



### **EPPO Now Operational – Perspectives from European Prosecutors**

**Le parquet européen désormais opérationnel – Perspectives des procureurs européens**

**Die EUSTa nimmt ihre Arbeit auf – Perspektiven der Europäischen Staatsanwälte**

Editorial

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Outlooks of European Prosecutors:

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*Maria Concepción Sabadell Carnicero* (European Prosecutor, Spain)

*Gabriel Seixas* (European Prosecutor, Luxembourg)

*Kristel Siitam-Nyiri* (European Prosecutor, Estonia)

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

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# Editorial

Dear Readers,

I have been a prosecutor for half of my life. I have combated high-level corruption for many years and possess firsthand experience in the vital importance of fairness, the willingness to comply with commonly agreed rules, the ability to administer justice – in other words, the rule of law. This is the core strength of the European Union for me and, I am sure, for millions of European citizens who grew up under dictatorial regimes in a divided Europe: our only effective way to ensure the rule of law is true democracy in a globalized world.

One of the new instruments that can play a key role in this respect is the European Public Prosecutor's Office (EPPO). It is the outcome of more than twenty years of convincing arguments and negotiations, and it marks one of the most ambitious European integration projects of the last decade.

The EPPO is a specialized prosecution office. Any fraud involving EU funds or serious cross-border VAT fraud committed in the participating Member States after November 2017 falls within our jurisdiction. As we have a mandatory competence, it is our legal obligation to investigate all new cases from the day we start operations.

In practice, 22 European Prosecutors in Luxembourg will oversee investigations initiated by the European Delegated Prosecutors in the participating Member States. The European Delegated Prosecutors will be active members of the judiciary in their respective national systems, and they will perform prosecutorial functions before the national courts.

This is the basic definition and description of the EPPO, but what does it mean?

From a magistrate's point of view, the EPPO is the most exciting challenge of our generation. For the first time, a European Union body will investigate, prosecute, and bring to trial criminal offences. Of course, it will not be easy to find solutions for 22 different judicial systems, especially because there is no precedent for a European Public Prosecutor's Office.

From a political perspective, the EPPO establishes a transfer of sovereignty and a new instrument to protect the Union budget in the 22 participating Member States. From a citizen's

perspective, the EPPO is the first powerful tool to defend the rule of law in the EU.

Lastly, from my perspective, even if I agree that setting up a prosecutor's office at the EU level is a complex and sensitive issue, if we wish to make the EPPO work in an efficient and independent manner, the choices to be made are ultimately straightforward. These are the key questions that need to be answered before we can assess whether the EPPO is capable of fulfilling its potential: Can we agree that the European Delegated Prosecutors should work full-time for the EPPO?

- Can we agree how many prosecutors there should be in each of the Member States in order to do the job properly?
- What types of support and equipment will they receive?
- What will the overall budget of the EPPO be?
- Will the EPPO's central office be able to analyze all the available information in order to genuinely improve cross-border investigations?
- Will the EPPO's central office be able to improve the identification of criminal assets, thus helping the Member States improve the recovery of damages?

Our work is that of true pioneers. I am convinced that we are ready. And we are not alone. We can count on the European Court of Justice, with all its authority and decisive jurisprudence. I am confident that we can also count on our fellow prosecutors, judges, and police officers in the Member States.

Why will the EPPO be a game changer in the fight against fraud involving European funds?

Until now, the level of protection of the financial interests of the EU varied across the Member States. In some Member States, thousands of investigations have taken place while, in other Member States, there were two or even less cases per year. From now on, the investigation and prosecution of these



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crimes will be a priority for all the European Delegated Prosecutors. This alone should already increase the overall level of protection for European funds.

The second, key expected improvement is the likely increase in the efficiency of investigations. The EPPO will be independent from national governments, the Commission, and other European institutions, bodies, and agencies. This is very important, because the independence of the institution and the independence of prosecutors is the first premise for obtaining efficient results when fighting corruption and other serious crime. Without this independence, we cannot talk about the rule of law or about equality in the face of the law. Independence is a crucial, basic rule for the functioning of the EPPO. And this should be the model followed by all the national public prosecutor's offices.

The main characteristic of the type of criminality that the EPPO will tackle is the speed with which criminals shift their *modus operandi* in reaction to law enforcement actions.

The EPPO has unprecedented possibilities to act in this respect:

- Obtaining and aggregating information at the European level;
- Conducting investigations without being limited by national borders;
- Generalizing the use of the most efficient investigative tactics;
- Using evidence administrated in another Member State without the need for other formalities;
- Conducting investigations simultaneously in several Member States.

Where do we stand today? We have adopted internal rules of procedure, which define our internal processes, including the key appointments of the Deputy European Chief Prosecutors, the Data Protection Officer, and the Administrative Director.

We also adopted our financial regulation, our data protection rules, and the rules on public access to documents.

The preparation of internal governance tools, such as the code of good administrative behavior, an anti-fraud strategy, and internal control standards, is well underway. We are also finalizing our operational templates in addition to the investigation and prosecution policy of the EPPO and related guidelines.

We just signed a working arrangement with Europol and Eurojust and expect one with OLAF to be signed soon. Discussions on cooperation between the EPPO and the Commission are progressing well. We initiated negotiations on working arrangements with non-participating Member States and are about to sign such an arrangement with Hungary. We decided on the number and composition of the permanent chambers – the true engine of the EPPO. A first version of our case management system has already been developed.

All in all, at the central level, we are ready. We are now waiting for the member States to nominate enough candidates as European Delegated Prosecutors to be able to start.

As prosecutors, we are responsible for enforcing the law. Our role is to set the wheels of justice in motion, in order to ensure that everyone is equal in front of the law and that no one is untouchable. It is now our task to build up a strong and efficient institution, which earns the trust of European citizens, is able to protect the financial interests of the European Union, and contributes to the enforcement of the rule of law. By protecting the European Union's budget, we will play an essential role in reinforcing and increasing the trust of all Europeans in the Union.

All we need is to be consistent and keep European interests at heart!

Laura Codruța Kövesi  
European Chief Prosecutor



## European Union

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

### Foundations

#### Fundamental Rights

##### EP: EU Must Be Credible Actor in Global Human Rights Protection

In its [annual report](#) assessing the human rights situation in the world in 2019, adopted in plenary on 20 January 2021 MEPs expressed deep concerns about authoritarian regimes around the world having used the pandemic to repress civil society and critical voices. The MEPs called for all EU programmes with an external dimension to mainstream support of human rights, democracy, the rule of law and the fight against impunity. These policies include developmental aid, migration, security, the fight against terrorism, women's rights, gender equality, EU enlargement, and trade. The MEPs also called on the EU to strengthen democratic institutions, to support transparent and credible electoral processes worldwide, to foster democratic debate, to fight against inequalities and to ensure the functioning of civil society organisations. In the report, the EP responded to a number of global

human rights and democracy challenges, including the protection of human rights defenders and the situation of vulnerable groups.

The EP made several recommendations on EU action that should be taken at the multilateral level, e.g., systematically introducing human rights clauses in all international agreements. The EU should also develop an explicit strategy to counter the increasing withdrawal of states from the international human rights framework.

MEPs urged that the new EU Global Human Rights Sanctions Regime be implemented ([→eucrim 4/2020, 258](#)). They stressed that this so-called EU-Magnitsky Act is an essential part of the EU's existing human rights and foreign policy toolbox. This sanction mechanism would strengthen the EU's role as a global human rights actor, allowing for targeted sanctions against individuals, state and non-state actors, and other entities responsible for (or complicit in) serious human rights violations. Acts of systematic corruption connected with human rights violations should also be sanctioned.

MEP [Isabel Santos](#) (S&D, PT), who

prepared the report, [said](#): “As MEPs, it is our duty to speak out, loudly and clearly, when it comes to human rights and the need to protect and recognise all those who work tirelessly and in difficult situations to uphold them. To achieve true credibility as the European Union, it is vital that we act and speak with a strong and unified voice on human rights. We should not fail those who look towards Europe with hope.” (TW)

#### EU Imposes First Sanctions for Human Rights Violations

After the adoption of the EU Global Human Rights Sanctions Regime – also dubbed the “European Magnitsky Act” – in December 2020 ([→eucrim 4/2020, 258](#)), the EU began imposing the first restrictive measures on individuals in March 2021: On 2 March 2021, [sanctions came into effect against four Russians](#) who had allegedly been involved in the arbitrary arrest, prosecution, and sentencing of activist *Alexei Navalny* and the repression of peaceful protests in connection with his unlawful treatment. On 22 March 2021, the [Council imposed further restrictive measures on eleven individuals and four entities](#) for serious human rights violations and abuses in various countries around the world. This included targeted sanctions against Chinese officials for the large-scale arbitrary detention of Uyghurs in China, which has generated a great deal of media coverage. The new mechanism

\* Unless stated otherwise, the news items in the following sections (both EU and CoE) cover the period 1 January – 31 March 2021. Have also a look at the eucrim homepage (<https://eucrim.eu>) where all news items have been published beforehand.

adopted in December 2020 enables the EU to list individuals or entities responsible for serious human rights violations, irrespective of where the violations occurred. The sanctions consist of the following:

- A travel ban to the EU for listed individuals;
- Freezing of assets in the EU for listed individuals/entities;
- A prohibition on making funds or economic resources available to listed individuals and entities. (TW)

### Poland: Continued Update on Rule-of-Law Developments

This news item continues the last update provided in December 2020 on the rule-of-law situation in Poland as far as it relates to European law. For a more detailed overview of ongoing developments in Poland, see also the webpage “[ruleoflaw.pl](#)”.

- 2 March 2021: The CJEU decides in the preliminary ruling [case C-824/18 \(A.B. and Others v Krajowa Rada Sądownictwa\)](#). According to the CJEU, the procedure for appointing judges to the Supreme Court in Poland could violate EU law, due to the lack of effective judicial control of the decisions of the National Council of the Judiciary (KRS). In addition, there could be a violation of Art. 267 TFEU if the CJEU were to be prevented from exercising its preliminary ruling competence. It is ultimately up to the referring Polish court to decide on an infringement of the EU standards of judicial independence and impartiality. In the event of an infringement, the principle of the primacy of Union law obliges the national court to leave respective legislative amendments unapplied. The specific case concerns amendments regarding the nomination procedure of judges to the Polish Supreme Court in 2018 and 2019. They ultimately resulted in making it impossible to lodge appeals against decisions of the KRS concerning the proposal or non-proposal of candidates for appointment to judicial positions at the Supreme

Court. Appeals that were still pending were declared closed. Five judges had opposed this in court. For the AG’s opinion in this case → [eucrim 4/2020, 257](#).

- 10 March 2021: In an *ad hoc debate*, [MEPs express concerns over attacks on the media](#) in Poland, Hungary, and Slovenia. MEPs call on the Commission and the Council to take action against governments that violate the principles of press freedom. Some MEPs were convinced that the events in Poland, Hungary, and Slovenia justify activation of the conditionality mechanism for the protection of the EU budget (→ [eucrim 3/2020, 174–176](#)).

- 11 March 2021: Poland and Hungary lodge actions with the CJEU against the agreed mechanism making protection of the EU’s financial interests conditional to adherence to rule-of-law values (→ [news under “Protection of Financial Interests”](#)). The cases are referred to as C-156/21 and 157/21.

- 31 March 2021: The [Commission refers an action to the CJEU](#) and applies for a declaration that the Polish “muzzle law” infringes Poland’s obligations under EU law. According to the Commission, the Polish law on the judiciary of 20 December 2019 that entered into force on 14 February 2020 (→ [eucrim 1/2020, 2–3](#)) undermines the independence of Polish judges and is incompatible with the primacy of Union law. The Commission sets out five different reasons why the Polish “muzzle law” violates provisions of EU law protecting judicial independence. One particularly critical point is that the law prevents Polish courts from submitting references for preliminary rulings on questions of independence to the CJEU. This includes threats to Polish judges about the use of disciplinary proceedings against them. The Commission has also asked the CJEU to order interim measures pending the delivery of the final judgment. The case is referred to as C-204/21.

- 15 April 2020: Advocate General *Evgeni Tanchev* criticises in two parallel cases the appointments of judges

at newly-created chambers of the Polish Supreme Court. In the Opinion in [Case C-487/19](#), the composition of the “Chamber of Extraordinary Control and Public Affairs”, which had to decide on the transfer of a Polish regional court judge, was found to be inadequate. The compatibility of the composition of this chamber with the right to an independent court established by law pursuant to Art. 19(1)(2) TEU and Art. 47 CFR was questionable, as the single judge who made the decision ruled against the appointment before the conclusion of his appointment procedure and despite ongoing appeal proceedings. However, according to the AG, it is up to the referring court and not the CJEU to determine whether it was an independent court. In [Case C-508/19](#), the AG also criticises the proper appointment of judges to the Polish Supreme Court. In the context of disciplinary proceedings initiated against a Polish district court judge, the independence and impartiality of the single judge of the disciplinary chamber was called into question. Also here, it remains the task of the referring Polish court to determine whether there has been a manifest and deliberate violation of the European principles. In the event of such a finding, the decisions of the Supreme Court are to be left unapplied. (TW)

### Hungary: Update on Recent Rule-of-Law Developments

This news item outlines the main rule-of-law developments in Hungary related to Union law. It continues the ongoing overview provided in previous [eucrim](#) issues (→ [eucrim 4/2020, 257](#)).

- 18 February 2021: The Commission [initiates a new infringement procedure against Hungary](#) for not having reacted to the CJEU’s ruling of 18 June 2020 (Case C-78/18). In this ruling, the CJEU declared the Hungarian NGO Act of 2017 to be contrary to Union law (→ [eucrim 2/2020, 69](#)). Hungary has not made any efforts to improve the situation since then. In the Commission’s view, the dis-

## Italy: The Ambiguous Position of the Italian Constitutional Court on Life Imprisonment

On 15th April 2021, [the Italian Constitutional Court ruled](#) on the constitutionality of life imprisonment. The main issue concerned the possibility of granting release on licence to convicted criminals who have been sentenced to life imprisonment for very severe offences.

The current Italian law provides a form of irreducible life imprisonment for the most serious crimes (such as Mafia-type criminal activities) for which no alternative measure or benefit can be applied at all.

This form of life imprisonment is also called “obstructive” life sentence (*ergastolo ostativo*). The convicted person can only benefit from rehabilitation and resocialisation measures if he/she “usefully” cooperates with the judicial authorities and, thanks to that, is able to prove that contacts with criminal organisations have permanently been broken off. However, this kind of “cooperation” does not often take place, inter alia, because the imprisoned fears revenge against their relatives by the Mafia-type group they were affiliated to.

The Italian Constitutional Court declared “obstructive” life sentence as unconstitutional, on the basis of the principle of equality, the presumption of innocence (Art. 3 and Art. 27 It. Cost.) and the prohibition of inhuman and degrading treatment (Art. 3 ECHR). The ruling is in line with a judgment of the ECtHR (ECtHR, 13th June 2019, [Marcello Viola v. Italy \(no. 2\)](#) (application no. 77633/16)), where the Strasbourg Court stated that the *ergastolo ostativo* violates Art. 3 ECHR. Nevertheless, the position taken by the Italian Constitutional Court is somewhat peculiar. The Court has been postponing the final decision on this topic for one year and is waiting for the legislator to intervene. As a consequence, the problem still remains open and the convicted persons are treated according to the irreducible life sentences they were subjected.

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closure obligation and requirements for associations and organisations receiving financial contributions from abroad are incompatible with data protection rights (Art. 8 CFR) and the free movement of capital (Art. 63 TFEU) within the EU. The Commission has repeatedly called on Hungary to remedy the situation as a matter of urgency. The initiation of the new infringement procedure may be referred back to the CJEU, which can impose financial sanctions in accordance with Art. 260(2) TFEU.

■ 25 February 2020: According to Advocate General (AG) *Athanasios Rantos*, Hungary infringed its obligations under EU law through its 2018 asylum policy reform. The new Hungarian legislation, inter alia, criminalises the assistance of organisations to asylum seekers with the purpose of initiating international protection procedures. The AG concludes that “the criminalisation of those activities impinges on the exercise of the rights guaranteed by the EU legislature concerning assistance for applicants for international protection.” He points out that the criminalisation of assistance to applicants seeking international protection could have a particularly significant deterrent effect on any person or organisation who, knowingly, attempts to promote a change in national legislation concerning international protection or attempts to facilitate applicants’ access to the procedure of obtaining that protection or access to humanitarian aid.

■ 15 April 2021: According to Advocate General (AG) *Priit Pikamäe*, Hungarian legislation enabling the public prosecutor to bring an action before the Hungarian Supreme Court (Kúria) for a declaration of unlawfulness of an order for reference made by a lower criminal court and the decision of the Supreme Court establishing this unlawfulness undermines the power to refer questions to the CJEU and is incompatible with EU law. On the basis of the primacy of EU law, a national judge must disapply such national legislation or judicial practice. The case ([C-564/19, IS](#)) was

referred by the Central District Court of Pest, Hungary. It actually concerns the scope of the right to interpretation of a sufficient quality (interpretation of Directive 2010/64/EU) and the right to be informed of the accusations (Directive 2012/13/EU), in the specific case of a trial in absentia. (TW)

## Reform of the European Union

### EU Launches Conference on the Future of Europe

Commission President *Ursula von der Leyen*, European Parliament President *David Sassoli*, and Portuguese Prime Minister *Antonio Costa* (whose country holds the Council of the EU’s rotating presidency) signed the [Joint Declaration on the Conference on the Future of Europe](#) at a ceremony on 10 March 2021. Since the Treaty of Lisbon, there have been hardly any steps in the EU to further develop the integration process and initiate new reforms. The “Conference on the Future of Europe” will create a new forum for ideas on Europe’s future with a hybrid format of inter-institutional negotiations and citizen participation.

The Joint Declaration lays out the scope, structure, objectives, and principles of the planned conference. According to the Joint Declaration, “(t)he Conference on the Future of Europe is a citizens-focused, bottom-up exercise for Europeans to have their say on what they expect from the European Union. It will give citizens a greater role in shaping the Union’s future policies and ambitions, improving its resilience. It will do so through a multitude of Conference events and debates organised across the Union, as well as through an interactive multilingual digital platform.”

The EU-wide conference will start on 9 May 2021, Europe Day, and will give citizens the opportunity to express their expectations of European policies until spring 2022. It will address issues included in the Commission’s policy priorities and the European Council’s

strategic agenda. These include tackling climate change, Europe’s digital transformation, and the promotion of European values. It is also open to citizens to raise additional relevant issues. There will also be physical events in all EU countries (once the pandemic situation allows). The conference will be co-chaired by the three institutions. An Executive Board will oversee the work of the Conference and prepare its plenary sessions. The national parliaments will have observer status.

Ahead of the Joint Declaration, a [Special Eurobarometer Survey](#) was released. The Survey (carried out between 22 October and 20 November 2020 in the 27 EU Member States) reveals that the vast majority of Europeans back the Conference on the Future of Europe. Three-quarters of Europeans consider that it will have a positive impact on democracy within the EU. Six from ten agree that the coronavirus crisis has made them reflect on the future of the European Union. Terrorism is ranked second after climate change as the main global challenge affecting the future of the EU. (TW)

### Executive Board Starts Implementation of Conference on the Future of Europe

The [Executive Board of the Conference on the Future of Europe](#) started its work by holding its constitutive meeting on 24 March 2021. The first steps taken were to ensure that citizens can become involved in discussions on the future shape and orientation of the European Union. This is to be accomplished, in particular, via a multilingual digital platform that will be launched on 19 April 2021. Given the development of the COVID-19 pandemic, the Executive Board also discussed whether/how to host a formal event on 9 May 2021 (Europe Day) in Strasbourg and whether/how to hold the first Conference Plenary on 10 May 2021.

The Executive Board is co-chaired by MEP *Guy Verhofstadt*, on behalf of the European Parliament, by the Portuguese

Secretary of State for EU Affairs, Ana Paula Zacarias; as representative of the acting Council Presidency, and by the European Commission Vice-President, *Dubravka Šuica*. The Executive Board has the task of overseeing the work, process, and organisation of the Conference on the Future of Europe. The Conference was officially launched on 10 March 2021 ([→related link](#)). (TW)

### Area of Freedom, Security and Justice

#### EU-LISA Input in Research and Innovation Funding for IT Systems in AFSJ

On 16 March 2021, the Commission (DG Home) and eu-LISA, (the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice) agreed on [“Terms of Reference”](#) that will strengthen collaboration in the development of research and innovation of large-scale IT systems under the respective EU funding programmes. eu-LISA will provide advice on research gaps, research activities, dissemination of solutions, testing research results, capability development, etc. within the EU’s Framework Programme for Research and Innovation. The Agency’s input will ensure that research funded by the EU provides state-of-the-art technologies, solutions, and knowledge to eu-LISA and to Member States for the operational management of IT systems in the area of freedom, security and justice. This will help the Commission to better plan research funding in this area, and eu-LISA will be additionally enabled to better monitor relevant European research and innovation that fall within its remit. The EU will spend over €95 billion over the next seven years on research and innovation projects. (TW)

#### Roadmap on 2021 Justice Scoreboard

On 11 March 2021, the EU Commission published a [roadmap](#) for the new edition

of the EU Justice Scoreboard 2021. The roadmap sets out the Commission’s approach for this year’s ninth report on the state of European justice systems. For previous editions [→eucrim 2/2020, 74–75](#) and [eucrim 1/2019, 7–8](#). The Justice Scoreboard serves to strengthen the rule of law and helps Member States to identify potential shortcomings, improvements, and “best practices” in national justice systems. This is done on the basis of a number of indicators relating to the efficiency, quality and independence of justice systems. In addition to being used in the context of the Rule of Law Report 2021, this year’s Justice Scoreboard will also provide assistance in the context of the European Semester and in the implementation of the Recovery and Resilience Facility (the latter being a measure to address the immediate economic and social impact of the corona pandemic). (TW)

#### Commission Launches/Continues Infringements Proceedings in Several JHA Matters

In February 2021, the [Commission launched several infringement proceedings](#) against EU Member States for having incorrectly transposed various EU instruments in the area of Justice and Home Affairs (JHA). In the following proceedings, the Commission took the first step by sending a letter of formal notice requesting further information to the following countries:

- Belgium, Bulgaria, Finland, Poland, and Sweden for not having fully or accurately transposed EU rules on combating racism and xenophobia by means of criminal law ([Framework Decision 2008/913/JHA](#));
- Cyprus, Germany, and Sweden for the incomplete and/or incorrect transposition of the [Framework Decision 2002/584/JHA on the European arrest warrant \(FD EAW\)](#). Here, the Commission thinks that the countries treat their own nationals more favourably in comparison to EU citizens from other Member States or provide additional grounds



for refusal of warrants that are not provided for in the Framework Decision. In 2020, the Commission already initiated infringement proceedings against Austria, the Czech Republic, Estonia, Ireland, Italy, Lithuania, and Poland for the incorrect transposition of the FD EAW;

- Estonia, Finland, and Poland for failing to fully transpose the EU rules on strengthening the presumption of innocence and the right to be present at the trial in criminal proceedings ([Directive \(EU\) 2016/343](#)), in particular as regards the EU rules on public references to guilt.

- In addition, the Commission sent a reasoned opinion (second step of the infringement procedure) to Malta for not having implemented several provisions of the Directive on victim's rights ([Directive 2012/29/EU](#)). Regarding the failure of correct transposition of the Directive, further infringement proceedings are ongoing against Belgium, Bulgaria, Latvia, Lithuania, Luxembourg, Poland, and Romania. (TW)

### Commission Takes First Steps for International Data Flows Post-Brexit

After the UK left the EU on 1 January 2021, the rules for international data transmission in the General Data Protection Regulation No. 2016/679 (GDPR) and the Directive on the exchange of personal data between law enforcement authorities No. 2016/680 (LED) will apply. Both EU regulations require that the Commission may decide, by means of an implementing act, that a third country ensures an adequate level of data protection. Under this condition, transfers of personal data to a third country may take place without the need to obtain any further authorisation (except where another Member State from which the data were obtained has to give its authorisation to the transfer).

On 19 February 2021, [the Commission presented two proposals for adequacy decisions](#) – one as required by the GDPR, another one as required by the LED. As stipulated in said EU regu-

lations, the Commission carried out a detailed assessment of the UK's relevant law and practice on data protection, e.g., the conditions and limitations as well as the oversight mechanisms and remedies applicable in case of access to data by UK public authorities, in particular for law enforcement and national security purposes. Based on its findings, the Commission concluded that the UK ensures an adequate level of protection for personal data transferred from private entities/competent authorities in the Union. Considering that the UK rules are currently widely in line with EU legislation (the UK implemented both the GDPR and the LED during its membership to the bloc), the Commission reserves the right to examine after four years whether the adequacy decisions are still valid because the UK is no longer bound to EU privacy rules after Brexit.

The Commission drafts now start an adoption process. First, the European Data Protection Board (EDPB) must give an opinion. Second, Member States' representatives must be addressed in the so-called [comitology procedure](#). Thereafter, the Commission will be able to adopt the final adequacy decisions for the UK.

At the moment, data transfers can be based on transition clauses as agreed in the Trade and Cooperation Agreement. Until 31 June 2021, the UK is still to be treated as an EU country in terms of data transfers, allowing EU companies or law enforcement agencies to exchange data with the UK under the same conditions as before Brexit ([→eucrim 4/2020, 266–267](#)).

The EU's adequacy decisions only concern data flows from the EU to the UK. Data flows in the other direction are regulated by UK legislation. (TW)

### Brexit: Eurojust Note on Judicial Cooperation with the UK

On 28 January 2021, Eurojust published [a note for judicial practitioners on future cooperation in criminal matters with the United Kingdom](#). This practical guid-

### European Judicial Network (EJN) Creates Dedicated Brexit Area

The EJN has set up a [dedicated area on its website](#), as well as a dedicated section in its judicial library, to assist legal practitioners looking for practical and legal information concerning the judicial cooperation between the EU and the UK as of 1 January 2021.

Letters from the UK Central Authority to its EU partners, e.g., concerning the notification of the competent authorities according to the Trade and Cooperation Agreement or the handling of European Investigation Orders received after the transition period, are recorded in the judicial library. In addition, the library contains:

- The text of the Trade and Cooperation Agreement (in all EU languages);
- Forms for surrender, and Freezing/Confiscation (in all EU languages);
- Notification from the EU regarding the EPPD;
- Notifications from EU Member States regarding competent authorities;
- Numerous additional Brexit-related documents.

The EJN will regularly update the judicial library's Brexit section. For a summary of the impacts of the Trade and Cooperation Agreement on the protection of the EU's financial interests and European criminal law, as well as for a note from Eurojust on future judicial cooperation with the UK in criminal matters, see separate news items. (CR)

ance provides an overview of the old, transitional, and new regimes and their respective application. It sets out the applicable measures with regard to surrender, mutual legal assistance, exchange of criminal record information, and freezing and confiscation of funds. Furthermore, the guidance provides a chart to clearly illustrate cooperation under the transitional and new regime.

Concerning the cooperation between Eurojust and the UK, the agenda foresaw the conclusion of a working arrangement that would also enable the

secondment of a UK Liaison Prosecutor to Eurojust (for the conclusion of the working arrangement on 12 February 2021 →separate news item).

A documentation of criminal justice-related items after Brexit on 1 January 2021 is provided at the EJM website (see news item under “Area of Freedom, Security and Justice”). Euclid also published a summary of the relevant provisions for the protection of the EU’s financial interests and European criminal law in the TCA (→[euclid 4/2020, 265–271](#)). (CR)

## Schengen

### Ireland Now Connected to Schengen Information System

On 15 March 2021, [Ireland joined the Schengen Information System \(SIS\)](#). The SIS is the largest and most widely used IT system for law enforcement cooperation and external border management in Europe. Irish authorities are now able to receive real-time information, e.g., on persons wanted for arrest and extradition, missing persons, and objects sought for seizure or use as evidence in criminal proceedings. Ireland has set up a new national [SIRENE bureau](#) (Supplementary Information Request at the National Entries), which is connected to other Member States’ bureaux, is operational 24/7, and is in charge of coordinating additional information exchange in relation to alerts.

Ireland is not a full member of the Schengen area but participates in the Schengen’s police and judicial cooperation arrangements. Next to Ireland, 26 EU Member States and four Schengen-associated countries (Iceland, Liechtenstein, Norway, and Switzerland) are connected to the SIS. At the end of 2020, the Schengen Information System contained approximately 93 million alerts. It was accessed 3.7 billion times in 2020 and consisted of 209,178 hits (when a search leads to an alert and the authorities confirm it). (TW)

## Legislation

### EU Leaders Give Guidance on EU’s Digital Transformation

The EU must enhance its digital sovereignty in a self-determined and open manner, said EU leaders at the [video conference of the European Council on 25 March 2021](#). The Council is invited to swiftly examine the Commission’s Communication on the 2030 Digital Compass (→related link), in order to develop the digital policy programme. In addition, the European Council gave guidance on the following issues, which outline the EU’s future digital policy priorities:

- Strengthening the European policy approach as regards further systems of critical infrastructure and strategic sectors;
- Widening the EU policy toolbox for digital transformation;
- Better exploiting the potential of data and digital technologies for the benefit of society, the environment, and the economy while upholding relevant data protection, privacy, and other fundamental rights;
- Strengthening the Single Market for digital services, in particular by swiftly adopting the Commission’s proposal on digital services, digital markets, and data governance (→[euclid 4/2020, 273–275](#));
- Promoting digital EU standards at the international level and developing global digital rules in cooperation with like-minded partners;
- Finding a solution for the tax challenges of the digital economy, whereby a common solution within the framework of the OECD should be sought first.

The European Council also made statements on several data-related issues that concern law enforcement. In this context, EU leaders stressed the need for law enforcement authorities to rely on data retention in order to effectively combat serious crime. Furthermore, the EU should create common data spaces, including access to and interoperabil-

ity of data. The European Council also looks forward to the Commission’s proposal for a regulatory framework on artificial intelligence. (TW)

### Commission Sets Out Digital Compass

On 9 March 2021, the Commission presented a concrete vision, targets, and avenues for Europe to become a leader in the digital area by 2030. The [Communication “2030 Digital Compass: the European Way for the Digital Decade”](#) (COM(2021) 118 final) sets out:

- A vision for the successful digital transformation by 2030 that is anchored in empowerment of European citizens and businesses and ensures the security and resilience of its digital ecosystem and supply chains;
- Clear and concrete objectives along the following four cardinal points that will map the EU’s trajectory: a digitally skilled population and highly skilled digital professionals, secure and performant sustainable digital infrastructures, digital transformation of businesses, and digitalisation of public services;
- A framework for digital principles that will enable Europeans to make full use of digital opportunities and technologies;
- An outline of a digital compass to ensure that the EU will reach its goals. The digital compass provides a governance structure, a framework to facilitate and accelerate the launch of multi-country projects to address gaps in EU critical capacities, and a multi-stakeholder forum to engage with the wider public;
- Actions to project the European approach to digitalisation on a global stage.

Some of the concrete targets to be achieved by 2030 include:

- At least 80% of all adults should have basic digital skills;
- All populated areas should be covered by 5G;
- Seventy-five percent of companies should use cloud computing services, big data, and artificial intelligence;
- All key public services should be

available online and 80% citizens should use an eID solution.

