



### **Focus: The Future of EU Criminal Justice – Expert Perspectives**

**Dossier particulier: L'avenir de la justice pénale européenne – La perspective des experts**

**Schwerpunktthema: Die Zukunft der Europäischen Strafjustiz – Expertenmeinungen**

Admissibility of Evidence in Criminal Proceedings in the EU

*Katalin Ligeti, Balázs Garamvölgyi, Anna Ondrejová, and Margarete von Galen*

Addressing the Problems of Jurisdictional Conflicts in Criminal Matters within the EU

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Application Problems Relating to “Ne bis in idem” as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR

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Institutional Framework for EU Criminal Justice Cooperation

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The Need for and Possible Content of EU Pre-trial Detention Rules

*Estella Baker, Tricia Harkin, Valsamis Mitsilegas, and Nina Peršak*

Improving Defence Rights

*Vânia Costa Ramos, Michiel Luchtman, and Geanina Munteanu*

Strengthening the Fight against Economic and Financial Crime within the EU

*Luigi Foffani, Valsamis Mitsilegas, and Pedro Caeiro*

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,

As we approach the end of 2020, we cannot but acknowledge the importance of dialogue with experts.

In the field of EU criminal justice, the Commission has always relied strongly on exchanges with experts. The prominent *Corpus Juris* project of just such a group of experts led by Prof. Delmas-Marty at the end of the 1990s was devoted to the protection of the financial interests of the European Community and included a proposal for a European Public Prosecutor's Office (EPPO). This groundwork bore fruit. – A true European Prosecution Office, which should soon start its activities in Luxembourg, was finally created. Especially in light of the ambitious financial support under *Next Generation EU* that will be necessary to exit from the COVID-19 crisis, the protection of the European budget will be a key priority for the Union. The EPPO will play a crucial role in this respect. It will fulfil this role together with OLAF, which has been strengthened by the recently adopted revision of Regulation (EU, Euratom) No 883/2013. In 2021, the Commission will take the necessary measures to ensure that the EPPO, as well as Eurojust, will be able to successfully cooperate with the competent authorities of third countries in their respective areas of competence.

The past months have brought to light the urgency of transitioning to digital solutions in the administration of justice. Commission President *Ursula von der Leyen* made making Europe fit for the digital age a priority. On 2 December 2020, the Commission set out its vision and approach towards an accelerated digital transition in the justice area (Communication COM(2020) 710 final). Many of the planned initiatives have been inspired by the Commission's Expert Group on EU Criminal Policy. This Communication, together with the new European judicial training strategy (Communication COM(2020) 713 final), also presented on 2 December 2020, will contribute to further strengthening the common European judicial culture.

This year has also witnessed the adoption by the Commission of the first ever Strategy on Victims' Rights (2020–2025), which aims to ensure that all victims of all crimes can enjoy their rights, irrespective of where the crime was committed and

its circumstances (Communication of 24 June 2020, COM(2020) 258 final). The Strategy pays special attention to the protection of the most vulnerable victims, such as victims of hate crime and terrorism and child victims, and was followed by the appointment of the first Victims' Rights Coordinator in September 2020.

Further initiatives will take place in 2021. Building on the recently published evaluation of the Environmental Crime Directive, the Commission will propose its revision to strengthen the Union's criminal law measures for the protection of the environment, which is another area where the Union is committed to becoming a leader and an example on the international scene. The Commission will also examine the appropriate avenues to step up the Union's efforts against hate crime and hate speech and will continue to negotiate the e-evidence proposals in order to conclude the legislative procedure as soon as possible, since this package is urgently needed to provide the competent national authorities with the necessary tools to prosecute crime more efficiently. This legislation should also allow the Union to resume negotiations with the United States on e-evidence.

Against this background, the Commission is determined to keep up a lively dialogue with experts in order to develop future-proof policies. The experts of the Commission's EU Criminal Policy Group recently issued a number of reflection papers identifying the areas in which further EU action could be necessary. We are delighted to share these contributions with you as readers of *eu crim*. We are confident that they will provide you with new ideas and insights into the ever-changing realm of EU criminal law.

Alexandra Jour-Schröder,  
Director Criminal Justice, European Commission, Directorate  
General for Justice, Consumers and Gender Equality



Alexandra Jour-Schröder



## European Union

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

### Foundations

#### Fundamental Rights

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

**spot light** On 30 September 2020, the Commission presented its first Rule of Law Report, which is to be published annually in the future. The report aims to highlight the most important – positive and negative – developments within the EU and in the individual Member States. It consists of a [general report](#) in the form of a Commission Communication to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions as well as [27 country chapters](#) presenting specific assessments on a Member State by Member State basis. Along with a [press release](#), the Commission also provides [factsheets on the 2020 Rule of Law Report](#) and the [EU's rule of law toolbox](#).

The aim of the report is:

- To identify possible problems in relation to the rule of law as early as possible, as well as best practices, so that

problems can be discussed in a timely manner in individual Member States;

- To enable Member States to exchange good experiences;
- To stimulate inter-institutional cooperation;
- To develop a rule-of-law culture across the EU.

To this end, a coherent and equivalent approach is also intended to establish comparability among the Member States.

The Commission stresses that the report is a preventive tool and does not contain a sanctioning mechanism – although it could serve as the basis for further scrutiny of specific EU countries. No recommendations are made either. It also stresses that the report is not a comprehensive compendium on the rule of law in the Union; instead it presents trends and specific challenges on the basis of developments since January 2019. The rule-of-law assessment focuses on four pillars:

- The national judicial system;
- The fight against corruption;
- Media pluralism and freedom;
- Institutional issues related to the checks and balances.

Rule-of-law-related issues in the context of the COVID-19 pandemic are also reflected.

For each pillar, the EU law provisions relevant for the assessment are part of the report's methodology. It also refers to opinions and recommendations from the Council of Europe, which provide guidance. The report was prepared following a targeted stakeholder consultation. A variety of EU agencies, European networks, national and European civil society organisations and professional associations, and international and European actors provided general and country-specific contributions. It further builds on a series of studies and reports, such as the [Media Pluralism Monitor](#) or the [EU Justice Scoreboard](#) ([→eucrim 2/2020, 74–75](#)). The main findings of the report are as follows:

#### ➤ *As to justice systems:*

The functioning of the justice system is high on national political agendas; almost all EU Member States are engaged in some form of justice reform, although their objective, scope, form, and state of implementation vary. Efforts are underway in a number of Member States that aim at strengthening judicial independence and reducing the influence of the executive or legislative power over the judiciary. The appointment of judges (procedures and methods) is one of the key points of discussion and reform in most Member States. The right of the executive to give formal instructions to

\* If not stated otherwise, the news in the following sections (both EU and CoE) cover the period 1 August – 15 November 2020. Have also a look at the eucrim homepage (<https://eucrim.eu>) where all news have been published beforehand.

the prosecution, including in individual cases, has been the subject of debate in certain Member States, e.g., Austria, Germany, Poland, and Bulgaria. Judicial independence remains an issue of concern in some Member States. The Commission refers here to Hungary and Poland, against which infringement proceedings and Art. 7(1) procedures have been initiated, but also to Bulgaria, Romania, Croatia, and Slovakia. Initiatives on the digitalisation of justice systems are ongoing in most EU Member States, but the COVID-19 crisis made aware of the needed efforts.

► *As to the anti-corruption framework:*

Several EU Member States have good national anti-corruption strategies in place or are at least developing them. Some Member States have also carried out reforms to strengthen corruption prevention and integrity; others have strengthened the capacity of the criminal justice system to fight corruption. Concerns remain, however, as regards the effectiveness of the investigation, prosecution, and adjudication of corruption cases, including high-level corruption cases, in several Member States.

► *As to media pluralism and media freedom:*

All Member States have legal frameworks in place to protect media freedom and pluralism, and EU citizens broadly enjoy high standards of media freedom and pluralism. The media proved essential during the COVID-19 pandemic in fighting against disinformation and maintaining democratic accountability. However, concerns have been raised in some Member States as regards the independence of media authorities and the transparency of media ownership. Some country chapters have identified a number of cases in which stakeholders voiced serious concerns over political pressure on the media, e.g., in Bulgaria, Hungary, Malta, and Poland. In few Member States, also repeated difficulties and obstacles in obtaining information were reported. In a number of Member States, journalists and other media ac-

tors increasingly face threats and attacks (physical and online) in various forms in relation to their publications and their work; nonetheless, some countries have developed good practices and structures to support and protect journalists.

► *As to institutional checks and balances:*

There are several good examples that promote the debate on a rule-of-law culture. Constitutional reforms to strengthen institutional checks and balances, in particular constitutional review, are underway in a number of Member States. Excessive use of accelerated and emergency legislation, however, particularly in response to the COVID-19 pandemic, has given rise to concerns over the rule of law. Civil society is an important element in defending the rule of law and ensuring participation in the legislative processes. In most Member States, there is an enabling and supporting environment for civil society. However, there are a number of examples that show that civil society organisations are increasingly operating in an unstable environment, e.g., by limiting access to foreign funding or smear campaigns in some Member States.

The report concludes that many EU Member States have high rule-of-law standards. Nevertheless, important challenges remain in all four pillars under scrutiny. The Commission calls on the European Parliament and the Council to take the report as a solid basis for further rule-of-law discussions. National parliaments and national authorities are invited to discuss the report, especially the findings in the country chapters “and seek support from one another, as an encouragement to pursue reforms and an acceptance of European solidarity.”

*Background:* The Commission’s first Rule of Law Report is at the centre of the new European Rule of Law Mechanism (ERLM). This mechanism was announced as one of the top priorities on the political agenda of Commission President *Ursula von der Leyen*. The ERLM is designed as a process involv-

ing an annual dialogue on the rule of law between the Commission, the Council, and the European Parliament, together with Member States and national parliaments, civil society, and other stakeholders. It will be complemented by a set of upcoming initiatives, including the [European Democracy Action Plan](#), a renewed [Strategy for the Implementation of the Charter of Fundamental Rights](#), and targeted strategies to address the needs of the most vulnerable in European societies.

The ERLM will be another element in the so-called EU rule of law toolbox, which aims to prevent and promote rule-of-law issues throughout the EU. It is a separate measure and must be distinguished from the EU’s *response* to rule-of-law threats via the Article 7 procedure, infringement proceedings, the rule-of-law framework (an early warning tool developed by the Commission in 2014 to enter into dialogue with Member States where systemic threats to the rule of law emerged), and – possibly in the future – the conditionality mechanism to protect the EU budget because of generalised deficiencies of the rule of law in a particular Member State. The latter is currently being negotiated between the EP and the Council (for the Commission proposal → [eucrim 1/2018, 12](#), and *L. Bachmaier*, [eucrim 2/2019, 120](#); see also the current news items under “Protection of Financial Interests”, at pp. 174–176). (TW) ■

### Council Launches Rule of Law Dialogue

On the basis of the Commission’s first Rule of Law Report of 30 September 2020, the General Affairs Council (GAC) launched the annual “Rule of Law Dialogue” at its meeting on 13 October 2020. Following the concept outlined in the Commission’s report, the German Council Presidency introduced a new approach to the annual dialogue (which has been in place since 2014).

Under this new approach, the dialogue will be organised into two different types of political discussions:

- A horizontal discussion covering general rule-of-law developments in the EU;
- Country-specific discussions addressing key developments one-by-one in each Member State.

At the October meeting, ministers started horizontal discussions on the general rule-of-law developments, corresponding to the four pillars dealt with in the Commission's report: justice systems, the anti-corruption framework, media pluralism, and other institutional issues of checks and balances. Country-specific aspects were also discussed at the November GAC meeting. There, the discussion focused on key developments in five EU Member States (following the EU protocol order), namely Belgium, Bulgaria, Czech Republic, Denmark, and Estonia.

*Michael Roth*, Germany's Minister of State for Europe said: "Rule of law is a core founding value of the EU. Our new dialogue is a further instrument in the EU's toolkit to strengthen and protect the rule of law. It aims to establish an open and constructive debate on the situation regarding the rule of law in all member states: equal treatment of all member states, non-discrimination and objective criteria are key. Our main goal is to achieve a clear and mutual understanding of what binds us together." (TW)

### First Assessment of Rule of Law Report between MEPs and National Parliamentarians

On 10 November 2020, MEPs in the [LIBE Committee discussed the Commission's first Rule of Law Report](#) (→news item p. 158) together with *Didier Reynders*, Justice Commissioner, and *Michael Roth*, Minister of State for Europe (as a representative of the German Council Presidency). In order to initiate the dialogue at the national level, members of national parliaments had the opportunity to submit comments or questions. Participants assessed how to make the most of the new annual democracy review in EU Member States. Also on the agenda: the way forward as regards the more comprehensive EP

proposal on a Democracy, Rule of Law and Fundamental Rights mechanism and the impacts on checks and balances following the measures to fight the corona pandemic.

Some participants expressed disappointment that success with regard to Poland and Hungary – currently the countries being most closely watched with regard to the rule of law – were not included in the report and that the review of EU organisations and their actions under the rule of law was missing. In this context, it was emphasised that the report is only a preventive tool for the early detection of rule-of-law violations and needs to be supplemented by other measures, such as infringement proceedings or the new rule-of-law conditionality mechanism in relation to the EU budget (→news item pp. 174–176). In this regard, the efforts of the German Council Presidency were helpful in discussing the findings of the country reports with the individual Member States in the Council, and discussions will be continued by the future Portuguese Presidency. In order to continue the debate in the national parliaments, Justice Commissioner *Reynders* will visit all national parliaments after an initial discussion in the German *Bundestag*. In addition, the Commission is working to prepare further reports on fundamental values, such as democracy and fundamental rights. (TW)

### EP Wants New Strong Rule-of-Law Mechanism

On 7 October 2020, a large majority of MEPs voted in favour of the [Resolution on the establishment of an EU Mechanism on Democracy, the Rule of Law and Fundamental Rights](#). The Resolution was adopted with 521 to 152 votes and 21 abstentions. The EP has thereby intensified its demand to establish an EU mechanism on democracy, the rule of law, and fundamental rights, which has been repeatedly called for since 2016 (→[eucrim 2/2020, 69–70](#) with further references). MEPs warn "that the Union is facing an unprecedented and es-

calating crisis of its founding values, which threatens its long-term survival as a democratic peace project." They voiced grave concerns over "the rise and entrenchment of autocratic and illiberal tendencies, further compounded by the COVID-19 pandemic and economic recession, as well as corruption, disinformation and state capture, in several Member States." This trend endangers "the cohesion of the Union's legal order, the protection of the fundamental rights of all its citizens, the functioning of its single market, the effectiveness of its common policies and its international credibility."

The EP has annexed a concrete proposal for an inter-institutional agreement on reinforcing Union values. The core element of this proposal is an Annual Monitoring Cycle, which covers all aspects of Art. 2 TEU and applies equally, objectively, and fairly to all Member States. The Annual Monitoring Cycle must contain country-specific, clear recommendations, with timelines and targets for implementation, to be followed up in subsequent annual or urgent reports. Failure to implement the recommendations is linked to concrete Union measures, e.g., procedures under Art. 7 TEU, infringement procedures, and budgetary conditionality (once in force).

MEPs propose that the new mechanism consolidates and supersedes existing rule-of-law instruments, in particular the Commission's annual Rule of Law Report, the Commission's Rule of Law Framework, the Commission's annual reporting on the application of the Charter, and the Council's Rule of Law Dialogue. The findings of the Annual Monitoring Cycle should be used in any assessment for the purpose of triggering the Article 7 TEU procedure and that of budgetary conditionality (once in force).

In relation to current rule-of-law concerns, the Resolution also raises the following issues:

- Demand for consistent action against attempts to jeopardise judicial independence;

- Swift conclusion of accession of the EU to the ECHR;
- Need for effective protection of civil society organisations, in particular human rights defenders and reporting actors;
- Actions (e.g., by funding and trainings) to promote awareness of the rule of law and judicial independence among the judiciary;
- Better coordination between the EP and the Council as regards the progresses of Article 7 procedures;
- Need for a robust and effective budgetary conditionality mechanism;

The EP's resolution of 7 October 2020 is a first reaction to the Commission's strategy to strengthen the rule of law within the EU. In the opinion of the Parliament, the Commission's Rule of Law Report (→news item p. 158) – tabled one week before the Resolution – does not go far enough, since it only invites to a dialogue with the EU institutions or countries concerned but does not include specific recommendations to address specific problems. MEPs also criticised that the Commission's report does not address all aspects of fundamental Union values as enshrined in Art. 2 TEU, e.g., democracy and fundamental rights issues like freedom of association and respect for the rights of vulnerable persons, including women, persons with disabilities, Roma, LGBTI persons, and the elderly. The EP resolution backs a report by MEP *Michael Šimečka* (Renew, SK) that was discussed in the committees before the summer break (→[eucrim 2/2020, 69](#)) and [in September 2020](#). (TW)

### Poland: Rule-of-Law Concerns Continue

This news item continues the overview provided in previous eucrim issues (→[eucrim 2/2020, 68](#) and [eucrim 1/2020, 2](#)) on the struggle between the EU and Poland as regards maintenance of the rule of law.

- August 2020: The [Civil Development Forum \(FOR\)](#) publishes the report “[Rule](#)

[of Law in Poland 2020: A Diagnosis of the Deterioration of the Rule of Law From a Comparative Perspective.](#)” It summarizes the state of the rule of law in Poland after five years of the Law and Justice (PiS) party being in power and analyses the current situation from a comparative perspective of the EU countries.

- 17 September 2020: A wide majority of MEPs (513 to 148 votes, with 33 abstentions) adopts a [resolution](#) that calls on the Council to resume the Article 7 procedure against Poland and to determine the clear risk of a serious breach of the rule of law by the Republic of Poland. According to MEPs, there is “overwhelming evidence” of breaches of EU values by Poland. The resolution expresses several concerns over the legislative and electoral system, the independence of the judiciary, and fundamental rights in Poland. MEPs express their worries about increased intolerance and violence against LGBTI persons. In this regard, they deplored the mass arrest of 48 LGBTI activists on 7 August 2020 (the Polish “Stonewall”). The resolution points out that the current situation in Poland damages mutual trust, especially in the field of judicial cooperation in criminal matters, given that national courts have refused or hesitated to surrender Polish suspects under the European Arrest Warrant procedure due to profound doubts about the independence of the Polish judiciary. The Commission is called on to make full use of the available tools to address the clear risk of a serious breach of the Union values by Poland, in particular expedited infringement procedures and applications for interim measures before the Court of Justice as well as budgetary tools. For the underlying report on this resolution prepared by MEP *Lópes Aguilar* (S&D, ES) →[eucrim 2/2020, 68](#).

- 22 September 2020: The [Council for General Affairs discusses the situation of rule of law](#) in Poland and in Hungary. Commissioner of Justice *Didier Reynders* and Commission Vice-Presi-

dent *Vera Jourová* updated the Member States on the latest developments since the end of 2019. Both emphasise that there are still serious concerns over the guarantee of the rule of law. In its overview on Poland, the Commissioners focus on disciplinary sanctions for judges and the implementation of the CJEU's order of 8 April 2020 on the Disciplinary Chamber of the Polish Supreme Court. The loss of trust affecting judicial cooperation between the Member States is also discussed.

In the subsequent press conference, Minister of State for Europe at the Federal Foreign Office of Germany, [Michael Roth says](#): “On the basis of very detailed reports from the Commission on the situation in Hungary and Poland, we have established that the conditions for terminating the Article 7 proceedings are not met and that the Council would continue the procedures.”

- September 2020: The registry of the ECtHR announces that it accepted the complaint by well-known Polish judge *Igor Tuleya* concerning disciplinary proceedings initiated against him in 2018 ([Application no. 21181/19](#)). The Polish government is requested to submit observations on the application. Tuleya adjudicated several cases that not only attracted widespread media coverage but also displeased the Polish ruling party, Law and Justice. He became a symbolic figure of resistance of the Polish judiciary against the Polish judicial reform introduced from 2016–2018. A set of seven disciplinary proceedings against Tuleya concern comments he made in public or questions over his participation in public meetings, while others relate to his judicial activity. *Inter alia*, disciplinary proceedings followed after his decision to submit a preliminary ruling request to the CJEU on the new disciplinary regime for judges. Tuleya argues that the disciplinary proceedings breached his rights from Arts. 8, 10, and 13 ECHR, in particular, because they destroyed his reputation as a judge and led to harassment against him. The ECtHR has found

[13 applications by Polish judges and lawyers to be admissible](#) against the Polish reform of the judiciary (for pending cases →[eucrim 2/2020, 68](#)).

■ 15 October 2020: In the case *Guz v. Poland* ([Application no. 965/12](#)), the European Court of Human Rights (ECtHR) rules in favour of a complaint brought forward by a Polish judge who was found guilty of a disciplinary offence. Polish courts found that the applicant, *Remigiusz Guz*, was guilty of “undermining the dignity of the office of a judge,” because he criticised a report on his work by another more senior judge as being “superficial, unfair and tendentious.” He upheld these remarks in the course of his promotion procedure before the national council of the judiciary. The ECtHR holds that the conviction of a disciplinary offence and the order of a warning following the impugned remarks breaches Mr Guz’s right to freedom of expression (Art. 10 ECHR). The ECtHR orders Poland to pay the non-material damage (€6000) and the costs of the proceedings (€853).

■ 30 October 2020: [The Commission proceeds with the infringement procedure](#) against the recent Polish law that brought about amendments to the Polish judiciary. The law of December 2019 is also labelled the “muzzle law,” since it is believed to lead to political subordination of Polish judges (→[eucrim 1/2020, 2–3](#)). The Commission initiated an infringement procedure against the law on 29 April 2020 (→[eucrim 1/2020, 4](#)). The Polish Government contested the reasoning put forward by the Commission and requested discontinuation of the infringement procedure. By contrast, the Commission still believes that the law undermines judicial independence and is contrary to the primacy of EU law. The law prevents Polish courts from directly applying certain provisions of EU law protecting judicial independence and from putting references for preliminary rulings on such questions to the CJEU. Therefore, the Commission took the second step in the infringement procedure

and sent a reasoned opinion to the Polish Government. If Poland does not comply with the concerns voiced in the reasoned opinion within the next two months, the Commission can refer the case to the CJEU. (TW)

■ 18 November 2020: The controversial Disciplinary Chamber of the Polish Supreme Court [lifts the immunity of Warsaw judge Igor Tuleya](#). The 50-year-old lawyer *Tuleya* is one of the most prominent critics of the judicial reforms by the national conservative ruling party, PiS. The public prosecutor’s office had demanded the waiver of his immunity. Among other things, it accuses him of exceeding his competences, because he had allowed media representatives into the courtroom when the verdict was handed down in a procedure that was unpleasant for the PiS. The Disciplinary Chamber now overruled a decision of June 2020. After the waiver of immunity, which immediately became final, criminal prosecution against the judge is now possible. *Tuleya* is also no longer allowed to take part in trials and his salary will be reduced by 25 percent, the Supreme Court announced. (TW)

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

The following continues the overview in recent eucrim issues regarding the clash between the EU and Hungary on maintenance of the rule of law (→[eucrim 2/2020, 69](#) and [eucrim 1/2020, 4](#)).

