximum prison sentences applicable to individuals[3] and financial penalties applicable to individuals or corporations;[4]
- Inclusion of rules on police and judicial cooperation in criminal matters in the context of transnational environmental crime, including rules on prosecution and jurisdiction.

Therefore, the Commission aimed to adopt a more comprehensive and prescriptive approach to the harmonisation of environmental criminal law in the EU, claiming – on the basis of existing studies on the implementation of the 2008 ECD[5] – the measures currently in place in the EU Member States to be insufficient to tackle environmental crime effectively.

After the Commission's proposal, the legislative process (under the ordinary legislative procedure)[6] continued as follows: the Council reached a general approach on the Commission's proposal at its meeting on 9 December 2022.[7] In turn, the European Parliament defined its position in April 2023.[8] Trilogue negotiations started in May 2023, and the negotiators reached an agreement on the text after the fourth trilogue meeting on 16 November 2023.[9] The European Parliament (at first reading session) adopted a legislative resolution on 27 February 2024 agreeing on the text of the Directive (with 499 votes in favour, 100 against, and 23 abstentions).[10] The Council finally adopted the recast ECD in March 2024 (by qualified majority voting with 25 delegations voting in favour of the new ECD while one delegation (Germany) abstained). The Directive (hereinafter 2024 ECD) was published in the Official Journal of 30 April 2024.[11] It replaces the 2008 ECD.[12]

With regard to the geographical scope of application, it should be borne in mind, however, that Denmark and Ireland are not bound by the 2024 ECD due to their opt-out arrangements in the Area of Freedom, Security and Justice (AFSJ).[13] This means that Denmark and Ireland will remain bound by the 2008 ECD, since their opt-outs do not apply to any legislation adopted under the pre-Lisbon first pillar.[14]

It is also noteworthy that the offence in relation to ship-source pollution, which had previously been included in a 2009 Directive,[15] has now been incorporated in the 2024 ECD.[16] As a consequence, the 2009 Directive on ship-source pollution crimes is replaced by the 2024 ECD as well, again with the exception of Denmark and Ireland.[17]

This article will examine key provisions of the 2024 ECD (particularly the new provisions concerning criminal offences and penalties) and critically assess the extent to which it may improve on the previous legal framework for combatting environmental crimes in the European Union.

## II. Key Reforms under the 2024 Environmental Crime Directive: the Expansion of Criminal Offences

Unlike the 2008 ECD, which contains a total of nine offences (including three pollution control offences,[18] two waste management offences,[19] three biodiversity offences,[20] and one atmospheric pollution management offence),[21] the 2024 ECD not only retains these offences (with some modifications ranging from significant to modest)[22] but introduces 12 new offences.[23] In addition, it introduces two new qualified offences for acts comparable to ecocide, largely thanks to the interventions of the European Parliament in the course of the ECD negotiations.[24] This extension largely reflects new developments in EU environmental law and policy, including new EU environmental legislation which was in the process of being adopted whilst the recast ECD was being negotiated.[25] Ultimately, this resulted in key amendments to the text of the 2024 ECD itself. In this regard, it should be noted that the 2008 ECD already provided for the option of that Directive being amended, taking into account new developments in EU environmental policy; yet this option was never exercised and no legislative amendments in accordance with the 2008 Directive were made.[26]

Overall, the new Art. 3(2) ECD lists a total of 21 offences dealing with a wide range of environmental policy concerns:

- Pollution control (including mercury pollution);[27]
- Waste management;[28]
- Dangerous activities in installations;[29]
- Offshore installation pollution;[30]
- Pollution by radioactive substances;[31]
- Invasive species;[32]
- Project execution/environmental impact assessment;[33]
- Waste shipment;[34]
- Ship-recycling;[35]
- Ship-source pollution;[36]
- Operation of an installation;[37]
- Radioactive materials;[38]
- Placing on market of commodities/illegal timber trade;[39]
- Ozone depleting substances;[40]
- Fluorinated greenhouse gases;[41]
- Illegal water abstraction;[42]
- Killing/possession of species;[43]
- Illegal trade in species[44];
- Habitat deterioration.[45]

The majority of these offences could be classified as "concrete endangerment offences" because they require that a specified threshold of environmental harm be met.[46] There are also "abstract endangerment offences," which do not depend on a threshold of environmental harm being met.[47] Yet, despite the move to significantly expand the number of offences, the 2024 ECD could be criticised for not having gone further and criminalised other activities with significant environmental or health impacts, in particular illegal, unreported, and unregulated (IUU) fishing,[48] fraud in the EU carbon markets,[49] illegal trade in genetically modified organisms (GMOs) and their deliberate release into the environment,[50] and the causing of forest fires[51] – none of which are covered as separate offences under the 2024 ECD.

As regards the definition of the offences in the 2024 ECD, another significant reform relates to the non-inclusion of amended versions of the two Annexes (A and B) of the 2008 ECD. Indeed, the 2008 ECD contains Appendix (A), listing 69 pieces of European Community (EC) environmental legislation which relate to the environmental offences defined in that Directive, and Annex B, listing three pieces of legislation adopted in the context of Euratom.[52] The fact that the 2008 ECD was adopted more than 15 years ago and considering the bulk of EU environmental legislation that has been adopted in the meantime[53] made a simple update of the list of EU environmental legislation in the two Annexes a less attractive option to the European Commission.

Yet, the deletion of the Annexes has neither led to a simplification of the criminal offences in the ECD nor to their "disentangling" from various pieces of EU environmental law legislative instruments.[54] In fact, through footnotes, cross-references, and sub-paragraphs, all of the 21 criminal offences in the 2024 ECD remain closely linked to and dependent on breaches of other pieces of EU environmental law.[55] This will result in a close interconnection between EU criminal law and EU environmental law, as the EU proceeds with its project of harmonising environmental criminal law. This reflects the choice of the legal basis for the 2024 ECD (Art. 83(2) TFEU). Art. 83(2) TFEU links the EU criminal-law powers to the effective implementation of a Union policy.

## III. Criminal and Non-Criminal Penalties

In line with the ECJ rulings on Environmental Crimes[56] and Ship-Source Pollution[57], the 2008 ECD does not contain specific types and levels of criminal penalties. It only contains general provisions on penalties applicable to natural persons[58] and legal persons,[59] requiring that penalties are

"effective, proportionate and dissuasive."[60] Conversely, as per the legal basis post-Lisbon enshrined in Art. 83(2) TFEU, the 2024 ECD prescribes specific types and levels of criminal penalties for both natural and legal persons. Although there are significant improvements in the 2024 ECD relating to several other areas such as, for example, jurisdiction,[61] crime prevention,[62] public participation in criminal proceedings,[63] limitation periods,[64] the protection of environmental defenders[65] and cooperation between Member States and EU agencies,[66] this section will focus on the level of penalties that apply to the criminal offences in Arts. 3 (2) and (3) of the 2024 ECD.[67]

### 1. Penalties for natural persons

The highest prison sentences for natural persons foreseen in the 2024 ECD is under Art. 5(2) lit. a). It requires Member States to introduce a maximum penalty of at least 10 years imprisonment "if [the offences] cause the death of any person." These offences relate primarily to pollution control offences.[68] The second highest criminal penalty for natural persons envisaged in 2024 ECD is a maximum of at least eight years imprisonment for the "ecocide" qualified offences (Art. 5(2) lit. b)). Although this can be considered a reasonably high minimum-maximum prison sentence for offences comparable to "ecocide",[69] it arguably indicates an anthropocentric direction of the 2024 ECD. Whereas the qualified offences in Art. 3(3) take an eco-centric formulation, the higher prison penalties envisaged in Art. 5(2) lit. a) are dependent on the element "death of a person". Yet, it is arguable that as offences "comparable to ecocide", these qualified offences should entail prison sentences at least as high as 10 years imprisonment as foreseen in Art. 5(2) lit. a) of the 2024 ECD.