The Commission hopes to start a societal debate on digital principles. According to the Commission, the European approach should be built upon the fundamental rights, such as freedom of expression and protection of personal data and privacy, including the right to be forgotten, but include more comprehensive guiding principles, too. These could include:

- Universal access to internet services;
- A secure and trusted online environment;
- Universal digital education and skills;
- Access to digital systems and devices that respect the environment;
- Accessible and human-centric digital public services and administration;
- Ethical principles for human-centric algorithms.

The Commission proposes that, after further public consultation, the digital principles could be enshrined in a solemn, inter-institutional declaration between the European Parliament, the Council, and the Commission. This declaration could complement the European Pillar of Social Rights. An annual Eurobarometer survey should monitor whether Europeans feel that their digital rights are respected.

Ultimately, the Commission wishes that Europe promotes its ideas through increased international digital partnerships. To this end, the EU will liaise with external funds, so that common global goals can be achieved.

The Communication on the Digital Compass follows [President von der Leyen's call](#) to make the next years Europe's "Digital Decade"; it responds to the [European Council's call](#) for a "Digital Compass" and builds on the Commission's [digital strategy](#) presented in February 2020 (→[eucrim 1/2020, 24](#)).

The Communication will be followed by structured consultations on the targets and elements of the compass as well as by an open consultation on digital principles. By the end of 2021, the Com-

mission aims to reach agreement on a "Declaration of Digital Principles" with the other institutions. In the third quarter of 2021, a Digital Policy Programme to operationalise the Digital Compass is to be proposed. (TW)

### Public Consultation on Digitalisation of Cross-Border Justice

Following its communication of 2 December 2020 on the digitalisation of justice in the EU (→[eucrim 4/2020, 262–263](#)), the Commission has [published a consultation](#) on the digitalisation of cross-border criminal and civil proceedings. The consultation period run until 11 May 2021 and is principally open to everyone but specifically invites those who are familiar with the use of IT tools in cross-border judicial proceedings.

The Commission aims to take concrete actions in the fourth quarter of 2021 to increase the efficiency and resilience of cross-border judicial cooperation in civil, commercial, and criminal matters, and improve access to justice for citizens, businesses, and legal practitioners through the use of digital technologies.

An inception impact assessment sets out more clearly the context, the problem behind the initiative, the objectives, and the policy options. Citizens and stakeholders should reflect on how the existing legislative framework for cross-border procedures could be modernised while ensuring that all necessary safeguards are in place. They are particularly invited to provide views on the Commission's understanding of the problem (as well as possible solutions) and to make available any relevant information that they may have, including on possible impacts of the different options. (TW)

### EP Input on AI

In a [resolution of 20 January 2021](#), the European Parliament outlined definitions and several ethical principles as regards the application of artificial intelligence (AI) in military and civilian sectors. There is no focus on the use of AI in

criminal justice, however the resolution includes a number of statements on the use of AI for justice in general as well as on the challenges for big data analyses, e.g., facial recognition.

MEPs emphasised that in any area, especially those managed by the state (such as justice), AI must remain a tool used only to assist decision-making or help when acting. AI must be subject to human control, allowing humans to correct or disable it in case of unforeseen behaviour. Moreover, AI is a scientific advancement which should not undermine the law but, on the contrary, always be governed by it. Under no circumstances should AI, robotics, and related technologies violate fundamental rights, democracy, and the rule of law.

Regarding the use of AI in the field of justice, MEPs adopted the following positions:

- The use of AI in fighting crime and cybercrime could bring a wide range of possibilities and opportunities but, at the same time, the principle "what is illegal offline is illegal online" should continue to prevail;
- The option of whether it is appropriate for law enforcement decisions to be partially delegated to AI should be discussed;
- When using evidence provided by AI-assisted technologies, judicial authorities should be obligated to provide reasons for their decisions;
- Research should explore improvements in the analysis and collection of data and the protection of victims, whereby it must be ensured that safeguards for due process and protections against bias and discrimination are applied;
- The principles of governance, transparency, impartiality, accountability, fairness, and intellectual integrity in the use of AI in criminal justice are important;
- It must be guaranteed that the public be kept informed about the use of AI and that decisions are personally taken by responsible officials who can, if neces-

sary, deviate from the results received from AI;

- Defendants must have the right to appeal a decision; such an appeal should be decided without the use of an AI system.

The resolution also addresses the phenomenon that AI technologies can have a deep impact on fundamental rights. The Commission is called on to assess the consequences of a moratorium on the use of facial recognition systems until the technical standards can be considered fully fundamental rights-compliant and that there are strict safeguards in place against misuse. Mass scoring applications (monitoring and rating citizens) should be explicitly banned. The EU should better promote its viewpoint in these areas when negotiating laws at the international level. The resolution also expresses concern over “deepfake technologies” that have the potential to “destabilise countries, spread disinformation and influence elections.” Creators should be obliged to label deepfake material or any other realistically made synthetic videos as “not original” and more research should be done into technology to counter this phenomenon.

The EP resolution aims at giving an input into the Commission’s White Paper on AI presented in 2020 (→[eucrim 1/2020, 8–9](#)).

Independent of the EP resolution, a [virtual conference on AI](#) and human rights was held on 20 January 2021, under the German Presidency of the Council of Europe. The aim was to help create an international legal framework for AI at the level of the Council of Europe. This could consist of both mandatory and soft law components, but always with respect to human rights, democracy, and the rule of law. (TW)

### Plans to Regulate AI Technology Enabling Biometric Mass Surveillance under Fire

Over 50 civil society organisations called Over 50 civil society organisa-

tions called on the European Commission to take a clear stance against biometric mass surveillance. In an [open letter of 1 April 2021](#), the organisations request that any upcoming Commission legislative proposal on AI “must take the necessary step of prohibiting applications of AI that irremediably violate fundamental rights, such as remote biometric identification technologies that enable inherently undemocratic mass surveillance.” More concretely, the letter calls on the Commission to take into account the following issues:

- The legislative proposal on AI must include an explicit ban – on fundamental rights grounds – on the indiscriminate or arbitrarily targeted use of biometrics in public or publicly accessible spaces, which can lead to mass surveillance;
- The EU must provide for legal restrictions or legislative red lines on all AI uses that contravene fundamental rights;
- Marginalised and affected communities must be included in the development of EU AI legislation and policy.

The letter underlines that the EU should be the forerunner for a truly human-centric approach towards AI and make clear that a democratic society does not allow certain uses of AI. The open letter follows a European Citizens’ initiative seeking a ban on biometric surveillance practices (→[related link](#)) and a similar [call from civil society organisations issued in January 2021](#). On 8 March 2021, 116 MEPs across all parties supported these calls. In [an open letter to Commission President Ursula von der Leyen](#), they stressed that the upcoming proposal on AI must respect the EU’s fundamental rights. This may include “the possibility to ban or prohibit applications of AI that are incompatible with fundamental rights...” The Commission’s expected legislative proposals follow the outcome of its White Paper on Artificial Intelligence launched in February 2020 (→[related link](#)), which laid the basis for subsequent public consultations and statements. (TW)

### FRA: Impact of Artificial Intelligence

On 1 February 2021, FRA published an [infographic](#) illustrating the potential impact of artificial intelligence in the areas of social benefits, predictive policing, medical diagnosis, and targeted advertising.

The infographic is based on the results found in the FRA’s report “Getting the future right – Artificial intelligence and fundamental rights in the EU” that was [published on 14 December 2020](#).

Looking at the impact of artificial intelligence in the area of predictive policing, the report sees, on the one hand, a potential positive impact of AI (e.g., higher detection rates resulting in less crime). On the other hand, a negative impact may occur due to possible errors (e.g., AI incorrectly suspects innocent persons). Such negative impacts could destroy trust in AI or result in the incorrect detection of crimes. (CR)

## Institutions

### Council

#### Portuguese Council Presidency Programme

The [Portuguese](#) Presidency of the Council of the European Union began on 1 January 2021 and will run until 30 June this year.

Inspired by the motive “Time to deliver: a fair, green and digital recovery” the Portuguese Presidency’s [programme](#) envisages five main lines of action that will strive to promote a resilient, green, digital, social, and global Europe.

Concerning migration, the Portuguese Presidency intends to prioritise the New Pact on Migration and Asylum and related initiatives.

Regarding the future of Schengen and border management, the Presidency is paying close attention to the interoperability of information systems, including the implementation of the Entry/Exit System (EES) and the European Travel

Information and Authorisation System (ETIAS). Another focus is the new mandate of Frontex, which is to be put into operation.

In the area of police and judicial cooperation, the Presidency aims to focus on several issues, including:

- Coordinating the fight against organised and cross-border crime, particularly drug trafficking;
- Trafficking in human beings;
- Crimes against women and children;
- Cybercrime, including child sexual abuse;
- Electronic evidence;
- Hate crime;
- Cooperation and the exchange of information on weapons and explosives.

Furthermore, the Presidency is paying particular attention to the prevention of terrorism and extremism, especially the challenges of radicalisation and violent extremism (of various origins and orientations) as well as related online activities.

Further priorities of the Portuguese Presidency include:

- Revision of the Europol Regulation;
- Implementation of the EU action plan on preventing money laundering and terrorist financing;
- Implementation of the European Public Prosecutor's Office;
- Implementation of the 2020–2025 EU Strategy on victims' rights;
- Launch of the next political cycle for the fight against serious and organised international crime. (CR)

### Informal Justice Affairs Meetings under Portuguese Presidency

Discussions of the [ministers of justice at the first informal videoconference under the Portuguese Council Presidency](#), held on 29 January 2021, focused on two topics in the area of criminal law:

- Problems of organised crime as regards counterfeiting of medicine and protective equipment. Portuguese Minister for Justice, Francisca Van Dunem, and European Commissioner for Justice, Didier Reynders, called on the Member

States to ratify the CoE's Medicrime Convention ([→eucrim 2/2016, 84–85](#)). The Convention is the first binding international instrument in the criminal law field on counterfeiting of medical products and similar crimes involving threats to public health that have a global relevance.

- Digitalisation of justice. Ministers agreed to leverage digitalisation in the justice area on the basis of the new recovery and resilience budget. They supported the promotion of e-CODEX ([→eucrim news of 19 January 2021](#)), in order to achieve the widest possible application.

The project “e-CODEX” (launched by the European Commission) consists of a package of software components to enable connectivity between national systems. Thus, it allows users (competent judicial authorities, legal practitioners, citizens) to electronically send and receive documents, legal forms, evidence, or other information in a swift and secure manner. In this way, e-CODEX allows the establishment of interoperable and secure decentralised communication networks between national IT systems supporting cross-border civil and criminal proceedings. e-CODEX already underpins the e-Evidence Digital Exchange System in relation to European Investigation Orders and Mutual Legal Assistance in the area of judicial cooperation in criminal matters.

At the [informal videoconference of the justice ministers of 11 March 2021](#), data retention was on top of the agenda. The ministers shared the view that a common approach is to be followed which complies with the rulings of the CJEU and fundamental rights. Nonetheless, CJEU case law has a considerable impact on criminal investigations.

Ministers discussed the strengthening of the application of the Charter of Fundamental Rights. They referred to the Commission Strategy of December 2020 ([→eucrim 4/2020, 259–260](#) and the [Council's conclusions on this topic of 5 March 2021](#)). Both the Commission

and the Council focus on targeted, practical actions, such as training, awareness raising for the public, proper funding and monitoring of the relevant acts, through which the implementation of the Charter can be concretely enhanced.

The justice ministers also dealt with judicial training following the Commission's new training strategy presented in December 2020 ([→eucrim 4/2020, 264](#)). Referring to [Council conclusions on boosting the training of justice professionals of 8 March 2021](#), the Council calls on Member States to encourage the use of training possibilities, invest in the digitalisation of judicial training, enhance training in EU law, emphasise the multidisciplinary approach of judicial training, and provide support to the judiciaries beyond the EU, in particular those in the Western Balkans.

Ultimately, the Commission updated the justice ministers on the state of play with regard to the implementation of the EPPO regulation. Work is ongoing in several areas in order to get the EPPO up and running as soon as possible. (TW)

### Home Affairs Meetings under Portuguese Presidency

At their [informal videoconference on 28 January 2021](#), ministers of home affairs discussed the [New Pact on Migration and Asylum](#), which was proposed by the Commission in September 2020. During its Council Presidency (which started on 1 January 2021), Portugal wants to focus on the external dimension of migration, external border control of the EU, and the balance between the principles of responsibility and solidarity. Furthermore, the importance of concerted safeguarding and management of the Schengen area and the Europol reform (initiated by the Commission in December 2020) were on the agenda of the ministerial meeting. (TW)

At the first [formal meeting on 12 March 2021](#), ministers of home affairs discussed the proposal for a directive to enhance the resilience of critical entities providing essential services,

such as health, transport or drinking water. They, *inter alia*, stressed the need to make such legislation consistent with the measures for a high common level of cybersecurity. In this field, a reform of the [Directive on security of network and information systems](#) (the NIS Directive) is currently under negotiation. Discussions also involved the external dimension of migration and the state of play of negotiations on the asylum and migration pact.

Ministers supported the Council Presidency's initiative to enhance cooperation between the EU and North African countries. The initiative included a proposal for a political dialogue on justice and home affairs, by means of which also operational cooperation should be fostered. Ministers voiced different views of whether more intensive cooperation with North African countries should concentrate on migration or additionally involve other security issues, such as counter-terrorism and organised crime. (TW)

### EU Starts Dialogue on Anti-Drug Policies with China

On 22 January 2021, [the EU and China officially launched a dialogue on the topic of illicit drugs](#) and the control thereof. The opportunity was taken to exchange views and information on the current situation and to access policies of the EU and China. Issues discussed included alternatives to coercive sanctions, new psychoactive substances, and the exchange of experience and best practice in the field of drug rehabilitation and treatment from a public health perspective.

The EU-China dialogue forms part of the key objectives set out in the [EU Drugs Strategy 2021–2025](#) (approved by the [Council](#) on 18 December 2020). The strategy delineates the political framework and priorities for the EU's drug policy from now until 2025. In particular, the EU will focus on two main drug-related issues, namely supply reduction and demand reduction. (CR)

## European Court of Justice (ECJ)

### AG Proposes Paradigm Shift Regarding the Duty to Refer for National Last Instance Courts

In his opinion dated 15 April 2021 in [Case C-561/19](#) (*Consorzio Italian Management und Catania MultiserviziSpA / Rete Ferroviaria Italiana SpA*), Advocate General (AG) *Bobek* proposed that the CJEU revisit its case law on exceptions from the duty borne by national last-instance courts to refer questions on the interpretation of Union acts to the CJEU (Art. 267 TFEU). The exceptions were established in the *CILFIT* judgment of 6 October 1982 ([C-283/81](#)); they are widely known as the “*acte éclairé*” and “*acte clair*” doctrine. AG *Bobek* stated that the current approach relies too heavily on the subjectivity of the national judge and should be replaced by a more *objective* imperative of securing uniform *interpretation* of EU law across the EU. According to his opinion, national courts of last instance have a duty to refer a case for a preliminary ruling on the interpretation of EU law, provided that the following three cumulative requirements are met:

- The case raises a general issue of interpretation of EU law;
- EU law can be reasonably interpreted in more than one possible way;
- The way in which EU law should be interpreted cannot be inferred from existing CJEU case law or from a single, clear enough judgment of the Court.

If just one of these requirements is not met, the national court of last instance is relieved of the duty to refer. AG *Bobek* indicated that the CJEU should strive for a paradigm shift (away from its *CILFIT* concept) in order to keep the system of preliminary ruling procedures feasible and warranted. (TW)

### The CJEU in 2020: A Review

On 5 March 2021, the Court of Justice of the European Union (CJEU) presented its 2020 [judicial statistics](#). Whilst the COVID-19 pandemic significantly af-

ected the operations of the Court, the number of new and completed cases brought to Luxembourg remained fairly stable: 1,582 new cases and 1,540 completed cases. Indeed, the number of cases might have been higher if the CJEU had not been closed from 16 March to 25 May 2020.

Despite the pandemic, the CJEU was able to resume its services with stringent health measures, thereby enabling court chambers to remain open to the representatives of litigating parties and the general public. Representatives of litigating parties unable to travel were offered to participate in hearings remotely by means of a videoconferencing system specifically designed to enable simultaneous interpretation. Forty hearings were held by videoconferencing before the Court of Justice and 37 before the General Court.

Lastly, the duration of finalised proceedings before the two courts was brought to an historic low, with an average of 15.4 months per case. (CR)

### New Member of the General Court of the EU

On 25 February 2021, Mr [David Petrlik](#) was appointed as a judge at the General Court of the EU. During his career, Mr *Petrlik* has served in several functions in the Czech judiciary and also worked for the EU. Prior to his new office, he served as Head of the Legal Section of the European Global Navigation Satellite Systems Agency (GNSS). (CR)

## OLAF

### OLAF Signs Cooperation Arrangement with Prosecutor General's Office of Ukraine

On 11 February, OLAF Director-General *Ville Itälä* and the Prosecutor General of Ukraine *Iryna Venediktova* signed an [Administrative Cooperation Agreement](#) (ACA). It will allow a more effective and targeted exchange of information between OLAF and the Ukraine's Gen-

eral Prosecutor's Office. OLAF now have 31 ACAs with partner authorities in non-EU countries and 13 ACAs with counterpart administrative investigative services of international organisations. For the important external dimension of OLAF's work → [Scharf-Kröner/Seyderhelm, eucrim 3/2019, 209–218](#). (TW)

### OLAF Supports Raids against Counterfeits

On 30 March 2021, OLAF informed the public about [successful raids in Belgium and Germany](#) against counterfeiters. Supported by OLAF, a raid in a warehouse in Antwerp, Belgium brought to light hundreds of counterfeit sports shoes and textiles with premium labels. Over €25,000 in cash was also seized. The warehouse in Antwerp was identified as the central hub of a distribution network for counterfeit goods in Europe. At the same time, customs raids in other spots in Belgium and in Germany led to the successful seizure of other counterfeit goods, among them perfumes and textiles. The operations were coordinated by OLAF. They were part of ongoing investigations against the illicit trade in counterfeit goods in the EU. (TW)

### Millions of Counterfeit Toys Confiscated

On 8 March 2021, OLAF and Europol reported on an [operation](#) that resulted in the seizure of close to five million toys with a total value exceeding €16 million.

Between October 2020 and January 2021, Operation LUDUS ran across 24 countries (20 EU Member States and 4 non-EU countries) with 4,768 inspections carried out. 44,127 samples were tested in laboratories, 125 judicial cases were opened, and 11 individuals were (thus far) arrested. In almost all cases, the counterfeit toys had not been subject to mandatory safety tests and had no warnings or advice on the packaging. Many of the toys contained toxic chemicals or exceeded legal decibel limits, thereby placing the health of children at risk.

Operation LUDUS was organised by Europol and supported by OLAF and the

European Union Intellectual Property Office (EUIPO). OLAF mainly supported the operation by running a targeted control action and by coordinating the activities of customs agencies and market surveillance authorities in the 20 EU Member States involved. Europol coordinated operational activities across the globe, developed risk indicators, which supported national law enforcement and customs authorities in prioritising checks, and provided a platform for real-time information sharing and cross-checking of intelligence. Operation LUDUS was the first operation on this scale targeting counterfeit toys. (CR)

### CJEU Puts an End to Dalli Action against OLAF

On 24 February 2021, the CJEU dismissed the appeal by former Maltese Commissioner *John Dalli* against a judgment of the General Court of 6 June 2019 ([Case C-615/19 P](#)). In this judgment, the General Court dismissed an action in which *Dalli* claimed compensation for non-material damage caused to him by alleged unlawful conduct against him by OLAF and the Commission (→ [eucrim 2/2019, 87–88](#)). Similarly to the General Court, the CJEU rejects all arguments put forward by *Dalli*, by means of which he claimed that OLAF's internal investigations against him for alleged bribery were unlawful. These arguments concern, for instance, the opening of investigations, their extension, the collection of evidence, and the violation of his procedural rights. In addition, the CJEU rejected the argument that the General Court erred in law when it negated the reality of the damage alleged and the existence of a causal link between OLAF's conduct and the damage invoked. The CJEU stated that the General Court took this finding only by way of complementary remark and it was not necessary for the Court to examine this condition since no unlawful conduct was established that may be attributed to a Union institution. (TW)

### OLAF Supports Raid in Poland against Illegal Trade in Medical Products

On 3 February 2021, [OLAF reported that Polish police successfully raided](#) premises of a criminal gang that traded in counterfeit and illegal pharmaceutical products. OLAF coordinated the operation, which also involved authorities in France and Italy.

Investigations revealed that an internationally-operating organised crime group imported active substances from Asia to Poland where they were shipped to other countries for the production of counterfeit medicines. Then the products, which partly mocked well-known brands, were sold in Europe and the US via online shops. In addition, the gang traded with genuine pharmaceutical products that were stolen from production plants. The Polish police in Poznań arrested 13 persons, seized hundreds of thousands of counterfeit medicine products and drugs (worth € 5.6 million), and confiscated instrumentalities and proceeds of crime, such as luxury vehicles and cash.

*Ville Itälä*, Director-General of OLAF, highlighted the added value of OLAF in coordinating and facilitating the exchange of data and information which proved crucial in the case. He also stressed that the operation showed that criminal activities not only defrauded citizens, but also posed a real risk to people's health. Therefore, OLAF is increasingly mandated with saving the lives of citizens. (TW)

### OLAF Discovers Fraud in Bulgarian Ministry and Signs Cooperation Arrangement with Bulgarian Prosecutor

On 1 February 2021, OLAF informed the public that it closed investigations into the [fraud and misappropriation of EU funds detected within the Bulgarian Ministry of Interior](#). In the case at issue, the Bulgarian Ministry of Interior received money from the EU Internal Security Fund in order to purchase all-terrain vehicles for the police. Investigations revealed that the Ministry of

Interior unilaterally changed the conditions of the grant agreement and manipulated tenders, as a result of which it bought sport utility vehicles (SUVs) from older stocks with the EU money. OLAF recommends the competent European Commission service to recover almost €6 million from the beneficiary. The Bulgarian Prosecutor's Office is recommended to open a criminal investigation for abuse of power to the benefit of a third party.

The information on this case comes shortly after OLAF signed an [administrative cooperation agreement with the Prosecutor's Office of the Republic of Bulgaria](#) in January 2021. The agreement will allow for a more effective and targeted exchange of information between OLAF and the Bulgarian Prosecutor's Office (while respecting the relevant rules on confidentiality and data protection), as well as for operational assistance and training. It also includes a provision on OLAF reports as a judicial follow-up of investigated cases. However, the arrangement neither affects mutual legal assistance or other forms of judicial cooperation in criminal matters nor future cooperation between Bulgarian prosecutors and the EPPO. (TW)

### OLAF Investigated Irregularities in Funding Agricultural Activities in Slovakia

On 21 January 2021, OLAF reported on three cases that were closed in 2020 involving [irregularities in agricultural funds in Slovakia](#). The three cases concerned direct payment applications made between 2013 and 2019 by several Slovakian companies. Investigators found that the conditions to receive EU money from the agricultural funds were not given in these cases. Applications were ineligible, for instance, because land plots were overlapping, land was used for other purposes than agricultural activity, or no valid lease contracts existed for the area claimed. OLAF also stressed that, beside the specific payment-related aspects, there have been several weak-

nesses and internal verification deficits regarding the control and management of EU funds at the competent Slovak managing authority. In two cases, OLAF issued recommendations for financial and judicial follow-up. In all three cases, OLAF made several administrative recommendations. During the investigations, OLAF also closely cooperated with Eurojust and the competent Slovak administrative and judicial authorities so that the procedural rights of the suspects could be ensured. (TW)

### Hits against Illegal Tobacco Trade in 2020

In a press release issued on 14 January 2021, OLAF took stock of [successful operations against illegal tobacco trade in 2020](#). In 20 operations, national customs and law enforcement authorities were able to seize nearly 370 million cigarettes that were foreseen for the black market. The potential loss of customs and excise duties and VAT is estimated at €74 million. OLAF supported the operations by providing vital information on the identification and tracking of lorries and/or containers loaded with contraband cigarettes and exchanging intelligence information in real time with EU Member States and third countries. The operations also revealed fraud and smuggling patterns: approximately 37% of the cigarettes were seized in non-EU countries, e.g., Albania, Kosovo, Malaysia, and Ukraine. The majority of the cigarettes originated from Asia (China, Vietnam, Singapore, Malaysia), but a reasonable share also came from Balkan and Eastern European countries (Montenegro, Belarus, Ukraine), Turkey, and the United Arab Emirates.

OLAF Director-General *Ville Itälä* said: "Our joint efforts have not only helped save millions of euros in lost revenues and kept millions of contraband cigarettes off the market, they have also helped us get closer to the ultimate goal of identifying and closing down the criminal gangs behind this dangerous and illegal trade." (TW)

## European Public Prosecutor's Office

### Working Arrangement Between EPPO and Prosecutor-General of Hungary

European Chief Prosecutor *Laura Kövesi* and Hungary's Prosecutor General *Péter Polt* [signed a working arrangement](#). It entered into force on 6 April 2021. Hungary is one of the EU countries that does not participate in the enhanced cooperation scheme of the EPPO. [The working arrangement](#) aims to facilitate the practical application of the existing legal framework for judicial cooperation in criminal matters between the EPPO and Hungary. It will allow the exchange of strategic information and establish the framework for operational and institutional cooperation. The arrangement ensures that the EPPO can cooperate directly with the Prosecutor General's office in Hungary. The Hungarian Prosecutor General's office will provide an EPPO contact point. In addition, Hungary may second a liaison officer to the EPPO's headquarters in Luxembourg.

It is also foreseen that high-level and technical meetings will take place on a regular basis, and both parties will cooperate on training, conferences and workshops. The arrangement emphasises that the relevant Union acts apply as regards the gathering of evidence and data protection, e.g. the European Investigation Order. (TW)

### Working Arrangement Eurojust – EPPO

On [12 February 2021](#), a [working arrangement](#) between Eurojust and the EPPO entered into force. The arrangement details practical modalities concerning cooperation in the fight against crimes that affect the EU's financial interests.

In particular, the arrangement sets out rules for the exchange of information held by the case management systems of Eurojust and EPPO. Issues concerning judicial, institutional, and administrative cooperation, as well as the processing of personal data, are also covered.



According to the arrangement, Eurojust and the EPPO will mutually support each other during operations, especially in transitional cases involving Member States that are not part of the EPPO or third countries. In such cases, the EPPO may request Eurojust to provide the following support:

- Organisation of coordination meetings;
- Establishment of coordination centres to carry out simultaneous investigations;
- Setting up of Joint Investigation Teams;
- Prevention and solving of conflicts of jurisdiction.

Further measures to enhance mutual cooperation include the setting up of liaison teams mandated to discuss and coordinate institutional and operational matters of general interest and to assess the practical implementation of the working arrangement. (CR)

### Working Arrangement Europol – EPPO

On 19 January 2021, a Working Arrangement between Europol and the European Public Prosecutor's Office (EPPO) entered into force. The Working Arrangement lays down detailed practical modalities concerning cooperative efforts to fight crimes affecting the EU's financial interests.

The agreement sets out a number of rules for the exchange of information, including:

- The exchange of personal data;
- The use of information;
- The onward transmission of the information received;
- The assessment of the reliability of the source of the information and the information itself;
- Secure processing of personal data.

Furthermore, the Working Arrangement sets out rules to guarantee the security of information. Regarding the exchange of classified information, it has been agreed that a separate agreement will need to be reached. The establishment, implementation, and operation of a secure communication line for infor-

mation exchange between EPPO and Europol will also be finalised in an additional memorandum.

Further measures of enhanced cooperation will include regular consultation meetings between liaison officers and experts. The tasks, rights, and obligations of these officers/experts will be governed by a separate instrument. (CR)

### EPPO Suggests Operational Start on 1 June 2021

In a letter sent to the Commissioners *Didier Reynders* and *Johannes Hahn* on 7 April 2021, European Chief Prosecutor *Laura Kövesi* proposed that the European Public Prosecutor's Office (EPPO) starts its operational activities on 1 June 2021. According to the EPPO Regulation, the Commission must fix the date on which the EPPO can assume its tasks. Since major steps have been taken, such as the appointment of the EPPO College, key decisions on EPPO's procedure, working arrangements with important partners, etc., the EPPO feels ready to start. (TW)

### EPPO Website

The website of the European Public Prosecutor's Office has been launched. Information about its mandate and tasks, members, job vacancies, news, documents, etc. is available at: <https://www.eppo.europa.eu/>. (TW)

### Appointment of European Delegated Prosecutors in Process

The EPPO is still in the process of setting up its operational capacities. The process of appointment of the European Delegated Prosecutors is ongoing. On 11 March 2021, Belgium became the tenth EU Member State to send candidates. The EPPO regularly provides an update of the state of play of the appointments. (TW)

### Administrative Director of EPPO Appointed

On 20 January 2021, the College of the European Public Prosecutor's Office

(EPPO) appointed *Olivier Ramsayer* as its first Administrative Director. *Ramsayer* was previously Director of Corporate Governance at Frontex. His new position includes being the legal representative of the new body for administrative and budgetary purposes and he will be responsible for the implementation of EPPO's budget. (TW)

### Europol

#### EDPS Gives Opinion on Europol Reform

On 8 March 2021, the EDPS published its Opinion 4/2021 on the Commission's Proposal of 9 December 2020 for a Regulation amending Regulation (EU) 2016/794 (→eucri 4/2020, 279). The revision of the current Europol Regulation will mainly include amendments as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role on research and innovation. Additional changes will affect the work of Europol, e.g., the legal regime on data protection, transfers of data to third countries, and the entering of alerts into the Schengen Information System (SIS).

Looking at the impact on data protection rules, the EDPS has raised concerns that exceptions from the current data protection rules applicable to Europol could become reality in practice. He therefore recommends better defining the situations and conditions in which Europol may resort to the proposed derogations.

Concerning Europol's extended legal possibilities to cooperate with private parties, the EDPS welcomes the insertion of extended safeguards, e.g., the prohibition of systematic, massive, or structural transfers of data. At the same time, however, the EDPS recommends that these restrictions be applied to all exchanges between Europol and private parties, irrespective of their location within or outside the EU. Europol's legal role and responsibility when acting

as service provider to national authorities and thus as a data processor should be further clarified in a binding legal act. In addition, an assessment should be made of the possible security risks created by the opening of Europol's communication infrastructure for use by private parties.

Regarding the envisaged use of personal data by Europol for research and innovation purposes, the EDPS recommends clarifying the scope of these activities in a binding document. Lastly, the EPDS calls for alignment of his supervisory powers vis-à-vis Europol, as provided for in [Regulation \(EU\) 2018/1725](#) and as applicable to the other EU institutions, agencies, and bodies, including the European Parliament, the Council, and the Commission. (CR)

### JPSG: Discussion on Europol Reform

On 1–2 February 2021, the Joint Parliamentary Scrutiny Group on Europol (JPSG) held its [biannual meeting](#) to discuss the revision and strengthening of Europol's mandate. The discussion focused on Europol's handling of large data sets (big data) and included a presentation by the European Data Protection Supervisor (EDPS). Further debates covered topics such as the impact of COVID-19 on the EU's internal security, the role of police cooperation, cybercrime, and digital resilience. (CR)

### Memorandum of Understanding with the World Anti-Doping Agency

On 18 February 2021, Europol signed a [Memorandum of Understanding](#) (MoU) with the World Anti-Doping Agency (WADA). Under the MoU, both agencies will exchange knowledge and expertise to enhance their cooperation in the fight against the illegal production and distribution of doping substances and their use in sporting events.