■ 12 August 2020: Following up their *ad hoc* analysis of 27 May 2020 (see [eucrim 2/2020, p. 69](#)), a [joint assessment paper by NGOs](#) (Amnesty International Hungary, the Eötvös Károly Institute, the Hungarian Civil Liberties Union, and the Hungarian Helsinki Committee) reiterated criticism of the so-called Transitional Act of June 2020. The Transitional Act repealed the much contested Authorisation Act that gave the Hungarian Government excessive powers during the state of danger to cope with the corona crisis (→[eucrim 1/2020, 5](#)). The NGOs point out that the Government

can resume its wide executive powers also on the basis of the Transitional Act if there is a state of “epidemiological preparedness.” This would, in particular, allow suspension of the application of parliamentary acts, derogate from provisions of acts, and rule by means of decrees. The [NGOs criticise that](#), if in the future, the Government declares a state of danger again, it will automatically have a carte blanche mandate to rule by decree. Furthermore, the Transitional Act ensures that many provisions originally included in the decrees adopted under the previous state of danger continue to apply. The NGOs also voice concern over other issues in the Transitional Act that endanger the exercise of fundamental rights or touch upon constitutional values.

■ 22 September 2020: The [General Affairs Council deals with](#) the Article 7(1) procedures against Poland and Hungary. The Commission provides updates on rule-of-law developments since the end of 2019. Regarding Hungary, the Commission outlines the situation in several areas, including the independence of the judiciary, media pluralism, and academic freedom. The ministers refrain from taking concrete decisions but conclude that the Article 7 procedure will “not be terminated.”

■ 1 October 2020: Hungary reacts to the Commission’s Rule of Law Report (→[news item p. 158](#)) with [fierce criticism](#). The Commission had given Hungary a bad review, *inter alia*, on its lack to investigate/prosecute corruption cases involving high-level officials and on its failure to ensure media pluralism. Hungary called the report “not only fallacious, but absurd.” The sources of the report are “biased and non-transparent.” The statement of the International Communications Office also criticises the methodology and concept of the report and its “ill-founded” content. It is claimed that the Rule of Law Report cannot serve as the basis for any further discussion on rule of law in the EU. Lastly, Hungary condemns the report



as “written by organisations forming part of a centrally-financed international network engaged in a coordinated political campaign against Hungary.” This could be understood as a hint to the Open Society Foundations linked to U.S. billionaire *George Soros* whom Hungarian Prime Minister *Viktor Orbán* considers an enemy of the Hungarian government.

■ 6 October 2020: The CJEU confirms the incompatibility of the Hungarian government’s law on higher education with the EU’s fundamental rights and international trade law ([Case C-66/18](#)). In 2017, Hungary introduced special requirements for foreign higher education institutions. First, the exercise, in Hungary, of teaching activities leading to a qualification by higher education institutions situated outside the European Economic Area (EEA) was made subject to the existence of an international treaty between Hungary and the third country. Second, the exercise of activities on the part of foreign higher education institutions in Hungary was made subject to the condition that they are offered in the country of origin. This law was obviously targeted against the international Central European University (CEU), which was founded by *George Soros* and which had to move from Budapest to Vienna at the end of 2017, because the CEU was the only higher education institution that did not fulfil the new requirements. The [Commission considered](#) the restrictions to be a violation of the General Agreement on Trade in Services (GATS) within the framework of the World Trade Organization (WTO). The judges in Luxembourg follow these arguments. In addition, Hungary violated fundamental EU rights and freedoms, such as academic freedom and the freedom of establishment. (TW)

### Romania: Rule-of-Law Events

Next to Poland and Hungary, Romania has become the subject of increased rule-of-law scrutiny by EU institutions.

The main recent developments are:

■ 23 September 2020: Romania is likely to be defeated in the judicial reform dispute. [Advocate General Bobek concludes](#) that the interim appointment of the Chief Judicial Inspector and the national provisions establishing a special public prosecutor’s section, with exclusive competence for offences committed by judges and prosecutors, are contrary to Union law. Several Romanian courts have asked the CJEU to examine whether individual judicial reforms in their country are compatible with Union law ([Joined Cases C83/19, C127/19 and C195/19, Case C-291/19 and Case C-355/19](#)). The 2016–2018 reforms amended the justice laws that were adopted upon Romania’s EU accession in 2007. The Commission already criticized the reforms in their regular monitoring reports within the Mechanism for Cooperation and Verification. The AG observes that the interim appointment of the management position of the judicial inspection is outside the normal legal procedure and has the practical effect of reinstatement. Such system could not dispel reasonable doubt as to the neutrality and the imperviousness to external factors of judicial bodies, which is not in line with EU law. Regarding the creation of the special section of the public prosecutor’s office, the AG clarifies that a body dealing with mistakes made by prosecutors and judges must be sufficiently transparent and well-founded, and its composition and working methods must guarantee that external pressure on the judiciary is avoided. *Bobek* argues that a clear, unambiguous, and accessible justification for this institution in Romania is lacking and that political influence cannot be ruled out.

■ 30 September 2020: In the [country chapter on Romania of the Rule of Law Report](#) (→news item p. 158), the Commission concludes that, in Romania, 42 controversial reforms enacted in 2017–2019 “with a negative impact on judicial independence continue to apply.” How-

ever, the Commission also acknowledges: “In 2020, the Government continued to affirm its commitment to restore the path of judicial reform after the reverses of 2017–2019. This led to a significant decrease in tensions with the judiciary.” In a [reaction to the report](#) a few days later, the current Romanian centre-right government reiterates its plan to reverse the controversial reforms enacted by the previous Social Democrat Party (PSD). In particular, the current government aims to undo the Special Section for Investigating Crimes in the Justice System. (TW)

### CJEU Judgment on the Right to Judicial Review in Tax Cooperation

On 6 October 2020, the CJEU [delivered its judgment in Joined Cases C-245/19 \(\*Luxembourg State v B\*\) and C-246/19 \(\*Luxembourg State v B and Others\*\)](#).

The background of the preliminary ruling (brought by the Higher Administrative Court, Luxembourg) is a request by the Spanish tax administration to the Luxembourg tax administration for information about an artist living in Spain. The request was based, among other things, on Directive 2011/16/EU on administrative tax cooperation. As the Luxembourg tax administration did not have the information, it obliged a Luxembourg bank and another Luxembourg company to provide information. In accordance with Luxembourg law at the time, recourse to the courts was excluded. If the information was not provided in due time, a fine was possible; only this could be challenged in court. The first question in the case concerned the necessity of a legal remedy against the information request a) by the taxpayer under investigation and b) by third persons. The second question concerned the specificity and precision of the request. For more information on the case and the opinion of the AG →[eucrim 2/2020, 70–71](#).

The Grand Chamber of the [CJEU held](#), in the first place, that the national legislation applicable to the case where

the taxpayer can only bring a legal challenge against an order of financial penalty for having infringed information obligations is not in line with Art. 47 CFR (the right to an effective legal remedy). In view of Art. 52(1) CFR (which allows the exercise of certain fundamental rights to be restricted in certain circumstances), however, legislation preventing such a taxpayer from bringing a direct action against an information order does not damage the essence of his/her right to an effective remedy.

As regards the situation of the third parties concerned by the information request in question, the judges in Luxembourg held, similarly, that the exercise of the right to an effective remedy against the information order (which must, in principle, be available to such third parties) may be limited by national legislation. This legislation may exclude the bringing of a direct action against such an order, provided that such third parties additionally have a remedy that enables them to obtain effective respect of their fundamental rights, such as an action to establish liability.

In the second place, the CJEU clarified the criteria that make an information request by another EU Member State “foreseeably relevant” within the meaning of Directive 2011/16. In the Court’s view, a combination of the following criteria are sufficient to ensure that a request is not manifestly devoid:

- Information on the identity of the person holding the information in question;
- The identity of the taxpayer subject to an investigation; or
- “Personal, temporal and material” links of contracts, invoices, payments, etc. with the investigation and the taxpayer under investigation.

As a result, the CJEU has departed from the opinion of the AG on several points and takes a more nuanced decision on the preliminary ruling questions than the AG. It will be up to the Higher Administrative Court in Luxembourg to apply the CJEU’s answer to the concrete case. (TW)

## Area of Freedom, Security and Justice

### German Council Presidency Conclusion on Fundamental Rights and AI

On 21 October 2020, the German Council Presidency published [presidency conclusions on the Charter of Fundamental Rights in the context of artificial intelligence and digital change](#). The EU should ensure that fundamental rights are always respected when using, developing, deploying, or designing artificial intelligence (AI), placing emphasis on a human-centric approach to AI. Human oversight and transparency of AI systems are essential for this. The conclusions stress that digital technologies, including AI, are essential for European digital sovereignty, security, innovations, and economic development. There are also risks, however, which the use of AI may pose for fundamental rights, democracy, and the rule of law. Hence, the EU must make an effort to ensure that fundamental rights as enshrined in the Charter remain guaranteed. The EU’s approach, i.e., the promotion of human rights and democracy in the use of digital technologies, should also be heeded in the global debate on the use of AI, in accordance with the [EU Action Plan for Human Rights and Democracy 2020–2024](#). The conclusions provide particular guidance on the following issues:

- AI and dignity;
- AI and freedoms;
- AI and equality;
- AI and solidarity;
- AI and citizens’ rights;
- AI and justice.

The Presidency stresses that Europe should make use of the opportunities offered by AI, particularly in the context of the digital economy to achieve climate neutrality by 2050 and in the fight against the COVID-19 pandemic. AI can benefit the justice system, e.g., by improving access to legal information and by reducing the duration of proceedings. However, AI in the justice system should acknowledge the following issues:

- Ensure transparency and explicability of judicial processes and decision-making;
- Maintain an independent judiciary and legal certainty;
- Prevent from adverse effects, e.g., through biased algorithms;
- Guarantee effective legal remedies;
- Continue non-digital access to law and justice.

The Conclusions call on EU institutions and Member States to follow the guidance provided in them and to consider effective measures for identifying, predicting, and responding to the potential impact of digital technologies (including AI) on fundamental rights. “Civil society” should be involved as far as possible when legal and regulatory frameworks are developed.

The Conclusions largely follow the Commission’s White Paper on AI ([→eucrim 1/2020, 8–9](#)) and the Council conclusions on digitalisation to improve access to justice ([→following news item](#)). The conclusions were published as Presidency conclusions and not as Council conclusions, because one Member State did not support them. It objected to the use of the term “gender equality,” as neither the Charter nor the Treaties use the term “gender.” Other Member States opposed the deletion of this term, because it is commonly used in more recent Union documents. The text of the German Presidency was backed by 26 delegations. (TW)

### Council Conclusions on Digitalisation in Relation to Access of Justice

On 13 October 2020, the Council adopted [conclusions on digitalisation in order to improve access to justice](#). The conclusions observe that further digitalisation of the Member States’ judicial systems has enormous potential to continue to facilitate and improve access to justice for citizens throughout the EU. Digital tools can help to better structure proceedings and to automate and accelerate the handling of standardised and uniform tasks. They can increase the effectiveness and

efficiency of court proceedings. It is also noted that the COVID-19 crisis has confirmed the need to invest in and make use of digital tools in judicial proceedings.

Member States are encouraged to make increased use of digital tools throughout judicial proceedings, e.g., secure means of electronic identification and trust services. The Council stresses, however, that using digital technologies should not undermine the fundamental principles of judicial systems, including the independence and impartiality of the courts, the guarantee of effective legal protection, and the right to a fair and public hearing. The Commission is called on:

- To further develop and strengthen e-CODEX (e-Justice Communication via Online Data Exchange) – the main tool for secure communication in both civil and criminal cross-border proceedings;
- To consider extension of the e-Evidence Digital Exchange System (eEDES), which already supports procedures related to European Investigation Orders and mutual legal assistance between Member States, to other judicial cooperation instruments in criminal matters;
- To develop a comprehensive EU strategy on the digitalisation of justice by the end of 2020.

The conclusions also place emphasis on digital skills. The need exists to promote digital skills in the justice sector – to allow judges, prosecutors, judicial staff, and other justice practitioners to use digital tools effectively and with due respect for the rights and freedoms of those seeking justice.

Moreover, the conclusions acknowledge the benefits of Artificial Intelligence (AI) in the justice sector. It is underlined that the use of AI tools must not interfere with the decision-making power of judges or with judicial independence. A court decision must always be made by a human being and cannot be delegated to an artificial intelligence tool. Care must be taken to prevent the use of AI tools or

## Studies on the Digitalisation of Justice

On 14 September 2020, the Commission published two [studies on the digitalisation of justice](#). The studies support the Commission in identifying areas where there is a need for coordinated action at the EU level.

The [study on “cross-border digital criminal justice”](#) identified the needs and challenges to communicate and exchange case-related data in a digital and secure way when agencies cooperate in cross-border criminal cases. After having found out the major deficiencies, the study suggests seven solutions to address business needs:

- Secure communication channel;
- Communication tool;
- Redesigned Eurojust case management system;
- The joint investigation team collaboration platform;
- Exchange of data between the JHA agencies and EU bodies;
- Judicial cases cross-check;
- Large files solution.

The [study on the “use of innovative technologies in the justice field”](#) explored existing policies, strategies, and legislation at the national and European levels and took stock of the current use of Artificial Intelligence (AI) and blockchain/Distributed Ledger Technology (DLT) tools in the justice field. It also suggests several horizontal actions as a way forward. Following consultations with public administration representatives and with stakeholders, the study team identified 130 projects that use AI and blockchain technologies: 93 projects by Member State authorities and the judiciary, 8 projects by professional legal organisations, and 29 projects (products and/or services) by private companies. These projects can be categorized in solving the following business problems:

- Processing high volume of data;
  - Processing high volume of video, audio and images;
  - Linking information across different sources;
  - Access to justice/public services;
  - Data protection compliance;
  - Preparing high volume of data;
  - Administrative/facilities management;
  - Lack of authenticity/traceability.
- Together with suggestions on the exchange of good practices regarding the projects identified, the study makes recommendations for cross-cutting, horizontal actions:
- Need for coordination and improved communication on project activities at the EU level, given that a number of projects with similar objectives, business problems and technologies used to solve them exist;
  - Establishment of a mechanism that facilitates collaboration and experience sharing on a regular basis;
  - Strengthening existing partnerships and networks;
  - Establishment of a supporting mechanism for legal professional organisations that facilitates the preparation and implementation of “proof of concepts”.

*Background:* The findings of the two studies will feed into the Commission’s work on a communication on digitalisation of justice that is to be presented in 2020. The communication will respond to discussions on the concept of digital criminal justice at the Justice and Home Affairs Council in December 2018. The way forward as regards innovative technologies is embedded in the wider context of the [Commission’s coordinated plan](#) to step up action at several levels in order to support the development and uptake of AI throughout the EU’s economy and public administration (see also the Commission’s White Paper on AI ([→eucrim 1/2020, 8–9](#))). (TW)

data sets from leading to discriminatory outcomes; transparency must be ensured if machine-learning tools are involved in decision-making processes.

The Council also shares the view of the Commission in its White Paper on AI ([→eucrim 1/2020, 8–9](#)) that the judiciary is an area where a clear European regulatory framework may be necessary; yet, this framework must take into account both the benefits and risks/requirements specific to the justice sector.

Given that many European and international organisations are carrying out work on the use of digital technologies in the judicial field, including AI, the Council stresses the importance of coherence and cooperation in this area. (TW)

## Legislation

### Commission: Interim Report on Consultation of AI White Paper

The Commission issued a [first summary report](#) of its consultation on the White Paper on Artificial Intelligence (AI) in the first half of 2020. For the White Paper [→eucrim 1/2020, 8–9](#). The consultation focused on three distinct aspects:

- Specific actions for the support, development and uptake of AI across the EU’s economy and public administration;
- Options for a future regulatory framework on AI;
- Safety and liability aspects of AI.

According to the report, more than 1250 contributions to the consultation were submitted from all over the world. Key findings from a preliminary evaluation of the online questionnaire include the fact that 90% of the participants fear fundamental rights violations through the use of AI. 42.5% would like to restrict a future regulatory framework to only high-risk AI applications; 30.6% are sceptical of such restrictions. 60.7% of respondents are in favour of revising the existing Product Liability Directive to cover risks posed by certain AI ap-

plications. 47% of respondents are also in favour of adapting national liability rules for all AI applications in order to ensure adequate compensation and fair apportionment of liability. According to a preliminary impact assessment, the Commission is also considering four different options, ranging from a soft-law approach to a legal instrument with binding requirements, with a scope yet to be defined and possible *ex-ante* and/or *ex-post* enforcement mechanisms. The Commission report includes links to all consultation contributions and to additional position papers.

In a next step, the consultation contributions will be analysed in detail. The Commission will then publish a comprehensive impact assessment. Legislative proposals will be presented in the first quarter of 2021 at the earliest. (TW)

## Institutions

### European Commission

#### Commission Work Programme 2021

On 19 October 2020, the European Commission published its [Work Programme 2021](#), entitled “A Union of vitality in a world of fragility”. It is supplemented by four [annexes](#).

The Work Programme contains new legislative initiatives across all six headline ambitions that were described in the Commission President *Ursula von der Leyen*’s Political Guidelines ([→eucrim news dated 27 July 2020](#)), and it reinforces her first [State of the Union Speech](#) of September 2020.

In the area of Justice and Home Affairs, the Work Programme outlines the following:

- Set-up of a new strategy for the future of Schengen;
- Continued work on the new pact on migration and asylum;
- Proposal for a number of measures on legal migration.

In order to strengthen the Security

Union, the Commission announced that it would be taking measures to tackle organised crime and hybrid threats as well as taking a new approach to counter-terrorism measures and radicalisation. Furthermore, it intends to improve the detection, removal, and reporting of child sexual abuse online. A comprehensive strategy on combating antisemitism shall also be presented. (CR)

## European Court of Justice

### New Judges at the Court of Justice

In the course of September and October 2020, [two new Judges took office at the CJEU](#).

Ms *Ineta Ziemele* will serve as judge at the Court of Justice for the period from 7 September 2020 to 6 October 2024. Before joining the Court of Justice, Ms *Ziemele* served as president of and judge at the Constitutional Court of the Republic of Latvia (2015–2020), judge and president of the Grand Chamber at the European Court of Human Rights in Strasbourg (2005–2014), and as visiting professor at several universities. She is successor to Mr *Egils Levits*.

Mr *Jan Passer* will serve as judge at the Court of Justice for the period from 6 October 2020 to 6 October 2024. Prior to this new position, Mr *Passer* served as judge at the General Court of the European Union (2016–2020), judge at the Supreme Administrative Court of the Czech Republic (2005–2016), and as a lecturer in law. He succeeds Mr *Jiří Malenovský*. (CR)

### New Advocate General Appointed

On 2 September 2020, the representatives of the Member States appointed Mr *Athanasios Rantos* as [Advocate General at the Court of Justice](#) for the period from 7 September 2020 to 6 October 2021. Before joining the CJEU, Mr *Rantos* was president of the Supreme Council for Administrative Justice and member of the Superior Special Court of Greece and taught at various law schools. Mr

Rantos replaces Ms *Eleanor Sharpston*, a British lawyer, who held the position since 2006 and [unsuccessfully appealed](#) against the decision to appoint Mr *Rantos* before the end of her term in October 2021. Ms *Sharpston*'s position was terminated early due to Brexit. (CR)

## OLAF

### OLAF and Europol Cooperation on New Footing

**spot light** [OLAF and Europol agreed on a new working arrangement](#). It entered into force on 9 October 2020 and replaces the administrative agreement between the two bodies of 2004. [The working arrangement](#) lays the basis for the exchange of operational, tactical, strategic, and technical information, including personal data and classified information. The arrangement is relevant for areas within the respective mandates of the bodies, e.g., fraud, corruption, money laundering, intellectual property crime, and illegal activities affecting the EU's financial interests. The forms of cooperation will include:

- Exchange of information, including case-related information;
- Cooperation/participation in joint operations, such as Joint Customs Operations, Joint Action Days, and Joint Investigation Teams;
- Exchange of specialist knowledge, reports, and results of analyses;
- Information on criminal investigation procedures and on crime prevention methods;
- Training activities;
- Support concerning the use of technical tools/equipment.

The arrangement also establishes the mode of cooperation, which includes, for instance, the designation of a single point of contact in each organisation and regular consultations. The exchange of liaison officers will also be possible. The main part of the arrangement addresses data protection issues, such as rules on the exchange of personal data and on the

security of processing of personal data. Provisions also relate to how information is secured and protected.

OLAF will be enabled to have – on a hit/no-hit basis – indirect access to personal data stored at/processed by Europol in line with the Europol Regulation (Art. 18(2) lit. a-c) of Regulation 2016/794). This concerns personal data on criminal suspects or convicted persons and persons about whom there are factual indications or reasonable grounds to believe that they will commit criminal offences (as far as the offences fall within the competence of Europol). It also concerns personal data processed within analyses of a strategic or thematic nature and those in operational analyses. OLAF also now has access to Europol's Secure Information Exchange Network Application (SIENA), which will make the exchange of operational and strategic information faster and more efficient. (TW)

### OLAF Activity Report 2019

In September 2020, OLAF published its [activity report for 2019](#). In 2019, OLAF celebrated its 20th anniversary to commemorate its establishment in 1999. The report shows the wide range of OLAF's operational activities, e.g., fraud affecting humanitarian aid, the environment, agricultural and regional development funds, etc., but also the fight against corruption and smuggling of counterfeit goods or tobacco. The key figures for 2019 are as follows (for comparison with the 2018 report → [eucrim 3/2019, 163](#)):

- OLAF concluded 181 investigations, and issued 254 recommendations to the relevant national and EU authorities;
- OLAF recommended the recovery of €485 million to the EU budget;
- OLAF opened 223 new investigations, following 1174 preliminary analyses carried out by OLAF experts.

The report also identifies several trends that came up during OLAF's investigations in 2019:

- Corruption, collusions, and manipu-

lations in public procurement procedures funded by the EU, e.g., as regards humanitarian aid and agricultural/food funds;

- Cross-border schemes making detection more difficult and time-consuming;
- Research funding continued to be a main target of fraudsters;
- Many investigations relating to smuggling and counterfeiting, involving complex cross-border networks;
- Tackling cigarette smuggling remains a priority for OLAF; in 2019, the fight against cigarette counterfeiting continued to be a major issue, together with the illegal smuggling of water pipe tobacco.

In addition to its investigations concerning cases of revenue fraud and counterfeiting, OLAF coordinated large-scale joint customs operations, such as POST-BOX II or SILVER AXE IV, which have also been reported on in [eucrim](#).

The focus chapter of the 2019 annual report deals with the growing threat of environmental fraud. According to OLAF, fraudulent and illegal activities are increasing in connection with environmental funds and investments, also due to the fact that sustainable development, tackling climate change, and protecting the environment have become a top priority of the EU's policy. OLAF reports on several cases in this area. One example is the “Volkswagen and Dieselgate” scandal involving improper spending of European Investment Bank money by the German automobile manufacturer to develop a “defeat device” circumventing EU rules on emissions instead of conducting research on how to reduce emissions. Other investigations of OLAF in the area of environmental fraud concerned trade in endangered species and illegal logging and import into the EU of (protected) wood and timber, illegal international trade in bio-diesel, and fraud in relation to water and waste management.

The report highlights that effective cooperation with partners is essential for OLAF's investigative and policy work. In 2019, OLAF forged further ties with

other EU services and international organisations/third countries:

- Collaboration with other European Commission services; in 2019, increasingly with regard to environment-related funding in view of European Green Deal projects;
- Signature of administrative cooperation arrangements (ACAs) with the European Court of Auditors (ECA) and working on ACAs with other international partners;
- Steering work at the Advisory Committee for Coordination of Fraud Prevention (Cocolaf);
- Integration of anti-fraud clauses in international funding and free trade agreements.

Other topics tackled in the report are, *inter alia*, the financial, judicial, and disciplinary monitoring of OLAF's follow-up recommendations and OLAF's work in the field of policy to fight fraud.