An additional concern are the applicable, much lower, criminal penalties for natural persons for most biodiversity offences[70]; they are to be subject to a maximum term of imprisonment of at least three years.[71] This is regrettable, as it signals a clear anthropocentric direction of the 2024 ECD. It is also inconsistent with various international instruments (many of which are endorsed or ratified by the EU itself) recognising the seriousness and urgency of the global biodiversity and climate crises.[72] Lastly, we should consider the fact that some of these biodiversity offences tend to be committed in the context of criminal organisations.

### 2. Penalties for legal persons

Arguably the most significant provision concerning the liability of legal persons is Art. 7(3) of the 2024 ECD.[73] For the majority of the criminal offences in the 2024 ECD[74] the following minimum levels of fines are applicable to legal persons:

> (i) 5 % of the total worldwide turnover of the legal person, either in the business year preceding that in which the offence was committed, or in the business year preceding that of the decision to impose the fine,
>
> or
>
> (ii) an amount corresponding to €40 000 000.

It is notable that the Commission's 2021 ECD proposal did not include the option of payment of a lump sum of fines for legal persons and the only option available in that proposal would have been for fines to be calculated on the basis of a company's worldwide turnover.[75] The introduction of the lump sum is likely because, in some Member States, fines are not generally calculated on the basis of a company's total worldwide turnover or because the Council perceived that calculating fines only on the basis of turnover would entail particularly high (and potentially disproportionate) fines. Although the minimum maximum €40 million lump sum alternative fine is certainly high in absolute terms,[76] some observers might regard this approach as the Council's attempt to weaken the text concerning the liability of legal persons as laid down in its November 2022 mandate in the course of the negotiations.[77]

While the higher minimum-maximum penalties foreseen in Art. 7(3) lit. a) apply to most offences listed in Art. 3(2) of the 2024 ECD, in the case of five biodiversity and water resource offences[78] the minimum maximum penalties for legal persons only need to be "3% of the total worldwide turnover of the legal person" or "an amount corresponding to €24,000,000" (Art. 7(3) lit. b) i) and ii)). This again illustrates the inappropriately lower penalties for biodiversity crimes in the 2024 ECD.

### 3. Alternative penalties

In line with the need for a "toolbox" approach for the effective enforcement of environmental law,[79] the 2024 ECD recognises the need for further optional alternative penalties beyond the prison sentences for natural persons listed in Art. 5 or the financial penalties for legal persons listed in Art. 7. These optional alternative criminal or non-criminal penalties[80] include environmental restauration and compensation for environmental damage,[81] exclusion from access to public funding,[82] withdrawal of permits,[83] and other penalties which apply more specifically to legal persons such as placing under judicial supervision[84] and judicial winding-up.[85] It should be noted that it was largely thanks to the Council's insistence in the course of the negotiations[86] that these alternative sanctions – unlike the Commission's

2021 ECD proposal[87] – became optional rather than mandatory penalties and that they may be of either a criminal or non-criminal nature.[88] This is a clear indication that the Council acted to weaken the text of the recast ECD when it comes to the available framework of penalties for environmental offences – a point of considerable criticism by some observers in the course of the negotiations.[89]

## IV. Conclusion

Whereas the 2008 ECD only had limited success in establishing a broad supranational framework for the harmonisation of environmental criminal law,[90] the 2024 ECD adopts a much more comprehensive and prescriptive approach. It makes use of the extended criminal law powers under Art. 83(2) TFEU post-Lisbon. As a consequence, unlike its predecessor, the 2024 ECD is now firmly established as an EU criminal law instrument, even though it continues to largely rely on EU environmental law for its implementation (especially when it comes to the definition of offences). While many of the core provisions proposed by the Commission in 2021 still stood at the end of the negotiations, the Council's interventions can be regarded as having led to the weakening of the text (particularly regarding the types and levels of penalties applicable to natural and legal persons). Yet, the European Parliament's achievements in the legislative process will be best remembered for firmly inserting the "ecocide" qualified offences into the final text.

In light of the above analysis of the reforms concerning the expansion of criminal offences and non-criminal penalties in the 2024 ECD, there will be numerous challenges when it comes to its incorporation into the national legal systems of the EU Member States. Given its inherent complexities, the 2024 ECD will probably not be remembered as a model for future legislative drafting. However, there is no doubt that the 2024 ECD is likely to bring considerable improvements and important additional enforcement tools to the fight against environmental crime in the EU.

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1 Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, Brussels, 15.12.2021, COM(2021) 851 final.
2 Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law, OJ L 328, 6.12.2008, 28.
3 Art. 5 COM(2021) 851, *op. cit. (n. 1)*.
4 Arts. 5 and 7 COM(2021) 851, *op. cit. (n. 1)*.
5 See further e.g. Commission Working Document, Evaluation of the Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law ('Environmental Crime Directive'), Brussels, 28.10.2020, SWD(2020) 259 final; and Milieu (Law & Policy Consulting), Study to supply the Impact Assessment of the Directive 2008/99/EC on the protection of the environment through criminal law, JUST/2020/JACC/FW/CRIM/0122, 9 December 2021, available at: <https://commission.europa.eu/system/files/2022-02/study_final_report_en.pdf>. All hyperlinks in this article were last accessed on 30 October 2024.
6 Reference: COD 2021/0422.
7 See General Secretariat of the Council, Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law – General Approach, Brussels, 16 December 2022, Council doc. 16171/22.
8 See Report on the proposal for a directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC - Amendments by the European Parliament, A9-0087/2023, 28 March 2023, available at: <https://www.europarl.europa.eu/doceo/document/A-9-2023-0087_EN.html>.
9 See Draft Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, Council doc. 17114/23, 22 December 2023.
10 P9_TA(2024)0093. See also the EP's Press Release, "Environmental Crimes: MEPs adopt extended list of offences and sanctions", 27 February 2024, available at: <https://www.europarl.europa.eu/pdfs/news/expert/2024/2/press_release/20240223IPR18075/20240223IPR18075_en.pdf>.
11 Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, OJ L, 2024/1203, 30.4.2024.
12 Art. 26 of the 2024 ECD. Note: If not stated otherwise, references to provisions (Articles) in the following endnotes refer to the 2024 ECD, *op. cit.* (n. 11).
13 See also Recitals 69 and 70 of the 2024 ECD.
14 For an analysis of the implications of Brexit for the implementation of the 2008 ECD in the UK, see R. Pereira "The development of environmental criminal law enforcement in the European Union: from institutional fragmentation to European environmental criminal justice governance?", in: R. Pereira, A. Engel and S. Miettinen (eds.), *The Governance of Criminal Justice in the European Union: Transnationalism, Localism and Public Participation in an Evolving Constitutional Order,* 2020, pp. 181 et seq. See also in the same collective book the chapter by V. Mitsilegas, "After Brexit: reframing EU-UK cooperation in criminal matters", pp. 17 et seq., and M. Lennan, "Evaluating the effectiveness of the EU Environmental Liability and Environmental Crime Directives as implemented by Scotland and the rest of the United Kingdom", (2021) 24 (1), *Journal of International Wildlife Law & Policy,* 26–37.