[WADA](#) is an international, independent agency composed and funded equally by the world's sport movements and governments. Its key activities include scientific research, education,

development of anti-doping capacities, and monitoring the World Anti-Doping Code. (CR)

## Eurojust

### Eurojust Annual Report 2020

On 23 March 2021, Eurojust published its [Annual Report for the year 2020](#). In 2020, Eurojust continued to be fully operational during the Covid-19 pandemic. The total number of cases supported by the agency increased 13% compared to the previous year, with 8800 cross-border criminal investigations. 4200 cases were new cases and 4600 ongoing cases from previous years.

As in the previous years, the majority of new cases concerned swindling and fraud (1264), money laundering (595), and drug trafficking (562). 1519 cases were solved with a rapid response, providing support within hours if necessary. Furthermore, 74 new agreements for Joint Investigation Teams (JITs) were signed – they will join the 188 ongoing JITs. Hence, in 2020, Eurojust provided financial and/or operational support to 262 JITs. In addition, Eurojust coordinated four major cross-border actions against intellectual property crime in 2020, taking down 5600 servers.

In 2020, Eurojust also provided operational guidance on the application of EU judicial cooperation instruments, in particular with regard to the European Arrest Warrant (1284 cases), the European Investigation Order (3159 cases), and freezing and confiscation, conflicts of jurisdiction, and extradition to third countries. It published a joint report with the EJM on the latter ([→ eucrim 4/2020, 288](#)).

Looking at crime-related priority areas, Eurojust handled 2647 ongoing and new cases of swindling and fraud, 1460 cases of money laundering, and 1169 cases of drug trafficking. Numerous cases involving mobile organised crime groups, trafficking in human beings, cybercrime, corruption, crimes against the

EU's financial interests, migrant smuggling, terrorism, and environmental crime also figure on the list.

Regarding cooperation with third States, Eurojust continued to expand its network by forming a gateway for prosecutors to 55 jurisdictions worldwide. In 2020, liaison officers from Albania, Georgia, and Serbia were deployed to Eurojust. In line with the Trade and Cooperation Agreement, a liaison officer was also deployed from the UK after Brexit. The network of Eurojust contact points was also extended, with contact points joining from Uzbekistan, Sri Lanka, Mexico, and Kosovo. Cooperation with Latin America took a big step forward through the agreement on broader access to the Iber@SecureCommunicationSystem, which opens the system to all national desks at Eurojust.

Activities involving Eurojust's governance and agency management in 2020 included the elections of the president, *Ladislav Hamram*, national member for the Slovak Republic, and vice-president, *Boštjan Škrlec*, national member for Slovenia. By the end of 2020, Eurojust had 332 holders of positions, including 26 national members assisted by 60 deputies and assistants as well as 223 staff members and 22 seconded national experts.

Eurojust has continued to contribute to the discussions and measures to speed up digitalisation of criminal justice across borders. (CR)

### Cooperation with EUIPO

On 15 March 2021, Eurojust and the European Union Intellectual Property Office (EUIPO) signed a [Service-Level Agreement](#) to enhance their cooperation in the fight against criminal abuse of intellectual property rights in the field of counterfeiting and online piracy. Under the agreement, Eurojust will receive €750,000 in additional funding until the end of 2024 to help build up greater capacity and expertise with this type of crime and to support complex investigations in this field. (CR)

## Cooperation with Latin-American Partners

During a high-level online meeting of the Europe Latin America Technical Assistance Programme against Transnational Organized Crime (EL PAC-CTO) and Eurojust, that was held on 5 March 2021, the partners agreed to expand their cooperation by [establishing Contact Points](#) to assist with judicial cross-border cooperation. Hence, Contact Points will be established in Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras and Panama providing for support in international cases. (CR)

## Liaison Prosecutors for Albania and Switzerland at Eurojust

Two new Liaison Prosecutors took up their positions at Eurojust.

At the end of January 2021, Ms *Fatjona Memcaj* started her work as first [Liaison Prosecutor for Albania](#) at Eurojust. Prior to taking this position at Eurojust, Ms *Memcaj* served as an appellate prosecutor at the dedicated prosecution office of the Court of Appeals of Tirana, where she dealt with topics including mutual legal assistance and extradition.

At the beginning of February 2021, Mr *Sébastien Fetter* started as [Liaison Prosecutor for Switzerland](#). Before taking up his new position, Mr *Fetter* served as a prosecutor specialising in cybercrime at the Public Prosecutor's Office (PPO) of the canton of Vaud and as a senior lecturer at the University of Lausanne. Mr *Fetter* replaces Ms *Tanja Bucher* who held the position since 2019. (CR)

## European Judicial Network (EJN)

### Final Report on EJN Peer Evaluation

At the end of March 2021, the EJN published the final report outlining the [outcome of its peer evaluation](#). The peer evaluation is based on contributions and input from the EJN contact points in the EU Member States, EU candidate

countries, and EJN-associated countries. It aims at evaluating the functioning of the network with a special focus on its operational functions and its support to judicial cooperation. Based on the findings of the evaluation, the report sets out an Action Plan with different activities to be taken by the EJN contact points, national correspondents, and the EJN secretariat.

In order to improve the cooperation on cases, the Action Plan recommends the establishment of a catalogue of best practices on the handling of EJN cases, including an illustration of the EJN case cycle to be developed by the EJN secretariat. In addition, the report concludes that cooperation with EJN contact points in third countries and other judicial networks should be reinforced through, for instance, further working agreements, Memoranda of Understanding, and meetings. EU countries with a lower response rate on operational cases should be addressed more intensively. Proper allocation of cases between the EJN and Eurojust should be further promoted.

To improve the functioning of the EJN and the engagement of the contact points, national correspondents are asked to regularly review the nominated contact points for their countries in order to ensure adequate representation, with a view to regional and professional balance. Furthermore, the national correspondents and the national authorities should closely observe the EJN guidelines on appointing contact points to make sure that suitable candidates are selected. Additionally, national authorities should allocate sufficient time for the contact points to fulfil their tasks. The list of contact points on the EJN website should be improved by supplementing and streamlining the information on regional competence, specialisation, and availability of the contact points, including photos. More regional and national meetings could provide added value for the functioning of the network in the various countries/

regions and promote engagement with the EJN. Another new measure worth analysing would be the introduction of a 24/7 availability of the contact points.

Lastly, the EJN should develop a broader awareness strategy to promote the work of the network by, for instance, producing awareness-raising material, promoting the insertion of the EJN website into the intranet pages of the judicial authorities, and more strongly using the EJN reporting tool for EJN cases. (CR)

## Frontex

### Study on AI-Based Capabilities for Border Security

On 26 March 2021, Frontex published its [final report](#) on Artificial Intelligence (AI)-based capabilities for border and coast guard applications. It presents the main findings of a study commissioned by Frontex in 2019.

The report provides a characterisation of the evolving landscape of AI-based capabilities in border security. It maps the technology, capability areas, and border security functions to which AI may be applied. In addition, it outlines the current and desired capability levels for nine selected technology areas, as well as the pathways for their adoption. These technology areas include:

- Automated Border Control (ABC);
- Maritime domain awareness;
- Machine learning optimisation;
- Surveillance towers;
- Heterogeneous robotic systems;
- Small unmanned aerial systems (sUAS);
- Predictive asset maintenance;
- Object recognition;
- Geospatial data analytics.

In addition, the report looks at cross-cutting enablers of and barriers against adoption of AI-based capabilities in border security, and it reflects on the implications of the new technology for Frontex. Several annexes and tables complement the report. (CR)

### Vacancies Published

On 24 March 2021, Frontex published [three vacancy notices](#): recruitment of a Deputy Executive Director for Returns and Operations, a Deputy Executive Director for Standing Corps Management, and a Deputy Executive Director for European Border and Coasts Guard Information Management and Processes. (CR)

### Working Arrangement with EMSA and EFCA Signed

On 18 March 2021, Frontex, the European Maritime Safety Agency (EMSA), and the European Fisheries Control Agency (EFCA) [signed a new working arrangement, in order to](#) further enhance their cooperation. The arrangement defines the precise forms of cooperation between the agencies, with the aim of supporting national authorities carrying out coast guard functions at the national, Union, and (where appropriate) international levels.

Forms of cooperation set out in the arrangement include:

- Sharing, fusing, and analysing information available in ship reporting systems and other information systems hosted by or accessible to the agencies;
- Providing surveillance and communication services based on state-of-the-art technology;
- Capacity-building;
- Enhancing the exchange of information and cooperation on coast guard functions;
- Capacity-sharing.

The arrangement also contains specific rules on cooperation for specific purposes referring to the relevant Directives and Regulations as well as provisions on governance, data protection, and fundamental rights. (CR)

### Cooperation with Albania

On 17 March 2021, Frontex and Albania signed a [renewed working agreement](#) to strengthen their cooperation in border management to better fight cross-border

crime and return. Building up on the Status Agreement that was agreed between the EU and Albania in 2019 and that allowed for the deployment of Frontex officers to Albania, the renewed agreement also includes the exchange of information and best practices in the area of border management and return. (CR)

### Conclusions from the Final Report on Operations in the Aegean Sea

On 5 March 2021, the Management Board of Frontex met to discuss the findings of the [final report](#) provided by the Working Group on Fundamental Rights and Legal Operational Aspects of Operations in the Aegean Sea. The report criticizes, *inter alia*, Frontex's monitoring, recruitment, and reporting procedures.

Of the 13 incidents investigated, eight were resolved to the effect that no third-country nationals were turned back in violation of the principle of non-refoulement. Regarding the remaining five incidents, however, the facts could not be clarified beyond doubt.

In consequence, the Management Board used the report to call on Frontex to revise its own reporting system in order to make it more efficient. Proposals to improve the system include:

- Clear documentation of the allocation of responsibilities within the agency to ensure that all staff and the members of the Frontex Management Board can fully exercise their duties;
- Setting minimum requirements for the qualification of experts in the Frontex Situation Centre (FSC);
- Ensuring serious incident reports concerning alleged violations of fundamental rights are always reported to, and assessed by, the Fundamental Rights Officer;
- Providing that every operational plan should include a transparent reporting mechanism;
- Establishing a systematic monitoring of the above reporting mechanism;
- Clarifying the relationship between systems to protect whistle-blowers and exceptional reporting of serious incidents;

- Ensuring clear communication of these systems to staff and team members, including mandatory training sessions;

- Immediate recruitment of 40 Fundamental Rights Monitors, to be in place by 5 December 2020.

Additionally, Frontex shall submit a proposal for the establishment of a transparent process to follow-up on serious incident reports concerning potential violations of fundamental rights. The Frontex Management Board will monitor the implementation of the report's findings. (CR)

### First Hearing of the European Parliament Scrutiny Working Group

On 4 March 2021, the European Parliament Scrutiny Working Group on Frontex (FSWG) held its first [hearing](#) to discuss the implementation of the fundamental rights provisions of the last Frontex mandate; to review the investigation related to the agency's activities in the Aegean Sea; to debate the interpretation of applicable rules for the surveillance of the external sea borders; and to clarify the political scrutiny role of the European Commission over Frontex.

Frontex informed the FSWG about the agency's plan to employ a new Fundamental Rights Officer from March onwards and also noted that 15 of the planned 40 Fundamental Rights Monitors had been recruited.

The [FSWG](#) was established in January 2021 following a decision by the Civil Liberties Committee to better monitor the agency, including its compliance with fundamental rights. The group consists of 14 MEPs, two per political group. (CR)

### Public Access to Documents

In 2019, Statewatch filed a complaint to the European Ombudsman concerning Frontex. The complaint concerned Frontex's alleged non-compliance with EU rules on public access to documents, the lack of information about sensitive documents in its annual reports, and the

agency's policy to not provide access to public documents to non-EU citizens residing outside the EU. On 3 February 2021, the European Ombudsman closed the case with the following [conclusions](#):

- Concerning access to public documents, Frontex agreed to update its public register of documents. Furthermore, the Agency agreed to publish the number of sensitive documents it holds that are not included in its public register.
- Regarding requests for access from non-EU citizens not residing in the EU, the Ombudsman found no maladministration in the agency's approach to dealing with such requests on a case-by-case basis. (CR)

## Agency for Fundamental Rights (FRA)

### FRA Management Board's Opinion on Multiannual Framework

On 24 February 2021, the FRA Management Board published its [opinion](#) on a new Multiannual Framework (MAF) 2023–2027 for the agency.

The Management Board proposes seven key amendments for the Commission to be considered when proposing the new MAF:

- Clarifying the thematic area of “judicial cooperation”;
- Adding the thematic areas of “social inclusion and protection; employment” as well as “sustainable development” and “democratic participation”;
- Revising and widening the thematic area “information society”;
- Rephrasing current thematic areas where necessary, e.g., with regard to the chapters on victims of crime and access to justice; migration, borders, asylum, and integration of refugees; rights of the child; integration and social inclusion of Roma;
- Stressing cross-cutting obligations and activities in the preamble of the MAF, underlining that the FRA is neither obliged nor expected to deal with all thematic areas to the same extent.

The opinion also includes a comparative table that details the precise wording the Management Board proposes for the list of thematic areas in the next MAF. Furthermore, a summary of the results achieved through the consultation of stakeholders (held between 21 December 2020 and 15 January 2021) is included in an annex. (CR)

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### Disputes over Budget Conditionality Mechanism

**spot light** On 11 March 2021, Poland and Hungary [filed an action](#) with the CJEU seeking legal review of the so-called conditionality mechanism. Under this mechanism, which was agreed in December 2020 in the wake of the agreement on the EU's record budget for the upcoming years, payments to an EU Member State may be cut or frozen if that country breaches principles of the rule of law ([→ eucrim 3/2020, 174–176](#)). To ensure that the mechanism would not completely fail because of the veto of Poland and Hungary, the European Council agreed on a compromise: Hungary and Poland accepted an “interpretative declaration” laid down in the [European Council summit conclusions](#). Among other things, it was agreed that no measures be taken on the basis of the regulation until the Commission has finalised guidelines on the way the conditionality mechanism will be applied. Furthermore, the Member States can first ask the CJEU to clarify whether the regulation is in line with EU law, and the Commission is obliged to incorporate any elements stemming from a potential CJEU judgment.

According to [media reports](#), Poland and Hungary oppose the conditionality mechanism, *inter alia*, on the following grounds:

- Lack of legal basis for the mechanism in the Treaties;
- Interference with the competence of the Member States;
- Disbursement of EU funds can only be linked to objective and concrete conditions unequivocally established in a regulation;
- Infringement of the principle of legal certainty.

At the same time, MEPs fiercely criticised the Commission for not having applied the mechanism in order to protect the EU budget against rule of law breaches. In a [plenary debate of 11 March 2020](#) with Budget Commissioner *Johannes Hahn*, MEPs took the view that the regulation on the conditionality mechanism remained untouched and has been legally binding since 1 January 2021. In contrast, the European Council conclusions on this matter do not carry any legal effect. MEPs urged the Commission to immediately act as guardian of the Treaties and to activate the mechanism without delay. Mr *Hahn* countered that the Commission will apply the mechanism only after work on the guidelines has been completed, which will also take into account a possible CJEU ruling.

On 25 March 2021, [MEPs adopted a resolution](#) in which they urge the Commission to immediately start investigations of possible breaches of rule of law principles of a Member State, to apply the [Conditionality Regulation](#) and to take all appropriate measures to protect the EU budget. The resolution reiterates the EP's viewpoint that any action against the validity of the Conditionality Regulation before the CJEU has no suspensory effect.

MEPs insist that the existing rules on the rule of law cannot be subject to the adoption of guidelines. If the Commission does deem such guidelines necessary, it must draft them by 1 June 2021 and consult the EP prior to their adoption. If the Commission does not fulfil its obligations, the EP will consider the launch of legal action for failure to act before the CJEU pursuant to Art. 265 TFEU. (TW)

## AG Gives Opinion on Compatibility of National Constitutional Court's Decisions with PIF Obligations

On 4 March 2021, Advocate General (AG) *Michal Bobek* delivered [his opinions](#) on cases referred by Romanian courts, in which doubts were voiced over the compatibility of decisions rendered by the Romanian Constitutional Court in conjunction with Union law, including Art. 325 TFEU. The [Joined Cases C-357/19 and 547/19](#) (*Euro Box Promotion and Others*) and the [Joined Cases C-811/19 and 840/19](#) (*FQ and Others*) particularly concern the impact of three Constitutional Court decisions:

- In 2018, the Constitutional Court of Romania held that some panels of the Romanian High Court of Cassation and Justice (HCCJ), the national supreme court, were not properly composed. This enabled some parties to criminal proceedings involving corruption and abuse of office to introduce extraordinary appeals;
- In 2016, the Constitutional Court declared the participation of domestic intelligence services in technical surveillance measures for the purposes of acts of criminal investigation to be unconstitutional. This led to the exclusion of such evidence in criminal proceedings.
- In 2019, the Constitutional Court ruled that the HCCJ failed to comply with its legal obligation to establish specialised panels to deal with corruption cases at first instance. As a result, cases involving corruption connected with EU funds, which had already been adjudicated, had to be re-examined.

The HCCJ and the Regional Court of Bihor, Romania, were unsure whether the Constitutional Court decisions are compatible with certain provisions and principles of EU law, in particular Art. 325(1) TFEU and the PIF Convention, Art. 47 of the Charter of Fundamental Rights, Art. 19(1) TEU, and Decision 2006/928/EC establishing a mechanism for cooperation and verification of progress in Romania to address specific benchmarks in the areas

of judicial reform and the fight against corruption.

Specifically regarding the obligations arising from Art. 325(1) TFEU to counter illegal activities affecting the EU's financial interests, AG *Bobek* clarified the elements that must be taken into account in order to assess the effectiveness of the protection these interests. In general, he noted that “the relevant test should simply be whether a national rule, case-law or practice, is liable to compromise, from a normative point of view, and regardless of its actual measurable effect in terms of the number of cases affected, the effective protection of the financial interests of the Union.”

Against this background, the AG concluded that the 2018 decision of the Romanian Constitutional Court did not compromise the effective protection of the EU's financial interests. He argued, *inter alia*, that the decision did not undermine the legal instruments enabling the fight against corruption and that the motivation for this decision relied on fundamental rights protection.

Similarly, Union law does not preclude a decision by which evidence obtained by technical surveillance measures is excluded from criminal proceedings. EU law does not regulate the manner in which investigative measures are carried out. The fact that a constitutional decision has repercussions for ongoing or future criminal proceedings relating to corruption is a necessary and logical consequence.

Ultimately, the AG took a different stance as regards the 2019 decision declaring unlawful the composition of panels of the HCCJ not specialised in corruption. An infringement of Art. 325(1) TFEU is possible if such a finding is liable to give rise to a systemic risk of impunity regarding offences affecting the EU's financial interests. The AG considers that the requirements of Art. 325(1) TFEU are not maintained because serious concerns might be raised regarding the generally perceivable or expected practical consequences of the decision at issue. (TW)

## Money Laundering

### Commission: Germany, Portugal, and Romania Failed to Correctly Transpose 4th AMLD

In February 2021, the Commission formally [initiated infringement procedures](#) against Germany, Portugal, and Romania for having incorrectly transposed the 4th Anti-Money Laundering Directive ([Directive \(EU\) 2015/849](#)). As an initial step, the Commission sent a letter of formal notice requesting further information to each of the countries. The Commission stressed that it will not tolerate legislative gaps that may have an impact on the effective fight against crime and the protection of the financial system.

The Commission alleges that the countries have not addressed fundamental aspects of the anti-money laundering framework, including:

- The proper exchange of information with Financial Intelligence Units (FIUs);
- Requirements of customer due diligence;
- The transparency of the central beneficial ownership registers.

Germany, Portugal, and Romania have two months to provide a satisfactory reply to the points raised by the Commission. Otherwise, the Commission may launch the second step of the infringement procedure by addressing a [reasoned opinion](#) to the countries. (TW)

### AG: Union Law Allows Punishment of Self-Laundering

In his [Opinion](#) of 14 January 2021 in [Case C-790/19](#) (*LG and MH (Auto-blanchiment)*), Advocate General *Hogan* held that Union law does not preclude the interpretation of a national provision which criminalises so-called self-money laundering. The case specifically concerns the interpretation of Art. 1(2) lit. a) of [Directive 2005/60/EC](#) on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing. This Directive is applicable in the case at issue and established the following obligation for

Member States – an obligation that has been taken over in subsequent anti-money laundering directives that replaced Directive 2005/60: “As money laundering shall be regarded ... the conversion or transfer of property, knowing that such property is derived from criminal activity or from an act of participation in such activity, for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such activity to evade the legal consequences of his action.”

This provision was transposed *verbatim* into Romanian law and the prescribed conduct made punishable by a prison sentence between 3 to 12 years. The referring Romanian court wishes to know whether the person who commits an act which constitutes the offence of money laundering within the meaning of this definition in Art. 1(2)(a) of Directive 2005/60 may also be the person who committed the predicate offence (the act from which the money to be laundered is derived). The case in question concerns LG’s conviction for money laundering because he transferred funds stemming from tax evasion to a company account and then withdrew them.

The Advocate General is of the opinion that neither the wording of the said provision of Directive 2005/60 nor the objective of the Directive exclude the criminalisation of self-laundering. However, it was in principle open to Romania to provide such an offence in its national law since the legal basis of the Directive comes from provisions of the EC Treaty that aim to ensure the proper functioning of the internal market; thus, the enactment of penal legislation by the Member States is not required (but also not excluded). The international context – namely the FATF Recommendations and the 1990 Council of Europe (CoE) Convention on money laundering – also indicate that self-laundering could be criminalised. Both the Recommendations and the Convention empower states to also apply the criminal offence

of money laundering to persons who committed the predicate offence.

Ultimately, the principle of *ne bis in idem* as provided in Art. 50 CFR does not speak against the result. The activities of conversion and transfer of illicitly obtained assets and their concealment and disguise through the financial system clearly constitute an additional criminal act distinguishable from the predicate offence (here: tax evasion). These laundering activities, moreover, cause additional or a different type of damage than that already caused by the predicate offence. (TW)

### Tax Evasion

#### EP Calls on Reform of EU Blacklist on Tax Havens

By an overwhelming majority of 587 votes in favour (50 against and 46 abstentions), MEPs [adopted a resolution on reforming the EU list of tax havens](#). The resolution backs a motion from December 2020 prepared by the Economic and Monetary Affairs Committee ([→eucrim 4/2020, 282](#)). In view of the fact that the current list only covers less than 2% of worldwide tax revenue losses (according to a 2020 tax justice report [→eucrim 4/2020, 281](#)), MEPs reiterated their call that the EU’s existing listing system is “confusing and ineffective.” The [resolution of 21 January 2021](#) makes several demands for a new approach:

- The criterion of whether a country’s tax system is fair or not should not only be based on preferential tax rates but needs to include other harmful tax practices;
- Countries with a 0% corporate tax rate policy or with no taxes on company profits should automatically be placed on the blacklist;
- Removal requirements must be more stringent; countries that only make token tweaks should remain on the list;
- The EU must remedy the lack of transparency: all third countries need to be treated and screened fairly using the

same criteria; the process of establishing the list must be formalised through a legally binding instrument by the end of 2021;

- EU Member States which have tax avoidance schemes in place must be regularly evaluated and urged to implement recommendations.

MEPs also called on the Commission to put forward a legislative proposal for coordinated defensive measures against tax avoidance and evasion. The EU’s policy towards non-cooperative tax jurisdictions has been a constant issue of debate between the European Parliament, the Commission, and the Council ([→eucrim 1/2018, 16](#); [→eucrim 1/2020, 18](#)). (TW)

#### ECA: EU Exchange of Tax Data System Yet Insufficient to Prevent Tax Evasion

On 26 January 2021, the European Court of Auditors (ECA) published its [Special Report 03/2021 on the exchange of tax information in the EU](#). The underlying tool is the Directive on administrative cooperation in the field of taxation (Directive 2011/16/EU), which has been amended several times in the recent years to widen its scope. The ECA carried out audits in five Member States between 2014 and 2019: Italy, the Netherlands, Poland, Spain and, Cyprus. For this purpose, the ECA examined, firstly, how the Commission is monitoring the implementation and performance of the tax information exchange system. Secondly, the ECA looked at how Member States are using the information exchanged and how they are measuring the effectiveness of the system.

The ECA found that the exchange of tax information between Member States was not yet sufficient to ensure fair and effective taxation throughout the internal market. Although the system has been set up in an appropriate manner, there is still a need for action in terms of monitoring, ensuring data quality, and using the information received. In particular, the auditors criticise that the information exchanged was often of limited quality.

Therefore, the ECA recommends the Commission to extend the scope of the EU's legal framework and to strengthen its monitoring activities and guidance. Moreover, Member States should make better use of the information they receive. Gaps in the exchange of tax data in the EU could provide an incentive for tax avoidance and evasion. (TW)

### Council Adopts Amendments to Administrative Tax Cooperation Directive

On 22 March 2021, the Council adopted amendments to Directive 2011/16/EU on administrative cooperation in the field of taxation. The amendments (laid down in Directive (EU) 2021/514, [O.J. L 104, 25 March 2021, p. 1](#)) aim at improving administrative tax cooperation and countering tax fraud/tax evasion. They implement the results of an assessment cooperation scheme carried out by the Commission in 2019. The amendments include, *inter alia*:

- Standardised reporting requirements for digital platforms as regards income earned through trade via these platforms;
- Automatic exchange of this income information among the Member States;
- Facilitated information exchange on groups of taxpayers;
- Improved rules on simultaneous controls and the presence of officials in another Member State during an enquiry;
- New framework for joint audits.

In a [legislative resolution of 10 March 2021](#), the European Parliament requested a number of additional improvements regarding the text of the new Directive amending Directive 2011/16. The EP was only consulted in this matter, however, and its statements are not binding for the Council. (TW)

### Fraudulent VAT Scheme Involving Vegetable Oil Dismantled

On 18 February 2021, Polish and German authorities dismantled an international [VAT fraud](#) scheme with the support of Europol. The scheme, which concerned the vegetable oil trade, caused the Pol-

ish treasury to lose an estimated €17.8 million in tax. Twelve suspects were arrested; it is possible that the ringleader is amongst them. (CR)

### MTIC Scheme Dismantled

On 10 February 2021, Dutch tax authorities, in cooperation with law enforcement and judicial authorities from four EU Member States and supported by Eurojust and Europol, smashed an [illegal VAT](#) scheme that involved the purchase and sale of Secure Digital (SD) memory cards. By using a complex missing trader intra-community (MTIC) fraud scheme, the criminal network defrauded the Dutch treasury of an estimated €9 million. (CR)

### Hit Against “Dieselising Lubricants”

In January 2021, German authorities, supported by eleven European countries and Eurojust, [revealed a major tax swindle](#) involving sales of fuel that allegedly defrauded German tax authorities of approximately €8 million.

The so-called “dieselising lubricants” criminal scheme involved suspects pretending to sell solvents and anti-corrosion agents or liquids exempt from energy taxation while, in reality, they were selling products containing high quantities of diesel and petrol fuels that are not exempt from energy taxation.

As a result of this operation, two of the alleged leaders of the criminal network involved were arrested. (CR)

### Counterfeiting & Piracy

#### Number of Counterfeit Euro Banknotes at Record Low in 2020

On 22 January 2021, [the European Central Bank \(ECB\) reported](#) that in 2020, around 460,000 counterfeit euro banknotes had been withdrawn from circulation – fewer than ever before. Compared to the total number of banknotes in circulation of over 25 billion, the number of counterfeits remains very low. According to the report, 17 counterfeits

were discovered per 1 million genuine banknotes in circulation in 2020. Compared to 2019, this represents a decrease of 17.7%. €20 and €50 banknotes were again the most counterfeited: around two-thirds of all counterfeits were of these two denominations. 94.5% of euro counterfeits were detected in euro area countries, 2.8% in EU Member States outside the euro area and 2.7% in the rest of the world. The ECB concludes that euro banknotes remain a reliable and safe means of payment.

On the occasion of the annual report on euro counterfeiting, the ECB points out that all euro banknotes can easily be checked for authenticity by using the “feel, look and tilt” method as described in the [dedicated section of the ECB’s website](#) and on the websites of the national central banks. In addition, the Eurosystem helps professional cash handlers ensure that banknote-handling and processing machines can reliably detect and withdraw counterfeits. The Eurosystem also supports law enforcement agencies in their fight against currency counterfeiting. The ECB adds that banknote integrity is continuously improving: the second series of banknotes – the [Europa series](#) – is even more secure and is helping to maintain public trust in the currency. (TW)

### Organised Crime

#### Dismantled Encryption Networks: German Courts Confirmed Use of Evidence from EncroChat Surveillance

**spot light** Two German courts – the Higher Regional Court of Bremen and the Higher Regional Court of Hamburg – confirmed warrants for pre-trial detention against persons whose criminal activities had been revealed as a follow-up of the infiltration of the encrypted communication network EncroChat. The dismantling of EncroChat has been celebrated by law enforcement authorities as one of the largest strikes against organised crime in recent years.



On 2 July 2020, Europol and Eurojust informed the public that a joint investigation led by French and Dutch law enforcement authorities enabled the interception, sharing, and analysis of millions of messages that were exchanged between criminals via the encrypted phone network provided by EncroChat. Since 2017, the French Gendarmerie and judicial authorities have been investigating phones that used the secured communication tool EncroChat, after discovering that the phones were regularly found in operations against organised crime groups and that the company was operating from servers in France. French police put a technical device in place to go beyond the encryption technique and were thus able to access the users' correspondence. Between April and June 2020, the authorities were able to read the chat messages of thousands of users in real time.

Although Germany was seemingly not involved in the initial joint investigation, the surveillance brought to light a bulk of data that led to follow-up criminal investigations in other European countries. The [decision of the Higher Regional Court of Bremen](#) (handed down in December 2020) and [the decision of the Higher Regional Court of Hamburg](#) (handed down in January 2021) in two separate cases confirm that the collection of evidence by French authorities can also be used in German criminal proceedings if the interception of the surveillance reveals criminal activities from persons residing in Germany (in the cases at issue: drug trafficking offences). The information was lawfully made available to the German Federal Police Office via the exchange of spontaneous information and intelligence in accordance with [Framework Decision 2006/960/JHA](#).

On 10 March 2021, Eurojust and Europol reported [another successful strike against an encrypted communication network](#) that was predominantly used by organised crime groups. As of mid-February 2021, authorities from Belgium,

France, and the Netherlands have been able to monitor the information flow of approximately 70,000 users of Sky ECC. Many users of EncroChat changed over to the popular Sky ECC platform, after EncroChat was unveiled in 2020. Europol supported the operations by coordinating the law enforcement activities of the JIT partners and by helping analyse the data. Eurojust facilitated judicial cooperation and coordinated European Investigation Orders. (TW) ■

### Invoice Mill Dismantled

During an action day conducted on 2 March 2021, Hungarian authorities were supported by Europol in [dismantling an organised criminal group \(OCG\)](#) suspected of facilitating VAT fraud and money laundering that caused a more than €8.2 million tax loss to the Hungarian state budget.