When [presenting the report](#), OLAF Director-General *Ville Itälä* said: “We keep abreast of fraud trends and we adapt to the ever-changing fraud patterns that seek to take advantage of the money that Europe makes available to achieve its priorities. OLAF's success is a crucial asset for Europe as the eyes of fraudsters turn towards the 2021–2027 budget with its 1.8 trillion euro designed to power Europe's recovery from the consequences of the COVID-19 pandemic.” (TW)

### Successful Judicial Follow-Up of OLAF Operation

Three persons who siphoned off more than €1.4 million from the EU's Research and Innovation fund have been sentenced to jail. They were convicted in Genoa/Italy at first instance as a judicial follow-up of OLAF's operation “Paper Castle” ([→eucrim 1/2018, 8–9](#)), OLAF [reported](#) on 6 November 2020. The perpetrators had received EU money in order to develop hover-craft prototypes for nautical emergency purposes. Instead, they put part of the money into paying off a mortgage on a castle. A system of fictitious

companies was behind the fraud scheme that extended from Italy to London (UK) and to Delaware (USA). The actual castle was seized by the authorities. (TW)

### OLAF Investigations in Illegal Funding of Construction Works Lead to Indictments in Hungary

On 27 October 2020, OLAF reported that [Hungarian public prosecutors had indicted](#) four Hungarians for having pocketed more than €1.7 million in EU and Hungarian funding by illegally overpricing the costs for the renovation of children's playgrounds in Hungarian municipalities. An investigation, which was opened by OLAF in 2011 and closed in 2014, revealed that a consultant had artificially inflated cost estimations for renovation and construction works and subsequently manipulated public tenders. The consultant and three other accomplices built up a system to request EU and Hungarian public funding by means of overpriced offers. Furthermore, the consultant systematically favoured the same general contractor. The scheme let it appear that the work was carried out by subcontractors at a much lower price; in most cases, the main contractor charged more than double the real cost of the work completed by the sub-contractors.

OLAF identified a total amount of €4 million in illegal subsidies for 145 projects. Now, the Hungarian public prosecutors have been indicted for illegal activities in 60 projects carried out during 2009 and 2013. The three main defendants had pocketed more than 536 million forints (€1.7 million) in EU and Hungarian public money. The fourth defendant is considered to have defrauded almost 187 million forints (€609,000). (TW)

### OLAF and Eurojust Help Dismantle Mafia-Like Gang

With the support of OLAF and Eurojust, the Italian Carabinieri managed a [successful strike against an organised criminal gang](#) that had established a sophisticated fraud scheme at the expense

of EU funds. OLAF was able to prove that the group had committed fraud against EU agricultural funds, ostensibly for rural development worth some €9.5 million. The criminal group had purchased machinery with the support of EU funds at an inflated price. Although the machinery was declared as new, it was in fact either second-hand or had been purchased at a much lower price than officially declared. In addition, the fraudsters laundered their money, e.g., through fictitious sales of food products. The Italian law enforcement authorities found that the group was additionally involved in other criminal offences, including extortion, intimidation, kidnapping, and illegal detention of firearms and explosives. The operation, dubbed “Grande Carro” (Italian for “Big Dipper”), covered seven EU Member States (Italy, Bulgaria, the Czech Republic, Germany, Ireland, Portugal, and Romania). It is estimated that the entire criminal scheme was worth over €16 million. 48 persons were arrested during the operation that took place at the end of October 2020. (TW)

### Customs Operation *Daphne* Detects Huge Volume of Illicit Cash Flows

On 23 October 2020, OLAF reported on the results of the [joint customs operation \*Daphne\*](#) that tackled illicit cross-border cash flows. The one-week operation took place in late 2019. It was led by the Italian Customs and Monopolies Agency and OLAF and involved 24 EU Member States. The operation identified €17 million in illicit cash flows.

Customs authorities detected a total of 508 cases of undeclared and opaque cash flows, leading to around 40 follow-up investigations. The vast majority of cases (423) involved air traffic, accounting for €15 million. Most of the cases (453) concerned passengers travelling to/from outside the EU (total of €15.6 million). Passengers travelling to/from EU countries accounted for only 31 cases. OLAF mainly supported through its Virtual Operations Coordination Unit,

which enabled the secure exchange of information during the operation. (TW)

### OLAF Supports Successful International Operation in Seizure of Counterfeit Healthcare Products

On 17 September 2020, OLAF reported on a [successful cooperation with its international partners](#), which led to the seizure of counterfeit healthcare and sanitary products in Columbia. OLAF alerted the Colombian police and customs authorities via AMERIPOL – the Police Community of the Americas – to a suspicious consignment originating from China and destined for Venezuela. OLAF also tracked the container and provided relevant information that resulted in the seizure of the goods in Colombia. The operation was a practical implementation of the new relationship between OLAF and AMERIPOL. OLAF Director-General *Ville Itälä* stressed: “Pooling knowledge and resources from all over the world is the only way to fight against this illicit trade and the criminal networks behind them. This is why OLAF has built up over time a solid network of partners in all continents”. For OLAF partnerships with countries/organisations outside the EU → *C. Scharf-Kröner* and *J. Seyderhelm*, [eucrim 3/2019, 209–218](#). (TW)

### European Public Prosecutor’s Office

#### EPPO: Path to Operation

On 28 September 2020, the following prosecutors [took their oaths of office](#) before the European Court of Justice:

*Laura Kövesi*, European Chief Prosecutor, and 22 European Prosecutors:

- *Frédéric Baab* (FR);
- *Cătălin-Laurențiu Borcoman* (RO);
- *Jaka Brezigar* (SI);
- *Danilo Ceccarelli* (IT);
- *Gatis Doniks* (LV);
- *Yvonne Farrugia* (MT);
- *Teodora Georgieva* (BG);
- *Daniëlle Goudriaan* (NL);
- *José Eduardo Guerra* (PT);

- *Petr Klement* (CZ);
- *Tomas Krušna* (LT);
- *Tamara Laptoš* (HR);
- *Katerina Loizou* (CY);
- *Ingrid Maschl-Clausen* (AT);
- *Juraj Novocký* (SK);
- *Andrés Ritter* (DE);
- *Maria Concepción Sabadell Carnicero* (ES);
- *Gabriel Seixas* (LU);
- *Kristel Siitam-Nyiri* (EE);
- *Harri Tiesmaa* (FI);
- *Yves Van Den Berge* (BE);
- *Dimitrios Zimianitis* (EL).

At the formal sitting, both the President of the ECJ, *Koen Lenaerts*, and *Kövesi* emphasised that the European Public Prosecutor’s Office takes its task seriously as an independent European institution enforcing justice and the rule of law. The European Public Prosecutor’s Office was established in 2017 to prosecute crimes against the EU budget. *Laura Kövesi* was appointed Chief Prosecutor in October 2019. After the remaining European Prosecutors had been appointed in July 2020 (→ [eucrim 2/2020, 82](#)), the delegated European Public Prosecutors still had to be recruited in the 22 participating Member States.

In the meantime, the College has adopted the first [decisions](#). These include the important [internal rules of procedure](#) as well as [rules concerning the processing of personal data](#) by the EPPO. In 11 November 2020, the German and Italian European Prosecutors, *Andrés Ritter* and *Danilo Ceccarelli* were [appointed](#) Deputy European Chief Prosecutors for a three-year mandate period. The two deputies will assist the European Chief Prosecutor in the performance of her duties and represent her in her absence or when she is prevented from attending to her duties.

On 14 October 2020, the Commission presented a [Delegated Regulation concerning the data to be processed](#) by the European Public Prosecutor’s Office. The Regulation provides the categories of persons and data (listed in the Annex to the Regulation) to be admitted as data

subjects and as possible data to be processed in accordance with Art. 49(3) of Regulation 2017/1939 establishing the EPPO. The Annex refers to suspected or accused persons in criminal proceedings of the EPPO as well as to convicted persons following EPPO criminal proceedings and to their contacts or associates. It also covers natural persons who reported or are victims of offences that fall within the EPPO’s competence. The Annex also lists in detail the categories of operational data that may be processed for the defined data subjects. (TW/CR)

### Europol

#### Webinar on Strengthening Europol’s Mandate

On 15 October 2020, the political group “Review Europe” of the European Parliament hosted a [webinar to discuss the reinforcement of Europol’s powers](#) and to increase its financial resources. Panelists included several MEPs as well as representatives of Europol, the EDPS, the European Commission, and national experts. Discussions ranged from calling for more and stronger cooperation to creating a genuine “European FBI.” MEPs from Renew Europe support the reinforcing of Europol’s powers and mandate. The European Commission is expected to present a legislative proposal on strengthening Europol’s mandate at the end of this year. (CR)

#### EDPS: Europol’s Processing of Large Datasets Not Compliant

On 5 October 2020, the EDPS published a [decision on its inquiry](#) concerning Europol’s processing of “large datasets,” i.e., contributions received from Member States and other operational partners or collected in the context of open source intelligence activities.

The EDPS found that Europol’s processing of large datasets does not comply with the principle of data minimisation as set out in the Europol Regulation. It therefore admonishes Europol to im-

### Study on Data Exchange between Europol and Private Parties

According to a [study by the law and policy consultant “milieu” on the practice of direct exchanges of personal data between Europol and private parties](#) that was commissioned by the European Commission (and made public in November 2020), the revision of Europol’s current Regulation is strongly recommended. For the following types of scenarios, the report recommends either revising, changing, or amending the respective rules in Europol Regulation 2016/794:

- The sharing of personal data between Europol and private parties in the context of referrals;
- The sharing of personal data directly between Europol and private parties outside the context of referrals (proactive sharing);
- The sharing of personal data between national law enforcement authorities and private parties via Europol;
- Europol’s receipt of personal data from private parties via an intermediary.

Regarding the sharing of personal data between Europol and private parties in the context of referrals, the report finds the current system insufficient. For instance, emerging needs, such as the sharing of personal data with Europol beyond the data contained in the referrals, cannot be addressed. Looking at the practice of Europol receiving personal data from private parties via an intermediary, many issues seem to hinder the functioning of this procedure, leading to missed opportunities for Europol to receive important datasets from private parties. Proactive sharing, i.e., private parties sharing personal data directly with Europol outside the context of referrals, is also rarely used. (CR)

plement all necessary and appropriate measures to mitigate the risks to data subjects created by the processing of large datasets.

Europol has been given two months to inform the EDPS of an action plan to address this admonishment and six months to take action. The EDPS de-

cision is based on an own-initiative inquiry that started in 2019 when the EDPS examined the use of big data analytics by Europol for purposes of strategic and operational analysis. The EDPS said that he will also forward his decision to the Europol Cooperation Board – the newly established forum in which the EDPS discusses common issues with the national data supervisory authorities – because a large part of the information the decision refers to is shared by national law enforcement authorities. (CR)

### Eurojust

#### Council Approves 2019 Annual Report

On 12 October 2020, the EU Ministers of Justice approved Eurojust’s Annual Report 2019 ([→eucrim 2/2020, 83–84](#)). In its [conclusions](#), the Council particularly welcomes Eurojust’s efforts to safeguard operational continuity in light of the COVID-19 pandemic crisis. Furthermore, it emphasises the importance of digitalisation to achieve both enhanced cross-border cooperation between national judges and prosecutors and the interconnectedness of EU information systems, i.e., Eurojust’s Case Management System (CMS), to enable Eurojust to exchange personal data with key partners. In this regard, the Council emphasises the need for further cooperation with counterparts such as the EPPO.

Looking at the above-mentioned challenges as well as Eurojust’s continually increasing operational workload, the Council outlines the need to reconsider Eurojust’s budget and allocate adequate resources. (CR)

#### Eurojust President Re-Elected

On 13 October 2020, [Ladislav Hamram was re-elected](#) as president of Eurojust during a virtual meeting of Eurojust’s College. The priorities of Mr *Hamram*’s second term include continuing the digitalisation of justice as well as extending Eurojust’s global scope with partners outside the EU. Additionally, Mr *Ham-*

*ram* intends to further strengthen Eurojust’s partnerships with other EU JHA agencies, such as Europol and Frontex, and to build up a good working relationship with the European Public Prosecutor’s Office (EPPO). (CR)

#### New Liaison Prosecutor for Norway

In September 2020, *Jo Christian Jordet* took up duty as the [new Liaison Prosecutor for Norway at Eurojust](#). Before joining Eurojust, Mr *Jordet* served as regional prosecutor, business lawyer, deputy judge, and police prosecutor in Norway. Mr *Jordet* succeeds Ms *Hilde Stoltenberg* who served at Eurojust since September 2016. (CR)

#### Eurojust Report on Sham Marriages

On 9 November 2020, Eurojust published a [report](#) on national legislation and an analysis of Eurojust casework on sham marriages. As sham marriages often appear as isolated acts, the report wishes to raise the awareness of judicial practitioners regarding this low-risk/high-value criminal activity. It identifies the main features of sham marriage cases, highlights the legal challenges and specific obstacles involved, analyses how judicial tools and instruments are applied, and provides an overview of best practices and the main lessons learned.

The report sets out several recommendations, *inter alia*:

- The need to harmonize national legislation governing sham marriages in order to facilitate mutual legal assistance measures;
- The need to make use of Joint Investigation Teams to investigate sham marriage cases;
- The need to involve Eurojust in order to better identify the links between the different criminal activities, to facilitate the investigations, to promote coordination, and to work out a joint prosecutorial strategy.

Lastly, the report recommends applying a comprehensive approach and involving all the relevant authorities. (CR)



### 16th JITs Annual Network Meeting

On 10 November 2020, [the National Experts for Joint Investigation Teams \(JITs\) met online](#) to discuss digital tools for Joint Investigation Teams (JITs). Against the background of the current COVID-19 pandemic crisis, the need to move towards a digital era for JITs was the main topic of the meeting. For instance, experts expressed the need for a secure and fast exchange of information and evidence within the scope of a JIT. (CR)

### EuroMed Justice

Since October 2020, Eurojust has been hosting the second phase of the [EuroMed Justice Programme](#). This programme, which started in May 2020 and is funded by the European Commission, aims at enhancing cross-border strategic collaboration in criminal matters and improving capacity building with the EU's South Partner Countries (SPC), namely Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, and Tunisia. The programme was designed following a thorough assessment of the needs, activities, and tools to be delivered to the partnering countries and EU Member States. Hosting the programme is a historic novelty for Eurojust, as this is the first time that the agency will host and implement a programme outside the EU's borders. (CR)

### Frontex

#### Inquiry to Push-Back Involvements

On 27 October 2020, Frontex announced the launch of an [internal inquiry](#) into accusations related to its activities at Greece's external borders. The inquiry comes in response to several media reporting suspicious incidents. According to the current state of investigation, Frontex has found no indications to substantiate the accusations. (CR)

#### Reaction to Push-Back Allegations

On 12 November 2020, the Management Board of Frontex met in [an ex-](#)

[traordinary session](#) to discuss media allegations of so-called "pushbacks" in the context of the ongoing Rapid Border Intervention in the Eastern Mediterranean (→previous news item). In order to investigate all aspects related to the matter, the Management Board decided to set up a sub-group to further deliberate these aspects. (CR)

#### Response to Amnesty International Report

In its [response to Amnesty International's report](#), Frontex explains its role in providing assistance in search and rescue activities, underpinning that the agency has neither a mandate to coordinate search and rescue cases nor to investigate Member States' authorities. Furthermore, it explains how the agency's multipurpose aerial surveillance works. (CR)

#### New Report by Frontex Consultative Forum on Fundamental Rights

On 2 October 2020, the Frontex Consultative Forum on Fundamental Rights published its [seventh annual report](#). The report outlines the Forum's main activities in 2019, e.g., the provision of advice on the following matters:

- Implementation of the European Border and Coast Guard Regulation (Frontex Regulation);
- The Frontex Fundamental Rights Strategy and Action Plan;
- Frontex operations and return support activities;
- Child protection and safeguarding in the context of Frontex activities;
- Training activities.

The report also sets out the priorities of the Forum for the year 2020, which again focuses on providing advice on the implementation of the Frontex Regulation and its fundamental rights implications including, for instance, rules on the independence of the Frontex Fundamental Rights Office, the setting up of a Frontex standing corps, and enhancement of the Frontex Complaints Mechanism. (CR)

### Contract with Chenega Europe Signed

At the end of October, Frontex signed a [contract with Chenega Europe](#) to provide the agency with human intelligence training. [Chenega Europe](#) is a subsidiary of the Chenega Corporation, which specializes in the delivery of professional services such as training, analysis, and security solutions focused on intelligence and military operations. Training for law enforcement includes training in intelligence-led policing, such as human intelligence (HUMINT) recruitment and assessment and management techniques. (CR)

#### Working Arrangement with Cepol Renewed

On 21 October 2020, Frontex and Cepol signed a [Working Arrangement](#) to renew their cooperation, with the aim of further harmonising cross-border law enforcement training in Europe. The new agreement supplements the first Working Agreement that the agencies signed in 2009. (CR)

#### Finding Technical Solutions for the EES

In order to further enhance the introduction of the Entry-Exit System (EES), Frontex is planning [to test various technical solutions](#) with the aim of advising EU countries on the most appropriate technology to be used. Therefore, Frontex is about to launch procurement procedures to gather industry solutions for the testing and implementation of EES-compliant equipment, including complete technological solutions, hardware and software, and development and integration services with national systems. The EES will register the entry and departure data of non-EU nationals crossing the external borders of EU Member States. For the legal framework →[eucrim 4/2017, 164](#). (CR)

#### Easy Access to Project Information

Since the end of October 2020, the Frontex website contains a [new section](#) bringing together information on all EU funded projects of interest to the EU

Border and Coast Guard community, e.g., the different Horizon projects (for instance, ANDROMEDA, BorderSENS, Compass2020, PERCEPTIONS, etc.). The new section also contains information on news and events that are of key relevance to the EU Border and Coast Guard community. (CR)

### Supporting Montenegro's Sea Border Control

On 14 October 2020, Frontex launched a [second operation in Montenegro](#) to support the country's sea border control activities. Under the operation, Frontex deploys specialised officers from EU Member States to the country and provides for technical and operational assistance, including aerial support. (CR)

### Maritime Surveillance by Aerostat

In September 2020, Frontex announced that it would launch a [pilot project for maritime surveillance by Aerostat](#) to assess the capacity and cost efficiency of Aerostat platforms for maritime surveillance as well as to modify and optimise the equipment used. Aerostat is to successfully support EU Member States in maritime border surveillance for law enforcement purposes. (CR)

### Airborne Mission to Fight Illegal Fishing

In August and September 2020, [in a first airborne mission of its kind](#), Frontex and the European Fisheries Control Agency (EFCA) joined forces to support Cyprus in tracking down illegal fishing in the southern part of the Exclusive Economic Zone (EEZ) of Cyprus. Frontex supported the operation by providing surveillance aircraft and validating vessels not transmitting their position in the area concerned. (CR)

### Agency for Fundamental Rights (FRA)

#### Cooperation Plan with eu-LISA Signed

On 12 November 2020, FRA and the European Agency for the operational man-

agement of large-scale IT systems in the area of freedom, security and justice (eu-LISA) signed a [cooperation plan for 2020–2022](#). It builds on the [cooperation agreement](#) that both agencies signed on 6 July 2016.

The cooperation plan foresees a range of joint activities with regard to the following:

- Exchange of information, expertise and best practices;
- Policy coordination;
- Training in Member States on the use of border-management IT systems;
- Data protection;
- Communication and events. (CR)

#### FRA Director Mandate Extended

On 24 September 2020, [Michael O'Flaherty was reappointed as Director](#) of the EU Agency for Fundamental Rights (FRA) for a second term of three years. FRA's Management Board formally decided to extend his contract. The extension will take effect from 16 December 2020. (CR)

## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### 31st Annual PIF Report

**spot light** On 3 September 2020, the Commission published the [31st annual report on the protection of the EU's financial interests](#), which gives an overview of the main legislative steps, policy initiatives, measures at the EU and national levels, and results as regards the protection of the EU budget in 2019.

As regards cross-cutting legislative and policy achievements, the report highlights that 2019 marked a milestone in so far as Directive 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law ("the PIF Directive"; [→eucrim 2/2017, 63–64](#)) had to be transposed by the 26

Member States that are bound by it. By the end of 2019, 18 Member States had communicated complete transposition and four partial transposition. The Commission launched infringement procedures in cases where transposition measures were not communicated and started assessment of compliance with the measures notified. Other important events in 2019:

- Adoption of Directive (EU) 2019/1937 on the protection of persons who report breaches of Union law ("the Whistleblowing Directive" [→eucrim 4/2019, 238–239](#));

- Substantial progress in setting up the EPPO, including the appointment of *Laura Codruța Kövesi* as European Chief Prosecutor in October 2019 ([→eucrim 3/2019, 164](#));

- Agreement on harmonised standard provisions on protection of the EU's financial interests in all post-2020 spending programme laws;

- Adoption of the Commission's anti-fraud strategy (CAFS) in April 2019 ([→eucrim 1/2019, 15](#)) and first implementations of its objectives, in particular strengthening the Commission's internal coordination of the fight against fraud and improving its anti-fraud analytical capability;

- Successful implementation of the Hercule III Programme and the Structural Reform Support Programme (SRSP).

Member States reported a wide range of activities in the field of cross-cutting measures. The majority of measures refer to improvements in the management and control of funds, but they also include, for instance, enhanced transparency, fighting corruption, and preventing conflicts of interest in public procurement as well as combating financial and organised crime. As regards the statistical results related to protecting the EU budget, the key figures are as follows:

- 11,726 irregularities were reported to the Commission (-2% compared to 2018), involving approximately €1.6 billion (34% less than 2018).

■ 8% of all reported irregularities, i.e. 939 cases, were reported as fraudulent (-25% compared to 2018, and -40% compared to 2015), involving approximately €461 million (63% less than 2018).

In addition, the PIF report provides detailed information on the measures and results as regards both revenue and expenditure. It also provides information on cooperation among the Member States, between the Member States and OLAF, and within the Better Spending Network launched in October 2019. Other chapters are dedicated to the Early Detection and Exclusion System (EDES) and inter-institutional cooperation, in particular the European Court of Auditors. Lastly, the report includes several recommendations, whereby it takes into account the increasing vulnerabilities of the EU budget in the wake of the coronavirus crisis, particularly as regards investments in the health sector:

- Keeping verifications and monitoring measures at a high level;
- Using emergency procurement on the basis of a case-by-case assessment;
- Completing the transition to e-procurement processes (for those Member States that have not already achieved this);
- Considering the possibility to further strengthen transparency in the use of EU funds by Member State actions;
- Close monitoring of the reporting of irregularities (in particular, non-fraudulent ones) for the 2014–2020 programming period.

The analyses in the PIF report support the assessment of those areas most likely to be at fraud risk, thereby helping to better target action at both the EU and national levels. It is accompanied by the following documents:

- Figures on the Member States' reported (fraudulent and non-fraudulent) irregularities ([Annexes I and II](#));
- [Annual overview with information on the results of the Hercule III Programme in 2019](#);

■ Report on the work of the [EDES Panel](#) under the Financial Regulation;

■ Comprehensive Commission Staff Working Paper on the Member States' "[follow-up on recommendations to the 30th annual report](#) on the protection of the Union's financial interests and the fight against fraud - 2018";

■ [Implementation of Article 325 TFEU by the Member States in 2019](#);

■ [Statistical evaluation](#) of irregularities reported for 2019: own resources, agriculture, cohesion and fisheries policies, pre-accession, and direct expenditure ([three parts](#)).