15 Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringement, OJ L 280, 27.10.2009, 52.
16 Art. 3(2) lit. i).
17 Cf. Art. 27. It should be noted though that Directive 2005/35/EC ("the ship-source pollution directive") remains in force for all EU Member States (yet without the Directive 2009/123/EC amendment, which only applies now to Ireland and Denmark). See Directive 2005/35/EC of the European Parliament and of the Council of 7 September 2005 on ship-source pollution and on the introduction of penalties for infringements, OJ L 255, 30.09.2005, 11. It should also be noted that the ship-source pollution directive is being revised at the time of writing, see Proposal for a Directive of the European Parliament and of the Council amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties, including criminal penalties, for pollution offences, COM(2023) 273 final.
18 Art. 3 lit. a), d) and e) of the 2008 ECD.
19 Art. 3 lit. b) and c) of the 2008 ECD.
20 Art. 3 lit. f), g) and h) of the 2008 ECD.
21 Art. 3 lit. i) of the 2008 ECD.
22 Compare, for example, the waste management offences in Art. 3(2) lit. f) of the 2024 ECD and Art. 3 lit. b) of the 2008 ECD; the waste shipment offence in Art. 3 lit. e) of the 2008 ECD and the equivalent new offence under Art. 3(2) lit. g) of the 2024 ECD; the offence concerning the operation of a plant in which a dangerous activity is carried out under Art. 3(2) lit. j) of the 2024 ECD reflects the same offence in Art. 3 lit. d) of the 2008 ECD; the offence relating to killing/destruction/sale etc of species in Art. 3(2) lit. n) of the 2024 ECD largely corresponds to Art. 3 lit. f) of the 2008 ECD; and the offence relating to trade in endangered species in Art. 3(2) lit. o) of the 2024 ECD corresponds to Art. 3 lit. g) of the 2008 ECD.
23 Art. 3(2) lit. b) (placing on market of product); Art. 3(2) lit. c) (the manufacturing/placing on the market of substance); Art. 3(2) lit. d) (mercury pollution); Art. 3(2) lit. e) (execution of projects carried out without a development consent); Art. 3(2) lit. h) (illegal ship recycling); Art. 3(2) lit. i) (ship- source pollution); Art. 3(2) lit. k) (pollution from offshore installations); Art. 3(2) lit. t) (fluorinated greenhouse gases pollution); Art. 3(2) lit. m) (water abstraction pollution); Art. 3(2) lit. p) (placing in market of relevant forest commodities); Art. 3(2) lit. r) (introduction/keeping etc invasive species) including two separate offences/restrictions ((i) and (ii)).
24 Art. 3(3) lit. a) and b). On the European Parliament's position in the negotiations, see EP, A9–0087/2023, *op. cit.* (n. 8).
25 This includes e.g. Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May 2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, 206; and Regulation (EU) 2024/573 of the European Parliament and of the Council of 7 February 2024 on fluorinated greenhouse gases, amending Directive (EU) 2019/1937 and repealing Regulation (EU) No 517/2014, OJ L 2024/573, 20.2.2024.
26 Recital 15 of the 2008 ECD states: "[w]henever subsequent legislation on environmental matters is adopted, it should specify where appropriate that this Directive will apply. Where necessary, Article 3 should be amended". Author's note: Art. 3 of the 2008 ECD defines the criminal offences. See further R. Pereira, *Environmental Criminal Liability and Enforcement in European and International Law,* 2015; R. Pereira, "The Legal Basis for Harmonisation of Environmental Criminal Law in the EU: Past and Future Challenges", in: M. Andenas and C. Andersen (eds.), *Theory and Practice of Harmonisation,* 2012, pp. 403 et seq.
27 Art. 3(2) lit. d).
28 Art. 3(2) lit. f).
29 Art. 3(2) lit. j).
30 Art. 3(2) lit. k).
31 Art. 3(2) lit. l).
32 Art. 3(2) lit. r).
33 Art. 3(2) lit. e).
34 Art. 3(2) lit. g).
35 Art. 3(2) lit. h).
36 Art. 3(2) lit. i).
37 Art. 3(2) lit. k).
38 Art. 3(2) lit. l).
39 Art. 3(2) lit. p).
40 Art. 3(2) lit. s).
41 Art. 3(2) lit. t).
42 Art. 3(2) lit. m).
43 Art. 3(2) lit. n).
44 Art. 3(2) lit. o).
45 Art. 3(2) lit. q).
46 Under the 2024 ECD, the threshold of environmental damage for most offences is typically that the prohibited conduct causes or is likely to cause "the death of, or serious injury to, any person, substantial damage to the quality of air, soil or water, or substantial damage to an ecosystem, animals or plants." See e.g. the offences in Art. 3(2) lit. a) and Art. 3(2) lit. b).
47 In particular, the waste shipment offence (Art. 3(2) lit. g); the ship recycling offence (Art. 3(2) lit. h); the trade etc in ozone depleting substances offence (Art. 3(2) lit. s)) and the trade in fluorinated greenhouse gases offence (Art. 3(2) lit. t). On the distinction between concrete endangerment, absolute endangerment and abstract endangerment offences, see further M. Faure and S.J. Lopik, "Methods for Environmental Criminal Law Research", in R. Pereira and T. Fajardo (eds.), *A Research Agenda for Environmental Crime and Law* (Edward Elgar, forthcoming in 2024/2025). For an analysis of the implementation challenges of those offences in selected EU Member States, see further A. Farmer, M. Faure and G. M. Vagliasindi (eds.), *Environmental Crime in Europe,* 2018.
48 Although IUU fishing is not listed as a separate offence in Art. 3(2), Recital 8 of the 2024 ECD reads: "[i]n the framework of the common fisheries policy, Union law provides for a comprehensive set of rules for control and enforcement under Council Regulations (EC) No 1224/2009 and (EC) No 1005/2008 in the event of serious infringements, including those that cause damage to the marine environment" and it goes further to state that "certain intentional unlawful conduct covered by Regulation (EC) No 1224/2009 and Regulation (EC) No 1005/2008 should be established as a criminal offence." The European Parliament draft (*op. cit.* (n. 8))proposed the inclusion of a new criminal offence (ra) linked to violations of EU fisheries laws adopted in the context of common fisheries policies, including Council Regulations (EC) No 1224/2009 and (EC) No 1005/2008.
49 See generally, K. Nield and R. Pereira, "Financial Crimes in the European Carbon Markets", in S. Weishaar (ed.), *Research Handbook on Emissions Trading*, 2016, pp. 195–231; and K. Nield and R. Pereira, "Fraud on the European Emissions Trading Scheme: Effects, Vulnerabilities and Regulatory Reform", (2011) 20(6) *European Energy & Environmental Law Review*, 255–286.
50 In this context, a notable reform is the following: While Directive 2001/18/EC on the deliberate release into the environment of genetically modified organism is listed in Annex A of the 2008 ECD in connection with some of the pollution control and biodiversity offences contained in that directive, Directive 2001/18/EC no longer appears listed as linked to any of the environmental criminal offences in the 2024 ECD.
51 It should be noted that Recital 21 of the 2024 ECD states: "Criminal offences relating to intentional conduct listed in this Directive can lead to catastrophic results, such as widespread pollution, industrial accidents with severe effects on the environment or *large-scale forest fires*." (emphasis added).
52 Thus, no "autonomous" environmental offences (i.e. criminalising national environmental law, regardless of whether or not persons violated EU environmental legislation) are neither contained in the 2008 ECD nor in the 2024 ECD. See Art. 3 of the 2008 ECD and Art. 3 of the 2024 ECD.