Through so-called "invoice mills," the OCG generated fictitious invoices, fictitious contracts, and involved "missing traders." Missing traders are persons commissioned to perform services without the necessary means to perform them; they were based in Hungary and Croatia and received transfers of money on a monthly basis from beneficiary companies that issued fictitious invoices. Criminal proceeds were then returned in cash to the companies. The operation resulted in the arrest of nine suspects, including the alleged leader of the OCG. Europol pointed out that the modus operandi of "invoice mills" is becoming increasingly common in the EU. (CR)

### The Use of Violence by Organised Crime Groups

On 28 January 2021, Europol published a spotlight [report on the use of violence by organised crime groups](#). Violence by organised crime groups (OCGs) is of growing concern in the EU with an increasing number of cases submitted to Europol.

OCG-related violence appears to be increasingly affecting a range of social

sectors and is now considered a risk to the general public. Serious violence does not exclusively affect criminals but also non-criminals including those engaged in tackling the criminal activities.

Challenges that law enforcement agencies face are detailed in the report and include, for instance, a range of violent techniques, tactics, and procedures that OCGs use to stymie investigations. Furthermore, homicides in this context are often perceived as isolated events with the underlying criminal activity often not apparent.

The report recommends embracing a step-by-step comprehensive approach that focuses on detection and deterrence rather than a one-way approach that only focuses on dismantling individual groups and confiscating their assets. (CR)

## Cybercrime

### Germany: Plans for Punishing Criminal Trading Platforms on the Internet

On 10 February, the German Federal Government passed a [draft law on the criminal liability of operating criminal trading platforms on the internet](#) and providing corresponding server infrastructures. To this end, a new provision is to be included into the German Criminal Code. Anyone who operates a trading platform on the internet whose purpose is to enable or promote the commission of certain illegal acts, such as child pornography, trafficking in drugs and weapons, or dealing in stolen data, is to be liable to a custodial sentence of up to five years or a fine. Likewise, anyone who knowingly or intentionally provides server infrastructures for corresponding trading platforms is to be punished. If the trading platform is operated on a commercial or gang basis or if the perpetrator knows that crimes are being enabled or promoted by the platform, the penalties are higher.

In addition to the introduction of the new offence, effective investiga-

tion possibilities are to be created. For this purpose, the qualifying offences, which require acting on a commercial or gang basis or the targeted promotion of crimes, are to be included in the catalogue of offences for which telecommunications surveillance, online searches, and traffic data collection is allowed. In the view of the German government, the new criminal law regulations are necessary because the existing rules on aiding and abetting have often proven insufficient against this criminal phenomenon. (TW)

### Council Conclusions on Cybersecurity Strategy

On 22 March 2021, the Council adopted [conclusions on the EU's cybersecurity strategy](#). The new cybersecurity strategy for the digital decade was jointly presented by the Commission and the High Representative for Foreign Affairs and Security Policy in December 2020 ([→eucrim 4/2020, 282](#)). It provides a framework for EU action to protect citizens and businesses from cyber threats, promote secure information systems, and protect a global, open, free, and secure cyberspace.

The Council stressed that cybersecurity is essential for building a resilient, green, and digital Europe. In particular, it is about achieving strategic autonomy to strengthen the EU's digital leadership. The conclusions highlight a number of areas for action in the coming years, e.g.:

- Regular and structured exchanges with multiple stakeholders, including the private sector, academia, and civil society organisations;
- Swift establishment and implementation of the European network of cybersecurity centres;
- Creation of security operation centres in the EU Member States, which are enabled to further monitor and anticipate signals of attacks on networks;
- Definition of a joint cyber unit that would contribute to the EU's cybersecurity crisis management;
- Engagement in the development of

international cybersecurity standards as well as the EU's cybersecurity certification schemes;

- Swift completion of the EU's 5G toolbox with measures that guarantee the security of 5G networks;
- Enhancement of international cooperation to combat cybercrime, including the exchange of best practices and technical knowledge and support for capacity building;
- Possible establishment of a Member States' cyber intelligence working group in order to strengthen the EU Intelligence Analysis Centre's (EU-INT-CEN's) work as a hub for situational awareness and threat assessments on cyber issues;
- Increasing the effectiveness and the efficiency of the cyber diplomacy toolbox, which should devote special attention to preventing and countering cyberattacks having systemic effects;
- Strengthened cooperation with international organisations and partner countries in order to advance the shared understanding of the cyber threat landscape.

As regards law enforcement cooperation, the conclusions stress the need to improve the capacity of law enforcement and judicial authorities to investigate and prosecute cybercrime. This must include facilitated cross-border access to electronic evidence, which must respect due process and other safeguards. The Council also reaffirms its support for the development, implementation, and use of strong encryption as a necessary means of protecting fundamental rights and the digital security of individuals, businesses, and governments. At the same time, the competent authorities in the areas of security and criminal justice must be able to obtain access to data in a lawful and targeted manner.

Next steps: The Council encourages the Commission and the High Representative to establish a detailed implementation plan in order to ensure the development, implementation, and mon-

itoring of proposals presented under the Cyber Security Strategy. The Council will monitor progress in implementing the conclusions through an action plan. (TW)

### EDPS Provides Opinion on Cybersecurity Directive

On 11 March 2021, the EDPS published its [Opinion 5/2021](#) on the Proposal of 16 December 2020 for a Directive on measures for a high common level of cybersecurity across the Union, repealing Directive (EU) 2016/1148 ([→eucrim 4/2020, 282](#)).

The current EU Network and Information Security [Directive 2016/1148](#) (the NIS Directive) of 6 July 2016 concerns measures for a high common security level of network and information systems across the Union, with the aim of improving the functioning of the internal market. To this end, it obliges Member States to:

- Adopt a national strategy on the security of network and information systems and to designate tasks related to the security of network and information systems to national competent authorities, single points of contact, and Computer Security Incident Response Teams (CSIRTs);
- Create a cooperation group to support and facilitate strategic cooperation and the exchange of information among Member States;
- Create a CSIRTs network to develop trust and confidence between Member States and to promote swift and effective operational cooperation;
- Establish security and notification requirements for operators of essential services and for digital service providers.

An [impact assessment](#) conducted by the European Commission in 2020, however, showed that the NIS Directive has limitations, e.g., a residual low cyber resilience level of businesses operating in the EU, inconsistent resilience across Member States and sectors, a low level of joint situational awareness, and a lack of joint crisis response.

Hence, the [Proposal of 16 December 2020](#) has a threefold aim:

- To increase the level of cyber resilience of a comprehensive set of businesses operating in the EU across all relevant sectors;
- To reduce inconsistencies in resilience across the internal market in the sectors already covered by the NIS Directive;
- To improve the level of joint situational awareness and the collective capability to prepare and respond to cyber-security challenges.

The EDPS welcomes the aims of the Proposal of 16 December 2020 in addressing a wider set of entities than the NIS Directive and in introducing stronger security measures, including mandatory risk management, minimum standards for these measures, and relevant supervision and enforcement provisions. To achieve a fully comprehensive approach, however, the EDPS recommends explicitly including Union institutions, offices, bodies, and agencies into the scope of the legislative act.

The EDPS does not expect the proposal to affect the application of existing EU laws governing the processing of personal data but instead effectively complement them. Therefore, the EDPS calls for a clear definition of the term “cybersecurity” in the proposal and recommends clearly outlined mechanisms for involvement of the EDPS, the European Data Protection Board, and competent authorities of the regulatory actors. (CR)

### EMOTET Disrupted

At the end of January, under the coordination of Eurojust and Europol, law enforcement and judicial authorities worldwide [disrupted EMOTET](#), a malware programme that acts as an unauthorised door opener for computer systems on a global scale. A “unique feature” of EMOTET is that it is offered for hire to other cybercriminals to install various types of malware – so-called “loader” operations. This has made EMOTET a

dangerous force in the world of cyber-crime.

To disrupt the EMOTET infrastructure, law enforcement and judicial authorities gained control from the inside and redirected victims’ infected machines towards their own, controlled infrastructure. (CR)

### Environmental Crime

#### Eurojust Report on Environmental Crime

On [29 January 2021](#), Eurojust published a [Report on Eurojust’s Casework on Environmental Crime](#). The report provides an overview of the legal and operational challenges that arise in such cases and is based on experiences encountered in nearly 60 cross-border environmental criminal law cases that were referred to Eurojust in the period from 2014 to 2018. The casework report is primarily aimed at members of public prosecution services and the judiciary in EU Member States that deal with cross-border environmental crime.

In the aforementioned period, a total of 57 environmental law criminal cases were registered by Eurojust. The types of environmental crimes that were registered included:

- Trafficking in waste;
- Trafficking in wildlife species;
- Air pollution;
- Illegal trade in hazardous chemicals;
- Hazardous contamination of food;
- Illegal construction works and related issues.
- Furthermore, environmental crimes are often accompanied by other forms of crime, e.g., organised crime, fraud, document forgery, and money laundering.

In addition to these statistical data, the report also identifies a number of legal and operational challenges when combating environmental crime, such as insufficient specialised knowledge and practical experience, different legislative and investigative approaches in different jurisdictions, as well as the multidisciplinary nature of environmen-

tal investigations (where a diverse range of specialised national administrative authorities are in charge).

Following its findings, the report recommends the following:

- Competent administrative, law enforcement, and judicial authorities should strive for multidisciplinary cooperation;
- Environmental crime should be recognised as organised crime;
- Environmental crime cases should be prioritised;
- International coordination and cooperation tools such as Joint Investigation Teams and early involvement of Eurojust should be increasingly used;
- Key concepts of environmental criminal law need to be further harmonised and more consistently interpreted across the EU Member States;
- The penalties for environmental crime should also be more uniform and dissuasive. (CR)

### Racism and Xenophobia

#### Terrorist Online Content: Council Agrees on Regulation – Criticism from NGOs

Following the provisional agreement between the Council and the European Parliament in December 2020 on a new regulation addressing the dissemination of terrorist content online ([→eucrim 4/2020, 284–285](#)), the [Council approved](#) the text on 16 March 2021. The regulation will lay down a harmonised legal framework that sets out the obligations for hosting service providers to effectively and swiftly detect and remove online terrorist content from their platforms. On 18 March 2021, the Commission issued a [communication](#) that outlined the main changes made by the Council and the EP to the Commission’s initial proposal of 2018 ([→eucrim 3/2018, 97–98](#)). In the end, the Commission accepted the position taken by the Council. The EP is expected to adopt the Regulation finally

during its plenary session at the end of April 2021.

On 25 March 2021, over 60 civil society organisations urged MEPs to vote against the adoption of the regulation. In an [open letter](#), they pointed out that the compromise detailed in the trilogue negotiations “still contains dangerous measures that will ultimately weaken the protection of fundamental rights in the EU. It also has the potential to set a dangerous precedent for online content regulation worldwide.” Their opinion is based particularly on the following three aspects:

- The proposal continues to incentivise online platforms to use automated content moderation tools, such as upload filters;
- There is a lack of independent judicial oversight;
- Member States are able to issue cross-border removal orders without checks. (TW)

### Commission: Hate Crime Should Become an EU Crime

On 23 February 2021, the Commission published a [roadmap](#) for a proposal to include hate speech and hate crime into the list of EU crimes for which harmonisation of substantive criminal law would be possible in accordance with Art. 83(1) TFEU. The Commission plans to present an initiative for a Council decision that would recognise hate speech and hate crime as EU crimes. Once adopted, the Commission will have competency to propose, in a second step, substantive legislation (i.e., a directive) harmonising the definition of and penalties for hate speech and hate crime. Citizens and stakeholders were called on to provide feedback by 20 April 2021 as to whether the conditions in Art. 83 TFEU for inclusion, i.e., particular seriousness and cross-border dimension of the crime, are fulfilled.

The roadmap states that the fight against hate crime and hate speech on grounds of race, religion, gender, and sexuality is a key priority of Commis-

sion President *Ursula van der Leyen*. It points out research and surveys that indicate the extent and increase of hate crime and hate speech (including online), as well as the links between the two and the impact on victims and society. The Commission underlines that there is a need for a common criminal law response at the EU level against racist and xenophobic hate speech and hate crime. (TW)

## Procedural Criminal Law

### Procedural Safeguards

#### Commission Implementation Report on Presumption of Innocence Directive

In a [report dated 31 March 2021](#), the European Commission points out that key provisions of Directive 2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings have been inadequately implemented in a number of EU Member States. The Commission is conducting seven infringement proceedings against EU Member States for not having fully implemented the provisions of this Union law. It also draws attention to the fact that some Member States have not taken specific transposition measures, as they believed that their legislation was already broadly in line with the requirements of the Directive – however, this does not mean that national law fully complies with the Directive. Major deficiencies relate to the prohibition of public references to guilt and to the right not to incriminate oneself.

With regard to public references to guilt (Art. 4 of Directive 2016/343), the Commission criticises that several Member States have limited its scope, since their national provisions do not cover all public authorities or all stages of criminal proceedings. In other Member States, the article’s practical implementation appears to be the problem. In

yet other cases, clear conditions limiting the dissemination of information are lacking.

Regarding the right to remain silent (Art. 7 of Directive 2016/343), the limited scope of national measures is also a compliance issue. Two Member States do not explicitly guarantee the right not to incriminate oneself in national law, and the case law of their supreme courts does not remedy the gap either. In several Member States, which have not specifically transposed Art. 7(5) of Directive 2016/343 (prohibiting the drawing of negative inferences from exercising the right to remain silent), compliance is detrimentally affected because general provisions are not sufficient or not broad enough in scope.

The Commission stressed that its report was only able to assess mainly the national legislative transposition measures, which were notified to it by the Member States. In this context, the Commission is disappointed that only one Member State (Austria) fulfilled its obligation to send data by April 2020 on how the Directive has been additionally implemented in practice (Art. 11 of the Directive). Hence, the Commission report also draws on publicly available information from the EU Agency for Fundamental Rights, which published its report on the practical implementation of the Directive in parallel on 31 March 2021 ([→related link](#)). In addition, the Commission took into consideration Commission-funded studies by external stakeholders.

The report is addressed to the European Parliament and the Council, which will further comment on the findings on the implementation of Directive 2016/343. (TW)

### FRA Report on Presumption of Innocence and Right to Be Present – More Needs to Be Done in Practice

On 31 March 2021, the EU Agency for Fundamental Rights (FRA) [presented its findings on how the rights to be presumed innocent,](#)



to remain silent, and to be present at trial – as specifically spelled out in Directive 2016/343 – are applied in practice. The findings are based on 123 interviews with defence lawyers, judges, prosecutors, police officers, and journalists in nine EU Member States (Austria, Belgium, Bulgaria, Cyprus, Germany, Italy, Lithuania, Poland, and Portugal). The report aimed at a practice-oriented evaluation of the implementation of the Directive in selected Member States that represent different legal traditions. The report covers various aspects of the aforementioned rights, e.g., the attitudes of criminal justice professionals, public references to defendants' guilt as well as defendants' physical presentation before or during a trial, and rules on the burden of proof.

On the positive side, FRA highlights that the conduct of criminal proceedings is generally regulated well in the legal orders of the nine Member States. In general, considerable efforts are made to conduct a new trial if the suspect was absent through no fault of his/her own. Yet, FRA also stressed that problems in implementing the necessary safeguards persist. In particular, media coverage of the accused is criticised as being too one-sided, which may contribute to influencing (lay) judges and the public. The presentation of the accused in handcuffs in the courtroom and/or isolated placement away from his/her defence lawyer also often suggest/s his guilt, even though it has not yet been legally established. Regarding the different elements of the procedural safeguards set out in the Directive, the report makes several recommendations for future improvement:

- Equal application of the right to be presumed innocent:
  - Ensuring that the presumption of innocence applies equally to all defendants, regardless of their ethnic background, status, and gender;
  - Putting in place effective measures against bias and prejudice among police officers, judges, and jurors, which may include codes of ethics/conduct and practitioners' training;
- Promoting diversity among justice professionals so that they are representative of all cultural, social, and ethnic backgrounds of a given society.
- Public references to guilt:
  - Only press officers should inform the media about ongoing cases;
  - Personal data and details about the private life of defendants should not be included;
  - Information leaks should be strictly prohibited and breaches of rules disuasively sanctioned;
  - States should provide guidance and material to the media in order to raise awareness of the sensitiveness of presenting defendants in public.
- Physical presentation of suspects and accused persons:
  - Restraints and security measures should only be used when needed;
  - Photos should only be allowed of unrestrained defendants;
  - Member States should provide for possibilities to protect defendants from public viewing, e.g., use of side entrances to courtrooms and covering faces while transported to and into courtrooms.
- Burden of proof:
  - Member States should ensure that the defence can request investigating and prosecuting authorities to investigate specific circumstances and search for crucial evidence on its behalf, when justified;
  - Member States should ensure that legitimate presumptions of law or facts that reverse the burden of proof are limited to the extent necessary in order to ensure the effectiveness of criminal proceedings and that the presumptions always possible to rebut.
- Rights to remain silent and not to incriminate oneself:
  - Suspects must be properly informed of their rights and not treated as witnesses;
  - Suspects' confessions and other testimony must be excluded as evidence if made outside the strict procedural framework;
- Likewise, hearsay evidence by police officers on what suspects confessed or testified should not be accepted as evidence;
- Evidence should also be excluded if doubts persist as to whether defendants were properly informed about their rights to remain silent and not to incriminate themselves;
- Examinations of suspects and accused persons by the police should be subject to strict guidelines and strict judicial assessment;
- Indirect methods used to pressure defendants into providing incriminating evidence – such as the promise of milder treatment, reduced sentences, or shorter proceedings – should never be used;
- In this regard, systematic guidance and training of police officers is needed.
- Rights to be present at trial and to a new trial:
  - Legal orders should promote efforts to ensure that defendants can be present at their trials, including, for instance, the need for courts to make reasonable efforts to locate defendants whose whereabouts are unknown;
  - Systems that presume that defendants have been notified by a summons served to their address should take additional steps to ensure that this presumption is up-to-date, e.g., when defendants are in state custody.

In conclusion, the FRA report on Directive 2016/343 corroborates previous findings on other criminal safeguards. These studies identified similar shortcomings in the practical implementation of the EU's rights accorded to suspects/accused persons in criminal proceedings, for example regarding how defendants are informed about their rights in criminal proceedings and how access to a lawyer is ensured (→ [eucrim 3/2019, 174](#)). The FRA report also supported the Commission in the preparation of its own implementation report of Directive

2016/343, which was also published on 31 March 2020 (→related link). (TW) ■

### CJEU Delivers Landmark Judgment on Right to Silence in Administrative (Punitive) Proceedings

**spot light** On 2 February 2021, the CJEU, sitting in for the Grand Chamber, rendered an important [judgment](#) on the right to remain silent in administrative proceedings if the person's answers might also establish his/her punitive liability. The case is referred to as [C-481/19](#) (*DB v Commissione Nazionale per le Società e la Borsa (Consob)*).

#### ► Facts of the case

In the case at issue, Mr *DB* was, inter alia, fined by the Italian National Companies and Stock Exchange Commission (Consob) in an administrative proceeding for failure to cooperate in an insider trading investigation. *DB* declined to answer questions when he appeared at a hearing before Consob, because he seemingly knew facts that alleged he had committed the administrative offence of insider dealing. Italian law penalises anyone who fails to comply with Consob's requests in a timely manner or delays the performance of the body's supervisory functions, including with regard to persons in respect of whom Consob alleges an offence of insider dealing (Art. 187 quinquies of the Decreto legislativo n. 58). By means of this provision, the Italian legislator implemented EU rules on insider trading and market abuse (Directive 2003/6/EC and Regulation (EU) No 596/2014). These rules request, inter alia, that administrative sanctions be determined for failure to cooperate or to comply with an investigation, with an inspection, or with a specific request that includes questioning of a person with a view to obtaining information.

#### ► Question referred

The referring Constitutional Court of Italy expressed doubts as to whether this obligation is in line with the rights in Art. 47 and 48 of the Charter of Fundamental Rights of the EU, in particu-

lar with the right to remain silent and the right against self-incrimination. It therefore asked whether the corresponding EU provisions in the Directive and the Regulation might be invalid. In that event, the Italian provision cannot be applied.

#### ► Findings of the CJEU

The CJEU emphasised that rights protected by the Charter should be interpreted coherently with the corresponding rights of Art. 6 ECHR. Therefore, it referred to the principles on the right to remain silent as established by ECtHR case law. As a consequence, the authorities must respect the right to be silent in two situations:

- In administrative proceedings that may lead to the imposition of administrative sanctions of a criminal nature;
- In administrative proceedings if the evidence obtained in those proceedings may be used in criminal proceedings against that person in order to establish that a criminal offence was committed.

The CJEU stated, in that regard, that its case law relating to the obligation on legal persons (undertakings) to provide information in administrative cartel proceedings, which also may subsequently be used to establish their liability and lead to fines, cannot be applied by analogy to establish the right to silence of natural persons charged with insider trading.

However, the right to silence cannot justify every failure to cooperate with the competent authorities, such as refusing to appear at a hearing or using delay tactics.

Regarding the validity of the secondary EU legislation on insider dealing and market abuse, the CJEU noted that neither Directive 2003/6 nor Regulation No 596/2014 oblige Member States to establish liability for failure to cooperate if the cooperation were inconsistent with the right to silence. The absence of an express prohibition against the imposition of a penalty for such a refusal to provide the competent authority with answers which might establish liability

for an offence cannot undermine the validity of the EU measures. Ultimately, it is for the Member States to ensure that natural persons cannot be penalised for refusing to provide such answers to the competent authority.

#### ► Put in focus

The Grand Chamber of the CJEU refrained from giving effect to a “diminished application” of Charter rights in punitive proceedings. It emphasised that the right to be silent is at the core of the right to a fair trial. It can be concluded from the case that the right to remain silent not only applies in oral hearings but also in the production of incriminatory documentary evidence. The judges in Luxembourg have pulled the ripcord and refused to transfer their more restrictive case-law developed in competition law (against legal entities) to natural persons. The question remains, however, whether this distinction can adequately be justified and whether there should also be a shift to a more liberal interpretation when it comes to punitive proceedings against legal entities. Another issue will be that the EU legislator must pay close attention to ensure laws are compatible with the Charter. The interpretation found by the CJEU is by no means obvious if one reads the relevant provisions in Directive 2003/6 and Regulation 596/14. (TW) ■

## Data Protection

### CJEU Confirms Strict Limitations of Data Retention

**spot light** In its judgment of 2 March 2021 on the Estonian rules on data retention, the CJEU (sitting in for the Grand Chamber) confirmed red lines for access to traffic and location data for law enforcement purposes. In a criminal case that concerned theft, fraud, and violence against persons party to court proceedings, the Estonian criminal courts essentially relied on reports drawn up on the basis of the data obtained from the provider of electronic communications

services. In particular, the data provided information on who the accused communicated with, how, when, for how long and from where to where during a certain period of time. In addition, the case questioned which competent authority can grant access to such data.

► *Questions referred*

The Estonian Supreme Court basically posed two questions to the CJEU:

■ Are national data retention regimes admissible in accordance with Art. 15(1) of [Directive 2002/58/EC](#) on privacy and electronic communications, read in the light of Arts. 7, 8, 11, and 52(1) CFR, even if they are not confined to the prevention, detection and prosecution of serious crimes, but to the duration of access and the quantity and nature of the data available in respect of such period is limited?

■ Can the Estonian public prosecutor's office, in the light of the various duties which are assigned to it by national legislation, be regarded as an "independent" administrative authority (within the meaning of the CJEU's judgment in *Tele2 Sverige and Watson*), that is capable of authorising access for the investigating authority to the data concerned?

For details on the facts of the case and the AG's opinion → [eucrim 1/2020, 23–24](#).

► *Findings of the CJEU on the first question*

The CJEU recalled the content of its recent ruling on data retention in *La Quadrature du Net and Others* (→ [eucrim 2/2020, 3/2020, 184–186](#)):

■ Access by public authorities is possible only in so far as traffic and location data have been retained by a provider in a manner that is consistent with Art. 15(1) of Directive 2002/58;

■ Legislative measures are precluded that, for law enforcement purposes, provide, as a preventive measure, for the general and indiscriminate retention of traffic and location data;

■ Limitations on the rights and obligations laid down in Arts. 5, 6, and 9 of Directive 2002/58 must be assessed by

measuring the seriousness of the interference entailed by such a limitation and by verifying that the importance of the public interest objective pursued by that limitation is proportionate to the seriousness of the interference;

■ A public authority's access to a set of traffic or location data that are liable to provide information regarding the communications made by a user of a means of electronic communication or regarding the location of the terminal equipment which he or she uses (and thus allow precise conclusions to be drawn concerning the private lives of persons concerned), is in any event a serious interference with the fundamental rights enshrined in Arts. 7 and 8 CFR;

■ Accordingly, only the objectives of combating serious crime or preventing serious threats to public security are capable of justifying the interference.

Against this background, other factors relating to the proportionality of a request for access, such as the length of the period in respect of which access to the data is sought and the quantity or nature of the data available cannot play a role. Therefore, these factors cannot have the effect that the objective of preventing, investigating, detecting, and prosecuting criminal offences in general is capable of justifying such access.

The CJEU also provided guidance concerning when contraventions of the requirements of EU law may lead to an exclusion of evidence obtained in criminal proceedings. In the view of the judges in Luxembourg, the yardstick is the risk of breach of the adversarial principle, and therefore, of the right to a fair trial entailed by the admissibility of such evidence. To this end, national courts must disregard information/evidence obtained via access to traffic and location data in breach of EU law if the suspects "are not in a position to comment effectively on that information[/] evidence and they pertain to a field of which the judges have no knowledge and are likely to have a preponderant influence on the findings of fact."

► *Findings of the CJEU on the second question*

The CJEU called to mind its previous case law as regards the substantive and procedural requirements for national legislation under which competent authorities can be granted access to the data in question. This entails that observance of the requirements are subject to a prior review that is either carried out by a court or by an independent administrative body. Since the court or body must reconcile the various interests and rights at issue, the status must be so that they act objectively and impartially and be free from any external influence. In the criminal law field, the requirement of independence implies that the authority entrusted with prior review, first, must not be involved in the conduct of the criminal investigation in question and, second, has a neutral stance vis-à-vis the parties to the criminal proceedings. That is not the case with a public prosecutor's office, like the Estonian public prosecution's office, because it directs the investigation procedure and brings the public prosecution before the court that has jurisdiction. This conclusion is not changed by the consideration that the public prosecutor's office is mandated to verify both the incriminating and exculpatory evidence, to guarantee the lawfulness of the pre-trial prosecution, and to act exclusively according to the law.

► *Put in focus*

Through its judgment on the Estonian case, the judges in Luxembourg reaffirmed that Union law does not lead to the general ban of data retention. However, they repeatedly stressed that data retention regimes can only be compatible with Union law if access to traffic and location data that allow precise conclusions concerning persons' private lives is limited to the investigation/prosecution of serious crimes or the prevention of serious threats to public security. Substantive and procedural law must regulate access to what is "strictly necessary." Hence, it remains to be seen whether the German data retention re-

gime, which is currently still under scrutiny in Luxembourg ([→eucrim 3/2019, 176](#)), is compatible with the CJEU’s guidelines, since it is actually restricted to a catalogue of serious criminal offences and includes further access limitations in respect of the principle of proportionality. (TW) ■

### Portuguese Council Presidency Pushes Forward EU Data Retention Law

Following the CJEU’s landmark judgment from 6 October 2020 in *La Quadrature du Net and Others* ([→eucrim 2/2020, 3/2020, 184–186](#)), the Portuguese Council Presidency wishes to make progress in drafting new EU legislation to harmonise the public authorities’ access to traffic and location data preserved by electronic communication service providers.

In a [CATS meeting on 8 February 2021](#), several Member States, including Spain and France, as well as the EU Counter Terrorism Coordinator, took the position that “new EU legislation on data retention is urgently needed due to the legal vacuum existing at the time.” They proposed that the EU should take the following approach:

- Include measures, criteria, and safeguards for the protection of fundamental rights;
- Combine these measures with changes in secondary legislation such as the GDPR;
- Adapt the provisions of other instruments that affect the data retention regime (the ePrivacy Directive and the Digital Services Act), “in particular with a view to ensuring that the latter would not limit the scope of the future data retention regime.”

During the discussions, most Member States believed that the implementation of the CJEU’s guidelines in relation to targeted data retention are not only difficult to implement but could also “be ineffective and insufficient given the needs of law enforcement authorities.”

In a [working paper issued on 19 February 2021](#), the Portuguese Council

Presidency proposed to start with discussions on two situations where the CJEU holds surveillance measures to be permissible. First, targeted retention of traffic and location data if certain requirements are fulfilled. Second, retention of the IP address of the source of a communication and civil identity data, where the CJEU showed some flexibility towards general retention. To this end, the Portuguese Council Presidency posed several questions on these two topics and invited the Member States to comment on them.

In addition, the Portuguese Council Presidency took up the matter of data retention at the highest political level. In a [discussion paper of 2 March 2021](#), it invited the national ministers of justice to express their views on the following issues:

- Should legislation be adopted to ensure a harmonized legal regime on data retention at the EU level, taking due account of the case law of the CJEU?
- If so, should a targeted or comprehensive approach be adopted?
- On the contrary, could data retention in the framework of police and judicial cooperation be based solely on national data retention laws (which are in line with the CFR and CJEU case law)?

At their [informal meeting on 11 March 2021](#), the ministers of justice agreed to follow a common solution. (TW)

### Council Agrees on Negotiating Mandate for e-Privacy Regulation – Data Retention Included

On 10 February 2021, the Council agreed on a [negotiating mandate](#) for the planned Regulation “concerning the respect for private life and the protection of personal data in electronic communications” (e-Privacy Regulation). Although the Commission presented its proposal ([COM\(2017\) 10 final](#)) in January 2017 and the Parliament adopted its [report](#) in the same year, the project was blocked in the Council for four years. The e-Privacy Regulation will replace the e-Privacy Directive 2002/58/EC

and regulate access to and processing of communication data.

The main contentious issues are the processing and storage options for terminal devices, the further processing of collected data, the relationship to the General Data Protection Regulation, and the retention of data. The current draft of the Council provides in Art. 7 para. 4 for allowing under Union or Member State law the retention of “electronic communications metadata” for a limited period of time “in order to safeguard the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the safeguarding against and the prevention of threats to public security.” This is under the caveat that the regime “respects the essence of the fundamental rights and freedoms and is a necessary and proportionate measure in a democratic society.”

The planned regulation thus attempts to tie in the CJEU rulings of 9 October 2020 (Cases C-623/17, joined Cases C-511/18, C-512/19 and C-520/18 [→eucrim 3/2020, 184–186](#)), which permit the retention of data in cases of threats to public security and to combat serious crime within narrow limits.