The annual report will be discussed in the European Parliament, which will issue a resolution on the situation of the protection of the EU's financial interests and probably give further follow-up recommendations. For the annual report 2018 → [eucrim 3/2019, 168–169](#) (TW)

### **CJEU: Recovery of Unduly Paid EU Funds Not Necessarily by Criminal Law**

The CJEU had to deal with questions of whether the State can enjoy status according to the EU's Victim Rights Directive and to what extent national law must provide criminal law mechanisms for the recovery of wrongly paid EU subsidies. The [case \(C-603/19, "TG, UF"\)](#) was decided on 1 October 2020 in response to a reference for a preliminary ruling from a Slovakian criminal court.

#### ► *Facts of the case*

In the case at issue, "TG and UF" were accused of subsidy fraud funded in part by the EU budget. In the criminal proceedings, the authorities from which the accused had received the funds (the district offices for labour, social affairs and family) sought damages, as injured parties, from the accused to the amount of the subsidy wrongly paid. The referring court points out that, on the one hand, the authorities would have difficulties recovering the money in an administrative procedure for compensation, because this can only be directed against the beneficiary. However, the

beneficiary in this case was a number of companies, i.e. legal persons, which were managed by the accused and had ceased to exist. On the other hand, the referring court considers itself precluded from awarding damages in criminal proceedings, since, according to the case law of the Supreme Court of the Slovak Republic, State authorities are referred to administrative courts for the purpose of reparation for unduly paid funds.

#### ► *Questions referred*

Against this background, the referring court asked the CJEU:

■ Is Directive 2012/29/EU establishing minimum rights of victims of crime (i.e., the right of the injured party to participate actively in criminal proceedings and to secure compensation for damage in criminal proceedings) also applicable to legal persons and the State/State authorities, where the provisions of national law confer on them the status of an injured party in criminal proceedings?

■ Is legislation, as interpreted in national case law, such that the State may not claim compensation in criminal proceedings for damage caused to it by fraudulent conduct on the part of an accused person and by not having other remedies by which to assert compensation compatible with Art. 325 TFEU?

#### ► *The CJEU's response*

The first question is clearly answered in the negative. The CJEU argues that the wording of Directive 2012/29 (Art. 1(1)) does not include legal persons within the scope of the Victims Rights Directive.

As regards the second question, the CJEU clarifies that Art. 325 TFEU obliges Member States to take effective measures to recover sums wrongly paid to the beneficiary of an EU subsidy but does not impose any constraint as regards the recovery procedure. The only requirement is the effectiveness of the measure. Thus, Member States have leeway, under the condition that they respect the principle of equivalence. The coexistence of different legal remedies with different objectives specific to administrative, civil, and criminal law

does not, in itself, undermine the effectiveness of the fight against EU fraud. Therefore, the national court (only) has to take account of whether an effective legal remedy for acts affecting the financial interests of the EU exist, be it criminal, administrative, or civil proceedings. In this context, the CJEU points out that, next to administrative recovery proceedings, the Slovak law seemingly also provides for the possibility to establish civil liability on the part of the managers of the companies as natural persons following a criminal conviction. Consequently, Art. 325 TFEU does not preclude national legislation, as interpreted in national case law, in which State authorities may not claim compensation for damage in criminal proceedings, but provides for other effective proceedings for the recovery of assistance wrongly received from the EU budget. It is up to the referring court to verify whether the effectiveness of the other proceedings exist under Slovak law. (TW)

### Agreement on Record Budget

Following intensive consultations, the German Council Presidency and the European Parliament [reached agreement on the EU's next long-term budget on 10 November 2020](#). At the initiative of Commission President *Ursula von der Leyen*, the EU has around €1.824 trillion available for the period from 2021 to 2027. This is an unprecedented sum in the history of the EU. Of this amount, around €1.074 trillion concerns the next multiannual financial framework (MFF); additional €750 billion are available for the Next Generation EU – the recovery fund to overcome the consequences of the corona pandemic.

In negotiations between the Council and the Parliament, [MEPs pushed through](#) additional spending of around €16 billion, which will be available for key programmes, such as the research programme Horizon Europe (up €4 billion), the health programme EU4Health (up €3.4 billion), and the education programme Erasmus+ (up €2.2 billion).

Seven other programmes [received top-ups](#) as well. In return, it was agreed that fines from anti-trust proceedings will flow into the EU budget in the future. This is in line with the Parliament's longstanding request that money generated by the European Union should stay in the EU budget.

The agreement also provides for an indicative [roadmap on further own resources](#) for the EU. From next year onwards, part of the budget will be financed by levies on non-recycled plastics. Also in 2021, an Emission Trading System is to be proposed as a new basis for own resources. From 2023 on, a digital levy and a carbon dioxide cap will follow. From 2026, the EU will receive revenue from a financial transaction tax on stock exchange transactions. This will provide the EU with additional resources. Earlier, leaders had agreed that the EU would issue debt securities for the first time in its history.

The financial package includes the following:

- More than 50% of the funds will go to modernisation projects. For example, research and innovation will be supported via Horizon Europe. Fair climate change and fair digitalisation will be promoted via the Just Transition Fund and the “Digital Europe” programme. The health system will be supported by the rescEU and EU4Health programmes;
- Traditional areas, such as cohesion policy and agricultural policy, will continue to receive strong support. This is considered necessary both for stability in times of crisis and for the modernisation of these policy areas, which contributes to reconstruction and to the green and digital transition.
- Around 30% is earmarked for the European Green Deal, which is to make Europe climate-neutral by 2050. In view of the record budget, this is a higher contribution to climate protection than ever before;
- 7.5% of annual spending is dedicated to biodiversity objectives from 2024 and 10% from 2026 onwards.

In addition, the budget will have greater flexibility to be better prepared for unforeseen crises, such as the corona pandemic. Budget scrutiny has also been strengthened: Concerning the expenditure of Next Generation EU funds, it was agreed that the EP, Council, and Commission will meet regularly to assess the implementation of funds made available on the basis of Art. 122 TFEU. The funds will be spent in a transparent manner and the EP, together with the Council, will monitor any deviation from previously agreed plans. For the recovery instruments, in which the EP has normally no say, the MEPs were able to negotiate a new mechanism – a “constructive dialogue” by means of which budgetary implications are discussed. Another element of better budget scrutiny is the general regime of conditionality for protection of the Union budget, on which the Council presidency and the EP's negotiators reached a provisional agreement on 5 November 2020 (→ following news item).

UPDATE: Following the European Parliament's consent, on 17 December 2020 the [Council adopted](#) the regulation laying down the EU's multiannual financial framework (MFF) for 2021–2027. Most of the sectoral EU funding programmes are expected to be adopted in early 2021 and will apply retroactively from the beginning of 2021. The next long-term budget will cover seven spending areas. It will provide the framework for the funding of almost 40 EU spending programmes in the next seven-year period. (TW)

### Compromise on Making EU Budget Conditional to Rule-of-Law Respect

**spot light** On 5 November 2020, the [German Council Presidency](#) and the European Parliament's negotiators [agreed on a compromise](#) to link the protection of the EU's financial interests with rule-of-law breaches in the Member States in the future. This so-called “conditionality mechanism” was initially proposed by the Commission in May

2018 (→[eucrim 1/2018, 12–13](#)). The deal does away with the Commission’s approach that “generalised deficiencies” to the rule of law in a given Member State may trigger preventive measures. Instead, appropriate measures can now be taken if it is established that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the EU budget or the protection of the financial interests of the EU “in a sufficiently direct way.”

Measures can be adopted if breaches of the principle of the rule of law (e.g., threatened independence of the judiciary, failure to correct arbitrary/unlawful decisions, limits in legal remedies) concern one or more of the following:

- The proper functioning of the authorities of that Member State implementing the Union budget;
- The proper functioning of the authorities carrying out financial control, monitoring and audit, and the proper functioning of effective and transparent financial management and accountability systems;
- The proper functioning of investigation and public prosecution services in relation to the investigation and prosecution of fraud, including tax fraud, corruption or other breaches of Union law relating to the implementation of the Union budget or to the protection of the financial interests of the Union;
- The effective judicial review by independent courts of actions or omissions by the authorities referred to;
- The prevention and sanctioning of fraud;
- The recovery of funds unduly paid;
- The effective and timely cooperation with OLAF and, subject to the participation of the Member State concerned, with the EPPO;
- Other situations or conducts of the authorities of the Member States relevant for the sound financial management of the Union budget or the protection of the EU’s financial interests.

Possible measures to be adopted in

the event of breaches of the rule-of-law principles and the procedure to be followed to adopt them can include:

- Suspension of payments and of commitments;
- Suspension of disbursement of instalments or the early repayment of loans;
- Reduction in funding under existing commitments;
- Prohibition to conclude new commitments with recipients or to enter into new agreements on loans or other instruments guaranteed by the Union budget.

*Functioning of the mechanisms:* The Commission, after establishing the existence of a breach, will propose triggering the conditionality mechanism against a Member State government. The Council then will have one month to adopt the proposed measures (or three months in exceptional cases) by a qualified majority. The Commission will use its rights (e.g., under Art. 237 TFEU or the Council Rules of Procedure) to convene the Council to make sure the deadline is respected.

The EP and the Council Presidency also agreed on the protection of final recipients and beneficiaries – such as students, researchers, farmers, and NGOs – who should not be punished for the failure of their governments. Next to reporting obligations by the Member States and guidance information provided by the Commission, the EP included a provision by means of which final recipients/beneficiaries can file a complaint to the Commission via a web platform, which will assist them in ensuring they receive the due amounts.

The conditionality mechanism must be endorsed by the Council and EP’s plenary. The situation is complex: while the conditionality mechanism can be adopted without the agreement of the opposing Member States, such as Poland and Hungary, the decision on own resources (which is quintessential for the adoption of the huge future EU budget package) must be adopted unanimously. However, Poland and Hungary have threatened to veto the own resources decision if the

rule of law mechanism is adopted. This, in turn, is the central condition for the European Parliament’s approval of the own resources decision.

The idea to make the transfer of EU money subject to the rule of law has also been met with criticism by legal experts (→*L. Bachmaier*, [eucrim 2019, 120](#)). In a statement of 15 October 2020, the Brussels-based think-tank [CEPS found](#) the approach problematic on several accounts:

- In most cases, the causal link between erosion of the rule of law and a breach of the EU’s financial interests will be tenuous and therefore difficult to uphold in court;
- In light of international practice, it is unusual to link budget transfers to a transgression of value-based rules;
- The conditionality mechanism comes at the expense of citizens (especially the most disadvantaged among them) in the Member State whose government infringes the rule of law.

The CEPS proposed strengthening the EPPO or making EU funding dependent on joining the new body for those Member States that are not yet participating in the EPPO.

Nevertheless, according to a [survey commissioned by the European Parliament](#) and conducted in late September/early October 2020, 77% of EU citizens agree that EU funds should be made conditional upon the national government’s implementation of the rule of law and of democratic values. 7 in 10 respondents agreed with this statement in 26 EU Member States. In addition, a majority of Europeans supports a larger EU budget to overcome the COVID-19 pandemic. Public health is the priority, followed by economic recovery and climate change. (TW)

UPDATE: After Hungary and Poland torpedoed the compromise proposal on the new multi-annual EU budget (2021–2027) and recovery fund for weeks because they disagreed with linking EU monetary support to rule-of-law conditionality, the 27 heads of state and

government were able to reach an agreement on the first day of their December summit in Brussels (10/11 December 2020). It provides for a compromise on the new rule-of-law mechanism, which the German Council Presidency had brokered. Hungary and Poland accepted an “interpretative declaration” laid down in the [European Council summit conclusion](#), which outlines the parameters of the mechanism and the possibilities both countries have to oppose the new mechanism. 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 it 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. It was also clarified that “the triggering factors set out in the Regulation are to be read and applied as a closed list of homogenous elements and not be open to factors or events of a different nature. The Regulation does not relate to generalised deficiencies.” And: “Any formal opening of the procedure will be preceded by a thorough dialogue with the Member State concerned so as to give it the possibility to remedy the situation.”

Following the political agreement at the EU summit, the [ECOFIN Council formally and finally adopted the Regulation](#), laying down the next multiannual EU financial framework for 2021–2027 (MFF) on 17 December 2020. The plenary of the [European Parliament \(EP\) had already approved](#) it on 16 December 2020.

However, in a [resolution on the MFF package and the rule-of-law regulation](#) published on 17 December 2020, MEPs questioned the EU summit declaration to suspend the rule-of-law mechanism pending CJEU approval. Instead, rule-of-law conditionality should apply in full from 1 January 2021. According to the EU Treaties, the European Council can-

not exercise legislative functions. MEPs therefore believe that a political declaration by the European Council cannot be considered an interpretation of legislation, and the “interpretative declaration” must be considered “superfluous.”

The EP also deeply regrets that, due to the requirement of unanimity in the Council, the entire procedure for adopting the budgetary and recovery package, including the new EU programmes for the 2021–2027 period, has been unduly protracted. Overcoming the hurdles resulting from this requirement should be one of the issues discussed at the upcoming conference on the future of Europe.

The European Council conclusions also [caused confusion](#) among legal experts. Initial [reactions on the platform “Verfassungsblog”](#) revealed that – although the summit conclusions are formally not binding – “they are clearly intended to cast a long shadow over the Conditionality Regulation to make it practically unusable.” (TW) ■

### **ECA Blames EU for Excessive Spending Errors**

On 10 November 2020, the European Court of Auditors (ECA) presented its [annual report on the 2019 financial year](#). Each year, the ECA audits the revenue and expenditure of the EU budget and provides a positive or negative opinion on the extent to which the annual accounts are reliable and income and spending transactions comply with applicable rules and regulations. In 2019, the EU spent €159.1 billion in total.

The [auditors signed off the 2019 accounting](#), giving “a true and fair view” of the EU’s financial position (“clean opinion”). No objections were also raised on revenue for 2019, which was legal and regular as well as free from material error. However, the auditors found widespread problems as regards expenditure. Although the overall level of irregularities in EU spending has remained relatively stable (2.7% in 2019 compared with 2.6% in 2018), the error rate in the “high-risk expenditure” category is high

(4.9%). High-risk expenditure concerns reimbursement-based payments, which are often subject to complex rules and eligibility criteria, e.g. research projects, investment in regional and rural development, and development aid projects. Compared with 2018, high-risk expenditure increased and represents the majority of audited spending (53%). Commonly found errors in this area included, for instance, ineligible projects and infringement of internal market rules, ineligible beneficiaries, and non-compliance with public procurement rules or irregular grant award procedures. Given the composition and the evolution of the EU budget over time, the pervasive level of error as regards expenditure has led to the ECA’s adverse opinion in this regard.

The audit also mentions that the ECA reported nine suspected fraud cases out of 747 transactions examined for the 2019 statement of assurance to OLAF. This is similar to the number of cases reported in previous years. Of the reported cases, OLAF has opened five investigations. In four cases, OLAF decided not to open an investigation.

The audit report also looks into the future, given the political agreement on the multiannual financial framework (MFF) for 2021–2027 and the temporary recovery instrument, the “Next Generation EU” (→news item p. 174). ECA President *Klaus-Heiner Lehne* said in this context: “Our adverse opinion on EU spending for the year 2019 is a reminder that we need clear and simple rules for all EU finances – and we also need effective checks on how the money is spent and whether the intended results are achieved.” He called to mind that the Commission and the Member States have a tremendous responsibility for sound and efficient financial management. This corresponds to demands by other legal experts that the agreed, historically high EU finances must be accompanied by appropriate control mechanisms (→[U. Sieber, Guest Editorial, eucrim 2/2020, 65–66](#)). (TW)

### ECA: EU's Multi-Billion Recovery and Resilience Facility to Be Improved

On 9 September 2020, the European Court of Auditors (ECA) published an [opinion that assesses Commission's Recovery and Resilience Facility \(RRF\)](#). With more than €600 billion, the RRF is the biggest section within the planned Next Generation EU budget (NGEU) and will provide grants and loans to EU Member States in order to mitigate the impact of the COVID-19 crisis and make the Member States more resilient in the future. The ECA Opinion comes at the request of the European Parliament's Committee on Budgetary Control.

The auditors generally welcome the RRF. It has the potential to support Member States in easing the economic and financial impact of the pandemic. It will also build on existing mechanisms, which fosters synergies and reduces the administrative burden at both the EU and Member State levels. However, the auditors also point out several weaknesses, which need to be remedied:

- Suitable mechanisms that ensure coordination with other sources of EU funding should be developed;
- The link between the RRF and the EU's objectives (e.g., Green Deal, digital transformation) should be strengthened, for instance through common indicators;
- Procedures for establishment of the necessary national Recovery and Resilience Plans (RRPs) as well as payment requests should be simplified in order to reduce the administrative burden and facilitate absorption;
- The allocation mechanism should be reconsidered, because it may favour Member States that are less severely affected by the pandemic in terms of decline in GDP and it only partly reflects the RRF's objective to promote the Union's economic, social, and territorial cohesion by improving resilience and supporting recovery;
- Strong and effective measures against fraud and irregularities must be put in place by the Commission and Member

States to ensure that the EU's financial support is used for its intended purpose.

Lastly, the auditors believe that the role of the European Parliament in the budgetary process should be explicitly defined and the audit rights of the ECA set out.

The opinion on the RRF complements other COVID-19-related opinions by the ECA, concerning, for example, the [Common Provisions Regulation \(CPR\)](#), [REACT-EU](#), and the [Just Transition Fund](#). (TW)

### ECA: Assessment on the Future of EU Agencies

At the end of October 2020, the European Court of Auditors (ECA) published a [special report on the future of EU agencies](#). The report assesses the conditions put in place by the EU to ensure the agencies' adequate performance. Furthermore, the report is intended to serve as a basis for discussion on the EU's future management of the performance of its agencies.

Decentralised EU agencies and other bodies (EU agencies) are bodies governed by European public law and equipped with their own legal personality. At the moment, there are different legal types of EU agencies: six executive Commission agencies and 37 decentralised EU agencies. In 2018, the total budget of all EU agencies (excluding the Single Resolution Board) was €4.0 billion, forming 2.8% of the EU's general 2018 budget.

In its assessment, the report looks at two key criteria that are relevant for all EU agencies, namely their flexibility to serve the relevant EU policy and European cooperation as well as the extent to which they act as centres of expertise and networking for the implementation of EU policies. The assessment also includes those EU agencies in the areas of security and justice, e.g., CEPOL, Eurojust, Europol, and Frontex.

In its conclusions, the report identifies a lack of flexibility in the set-up and operation of EU agencies as well as in

the maximisation of their full potential. Furthermore, the report criticises the European Commission for not always fully considering alternative solutions to setting up an EU agency.

Hence, the ECA recommends the following:

- Ensure the relevance, coherence, and flexibility of the set-up of EU agencies;
- Allocate resources to EU agencies in a more flexible manner;
- Improve governance and reporting on performance;
- Strengthen the role of EU agencies as centres for sharing expertise and networking.

This is the first time that the ECA has made an overall assessment of all EU agencies at once, instead of focusing on the performance of individual agencies as in the past. (CR)

## Money Laundering

### Council Conclusions on Anti-Money Laundering

On 5 November 2020, the Council published [conclusions on anti-money laundering and countering the financing of terrorism](#). The Council mainly encourages the Commission to further elaborate legislative proposals on an EU single rulebook, the structure and tasks of an EU AML/CFT supervisor, and a coordination and support mechanism for FIUs. The measures were recently proposed by the Commission in its AML/CFT Action Plan ([→eucrim 2/2020, 87–88](#)).

The Council backs the Commission's plan to further harmonise substantive law with a possible single EU regulation that takes over parts of the current AML Directives. It also sets out the general framework of this regulation. The Council proposes, for instance, that the Commission consider the following when preparing the single rulebook:

- Expand the list of obliged entities beyond the current EU framework with regard to virtual asset service providers;
- Review the types of obliged entities,

paying specific attention to ML/TF risks that derive from certain entities;

- Establish uniform and high standards of customer due diligence;
- Define standardised data sets for the identification of customers;
- Widen the scope for the use of data within the limits set by data protection provisions, including information-sharing possibilities between companies.

The Council also generally acknowledges the added value of an EU AML/CFT supervisor and supports the Commission's intention to table a legislative proposal in this regard. However, it underlines the important contribution of national supervisory authorities to the prevention and combating of money laundering. Taking into account the principle of subsidiarity, the aim is to ensure that the remit of the EU's money laundering supervisory authority actually adds value compared to that of national ones. The Council notes that the non-financial sector consists of a wide range of professions, the scope, professional requirements, and admission criteria of which have not been harmonised. Competencies of the EU body should be triggered on a "risk-sensitive basis." The Council suggests that the Commission initially restrict the remit of the proposed EU supervisory authority to selected high-risk obliged entities from the financial sector. The Commission should proceed step by step: the authority should initially supervise credit institutions, payment services, *bureaux de change*, electronic money institutions, and virtual currency providers. As regards all types of obliged entities, the EU supervisor could advise and support national authorities. In addition, the Council also offers guidance to potential powers of the EU body.

The proposal for the FIU coordination and support mechanism should take into account the current core functions of the FIU network. This includes the following:

- Strengthening and facilitating joint analysis between FIUs;
- Supporting the FIUs' operational and

strategic analysis as well as the identification of EU-relevant risks and phenomena;

- Promoting exchanges and capacity building among FIUs;
- Improving cooperation with other competent authorities.

The Commission is also called on to solve data protection issues when data are exchanged in the FIU network. (TW)

### EDPS Takes Position on Commission AML/CFT Action Plan of May 2020

In [Opinion 5/2020](#), the European Data Protection Supervisor (EDPS) assesses the data protection implications of several measures proposed in the Commission's action plan for a comprehensive Union policy on preventing money laundering and terrorism financing ([→eucrim 2/2020, 87–89](#)). The EDPS welcomes several aspects in the action plan, e.g. the Commission's commitment to a risk-based approach. It advises the Commission to strike a balance, however, between interference with the fundamental rights of privacy and personal data protection and the measures that are necessary to effectively achieve the general interest goals on AML/CFT in legislation.

As regards the effective implementation of the existing AML/CFT framework, the Commission should focus on compatibility with the GDPR and the data protection framework. This concerns particularly the interconnection of central bank account mechanisms and beneficial ownership registers, which must be governed by the principles of data minimisation, accuracy and data protection by design and by default.

Potential legislation on customer due diligence must maintain safeguards that guarantee the right of customers to be informed when their data is collected and about the purposes of the data processing.

If the Commission tables a proposal for a central EU AML/CFT supervisor, it should provide the legal basis for the processing of personal data and the

necessary data protection safeguards in accordance with the GDPR and Regulation 2018/1725, particularly as regards information sharing and international transfers of data.

A mechanism for support and coordination of FIUs must clarify the conditions for access to and sharing of information on financial transactions.

Although the EDPS generally supports the development of public-private partnerships (PPPs) for the research and analysis of typologies and trends in AML/CFT, he is critical of other aspects of PPPs. The envisaged operational information sharing on intelligence suspects would lead to a high risk for privacy and data protection rights. Under no circumstances, should a private entity be entrusted with an enforcement role. Processing operations concerning information on possible offences arising from reported suspicious transactions should be exclusively in the hands of public authorities and not shared with private entities. In this context, the EDPS also points to concerns that information sharing creates issues involving conflicts of interest, the duty of confidentiality with clients, and the purpose limitation principle in data protection law.

As regards the Commission's vision of strengthening the EU's global role, the EDPS encourages it to integrate data protection principles when setting up international standards at the Financial Action Task Force.