53 In relation to the new offences in the 2024 ECD, see e.g. Regulation (EU) 2017/852 of the European Parliament and of the Council of 17 May 2017 on mercury, and repealing Regulation (EC) No 1102/2008, OJ L 137, 24.5.2017, 1; Regulation (EU) No 1143/2014 of the European Parliament and of the Council of 22 October 2014 on the prevention and management of the introduction and spread of invasive alien species, OJ L 317, 4.11.2014, 35; Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on safety of offshore oil and gas operations and amending Directive 2004/35/EC, OJ L 178, 28.6.2013, 66; Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment, OJ L 26, 28.1.2012, 1.
54 See further, R. Pereira, *Environmental Criminal Liability*, *op. cit.* (n. 26).
55 This is not the case however of the offences relating to "the discharge, emissions etc of a quantity of materials […] or radiation" (Art. 3(2)a)) and to "the placing on the market […] of a product […]" (Art. 3(2)b) of 2024 ECD) which are not directly linked to breaches of any specific EU legislative instruments. The references to EU environmental law in this article will be made to broadly also include environmental policy areas adopted on the basis of legal bases beyond the "environmental title" framework of Art. 192 TFEU, for example Art. 100(2) TFEU (common transport policy) and Art. 114 TFEU (internal market).
56 ECJ, Case C- 176/03, Commission of the European Communities v Council of the European Union, ECR [2005], p-I-7879.
57 ECJ, Case C- 440/05, Commission of the European Communities v Council of the European Union, ECR [2007] p. I-0909, para. 70.
58 Art. 5 of the 2008 ECD.
59 Art. 7 of the 2008 ECD.
60 In line with the CJEU case-law, see e.g. Case 68/88 Commission v. Hellenic Republic [1989] ECR 2965; Case 265/95 Commission v. France [1997] ECR 6959.
61 Art. 12.
62 Art. 16.
63 Art. 15. On the question of participatory governance in EU criminal justice, see further R. Pereira, A. Engel and S. Miettinen (eds), *The Governance of Criminal Justice in the European Union, op. cit.* (n. 14).
64 Art. 10.
65 Art. 14.
66 Art. 20. On this question, see further V. Mitsilegas and F. Giuffrida, "The Role of EU Agencies in Fighting Transnational Environmental Crime: New Challenges for Eurojust and Europol", *Brill Transnatioal Crime 1.1* (2017), 1–150. For a possible extension of the competence of the European Public Prosecutor's Office (EPPO) over environmental crime, see M. Jimeno Bulnes, "The European Public Prosecutor's Office and Environmental Crime - Further Competence in the Near Future?", in this issue; C. Di Francesco Maesa, "EPPO and Environmental Crime: May the EPPO ensure a more effective protection of the environment in the EU?", (2018) 9(2) *New Journal of European Criminal Law (NJECL)*, 191.
67 On the deterrent effects of environmental criminal penalties, see further C. Abott, *Enforcing Pollution Control Regulation: Strengthening Sanctions and Improving Deterrence,'* 2009; R. Pereira, *Environmental Criminal Liability, op. cit.* (n. 26), See also more generally: P. Robinson and J. Darley, "Does Criminal Law Deter? A Behavioural Science Investigation" (2004) 24 (2) *Oxford Journal of Legal Studies*, 173; G. Becker, "Crime and Punishment: An Economic Approach" (1968) 76 *Journal of Political Economy*, 161.
68 The offences subject to a minimum-maximum penalty of imprisonment of 10 years under Art. 5(2) lit. a) concern: pollution control (including the new mercury pollution offence – Art. 3(2) lit. a)–d)); waste management (Art. 3(2) lit. f)); dangerous installations (Art. 3(2) lit. j)); offshore installation pollution (Art. 3(2) lit. k)); pollution by radioactive substances (Art. 3(2) lit. l)); and invasive species (Art. 3(2) lit. r)).
69 Although it is lower than the prison penalties foreseen for "ecocide" in several former Soviet States that tend to range from 10–20 years imprisonment; and lower than the prison sentences available for "ecocide" in at least two EU Member States, i.e. Belgium and France. See further R. Killean and D. Short, *Scoping a Domestic Legal Framework for Ecocide in Scotland*, Report for the Environmental Rights Centre for Scotland (ERCS), March 2024, available at <https://www.ercs.scot/wp/wp-content/uploads/2024/04/Scoping-a-Domestic-Legal-Framework-for-Ecocide-in-Scotland_April24_online.pdf>.
70 With the notable exception of the offence in Art. 3 (2) lit. p) relating to placing on Union market of relevant commodities or products in breach of Regulation (EU) 2023/1115 on deforestation-free products, which is subject to a minimum maximum imprisonment of at least 5 years (Art. 5(2) lit. c)).
71 The biodiversity and water resources offences in Art. 3(2) relate to illegal water abstraction (lit. m); killing/possession etc of species (lit. n), illegal trade in species (lit. o), deterioration of a habitat (lit. q) and keeping/breeding etc of invasive species (lit. r).
72 See e.g. Convention on Biological Diversity, Kumming-Montreal Global Biodiversity Framework (CBD/COP/15/L25), December 2022. See also the Communications of the Commission of 11 December 2019 on "The European Green Deal" and of 20 May 2020 on "EU Biodiversity Strategy for 2030. Bringing nature back into our live." See further, L. Kramer, "Biodiversity Crime", in: R. Pereira and T. Fajardo (eds.), *A Research Agenda for Environmental Crime and Law* (Edward Elgar, forthcoming in 2025).
73 Arts. 6 and 7(1) largely follow the text of the 2008 ECD. They clarify, however, that criminal penalties applicable to legal persons may be of a criminal or non-criminal nature.
74 Offences listed in Art. 3(2) lit. a) to l), and lit. p), s) and t).
75 Art. 7(4) and (5) of the Commission proposal, *op cit.* (n. 1).
76 This can be illustrated by the increased levels of criminal penalties following the publication of the Sentencing Council Environmental Offences Guidelines (2013) in the UK.
77 See Council General Approach, *op. cit.* (n. 7).
78 Art. 3(2) lit. m) (water abstraction), lit. n) (killing/taking etc of species), lit. o) (illegal wildlife trade), lit. q) (habitat loss) and lit. r) (keeping/breeding etc invasive species).
79 See further M. Faure, "The Development of Environmental Criminal Law in the EU and its Member States", (2017) 26 (2) *Review of European, Comparative and International Environmental Law,* 139.
80 The fact that these are optional rather than mandatory penalties is clear from the use of the terms "may" and "such as" in Art. 5(3) and Art. 7(2).
81 Art. 5(3) lit. a).
82 Art. 5(3) lit. c).
83 Art. 5(3) lit. e).
84 Art. 7(2) lit. f).
85 Art. 7(2) lit. g).
86 See Council doc. 16171/22, *op. cit.* (n. 7).
87 Compare with Art. 5(5) and Art. 7(2) of the Commission's proposal (*op. cit.* (n. 1)), which would have required Member States to introduce all of the alternative sanctions with the use of the term "shall include".
88 While this was to be expected in the case of legal persons (given the differences in the EU Member States concerning the possibility of holding corporations criminally liable), the 2024 ECD could have required that the alternative penalties for natural persons are of a criminal nature.
89 See e.g. WWF, "Member States against strong EU rules to penalise environmental crimes", 9 December 2022, available at <https://www.wwf.eu/?8400366/Member-States-against-strong-EU-rules-to-penalise-environmental-crimes>.
90 See also, R. Pereira, "Towards Effective Implementation of the EU Environmental Crime Directive? The Case of Illegal Waste Management and Trafficking Offences", (2017) 26 *Review of European, Comparative and International Environmental Law*, 147–162.