The Council’s agreement on a negotiating mandate means that the trilogue negotiations between the Council, the European Parliament, and the Commission can now begin. (TW)

### Commission Admits Initiative against Biometric Mass Surveillance

On 7 January 2021, the Commission [decided to register](#) a European Citizens’ Initiative entitled: “[Civil society initiative for a ban on biometric mass surveillance practices](#).” The organisers are calling on the European Commission to strictly regulate the use of biometric technologies in order to avoid undue interference with fundamental rights. In particular, EU law should prohibit, in law and in practice, indiscriminate or arbitrary uses of biometrics which can lead to unlawful mass surveillance. Intrusive systems



should not be developed, deployed, or used by public or private entities insofar as they can lead to unnecessary or disproportionate interference with people's fundamental rights.

The Commission's decision only means that the Initiative is legally admissible. An analysis of the substance of the plea has not been carried out at this stage.

Following the registration, the organisers can start the process of collecting signatures of support. Should the Initiative receive one million statements of support within one year from at least seven different Member States, the Commission will have to react within six months. The Commission could decide either to follow or not follow the request; regardless of the decision, the Commission must explain its reasoning. (TW)

### Spain Must Pay for Non-Transposition of EU Data Protection Directive

On 25 February 2021, the [CJEU ordered Spain](#) to pay a lump sum of €15 million and a daily penalty payment of €89,000 for its ongoing failure to transpose [Directive 2016/680](#) regarding the protection of personal data by law enforcement authorities (for the Directive → [eucrim 2/2016, 78](#)). The deadline for transposing the rules of the Directive into national law ended on 6 May 2018. Since Spain had not notified any information on transposition measures, the Commission initiated infringement proceedings in July 2018 and referred the case to the CJEU on 25 July 2019 (→ [eucrim 2/2019, 104](#)).

In the proceedings before the Court ([C-658/19](#)), Spain did not contest the failure of transposition, but pointed out the exceptional political and institutional circumstances which hindered the country to adopt the necessary organic law transposing the Directive and which should be taken into consideration for the proportionality of the penalties.

The CJEU found that the imposition of both a lump-sum and a penalty pay-

ment are justified in the present case since Spain persisted in its failure to fulfil its obligations. It is the first time that the CJEU has imposed both types of financial penalties concurrently in a judgment following the action for failure to fulfil obligations pursuant to Art. 260(3) TFEU. The penalty payment of €89,000 applies from the date of delivery of the judgment until the infringement established has been brought to an end. (TW)

## Freezing of Assets

### CJEU: Bulgarian Confiscation Rules Excluding Rights for Third Parties Acting in Good Faith Are Contrary to EU Law

In its [judgment of 14 January 2021](#), the CJEU clarified EU Member States' obligations with regard to [Framework Decision 2005/212/JHA](#) on confiscation of crime-related proceeds, instrumentalities, and property. The case ([C-399/19](#), "OM") dealt with the rights of third parties acting in good faith in confiscation proceedings in Bulgaria.

#### ► *Facts of the case*

In the case at issue, *OM* – an employee at a transport company established in Turkey – used the freight lorry of his employer to illegally smuggle antique coins from Turkey into the EU. After crossing the border, Bulgarian customs checked the tractor unit and found the coins. Following *OM*'s conviction, the Bulgarian authorities seized the coins and the tractor unit for the benefit of the Bulgarian State. The trailer was returned to the Turkish company. On appeal, *OM* opposed the seizure of the tractor unit, claiming that that seizure was contrary, inter alia, to the provisions of the TFEU and the CFR.

#### ► *Questions referred*

■ The referring Court of Appeal of Plovdiv, Bulgaria, first asked the CJEU whether Bulgarian legislation, which provides for the confiscation of the means of transport used to commit a smuggling offence even if it belongs to a

third party acting in good faith, is in line with Art. 17 CFR.

■ Second, in the light of Art. 47 CFR, the Court of Appeal asked about the compatibility of the Bulgarian provisions that preclude the owner of the means of transport who is not the perpetrator direct access to the courts to state its case.

#### ► *Findings of the CJEU*

The CJEU confirmed that both approaches of the Bulgarian legislation are contrary to Union law.

First, the CJEU rejected interventions that it would not have jurisdiction over because there is no link between the dispute in the main proceedings and EU law. The CJEU pointed out that the referring court actually sought guidance as to the obligations for the national legislator to comply with the provisions of FD 2005/212 that is applicable in the present case. The FD provides for rules relating to the confiscation of instrumentalities and proceeds from criminal offences and the remedies that must be available to persons affected by a confiscation measure, including *bona fide* third parties. These provisions must be interpreted in light of the right to property enshrined in Art. 17 CFR. The right to property does not constitute an absolute prerogative, but may be subject to limitations. In accordance with Art. 52(1) CFR, limitations may be placed on the exercise of the rights and freedoms enshrined therein, on condition that those limitations genuinely correspond to objectives of public interest pursued by the European Union and do not constitute, in relation to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of the right so guaranteed.

The CJEU found that the Bulgarian legislation aims to prevent unlawful importation of goods into the country but is a disproportionate and an intolerable interference of the right to property if it subjects the property of a third party acting, in good faith, to a confiscation measure because the property was used

to commit an aggravated smuggling offence.

As regards the right to a remedy, the CJEU noted that both FD 2005/212 and Art. 47 CFR provide for the obligation that a third party whose property rights have been affected by a confiscation measure must be entitled to challenge the legality of the measure. Since the Bulgarian law does not afford such a right to a remedy to persons other than the perpetrator of a criminal offence, it is contrary to EU law. (TW)

## Cooperation

### Customs Cooperation

#### ECA: Deficiencies in Customs Control Hamper EU's Financial Interests

According to the European Court of Auditors (ECA), customs control in the EU still considerably varies, thus hampering the protection of the EU's financial interests. In its [Special Report 04/21](#) of 30 March 2021, the ECA examined whether the current EU regulatory customs financial risk framework was appropriately designed and has been applied in a uniform and consistent way. The ECA found that the framework was not designed well to ensure a harmonised selection of import declarations for control. In addition, the implementation of the framework by the Member States differs. The main shortcomings of the framework are:

- Poorly defined concept of risk and insufficiently detailed norms;
- Lack of important features, e.g., appropriate data-mining techniques and appropriate methods to counter financial risks resulting from e-commerce;
- Member States have not significantly changed their control selection procedures;
- No uniform way of interpreting risk signals among Member States;
- Ineffective sharing of information on importers;
- Procedures for reducing the num-

ber of controls to a feasible level differ, which is why similar risks are not addressed in a consistent way.

The auditors recommend that the Commission enhance the uniform application of customs controls and establish a full-fledged analysis and coordination capacity at the EU level. They stress, however, that progress can only be made with the support of the EU Member States. (TW)

#### Launch of New EU Import Control System – ICS2

On 15 March 2021, the Commission [launched a new import control system](#) to improve the protection of the Customs Union against security threats posed by the illegal movement of goods at the EU's external borders. The new system is a core project intended to implement customs risk assessment mechanisms. [The Import Control System 2 \(ICS2\)](#) supports the EU's new "pre-arrival security and safety programme," which will remodel the existing process in terms of IT, legal, and customs risk management/controls as well as trade operational perspectives. The ICS2 will collect data on all goods entering the EU prior to their arrival. Economic operators must declare the security and safety data of consignments to ICS2, which will enable customs authorities to carry out high-risk assessments and intervene, when appropriate. ICS2 is being introduced in three release phases, each covering different economic operators.

The first phase of ICS2, launched now, will mainly cover mail and express shipments entering or transiting the EU by air. It will gradually improve the collection of supply chain data by customs authorities and introduce new processes and tools. The aim of this first phase is to curb unsafe traffic in the context of massive and growing flows of e-commerce. Subsequently, in phase 2, the new functions will be extended to general air freight in March 2023 and, from 2024 on, will also cover maritime, rail, and road transport modes in phase 3. (TW)

## European Arrest Warrant

### EP Adopted Own Report on EAW Implementation

**spot light** On 20 January 2021, the European Parliament adopted its [own initiative report on the implementation of the European Arrest Warrant](#) (EAW) and the surrender procedures between Member States. The report was prepared by MEP [Javier Zarzalejos](#) (EPP, ES) and is also based on comprehensive assessment reports drafted by the European Parliamentary Research Service ([→eucrim 2/2020, 111](#); [eucrim 1/2020, 26](#); and the article by [Wouter van Ballegoij](#), [eucrim 2/2020, 149–154](#)). For the drafts of the EP report in the committees [→eucrim 3/2020, 193](#).

While [MEPs consider](#) that the EAW is "generally a success" and has "positive effects on the maintenance of the AFSJ [Area of Freedom, Security and Justice]," they believe that the time is ripe to improve and update the instrument, particularly since digital transformations have changed the ecosystem of crime. On the one hand, improvements should make the EAW more effective, on the other they should focus on better respecting the principle of proportionality. In accordance with CJEU case law, the approach must be maintained that the refusal of EAWs should be the exception and refusal grounds be interpreted restrictively. However, MEPs call for refusal to be permitted where there are substantial grounds to believe that the execution of the EAW would be incompatible with the executing Member State's obligation in accordance with Art. 6 TEU and the CFR. The report makes several specific recommendations to improve the functioning of the EAW, *inter alia*:

- The Commission must ensure the full and correct implementation of the procedural rights directives which is a prerequisite for mutual trust;
- The Commission should "carry out a formal and substantive consistency assessment of the list of 32 categories

that do not require a double criminality check”; to this end, a homogeneous list of categories of offences should be drawn up, possibly combined with an annex containing definitions of each list entry;

- Additional offences should be included on the list so that more automatic surrender is allowed; this extension could include environmental crimes, certain forms of tax evasion, hate crimes, sexual abuse, gender-based violence, offences committed through digital means such as identity theft, offences involving the use of violence or a serious threat against public order of the Member States, and crimes against the constitutional integrity of the Member States committed by using violence, genocide, crimes against humanity, and war crimes;

- The possibilities to exercise (broad) discretion on the part of the executing authority should be diminished as far as possible;

- Member States are urged to ensure that an EAW is only issued if less intrusive measures would not lead to the same result, e.g., hearings by videoconference or similar tools;

- Member States should ensure that available alternatives to detention and coercive measures in EAW proceedings can be ordered, particularly if a person consents to his/her surrender;

- Effective defence in cross-border proceedings must be ensured in full compliance with Directive 2013/48; to this end, the Commission and Member States must provide appropriate funding for dual representation of the requested person as well as specific training for practitioners involved in EAW proceedings;

- The SIS II and Interpol system should regularly be reviewed in respect of possible withdrawals of alerts, e.g., if the EAW has been refused on mandatory grounds such as the principle of *ne bis in idem*.

Another set of recommendations concerns fundamental rights, for instance:

- Member States must guarantee that every person, including victims of crime

or requested persons of an EAW, whose rights and freedoms as guaranteed by Union law are violated, has the right to effective remedy before a tribunal in accordance with Art. 47 CFR; however, these remedies must be fully in line with the time limits set in the FD EAW;

- The introduction of a system of precautionary measures, including the suspension of the instrument, should be considered if the person will run the risk of having his/her fundamental rights contravened in the issuing State;

- Several efforts must be undertaken that strengthen mutual trust; these efforts include the EU mechanism on democracy, the rule of law, and fundamental rights as proposed by the EP (→[eucrim 3/2020, 160–161](#)), a feasibility study on supplementing instruments on procedural rights, such as those on admissibility of evidence and prison conditions in pre-trial detention, and measures that ensure the follow up to assurances provided by the issuing judicial authorities.

MEPs voiced concerns over bad prison conditions in some EU Member States that have a considerable impact on the EAW system. They reiterate their call for Member States to improve deficient prison conditions. The Commission is called on to fully exploit the possibility of financing the modernisation of detention facilities through EU Structural Funds.

Ultimately, the resolution recommends a more coherent EAW legal framework. The Commission must provide a more coherent policy on mutual recognition that considers CJEU case law and prevent divergences across the various mutual recognition instruments. Coherency issues related to the implementation of the FD EAW must be addressed through a combination of practical measures (training of practitioners), soft law (handbooks and recommendations), targeted legislation (the definition of judicial authority, *ne bis in idem*, fundamental rights, etc.) and, as a second step, supplementary legislation (pre-trial detention). In the medium term, the leg-

islator should promote an EU judicial cooperation code in criminal matters that systematically compiles the existing legislation, so that legal certainty and the coherence of the various EU instruments can be guaranteed.

The EP resolution is not legally binding but has an appealing character. It ties in with a long-standing discussion of the EAW topic in EU institutions. Already in July 2020, the Commission published its report in which the handling of the EAW was evaluated (→[eucrim 2/2020, 110–111](#)). On 1 December 2020, the Council adopted conclusions on the EAW under the German Presidency (→[eucrim 4/2020, 290](#)). (TW)

### ECtHR: EAW Cannot be Automatically Executed

**spot light** On 25 March 2021, the European Court of Human Rights (ECtHR) delivered a landmark judgment on the relationship between the European Convention on Human Rights (ECHR) and the EU’s mutual recognition instruments in criminal matters, i.e., the European Arrest Warrant. The judgment was handed down in the cases *Bivolaru and Moldovan v. France* (Application Nos. 40324/16 and 12623/17). The full judgment is (currently) only available in [French](#); a press release in [English](#) has been provided.

#### ► *Recapitulation of principles*

First, the ECtHR recapitulated its doctrine as to when the fundamental guarantees of the ECHR apply in relation to Union acts:

- When entering into international obligations, Contracting States remain bound by their obligations as set out in the ECHR;

- If the international organisation in question (here: the European Union) conferred on fundamental rights an equivalent or comparable level of fundamental rights protection to that guaranteed by the ECHR, measures for fulfilling these international obligations are deemed justified;

- The applicability of this presumption

of equivalent protection has two prerequisites: (1) the national authorities have no margin of manoeuvre in relation to the international obligation; (2) the case at issue satisfies “the deployment of the full potential of the supervisory mechanism provided for by the legal order of the organisation”;

- The principle of mutual recognition of judicial decisions in the EU may not be applied in an automatic and mechanical manner to the detriment of fundamental rights;

- If the presumption of equivalent protection applies, the ECtHR will ascertain whether the application of the mutual recognition instrument renders the protection of Convention rights manifestly deficient or not;

- The principles not only apply to the European Arrest Warrant but also to all EU mechanisms of mutual recognition.

In the two cases at issue, both complaints concerned the surrender of Romanian nationals from France to Romania. Both complainants argued that the French courts executing the respective Romanian EAWs had not taken account of their individual risks of being exposed to inhuman and degrading treatment in Romania, as a result of which Art. 3 ECHR was breached.

#### ► *Application of the protection principles in the first case*

In the case of Mr *Moldovan*, in which poor prison conditions in Romania were at issue, the ECtHR stated that the French judicial authorities had to assess the facts and circumstances within the framework strictly delineated by the CJEU’s case law in *Aranysosi and Căldăraru* on Art. 4 of the Charter of Fundamental Rights ([eucrim 1/2016, 16](#)). According to the ECtHR, this jurisprudence provides protection equivalent to that provided by Art. 3 ECHR. The executing judicial authority had no autonomous margin of manoeuvre, so that the presumption of equivalent protection applied. However, this presumption was rebutted in the present case. The ECtHR found that there had been a sufficient

factual basis for the French authorities to find that Mr *Moldovan* would be exposed to a real risk of inhuman and degrading treatment in the Romanian prison cells after his surrender. In particular, information given to the French authorities on the personal space to be allocated to Mr *Moldovan* in the Romanian prison centre should have given rise to a strong presumption of a breach of Art. 3 ECHR. The assurances provided by the Romanian authorities were stereotypical descriptions of the detention conditions. Therefore, the ECtHR determined a breach of Art. 3 ECHR and ordered France to pay him €5000 just satisfaction in compensation.

#### ► *Application of the principles in the second case*

In addition to detention conditions, the case of Mr *Bivolaru* also concerned the implications of his refugee status in Sweden. The ECtHR noted that the French Cour de Cassation had declined to seek a preliminary ruling before the CJEU in this latter question. This failure to make a referral led to the second condition for the presumption of equivalent protection (involving deployment of the full potential of the relevant supervisory machinery provided for by EU law) not having been fulfilled. Accordingly, the ECtHR reviewed the manner in which the executing French authorities had examined breaches of Art. 3 ECHR in the light of potential persecution of the defendant on account of his political and religious beliefs in Romania. The ECtHR concluded that the French authorities had examined Mr *Bivolaru*’s individual situation in depth but had no sufficient factual basis to establish the existence of a real risk of a breach of Art. 3 ECHR and to refuse the execution of the EAW on that ground. Similarly, there was no solid factual basis for the French authorities to doubt a breach of Art. 3 ECHR because of inhuman detention conditions, since the applicant had not provided sufficiently detailed or substantiated *prima facie* evidence on this risk. As a result, a violation of Mr

*Bivolaru*’s Convention rights could not be established.

#### ► *Put in focus*

The ECtHR clarified that the EU Member States must comply with the guarantees of the ECHR when applying EU mutual recognition instruments. It equally confirmed that the ECtHR will assess this conformity. Although the door for accepting breaches of the ECHR is only slightly ajar, the ECtHR outlined ways in which successful complaints could be filed by individuals subject to surrender on the basis of EAWs. For the first time, the ECtHR acknowledged a rebuttal of the presumption of equivalent protection because of a manifest deficiency in applying the EAW as mutual recognition instrument.

As regards the assessment of whether poor prison conditions can lead to a refusal of extradition, the ECtHR concurred with the CJEU approach only insofar as both courts require a real, individualised risk of breach of the fundamental right to human and non-degrading treatment to have been incurred by the requested person. Read between the lines, the ECtHR clarified that it applies a different methodology than the CJEU: the ECtHR does not follow a two-step approach requiring (1) evidence of systemic and generalised deficiencies in the issuing State before (2) any individual risk is identified (cf. the CJEU in *Aranysosi and Căldăraru*, cited above).

In addition, the Convention serves as the benchmark if the complaint is not covered by the presumption of equivalent protection (here: failure to make a referral for preliminary ruling to the CJEU). Although the complaint was not successful in the end, the ECtHR vehemently blamed the French Cour de Cassation for not having sought guidance from the CJEU on questions that have not yet been decided and that were decisive in the present case (here: implications of asylum granted by another EU Member State on the execution of EAWs). In such cases, the yardstick of “manifest deficiency” is irrelevant. (TW) ■

### CJEU: Convictions of Third Countries Executed in EU Member States Can Be Subject of an EAW

In its [judgment of 17 March 2021 in Case C-488/19 \(JR\)](#), the CJEU had to address questions on the applicability of the Framework Decision on the European Arrest Warrant (EAW) and the scope of refusal grounds. The case, which was referred by the Irish High Court, dealt with a rather unique constellation: JR, a Lithuanian national, was sentenced in Norway for possession of narcotic substances. Subsequently, Lithuania recognised this Norwegian judgment and took over further execution of the sentence against JR in Lithuania. However, JR absconded and went to Ireland. Lithuania sought his surrender from Ireland in order to execute the remainder of the imprisonment sentence (namely one year and seven months).

According to the CJEU, an EAW can also be issued on the basis of a sentence imposed in a third country (here: Norway), provided that the sentence was recognised in the issuing EU Member State (here: Lithuania). The prerequisites for this are, however, the imposition of a custodial sentence of at least four months and compliance with the EU's fundamental rights in the third-country criminal proceedings.

Although automatic extradition without review only applies between EU Member States, the principle of mutual trust extends to the proper recognition of third-country judgments. Accordingly, the issuing Lithuanian authorities are to be trusted that, in the context of recognition, the sentence handed down in the third country of Norway had been examined for compliance with fundamental rights, in particular the rights of defence under Arts. 47 and 48 of the Charter of Fundamental Rights.

In addition, the CJEU clarified that the ground for refusal in Art. 4 No. 7 lit. b) FD EAW does not apply in the present case. According to this provision, an executing state may refuse to execute an EAW "if the offence was committed out-

side the territory of the issuing State and the law of the executing State does not allow prosecution for the same offences when committed outside its territory" (so-called extraterritoriality clause or refusal ground of double jurisdiction). In the present constellation, only the criminal law jurisdiction of the third State (here: Norway), which allowed prosecution of the offence, is relevant. The interpretation of the respective ground for refusal in the FD EAW must be based on the premise that the impunity of the requested person be avoided. (TW)

### CJEU Rules on Compliance of FD EAW with Charter of Fundamental Rights

In its [judgment of 28 January 2021 in Case C-649/19 \("criminal proceedings against IR"\)](#), the CJEU took a stance on the extent of a person's rights of information if he/she is subject to a European Arrest Warrant (EAW). In addition, the CJEU had to rule on the validity of Framework Decision 2002/584 on the European Arrest Warrant (FD EAW) in the light of the rights to liberty and to an effective remedy (Arts. 6 and 47 CFR).

#### ► *Facts of the case*

In the case at issue, the Specialised Prosecutor's Office in Bulgaria initiated criminal proceedings against IR, accusing the defendant of participation in a criminal group for the purpose of committing tax offences. During the pre-trial stage of the criminal proceedings, IR was informed of only some of his rights. Since IR absconded, the public prosecutor issued an EAW. The referring Specialised Criminal Court annulled this EAW. The court had doubts as to whether the EAW is compatible with Directive 2012/13 on the right to information in criminal proceedings.

#### ► *Questions referred*

The Bulgarian court first sought guidance from the CJEU whether persons requested by means of an EAW for the purpose of arrest not only enjoy the rights as explicitly provided for in Art. 5 of Directive 2012/13 ("Letter of Rights in EAW proceedings") but also the other,

more extensive rights in Arts. 4, 6, and 7 of the Directive which apply to "suspects or accused persons who are arrested or detained." These rights include the right to be provided with a written letter of rights on arrest that informs about the possibility of challenging the lawfulness of the arrest, obtaining a review of the detention, and making a request for provisional release.

Should that question be answered in the negative, the Specialised Criminal Court secondly voiced doubt over the validity of the FD EAW since the information communicated to persons arrested on the basis of an EAW is more limited than the information communicated to suspects or accused persons who are arrested or detained in national proceedings (in accordance with Arts. 4, 6, 7 of Directive 2012/13). As a consequence, persons requested for the purpose of execution of an EAW have excessive difficulties in challenging warrants issued against them.

#### ► *Findings of the CJEU on the first question (scope of information rights)*

The CJEU first observed that the wording of the provisions of Directive 2012/13 does indeed not lead to the conclusion whether the various rights are conferred also to persons who are arrested or detained for the purposes of the execution of an EAW. The CJEU concluded, however, that the rights enshrined in Arts. 4, 6, and 7 do not apply to persons in EAW situations because the context and objective of Directive 2012/13 are pretty clear in this regard. In line with Art. 5 ECHR, Directive 2012/13 distinguishes situations of persons who are deprived of liberty in the sense of Art. 5(1) lit. c) and persons who are lawfully arrested with a view to deportation and extradition (Art. 5(1) lit. f). For the CJEU, it follows from this that the provisions referring to suspects or accused persons who are arrested or detained do not concern persons who are arrested for the purposes of the execution of an EAW.

This interpretation is confirmed by

the fact that Directive 2012/13 sets out a twofold objective: (1) It lays down minimum standards to be applied in the field of information to be given to suspected or accused persons, in order to enable them to prepare their defence and to safeguard the fairness of the proceedings; (2) It also seeks to preserve the specific characteristics of the procedure relating to EAWs, which is characterised by a desire to simplify and expedite the surrender procedure.

► *Findings of the CJEU on the second question (validity of the FD EAW)*

The CJEU first noted that the validity of the FD EAW must be established in the light of primary Union law, i.e., Arts .6 and 47 CFR. In this context, the CJEU stressed that the FD EAW forms part of a comprehensive system of safeguards, in which the subject to an EAW is able to exercise his/her rights. This includes:

- According to previous case law (Joined Cases C-508/18 and C-82/19 PPU (→[eucrim 1/2019, 33–36](#)) and C-566/19 PPU and C-626/19 PPU (→[eucrim 4/2019, 242–245](#))), the right to liberty must be protected by an independent review either at the first level, at which a national decision, such as a national arrest warrant, is adopted, or at the second level, at which a European arrest warrant is issued;
- The person subject to an EAW enjoys the safeguards of fair proceedings because he/she acquires the status of “accused person” from the moment of his/her arrest, so that all the rights referred to in Arts. 4, 6, and 7 of Directive 2012/13 can be exercised (enabling the accused person to prepare his/her defence);
- Information provided in Art. 8(1) lit. d) and e) corresponds, in essence, to the information referred to in Art. 6 of Directive 2012/13;
- The mere fact that the person who is the subject of an EAW is not informed about the remedies available in the issuing Member State and is not given access to the materials of the case until after he/she is surrendered to the competent authorities of the issuing Member

State, cannot call into question the effectiveness of the right to judicial protection.

In sum, none of the concerns put forward by the referring court affect the validity of the FD EAW. (TW)

### **CJEU: Consequences of Invalid EAWs for Pre-Trial Detention in the Issuing State**

In [Case C-414/20 PPU \(“MM”\)](#), the CJEU had to rule on the consequences if a Member State issued a European Arrest Warrant (EAW) without prior judicial decision that orders the arrest of the requested person. In the case at issue, MM was prosecuted in Bulgaria for having participated in a criminal drug-trafficking organisation. The public prosecutor only took a decision that put MM under investigation; this only had the legal effect that MM was notified of the charges against him. Without a court order for pre-trial detention, the public prosecutor issued an EAW. MM was surrendered from Spain to Bulgaria. Possible deficits of the EAW were not examined by the Spanish authorities executing the EAW since MM consented to his surrender.

The referring criminal court in Bulgaria essentially asked about the consequences any possible shortcomings concerning the Bulgarian EAW might have on subsequent criminal proceedings in Bulgaria, in particular whether pre-trial detention in Bulgaria could be maintained.

In its [judgment of 13 January 2021](#), the CJEU first pointed out that an EAW must be based on a “[national] arrest warrant or any other enforceable judicial decision having the same effect” in accordance with Art. 8(1) lit c) FD EAW. According to the CJEU, this provision is to be understood in such a way that the EAW may only be based on such legal acts which are intended to enable the arrest of a person for the purpose of criminal proceedings. Measures that solely intend to notify the person concerned of the charges against him and to afford

him the possibility to defend himself by providing explanations or presenting offers of evidence are not covered by the notion “other enforceable judicial decision having the same effect as a (national) arrest warrant.” An EAW issued in disregard of this requirement would be invalid.

Furthermore, because of the principle of effective legal protection stemming from Art. 47 CFR, it must be possible to have the conditions of the EAW reviewed before a court. This also applies if national law does not provide for this possibility.

Lastly, the CJEU stated that neither the FD EAW nor Art. 47 CFR require a national court to release a person who is the subject of a pre-trial detention measure if it finds that the EAW that led to that person’s surrender is invalid. An opposite consequence would be counter to the aim of the EAW mechanism, which is to ensure that an alleged offender does not go unpunished. The EAW has, in principle, exhausted its legal effects after the accused person’s surrender to the issuing Member State and it is not an order for detention of the person sought in the issuing Member State. Therefore, it is for the national law to lay down the consequences of an invalid EAW. (TW)

### **CJEU: National Arrest Decision and EAW Cannot be Issued by Public Prosecutor Alone**

On 10 March 2020, the [CJEU decided](#) on the consequences of the Bulgarian criminal procedure system, under which both the European arrest warrant and the decision on which it is based had been issued by the Bulgarian public prosecutor without court review prior to surrender. The judgment in the underlying [Case C-648/20 PPU \(European Arrest Warrant issued for PI\)](#) follows up on the previous decision of 13 January 2021 in [Case C-414/20 PPU \(“MM”](#) →[news item above](#)). While the CJEU in *MM* had to decide on the legal effects of a potentially invalid EAW, which was solely issued by the Bulgarian public prosecutor,

in the criminal proceedings in Bulgaria, the case in *PI* concerned the handling of such EAWs in the executing Member State.

➤ *Facts of the case and question referred*

In the case at issue, the Westminster Magistrates' Court (UK) was called on to execute a Bulgarian EAW against PI. The prosecutor of Svishtov Regional Prosecutor's Office issued an EAW for the purposes of the criminal prosecution of PI who is suspected of having committed theft of money and jewellery. This EAW was based on an order from said prosecutor that PI be detained for a maximum period of 72 hours.

The Bulgarian system does not foresee any participation of a court prior to the issuance of EAWs. It is neither required that a court reviews the EAW nor issues a national arrest warrant. According to the Bulgarian system, a court is only involved after surrender of the requested person when a court has to impose a preventive measure involving deprivation or restriction of liberty.

The Westminster Magistrates' Court expressed doubts as to whether this approach satisfies the requirements of dual level of protection as established by the FD EAW as interpreted by the CJEU case law (in particular in *Bob-Dogi* (C241/15 → [eucrim 2/2016](#), p. 80) and *OG and PI* (C508/18 and C82/19 PPU → [eucrim 1/2019](#), 33–36).

➤ *Findings of the CJEU*

The CJEU confirmed its standpoint that the requested person must enjoy a dual level of protection for procedural and fundamental rights. Art. 8(1) lit. c) FD EAW entails that effective judicial protection should be adopted, at least:

- At the first level, at which a national judicial decision, such as a national arrest warrant or a comparable measure, is adopted; or
- At the second level, at which a European arrest warrant is issued (which may occur, depending on the circumstances, shortly after the adoption of the national judicial decision).

This concept presupposes that judicial review is exercised *before* the arrest warrant is executed. In other words, a court must be involved prior to submission of an EAW guaranteeing adequate protection of the individual rights. Consequently, a Bulgarian law that provides only *ex post* judicial review does not comply with the requirement set by Art. 8(1) lit. c) FD EAW and the executing judicial authority can refuse the EAW.

The CJEU clarified that this finding is not called into question by its decision of 13 January 2021 in *MM*. In this context, the CJEU states: “[in *MM*,] the Court (...) confined itself to holding that, where the law of the issuing Member State does not contain a separate legal remedy, EU law confers jurisdiction on a court of that Member State to review indirectly the validity of the European arrest warrant. Accordingly, it cannot be inferred from that judgment that the Court ruled that the existence of such a possibility of *ex post* judicial review was such as to satisfy the requirements inherent in the effective judicial protection of the rights of the requested person.” (TW)

## European Investigation Order

### AG: Tax Authority Cannot Issue EIO without Prior Judicial Validation

In his [Opinion of 11 March 2021](#) in Case [C-66/20](#) (*XK / Finanzamt für Steuerstrafsachen und Steuerfahndung Münster*), Advocate General (AG) *Sánchez-Bordona* rejects the authorisation of administrative authorities – despite exercising powers as a prosecution office in criminal tax matters – to issue a European Investigation Order (EIO) without the involvement of a judge, court, or public prosecutor. Even if the tax authority performs investigative tasks, independence from the executive cannot be guaranteed due to the administrative hierarchy and the special interest in tax matters. The EIO of a national

administrative authority must therefore be validated by a judge or public prosecutor in accordance with Art. 2 lit.c)ii) of Directive 2014/41/EU.

According to the AG, the purpose of the validation procedure (as established by the EIO Directive) would be countered if a Member States could easily allow the administrative authorities belonging to the executive – by equating them with the judicial authorities – to transmit such an order which had not been validated by the judicial authorities (including the public prosecutor's office).