The EDPS ultimately stresses that the Opinion is without prejudice to further consultation on individual legislative initiatives, in accordance with Art. 42 of Regulation 2018/1725. (TW)

### No Implementation of 5th AMLD: Commission Acts against Cyprus

In October 2020, the Commission [sent a reasoned opinion to Cyprus](#) for not having notified any measures for the transposition of the 5th Anti-Money Laundering Directive (AMLD). The 5th AMLD was adopted in 2018 and further develops the obligations as laid down in the



4th AMLD of 2015, in particular by extending its scope ([→eucrim 2/2018, 93–94](#)). The 5th AMLD had to be transposed by the EU Member States by 10 January 2020. The Commission has now initiated the second step of the infringement procedure. If Cyprus fails to give a satisfactory response within the next two months, the Commission may decide to refer the case to the CJEU. (TW)

## Counterfeiting & Piracy

### Council Conclusions on Improving Intellectual Property Policy

In its [conclusions on intellectual property policy of 10 November 2020](#), the Council set up a number of guidelines on better intellectual property enforcement. The Council is concerned that there is still a high number of counterfeit goods being offered on online marketplaces – including those that threaten public health and security. The situation exists despite several memoranda of understanding that the EU concluded with companies. The Council calls on the Commission to:

- Provide country-by-country data on levels of counterfeiting and piracy, in order to better assess the effectiveness of countermeasures;
- Establish principles designed for enhanced tripartite collaboration between right holders, intermediaries, and law enforcement authorities;
- Propose measures that require online platforms and other hosting providers to take proportionate measures against counterfeits.

In general, the Council stressed the importance of a strong, efficient, transparent, and balanced IP protection scheme. (TW)

## Organised Crime

### European Drug Report 2020

On 22 September 2020, the [European Drug Report for 2019](#) was launched. The

report provides a comprehensive analysis of recent drug use and market trends across the EU, Turkey, and Norway. The 2020 report focuses on the effects of the COVID-19 pandemic on drug use, supply, and services. Furthermore, it looks at the current and emerging trends in Europe's drug situation up to 2020 and provides an overview of Europe's drug situation regarding drugs such as cannabis, cocaine, amphetamines, and heroin. It also provides insight into drug-related infectious diseases and drug-related deaths and mortality. Emerging trends include:

- The increasing role of cocaine in Europe;
- The increased use of heroin;
- The need to better assess the relationship between problems with cannabis use and developments in the drug market;
- Increased and diverse drug production in Europe.

The report is accompanied by a [summary](#) of the main findings and an annual [statistical bulletin](#). (CR)

### Report on Sports Corruption

On 5 August 2020, Europol published a new [report looking into the involvement of organised crime groups in sports corruption](#). The report analyses the following:

- The link between sports corruption and organised crime;
- The characteristics, structure, and *modus operandi* of criminal networks;
- The different types of match-fixing as the most prominent form of sports corruption monitored by Europol;
- The Asian betting model;
- Targeted sports such as football and tennis.

According to the report, annual global criminal proceeds from betting-related match fixing are estimated at €120 million.

The report sets out ten key findings, concluding that organised crime groups (OCGs) involved in sports corruption are active on a transnational level, operate using a top-down operational busi-

ness model, and are often polycriminal. Online betting is increasingly used by OCGs for betting-related match fixing. In this context, the fear exists that the use of online technologies for the purpose of sports betting – linked to competition manipulation – will continue to facilitate these illicit activities. Furthermore, the fixing is usually organised separately from the betting in match-fixing schemes. In addition, OCGs predominantly target lower-level sports competitions.

The report also finds that betting-related match fixing can well serve as a platform to further high-scale money laundering schemes by the same OCGs involved in sports corruption for its own benefit and/or serve other OCGs in search of specialised 'laundry services.' Money laundering takes place via online betting, either by exploiting regulated betting operators or by taking direct ownership of these operators. In addition, OCGs misuse identities to create betting accounts and e-wallets that are used to bet on prearranged matches. Lastly, OCGs seem to maximise their illegal gains by combining the benefits of competition manipulation for both sports-related and betting-related purposes. (CR)

## Trafficking in Human Beings

### Progress Report on Fight Against Trafficking in Human Beings

On 20 October 2020, the European Commission presented its [third report on progress made in the fight against trafficking in human beings](#) (THB). The report identifies key patterns and challenges in addressing THB, provides an analysis of statistics, and outlines the results of anti-trafficking actions. It covers the period from 2017 to 2018.

According to the report, 14,145 victims of trafficking were registered in the EU in 2017 and 2018; the actual number is likely considerably higher, however, since many victims of trafficking remain

undetected. 49% of all victims were EU citizens, with more than 34% of them being trafficked in their own EU Member State. 72% of all registered victims were women and girls, mainly trafficked for sexual exploitation. Children accounted for 22% of all victims.

While sexual exploitation remains the dominant form of trafficking (60% of all victims), trafficking for labour exploitation affects 15% of all victims, the majority of them being men (68%). Other forms of trafficking include forced begging and criminality, forced and sham marriages, and even organ removal.

Given that only 2424 convictions were reported in the 2017–2018 period, but that there is a high number of registered victims in the EU, the report calls for a strong response to the impunity of the perpetrators and making trafficking a “high-risk low-profit” crime.

While the report sees progress in several areas, notably within the framework of the European Multidisciplinary Platform Against Criminal Threats (EM-PACT-THB), it calls for further efforts to better implement [Directive 2011/36](#) and to find new strategic approaches towards countering THB. The report is rounded off by a [staff working document](#), a [study on data collection on THB in the EU](#), and a [factsheet](#). (CR)

### Europol: Report on Internet-Enabled Trafficking in Human Beings

On 18 October 2020, Europol published a [report outlining the challenges of countering human trafficking in the digital era](#). Modern communication technologies have significantly impacted the way in which organised crime groups (OCGs) involved in international trafficking in human beings (THB) operate by broadening their ability to traffic human beings for different types of exploitation. The majority of victims of THB involving an online component are female, and minors are also particularly vulnerable.

Modern technology is used at every stage of exploitation, from recruitment

to financial management. The recruitment strategy is based on the online profiling of victims. Active recruitment methods involve posting false job advertisements on trusted job portals and social media marketplaces or setting up fake employment agencies. Passive recruitment methods involve scouting the Internet and social media and replying to announcements posted by job seekers looking for jobs abroad. Victims are often controlled by different forms of blackmail as well as virtual forms of movement restriction and real-time monitoring.

As a result, the entry barrier for human traffickers is much lower. At the same time, technology also serves as a multiplier, enabling the commercialisation and exploitation of victims on a massive scale. Furthermore, traditional structures and divisions of labour within trafficking networks have changed, with more female offenders taking part in Internet-enabled THB.

Looking at the new developments, the report calls for the following:

- Investing in equipment and training, so that law enforcement authorities are empowered to face these technological challenges;
- Amending the existing legislative and policy framework in order to promote information exchange and cooperation between law enforcement and the private sector;
- Further developing international investigations in order to meet the challenges of geographical displacement.

Fighting human trafficking is one of the EU’s and Europol’s top priorities. The Europol report was released on the 2020 EU Anti-Trafficking Day.

*Catherine de Bolle*, Europol Executive Director, commented: “Fighting human trafficking is one of the EU and Europol’s top priorities. Europol has a team of experts fighting human trafficking at the disposal of our Member States and partners. We analyse criminal information and can connect the dots between national and international investigations.” (CR)

## Cybercrime

### Europol: IOCTA 2020

**spot light** On 5 October 2020, Europol published its [Internet Organised Crime Threat Assessment \(IOCTA\) 2020](#). The report details the latest developments with regard to cross-cutting crime facilitators and challenges to criminal investigations, cyber-dependent crime, child sexual exploitation online, payment fraud, and criminal abuse via the dark web.

In the area of cross-cutting crime, the report finds that social engineering remains an effective threat that enables other types of cybercrime. Cryptocurrencies continue to facilitate payments for various forms of cybercrime with developments towards privacy-oriented crypto coins and services. The report also describes reporting challenges that hinder the rendering of an accurate overview of crime prevalence across the EU.

As in the [2019 IOCTA report](#), the 2020 report identifies ransomware as the most dominant threat in the field of cyber-dependent crime with criminals threatening the victims to publish data if they do not pay. Furthermore, ransomware targeting third-party providers also creates significant potential damage for other organisations in the supply chain and critical infrastructure. The malware ‘Emotet’ is omnipresent, given its versatile use, and it is the benchmark of modern malware. Lastly, the report sees a high threat potential of DDoS attacks.

Looking at online child sexual exploitation (CSE), the report sees a continuing trend (see also [IOCTA 2018](#) and [IOCTA 2019](#)) of an increasing amount of online child sexual abuse material (CSAM), being further exacerbated by the COVID-19 crisis. Consumption is reinforced by the enhanced use of encrypted chat apps and similar offers, which makes it more difficult for law enforcement to detect and investigate online child sexual exploitation activities. Furthermore, online offender communi-

ties exhibit considerable resilience and are found to be continuously evolving. The commercialisation of online CSE is becoming an increasingly widespread issue, with livestreaming of child sexual abuse continuing to increase and becoming even more prevalent during the COVID-19 crisis.

In the area of payment fraud, the report pinpoints online investment fraud as one of the most rapidly growing crimes, generating millions in losses and affecting thousands of victims. SIM swapping seems to be a key trend. Furthermore, business email compromise (BEC) remains an area of concern, and card-not-present (CNP) fraud continues to increase.

Ultimately, the report describes the dark web environment as volatile, with lifecycles of dark web marketplaces being shorter and no new, clearly dominant market arising compared to previous years to fill the vacuum left by the take-downs in 2019. However, the nature of the dark web community at the administrator level also shows how adaptive it is in challenging times, leading to more effective cooperation in the search for better security solutions and safe dark web interaction. (CR)

### ENISA: Annual Report on Cyber Threat Landscape

On 20 October 2020, the European Union Agency for Cybersecurity (ENISA) published the annual report on cyber threats – the “[ENISA Threat Landscape 2020](#)” (ETL 2020). The report identified and evaluated the top cyber threats in the EU between January 2019 and April 2020. It shows that cyberattacks are continuing to increase.

There still is a long way towards achieving a more secure and trustworthy digital environment, because existing cybersecurity measures have been weakened through changes in working and infrastructure patterns caused by the COVID-19 pandemic. Personalised cyberattacks have increased considerably, whereby cybercriminals are using more

advanced, sophisticated methods and techniques. They are more widespread and often remain undetected.

The ETL 2020 actually consists of 22 separate (digital) reports, designed for different readerships. “[The year in review](#)” is addressed to the general public and provides an overview of the threat landscape, outlining the most important topics referenced across all reports, the 15 most important threats, and conclusions and recommendations (for policy, business, and research/education). It summarizes the [top ten trends](#) observed during the reporting period:

- The attack surface in cybersecurity continues to expand due to digital transformation;
- There will be a new social and economic norm after the COVID-19 pandemic that is even more dependent on a secure and reliable cyberspace;
- Social media platforms are increasingly being used for targeted, more efficient attacks, entailing different types of threats;
- Finely targeted and persistent attacks on high-value data (e.g., intellectual property and state secrets) are being meticulously planned and executed, often by state-sponsored actors;
- Massively distributed attacks with a short duration and wide impact are used with multiple aims, such as credential theft;
- Financial reward is still the predominant motivation behind most cyberattacks;
- Ransomware remains widespread, with costly consequences for many organisations;
- Many cybersecurity incidents still go unnoticed or take a long time to be detected;
- Thanks to more security automation, organisations will invest more in preparedness using Cyber Threat Intelligence (CTI) as their main capability;
- The number of phishing victims continues to grow in the EU, since it exploits the human dimension being the weakest link.

The top five threats in 2019/2020 were: malware, web-based attacks, phishing, web application attacks, and spam. As regards the question of the main change compared to previous years’ report (→[eucrim 1/2019, 20](#)), it is observed that the COVID-19 pandemic showed the capability of malicious actors to quickly adapt to digital transformation processes, whereas cybersecurity professionals had difficulties responding to the challenges introduced by working-from-home arrangements. During the crisis, cyberattacks proved to be more sophisticated and advanced, such as credential stealing, targeted phishing, social engineering attacks, extensive penetration of mobile platforms, etc.

In addition to the review report, the ETL 2020 provides for the following six strategic and technical reports:

- Sectorial and thematic threat analysis, including 5G, the internet of things, and smart cars;
- Main cybersecurity incidents happening in the EU and worldwide;
- Topics of research and innovation in cybersecurity;
- Emerging trends, focusing on the challenges and opportunities for the future in the cybersecurity domain;
- Overview of CTI;
- Report on the top 15 threats, presenting a general overview, the findings, major incidents, statistics, attack vectors and corresponding mitigation measures.

These reports are accompanied by 15 reports that publish detailed information on cyber threats, such as malware, phishing, identity theft, botnets, ransomware, etc.

The ETL is part of ENISA’s mandate to provide strategic intelligence to stakeholders. The content is collected from open sources, such as media articles, expert opinions, intelligence reports, incident analysis, and security research reports as well as through interviews with members of the ETL Stakeholders Group. The ETL 2020 contributes to the Commission’s new cybersecurity strategy. (TW)

### Restrictive Measures for Cyber Attacks against the German Bundestag

On 22 October 2020, the [Council imposed restrictive measures](#) against two persons and one body responsible for or involved in the cyberattacks on the German Federal Parliament (Deutscher Bundestag) in April and May 2015. The persons/body concerned belonged to Russian military intelligence. The attack targeted the Parliament's information system and impaired its functionality for several days. A significant amount of data was stolen, and the email accounts of several Members of Parliament, including that of Chancellor *Angela Merkel*, were affected. The sanctions consist of a travel ban and the freezing of assets. In addition, persons and entities from the EU are prohibited from making funds available to those on the list.

Sanctions are one of the options available in the Union for a joint diplomatic response to malicious cyber-activities. They are part of the so-called “cyber diplomacy toolbox.” Targeted restrictive measures against individuals/concrete entities are intended to prevent, discourage, deter, and respond to persistent and increasing malicious behaviour in cyberspace that is directed against the EU or its Member States. The Council [used this tool in July 2020](#) for the first time. The legal framework was [adopted](#) in May 2019 ([→eucrim 2/2019, 99](#)) (TW)

### Blow against Dark Web

At the end of September 2020, a large-scale [series of operations](#) coordinated by Eurojust and Europol led to the arrests of 179 vendors of illicit goods on the Dark Web across Europe and the United States. The operations also led to the seizure of €6.5 million in cash and virtual currencies, 500 kg of drugs, and numerous firearms.

Operation “DisrupTor” was conducted by law enforcement and judicial authorities from Austria, Cyprus, Germany, the Netherlands, Sweden, Aus-

tralia, Canada, the United Kingdom, and the United States. In conjunction with the reported operation, Europol issued a warning about the risks of buying illegal goods anonymously on the Dark Web. (CR)

### Awareness Campaign on Save E-Commerce

At the beginning of November 2020, Europol published a new [awareness campaign](#) to support e-merchants on protecting their e-businesses from fraud occurring on their platforms. The campaign aims to empower them to take steps to protect their business and customers against threats, such as fraud, phishing, and parcel mules. It offers advice on how to set up an e-business, how to sell online, and how to protect an e-shop from cybercrime threats. (CR)

## Terrorism

### Commission Identifies Weaknesses in Transposition of Directive on Combating Terrorism

On 30 September 2020, the Commission published a [report assessing the measures taken by the Member States to comply with EU anti-terrorism legislation](#) (Directive 2017/541 [→eucrim 2/2017, 69](#)). The Member States had to implement the rules of the Directive by 8 September 2018. The Commission's reporting obligation is laid down in Art. 29(1) of the Directive. The Directive is the main criminal law instrument at the EU level to combat terrorism. It lays down minimum standards for the definition of terrorist offences and offences related to terrorism and for penalties, while at the same time granting rights to protection, assistance, and support to victims of terrorism.

The report concludes that transposition of the Directive into national law has helped to substantively strengthen the Member States' criminal law approach to terrorism and the rights granted to victims of terrorism. Of the

25 Member States bound by the Directive, 23 adopted new legislation in order to ensure transposition of the Directive. While the Commission considers transposition by the Member States to be generally satisfactory, there are gaps that are cause for concern. For example, not all Member States criminalise in their national law all the offences listed in the Directive as terrorist offences. The Commission considers it important that these offences be clearly established as terrorist offences in national legislation, because loopholes in the prosecution of terrorists, e.g. charging lone offenders, could arise otherwise, and law enforcement cooperation could be hampered.

There are also shortcomings in the measures taken by Member States to criminalise travel for terrorist purposes and the financing of terrorism. Ultimately, the Commission detected deficiencies in the transposition of specific provisions for victims of terrorism; as a result, victims of terrorism may not receive assistance or support tailored to their specific needs. The Commission will continue to monitor national transposition measures, and it will initiate infringement procedures if necessary.

The implementation report will be submitted to the European Parliament and the Council. In accordance with Art. 29(2) of the Directive, the Commission will publish a more comprehensive evaluation in September 2021, which will examine, in more detail, the added value of the Directive in the fight against terrorism. This evaluation will also take into account the impact of the Directive on fundamental rights and freedoms. (TW)

## Environmental Crime

### Evaluation Report on Environmental Crime Directive

On 28 October 2020, the Commission provided a comprehensive evaluation of [Directive 2008/99/EC](#) on the protection of the environment through crimi-

nal law. The Directive is the EU's main instrument seeking effective protection of the environment and full application of the existing environmental EU legislation through criminal law means. Member States must approximate the criminalization of environmental offenses and ensure deterrent sanction levels. Through the evaluation (from an ex-post viewpoint), the Commission has taken stock of the state of implementation after the end of the transposition period (December 2010), as to whether the Directive has fostered cross-border cooperation and as to its relevance, effectiveness, efficiency, coherence, and EU added value. The evaluation integrates the results of the public stakeholder consultation, which was held from 10 October 2019 to 2 January 2020. The [evaluation documents](#) include the following:

- A Commission Staff Working Document setting out the results of the evaluation and including, *inter alia*, conclusions and suggestions for revision ([SWD\(2020\) 259 final, part 1](#));
- A Commission Staff Working Document with 11 Annexes, including case studies, the results of the public consultation, and a table on convictions and sanctions ([SWD\(2020\) 259 final, part 2](#));
- An executive summary of the evaluation ([SWD\(2020\) 260 final](#)).

The evaluation shows that, although the Directive has been implemented by all Member States, its objectives have only been partially achieved. Some of the reasons for this are: a too small scope of application of the Directive; in part, unclearly formulated legal terms; too little prosecution and punishment of environmental crimes in the Member States. The Commission sees room for improvement and suggests the following:

- Gathering statistics and data on environmental crime in a consistent manner throughout the EU;
- Taking measures to facilitate the interpretation of several legal terms;

- Standardising the level of sanctions across the Member States;
- Considering additional sanctions and sanctions linked to the financial situation of legal persons;
- Refining the legal technique used for defining the scope of the Directive (currently by references to environmental legislation listed in the Annexes of the Directive);
- Extending the scope of the Directive to cover more or new areas of environmental crime;
- Strengthening cooperation between enforcement authorities within Member States, in particular with those that fight money laundering, fraud, and organised crime, in order to better address the illicit profits of environmental crime;
- Taking measures to improve practical implementation (e.g., specialisation of law enforcement practitioners);
- Increasing public awareness of environmental crime, improving prioritization of environmental issues in the EU Member States;
- Clarifying the relationship between criminal and administrative sanctions, and possibly integrating a reference to the *ne bis in idem* principle into the Directive, in order to avoid dual sanctioning in line with CJEU case law.

The Commission stressed that the findings and recommendations do not prejudice a potential review of the Directive. They should be considered food for thought for further discussions. (TW)

## Racism and Xenophobia

### EU Internet Referral Unit Transparency Report for 2019

On 13 October 2020, Europol's EU Internet Referral Unit (EU IRU) published its [2019 Transparency Report](#). The report gives an account of the unit's preventive activities and the investigative support it provides.

The EU IRU, which started its operations in 2015, is part of Europol's European Counter Terrorism Centre (ECTC).

It reports terrorist and violent extremist content to online service providers (OSPs) and provides support to EU Member States and third parties in the context of Internet investigations. In addition, it provides support to Europol's European Migrant Smuggling Centre (EMSC) by flagging Internet content used by traffickers to offer smuggling services to migrants and refugees. Key figures of the EU IRU's activity in 2019 are as follows:

- Assessment of the content of 25,453 terrorist/violent extremist items and 831 items promoting illegal immigration services;
- Organisation of seven Referral Action Days (RADs);
- Operational support to 251 EU Member States' operations with the EU IRU by delivering intelligence notifications, cross-match reports, intelligence packages, preliminary forensic reports, and expertise.

Furthermore, the EU IRU generated 13 strategic and thematic reports describing trends and patterns in terrorist or violent extremist propaganda. It also produces a weekly analysis of jihadist propaganda and new dissemination techniques. Lastly, the unit runs several projects, such as SIRIUS ([→eucrium news dated 17 February 2020](#)), and drafts the [EU Crisis Protocol](#). (CR)

### Action Day against Racism and Xenophobia on the Internet

On 3 November 2020, for the first time, Europol's European Counter Terrorism Centre coordinated a European-wide [action day targeting racist and xenophobic hate speech on the Internet](#). The action was initiated by Germany's Federal Criminal Police Office.

Law enforcement authorities from more than 10 countries conducted numerous house searches and interrogations, confirming that the World Wide Web is not a legal vacuum. In total, 97 locations were raided, also leading to the interrogation of several individuals. (CR)

## Procedural Criminal Law

### Data Protection

#### CJEU: Data Retention Allowed in Exceptional Cases

**spot light** On 6 October 2020, the Grand Chamber of the CJEU [delivered its judgments](#) on data retention concerning the British, French, and Belgian rules ([Case C-623/17 \(Privacy International\)](#), and [Joined Cases C-511/18 \(La Quadrature du Net and Others\)](#), [C-512/18 \(French Data Network and Others\)](#), and [C-520/18 \(Ordre des barreaux francophones et germanophone and Others\)](#)). The cases were referred to the CJEU following several CJEU judgments in recent years (in particular, the 2016 judgment in *Tele2 Sverige and Watson and Others*), which precluded national legislation on the retention of and access to personal data in the field of electronic communications. The referring courts raised doubts as to whether the case law deprives Member States of an instrument considered necessary to safeguard national security and combat crime. For detailed information on the cases at issue and the opinion of the Advocate General → [eucrim 1/2020, 22–23](#). The CJEU addressed the following questions:

► *Is the e-Privacy Directive applicable?*

In its rulings, the Grand Chamber first counters arguments that Directive 2002/58/EC (the Directive on privacy and electronic communications, commonly referred to as the “e-privacy Directive”) is not applicable in the present cases, since the Directive excludes “activities concerning public security, defence and State security” from its scope (Art. 1(3) and the legislations at issue concern national security that falls outside the scope of EU law (Art. 4(2) TEU). The CJEU points out that legislative data-retention measures regulate data processing by private service providers and not “activities characteristic

to the State”, for which the Directive is exempted as referred to in Art. 1(3). Reference to Art. 4(2) TEU also cannot invalidate this conclusion, since the mere fact that a national measure has been taken for the purpose of national security cannot render EU law inapplicable and exempt Member States from their obligations to comply with that law.