# The Revised EU Environmental Crime Directive

## Changes and Challenges in EU Environmental Criminal Law with Examples from Sweden

Christina Olsen Lundh*

**Environmental crime includes wildlife crimes, illegal waste dumping, substance smuggling, and illegal mining. These types of crime lead to habitat loss and species extinction, contribute to global warming, destabilise communities and economies, undermine security and development, and foster corruption. Often transnational in nature, environmental crime has become a lucrative industry for organised crime, which is underpinned by Europol research that has identified numerous criminal networks operating within the EU specializing in waste, pollution, and wildlife crimes. However, there is a lack of comprehensive data, which hampers evaluation and monitoring of measures by policymakers and practitioners. Limited awareness and scarce resource allocation for combating environmental crime is an overarching problem.**

**The Environmental Crime Directive adopted in 2008 aimed to address some of these issues, but the European Commission's evaluation found that it did not have much effect in practice. In April 2024, a revised directive was adopted. It introduces several new offences, defines concrete types and levels of penalties, and emphasizes resource allocation, cooperation, awareness, and support for environmental defenders. This article describes some of the novelties of the Environmental Crime Directive and provides food for thought regarding the challenges in implementing the directive.**

### I. Introduction – EU Environmental Criminal Law

In the European Union (EU), environmental criminal law[1] is established as an autonomous legal field.[2] The term "environmental crime" covers many areas, for example wildlife crime[3] (including forestry and fishery crimes), illegal dumping of waste, smuggling of substances, and illegal mining.[4]

Abuse or vandalism, for example, are criminalised because the actions inflict harm on people or property, and society wants people to avoid causing harm. Environmental criminal law serves to prevent such harm and also aims to ensure the sustainability of natural resource systems and a healthy environment.[5] Illegal logging, for example, causes habitat loss, species extinction, and landslides and contributes to global warming.[6] Wildlife trafficking contributes to species extinction, might spread disease,[7] and causes great suffering to the lives of animals involved.[8] Above all, natural resources are finite.[9] About one million species are currently threatened with extinction, at risk of disappearing within decades.[10] Environmental crime also destabilizes communities and economies and has a deleterious impact on security and development; it weakens the rule of law and fosters corruption.[11]

Environmental crime often has a transnational and transcriminal character.[12] It has become the third most lucrative industry for organised crime groups, generating up to USD 280 billion per annum. The black market for illegal wildlife products alone is worth up to USD 20 billion per year.[13] Europol has mapped 821 highly threatening criminal networks operating within the EU. Among these networks, four specialise in waste and pollution crimes, while three focus solely on wildlife crimes. Additionally, 12 networks engage in environmental crime alongside other criminal activities, primarily drug trafficking.[14]

Yet, environmental crime cases represented less than 1% of Eurojust's total casework for the years 2014-2018, a figure that is most likely underestimated. The underestimate may be due to the fact that environmental crime is often linked to crimes like fraud, document forgery, and money laundering. These crimes often take precedence over environmental crime, leading to environmental offenses being inadequately investigated and prosecuted (and even reported).[15] Lack of comprehensive statistical data hampers both the evaluation and effective monitoring of measures by national policymakers and practitioners. Additionally, it leads to limited awareness and resource allocation for combating environmental crime and creates practical challenges and inconsistencies for law enforcement.[16]

As part of the Green Deal,[17] the European Commission decided to evaluate the 2008 Directive on the protection of the environment through criminal law and found that it did not have much effect in practice. The number of cases successfully investigated and sentenced had remained at a very low level.[18]

Against this background, the 2008 Directive was revised and replaced by Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the

protection of the environment through criminal law (hereinafter: ECD)[19] The ECD covers twenty different types of offences plus has a provision that obligates the Member States to establish qualified offences, which are subject to more severe penalties when the offences defined lead to serious widespread and substantial (i.e., irreversible or long-lasting) damage or destruction of the environment.[20] The ECD has added new offences, for example against unlawful ship recycling, water abstraction, and serious breaches of EU laws on chemicals and mercury laws, fluorinated greenhouse gases, and invasive species legislation. The ECD is supplemented by several sectoral Regulations, such as the Regulation on illegal, unreported and unregulated fishing[21] (aiming at preventing, deterring, and eliminating such practices), and the Wildlife Trade Regulations[22].

In the following, I will highlight some challenges in EU environmental criminal law and explain how the 2024 Directive seeks to resolve these issues. These solutions involve the need for clear definitions of criminalised conduct. The need for clarity, particularly in implementation, is underscored by the application of criminal law principles, including *mens rea* requirements (II), the need to enhance the ability to detect and prosecute environmental crimes (III), and the need to ensure a more equitable "level playing field" for sanctions and other consequences for those who harm the environment (IV). The discussion of these challenges and solutions is supported by examples from Sweden. In section (V), I offer some thoughts on the future enforcement of environmental crime in the EU and provide concluding remarks.

## II. Knowing What Is Criminal

Assuming people generally avoid criminal behaviour, it is essential to know what to refrain from. Authorities must also understand when an act constitutes a crime. In environmental law, the line between legal and illegal behaviour is often blurred and difficult to detect. A reasonable assumption might be that anything causing major damage is illegal, but that is not always the case. In principle, all human actions cause major damage to the environment and ecosystems, yet most of these actions are legal. What is criminalised depends on cultural, temporal, local, and normative assumptions, which are constantly changing.