The AG also points out that, in Case C-452/16 PPU, the CJEU had extended the term “judicial authority” to all authorities participating in the administration of criminal justice while explicitly excluding administrative authorities that are part of the executive. In certain countries, the public prosecutor's office is also subject to individual instructions by the executive, but unlike administrative authorities – as organs of the executive – it has an autonomous status. In an investigation of tax evasion, the tax authority of Münster, Germany felt entitled to transmit an EIO requesting the search of business premises directly to an Italian public prosecutor's office, since under German law the tax authorities assume the investigative power of the public prosecutor's office. (TW)

## Criminal Records

### Commission Report on ECRIS

On 21 December 2020, the Commission presented its [second statistical report on the European Criminal Records Information System](#) (ECRIS). This system has allowed judicial authorities to easily exchange information on previous criminal convictions since 2012. The purpose of the report is to present the compliance of Member States' exchanges with the ECRIS legal framework and to identify any issues regarding the efficiency of the system (with a view to remedying

them). It provides an overview of the use of ECRIS in the period from 1 January 2017 to 31 December 2019. The report is accompanied by a [Commission Staff Working Document](#) with detailed graphs and tables comparing the use of ECRIS in the given period. The main findings of the report include:

- In 2019, all EU Member States actively used ECRIS;
- From just under two million messages exchanged by all interconnected Member States in 2016, the number increased to almost 4.2 million in 2019 with an average of 348,000 messages per month;
- The number of requests for information has tripled since 2017 – to hit one million in 2019 alone. This high increase is explained by the shift in the use of ECRIS, not used any more exclusively or even mainly for the purpose of criminal proceedings, but also – on a regular basis – for purposes other than criminal proceedings (e.g., pre-employment screening, requests on one’s own criminal record, etc.);
- Since 2018, ECRIS is consulted equally often for both criminal and other purposes (50/50%), while in previous years the use of ECRIS for other purposes than criminal proceedings was, on average, 20%;
- In 2019, only 19% of replies revealed previous criminal convictions whereas in previous years this rate was at a stable level of around 30%;
- ECRIS is still rarely used for third country nationals (92% of all requests concern EU nationals).

The data also revealed that ECRIS is used very differently by the EU Member States. It was also found that some Member States do not fulfil all their obligations under the Framework Decision 2009/315/JHA on the exchange of criminal records. In particular, requests are sometimes not answered or not answered within the prescribed time limit. Some Member States did not send notifications on new convictions or did not send updates. (TW)

## Law Enforcement Cooperation

### New E-Evidence Legislation: Trilogue Started – Criticism on EP Stance

After the European Parliament adopted its position on the e-evidence package in December 2020 ([→eucrim 4/2020, 295–296](#)), trilogue negotiations between the EP, the Council, and the Commission started on 10 February 2021. The Council had already presented its general approach in 2018 ([→eucrim 4/2018, 206](#)). For the original Commission proposal [→eucrim 1/2018, 35–36](#). The new legislation aims to simplify the ability of law enforcement authorities to access data held by private digital service providers in another national jurisdiction. The proposal is highly contentious; the EP included several amendments in its position. In particular, the lack of judicial control in the executing state as well as unresolved questions regarding notification obligations were criticised. For the discussion and criticism put forward by NGOs, navigate to previous eucrim issues under “Law Enforcement Cooperation.”

The Council [expects difficult negotiations](#). In [preparatory documents from 25 January 2021](#), the Council Presidency juxtaposes the initial Commission proposal and the respective positions of the EP and the Council, both as regards the [proposed Regulation](#) on European Production and Preservation Orders for electronic evidence in criminal matters and the [Directive](#) laying down harmonised rules on the appointment of legal representatives for the purposes of e-evidence gathering. Regarding the latter instrument, it should be noted that the EP wishes to merge the provisions of the Directive into the Regulation.

In mid-January 2021, the [European Judicial Network e-Evidence Working Group \(WG\)](#) criticised the EP’s position. After having assessed the proposed amendments made by the EP, the WG believes that the drafted provisions are inconsistent, confusing, and unclear. The WG also commented on eight

points that may affect judicial cooperation regarding the obtainment of e-evidence if the Regulation were adopted in its current form. In conclusion, the EJV WG believes that the EP’s version is no advancement compared to other existing judicial cooperation instruments.

On the opposite side of the fence, the civil stakeholder organisation [EDRI blamed the EP](#) for having made too far-reaching compromises that water down adequate safeguards previously included in the original drafts of the EP rapporteur. In particular, the compromise will put the rights of journalists, lawyers, doctors, social workers, and individuals in general at risk. EDRI stated: “The final Regulation will likely be even more underwhelming considering that the Parliament will now have to accept further compromises in its negotiations with the Council. The Council has previously taken a position on e-evidence which largely ignores even the most basic protections needed to be in conformity with fundamental rights and the EU’s own rules on due process.”

It considers the following issues to be crucial for a sufficient protection of safeguards:

- Involvement of the “affected State”;
- Sufficient involvement of the executing State;
- Safeguards against fishing expeditions;
- Safeguards against deficiencies in mutual trust and EU judicial cooperation. EDRI also cites European Parliament rapporteur MEP Birgit Sippel who announced that the Parliament’s position won’t “crack before our courts”. EDRI commented, however: “[s]adly, there is little chance that her compromise will ever become the final Regulation but is merely another small step of weakening fundamental rights in law enforcement practice in the EU. The next step is going to be the trilogue negotiations with the Council and the Commission, both of which have even less interest in subjecting cross-border access to data to proper safeguards”. (TW)





## Council of Europe

Reported by Dr. András Csúri

### Foundations

#### European Court of Human Rights

##### Protocol No. 15 to the ECHR Enters into Force

On 21 April 2021, [Italy deposited](#) its instrument of ratification of [Protocol No. 15](#) amending the European Convention on Human Rights (ECHR), thereby bringing the Protocol into force for all CoE member states with effect from 1 August 2021.

Protocol No. 15 adds a new recital to the Preamble of the ECHR. This reads as follows: “Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention.”

The Protocol brings about a reform of the ECtHR by amending several provisions of the Convention. In particular, the time-limit, within which an application may be lodged to the ECtHR following a final domestic decision is reduced from six to four months. Judge *Robert Spano*, President of the ECtHR, stated that all relevant information on the measures taken to ensure the smooth functioning of the work of the Court will be published on its website in due course.

##### ECtHR: New Case Processing Strategy

On 17 March 2021, the European Court of Human Rights (ECtHR) introduced a new case management strategy that establishes a new category of “impact” cases. The Registry published a [summary document](#) on the Court’s website describing the main aspects of this new strategy.

As a result of the Interlaken reform process (2010–2020), the Court has reduced its backlog from 160,000 pending cases in 2011 to 65,000 at present. During this period, a prioritization policy based on seven categories, ranging from urgent to obviously inadmissible applications, allowed for acceleration of processing times. Nevertheless, there are currently 17,800 potentially well-founded category IV cases, which do not involve core rights and take the court an average of 5–6 years to process. Among these category IV cases, a small percentage may raise very important issues of concern for the State in question and/or the Convention system as a whole, justifying more expeditious case processing. These cases are identified and labelled as “impact” cases under the new category IV-High. To date, approximately 650 such cases have been identified so far, based on a list of examples and the following criteria:

- The conclusion of the case might lead to a change in or clarification of international or domestic legislation or practice;
- The case touches upon moral or social issues;

- The case deals with an emerging or otherwise significant human rights issue.

If any of these criteria are met, the ECtHR may take into account whether the case has had significant media coverage domestically and/or is politically sensitive.

On the one hand, the new strategy aims to ensure that priority cases in categories I-III and in the newly categorized “impact” cases (category IV-High) are identified, processed, and decided even more quickly by the Court. This will be achieved through increased use of the Court’s resources and rigorous internal monitoring.

On the other hand, the strategy will ensure a balanced and productive output through increased standardisation and streamlining of the processing of non-impact category IV cases by using existing working methods and IT tools. In the future, the handling of non-priority and non-impact cases will be handled by committees of three judges instead of chambers of seven judges. The ECtHR will strive to produce shorter and more focused draft judgments in these cases.

### Specific Areas of Crime

#### Corruption

##### Human Rights Commissioner: Corruption Undermines Human Rights and Rule of Law

On 19 January 2021, the Commissioner for Human Rights, *Dunja Mijatović*, issued a [comment](#) on how corruption undermines human rights (HR) and the rule of law. In her concluding remarks, the Commissioner urges Member States to fully implement GRECO’s recommendations.

*Mijatović* stressed that, in recent years, citizens of many European countries have protested against systemic corruption and demanded respect for the rule of law, accountability, and a determined fight against corruption. She

warned member states that corruption undermines trust in public institutions, hinders economic development, and has a disproportionate impact on the exercise of human rights, especially among people belonging to marginalised or disadvantaged groups. It also disproportionately impacts women, children, and people living in poverty. In particular, the access of these groups to basic social rights, e.g. health care, housing, and education, is hampered.

It is estimated that every year corruption, bribery, theft, and tax evasion cost developing countries about USD 1.26 trillion a year. This sum would be enough to lift the 1.4 billion people living on less than USD1.25 a day above the poverty line and keep them there for at least six years. As a striking example, over 7% of health spending worldwide is lost to corruption, according to the 2019 Transparency International [report](#).

The Commissioner highlighted the serious threat that corruption poses to the administration of justice and human rights. In several CoE member states, governments have implemented hasty judicial reforms that reinforce the strong influence of the executive branch on the judiciary, which seriously undermines judicial independence and weakens judicial oversight. Thus, the ability of the judiciary to fight corruption is affected. GRECO has underlined the need to ensure the genuine independence of judges, namely to prevent undue political influence on the judiciary, which can lead to biased, corrupt judgments that do not serve the public interest. *Mijatović* raised these issues with [Turkey](#), [Poland](#), [Hungary](#), [Romania](#), and [San Marino](#).

Corruption is particularly dangerous in law enforcement, as it affects both citizens' safety and their pursuit of justice, including in cases of political corruption and police misconduct. An interesting aspect in this regard is GRECO's ongoing fifth round of evaluations, which enables a number of recommendations to be made to member states. These evalu-

ations also help increase the representation of women in senior positions within the police and ensure their integration at all levels in law enforcement agencies. Recommendations in this regard have been made, for example, in relation to the police in [Estonia](#), [Denmark](#), and [Spain](#).

Another issue dealt with in the comment is corruption as a significant barrier to health care access. The practice of informal payments in some countries is problematic, as it discourages patients (especially those from poor families) from seeking medical care or doing so in a timely manner. The COVID-19 pandemic has further exacerbated existing systemic problems and increased corruption risks.

*Mijatović* emphasized the central role of investigative journalists and whistle-blowers in fighting corruption. She pointed to the murder of journalists in CoE member states as well as the phenomenon of so-called “Strategic Lawsuits against Public Participation” (SLAPPs), which are unfounded lawsuits filed by powerful individuals or companies seeking to intimidate journalists into giving up their investigations (for the discussion at the EU level → [eucrim 4/2020, 258–259](#) and [eucrim 2/2020, 106–107](#)). Since perceptions of corruption and reality do not always match, even countries with high levels of trust in their public institutions need to implement preventive anti-corruption measures, regardless of their place on perception indexes.

Overall, the Commissioner highlighted transparency as an indispensable tool in the prevention of corruption – it demonstrates that the public interest remains at the heart of decision-making. Despite the strict anti-corruption standards and GRECO's effective monitoring, corruption continues to pose a serious threat to the rule of law and human rights in the CoE region. Therefore, *Mijatović* calls on states to fully comply with the relevant CoE standards and implement GRECO's recommendations. This must particularly include the following:

- Public officials need to avoid engagements that may involve a conflict of interest and an increased risk of corruption.
- States must ensure a well-functioning and adequately funded system of oversight of police misconduct and provide regular training for members of law enforcement agencies on integrity and ethics.
- Public spending on health care needs to be effectively monitored.

Governments must protect the right to freedom of expression and the safety of journalists by fighting impunity for crimes against journalists and by effectively combating SLAPPs. This could be done, for instance, by allowing early dismissal of such lawsuits and introducing measures to punish abuses. In particular, member states should reverse the costs of lawsuits and minimise the consequences of SLAPPs by providing practical assistance to those being sued.

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

On 15 January 2021, GRECO published its fifth round evaluation [report](#) on Norway. The focus of this evaluation round is on the effectiveness of the frameworks currently in place to prevent corruption among persons with top executive functions (ministers, state secretaries, and political advisers) and members of the police. The evaluation focuses particularly on issues of conflicts of interest, the declaration of assets, and accountability mechanisms (for other reports on this evaluation round: [eucrim 4/2020, p. 297 et seq.](#) with further references).

Norway joined GRECO in 2001 and holds an unprecedented record in implementing GRECO recommendations, with 100% of them fully implemented in all evaluation rounds. The country has traditionally performed well in international perception surveys on corruption. It consistently ranks among the top ten countries in Transparency International's Corruption Perception Index (7th in 2020) and in the fight against corruption

(5th among 30 advanced economies, according to the 2017 Inclusive Growth and Development Report of the World Economic Forum). As a result of the World Bank Governance Indicators, Norway has had an average score of nearly 100% on corruption control over the past two decades.

The country's citizens are highly satisfied with services and institutions (OECD Government at a Glance, 2015), administrative corruption and petty bribery are almost non-existent (GAN Business Anticorruption Portal, Norway Corruption Report), and Norway's economic crime-fighting unit, ØKOKRIM, has proven its proactivity in investigating and prosecuting corruption in Norway and abroad (OECD Phase 4 Report: Norway, 2018).

There are other corruption-related challenges, however, such as close networks and conflicts of interest. The country essentially relies on high expectations and trust in its senior officials. Violations of integrity standards have limited formal consequences other than political repercussions. As a result, just like in other countries, disagreements in this regard often lead to heated public debate. In 2017, the Office of the Auditor General found that Parliament had disregarded standard procurement rules and other safeguards for major construction projects, leading to an avalanche of costs and the resignation of the President of Parliament. In 2018, the Minister of Fisheries resigned after having violated security rules during a private trip.

GRECO therefore calls for further measures to prevent corruption and recommends strengthening accountability and law enforcement mechanisms. In addition, more effort should be made to ensure formalized training and guidance on ethical issues for all senior executives. Further measures should be taken with regard to the rules governing how persons in top executive positions interact with lobbyists – and with regard to revolving doors.

In this context, GRECO recom-

mends, in particular, that the following be considered in relation to central governments (top executive functions):

- Providing dedicated training on ethics, conflicts of interest, and corruption prevention in a systematic manner to persons entrusted with top executive functions at the start of their term and on a regular basis throughout their terms of office;
- Establishing a system to ensure consistent interpretation of ethical matters among those responsible for giving advice on them;
- Introducing rules/principles and providing guidance on how persons entrusted with top executive functions engage in contacts with lobbyists and other third parties who seek to influence governmental processes and decisions; in addition: increasing the transparency of the purpose of such contacts, e.g., the identity of the person(s) involved and the specific subject matter(s) of the discussions;
- Amending standards for retaining or accepting paid and unpaid secondary positions, occupations, or other paid assignments in connection with the prohibition of such activities, unless a written (well-considered) authorisation is received that is also made available to the public ;
- Developing general guidelines to address the conflicts of interest that can arise from private activities, both when entering and leaving a government position;
- Subjecting state secretaries and political advisors to the same disclosure requirements as ministers and possibly requiring the same information for spouses and dependent family members;
- Filing disclosures electronically to avoid the possibility of transcription errors on the part of the registrar;
- Enacting enforceable sanctions for failing to file or knowingly make false statements on the disclosure reports;
- Enacting formal systems for review of the declarations of persons entrusted with top executive functions.

As for the police, public surveys in-

dicate that corruption within the police force is very rare (Global Corruption Barometer, 2013). The reliability of police services to protect businesses from crime is considered very high (Global Competitiveness Report, 2017). In addition, the Norwegian government has effective mechanisms in place to investigate and prosecute corruption among police officers (Human Rights Report, 2018).

The police is currently being reformed in order to streamline its operations, and steps have been taken to strengthen internal control and audit systems in recent years. There have also been affirmative moves to improve the protection of whistle-blowers, including recent legislative changes in 2020 and the development of guidelines and operational arrangements. Nevertheless, more needs to be done in order to ensure a more well-coordinated and proactive integrity policy, such as refining risk assessment/information collection tools and better monitoring/cross-checking of integrity-related registers (e.g., business interests, disciplinary action data, reviews and reconsiderations, internal deviation reports, etc.). Furthermore, the Code of Conduct for the Police needs to be accompanied by additional measures to make it meaningful.

With regard to law enforcement agencies, GRECO therefore recommends the following:

- Adopting a coordinated corruption prevention and integrity policy for the police, based on systematic and comprehensive review of risk-prone areas, coupled with a regular assessment mechanism;
- Supporting implementation of the Code of Conduct by means of a more uniform, coordinated, and comprehensive approach, including training programmes and awareness-raising measures on integrity/professional ethics and systematic confidential counselling on these matters;
- Developing a streamlined system for authorisation and recording of second-

ary activities within the police, coupled with effective follow-up measures;

- Conducting dedicated training and awareness-raising activities on whistleblowing for all hierarchy levels and chains of command within the police;
- Establishing national statistics on disciplinary measures and clearly communicating them to the public while respecting anonymity.

## Procedural Criminal Law

### CCPE: Opinion on the Role of Prosecutors in Emergency Situations

On 21 March 2021, the Consultative Council of European Public Prosecutors (CCPE) published [Opinion No. 15](#) on “The role of public prosecutors in emergency situations, in particular when facing a pandemic.” The Opinion was adopted in November 2020; it is available in different languages on the [CCPE website](#).

Opinion No. 15 sheds light on the implementation of the usual tasks of prosecutors in emergency situations, their new or expanded tasks in response to such situations, the management of challenges faced by prosecutors in emergency situations, and the modalities of international cooperation during a pandemic, while ensuring that prosecutors carry out their mission with the highest quality and efficiency and respect for the rule of law and human rights.

The Opinion emphasizes that a formal declaration of a state of emergency is required for emergency measures and derogations from rights set forth in international instruments, including the ECHR. Furthermore, the restrictions introduced as a result of the pandemic may affect not only civil and political rights protected by the ECHR but also economic, social, and cultural rights, with the possible risk that they may entail discrimination against certain groups. This particularly affects health care workers and racial and ethnic minorities, which

Council of Europe Treaty	State	Date of ratification (r), signature (s), accession (a) or entry into force (e)
<a href="#">Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data</a> (ETS No. 223)	Spain	28 January 2021 (r)
	Finland	10 December 2020 (r)
	Liechtenstein	7 December 2020 (s)
	Malta	2 November 2020 (r)
	Cyprus	21 September 2020 (r)
	Estonia	16 September 2020 (r)
	Mauritius	4 September 2020 (s)
	Bosnia and Herzegovina	2 July 2020 (s)
	Romania	26 June 2020 (s)
	Serbia	26 May 2020 (r)
Lithuania	23 January 2020 (r)	
<a href="#">Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons</a> (ETS No. 222)	Hungary	31 March 2021 (s)
	Ukraine	1 December 2020 (r)
	Austria	8 July 2020 (r)
	Netherlands	23 January 2020 (s)
<a href="#">Council of Europe Convention on Offences relating to Cultural Property</a> (ETS No. 221)	Greece	2 March 2021 (r)
	Montenegro	8 April 2019 (s)
	Russia	8 November 2018 (s)
	Mexico	6 September 2018 (r)
	Latvia	22 February 2018 (s)
	Cyprus	7 December 2017 (r)
	Italy	24 October 2017 (s)
	Ukraine	11 September 2017 (s)
	Slovenia	4 July 2017 (s)
	San Marino	19 May 2017 (s)
	Armenia	19 May 2017 (s)
Portugal	19 May 2017 (s)	
<a href="#">Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism</a> (ETS No.217)	Switzerland	25 May 2021 (r)
	San Marino	1 May 2021 (e)
	Croatia	15 March 2021 (r)
	Russia	24 January 2020 (r)
<a href="#">Council of Europe Convention against Trafficking in Human Organs</a> (ETS No. 216)	Spain	1 April 2021 (e)
	Switzerland	21 October 2020 (r)
<a href="#">Council of Europe Convention on the Manipulation of Sports Competitions</a> (ETS No. 215)	Greece	16 June 2020 (r)
<a href="#">Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms</a> (ETS No. 214)	Bosnia and Herzegovina	9 March 2021 (r)
	Luxembourg	14 May 2020 (r)

Council of Europe Treaty	State	Date of ratification (r), signature (s), accession (a) or entry into force (e)
<a href="#">Protocol No. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 213)</a>	Italy	21 April 2021 (r)
	Bosnia and Herzegovina	8 September 2020 (r)
<a href="#">Convention on the counterfeiting of medical products and similar crimes involving threats to public health (ETS No. 211)</a>	Ecuador	7 May 2021 (s)
	Niger	19 February 2021 (s)
	Belarus	28 September 2020 (r)
	Bosnia and Herzegovina	18 September 2020 (r)
<a href="#">Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS No. 210)</a>	Ireland	1 April 2021 (e)
	Armenia	7 September 2020 (r)
<a href="#">Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS No. 198)</a>	Austria	28 July 2020 (r)
	Lithuania	28 April 2020 (r)
<a href="#">Council of Europe Convention on the Prevention of Terrorism (ETS No. 196)</a>	San Marino	1 May 2021 (e)
	Switzerland	25 March 2021 (r)
<a href="#">Additional Protocol to the Criminal Law Convention on Corruption (ETS No. 191)</a>	Estonia	1 April 2021 (e)
<a href="#">Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189)</a>	Sweden	28 April 2021 (r)
<a href="#">Convention on Cybercrime (ETS No. 185)</a>	Sweden	28 April 2021 (r)
	Colombia	16 March 2020 (a)
<a href="#">Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182)</a>	Liechtenstein	25 September 2020 (r)

Latest Update: 22 May 2021 (by *Clara Arzberger*)

can lead to hate speech, racism, xenophobia, attacks on and forced returns of refugees and asylum seekers, mistreatment of foreigners and migrants, sexual violence, gender-based violence, and domestic violence.

Legislation governing the enactment

of measures in emergency situations must primarily respect non-derogable rights. Measures affecting other rights must be based on the overarching principle of the rule of law and on the principles of necessity, adequacy, equality and non-discrimination, proportionality,

temporariness, effective (parliamentary and judicial) scrutiny, predictability of emergency legislation, and loyal co-operation among state institutions.

The integrity of the prosecution service – including its competencies, independence, and impartiality – should be protected in the same way as the integrity of the court system. Where appropriate, prosecutors should pay particular attention to whether the use of emergency measures interferes with fundamental human rights to a greater extent than is strictly necessary. Prosecutors may also be called upon to monitor the necessity, proportionality, and appropriateness of emergency measures outside the criminal justice sphere.

The establishment of crisis response teams could be envisaged and, taking into account legal diversity, guidelines should be issued for cooperation mechanisms both within and outside the prosecutor's office in special emergencies. In emergencies, special cooperation and coordination mechanisms can be established by prosecutors' offices with other institutions such as law enforcement agencies, health care facilities, and representatives of mass media.

Emergencies, such as a pandemic with closed borders and quarantine measures, pose particularly serious problems for international cooperation, which can lead to the complete breakdown of certain elements of cooperation. For such situations, more effective and innovative forms of cooperation must be developed in order to maximize operational efficiency. In this context, consideration should be given to using simplified procedures in emergencies, such as accepting and processing MLA and extradition requests by electronic mail.

Lastly, the CCPE invites member states to share the results of possible evaluations on the impact of the pandemic on their judicial systems in order to update the Opinion.

## Fil Rouge

It is now official: the European Public Prosecutor's Office (EPPO) will start its operational activities as from beginning of June this year.

On 7 April 2021, the European Chief Prosecutor, *Laura Kövesi*, submitted to the European Commissioner for Justice, *Didier Reynders*, and to the European Commissioner for Budget and Administration, *Johannes Hahn*, her proposal to start the EPPO's operational activities. Having assessed that the conditions laid down in Regulation (EU) 2017/1939 are fulfilled and that the EPPO is set up and ready to assume its investigative and prosecutorial tasks, the European Commission adopted the necessary implementing decision on 26 May 2021; it determines the date on which the European Public Prosecutor's Office assumes its operational work. The decision was published in the Official Journal L 188 of 28 May 2021. The EPPO will assume its investigative and prosecutorial tasks conferred on it by the Regulation on 1 June 2021.

The appointment process of European Delegated Prosecutors (EDPs) is already advanced. On the eve of the official start, only two participating Member States (Finland and Slovenia) have not yet proposed their candidates for the EDP positions (though for very different reasons); 88 EDPs over a total number of 140 have already been appointed by the College.

According to the Commission and the European Chief Prosecutor, the lack of appointment of the EDPs from two Member States should not prevent the effective start of the EPPO's operational work. This approach takes into account the possibility that the European Prosecutors of the concerned Member State can conduct the investigation personally in those Member States, with all the powers, responsibilities, and obligations of an EDP in accordance with Art. 28(4) of the EPPO Regulation.

Considering that the entire project of the European Public Prosecutor, from its conception, took more than a quarter of century the EPPO will become functional at last, after an intense preparatory phase which started at the end of September 2020 when the European Chief Prosecutor and the 22 European Prosecutors took oath before the European Court of Justice. Since then a number of decisions of the College have already been adopted in order to allow

the new body to start working efficiently from day one, in particular decisions on rules of procedure, the Permanent Chambers, recruitment and working conditions of the EDPs, the conclusion of working arrangements with Europol and Eurojust, and, most recently, the operational guidelines on investigation, evocation, and referral of cases.

This special issue is devoted entirely to the concrete functioning of the EPPO. *eu crim* wishes to pay both a formal tribute to the new supranational body and to give voice to several important components of the Office: eleven European Prosecutors, representing half of the College, outline their views on the major challenges and opportunities ahead for the EPPO. The European Chief Prosecutor delivers her perspective in the guest editorial.

The panoply of topics reaches from the independence of the EPPO to the defence of procedural rights. It ranges from abandoning or transforming the role of the investigative judge still present in some participating countries (e.g. France and Belgium) to the crucial role of the Permanent Chambers in the decision-making process and in ensuring the genuine multinational element in the EPPO's proceedings. Contributions also tackle the reporting mechanisms, the interplay between the EPPO and OLAF, questions on the material competence of the EPPO to fight fraud, including the tricky concept of "inextricably linked offenses, the gathering and admissibility of evidence in the participating Member States, the deprivation of illicit proceeds of crime and – last but not least – challenges in connection with digitalisation.

United in diversity – this motto of the European Union is well reflected in the many contributions in this issue. On the one hand, they reveal the enormous challenges posed by this revolutionary project in the field of European criminal law. On the other hand, they show the irrepressible enthusiasm of the authors, who are well aware of the historic moment they are contributing to in realizing the efficient protection of the EU budget – in particular against the background of the unprecedented amount of new resources made available through the long-term 2021–2027 budget and the "NextGenerationEU" financial instrument.

*Lorenzo Salazar*, Deputy Prosecutor General to the Court of Appeal of Naples; Member of the *eu crim* Editorial Board

\* N.B. The contributions by the European prosecutors reflect the personal views of the authors and not necessarily that of the Office they are affiliated with.

## Le parquet européen: un projet entre audace et réalisme politique

Le parquet européen devrait entrer en fonction au cours du premier semestre 2021. N'ayant pas obtenu un accord unanime au Conseil, il débutera son activité dans le cadre d'une coopération renforcée réunissant vingt-deux États membres. Cet échec apparent est en fait un succès, car il possèdera malgré tout une dimension suffisante pour peser réellement dans son champ de compétence – la défense des intérêts financiers de l'Union – mais aussi au niveau institutionnel.

Le projet, souvenons-nous, est né d'une réflexion collective conduite par la professeure de droit, *Mireille Delmas-Marty*, qui a débouché sur le fameux « Corpus Juris » sur la protection des intérêts financiers de l'Union publié en 1997. Celui-ci proposait déjà de créer un parquet européen chargé de poursuivre les auteurs des infractions portant atteinte au budget européen. La proposition était d'autant plus audacieuse que l'espace judiciaire européen n'existait pas encore, Eurojust non plus. Elle sera reprise à l'article 86 du Traité de Lisbonne (TFUE) qui lui sert de base légale.

Une idée audacieuse et simple à exprimer – un parquet européen –, mais dont la mise en œuvre était singulièrement complexe, au moins pour deux raisons. La première était purement technique. Rien de plus compliqué, en effet, que de créer de toutes pièces un ministère public européen. Car il faut tout prévoir si l'on veut que ça marche : la répartition des pouvoirs entre l'échelon central et l'échelon national, la structure et le fonctionnement interne de l'organe, le droit applicable aux enquêtes et aux poursuites, la coopération transnationale, etc... La seconde difficulté était de nature politique. Il faut bien comprendre qu'au-delà des aspects juridiques et techniques, la création d'un parquet européen représentait un véritable transfert de souveraineté au profit d'une autorité judiciaire supranationale. Or les États membres n'étaient pas disposés à accepter un tel sacrifice sans obtenir quelques garanties en retour. Le projet a donc donné lieu, dès le départ, à deux conceptions assez éloignées l'une de l'autre : d'un côté, celle de la Commission européenne qui voulait un organe entièrement intégré et sans « lien national » avec les États membres ; de l'autre, une approche plus réaliste portée par la France et l'Allemagne à laquelle la plupart des États membres se sont ralliés ensuite.

Après de nombreux rebondissements, c'est la vision des États membres qui s'est finalement imposée. Que contient-elle ? D'abord cette idée que le parquet européen ne peut se satisfaire de demi-mesures : sa création devra entraîner un vrai transfert de compétences. Dans le champ d'action qui est le sien, toutes les prérogatives d'action publique (direction des enquêtes, exercice des poursuites) seront désormais exercées par un office central européen. Deuxième élément : l'indépendance. Ce parquet européen n'aura de légitimité que s'il est pleinement indépendant à l'égard des États membres – cela va de soi –, mais aussi à l'égard des institutions européennes. Troisième idée : un parquet collégial. C'est sur ce point que le désaccord s'était cristallisé entre les États membres et la Commission européenne qui croyait y déceler le



Frédéric Baab  
Procureur européen (France)

“ Le parquet européen n'est pas seulement un projet audacieux, c'est aussi un bouleversement pour les ordres juridiques internes, en particulier dans les pays, comme la France, qui connaissent encore le juge d'instruction . ”

retour à bas bruit du modèle intergouvernemental. Ce qui n'était pas notre intention. La collégialité que nous voulions n'était pas celle de l'agence Eurojust où chaque Membre national représente son pays. Il était clair pour nous, dès le départ, que les procureurs européens agiraient au nom et pour le compte d'un intérêt supérieur aux intérêts nationaux, un intérêt commun à tous les États membres, un intérêt européen. Quatrième et dernière idée : l'application du droit national. Il était hors de question, en effet, de s'engager dans la négociation d'une procédure pénale européenne dont personne ne voulait : c'eût été le meilleur moyen de tuer le projet dans l'œuf.