► *Which forms of traffic and location data retention are precluded by Union law?*

The referring courts asked whether Art. 15(1) of Directive 2002/58 precludes national legislation that imposes on providers of electronic communication services an obligation to retain traffic and location data for purposes of national and public security and combating crime. Art. 15(1) of Directive 2002/58 allows Member States to introduce exceptions to the principal obligation, laid down in Art. 5(1) of that Directive, to ensure the confidentiality of personal data (and to the corresponding obligations, referred to, *inter alia*, in Arts. 6 and 9 of that Directive), “when such a restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard national security (i.e. State security), defence, public security, and the prevention, investigation, detection and prosecution of criminal offences or of unauthorised use of the electronic communication system.” To this end, Member States may, *inter alia*, adopt legislative measures providing for the retention of data for a limited period, justified on one of these grounds.

The judges in Luxembourg principally upheld previous case law – the prohibition of “general and indiscriminate” data retention. This would also apply to cases in which telecommunication providers transfer data to security and intelligence agencies for the purpose of safeguarding national security, as is the case for the British rules.

The same holds true for data retention as a preventive measure, which was specific to the French and Belgian legislation. These obligations to forward and

retain traffic and location data in a general and indiscriminate way constitute particularly serious interferences with the fundamental rights guaranteed by the CFR, where there is no link between the conduct of the persons whose data is affected and the objective pursued by the legislation at issue. By further developing its case law in *Tele2 Sverige/Watson* and clarifying the interpretation of Art. 15 of Directive 2002/58, however, the CJEU allows several exceptions:

- General and indiscriminate retention of traffic and location data is allowed “in situations where the Member State concerned is confronted with a serious threat to national security that is shown to be genuine and present or foreseeable.” Then, the following additional conditions must be fulfilled:

- The decision imposing such an order is subject to effective review, either by a court or by an independent administrative body whose decision is binding;

- The review verifies that one of the described situations exists and that the conditions and safeguards, which must be laid down, are observed;

- The order is given only for a period limited in time to what is strictly necessary (there may be the possibility for extension, however, if the threat persists).

- Legislation can also provide for targeted retention of traffic and location data to combat serious crime and prevent serious threats. It is then required that this targeted retention is:

- limited on the basis of objective and non-discriminatory factors, according to the categories of persons concerned or using a geographical criterion;

- limited to a period of time which is strictly necessary (but which can be extended).

- General and indiscriminate data retention of IP addresses assigned to the source of an Internet connection may be allowed in order to combat crime and safeguard public security, provided the retention is limited to a period of time which is strictly necessary.

- General and indiscriminate data re-

tention relating to the civil identity of users of electronic communication systems is also allowed, whereby the Member States are not required to limit the retention period.

■ Legislative measures can also allow recourse to an order for the expedited retention of data in the possession of service providers, provided that:

■ The purpose is to combat serious crime and, *a fortiori*, to safeguard national security;

■ The retention obligation relates only to traffic and location data that may shed light on serious criminal offences or acts adversely affecting national security;

■ The order is subject to effective judicial review;

■ The retention is undertaken for a specific period of time.

As cross-cutting requirements for all exceptions, the legislative measures must provide clear and precise substantive and procedural rules as well as effective safeguards against the risks of abuse.

► *Does Union law preclude the obligations for providers to implement measures allowing the automated analysis and real-time collection of traffic and location data?*

The CJEU ruled that Art. 15(1) of Directive 2002/58, read in the light of Arts. 7, 8, 11, and 52(1) CFR, does not preclude national rules that require providers to take recourse, first, to the automated analysis and real-time collection of traffic and location data and, second, to the real-time collection of technical data concerning the location of the terminal equipment used. However, also here, several additional requirements must be observed by the national legislator:

As regards *automated analysis tools*:

■ They must be limited to situations in which a Member State is facing a serious threat to national security which is shown to be genuine and present or foreseeable;

■ Recourse to such analysis is subject to an effective review (either by a court or by an independent administrative body whose decision is binding);

■ The aim of this review is to verify that a situation justifying such a measure exists and that the conditions and safeguards that must be laid down are observed.

As regards the *real-time collection* of data:

■ Recourse is limited to persons in respect of whom there is a valid reason to suspect that they are involved in one way or another in terrorist activities;

■ A prior review is carried out (either by a court or by an independent administrative body whose decision is binding);

■ The review ensures that such real-time collection is authorised only within the limits of what is strictly necessary;

■ In cases of duly justified urgency, the review takes place within a short time.

► *May a national court limit the temporal effects of a declaration of illegality if the national legislation is held incompatible with Union law?*

This question was specific to the Belgian situation. Although Belgian law empowers Belgian courts to suspend the temporal effects of illegality – with a view to, *inter alia*, safeguarding national security and combating crime – the CJEU observed that this would undermine the primacy and uniform application of EU law. Hence, the answer to the question was “no.” The CJEU argues that maintaining the effects of national legislation would mean that the legislation would continue to impose obligations on service providers that are contrary to EU law and which seriously interfere with the fundamental rights of the persons whose data has been retained.

The judges in Luxembourg noted, however, that the question implies whether EU law precludes, in criminal proceedings, the use of information and evidence obtained as a result of a data retention regime in breach of Union law. In order to give a useful answer to the referring court, they called to mind that, as EU law currently stands, it is, in principle, for the national law alone to determine rules on the admissibility and

assessment of such evidence in criminal proceedings. Nonetheless, national evidence rules are not purely exempted from Union law, because Member States are obliged to respect the Union principles of equivalence and effectiveness. In this context, the CJEU specifies: “[T]he principle of effectiveness requires national criminal courts to disregard information and evidence obtained by means of the general and indiscriminate retention of traffic and location data in breach of EU law, in the context of criminal proceedings against persons suspected of having committed criminal offences, where those persons are not in a position to comment effectively on that information and that 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.”

► *Put in focus:*

The CJEU has updated its data retention saga. It involved the following judgments:

■ [Case C-301/06 \(Ireland v EP/Council → eucrim 1–2/2009, 2–3\)](#), backing the choice of legal basis of the EU Data Retention Directive 2006/24/EC as a first pillar instrument (cf. eucrim );

■ [Joined Cases C-293/12 and C-594/12 \(Digital Rights Ireland, and Seitlinger and Others → eucrim 1/2014, 12\)](#), declaring the EU’s Data Retention Directive 2006/24 invalid on the ground that the interference into fundamental rights, which resulted from the general obligation to retain traffic and location data, had not been limited to what was strictly necessary;

■ [Joined Cases C-203/15 and C-698/15 \(Tele2 Sverige, and Watson and Others → eucrim 4/2016, 164\)](#), prohibiting Member States from maintaining national data retention regimes if they entail a general and indiscriminate retention of data;

■ [Case C-207/16 \(Ministerio Fiscal → eucrim 3/2018, 155–157\)](#), backing Spanish legislation that provides public authorities with access to data relating

to the civil identity of users of means of electronic communication for the purpose of investigating criminal offences.

The two judgments of 6 October 2020 further refine the CJEU’s approach to data retention. By detailing exceptions from a general and indiscriminate (national) data retention regime, the CJEU has drafted a possible model for data retention at both the European and national levels. On the one hand, the CJEU accommodates law enforcement, although the rather complicated model of exceptional cases allowing data retention for preventive purposes remains a kind of mirage. On the other hand, it remains to be seen whether this concept can be implemented by the legislators and whether it proves practicable for law enforcement authorities. The judgments will certainly also have an impact on other pending references for preliminary rulings, such as that of the German Federal Administrative Court (Bundesverwaltungsgericht) in Cases [C-793/19](#) and [794/19](#), which seeks guidance on the compatibility of the German rules on data retention ([→eucrim 3/2019, 176](#)). Nonetheless, the outcome of these references still remains unclear. In addition, the judgments will have repercussions on the current discussion at the EU level about re-introducing harmonised EU rules on data retention for law enforcement purposes (for the discussion and the pushes from the Council [→eucrim 4/2019, 236](#) and [eucrim 2/2019, 106](#))

► **Reactions:**

The media and experts commented the judgments differently.

Privacy International, who brought the case concerning the UK, [praised](#) the fact that the judgment reinforces the rule of law in the EU. A [press release](#) that responds to the judgment, mainly stresses three important issues:

- “EU law applies every time a national government forces telecommunications providers to process data, including when it is done for the purposes of national security.

- EU law sets out privacy safeguards regarding the collection and retention of data by national governments, which countries such as the UK, France and Belgium must follow.

- The cases will now return to each individual country’s courts for implementation of the judgment.”

[La Quadrature du Net](#), who brought the French case, said: A first reading of the judgment suggests that it was a “victorious defeat.” It concluded: “French law thus ends up in flagrant contradiction with the decision of the CJEU: the principle of bulk metadata retention is refused by the Court while it is the principle in France.”

[Statewatch commented](#): “In summary, it might be said that the state’s surveillance menu is still rather extensive – but the buffet has been discontinued.”

The [Irish Independent draws a connection](#) between the data retention judgment and the CJEU’s recent ruling in *Schrems II* ([→eucrim 2/2020, 98–99](#)) and believes that “the judgment moves the EU further away from countries such as the US and China, which integrate mass surveillance into their domestic security arrangements.”

[Euractiv points to ramifications](#) of the judgment for the UK after Brexit, since it might hinder the Commission from approving an adequacy decision that would enable data exchanges between EU and UK companies after the UK finally leaves the bloc at the end of this year.

[Natasha Lomas](#) wrote on [TechCrunch](#) that “a battle of definitions could be looming,” although the CJEU made clear that bulk powers (as conferred to UK agencies) must be the exception, not the statutory rule.

According to data protection expert [Juraj Sajfert on European Law Blog](#), the ruling in *La Quadrature du Net and Others* is a complex victory for the law enforcement community and a major step backwards in the Court’s data retention jurisprudence. He analyses the victories for both the privacy/data pro-

tection campaigners, on the one hand, and the law enforcement community, on the other.

The German [IT news portal “heise.de”](#) collected opinions from data protectionists and politicians. Data protectionists complain that the CJEU allowed exceptions to the previous ban on general and indiscriminate logging of user tracks for the first time. The portal cited Hamburg data protection supervisor *Johannes Caspar*, saying: “The CJEU has brought the ‘old zombie’ back to life.” MEP *Patrick Breyer* fears that “the now permitted data retention of IP addresses makes it possible to ‘screen’ the private Internet use of normal citizens for months and make it transparent.”

*Sabine Leutheusser-Schnarrenberger*, former Federal Minister of Justice, commented on [Verfassungsblog](#): “The European Court of Justice has stood firm: There can be no mass surveillance of EU citizens without cause.” She added that the exceptions made by the CJEU cannot serve as a basis for a blanket reintroduction of data retention as in the current framework. *Leutheusser-Schnarrenberger* also pointed to scientific studies that question the added value of the mass storage of telecommunication traffic, and location data for the prevention and combating of crime, e.g., the 2011 [expert report of the Max Planck Institute for Foreign and International Law](#) or the [December 2019 analysis by the European Parliamentary Research Service](#) on “general data retention/effect on crime.” (TW) ■

### NGOs Call on the Commission to Give Up Data Retention Plans

On the eve of the CJEU’s judgment on the data retention rules in France, Belgium, and the UK of 6 October 2020 ([→previous news item p. 184](#)), more than 40 civil society organisations from 16 countries sent a [joint letter](#) to the Commission calling for a ban on blanket telecommunications data retention. The organisations expressed their deep concern over announcements that the Com-



mission intends to assess the need for further action on communications data retention once the judgments in pending cases are delivered. The commissioned study on the feasibility of an EU-wide data retention scheme is considered biased, since it does not take into account the threats of telecommunications data retention. The letter lists reasons why the invasive surveillance of the entire population must be deemed unacceptable.

It also points to studies proving that the communications data available without data retention are generally sufficient for effective criminal investigations; it is stated that blanket data retention has proven to be superfluous, harmful, or even unconstitutional in many states across Europe. The Commission is urged to:

- Give up any attempts to re-introduce telecommunications data retention;
- Open infringement procedures to ensure that national data retention laws are repealed in all Member States concerned;
- Work towards an EU-wide ban on blanket and indiscriminate data retention practices that capture people's activities. (TW)

### Ways Out of Schrems II Judgment

Business representatives and the EU and U.S. administrations have begun to think about the consequences of the CJEU's judgment in *Schrems II* of July 2020 (→[eucrim 2/2020, pp. 98–99](#)). In a [joint press release](#) of 10 August 2020, the European Commission and the U.S. Department of Commerce started talks “to evaluate the potential for an enhanced EU-U.S. Privacy Shield framework.” Both sides emphasised that they share a commitment to privacy and the rule of law; at the same time, economic relationship should further be deepened.

[Statewatch reported](#) that observers meanwhile believe that a replacement of the Privacy Shield is likely but would also be struck down by the courts if the U.S. is not willing to undertake signifi-

cant reforms of its legal system. This concerns, in particular, U.S. surveillance powers and sufficient redress for data subjects in the EU – the two main arguments of the CJEU when it declared the current Privacy Shield invalid.

*None of your business* (noyb) – the NGO founded by *Maximilian Schrems* – [compiled FAQs](#) that give a simple overview of the judgment and the questions answered. The FAQs stress that the judgment does not affect transfers of (1) data that is not “personal data” and (2) “necessary” data to the United States (e.g., emails to the USA, bookings in the USA, business transactions, etc.). However, businesses must review their practices if they outsource data processing to the USA, i.e., if they choose to transfer personal data because it is easier, cheaper, or more practical to store it with a U.S. service provider than a European provider. Noyb also informs about the consequences of the judgment for consumers and companies, possible actions by EU and U.S. companies, and potential political solutions.

On 29 October 2020, the European Data Protection Supervisor (EDPS) issued a [strategy paper](#) that aims to ensure and monitor compliance of EU Institutions' bodies, offices and agencies (EUIs) with the *Schrems II* ruling. The paper supports EUIs, so that ongoing and future international transfers comply with EU law, in particular Regulation 2018/1725 (→[eucrim 4/2018, 200–201](#)). The EDPS drafted a compliance action plan, including both short-term and mid-term measures. As a short-term compliance action, the EDPS, for instance, calls on EUIs to complete a mapping exercise identifying which ongoing contracts, procurement procedures, and other types of cooperation involve transfers of data. As far as new processing operations or new contracts with service providers are concerned, the EDPS strongly encourages EUIs to avoid transfers of personal data towards the United States. In the medium term, the EDPS will ask EUIs to carry out

Transfer Impact Assessments (TIAs) on a case-by-case basis. Subsequently, the EDPS will collect further information and start working with the EUIs on joint assessments as regards the level of protection of personal data afforded in third countries. (TW)

### EDPS: Orientations on Body Temperature Checks

On 1 September 2020, the EDPS issued [orientations](#) on the use of body temperature checks by Union institutions, bodies, offices, and agencies (EUIs) in the context of the COVID-19 crisis. In its orientations, the EDPS defines basic body temperature checks conducted outside of the scope of [Regulation 2018/1725](#) and those subject to the Regulation. Regulation 2018/1725 is the key legislation that lays down rules on how EU institutions, bodies, offices, and agencies should treat the personal data they retain on individuals (→[eucrim 4/2018, 200–201](#)). According to the EDPS, basic body temperature checks are principally not subject to Regulation 2018/1725 if they are designed to measure only body temperature, operated manually, and are not followed by registration, documentation, or other processing of individuals' personal data.

Conversely, basic body temperature checks that are followed by the processing of individuals' personal data are subject to the Regulation. Here, the EDPS recommends applying additional data protection safeguards, to make sure that the principle of data protection by design and default is respected and to regularly review the necessity and proportionality of these measures. (CR)

### Victim Protection

#### Eurojust is Furthering Victims' Rights

On 22 September 2020, on the occasion of the High-Level Conference on the EU Strategy on Victims' Rights, [Eurojust announced that it would join](#) the newly created Victims' Rights Platform.

The platform is the first measure created under the [first EU Strategy on Victims' Rights](#) (→[eucrim 2/2020, p. 104](#)), which was adopted at the beginning of the year to provide a forum for discussion. Other partners of the platform include the European Network on Victims' Rights, the EU Network of National Contact Points for Compensation, the EU Counter-Terrorism Coordinator, the European Union Agency for Fundamental Rights, and civil society organisations. (CR)

## Cooperation

### Customs Cooperation

#### New Customs Union Action Plan

**spot light** On 28 September 2020, the European Commission presented a new [Customs Union Action Plan](#), setting out a series of measures to make EU customs smarter, more innovative, and more efficient. The Action Plan follows the announcement by Commission President *Ursula von der Leyen* in her [political guidelines](#) that the Customs Union needed to be taken to the next level, especially by ensuring an integrated European approach to customs risk management, which supports effective controls by EU Member States.

The Action Plan reacts to several challenges that the Customs Union is currently facing, such as the fast-changing trade world with new business models, e.g., e-commerce; difficulties in ensuring adequate and effective controls to protect the EU's financial interests from fraud; resilience in reacting to emergency situations, e.g. the coronavirus pandemic or Brexit.

In order to meet these challenges, the Action plan focuses on four areas and includes the following key initiatives:

- *Risk management*: greater availability and use of data and data analysis for customs purposes; establishment of intelligent, risk-based supervision of supply chains and a new analytics hub

within the Commission for collecting, analysing, and sharing customs data that can inform critical decisions, help customs authorities identify weak points at the EU's external borders, and manage future crises.

- *Managing e-commerce*: strengthening of obligations for payment service providers and online sales platforms to fight tax fraud in e-commerce (legislative proposal: Q1/2023).

- *Promotion of compliance*: “Single Window” initiative to facilitate border formalities for businesses (legislative proposal of October 2020 →following news item).

- *Customs authorities acting as one*: roll-out of modern and reliable customs equipment under the next EU budget (as of 2021); new reflection group formed of Member States and business representatives to help prepare for future crises and challenges (launch planned in early 2021).

Another strategic priority will be on international customs cooperation. In this context, the Commission is working towards an EU-China agreement on a new Strategic Framework for Customs Cooperation 2021–2024 and is extending its monitoring system on the origin of products eligible for preferential trade arrangements.

The Action Plan includes a number of measures to crack down on fraud and other illegal activities:

- Providing customs with more data and data analysis by means of a new system;

- Strengthening the customs risk management strategy;

- Giving customs access to data provided by payment service providers and online platforms;

- Reinforcing cooperation between customs and market surveillance authorities to prevent dangerous and non-EU-compliant goods from entering the EU;

- Reassessing and, if necessary, strengthening the EU rules on cooperation with Member States to combat customs fraud;

- Strengthening international cooperation.

The Action Plan takes up some of the results of the foresight project “The Future of Customs in the EU 2040,” which was launched in 2018. The aim of this – partly still ongoing – project is to create a shared and strategic understanding among Member States and other key stakeholders of ways to deal with current and future customs challenges and to generate a vision of what the EU customs ecosystem could look like in 2040. (TW)

#### Commission: Single Window for Modernisation of EU Customs Union

On 28 October 2020, the Commission launched an important initiative to strengthen cooperation and information exchange in the clearance of goods at the EU borders. The [EU Single Window Environment](#) will create a single portal to allow businesses to provide information related to their goods imported into or exported out of the EU only once.

Currently, the formalities required at the EU's external borders often involve various authorities who are responsible for different policy areas, e.g. health and safety, the environment, agriculture, fisheries, cultural heritage, market surveillance, and product conformity. As a result, businesses have to transmit information to different authorities, each with its own portal and procedures. This is cumbersome and time-consuming for economic operators and makes it more difficult for authorities to act jointly to address risks, including fraud.

The Single Window Environment will streamline the processes for goods clearance. Businesses/traders will be able to upload all items of security and compliance information to a national Single Window portal. The relevant data are then made available to all relevant authorities through the EU digital framework that the Commission will put in place. The Single Window aims to:

- Facilitate trade, by reducing the ad-

ministrative burden for companies;

- Increase the efficiency of goods clearance, while improving regulatory compliance;
- Promote better digital cooperation and coordination between all national authorities in all Member States involved in the clearance of goods.

The Commission stressed that the way to the Single Window portals is long, but it will technically and financially help the Member States achieve this aim.

The initiative for the EU Single Window Environment represents the first concrete result of the recently adopted [Action Plan](#) for the development of the Customs Union – an ambitious project to modernise border controls over the next ten years. A series of measures have been designed to make EU customs smarter, more innovative, and more efficient. The Action Plan follows the announcement by Commission President *Ursula von der Leyen* in her [political guidelines](#) “to take the Customs Union to the next level.” In order to help customs authorities manage the competing demands of facilitating international trade and protecting the Customs Union, *von der Leyen* announced plans for an integrated European approach to customs risk management and more effective controls by Member States. (TW)

## Police Cooperation

### Home Affairs Ministers Discuss European Police Partnership

At their video conference on 8 October 2020, the Home Affairs Ministers of the EU Member States continued discussions on a new European Police Partnership. They agreed that the existing security architecture should be improved in the following three areas:

- Applying new technologies, such as artificial intelligence, to make better use of the growing flow of data;
- Reinforcing operational cooperation

between police forces by consolidating the police cooperation *acquis* and making sure that police officers easily know which cooperation tools are available to them;

- Building an active, efficient partnership with third countries, while adhering to EU values.

The discussion follows the views initially exchanged at the informal videoconference of Home Affairs Ministers in July 2020 (→ [eucrim 2/2020, 79](#)). The development of a strategic European Police Partnership aims at bringing new impetus to police cooperation at the EU level. (TW)

In parallel, the European Commission [launched an initiative](#) on a new legal EU framework for cross-border police cooperation. Under the Security Union strategy, the aim is to establish a modern, single legal text that streamlines and consolidates the existing, partly fragmented framework. The underlying [Inception Impact Assessment](#) lists a number of topics that should be integrated into a future “Police Cooperation Code.” As a first step, the Commission gathered feedback for its ideas. (TW)

### Debate on Broadening Prüm Data Exchange Network

[Euractiv](#) and [Statewatch](#) reported that MEPs discussed plans to reform police cooperation tools, based on the Prüm legal framework, with independent experts at a meeting on 22 September 2020. A next-generation Prüm (dubbed “Prüm.ng”) is currently being discussed in Council working groups. The aim is to further enhance the information exchange between police authorities, in particular by remedying existing shortcomings and including other forms of data exchange, mainly facial images. Currently, the Prüm decisions allow the exchange of fingerprints, DNA (on a hit/no-hit basis), and vehicle owner registration data (direct access via the EU-CARIS system).

The experts at the EP meeting voiced concern over the extension to facial im-

ages. They criticised that the current technology will lead to “false positives” and to biases in algorithms that may entail discriminatory treatment of ethnic minorities; furthermore, uniform standards and transparency are lacking. Many MEPs also took a critical position towards the plans to build up a police facial image database in the EU. They argued that the extension idea is not acceptable as long as problems with the quality of data persist and warned that – given the situation in certain EU countries – the extension may be a playing field for abuses, such as capturing facial images from political opponents. It was advocated that, first, a more in-depth, fact-based assessment of the potential ramifications of the new system should be carried out before going ahead with the expansion concept. Other MEPs were more favourable towards a necessary modernisation of the Prüm framework.

*Background:* Discussions on reform of the Prüm decisions – the major tool for EU police cooperation between national authorities – were triggered by respective [Council conclusions in July 2018](#). They dealt with implementation of the Prüm decisions ten years after their adoption. The conclusions outlined possible future improvements, in particular integrating further data workflows into the Prüm legal framework. The Council was called on to revise Decision 2008/615/JHA and Decision 2008/616/JHA “with a view to broadening the scope of the Decisions and, to that end, to updating the necessary technical and legal requirements.” Europol is also to become a partner in the Prüm network. Subsequently, the Council set up focus groups and discussed possible revisions in the Working Party on Information Exchange and Data Protection (DAPIX). Their work not only deals with the more expansive use of current data categories and the extension to facial recognition technology but also deals with possible use of the network infrastructure for national ID, passport, and other document

registers. The focus groups successively presented reports on their discussions of the topics.