In most EU Member States, administrative environmental law and criminal environmental law co-exist. Whether or not a conduct is punishable as crime may depend on whether an administrative permit allows the conduct in question.[23]

According to the ECD, in order to constitute a criminal offence, a conduct must be "unlawful", meaning, first, a behaviour that violates Union law adopted to achieve one of the objectives in Art. 191(1) TFEU.[24] This covers all EU law contributing to these objectives, *irrespective* of its legal basis.[25] Secondly, an "unlawful" act can also constitute a breach of a national administrative regulation or decision, giving effect to Union environmental law. In some cases, a certain *consequence of a conduct* must follow in order for the conduct to be criminal and sometimes also *a certain effect* (i.e., emissions as a consequence of a conduct and then damage to the environment as an effect of the emissions). A conduct constitutes a criminal offence when committed *intentionally* and, for some crimes, also when committed with *at least serious negligence*. Failure to comply with a legal duty to act can have the same negative effect on the environment and human health as active conduct. Therefore, the definition of criminal offences covers both acts and omissions, where applicable.[26]

### 1. Nullum crimen sine lege

In criminal legislation, the principle of legality (*nullum crimen/nulla poena sine lege*) demands foreseeability and precision. Criminal law provisions must be reasonably comprehensible and have a clear and unambiguous legal basis[27] to ensure that everyone knows the legal limits: if it is not defined as a crime, it is not a crime; and if no sanctions are prescribed, none can be imposed.

The importance of being precise has long been emphasised by the CJEU.[28] Prohibitions of a criminal nature must be clearly worded; it is often necessary to set out precisely the types of conduct that are prohibited.[29] Although definitions are more precise in the 2024 ECD than in its 2008 predecessor, most interpretations require a deeper understanding of the underlying environmental law. This is especially since the ECD stipulates that relevant terms used when defining unlawful conduct should be construed in accordance with definitions in EU environmental law.[30] This requirement is accentuated by the difficulties of interpretation underlying environmental directives (corroborated by the number of references for preliminary rulings[31] and infringement proceedings[32] in the environmental policy area).

The following example from Swedish case law may illustrate the difficulties described above.

A case from the Swedish Supreme Court (*Högsta domstolen*)[33] concerned the marketing of twelve coyote skins (in Swedish "*prärievarg*") under the designation "*vargskinn*" ("wolfskin").

The alleged offence concerned the marketing of specimens from species listed in Annex A of the CITES Regulation[34], namely the wolf (*Canis lupus*). The coyote (*Canis latrans*) is not listed. The defendant explained that he had sold the skins as "wolfskins" at a market stall during a historically themed event (a "medieval market"), since while wolves had once existed in the area, there had never been coyotes. Consequently, although he had labelled them as "wolfskins" for thematic reasons, he had not intended to sell the hide of a protected species

The Swedish Environmental Code criminalises the marketing of animals, plants, etc. if it is in violation of Art. 8(1) of the CITES Regulation,[35] according to which, *inter alia*, the offering for sale of specimens of species listed in Annex A is prohibited. In Art. 2 lit t) "specimen" is defined as follows:

> any animal or plant […] of the species listed in Annexes A […] as well as any other goods *which appear* from […] a mark or label, or from any other circumstances, to be […] animals or plants of those species.[36]

Looking only at the English version of the text, the *marketing* as a wolfskin was prohibited, no matter what type of skin it was. The defendant had marketed goods that *appeared to be* from wolves. However, the Swedish text version of the Regulation lacks the word "appear".[37]

The Swedish Supreme Court held that if the wording of the provision neither provides the text with understandable content nor makes it clear that the act in question is punishable in any other way, a conviction would be contrary to the principle of legality. As a result, the seller was found not guilty. The court thus ruled in accordance with the wording of the Swedish language version of the Regulation and with the principle of legality, which is enshrined in both EU and national law.

## 2. Awareness

Given that individuals typically seek to avoid unlawful conduct, it becomes crucial to have clarity on what actions are prohibited. In wildlife trafficking, people often unknowingly commit crimes. For example, Europeans buy souvenirs made of endangered species on trips abroad and then bring them back to Europe: tequila bottles containing endangered snakes, food items, leather goods, shells (also as bracelets or neckless), ivory, musical instruments, and medicine. To be legal, trade in endangered species, including products made from them, must be sustainable and traceable. This means that all imports, exports, re-exports, etc. of such species must be authorised through a licensing system.[38] The species covered (approximately 35,800 animal and plant species) are listed in three categories, depending on the level of protection they require. Trade is only allowed in accordance with the provisions of the CITES Regulation.[39] Many of the illegal souvenirs are sold openly, giving the buyer the impression that the products are legal; however, by participating in the trade, the tourist is committing a crime that they likely do not intend to commit.

Awareness of restrictions might not only affect peoples' actions. It might also affect whether an act is considered intentional or negligent. In the following, I will illustrate the *mens rea* problem regarding awareness of the criminalisation through two Swedish cases. The first example concerns wildlife trade the second example concerns waste trade. In NJA 2012 p. 28, a stuffed Eurasian Goshawk (*accipiter gentilis*) was marketed on an internet buy-and-sell website. The seller claimed he had never heard the word CITES and was unaware of the fact that the Eurasian Goshawk is a protected species and that, if he had known, he would never have sold it. Since knowledge is a necessary prerequisite, the Swedish Supreme Court found the seller guilty of having *negligently* sold the Eurasian Goshawk in violation of Art. 8(1) of the CITES Regulation. The defendant could easily have asked the Swedish Agricultural Agency whether its sale was permitted or not. The court's verdict means that, to establish intention, the perpetrator needs to have knowledge about everything in the provision, including the content of Art. 8(1) of the CITES Regulation. Acting without this knowledge, yet still acting, was considered as negligent but not intentional behaviour. [40]

In another case,[41] a man transported a container with *inter alia* 80 television sets with cathode ray tubes from a Swedish port with Ghana as the final destination. In Rotterdam, the container was stopped by Dutch authorities and shipped back to Sweden. The man was charged for having attempted, intentionally or negligently, to export hazardous waste from the EU to Ghana,[42] and thereby violating an export ban according to Art. 36 of the Waste Shipment Regulation.[43] The Regulation prohibits the export of *inter alia* hazardous waste for recycling to countries that are not members of the OECD. The man claimed that the goods were not hazardous waste; the intention was to sell them as used goods in Ghana. The Scania and Blekinge Court of Appeal (in Malmö) held that the defendant's statement implied no intention to export "hazardous waste for recycling" on his part. However, in acting as a trader, he should have informed himself and ensured that the export was legal. The waste had not crossed the EU border, and so the offence was not completed. As a result, the Court of Appeal found him negligent and guilty of attempted unauthorized waste transport. In the Court of Appeal, he was thus convicted of attempted unlawful waste transport. The Swedish

Supreme Court shared the view that the defendant was negligent. However, it emphasized that, since the transport was stopped in Rotterdam, the act constituted only an attempt. As a general principle of criminal law, the Supreme Court stressed, criminal liability for *attempt* presupposes *intent* to complete the crime. Given that the defendant had no intention to export hazardous waste, he could not have been trying to do so. Therefore, he was found not guilty. Also in this case, acting without knowledge, yet still acting, was considered negligent but not intentional. The problem here was that the transport was discovered just *before* it crossed the border, which was a prerequisite for the crime to be complete. Since then, the provision in Swedish legislation has been changed.[44] For criminal liability, the transport does not need to *cross* a geographical border. The crime is now considered consummated when someone organizes or carries out the transport, provided that the other elements of the offence are met; the transport itself does not need to have started yet.

The ECD emphasises and calls for various measures to raise public awareness about environmental crime, which include campaigns targeting relevant stakeholders as well as the development of research and education programmes.[45] Ultimately, this may complicate claims of a lack of *mens rea* based on ignorance, particularly given that, in cases of doubt, one is required to consult the relevant authority.