C'est sur ces bases que le règlement UE 2017/1939 a été adopté le 12 octobre 2017. Il confère au parquet européen le statut d'organe de l'Union et pose le principe de son indépendance en apportant de solides garanties à la nomination de ses membres. Celui-ci s'établit à deux niveaux : un échelon central situé à Luxembourg représenté par le chef du parquet européen, le collège des procureurs européens et le directeur administratif ; un échelon décentralisé représenté par les procureurs européens délégués dans chaque État participant. Le niveau central s'appuiera, à la fois, sur les procureurs européens qui « superviseront » les enquêtes conduites dans leur propre pays et sur les « chambres permanentes », composées chacune de trois procureurs européens, qui prendront toutes les décisions d'action publique dans les dossiers (exercice des poursuites et appels éventuels). Le texte détermine enfin la manière dont le parquet européen exercera son droit d'évocation sur la base des informations transmises par les États membres. Ces règles ont été complétées par une série de dispositions concernant notamment le contrôle par la Cour de Justice, ainsi que la coopération opérationnelle avec les partenaires (OLAF, Europol, Eurojust).

L'étape suivante a été la transposition de ce règlement en droit national. Car même s'il est d'application directe, sa mise en œuvre nécessitait l'adoption d'un cadre procédural spécifique. C'était particulièrement vrai dans les pays qui connaissent le juge d'instruction. Le point était délicat à traiter, car le maintien d'un magistrat instructeur était par principe incompatible avec la mise en place d'un parquet européen. Autorité de poursuite à part entière, ce dernier n'avait pas vocation à se dessaisir au profit d'une autorité judiciaire nationale. La France a fait le choix de conférer les pouvoirs du juge d'instruction au procureur européen délégué. Ces dispositions figurent dans la loi relative au parquet européen du 24 décembre 2020 qui lui permet d'être conforme au règlement tout en préservant l'ordre juridique français. S'il l'estime opportun, le procureur européen délégué pourra donc conduire ses enquêtes « conformément aux dispositions applicables à l'instruction » ; et c'est lui *in fine* qui saisira – ou non – la juridiction de jugement conformément aux instructions données par la chambre permanente. Voilà donc un procureur qui portera de temps en temps les habits d'un juge. Le projet, on le voit, n'était pas seulement audacieux, il contenait dès le départ de grands bouleversements!



# The EPPO and the Fight against VAT Fraud – A Legal Obstacle in the Regulation?

Fighting profit-driven crime is at the core of the mission of the European Public Prosecutor's Office (EPPO). The first ever EU prosecution body is invested with the mandate of protecting the Union's financial interests and its sphere of competence is naturally focused on fighting financial crime.

It is estimated that, on a world scale, drug trafficking is the most lucrative crime. At the EU level, the drug market is estimated to have a minimum retail value of €30 billion per year.<sup>1</sup> Other criminal activities seem more profitable, however, at least within the EU. In 2018, imports of counterfeit and pirated products into the EU amounted to as much as €121 billion (6.8% of EU imports).<sup>2</sup> Tobacco smuggling, a core offence within the competence of the EPPO, costs the EU budget more than €10 billion annually in lost public revenue<sup>3</sup> – a significant amount, especially when compared to customs duties on all products imported to the EU, which amounted to €25 billion in 2018.<sup>4</sup> Recently, OLAF reported that, based on detected cases, fraudulent irregularities affected the EU's expenditure slightly in excess of €1 billion in 2018.

However, multiple sources reveal that the most profitable crime in the EU is probably intra-EU VAT fraud. Missing trader intra-community (MTIC) fraud costs around €60 billion annually in tax losses<sup>5</sup> – a figure strongly corroborated by independent indicators. The EU's VAT gap in 2018 was €137.5 billion<sup>6</sup> and a significant part of it arises from VAT fraud, although the difference between expected and actual VAT revenue represents more than just fraud.<sup>7</sup> Moreover, a recent study<sup>8</sup> revealed that the EU has been running massive trade surpluses with itself for years – a logical impossibility and a strong indicator of fraud. The €307 billion self-surplus in 2018 (86% of the entire global self-surplus) for that year suggests possible VAT fraud amounting to up to €64 billion in that year. In respect of VAT fraud – regularly presented as one of the EPPO's "core offences" – the EPPO is competent if the offence is connected with the territory of two or more Member States and involves a total damage of at least €10 million.

VAT fraud often goes hand in hand with direct tax offences and is ultimately committed either by presenting false, incorrect, or incomplete statements or documents or by non-disclosing VAT-related information. Frequently, this conduct simultaneously involves both VAT and direct taxes. In case of simulated transactions in a "carousel fraud," an economic operator might not only illegally claim VAT reimbursement but also deduct from the taxable base the expenses related to the simulated purchase. Both the VAT and the direct tax offences would be committed via one and the same false or incorrect tax statement. In addition, in the context of a foreign company that avoids creating a permanent establishment<sup>9</sup> in an EU Member State with the purpose of avoiding taxes, the charges might include both direct taxation and VAT as a consequence of non-disclosing information related to both taxes. Therefore, it can be well submitted that, in such cases, VAT and direct tax offences would be "inextricably interlinked."



Danilo Ceccarelli  
Deputy European Chief Prosecutor,  
European Prosecutor (Italy)

“ —————  
The questionable decision to exclude the competence of the EPPO for criminal offences in respect of national direct taxes could adversely affect its capacity to fight VAT fraud.  
————— ”

Council Regulation (EU) 2017/1939 establishing the EPPO does not give a clear definition of the notion of “inextricably linked offences.” Recital 54 makes reference to the “*ne bis in idem* principle” and to “concrete circumstances which are inextricably linked together in time and space.” The “*ne bis in idem* principle” is a fundamental guarantee for the defendant, whereas in this case the Regulation has an entirely different purpose, i.e. setting out an operational and procedural rule in order to establish which prosecutor’s office is competent. Common practice and criminal procedure law in Member States allow – and often oblige – national prosecutors to investigate and prosecute connected offences in the same proceedings, even if they are not “inextricably linked.” This is done in the interest of justice and in order to ensure the consistency of the prosecutorial action.

It is expected that the interpretation of the notion of “inextricably linked offences” will become a very controversial legal issue, but there is no doubt that offences involving both VAT and direct taxes at the same time should fall under this legal definition, as outlined above. It is surprising, however, to read in Art. 22(4) of Regulation 2017/1939 that the EPPO apparently will not be able to investigate and prosecute both the offences.

The rationale of this provision is obscure. Neither the recitals of the EPPO Regulation nor the PIF Directive<sup>10</sup> provide any background on the reasons why, exclusively in respect of direct taxes, the rules on inextricably linked offences do not apply. Moreover, this is not consistent with the rules and operational practice followed by prosecution services in the Member States. Undoubtedly, there is the risk that this approach might substantially affect the capacity and the competence of the EPPO to investigate serious cross-border VAT fraud.

The operational activity of the EPPO will soon reveal the exact consequences that Art. 22(4) of the EPPO Regulation may create and whether a reasonable interpretation is possible. This could be the first and most important provision to undergo the “review clause” foreseen in Art. 119 of the -EPPO Regulation, well before the five-year timeframe established therein for evaluation is up.

# The Material Competence of the EPPO and the Concept of Inextricably Linked Offences

According to Art. 22 of Council Regulation (EU) 2017/1939 (the “EPPO Regulation”), the material competence of the new EU body shall cover three different clusters of criminal conduct:

- First and foremost, at least from a quantitative point of view, the Regulation covers offences affecting the financial interests of the European Union that are provided for in the PIF Directive (Directive (EU) 2017/1371), as implemented in national law;<sup>11</sup>
- Secondly, the Regulation covers participation in a criminal organisation, as defined in the applicable national law implementing Framework Decision 2008/841/JHA, as long as the organisation is focused on committing PIF offences;
- Thirdly, the Regulation covers offenses that are *inextricably linked* to those falling in the first cluster (but not in the second one).

While the first two clusters are – each on their own – conceivable and immediately understood by experienced legal practitioners, the third cluster has a rather “fluid” nature. In fact, it is possible to produce a list of offences or to outline a number of criminal activities falling under paragraphs 1 and 2 of Art. 22, but cases in which paragraph 3 shall be applicable can only be perceived in connection to an actual situation involving a PIF offence, as defined in paragraph 1 of Art. 22. In other words, paragraph 3 does *not* provide for a *stand-alone material competence*; this competence can only exist if, at the same time, the EPPO is materially competent based on paragraph 1.<sup>12</sup> One could say that paragraphs 1 and 2 of Art. 22 establish the core of the EPPO’s material competence, whereas paragraph 3 contains an extension of said competence.

The reasons for extending the competence of the EPPO to any other criminal offence inextricably linked to a PIF crime can be found in Recital 54 of the EPPO Regulation. They stem from the need to carry out efficient investigations and from the implications of the *ne bis in idem* principle. As noted by some authors, this extended or ancillary competence may encompass non-harmonized offences and even offences that do not fall under the scope of the Union’s (prescriptive) jurisdiction, as defined in Art. 83(1) and (2) TFEU.<sup>13</sup> The extension is limited, however, by the application of the principle of preponderance,<sup>14</sup> along with other criteria such as the instrumentality of the offence or the amount of damage caused or likely to be caused to the Union’s financial interests, as laid down in Art. 25(3) of the EPPO Regulation. It goes without saying, of course, that any extension of the EPPO’s material competence under Art. 22(3) must be in line with Art. 86 TFEU.<sup>15</sup>

As already mentioned, the construction of a concept of *inextricably linked offences*, as a key component of the (extended) material competence of the EPPO, must take two aspects into consideration:



José Eduardo Guerra  
European Prosecutor (Portugal)

“—————  
The effectiveness of the EPPO demands a functional interpretation of Art. 22(3) of the EPPO Regulation. Yet, the precise contour of this functional interpretation is far from being shaped, and such a task must be accomplished by practitioners, academics, and jurisprudence in the years to come.  
—————”

- The need for an *efficient investigation of offences* affecting the Union’s financial interests;
- The implications of the *ne bis in idem principle* in light of the case law of the CJEU.

The legislator expressly mentioned that the concept in question must be considered in light of the jurisprudence of the CJEU on *ne bis in idem*,<sup>16</sup> which has consistently rejected a *normative* vision and affirmed “*idem*” as a factual notion. In *Van Esbroeck* (C-436/04), the Court established the *identity of the material acts* as the relevant criterion for the application of Art. 54 of the Convention implementing the Schengen Agreement (CISA). This jurisprudence was followed by the Court in subsequent rulings, for instance in *Kraaijenbrink* (C 367/05):<sup>17</sup>

26 (...), it should be noted that the Court has already held that the only relevant criterion for the application of Article 54 of the CISA is identity of the material acts, understood as the existence of a set of concrete circumstances which are inextricably linked together (see *Van Esbroeck*, paragraph 36; Case C 467/04 *Gasparini and Others* [2006] ECR I 9199, paragraph 54, and Case C 150/05 *Van Straaten* [2006] ECR I 9327, paragraph 48).

27 In order to assess whether such a set of concrete circumstances exists, the competent national courts must determine whether the material acts in the two proceedings constitute a set of facts which are inextricably linked together in time, in space and by their subject-matter (see, to that effect, *Van Esbroeck*, paragraph 38; *Gasparini and Others*, paragraph 56, and *Van Straaten*, paragraph 52).

Based on this jurisprudence and in line with Recital 54, two offences should be considered inextricably linked if the underlying facts are *substantially identical*, regardless of their legal classification, such that a decision on the merits of one would bar the prosecution and/or trial of the other.<sup>18</sup> This approach is only one side of the same coin, however, the other being the efficiency of the investigations.

The effectiveness of the EPPO demands a functional interpretation of Art. 22(3) that, within the limits of the Treaty and in line with the jurisprudence of the CJEU, might lead to a solution allowing for an extension of the material competence of the EPPO to include ancillary offences based on identical facts but also avoid any artificial splitting of the criminal conduct or an erosion of the guarantees of defence. Yet, the precise contour of this functional interpretation is far from being shaped, and such a task must be accomplished by practitioners, academics, and jurisprudence in the years to come.

# Reporting of Crime Mechanisms and the Interaction Between the EPPO and OLAF as Key Future Challenges

The establishment of the EPPO overwrote the topography of both EU and national bodies protecting the financial interests of the EU and created a breaking point in the field of criminal law. For the first time in history, apart from international criminal tribunals, the right to investigate and prosecute criminal offences was given to a supranational authority in the EU. National prosecution services will hand over control of their policies to combat PIF offences to the new body at the EU level. This contribution highlights two future challenges: the need for effective reporting channels between the EPPO and other bodies involved in detecting PIF crimes (a)) and the interplay between the EPPO and OLAF (b))

a) In order to achieve its goals, the EPPO will need to establish smart information flows between the central office in Luxembourg, delegated prosecutors, and national authorities and, at the same time, avoid causing delays in the information exchange. Aside from adjusting the reporting mechanism to the various procedural rules of the 22 participating Member States, the reporting system will have to incorporate lines of communication and case-related information exchange with other EU bodies like Eurojust, Europol, the European Court of Auditors (ECA), the European Investment Bank (EIB), and especially with OLAF.

The EPPO Regulation left untouched the duty of the national authorities to report to the Commission any irregularities that were the subject of primary administrative or judicial findings and to update and amend the information on a quarterly basis.<sup>19</sup> This is one of the ways in which OLAF receives information about irregularities, usually through the system of the anti-fraud coordination service (AFCOS) established to facilitate effective cooperation.<sup>20</sup> The national authorities shall also transmit to OLAF any other document or information relating to the fight against fraud, corruption, and any other illegal activity affecting the financial interests of the Union.<sup>21</sup> Fraud and corruption, however, are not purely administrative irregularities but typical categories of criminal law.

In parallel to the obligation to inform OLAF, the national authorities shall, without undue delay, report to the EPPO any criminal conduct in respect of which it could exercise its competence,<sup>22</sup> even cases involving damage caused to the EU's financial interests of less than €10.000. We should bear in mind that the requirements for the initial reports to the EPPO are much lower than to those for the system of reporting irregularities.<sup>23</sup>

Without prejudice to the ideas of shared competence between the EPPO and national authorities and the complementarity of OLAF investigations, it is necessary to streamline and rationalize the existing information and reporting channels so that the national authorities can report PIF crimes to one single point of contact. In this context, it is important to underline that the EPPO is the only EU institution able to apply means of criminal law to combat crime affecting the EU's financial inter-



Petr Klement  
European Prosecutor (Czechia)

“ The EPPO and OLAF shall not only co-exist, but also take advantage of their capacities, professional knowledge and the new legal options in order to become a powerful tool for combating fraud. ”

ests. Therefore, if “there are reasonable grounds to believe” that an offence within the EPPO’s competence has been committed, all information should be forwarded directly to the EPPO, which is in the exclusive position of being able to assess its own competence. In this regard, some of the existing EU mechanisms concerning *de facto* reporting of PIF crimes seem to be obsolete, as well as national law duties to report such information to a national prosecution office in advance or in parallel to the EPPO. Similarly, if OLAF finds there are facts that could give rise to criminal proceedings and trigger the competence of the EPPO as late as the final drafting of the OLAF report, it seems to be reasonable to inform the EPPO exclusively.<sup>24</sup> Spreading information across too many communication lines may be harmful to the main objective of the EPPO, namely the effective prosecution of PIF crimes and bringing criminal offenders to trial.

b) Art. 101 of the EPPO Regulation is an opportunity for the EPPO and OLAF to overcome obstacles of cooperation with the authorities in the 22 participating Member States and to imbue the results of OLAF investigations with a new value in criminal proceedings. According to Art. 101, the EPPO may request OLAF to support and complement the EPPO’s activity, *inter alia*, by providing information or conducting administrative investigations. However, such requests will need to come from the prosecution in open criminal proceedings, with the clear intent of giving evidence in trial.

Two conditions are crucial for the success of this cooperation. First, it is important not to diverge from the standard of procedural safeguards in Chapter VI of the EPPO Regulation and from EPPO instructions to adhere to specific formal procedures. Second, OLAF investigators shall, upon instruction and in cooperation with the EPPO prosecutors, focus on the investigation of facts concerning particular offences and on building up a criminal case. In particular the latter aspect will entail changes at the part of OLAF. Until now, OLAF’s remit has not been to document all elements of a particular criminal offence (*actus reus* and *mens rea*) beyond reasonable doubt in its final reports. Regulation 883/2013 merely indirectly indicates OLAF’s burden of proof as “facts, which could give rise to criminal proceedings” or it remains completely silent. There is a much higher standard of proof in criminal proceedings, especially for proving the *mens rea* beyond reasonable doubt. Until now, OLAF was supposed to document suspicion of fraud more on the balance of probabilities and, in most cases, did not receive sufficient feedback from any subsequent criminal proceedings.

Building up a criminal case means focusing on proving all elements of crime while taking into account national procedural rules from the outset of the investigation, especially specific guarantees and the rights of suspects and victims. This approach is the only way to avoid diminishing the value of evidence in trials, having to recollect evidence (on the part of national authorities), and the procedures becoming thwarted, on occasion, as a result of the deliberate destruction of evidence by criminals.

The new legal framework introduces unique options for OLAF/EPPO cooperation, a cooperation which could benefit from OLAF’s networks and experience and from the EPPO’s powers. The new situation requires streamlining of information channels, however, as well as respecting the *sine qua non* conditions of criminal procedures. The will towards an effective cooperation, not just co-existence, has already been expressed by both sides.

# EPPO – Diversity and Challenges in Investigation and Prosecution in 22 Member States

For an efficient functioning of the EPPO, all participating Member States<sup>25</sup> are obliged to meet the substantive and procedural preconditions. The substantive preconditions are covered by the criminal offenses and penalties transposing the PIF Directive<sup>26</sup> into the national laws. Although the Directive harmonises the legal orders, it should be stressed that the underlying criminal law provisions are those of the national legal orders of the Member States.

The procedural preconditions relate to the implementation of the EPPO Regulation.<sup>27</sup> Compared to the substantive aspect, the situation is a little different: European Delegated Prosecutors (EDPs) will conduct investigations in accordance with the Regulation and, for matters not covered by it, in accordance with national law. Furthermore, Art. 30(1) of the EPPO Regulation lists certain investigative measures that the Member States are obliged to provide in their national criminal procedure laws and which the EDP must be able to request or order.<sup>28</sup> Although the EPPO may order or require investigative measures to be taken throughout the EU, the possibility to enforce investigative measures depends, to a large extent, on the conditions laid down by the national laws of the Member States. Practice will show to which extend courts will hold investigative measures admissible if they are carried out on the basis of an EPPO order but are not prescribed by their national law. In this context, it should be noted that Union law obliges the Member States to apply and interpret national law in accordance with EU law, in this case the EPPO Regulation. The EPPO Regulation does not set any common standards for national rules of criminal procedure, however, which means that Member States are free in this respect.<sup>29</sup>

The chosen approach means that EDPs in 22 Member States have to apply 22 different laws of criminal procedure. This will create certain difficulties in their daily work on specific subjects. In some Member States, for instance, EDPs will conduct their own investigations, whereas, in others, they will only supervise investigations carried out by the police. In a number of Member States, it will also be possible for two or more prosecutors to conduct the same investigation, while it will not be possible in others. In some Member States, EDPs will be able to apply a simplified prosecution procedure in the investigation phase but, in others, they will only be able to do so after the indictment has been filed.<sup>30</sup>

All these differences in the national criminal procedures pose a major challenge to the Permanent Chambers, which will be tasked with monitoring and directing investigations and prosecutions conducted by EDPs. Here, a great role and responsibility falls to the supervising European Prosecutors, who will present summaries of the cases under their supervision and make proposals for decisions to be taken by the Permanent Chambers. The role of European Prosecutors will also be important in explaining to the president and members of the Permanent Chambers not only the facts of the case but also the specifics of their national legislation.



Tamara Laptos  
European Prosecutor (Croatia)

“Differences in the criminal systems of the 22 participating Member States will certainly be a challenge for the EPPO when conducting investigations at the national level and, in particular, when using evidence obtained from other Member States. How competent courts in individual Member States react to the impact of evidence gathered in other Member States under the EPPO Regulation will be shown in practice. Surely, the sooner the EPPO starts producing some tangible results, the sooner it will be recognized by European taxpayers as an effective and efficient instrument in the protection of the European Union’s budget.

As mentioned, the EPPO is responsible for conducting investigations throughout the EU. The EPPO Regulation supports this objective by making cross-border collection of evidence faster and more efficient.<sup>31</sup>

Nonetheless, if investigative measures need to be taken in the territories of different Member States, the admissibility of the measures and their form of execution is determined by the law of the Member State upon whose territory the investigative measure is taken. This concept implies the following:

- Cross-border gathering of evidence in the traditional sense, as an activity involving the judicial authorities of different countries, will not be applicable in EPPO cases;
- Evidence gathered during the investigation, which the EPPO will submit when filing the indictment, comes from different criminal procedural systems;
- Not only prosecutorial activities, but also other activities, e.g., the indictment and conducting the criminal trial, will remain at the national levels of the Member States.

The issue that evidence is gathered under different legal orders will certainly raise the question of admissibility of evidence. The Regulation is quite clear in this regard: evidence presented by the EPPO in court should not be denied admission solely on the ground that the evidence was collected in another Member State or in accordance with the law of another Member State.<sup>32</sup> Nonetheless, the criminal justice systems of the Member States have had or will have to undergo certain adjustments and changes. The way in which prosecutors (EDPs) and other parties in criminal proceedings work and act will need to be adapted, especially concerning a preliminary procedure in which the EPPO will carry out all actions and assume the rights and obligations of prosecutors through the EDPs.

The EPPO will soon begin its work on specific criminal cases detrimental to the EU's financial interests. Successful and efficient work by the EPPO will require both the contributions of EPPO officials at the central and decentralised level and those of all other competent national authorities belonging to the participating Member States. Only then will the joint work and motivation of all participants who combine their expertise via the new Office lead to concrete results in protecting the EU's financial interests, regardless of the differences in the criminal justice systems of the 22 participating Member States. The sooner the EPPO starts producing tangible results, the sooner it will be recognised by European taxpayers as an effective and efficient instrument in the protection of the EU budget.



# The Permanent Chambers at the Heart of the EPPO’s Decision-Making

As a former Eurojust National Member for Austria and as a public prosecutor specialised in economic crime cases, I have experienced first hand that the success of investigations into cross-border, white-collar crime depends as much on the compatibility of the different applicable legal regimes as on the national judicial authorities’ willingness to find “out-of-the-box” solutions where such compatibility is lacking.

Council Regulation 2017/1939 of 12 October 2017 implementing enhanced co-operation on the establishment of the European Public Prosecutor’s Office (“EPPO Regulation”) sets up the EPPO as one single office with a central and a decentralised level.<sup>33</sup> Whilst the investigations are to be conducted by the European Delegated Prosecutors (EDPs) at the decentralised level, the “main decisions” – e.g., whether to file an indictment, to dismiss the case, to apply a simplified prosecution procedure, or to refer a case to the national authorities – will be taken by the Permanent Chambers at the central level.<sup>34</sup>

Even before the initiation of an investigation, the Permanent Chamber may have to take a decision, notably when the EDP, after verification of a criminal complaint, is of the view that there are no reasons to initiate an investigation. The Permanent Chamber can “overrule” the EDP’s decision and instruct the EDP to start an investigation. Equally, at later stages of the proceedings, e.g., when the verdict is handed down at the end of the trial, the decision whether to lodge an appeal or not, will, in principle,<sup>35</sup> be taken by the Permanent Chamber at the central level upon proposal from the EDP who represents the EPPO in court.<sup>36</sup>

The Permanent Chambers monitor and direct the investigations and prosecutions conducted by the EDPs, ensure the coordination of investigations and prosecutions in cross-border cases, and, by way of implementing decisions taken by the College in accordance with Art. 9(2) of the EPPO Regulation, ensure coherence, efficiency, and consistency in the EPPO’s prosecution policy throughout the Member States.<sup>37</sup> The members of the Permanent Chambers generally take their decisions following proposals submitted by the EDPs conducting the proceedings. The case virtually goes back and forth between the decentralised and the central levels of the EPPO.

By way of College Decision 015/2020, the EPPO has established 15 Permanent Chambers.<sup>38</sup> The cases will be randomly allocated to any one of the Permanent Chambers by the EPPO’s Case Management System, with the right of the European Chief Prosecutor to suspend the allocation of new cases to one or several Permanent Chambers for a specified period of time, so as to ensure an equal distribution of workload between the Permanent Chambers.<sup>39</sup>

Each of the Permanent Chambers consists of a chairperson (i.e., the European Chief Prosecutor, one of the two Deputy European Chief Prosecutors, or a European Prosecutor) and two European Prosecutors as permanent members.<sup>40</sup> Additionally, the



Ingrid Maschl-Clausen  
European Prosecutor (Austria)

“—————  
The Permanent Chambers are the genuine multinational element in the EPPO’s proceedings.  
—————”

European Prosecutor supervising an investigation or prosecution in an individual case (i.e., the European Prosecutor from the Member State of the EDP handling the case-) takes part in the deliberations and decision-making of the Permanent Chamber in that individual case.<sup>41</sup>

The decision-making Permanent Chambers, which are composed of three plus one members from different Member States and different legal traditions, are the genuine multinational element in the EPPO's proceedings. Otherwise, proceedings would be conducted by the EDPs almost entirely as if they were acting as national prosecutors on the basis of national law.<sup>42</sup> While this setting guarantees the EPPO's independence from national judiciaries and from (individual) Member States, on the one hand, it creates a number of linguistic, legal, and practical challenges, on the other.

The proceedings will be conducted in the official language of the Member State of the EDP handling the case-. The case file will be in that language, too. To allow the (three permanent) members of the Permanent Chambers to have access to the content of the case file in a language they understand, the acts of the criminal investigation that are essential for the central Office to carry out its tasks, will have to be made available in English,<sup>43</sup> where appropriate in summary form.<sup>44</sup> In each single case dealt with by the EPPO, one of the Permanent Chambers will take a decision at least once and, in most cases, much more often during the lifetime of an EPPO case. As the Permanent Chambers consist of (only) the 22 European Prosecutors and the European Chief Prosecutor, the Permanent Chambers will also have to find ways to counter the risk of becoming the "bottleneck" in the EPPO's future casework.

The future work of the Permanent Chambers is poised to fulfil their objective of ensuring coherence, efficiency, and consistency in the EPPO's prosecution policy is achievable without a harmonised criminal procedure applicable to all EPPO proceedings.

# The Independence of the European Public Prosecutor’s Office

An efficient and impartial European public prosecution service cannot exist without effective external independence of the EU institutions and the Member States. Likewise, the internal autonomy of its members is of utmost importance. The idea of independence has been underscored from the project’s inception in the late 1990s to Regulation 2017/2019<sup>45</sup> (hereinafter, the Regulation), which ultimately established the European Public Prosecutor’s Office (EPPO). In fact, independence is one of the EPPO’s main, if not its most important feature. It is an essential guarantee against abuse of power, which is not only in the prosecutors’ own interests but also in the interest of society itself and in the interest of the rule of law. Thus, the Regulation emphasises this fundamental principle by categorically establishing in Art. 6 that the EPPO shall be independent and act in the interest of the Union as a whole. This central provision also stipulates that the EPPO shall refrain from seeking or taking instructions from any person or entity outside it while at the same time obliging Member States and EU entities to respect the EPPO’s independence. Moreover, the Regulation does not merely affirm this external independence but also lays down specific rules to ensure that independence, in line with the case law of the European Court of Human Rights reiterated by the Venice Commission.<sup>46</sup> These rules relate *inter alia* to the manner of appointment of the EPPO’s prosecutors, the duration of their terms, and the existence of guarantees against external pressures, including decision making on budgetary matters.

With regard to the European Chief Prosecutor and the European Prosecutors (EPs), the Regulation requires them to be professionals whose independence is beyond doubt. It also provides for selection and appointment procedures that, in principle, should confirm their independence, as they involve international selection panels and different EU institutions.<sup>47</sup> In the same vein, their non-renewable terms and the fact that the decision on their dismissal is entrusted to the European Court of Justice will act as safeguards of their independence. The Regulation also advocates the external independence of the European Delegated Prosecutors (EDPs)<sup>48</sup> who are clearly more exposed to external pressure, as they will directly carry out the EPPO’s proceedings in their respective Member States. In these cases, however, and although the appointment of the EDPs is a matter for the EPPO College, their selection is assigned to the Member State; the College may only reject those candidates who do not fulfil the legal requirements. It is also worth noting that EDPs are recruited for a renewable term of five years and will eventually return to their national systems. Furthermore, the Regulation allows for the possibility of so-called “double-hatted” prosecutors, who will exercise their functions both within the EPPO and in their national prosecution services, making them subject to two different sets of rules, two sets of disciplinary proceedings, and, in certain cases, two chains of command.

It is clear from the above that mechanisms need to be put in place to ensure the EDPs’ independence. To this end, the Decision of the College on the conditions of employment of the EDPs has explicitly established the EPPO’s assistance to EDPs



Maria Concepción Sabadell Carnicero  
European Prosecutor (Spain)

“ An efficient and impartial European public prosecution service cannot exist without effective external independence from the EU institutions and the Member States and internal autonomy of its members. ”

in the event of personal threats or damages resulting from the proper discharge of their functions. With the same objective, the College has also decided to specifically regulate the disciplinary offences and sanctions applicable to EDPs. Likewise, the College must pay special attention to the rules for the assignment and reassignment of cases between EDPs.

Ultimately, as stated above, the external independence of the EPPO is also linked to the allocation of sufficient financial resources in order to fulfil its mandate and linked to the necessary budgetary autonomy to manage them. As established by the Regulation, adequate financing of the EPPO lies with both the EU, through the general budget of the Union, and with each participating Member State, as they are obliged to provide their EDPs with the resources and equipment needed to carry out their duties.<sup>49</sup>

Along with this external independence, the internal autonomy of prosecutors handling the EPPO's cases is necessary to ensure the protection of citizens' rights, in particular the rights to a fair trial and to equality before the law. This encompasses objective and impartial performance of the prosecutors' duties. In the context of the internal dimension of independence, the hierarchical system established by the Regulation, which requires EDPs to comply with the instructions of the Permanent Chambers and the EPs, does not breach internal independence, since the Regulation provides for checks and balances that aim at ensuring the discharge of prosecutorial functions impartially and in accordance with the principle of legality. These checks and balances include making it impossible for the Permanent Chambers to dismiss a case that an EDP has proposed bringing to judgment<sup>50</sup> and making it possible for the EDPs to request the review of the instructions received.<sup>51</sup> In order to enable such a review, the internal rules of procedure adopted by the College foresee the relevant procedure, assigning the final decision to a Permanent Chamber other than the one that issued the instruction, so that three more EPs examine whether the instruction is legally compliant. In any event, if the EDPs disagree with said decision, their replacement might be considered, as recommended by the Council of Europe.<sup>52</sup>

As regards impartiality and objectivity, the Regulation explicitly lays down the EPPO's duty to act in an impartial manner, seeking all relevant evidence – whether inculpatory or exculpatory.<sup>53</sup> It also prohibits the intervention of an EP in proceedings where a conflict of interests may exist.<sup>54</sup> In this respect, the internal rules of procedure adopted by the College regulate the procedure for the substitution of EPs and EDPs in case of conflicts of interest in order to ensure their impartiality. Ultimately, one more important aspect should be mentioned: independence cannot be understood without accountability. As with any authority granted power in democracy, the EPPO is accountable to the society it serves. Thus, the Regulation imposes an obligation on the EPPO to issue annual reports on its general activities,<sup>55</sup> stressing the necessary transparency in order to build credibility.