Meanwhile, the Commission mandated the consultancy firm [Deloitte with a feasibility study](#). The [final report](#) – together with an [advanced technical report](#) and a [cost-benefit analysis](#) – was tabled in May 2020. The study identified, analysed, and proposed improvement opportunities for the Prüm framework in the following areas:

- Improving automated data exchange;
- Streamlining and improving the efficiency of the follow-up procedure;
- Introducing new data categories;
- Introducing a new IT architecture;
- Exploring the possibility of linking Prüm to other information systems and to interoperability solutions;
- Integrating other stakeholders.

In parallel, the EP LIBE Committee also commissioned a study that assessed future developments regarding Prüm and Directive 2004/82/EC on the collection and transmission of advance passenger information (“API Directive”). The [September 2020 study report](#) – written by Dr. *Niovi Vavoula*, Queen Mary University of London – is more critical than the Deloitte report and provides a series of policy recommendations on implementation of the Prüm Decisions at the national level, possible ways forward with a view to establishing the next-generation Prüm, and the potential for opening up the Prüm framework to the United Kingdom and third countries, particularly the Western Balkans.

NGOs are campaigning for a ban of biometric mass surveillance, such as facial recognition, throughout the EU. Given that biometric processing technologies, which are highly intrusive and rights-violating, are quietly becoming ubiquitous in public spaces, EDRi and other [civil society organisations have called on](#) the European Commission, the European Parliament, and Member States to ensure that such technologies are comprehensively banned in both law

and practice. The accompanying [policy paper](#) with detailed explanations was issued on 13 May 2020. (TW)

## Judicial Cooperation

### Advocate General: CJEU Should Give Up Petruhhin Decision

In his [opinion in case C-398/19 \(BY – Generalstaatsanwaltschaft Berlin\)](#), delivered on 24 September 2020, Advocate General (AG) *Gerard Hogan* recommends that his colleagues on the Luxembourg judges’ bench no longer follow the [judgement in Petruhhin \(C-182/15 → eucrim 3/2016, 131\)](#). The AG explains the legal and practical difficulties in the application of the maxim in the *Petruhhin* judgment: in situations of extradition requests to Union citizens from third countries, the requested EU Member State (= host State) is required to give the home Member State the opportunity to prosecute the offences of his/her own national and to give priority to a potential EAW of that Member State over the extradition request of the third country.

#### ► *Facts of the case:*

In the case at issue, the person concerned (BY) is a Ukrainian national, who moved from Ukraine to Germany in 2012. Since he was a descendent of former Romanian nationals, he obtained Romanian nationality in 2014; however, he never had his life centre in Romania. In 2016, a Ukrainian criminal court issued an arrest warrant against BY, alleging him of misappropriation of funds in 2010 and 2011. Subsequent to the Ukrainian extradition request, BY was arrested in Berlin (but later released from extradition detention on bail). In view of his Romanian nationality and in application of the CJEU’s *Petruhhin* decision, the Berlin General Prosecutor’s Office inquired whether Romania intends to take over criminal prosecution of BY. The Romanian Ministry of Justice has not clearly answered this yet. It informed the Berlin General

Prosecutor, *inter alia*, that (as a prerequisite for an EAW) the issuing of a national request required a sufficient body of evidence underpinning the commission of the offences abroad. It requested the General Prosecutor’s Office in Berlin to provide documents and copies of the evidence from Ukraine.

#### ► *Questions referred:*

The referring court (*Kammergericht Berlin*) feels restricted to allow the extradition of BY to Ukraine by the CJEU’s judgment in *Petruhhin*, because, so far, the Romanian authorities have neither decided for nor against a prosecution of BY in respect of the alleged offences, which are at the heart of the extradition request. The German court seeks clarification from the CJEU as regards the obligations of the Member States arising from the principles established in *Petruhhin* and poses the following three questions:

- In contrast to the *Petruhhin* case, the person concerned did not possess the nationality of an EU Member State when he moved to Germany, which is why it must be questioned whether the rights deriving from Union citizenship (Arts. 18 and 21 TFEU) actually apply?
- Is the home Member State (here: Romania) obliged to request that the requesting third country (here: Ukraine) provides the case files for the purpose of examining whether to take over the prosecution?
- If Germany declares the extradition illegal, in order to satisfy the principle of non-discrimination enshrined in Art. 18 TFEU, would it then be obliged to take over the prosecution of the Union citizen itself (provided that it is possible to do so under its national law under certain conditions)?

#### ► *The AG’s criticism of the Petruhhin concept*

By way of a preliminary analysis, the AG questions whether *Petruhhin* was correctly decided. He points out that there is a decisive difference between the position of own nationals of the requested State (who enjoy the right not to

be extradited, as conferred, for instance, in the applicable Art. 6 of the CoE 1957 Extradition Convention) and that of non-nationals who hold the nationality of another EU Member State. As regards own nationals, the requested Member State applies the principle *aut dedere aut iudicare* (either extradite or prosecute) without restrictions, i.e., it can exercise extraterritorial jurisdiction over criminal acts of its citizens on the basis of the “active personality principle.” This is not the case for non-nationals/Union citizens, in respect of whom extraterritorial jurisdiction can be exercised only under limited circumstances. The reason for this is that, under the principles of international law, there must be at least a general link if acts were committed by a foreigner on foreign territory. Hence, from a legal point of view, the AG sees a material difference in the circumstances of a risk of impunity and, as a consequence, a non-violation of the principle of non-discrimination in Art. 18 TFEU, depending on the nationality of the requested person. As a result, he reaches the same conclusion as his colleague AG *Yves Bot* in his opinion on the *Petruhhin* case.

In addition, AG *Hogan* lists a series of practical difficulties that resulted from the *Petruhhin* judgment, such as the problem of lacking deadlines by which the host Member State can expect an answer from the home Member State or insufficient information on the part of the home Member State for issuing an EAW if it is approached by a host Member State following an extradition request by a third country. In sum, AG *Hogan* concludes that “the [*Petruhhin*] judgment of 6 September 2016 was, with respect, wrongly decided and should not now be followed by this Court.”

► *Reply to the questions posed:*

If the CJEU would like to stick to the *Petruhhin* judgment, the AG answers the questions of the referring court as follows:

■ The Union citizen is entitled to rely on the rights guaranteed by Arts. 18 and

21 TFEU, regardless of when he obtained such citizenship and whether he actually crossed a border;

■ The home Member State is not obliged under EU law to request that the requesting third country provide the case files for the purpose of examining whether to take over the prosecution;

■ EU law imposes no obligation on the requested State itself to take over the prosecution of a non-national who has been the subject of a third-country extradition request.

► *Put in focus:*

The case at issue shows again that the CJEU’s *Petruhhin* judgment constitutes a paradigm shift in international extradition law. It must be questioned whether it unduly restricts cooperation between EU countries and third countries, considering that not only EU cooperation but also international cooperation is based on mutual trust and pursues the aim of avoiding impunity. In this context, it is worth referring to the recent judgment of the Higher Regional Court of Frankfurt a.M. that combined the “*Petruhhin* principles” with the concepts of the transnational effects of *ne bis in idem* (→[eucrim 2/2020, 110](#)). The Frankfurt court had denied the extradition of an Italian citizen (charged with gang fraud (art forgery)) to the USA, because he had previously been sentenced in Italy on the same charges. (TW)

**Council: Summary on Impact of COVID-19 on Judicial Cooperation in Criminal Matters**

At the end of October 2020, the General Secretariat of the Council published an [executive summary](#), compiling the information received from Eurojust and the European Judicial Network (EJN) on judicial cooperation in criminal matters as regards the impact of measures taken by governments of the EU Member States (and Iceland and Norway) to combat the spread of COVID-19.

The executive summary outlines the impact of these measures on the issuing and execution of European Arrest War-

rants (EAWs), European Investigation Orders (EIOs), mutual legal assistance (MLA) requests, and freezing and confiscation orders. Furthermore, it summarizes the impact of these measures on extradition, the transfer of sentenced persons, and the use of Joint Investigation Teams.

While the situation with regard to the warrants and orders has been brought back to normal, with most judicial authorities having resumed to their activities, the reports finds that the COVID-19 crisis continues to impact the actual surrender of requested persons and the transfer of sentenced persons, often resulting in postponement or suspension.

The Council, Eurojust, the EJN, and the Commission regularly collect information on the responses of EU Member States to the consequences of the corona pandemic on judicial cooperation in criminal matters (→[eucrim 2/20, 108–109](#)). (CR)

**ECBA: Principles on the Use of Video-Conferencing in Criminal Cases**

In September 2020, the European Criminal Bar Association (ECBA) issued a statement setting out [principles on the use of video-conferencing in criminal cases in a post-COVID-19 world](#). The ECBA observed that, faced with the challenges of the COVID-19 pandemic, judicial authorities in Europe and elsewhere have made intensified use of remote technologies, in particular video-conferencing, as a replacement for the physical presence of the suspect/accused, witnesses, experts, defence and prosecution lawyers, court clerks, and even judges. There are two sides to the medal. On the one hand, remote technologies may reduce delays in the criminal process and further the defendant’s right to be heard. On the other hand, they entail risks to the right to a fair trial, in particular the right to be present with all its repercussions.

European criminal lawyers fear that remote presence via video will turn from an exceptional tool to a regular one in

### New Translation of German Act on International Cooperation in Criminal Matters Published

In collaboration with the German Federal Office of Justice, the German Federal Ministry of Justice and Consumer Protection published a [new translation of the German Act on International Mutual Assistance in Criminal Matters](#) (*Gesetz über die internationale Rechtshilfe in Strafsachen – IRG*). The translation not only includes an update of new provisions but also replaces the former translation, which dates back to 2012. The new translation especially takes into account recent German provisions that implement the various EU mutual recognition instruments and other related Union law, such as Directives conferring procedural safeguards to EAW constellations and EU data protection rules. EU cooperation has been embedded into the IRG. The provisions are included in Parts 8 et seq. of the Act (Sections 78 et seq.). The translation also includes the amendments to the Act that were lastly made in December 2019. English translations of German acts and laws are available via the [Internet site “gesetz-im-internet.”](#) (TW)

the post-COVID era. Therefore, they developed several principles that should be considered quintessential for ensuring the right to defence in such situations. The paper first distinguishes between the use of remote hearings in cross-border and domestic cases and, second, the use of remote technology during the pre-trial stage (to conduct interviews of the suspects/accused) and the trial stage (to run hearings). The ECBA makes concrete proposals for actions that should be undertaken by the EU and Council of Europe institutions and the Member States. In cross-border cases, the ECBA considers hearings by means of video-links highly useful in that, if conducted appropriately, they can serve as a much better alternative to temporary transfers and surrenders. In this context, it calls on, *inter alia*, to:

- Explicitly establish the right of the accused to participate by video-link, at least in cases in which this is the most proportionate solution;
- Develop appropriate and compatible legal standards for remote participation;
- Promote the development of appropriate and compatible technical infrastructures and solutions (which allow for true-to-life remote participation and the exercising of procedural rights in this context);
- Consider issues relating to transparency and privacy in the use of remote technology in criminal trials.

In domestic cases, the ECBA clearly advocates establishing the right of the accused to be physically present at his/her trial and prohibiting mandatory participation of an accused in his/her trial by video-links. (TW)

### European Arrest Warrant

#### CJEU Delivers Judgment on Speciality Rule

On 24 September 2020, the CJEU ruled on a reference from the German Federal Court of Justice (*Bundesgerichtshof*) in an urgent preliminary ruling procedure ([Case C-195/20 PPU](#) [*Generalbundesanwalt beim Bundesgerichtshof v XC*]). The case concerned interpretation of the speciality rule applicable to the European Arrest Warrant. This rule is laid down in Art. 27(2) and (3) of Framework Decision 2002/584 (FD EAW). It states that persons surrendered may not be prosecuted, sentenced, or otherwise deprived of their liberty for an offence committed prior to their surrender other than that for which they were surrendered (Art. 27(2)). This principle does not apply, however, if the executing judicial authority that surrendered the person gives its consent (Art. 27(3)(g) FD EAW).

The CJEU has now ruled that the principle of speciality is linked to the execution of only one particular EAW. This means that the principle of special-

ity does not preclude a measure restricting the liberty of a person who was the subject of a first EAW from being the subject of an arrest warrant for an earlier and different act for which he/she was surrendered in execution of said arrest warrant and if that person voluntarily left the territory of the issuing Member State of that first EAW. In the concrete case, this meant that only Italy, which decided on a second EAW against the person concerned, had to give its consent for further prosecutions and not Portugal, which decided on the first EAW.

The case before the CJEU indirectly has to do with the missing person case *Maddie McCann*. In 2007, the four-year old girl disappeared from her bed in an apartment at a resort in the Algarve region of Portugal. The case attracted huge media coverage. One person is currently the main suspect of having kidnapped and abused the child. He is in prison in Germany for other crimes that were the subject to the preliminary ruling procedure before the CJEU. He remains silent regarding the *Maddie McCann* case, and the prosecution office of Braunschweig is continuing investigations against him. Nonetheless, the CJEU has confirmed that German authorities did not make a mistake when they convicted the defendant for other offences in 2019. He must remain in prison and serve a combined custodial sentence of seven years. (TW)

#### AG: No Automatic Non-Execution of EAWs Issued by Poland

At the end of July 2020, the Rechtbank Amsterdam referred to the CJEU the question of whether the “real risk” of an unfair trial due to the lack of independence of the Polish judiciary could justify a general ban on the execution of European Arrest Warrants (issued for the purpose of prosecution) from Poland ([Case C-354/20 PPU](#) (*Openbaar Ministerie*)). At the beginning of September 2020, the Dutch court referred a second case to the CJEU that deals with the execution of EAWs issued for the purpose of execut-

ing Polish sentences ([Case C-412/20 PPU](#)). The referring court argues that recent developments have had such an impact on the independence of the Polish courts that they can no longer be independent of the Polish government and parliament. In light of the worsening of the generalised and systemic deficiencies in the Polish justice system, the Rechtbank, in essence, is asking whether it is entitled to deviate from the CJEU judgment in [Case C-216/18 PPU](#) (“*LM*” → [eucrim 2/2018](#), 104–105) and whether it is entitled to refuse the surrender requested by Polish courts without having to examine in detail the specific circumstances of each EAW.

In his [opinion of 12 November 2020](#), Advocate General *Campos Sánchez-Bordona* takes the view that even intensification of the threat to judicial independence in Poland cannot lead to automatic refusal. On the contrary, the two-stage examination as established in the *LM* judgment must be maintained and rigorously followed by the national courts:

- (1) Examination of whether there is a real risk of fundamental rights infringements as a result of systemic or generalised deficiencies affecting the independence of the issuing judicial authority;
- (2) Specific and precise examination of whether the right to a fair trial could be breached in the specific case.

Failure to carry out the second step of the examination could lead to impunity for many crimes and thus to a violation of victims’ rights. It would also discredit the work of all Polish judges. An automatic suspension of execution could only be considered in the event of a serious and persistent breach of the EU’s fundamental values, as formally identified by the European Council. The conditions under which a judicial system can protect the principles of the rule of law would then no longer apply. This particular system makes it all the more necessary for the Rechtbank Amsterdam to rigorously examine the individual circumstances.

*Background:* Based on the decision of the CJEU in *LM*, a German court refused, for the first time, surrender to Poland due to fair trial concerns in February 2020 (→ [eucrim 1/2020](#), 27–28). Recently, legal experts called on politicians to increase pressure on Poland to adhere to the rule of law, because the issue cannot be burdened to judges executing EAWs (→ following news item. (TW)

### Legal Experts Call for Political Intervention after EAW Suspensions

Against the background that more and more national courts tend to suspend cooperation with Poland due to rule-of-law concerns, the Meijers Committee – an independent group of experts on international immigration, refugee and criminal law – urge politicians to increase pressure on the concerned Member States to adhere with the EU values and the rule of law. [The statement points out](#) several side effects of the aforementioned development:

- Bearing in mind that the European Arrest Warrant mechanism was set up in order to keep the judiciary away from deciding on politically sensitive issues, judges now in fact have to assess these issues, while those who should act – politicians – remain almost silent;
- It is unrealistic to place all hope in the CJEU, which cannot bring about a workable legal solution;
- Large-scale suspension of surrender may lead to an increased prosecution of the alleged crimes in the executing State, which will jeopardise the principle of rehabilitation;
- Long-term suspension creates long-term uncertainty for requested persons on their legal position;
- Member States must pose the question of whether they can still issue EAWs towards Member States in which the rule of law is in decline;
- Suspension may have undesirable repercussions on the side of the Member States, because the Member States blamed may increasingly refuse the ex-

ecution of incoming requests as a counteraction.

The Meijers Committee believes that these arguments justify more than ever that political intervention is needed now. (TW)

### EAW and Ireland: Commission Initiates Infringement Procedure

In October 2020, the Commission [initiated an infringement procedure against Ireland](#) for not complying with the FD EAW. The Commission believes that Ireland has failed to comply with the mandatory time limits for executing EAWs. In addition, the Commission criticises that Ireland introduced additional grounds for refusal of an EAW that affect cross-border judicial cooperation. The Commission sent a letter of formal notice to Ireland, giving it two months to take the necessary measures to address the shortcomings identified by the Commission. (TW)

### Draft for EP Resolution on EAW

On 3 September 2020, MEP *Javier Zarzalejos* (EPP, ES), member of the LIBE Committee, presented the first [draft of a resolution by the EP](#) on the implementation of the European Arrest Warrant. According to *Zarzalejos*, the EAW system is a success, and the limited problems that still exist do not put this into question. He also analysed targeted revisions of the tool, e.g., as regards the double criminality issue. He suggests thinking of the extension of the list of 32 offences for which double criminality checks do not take place or the approval of a “negative list,” in which Member States can convey the offences that have been decriminalised and that they do not wish to cooperate on. The latter model was already proposed at the very beginning in the Commission’s proposal on the EAW in 2001.

*Zarzalejos* stresses, however, that many problems can also be solved by soft-law mechanisms, practical guidance, and training. As regards the issue of fundamental rights, he calls on the Commission to supplement the FD

EAW with further harmonisation of procedural safeguards, e.g., on the admissibility of evidence and prison conditions in pre-trial detention. An additional EU platform, including all EU Member States, should be considered, which aims at information exchange and learning, including an overview of the diverse national EAW case law.

The draft has not remained without controversy. Other committee members [submitted 235 amendments](#) by 5 October 2020. The [Committee on Constitutional Affairs](#) also handed in a comprehensive list of suggestions for the EP resolution on 12 October 2020.

The draft builds, *inter alia*, upon an exchange of information with stakeholders, such as the European Commission, Eurojust, FRA, academics (including the 2016 EP EAW report), and practitioners using the instrument; the Commission's implementation report of July 2020 ([→eucrim 2/2020, 110](#)); and the comprehensive ex-post impact assessment by the EPRS, published in June 2020 ([→eucrim 2/2020, 111](#) and the article by *W. van Ballegooij*, [eucrim 2/2020, 149–154](#)) (TW)

## European Investigation Order

### Eurojust: EIO Casework Report

On 10 November 2020, Eurojust published the first [report on its casework in the field of European Investigation Order \(EIO\)](#). The report informs practitioners and policymakers of the main difficulties encountered in the practical application of the EIO, showcases solutions and best practice, and illustrates support offered by Eurojust.

According to the report, the most relevant issues with regard to the EIO are as follows:

- Defining the scope of the EIO;
- Clarifying the content of the EIO and assisting with requests for additional information;
- Bridging the differences among national legal systems;

- Ensuring a correct and restrictive interpretation of the grounds for non-execution of EIOs;
- Accelerating the execution of EIOs;
- Facilitating direct contact and the exchange of information between issuing and executing authorities ;
- Resolving language issues;
- Encouraging the use of Annexes B and C of the EIO Directive;
- Transmitting EIOs to the competent executing authorities ;
- Coordinating the execution of EIOs in different Member States and/or together with other instruments.

For many of these issues, the report recommends seeking the support of Eurojust at an early stage. Furthermore, it outlines best practice examples on how to better handle the problems that have emerged. (CR)

## Law Enforcement Cooperation

### E-Evidence Legislation – State of Play

At a [videoconference on 9 October 2020](#), the German Council Presidency informed the justice ministers of the state of play regarding the e-evidence legislative proposals submitted by the Commission in April 2018 ([→eucrim 1/2018, 35–36](#)). The proposals – one for a Regulation on the European Production and Preservation Order and one for a Directive on the appointment of legal representatives of the IT companies – aim to speed up access to electronic evidence, regardless of the location of the data. The ministers reiterated their Council negotiating position, as agreed, on the Regulation in December 2018 ([→eucrim 4/2018, 206](#)) and on the Directive in March 2019 ([→eucrim 1/2019, 40](#)). The Presidency hopes that the European Parliament will adopt their position soon, so that trilogue negotiations can begin soon. The EP has [not taken any essential action](#) since the MEPs' critical positions in 2019 ([→eucrim 1/2019, 38–40](#)).

The European Commission also re-

ported to ministers about ongoing international negotiations on e-evidence, which include negotiations for an EU-US agreement on cross-border access to e-evidence ([→eucrim 3/2019, 179](#)) and negotiations in the Council of Europe on a second additional protocol to the Budapest Convention ([→eucrim 4/2019, 248](#)). (TW)

## 25 Organisations Demand Fundamental Rights-Based Approach to E-Evidence Legislation

In a [joint letter of 14 September 2020](#), a coalition of 25 organisations calls on the members of the EP's LIBE Committee to ensure that forthcoming legislation on e-evidence contains procedural safeguards for journalists, doctors, lawyers, social workers, etc. The signatories, which include professional associations, media organisations, civil society groups, social services organisations, and technology companies, demand that e-evidence legislation must contain explicit legal safeguards against law enforcement abuses and political prosecution. These should include:

- Active involvement of judicial authorities from the executing State and, where applicable, the affected State;
- Powers of these judicial authorities to review a production or preservation order based on their own national legal framework and, subsequently, to validate or reject the order before an online service provider can execute it;
- No “auto-execution” after a certain period of time had lapsed.

The letter also points out that respect for basic human rights is even more important at a time when some Member States are suffering a serious degradation of the rule of law and democratic principles, thus compromising European values. (TW)

### Training on Requesting E-Evidence

Europol's [training game SIRIUS](#), which has been offering law enforcement training in the field of online investigations since 2017 ([→eucrim news dated](#)



## CEPS/QMUL Report Helps Navigate the E-Evidence Discussion

In October 2020, a taskforce of the Centre for European Policy Studies (CEPS) and Queen Mary University of London (QMUL) published a [report on “Cross-border data access in criminal proceedings and the future of digital justice”](#). The report contributes to the current discussion on law enforcement obtaining electronic data held by service providers that are subject to another jurisdiction. The report is the result of discussion within the Task Force that included EU and national policymakers, providers of internet and telecommunication services, prosecutors, criminal lawyers, civil society actors, and academic experts.