In this context, it is important to note that the ECD deems some conducts unlawful even if *carried out under an authorisation by a competent authority,* when the authorisation was obtained by different forms of deception, or if the authorisation is *manifestly contrary to substantive legal requirements*. The phrase "in manifest breach of relevant substantive legal requirements" should, according to the recitals, be understood as referring to an obvious and substantial violation of substantive legal norms and is not intended to encompass procedural breaches or minor aspects of the authorisation. This interpretation does not shift the responsibility for ensuring the legality of authorisations from competent authorities to operators. Furthermore, the existence of a lawful authorisation does not exempt the holder from criminal liability if they fail to comply with all the conditions of the authorisation or other applicable legal obligations that fall outside the scope of the authorisation.[46] This emphasises the need of awareness for operators. How this will be implemented and how national courts will handle such situations remains to be seen. In the Swedish Environmental Code, for example, the provision on "environmental crime" stipulates that if a competent authority has authorised the procedure, no liability shall be imposed under that section.[47]

## III. Detecting Crimes

### 1. Strengthening awareness, knowledge, and cooperation

Environmental crimes often go unnoticed: they typically harm wildlife and plants, which lack identifiable owners or witnesses to report offenses. Therefore, authorities must be vigilant and proactive.

As already stated, the line between legal and illegal activities is thin. The same action might be legal with a permit, but criminal without. Illegal profits might be laundered through legitimate businesses and seemingly legitimate businesses may engage in criminal activity. Fraud, exploitation, and corruption are integral elements of the environmental crime infrastructure.[48]

Illustrative examples are trade in endangered species and illegal waste shipments, which both involve tactics like falsifying documents. Species are falsely labelled as non-CITES specimens and legal documents are used for illegal sales. Hazardous waste is classified as non-hazardous. It is estimated that around 25% of all waste shipments are illegal on account of such declassification. Detecting them requires thorough inspection by authorities. Despite being the fourth largest criminal activity globally, combating these crimes lacks adequate resources and political prioritization.[49]

The ECD has also tackled this problem. Member States are obliged to establish national strategies on combatting environmental criminal offences by 21 May 2027. The strategies must outline objectives, priorities, coordination methods, monitoring procedures, resources needed, and involvement in relevant European networks. Minimum criteria concerning resources and enforcement powers must also be established. Subsequently, the strategy needs to be reviewed and updated at least every five years.[50] In addition, Member States must set up systems to record and provide anonymized statistical data on environmental crime, covering investigations and judicial outcomes, and report annually to the European Commission. The Commission itself must publish a report based on the data every three years.[51] The obligations for statistical data are important, since lack of comprehensive statistical data hampers both the evaluation and effective monitoring of measures by national policymakers and practitioners. The lack of data also leads to limited awareness and resource allocation when combating environmental crime.[52]

Environmental crime is often of a complex and technical nature; competent authorities with high levels of legal, tech-

nical, and financial support, along with extensive training and specialisation are needed to combat them.[53] The ECD encourages Member States to strengthen the specialisation of authorities in environmental crime and mandates specialised and regular training for judges, prosecutors, police, and other relevant staff, tailored to their roles. Member States are encouraged to establish specialised units and provide technical expertise to enhance professionalism in handling environmental criminal cases.[54]

The ECD also attaches importance to cooperation. Cooperation mechanisms should be organised between all actors along the administrative and criminal enforcement chains. Member States need to cooperate through EU agencies, in particular Eurojust and Europol, as well as with EU bodies, including the European Public Prosecutor's Office (EPPO) and the European Anti-Fraud Office (OLAF), in their respective areas of competence.[55]

In this context, it is worth mentioning that, at the international level, Interpol has four global enforcement teams (Fisheries, Forestry, Pollution, and Wildlife). These teams aim to dismantle the criminal networks behind environmental crime by providing law enforcement agencies with tools and expertise.[56]

### 2. Threats to environmental defenders

Public awareness is crucial, not only to prevent and detect crimes, but also to define the prioritisation of environmental issues and to allocate necessary resources at national levels.[57] Hopefully, the more aware people are, the more active authorities are. At the same time, the dangers for individuals who point out the relevant problems must be minimised.

In today's reality, environmental defenders[58] who point out doubtful (but lucrative) activities such as illegal logging or waste crimes, regularly face threats, e.g., from contract killers or aggressive lawyers.[59] Many attacks, including fatal ones, go unrecorded. In 2019 alone, 212 land and environmental defenders were murdered, over half in Colombia and the Philippines.[60] Most confrontations occur in the mining, agriculture, and forestry sectors.[61] According to the EU Commission, two forest rangers investigating illegal timber harvesting were murdered in one EU Member State.[62] Growing demand for resources to meet consumer needs drives violence globally.[63] Due to the transnational nature of environmental crime, global recognition of the crime is essential. Silencing witnesses undermines judicial confidence and threatens democracy. Witnesses who provide information must feel safe.[64] The ECD states that Member States must implement measures to guarantee that individuals who report offenses, furnish evidence, or cooperate with competent authorities receive support and assistance during criminal proceedings. Member States should consider allowing anonymous reporting of environmental offenses where not already available.[65]

## IV. Sanctions

### 1. Sanction levels

Today's sanction levels are often too low to be dissuasive.[66] Member States have significant differences in penalties. As an example: regarding the same offenses prescribed under Art. 3 lit. a) of Directive 2008/99, Bulgaria sets a penalty of up to €25,000,[67] while Austria imposes a maximum penalty of €3.6 million, and Flanders in Belgium a maximum penalty of €4 million. Some Member States have particularly low sanction levels: Bulgaria, Sweden, and Belgium for offenses under Art. 3 lit. g)[68] and Italy for offenses under Art. 3 lit. f) of the 2008 Directive,[69] Ireland has low sanctions for offenses under Art. 3 lit. d),[70] while Romania's sanctions are slightly higher, but still not much higher than €30,000 for the offenses prescribed in Art. 3 of the 2008 Directive. Germany, Belgium (at the federal level), and Ireland have sanction levels exceeding €10 million for some offences. The maximum levels of prison sentences also vary widely across Member States, ranging from 2 years to life imprisonment (Malta), for various categories of offenses under Art. 3 of Directive 2008/99.[71]

Establishing a uniform sanctioning system is considered crucial, for example since illegal trade in waste offers substantial profits with comparatively lower sanctions than those for drug trafficking.[72] Efficiency is linked to the ability to achieve the Union's regulatory target. Proportionality involves determining the appropriate level of sanction necessary to meet the intended objectives. Deterrent sanctions should encourage the perpetrator not to repeat his actions and discourage other persons from doing the same.[73] Enhanced coherence between national criminal sanctioning systems and administrative law enforcement and sanctioning mechanisms is believed to generate synergies and promote a unified approach across all components of the law enforcement chain, thereby strengthening efforts to combat environmental crime.[74] While the 2008 Directive left a very broad discretion to the Member States, the 2024 Directive defines concrete types and levels of penalties for natural and legal persons. This can be considered a huge step forward in ensuring a deterrent effect across the EU.[75] Nevertheless, Member States are also under a general obligation to take all measures necessary to ensure that EU law is applied and enforced effectively and that its *effet utile*

is achieved. Infringements of EU law, both procedural and substantive, must be penalised under conditions, which are analogous to those applicable to violations of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate, and dissuasive.[76] In the end, the European Commission monitors whether Member States fulfil their obligations.[77]