In short, the EPPO Regulation has laid the foundation for ensuring the independence of the new body, but its effective implementation requires joint and determined action by those who make up the EPPO, the EU institutions, and the Member States. This independence will enable the EPPO to discharge its functions fairly and effectively, improve public trust in justice, and serve as an example for other public prosecutors' offices.

# Opportunities and Challenges in Cases Involving Proceeds of Crime

The Union has set itself the objective of establishing an area of freedom, security and justice. To achieve this goal and strengthen the trust of citizens in our institutions, the protection of the Union’s financial interests is an absolute necessity and of utmost importance. Every year, the Member States indeed lose billions of euros in revenue, *inter alia* value added tax (VAT), due to cross-border carousel fraud depriving the European Union of a substantial amount of its budget. In addition, hundreds of millions of European structural funds are misappropriated or misused for wrongful purposes each year.

Until now, the offenses affecting the financial interests of the European Union (PIF offenses) have not been sufficiently investigated and prosecuted at the national level. In addition, the proceeds generated were usually not sufficiently identified and recovered as a priority, thus causing a definitive loss to the Union budget. In the context of this specific financial criminality, the expression “crime does not pay” makes full sense. The most effective measure is to deprive the perpetrators of any advantage in connection with the offense.

During its operation, the recovery of proceeds generated by PIF offenses shall thus be a top priority of the European Public Prosecutor’s Office (EPPO). In order to achieve this objective, the EPPO will adopt an entirely new approach and devote all its resources to enhancing the fight against cross-border VAT fraud, corruption harming the Union’s interests, and the laundering of the proceeds of PIF crimes by criminal organisations.

As the EPPO will operate across the territories of 22 participating Member States and have access to a wide range of information, including that provided by the European Union, it will be able to promptly detect cases of fraud and initiate investigations, so that the necessary preservation measures can be taken. In all cases generating proceeds of crime, the EPPO shall develop and proactively promote (parallel) financial investigations at the very outset of its operation and initiate money-laundering cases to facilitate the recovery of misappropriated funds, where appropriate. The identification, tracing, seizure, and confiscation of proceeds of crime shall be pursued by the EPPO as a priority in all its cases. Furthermore, the use of multidisciplinary task forces specialised in financial or asset recovery investigations shall be endeavoured at the national level in order to enable a swift exchange of information and knowledge.

The “follow the money” approach will become even more important during the ongoing COVID-19 pandemic crisis: the European Union is willing to spend money more flexibly through the EU Next Generation Programme to support the economies and health services, but flexible spending also opens up new and different opportunities for fraudsters to misappropriate Union funds.



Gabriel Seixas  
European Prosecutor (Luxembourg)

“—————  
The European Public Prosecutor’s  
Office should ensure that crime does  
not pay.  
—————”

The challenge is huge, as the EPPO will have to coordinate its specific actions in a harmonised and consistent way through the participating Member States as well as across their borders when concrete links appear. Yet, the judicial systems and traditions vary significantly from one country to another, e.g., in relation to the level of cooperation and exchange of information between competent authorities, in relation to access to relevant databases, and, last but not least, in relation to the analytical, technical, and human capabilities available at the national level in order to perform appropriate financial analyses.

The EPPO will have to circumvent these differences and set up common standards applicable to the investigation and prosecution of PIF offenses all across Europe. In order to add benefit to its operations, the EPPO will also need to develop an adequate operational capacity at the central level in order to assist and complement the complex financial investigations carried out by the European Delegated Prosecutors at the national level. The aim is to identify existing links in a specific case within the territories of other countries, thus affording the Permanent Chambers a unique overview of ongoing cross-border criminality and the possibility to take immediate action. Ultimately, the EPPO should also perform strategic reviews of ongoing criminality related to PIF offenses in order to identify recurrent typologies as well as new trends, risks, and vulnerabilities, with the aim of sharing the valuable experiences gathered during its operations and raising awareness of cross border crime in the public and private sectors.

In the end, the overall protection of the Union's financial interests can only be achieved if all levels within the EPPO work together closely. There is also a need for the EPPO to work hand in hand with the national competent authorities, rely on the support of Eurojust, Europol and OLAF as well as of a network of practitioners as the Camden Asset Recovery Inter-Agency Network in order to increase the efforts to deprive criminals of their illicit profits.

Cooperation with other institutions, bodies, offices, and agencies of the Union will also be essential for the EPPO from an administrative recovery perspective, of course – always taking into account, however, the proper conduct and confidentiality of its investigations.

I am convinced that, by doing so, the EPPO will ultimately fill the existing gaps in convictions and, as a result, achieve a higher level of repatriation of misappropriated Union funds.

## EPPO and Digital Challenges

One of the challenges for the European Public Prosecutor’s Office (EPPO), which the Member States identified during the negotiations on the EPPO Regulation, was the speed of criminal proceedings. How can we make sure that investigations will not take even longer with the addition of this new actor in the chain of criminal justice? Considering that most legal decisions during the investigation of a PIF crime will now be made in Luxembourg, will this make criminal proceedings even more bureaucratic?

One of the major principles, which was agreed on in the EPPO Regulation, is that the work of the EPPO should be carried out in electronic form. A case management system is to be established, owned, and managed by the EPPO.<sup>56</sup> It is clear that the EPPO can be effective only if the information exchange between the central office in Luxembourg and the European Delegated Prosecutors in the Member States is fast and smooth.

According to Art. 24 (2) of the EPPO Regulation, when a judicial or law enforcement authority of a Member State initiates an investigation in respect of a criminal offence for which the EPPO could exercise its competence, that authority shall inform the EPPO without undue delay, so that the latter can decide whether or not to exercise its right of evocation. We still do not know how large the current backlog of cases in the Member States is, in which the EPPO must decide on evocation. The initial estimates from the Member States indicate that this number could be around 3000 cases. There is no transitional period foreseen for when the EPPO becomes operational; it will start with full speed from day one, and any evocation decision must be made within 5 days.<sup>57</sup> In a “paper era,” this would most likely be impossible. Imagine truckloads of case files (the volume of one case file for an average PIF crime could be anywhere from 50 to several thousand pages) transported to Luxembourg from 22 Member States – the logistics would inevitably raise questions about security, storage, time, workload, etc.

Taking into consideration that the College of the EPPO only started in early autumn of 2020 and that the time for actual preparatory work has been extremely short, it is quite impressive that, as of February 2021, the first version of the EPPO Case Management System (CMS) is ready to be launched. There is still a huge amount of work ahead of us, but this is a good starting point.

The main challenge in developing the CMS was that Member States and their judicial systems are at very different levels of digitalisation. When discussing digital procedure, we often speak in different languages. For some Member States, digitalisation means scanned pdf documents, for others it means sending a memory stick back and forth between law enforcement authorities, for yet a third group, it means metadata and the use of artificial intelligence. The EPPO’s CMS must work for all of them, and it has to be a user-friendly tool facilitating the smooth exchange of



Kristel Siitam-Nyiri  
European Prosecutor (Estonia)

“Digital solutions play the key role in the effectiveness of the European Public Prosecutor’s Office.”

information. The CMS must allow the EPPO to operate as a single office, where the case files administered by European Delegated Prosecutors are available to the central level for the exercise of its decision-making, monitoring, directional, and supervisory tasks.<sup>58</sup>

It is extremely difficult to digitalise cross-border judicial cooperation if the Member States are not digitalised at the national level. Yet, it is reassuring to see that the European Commission has acknowledged and emphasised this problem in its communication outlining plans to speed up the digitalisation of justice systems,<sup>59</sup> including a toolbox and an action plan.

In order to ensure swift information exchange during investigations between the central office and the decentralised level, the EPPO will also rely on the cooperation and willingness of the Member States. I believe that EPPO's CMS could provide the impetus needed for those Member States still taking their first steps towards digitalisation. At the same time, we must keep in mind that we should not hold back states that are already more advanced in this field.

Digital tools are not only meant for communication between the EPPO's central office and European Delegated Prosecutors. We also need digital information exchange with Eurojust, Europol, and OLAF. It is necessary to cross-check different cases and information in order to coordinate the fight against cross-border crime in the most effective way. This requires developments in the respective case management systems but also possible updates to the legal framework.

We know that technology has become a horizontal dimension for all types of criminality. As criminals are increasingly using digital means to commit offences, it is clear that law enforcement and judicial authorities also have to take advantage of the rapid advancement of technology in order to keep up. Whether we talk about the interconnectivity of databases, asset recovery, predictive policing software, digital forensics, the use of analytical tools, etc., the use of technology in the fight against serious and cross-border crime, including crimes against the EU's financial interests, is crucial.

I believe that the EPPO will play an important role here. We can and should be ambitious in the use of digital tools. This way, we can create new synergies in cross-border cooperation and improve the effectiveness of justice.

As already mentioned above, we still have a huge amount of work ahead of us in order to ensure that the EPPO will be a modern and effective institution, with fully equipped digital processes. Being the pioneer in the field of prosecution at the EU level is definitively not only a challenge and responsibility but also a valuable opportunity. As we are starting a new organisation, we will not have to go to the trouble of adapting or changing the customary workflows. Instead, we will have the advantage of creating our own working processes, which will be up-to-date from the very beginning – using all the possibilities the digital world has to offer.



## Role of the Belgian Investigative Judge in EPPO Cases

In the investigation phase, Belgian criminal procedure is characterized by a dual-level system: (i) the preliminary enquiry under total control of the public prosecutor's office and (ii) the judicial investigation, which is led by the investigative judge and monitored by the public prosecutor's office.<sup>60</sup> This puts Belgium in an exceptional position in the European Union. Only France, Luxembourg, Spain and Slovenia grant similar powers to the investigative judge, as a result of which this judge assumes the role of both judge and investigator in certain (usually more serious) criminal cases. The investigative judge is “both Maignet and Salomon,” according to the famous quote by *Robert Badinter*, the former French Minister of Justice.

The four aforementioned countries, which are also participating members of the European Public Prosecutor's Office (EPPO), have adapted or will adapt their criminal investigation and prosecution procedures in light of the forthcoming operations being conducted by the EPPO.<sup>61</sup> For these criminal cases, the EPPO and, in particular, the European Delegated Prosecutors (EDPs) will take over the leading investigative tasks from the investigative judges. For certain intrusive measures restricting personal liberty and the right to private life, the investigative judges will still be able to intervene in the investigation – as real judges, who guarantee the protection of fundamental rights and freedoms by granting or refusing judicial authorisation. They will therefore become judges of the investigation (or judges of the liberties) rather than investigative judges.

By contrast, Belgium will not change its criminal procedure for EPPO cases.<sup>62</sup> The two main reasons are the political will to preserve the decisive role of the judiciary in important criminal investigations<sup>63</sup> and the prevention (and fear) of potential discrimination and unconstitutionality<sup>64</sup> (due to a difference in treatment between EPPO cases and similar, purely national cases). The Belgian examining magistrates remain in charge of the EPPO cases. The Belgian investigative judges will remain in charge of the EPPO cases, when requested by the Belgian EDPs. This judicial request is mandatory under Belgian law if it is necessary, for instance, to carry out a home search without permission, an interception of telecommunication data, an insight operation into an IT system, or an arrest warrant. The EDPs will of course follow these judicial investigations closely and submit judicial claims to the investigative judges where necessary. In the event of contradictory decisions or poor or lengthy investigations, the EDPs may (like other prosecutors) appeal to, or turn to, the Court of Appeal. At the end of the investigation, it is also their task to take a final decision (after approval by the Permanent Chamber) and to ask another judge (the so-called “*chambre de conseil*”) whether the case should be referred to the criminal court. It should be noted that the Belgian legislator provides for the appointment of investigative judges specialised in financial crime, who will deal with the files for which the EPPO is competent as a matter of priority.



Yves Van Den Berge  
European Prosecutor (Belgium)

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Is the Belgian legislative position of retaining the leading role of the investigative judge in certain EPPO criminal investigations in accordance with the EPPO Regulation? In view of the wording of the Regulation and the preparations leading up to it at the European level, the answer can only be in the affirmative.  
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The question now is whether the Belgian legislative position of retaining the leading role of the investigative judge in certain EPPO criminal investigations is in accordance with the EPPO Regulation. In view of the wording of the Regulation and the preparations leading up to it at the European level, the answer can only be in the affirmative.<sup>65</sup> Some of the key provisions of the EPPO Regulation, whereby the EPPO continues to rely on national rules, are contained in Arts. 28, 30, and 41 and in Recital 15. Let us have a closer look at the wording of these provisions.

Art. 30(3) stipulates that certain investigation measures may be subject to further conditions, including limitations, provided for in the applicable national law. As investigative powers are and will remain national, so too will be the relationship between actors in criminal investigations. Thus, the Regulation does not prohibit the intervention of a judge in a Member State, even if he/she is a leading investigative judge. This *ratio legis* can also be found in Recital 15: “This Regulation is without prejudice to Member States’ national systems concerning the way in which criminal investigations are organized.” The original European Commission proposal did not include such an explicit recital.<sup>66</sup> Art. 28(1) also does not prohibit intervention or evocation by the investigative judge: “The European Delegated Prosecutor handling a case may, *in accordance* with this Regulation *and with national law*, either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State. Those authorities shall, *in accordance with national law*, ensure that all instructions are followed and undertake the measures assigned to them.” This provision does not change the role of the national judge in the preliminary investigation of EPPO cases, either (the judge may always decide otherwise or refuse to accede to the request of the delegated prosecutor).

Since its genesis, the EPPO Regulation, all the more so with regard to Art. 28, did not intend to drastically change the national relationship between the prosecution and the judiciary – quite the opposite is the case. For example, the above-mentioned original Commission proposal did contain another, stricter position in Art. 18(1) on the powers of the EPPO: “The designated *European Delegated Prosecutor shall lead the investigation* on behalf of and under the instructions of the European Public Prosecutor. The designated European Delegated Prosecutor may either undertake the investigation measures on his/her own or instruct the competent law enforcement authorities in the Member State where he/she is located. These authorities shall comply with the instructions of the European Delegated Prosecutor and execute the investigation measures assigned to them.” Hence, the Commission proposal did not include a reference to national law. The Member States subsequently intervened during the negotiations in the Council, and this led to the previously cited Art. 28(1) of the current EPPO Regulation, namely the deletion of “shall lead the investigation.”<sup>67</sup>

As a consequence, in EPPO cases that will be conducted in Belgium, the EPPO may not be the day-to-day leader in the judicial investigation phase, but the Belgian delegated prosecutors will still be able to influence the work of the Belgian investigative judge and be able to give orders, often after the intervention and decisions of the supervising European Prosecutor and the Permanent Chamber. Moreover, every criminal investigation and prosecution begins and ends with actions by the EPPO.

# EPPO: A Challenging Balance-Striking Exercise in the National and EU Judicial Environment

The European Public Prosecutor's Office (EPPO) is expected to tackle corruption and severe cross-border criminality against the EU's financial interests via a more coherent and efficient strategy compared to that applied up to now by the national judicial authorities. The Office has to demonstrate the need to invest in such an innovative judicial body at the EU level by providing new means to support a comprehensive Union strategy in the area of freedom, security and justice.<sup>68</sup> In thus significantly promoting the intensification of European integration, it will also face a number of challenges.

Some challenging issues stem from the EPPO Regulation itself and are partly attributed to the reluctance of the EU legislator to provide clear, uncontested solutions. These issues will soon have to be addressed in practice, as they are linked with the core performance of the EPPO. One example is that the EPPO is expected to actively intervene in all relevant stages, since a *new landscape seems to be emerging in the field of national criminal proceedings*. This will inevitably necessitate a rearrangement of the balance between the parties to the criminal proceedings (prosecutorial and other competent judicial national authorities, victims, suspects, and defendants) in light of the specific provisions of the EPPO Regulation (Chapter VI), as complemented by the EPPO's Internal Rules of Procedure, by the EU procedural rights *acquis*, and by the ECtHR jurisprudence. It should be reiterated that, in the area of procedural rights, no common rules were foreseen, even in the Corpus Juris, while, at the EU level, the EU procedural rights directives simply articulate a list of minimum relevant guarantees and leave it to the Member States to choose the means by which to implement safeguards. Furthermore, the EPPO Regulation leaves it to the national courts to rule on possible ambiguous areas, while no direct recourse to the European Court of Justice (CJEU) is foreseen. Although the CJEU's jurisprudence is therefore limited to preliminary rulings, it will undoubtedly trigger the need to revisit the current regulatory framework.

Against the background of such an emerging, variable procedural geometry, the way in which the EPPO will handle possible procedural rights issues is important. Ultimately, they should not be perceived as a source of risk that might endanger the EPPO's tasks but rather as an opportunity to act proactively. As existing differences among national legislations may affect cross-border cooperation,<sup>69</sup> the EPPO will have to play a key role in reconciling differences between national criminal procedures and find a way to overcome them.

Another challenging field concerns the *developing relationship between the EPPO and OLAF*. The EPPO will profit not only from OLAF's expertise but will also need to preserve the institutional balance between the two bodies, which is crucial for achieving their goals, all of which are based on complementarity and mutual cooperation.



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The *mission of European Prosecutors* also appears to be complex, yet essential. Notwithstanding them being formally separate from the national judiciary, they will have to essentially contribute to the sound organisation of the decentralised EPPO level, to perform in-depth oversight of investigations, and to focus on critical, national areas in which the EPPO must dedicate special efforts towards establishing its added value, in particular during the initial operational phase. Therefore, apart from accomplishing the preparatory work, which is currently being realised at the central level, in order to enable the swift launching of the operational work of the EPPO, the intervention of the European Prosecutors at this stage is essential in many ways.

The European Prosecutors will have to encourage the double-hatted European Delegated Prosecutors (EDPs) to perceive themselves as a real supranational judicial body divested from their national identities. They will also have to ensure that the bidirectional flow of information between the EPPO levels (centralised and decentralised levels) and, ultimately, the handling of cases is accomplished in the best interest of justice. In addition, it is up to the European Prosecutors to detect the areas in their respective Member States in which the EPPO has a guiding role to play under the current EU political agenda.<sup>70</sup>

Given that the urge to create the EPPO has been dictated by the reduced capability of Member States to combat severe financial crime against the EU budget, the EPPO will be expected to address these gaps. The EDPs, with the guidance of the European Prosecutors, will be the designated tool to not only close the gaps but also to achieve tangible results that had been unattainable up to now.

Furthermore, when the EPPO's operational activity starts, the European Prosecutors' coordination activity will need to take into account the EPPO's priorities at the national level. Such first-stage actions may include, for instance, charting the fields where the EPPO can offer drastic solutions and ensure progress in tackling crimes falling within its remit. They may also take into consideration developments stemming from national commitment to align with stakeholders' recommendations<sup>71</sup> or to follow international obligations,<sup>72</sup> in order to better achieve the EPPO's goals, develop its crime fighting strategy, and demonstrate its added value.

Ultimately, both due coordination of the EDPs' tasks and ensuring that the instructions issued by the EPPO's central level are respected, entails full awareness of possible weaknesses of national judicial structures and proceedings. This, again, is an area where European Prosecutors have a key role to play.

Responding successfully to all of the above challenges engages the EPPO both at the central level (College, European Prosecutors, Permanent Chambers) and at the decentralised level (European Delegated Prosecutors and other national authorities in the participating Member States). It is crucial for all actors involved to find their respective position in the rather complex EPPO structure, to cooperate productively, and to overcome shortcomings inherent to this new judicial experiment, so that the functionality and effectiveness of the new supranational prosecutorial body is ensured.

## Notes

- 1 European Monitoring Centre for Drugs and Drug Addiction/Europol, “EU Drug Markets Report”, 2019.
- 2 OECD/EUIPO, “Trends in Trade in Counterfeit and Pirated Goods”, 2019.
- 3 Commission, “31st Annual Report on the protection of the European Union’s financial interests – Fight against fraud – 2019; EURACTIV, “EU anti-fraud official: Tobacco smuggling is ‘major source’ of organised crime”, 7/2/2017; World Bank Group, “Confronting Illicit Tobacco Trade: An Update on EU Policies”, 2019.
- 4 C. Fuest and J. Pisani-Ferry, “Financing the European Union: new context, new responses”, Policy Contribution, Issue no 16, September 2020.
- 5 Europol, “MTIC (Missing Trader Intra Community) fraud”, <<https://www.europol.europa.eu/crime-areas-and-trends/crime-areas/economic-crime/mtic-missing-trader-intra-community-fraud>>; European Parliament, “VAT fraud – Economic impact, challenges and policy issues”, October 2018; ECA Special report 2015/24, “Tackling intra-Community VAT fraud: More action needed”; J. Sarnowski and P. Selera, “European compact against tax fraud – VAT solidarity and new dimension of effective and coherent tax data transfer”, (2020) 21 ERA Forum, 81–93.
- 6 VAT Gap in the EU, TAXUD/2015/CC/131.
- 7 N. Hangáčová and T. Strémy, “Value Added Tax and Carousel Fraud Schemes in the European Union and the Slovak Republic”, (2018) 26 *European Journal of Crime, Criminal Law and Criminal Justice*, 132–159.
- 8 M. T. Braml and G. J. Felbermayr “The EU Self-Surplus Puzzle: an Indication of Vat Fraud?”, Kiel Working Paper 2146, published 12/2019 (see also T. Wahl, (2020) *eu crim*, 17).
- 9 OECD BEPS Action 7, “Preventing the Artificial Avoidance of Permanent Establishment Status”.
- 10 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law, *O.J. L* 198, 28.7.2017, 29.
- 11 And involving the limitation as regards VAT fraud also expressed in Art. 22(1) of the EPP0 Regulation.
- 12 D. Brodowski, in: H-H. Herrnhof, D. Brodowski, and C. Burchard, European Public Prosecutors Office, Article-by-Article Commentary, 2021, Art. 22, mn. 100 (p. 168).
- 13 P. Caeiro and J. Amaral Rodrigues, “A European Contraption: The relationship between the competence of the EPP0 and the scope of Member State’s jurisdiction over criminal matters”, in K. Ligeti, M. João Antunes and F. Giuffrida (eds.), *The European Prosecutor’s Office at Launch*, 2020, p. 65.
- 14 See Recitals 55 and 56 on the criteria of preponderance.
- 15 For a thorough analysis on the need to keep the application of Art. 22(3) of the EPP0 Regulation in line with Art. 86 of the TFEU, see E. Sitbon, “Ancillary Crimes and Ne Bis in Idem”, in: W. Geelhoed, L.H. Erkelens and A.W.H. Meij (eds), *Shifting Perspectives on the European Public Prosecutor’s Office*, 2018, pp. 129 et seq.
- 16 See Recital 54 of the EPP0 Regulation.
- 17 Extensive information on the jurisprudence of the CJEU can be found in the Eurojust report on case law by the Court of Justice of the European Union on the principle of ne bis in idem in criminal matters, April 2020, available at: <<https://www.eurojust.europa.eu/case-law-court-justice-european-union-principle-ne-bis-idem-criminal-matters>>. See also A. Weyembergh, “La Jurisprudence de la CJ relative au principe ne bis in idem: une contribution essentielle à la reconnaissance mutuelle en matière pénale”, in: *The Court of Justice and the Construction of Europe: Analyses and Perspectives on Sixty Years of Case-law*, 2013, pp. 539 et seq.
- 18 Critically, see N. Bitzilekis, “The Definition of Ancillary Competence According to the Proposal for an EPP0 Regulation”, in: Petter Asp (ed.), *The European Public Prosecutor’s Office – Legal and Criminal Policy Perspectives*, p. 112, 114–115.
- 19 Art. 28 (1), (3) of Commission Regulation (EC) No 1828/2006 of 8 December 2006.
- 20 Cf. Art. 12a of Regulation (EU, Euroatom) No 883/2013 of 11 September 2013 as amended by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020.
- 21 Art. 8 (3) of Regulation No 883/2013.
- 22 Art. 24 of Council Regulation (EU) 2017/1939 of 12 October 2017 establishing the EPP0.
- 23 Art. 24 (4) of Regulation 2017/1939 vs. Art. 28 of the Commission Regulation (EC) No 1828/2006.
- 24 Pursuant to Art. 24 (1) and 25 (1) of Regulation 2017/1939 and Art. 12c of Regulation 883/2013.
- 25 I.e. the EU Member States that support the EPP0 by accepting the enhanced cooperation procedure. Hereinafter referred as “Member States”.
- 26 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union’s financial interests by means of criminal law, *O.J. L* 198, 28 July 2017, 29.
- 27 Council Regulation (EU) 2017/1939 of 12 October 2017 on the implementation of enhanced cooperation in connection with the establishment of the European Public Prosecutor’s Office (‘the EPP0’), *O.J. L* 283, 31. October 2017, 1.
- 28 It should be added that Art. 30(1) further stipulates that this obligation applies at least in cases in which the offense under investigation is punishable by a maximum term of imprisonment of at least four years.
- 29 Of course, to the extent that the national rule is not contrary to the Regulation.
- 30 For the application of simplified prosecution procedures, cf. Art. 40 of the EPP0 Regulation.
- 31 Cf. Art. 31 of the EPP0 Regulation.
- 32 Cf. Art. 37(1) of the EPP0 Regulation.
- 33 Art. 8(1) and (2) of the EPP0 Regulation.
- 34 Art. 10(3) of the EPP0 Regulation.
- 35 When it is not possible to wait for the instructions of the Permanent Chamber within the deadline for the legal remedy, the EDP will take a subsequent decision autonomously and, where applicable, instructions from the Permanent Chamber as to whether or not to maintain or withdraw the appeal.
- 36 Art. 16(7) of the EPP0 Regulation.
- 37 Art. 10(2) of the EPP0 Regulation.
- 38 Art. 2(1) of College Decision 015/2020.
- 39 Arts. 4 and 5 of College Decision 015/2020.
- 40 Art. 10(1) of the EPP0 Regulation.
- 41 Art. 10(9) of the EPP0 Regulation.
- 42 The main differences in the applicable procedural law are the independence from Member States, the principle of mandatory prosecution, and the exhaustively listed grounds for dismissal (Art. 39(1) of the EPP0 Regulation), which apply instead of national legal provisions.
- 43 Art. 1(1) of College Decision 002/2020 establishes English as the working language for the EPP0’s operational and administrative activities.
- 44 According to Art. 2(4) of the Internal Rules of Procedure, the EDP handling the case has to ensure the translation. Based on Art. 3(1) of the Internal Rules of Procedure, the EPP0 will seek to use electronic translation tools for speedy and high-quality translations.
- 45 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPP0’), *O.J. L* 283, 31 October 2017, 1.
- 46 CDL-AD(2016)007, Rule of Law Checklist adopted by the Venice Commission at its 106th Plenary Session (Venice, 11–12 March 2016).
- 47 Arts. 14 and 16 of Regulation 2017/1939.
- 48 Art. 13 of Regulation 2017/1939.
- 49 Arts. 91 and 96 of Regulation 2017/1939.
- 50 Art. 36 of Regulation 2017/1939.
- 51 Recital 34 of Regulation 2017/1939.
- 52 Recommendation Rec(2000)19 of the Committee of Ministers of the Council of Europe on the role of public prosecution in the criminal justice system.
- 53 Art. 5 of Regulation 2017/1939.
- 54 Art. 12 of Regulation 2017/1939.
- 55 Arts. 6 and 7 of Regulation 2017/1939.
- 56 Recital 47, Arts. 44 and 45 of the EPP0 Regulation.
- 57 Art. 27 paragraph 1 of the EPP0 Regulation.
- 58 Art. 8 paragraph 1, Art. 45 paragraph 2, and recital 47 of the EPP0 Regulation.
- 59 <[https://ec.europa.eu/info/sites/info/files/communication\\_digitalisation\\_en.pdf](https://ec.europa.eu/info/sites/info/files/communication_digitalisation_en.pdf)>.

60 In French: respectively “*l’information*” and “*l’instruction*”.

61 France: Loi n° 2020-1672 du 24 décembre 2020 relative au Parquet européen, à la justice environnementale et à la justice pénale spécialisée; Luxembourg: Projets de loi en cours d’examen à la Chambre des Députés (7759/7760).

62 La loi du 17 février 2021 portant des dispositions diverses en matière de justice, Doc.parl., Chambre, 2020–2021, n° 55-1696, Moniteur belge 24 février 2021.

63 A Commission for the reform of criminal procedural law was appointed by the former Belgian Minister of Justice Koen Geens. The Commission submitted via the Minister a proposal for a new Code of Criminal Procedure. The redefinition of the role of the investigative judge in the Code was criticised both in practice and in Parliament. The proposal for a new Code is still pending in Parliament: Proposition de loi contenant le Code de procédure pénale, Doc.parl., Chambre, 2020–2021, n° 55-1239/001.

64 In its judgment of 21 December 2017 (no. 148/2017), the Belgian Constitutional Court annulled the law that allowed the public prosecutor to ask the investigative judge to authorise a home search without the latter being obliged to lead the investigation (the so-called “*mini-instruction*”/“*mini-investigation*”). The Constitutional Court argued that allowing a search by means of such a mini-investigation (judicial authorisation), without additional safeguards to protect the defense, constitutes an infringement of the right to private life and of the inviolability of the home. The Court ruled that a full-fledged judicial investigation under the leadership of the investigative judge is required.

65 For this analysis, see also F. Verbruggen, V. Franssen, A.-L. Claes, A. Werding, *Implementatie van het Europees Openbaar Ministerie in de Belgische rechtsorde/Mise en oeuvre du Parquet européen en droit belge*, 2019-08, pp. 77–86.

66 Proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office, 17 July 2017, COM(2013) 534 final.

67 Proposal for a Regulation on the establishment of the European Public Prosecutor’s Office – Draft Regulation, 31 January 2017, Council doc. 5766/17, Art. 23(1), p. 67.

68 Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Security Union Strategy on the EU Security Union Strategy, COM(2020) 605 final, p. 22.

69 See E. Sellier and A. Weyembergh, [Criminal procedural laws across the European Union](#), Study requested by the European Parliament LIBE Committee, 2018, available at: <[https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL\\_STU\(2018\)604977\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/STUD/2018/604977/IPOL_STU(2018)604977_EN.pdf)>, reported at eucrim 2/2018, 100.

70 See [OLAF’s 2019 Report](#), p. 25, where reference is made to the EU political agenda focusing on the growing threat of environmental fraud. See also the Commission’s [31st Annual Report on the protection of the European Union’s financial interests – Fight against fraud – 2019](#), COM(2020) 363 final, para. 4.3.2.3 and Transparency International’s Corruption Perceptions Index ([CPI](#)) [2020 Report](#) of 28 January 2021 on the corruption risks in wake of the COVID-19 crisis.

71 See GRECO’s [2nd Compliance Report on Greece](#), 24 September 2020, paras. 41, 43. See also the progress made in Greece as regards the Corruption Perceptions Index, Transparency International, *op. cit.* (n. 3).

72 I.e., as regards Greece, the recent unification of the Prosecutor’s Office against Financial Crime and the Prosecutor’s Office on anti-corruption in a single body by means of Law 4745 of 6 November 2020 could bring about a more effective fight against corruption and financial crime, including EPPO cases.

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