### 2. Complementary sanctions and measures

According to the Commission, accessory sanctions, such as reinstating the environment and withdrawing permits, are often seen as more effective than financial penalties for legal entities and should therefore be made available.[78] The ECD encourages Member States to implement additional criminal and non-criminal (administrative) sanctions and measures, such as permit withdrawal and urges them to develop alternatives to imprisonment in order to help restore the environment. The sanctions should be tailored to individual circumstances and cover both natural and legal persons.[79]

Most Member States have some complementary sanctions and measures in place, either accessory sanctions within their criminal law or administrative sanctions and measures other than fines.[80] However, they differ between Member States and their use is not consistent.[81]

Finnish law provides an example of good practice in this context with its concept of "forfeiture of value". This term describes a type of compensation that is penal in nature. Given that it is difficult (and inappropriate) to determine a market value for protected species, Finnish law determines the value as a "representative of its species". Concretely: anyone who has committed certain environmental crimes must be sentenced to forfeit to the state the object of the crime (for example the illegally traded goods) *and,* if protected species are involved, the "representative value" of the species affected. The representative values are determined by the Ministry of the Environment.[82]

The difference between the penal approaches taken by Sweden and Finland can be illustrated by the following case. In February 2009, the British police carried out "Operation Easter," a nationwide project to apprehend so-called "egg dealers". During this operation, a British egg-smuggling ring was uncovered, with worldwide connections, including Sweden and Finland. In Sweden, the infamous "Stekenjokk egg case" [83] emerged; in Finland, the defendant was called "the Egg-man from Närpes".[84] In the Swedish case, the three defendants possessed extensive collections of both bird eggs and fully grown birds. In total, at least 4,000 eggs were involved in the case, but the collections included even more. It is not yet illegal in Sweden to have a collection; however, the taking and trading of eggs are criminal offenses. The indictment against the three defendants included charges of aggravated hunting crime, aggravated dealing, and aggravated species protection offence. The descriptions of the criminal acts covered 105+6 incidents, some of which were later dismissed. In Finland, the "Egg-man from Närpes" was convicted for nature conservation crimes, hunting crimes, and for possessing over 9,000 bird eggs and several stuffed or frozen birds and animals.

In Sweden, three defendants were sentenced; two of them were fined 11,900 SEK (approx. €1,260 in 2015) and 41,400 SEK (approx. €4,390 in 2015), respectively, while the third was sentenced to one year of imprisonment. In the Finnish case, the defendant was sentenced to one year and four months of imprisonment. The Finnish court *also* asserted the value of *each* individual animal and egg as a representative of its species, which totaled €561,180. However, considering the defendant's personal circumstances, the fact that the value confiscation is akin to a punishment which, in this case, would have a ruinous effect, and that the egg collection has been forfeited to the state and could likely be used for scientific purposes in the future, the court found grounds to adjust the otherwise unreasonable final amount to €250,000.

The advantage of the Finnish approach: the consequences for the perpetrator's behaviour are much more "noticeable" than "just" a punishment. Moreover, the public gains some awareness of the damage caused to nature by the offence when attention is drawn to the social costs associated with nature conservation crimes.[85]

## V. Concluding Remarks: Hope and Complexity

Directive (EU) 2024/1203 on the protection of the environment through criminal law is largely based on the findings from the evaluation of the 2008 Environmental Crime Directive, which revealed significant enforcement gaps across EU Member States and throughout the law enforcement chain. Furthermore, the complexity and technical nature of environmental law made it difficult for authorities to effectively detect, investigate, and prosecute environmental offenses. As a result, the number of successfully prosecuted cases remained low, making environmental crime a relatively "safe" avenue for financing criminal activity.

The 2024 Directive addresses these issues more comprehensively by providing clearer definitions of environmental crimes and standardising what constitutes unlawful behav-

iour. It also recognizes the growing complexity of environmental crime and seeks to strengthen cooperation across all sectors of enforcement. The inclusion of new offenses demonstrates the Directive's adaptation to emerging environmental threats. Additionally, it introduces harsher penalties for severe offenses that cause long-lasting and irreversible environmental damage, ensuring that these are met with sufficiently deterrent sanctions.

There is a strong focus on planning and monitoring, which is expected to enhance both the detection and prosecution of environmental crimes. Another significant improvement is the Directive's emphasis on knowledge and the need for specialised training for judges, prosecutors, and law enforcement agencies, ensuring they have the expertise to handle the technical aspects of environmental crime. Together with public awareness and cooperation between national and EU bodies, such as Eurojust and Europol, this knowledge is crucial for the Directive's effective enforcement. Importantly, the Directive also highlights the need for support and protection of environmental defenders. By urging Member States to safeguard these individuals, the Directive recognises the important role they play in exposing illegal activities.

While the Directive marks a notable development, its effectiveness will largely depend on its implementation. It is essential that national governments allocate sufficient resources and develop appropriate strategies to combat environmental crime effectively. The challenges remain substantial, particularly given the diversity of legal systems and varying levels of commitment to environmental protection across Europe. The complex and technically intricate nature of environmental law persists, and, when combined with the necessity of applying fundamental principles of criminal law, it imposes very high demands on implementation. This means that the European Commission still faces considerable work in ensuring that the Directive's objectives are fully realised, with continuous monitoring and adjustments required.

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58 The UN defines environmental human rights defenders as "individuals and groups who, in their personal or professional capacity and in a peaceful manner, strive to protect and promote human rights relating to the environment, including water, air, land, flora and fauna". See <https://www.unep.org/topics/environmental-law-and-gover-

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61 Naturskyddsföreningen (2019). Miljöförsvarare under attack – om hoten mot dem som skyddar vår natur.
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63 Global Witness (2019), *op. cit.* (n. 59).
64 Dir. 2022:141, Investigation directives for the government committee on *Anonyma vittnen*, p. 2
65 ECD, *op. cit.* (n. 19), Art. 14.
66 European Commission (2020), Evaluation report, *op. cit.* (n. 16), 7. See also opinion of AG Geelhoed, 18 November 2004, Case C-304/02 *Commission v France*.
67 The discharge of materials or ionizing radiation into air, soil, or water that causes or is likely to cause death, serious injury, or substantial damage to air, soil, water, animals, or plants.
68 Trading in specimens of protected wild fauna or flora or parts or derivatives thereof, except for cases where the conduct concerns a negligible quantity and has a negligible impact on the conservation status.
69 The killing, destruction, possession or taking of specimens of protected wild fauna or flora, except for cases where the conduct concerns a negligible quantity and has a negligible impact on the conservation status.
70 The operation of a plant in which a dangerous activity is carried out or in which dangerous substances are stored and which, outside the plant, causes or is likely to cause death or serious injury to any person or substantial damage to the environment, or to animals or plants.
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83 Court of Appeal of Nedre Norrland, verdict of 24 April 2015 in case B 276-14.
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85 As described in the verdict of 1 July 2016 from Vasa Court of Appeal.

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