It examines the ways in which data can currently be requested, disclosed, and exchanged – in full respect of the multilayered web of legally binding criminal justice, privacy, and human-rights standards that apply within the EU and in cooperation with third countries. After having analysed the current main developments concerning cross-border access of law enforcement authorities to data stored by service providers – i.e., the US CLOUD Act, the drafting of the Second Additional Protocol to the Budapest Convention, and the European Commission’s e-evidence proposal –, the authors (*Sergio Carrera, Marco Stefan and Valsamis Mitsilegas*) provide a number of policy, normative, and technical solutions. They are designed to facilitate rule-of-law-based and fundamental rights-compliant judicial cooperation when it comes to the cross-border gathering and transfer of data in criminal proceedings. Key findings include:

- Reciprocal judicial scrutiny of cross-border data-gathering measures constitutes a key factor that must be maintained in judicial cooperation between EU countries;
- A compatibility assessment with EU legal standards should remain a prerogative of States’ judiciaries and cannot be performed by service providers as private companies;
- Instruments that promote the direct and unmediated extraterritorial enforcement of criminal jurisdiction exacerbate conflict of laws;
- There is no quantitative or qualitative evidence showing that procedures under the European Investigation Order (EIO) take too long or are ineffective for the purpose of collecting e-evidence across borders;
- Improvement could be made by having a single EU portal for electronic communication and transmission of digital EIOs;
- Given the recent CJEU *Schrems II* ruling (→[eucrim 2/2020, 98–99](#)), EU international cooperation instruments enabling cross-border transfers of data must provide for effective safeguards;
- Protection of EU standards can be ensured by applying the EU-US MLA Agreement – the standing legal basis for the collection and transfer of electronic information;
- The CLOUD Act is a one-sided instrument designed to serve U.S. interests and leading to disadvantages of non-US citizens or residents;
- EU Member States’ participation in the negotiations on the Second Addition Protocol to the Budapest Convention risks the coherence with applicable EU law;
- The e-evidence proposal would introduce an EU legal framework on direct public-private partnership, with the intention of overcoming “legal fragmentation” and solving financial issues;
- Given recent developments, there is a serious need to reassess the necessity and appropriateness of the proposed e-evidence rules;
- The lack of systematic and/or meaningful involvement of competent oversight authorities in the country of execution or in the affected State (in the e-evidence proposal) limits the right to effective judicial remedy;
- The direct interconnection of law enforcement authorities with service providers will generate hitherto largely unexplored challenges;
- A new EU instrument allowing Members States’ judicial authorities to order disclosure of the content of electronic communication data directly from U.S. service providers would not prevent conflicts of law and conflicts of jurisdiction at the transatlantic level.

The CEPS/QMUL report contributes food for thought to the current, heated debate on e-evidence (see previous eucrim issues under the heading “Law Enforcement Cooperation”). (TW)

[17 February 2020](#)), now also takes the user through an immersive scenario to learn how to request data from online service providers, such as Internet providers and social media platforms. By playing the game, users gain hands-on experience on this complex issue involving online service providers that can be located outside of Europe and all have specific ways of receiving such requests from law enforcement. (CR)

## Updated Memorandum on Battlefield Evidence

With a view to strengthening the EU’s information exchange in the field of counter-terrorism, Eurojust published a new edition of its [Memorandum on Battlefield Evidence](#) in September 2020. The Memorandum outlines present-day possibilities of and experiences with using battlefield evidence in criminal proceedings in EU Member States and non-EU countries. It is based on replies to a questionnaire received from national judicial authorities and includes the following:

- The applicable legal framework;
- Overview of how battlefield information is obtained from military forces and other actors;
- Experiences of national authorities in using battlefield information as evidence.

While the first edition of the Memorandum of 2018 could not rely on many experiences of national authorities in obtaining and using battlefield information, this experience has significantly increased over the last two years. Hence, this new edition provides more detailed chapters on categories of battlefield evidence, how to use battlefield experience in judicial proceedings, and how to overcome corresponding challenges. The Memorandum must be seen in the wider context of international efforts to make better use of information obtained in conflict zones. Such information is considered particularly relevant when prosecuting foreign terrorist fighters. (CR)



## Council of Europe

Reported by Dr. András Csúri

### Foundations

#### European Court of Human Rights

##### ECtHR: Launch of New Factsheets

On 18 September 2020, the European Court of Human Rights launched a series of four new factsheets providing an overview of its case law on the following topics:

- [Independence of the justice system](#);
- [Restrictions on the right to liberty and security for reasons other than those prescribed by the ECHR](#);
- [The right to respect for family life of prisoners in remote penal facilities](#);
- [The use of force in the policing of demonstrations](#).

The ECtHR's factsheets have been translated into several languages and aim to increase awareness of the Court's judgments in order to improve the domestic implementation of the ECHR.

##### ECtHR: Launch of HUDOC Case-Law Database in Ukraine

On 5 November 2020, the Court launched the [Ukrainian interface](#) of its case law database HUDOC, which was developed in cooperation with Ukrainian authorities. At the virtual launch of the database, Ms *Ganna Yudkivska*, judge elected in respect of Ukraine, emphasised that there are currently about 10,000 applications pending against the country. She expressed her hope that the new HUDOC interface would further increase understanding of the Court's case law among legal professionals and the

general public. The Ukrainian interface joins the existing English, French, Georgian, Russian, Spanish, and Turkish versions of the HUDOC database.

### Specific Areas of Crime

#### Corruption

##### GRECO: Fourth Round Evaluation Report on San Marino

On 29 September 2020, GRECO published its [fourth round evaluation report](#) on San Marino. This evaluation round was launched in 2012 in order to assess how states address the prevention of corruption with respect to Members of Parliament (MPs), judges, and prosecutors (for recent reports → [eucrim 1/2018, 39–40](#); [3/2019, 184](#) with further references). San Marino is one of the smallest members of GRECO, with an economy based mainly on services, in particular banking and tourism. It is currently negotiating an association agreement with the EU to access the internal market.

As regards MPs, the 2017 *Conto Mazzini* case, which resulted in the conviction of a large number of persons among the political elite, placed the actions of politicians under closer public scrutiny. GRECO acknowledges the transparency of the legislative process: information is available at every stage, decisions are mainly made by open vote, and exceptions are strictly regulated by law. Because of the part-time status of

MPs and the natural proximity between citizens and politicians, however, the report emphasises the need for better regulation of conflicts of interest by introducing the public declaration of assets, income, liabilities, and interests as well as a code of ethics for MPs.

As far as judges and prosecutors are concerned there is no difference between judges and prosecutors as they belong to the same professional corpus of officials (thus, the principle of the unity of the judiciary does apply). However, controversy exists in the country as to the perceived interference of politics in judicial work, e.g., to the composition of the Judicial Council and to recruitment processes (especially when the person is recruited from outside the judicial track). The report also identifies deficiencies regarding the case backlog, particularly in civil matters, current technical means, the publicity of court decisions, and case assignments.

Against this backdrop, GRECO recommends that, based on objective and measurable selection criteria, the composition of the Judicial Council should be changed by providing that at least half of its members are judges elected by their peers and that non-judicial members cannot be members of the executive and the legislative. The appointment and permanent employment of judges should be regulated according to clear and objective criteria, based on merit, with regard to qualification, integrity, ability, efficiency, and a transparent procedure. The criteria for consistent, fair, and objective case allocation should also be strengthened and an analysis of the workload, internal procedures, and resources conducted. To increase transparency, all court decisions shall be published in a user-friendly format and made available to all legal professions and to the public at large. There is further need to update the codes of conduct for judges, accompanied by explanatory comments. Lastly, the disciplinary liability of judges is to be revised, with a view to strengthening its objectiv-

ity, efficiency, and proportionality. This should be achieved, in particular by better defining disciplinary infringements and the requirements for initiating such proceedings as well as by providing for a more nuanced range of sanctions and appeal channels.

## Money Laundering

### MONEYVAL: Follow-Up Report on Lithuania

On 24 August 2020, MONEYVAL published its [first enhanced follow-up report](#) on the efforts of Lithuania to improve its AML/CFT measures based on the [fifth round evaluation report](#) adopted in December 2018 ([→eucrim 1/2019, 45](#)). Such follow-up reports analyse progress in addressing the technical compliance deficiencies identified in the mutual evaluation reports and the implementation of new requirements concerning the FATF Recommendations. The follow-up reports do not address what progress the countries have made to improve their effectiveness. The country's compliance with international standards was upgraded, meaning that Lithuania's understanding of national ML/TF risks has improved. It has also taken appropriate countermeasures. The follow-up report took into account the implementation of new international requirements for virtual assets, covering both virtual currencies and the providers of these assets. Since deficiencies remain, however, MONEYVAL downgraded Lithuania's rating from "largely compliant" to "partially compliant" in the area of virtual assets.

The report notes that Lithuania has reached a level of full compliance with eight of the 40 FATF Recommendations that constitute the international AML/CFT standard. The country remains in the enhanced follow-up process.

### MONEYVAL: Follow-Up Report on Ukraine

On 28 August 2020, MONEYVAL published its second enhanced [follow-up](#)

[report](#) on the efforts of Ukraine to improve its AML/CFT measures based on the [fifth round evaluation report](#) adopted in December 2017 ([→eucrim 1/2018, 40–41](#)). MONEYVAL upgraded the Ukraine to "largely compliant" regarding its criminal law provisions for the offence of TF and the sanctions available against financial institutions and other entities for non-compliance with AML/CFT legislation. In the following areas, the ratings remained the same:

- Financial sanctions related to terrorism and to proliferation;
- Regulation and supervision of non-financial professions;
- Maintenance of national statistics on AML/CFT.

The implementation of old and new requirements for virtual assets was downgraded from "largely compliant" to "partially compliant." Overall, to date, Ukraine has achieved full compliance with eleven of the 40 FATF Recommendations constituting the international AML/CFT standard. The country remains in the enhanced follow-up process and is to report back in one year's time.

### MONEYVAL: Follow-Up Report on the Czech Republic

On 26 August 2020, MONEYVAL published its [first enhanced follow-up report](#) on the efforts of the Czech Republic to improve its AML/CFT measures based on the [fifth round evaluation report](#) adopted in December 2018 ([→eucrim 1/2019, 45](#)). MONEYVAL noted progress and assigned higher compliance ratings for the following:

- The mechanisms for national cooperation and coordination to tackle ML/TF;
- The strengthening of countermeasures against countries and jurisdictions with a high ML/TF risk;
- The eradication of regulatory gaps for corresponding banking relationships, thereby increasing transparency for bank-to-bank transactions.

The Czech Republic could not be upgraded in the areas of financial sanctions related to terrorism and tracking

mechanisms for the movement of cash across borders, due to the lack of sufficient improvements in these areas. However, the report sees some progress in the implementation of the new international requirements regarding virtual assets. To date, the country has reached a level of full compliance with five of the 40 FATF Recommendations and remains in the enhanced follow-up process.

### MONEYVAL: Follow-Up Report on the Isle of Man

On 23 October 2020, MONEYVAL published its [third enhanced follow-up report](#) on the efforts of the Isle of Man to improve its AML/CFT measures based on the [fifth round evaluation report](#) adopted in December 2016 ([→eucrim 1/2017, 23](#)). MONEYVAL noted the Isle of Man's steady, positive progress, particularly that made by the Financial Supervisory Authority in the implementation of its sanctioning regime. MONEYVAL also assigned a higher international compliance rating in the areas of tipping-off and confidentiality and gave a positive compliance rating in the area of new technologies, including virtual assets. A rating related to group-wide requirements for non-financial businesses and professions is still pending. To date, the Isle of Man has reached a level of full compliance with twenty of the 40 FATF Recommendations and remains in the enhanced follow-up process.

### MONEYVAL: Money Laundering and Terrorism Financing Trends during the COVID-19 Crisis

On 2 September 2020, MONEYVAL published a [report](#) outlining general assumptions and preliminary conclusions on threats, vulnerabilities, and best practices identified during the ongoing corona pandemic. The report is based on information received from its members. It aims to assist policymakers, practitioners, and the private sector in applying a more targeted and effective response to emerging ML/TF risks.

The report underlines that criminals have updated their *modus operandi* to gain additional profits by exploiting the upheaval generated by the COVID-19 pandemic. While the level of criminality remained stable, there has been a surge in certain crimes, especially those with transnational elements, e.g., fraud through electronic means, the sale of counterfeit medicines, and cybercrime.

The promptly implemented economic and relief measures aiming to support businesses and individuals have created new opportunities for misappropriation. Furthermore, the urgent need to acquire specific medical equipment and supplies in some countries has led to a temporary suspension of complex controls in public procurement procedures, creating vulnerabilities for fraud, corruption, and subsequent ML.

The limits imposed on physical meetings in the private sector have raised supervisors' concerns with regard to the full application of customer due diligence measures. The reporting of suspicious transactions has remained steady. As supervisory control of ML/TF threats shifted to off-site and desk-based reviews, the authorities in charge have found innovative ways to carry out their tasks by using secure electronic means and shared-screen facilities. Domestic information exchange was only minimally disrupted, and international cooperation in the fight against ML/TF does not appear to have been negatively impacted by the measures against COVID-19.

Some of the findings in the report are also relevant for the general public, in particular information on potential criminal schemes, such as phishing emails, text messages containing links to malicious websites, attachments with the aim of obtaining personal payment information, and social engineering.

Based on these findings, the report offers a number of recommendations in all the above areas, *inter alia*:

- Any exemptions or simplified meas-

ures should be properly justified and supported by a risk analysis;

- Jurisdictions should continue to provide assistance to the private sector by communicating relevant information on risk situations, including the present report;

- Authorities should closely monitor the situation of public procurement, especially where controls have been relaxed;

- More resources should be placed into off-site monitoring when on-site controls are not possible;

- Jurisdictions should be able to provide to foreign counterparts all relevant information on legal persons to the fullest extent possible, as criminals are actively using foreign legal persons to commit fraud offences.

#### **MONEYVAL: Fifth Round Evaluation Report on Slovakia**

On 29 October 2020, MONEYVAL published its [fifth round evaluation report](#) on the effectiveness of the Slovak anti-money laundering (AML) and countering the financing of terrorism (CFT) regime and on its level of compliance with FATF Recommendations. MONEYVAL points out that Slovak authorities have a moderate understanding of the national ML and CFT risks, which include organised crime, corruption, and cybercrime. While some prosecutors have a good understanding of the attendant risks, other actors rely on the results of the said not entirely correct national risk assessment.

The Slovak Republic scores poorly on the use of financial and other relevant information to gather evidence and detect criminal assets. The outcome of ML investigations and prosecutions only partially reflects the country's response to these risks. While the number of convictions for ML has increased since the last assessment, a large proportion of them relates to simple property offences, e.g. car theft.

The lack of a central bank account register and useful beneficial ownership information are considered the main

challenges when carrying out financial analysis. The officials at the Financial Intelligence Unit (FIU) are knowledgeable, but there is a lack of coherent management guiding their activities. There are significant deficiencies in the mechanism for transmitting their analyses to the relevant agencies, as most of them are only forwarded to the fiscal authorities and not to law enforcement agencies.

Preventive measures are seriously affected by the lack of proceeds-oriented operative analysis, logistical and procedural constraints, the limitations to seizing assets from third parties, and the high burden of proof required for certain provisional measures. Confiscation is rarely imposed, if at all, in criminal cases and only a fragment of the secured assets is ultimately recovered.

There were no convictions for TF in the period assessed, with three relatively complex investigations still underway. Slovak banks have demonstrated a good understanding of the ML/TF risks, but some non-banking financial institutions and designated non-financial businesses and professions were unable to clearly articulate how ML might occur in their institution or sector. The private sector has generally demonstrated an understanding of the procedures for reporting suspicious transactions to the FIU and is submitting an adequate number of reports. In turn, the FIU has recently begun to improve its feedback to reporting entities.

Slovakia created the "Register of Legal Entities, Entrepreneurs and Public Authorities" in 2018. At the time of MONEYVAL's evaluation visit in 2019, the process of filling in the register had just started; it is progressing gradually. There are no mechanisms, however, to verify information on the actual beneficial owners at the time of registration, except for some ex-post control mechanisms by state authorities. Based on the results of the evaluation, MONEYVAL is applying its enhanced follow-up procedure to Slovakia.

## MONEYVAL: Fifth Round Evaluation Report on Georgia

On 2 November 2020, Moneyval presented its [fifth round evaluation report](#) on Georgia. However, there are deficiencies in the identification, in-depth analysis, and understanding of some specific threats, vulnerabilities, and risks, e.g.:

- The use of cash in the economy;
- The real estate sector;
- Trade-based ML/TF (including in free industrial zones of Georgia);
- The activities of legal persons;
- The use of non-profit organisations.

The existing exceptions regarding the application of the FATF Recommendations are not tailored to strictly limited and justified cases and are either not supported by any risk assessment or do not correspond to the results of the national risk assessment. Proactive disclosure of information by the Financial Intelligence Unit is an important source for initiating investigations into ML/TF cases. However, the impact of disclosure is limited by significant restrictions on the financial information that law enforcement can obtain at all.

Potential ML cases are not adequately detected and the total number of investigations is modest compared to the scale of predicate offenses in the country. Nevertheless, when potential ML cases are detected, they are effectively investigated using a range of techniques, mainly by the AML Division of the Attorney General's Office (GPO). This has resulted in the successful resolution of several cases involving high-asset values and complex factors.

The prosecution of ML cases only partly reflects prevailing criminal trends and threats. As there are no legal or structural obstacles to prosecuting ML

cases, however, there have been convictions for all types of ML. Nevertheless, the number of convictions in complex ML cases and in cases involving legal entities remains low.

Fighting TF has been well integrated into counter-terrorism strategies and investigations. TF is generally investigated and prosecuted quite effectively using a range of investigative methods. There have been two TF prosecutions involving different types of TF activities, resulting in multiple convictions. If a conviction is not possible, alternative measures are also used to good effect.

Georgia has a new legislative framework for implementation of the UN Security Council Resolutions on targeted financial sanctions with respect to TF and proliferation financing, but it is still not in line with the notion of "implementation without delay". Despite having convicted persons for terrorism and TF, Georgia has not listed any terrorists or terrorist organisations for the assessment period.

The knowledge level of the risks highlighted in the national risk assessment and/or outlined in the AML/CFT law and guidance notes was generally good among financial institutions. However, the overall risk posed by the high level of cash in circulation in the country has been underestimated. Significant gaps were also found in the application of customer due diligence measures by most designated non-financial businesses and professions and by the National Agency of Public Registry for the real estate sector.

The National Bank of Georgia and the Insurance State Supervision Service oversee most financial institutions and have a comprehensive understanding of

sectoral and individual institution risks. They apply robust "fit and proper" entry examinations to such institutions and conduct ongoing reviews of licensing requirements.

Although casinos pose the highest ML/TF risks in the country, the Ministry of Finance does not conduct AML/CFT supervision of casinos in practice. There are also technical deficiencies in licensing requirements, which seriously undermine the effectiveness of these requirements in preventing criminals or their associates from controlling or managing a casino. According to the report, the application of "fit and proper" entry controls, among other non-financial measures, is inconsistent. In addition, the level of AML/CFT oversight is inadequate and uneven. As a result, the low level of reporting of suspicious transactions remains a problem.

Setting up a legal entity in Georgia is straightforward, and all information required for registration is publicly available. The authorities have not demonstrated effective identification and analysis of threats and vulnerabilities related to ML and TF through such entities, although it is widely known that the use of "fictitious" limited liability companies in criminal schemes poses a significant ML risk. The mechanisms available in practice to obtain information on beneficial ownership of legal entities established in Georgia do not provide adequate, accurate, and up-to-date information in all cases. Georgia has mechanisms in place to effectively engage in international cooperation, and its authorities have cooperated with a variety of foreign jurisdictions to provide and obtain information through both formal and informal channels.

### Fil Rouge

The Commission's Expert Group on EU Criminal Policy was established in 2012 and is composed of ten practitioners and ten academics. Coordinated by the Directorate-General for Justice and Consumers, the Group acts as a think-tank and provides invaluable support to the Commission in keeping pace with societal, legislative, and judicial developments in the field of criminal law. The most recent output from the experts is a series of papers that investigate a number of key issues surrounding EU criminal policy and that provide recommendations for EU action, including follow-up by the Commission through legislative proposals. These papers were discussed at two Expert Group meetings and finalised in the final quarter of 2020. The views expressed therein are those of the authors only and do not represent the Commission's position.

A first analysis of the current EU rules on the admissibility of evidence is given by *Ligeti, Garamvölgyi, Ondrejová, and von Galen*, who argue that the time has come to provide legislative follow-up to the 2009 Green Paper on the matter. This is a remarkably timely suggestion, since the Commission soon plans to conduct a study to evaluate the need for, and possible content of, a Union instrument laying down minimum rules on the mutual admissibility of evidence.

Two articles on two interlinked matters follow. The first deals with jurisdictional conflicts in criminal matters within the EU and is authored by *Kaiafa-Gbandi*, who calls for the EU to find a better solution with regard to the settlement of these conflicts. In the second article, *Satzger* outlines the only existing mechanism that currently helps solve conflicts of jurisdiction, namely the *ne bis in idem* principle. He concludes that an EU legal act summarising, correcting, and further developing the concept of a European *res judicata* and its consequences should be adopted; this should be without prejudice, however, to the CJEU's crucial role in clarifying the scope and application of said principle.

*Espina, Ettenhofer, Falletti, and Weyembergh* explore the institutional framework for cooperation among EU bodies active in the field of criminal justice – Eurojust, the European Public Prosecutor's Office (EPPO), and the European Judicial Network. They put forward useful suggestions for

enhancing this framework. As the EPPO is about to start its operational activities, these reflections set the scene for a highly topical debate that is likely to continue for the next several years.

*Baker, Harkin, Mitsilegas, and Peršak* make a strong case for a harmonised approach to pre-trial detention rules. They recommend the adoption of EU legislation that at least covers rules on the maximum length of pre-trial detention and enshrines the principle of the presumption of liberty, including the complementary principle that pre-trial detention is to be used only as a last resort. Now that the CJEU's case law is paying increasing attention to pre-trial detention, *inter alia*, the Commission will soon examine the opportunity to lay down minimum rules on the matter.

A detailed assessment of several options to improve defence rights in the EU is provided by *Costa Ramos, Luchtmann, and Munteanu*, who focus on the need for additional minimum rules in the area of cross-border cooperation proceedings and on defence rights beyond the first generation of directives on procedural safeguards. This issue will also be assessed by the Commission, which is simultaneously continuing to monitor the implementation of existing procedural rights directives in the Member States.

Lastly, *Caeiro, Foffani, and Mitsilegas* take stock of EU legislation in the field of anti-money laundering, organised crime, and corruption. They suggest various improvements to ensure that the EU is adequately equipped to fight these phenomena. The three types of crime may also fall within the EPPO's competence if they affect the Union's financial interests; hence, the matter is likely to become increasingly important and a subject of debate in the future. As suggested by the authors, further in-depth scrutiny is required as to whether modernisation of the definition of these crimes will be necessary within and beyond the field of protection of the Union budget.

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# Admissibility of Evidence in Criminal Proceedings in the EU

Katalin Ligeti, Balázs Garamvölgyi, Anna Ondrejová, and Margarete von Galen\*

With the increase in volume and importance of cross-border investigations in the EU, ensuring the admissibility of evidence gathered in another Member State at trial is crucial – both for efficient law enforcement and for the protection of fundamental rights. At present, the rules on the collection, use, and admissibility of evidence are left to the laws of national criminal procedure of the Member States. These differ extensively as to the collection, use, admissibility, and nullity of evidence and thereby act as an obstacle to the use of cross-border evidence. In order to overcome the present difficulties, this article argues in favour of a new legislative proposal based on Art. 82(2) subsection 2 TFEU laying down common rules for the admissibility and exclusion of evidence in criminal proceedings. The article starts with a short description of the problem and a summary of the current legal framework before turning to the analysis of the legal basis for EU action and the policy options available to the EU legislator.

## I. The Problems of Cross-Border Evidence and EU Initiatives to Resolve them

With the increase in volume and importance of cross-border investigations in the EU, ensuring the admissibility of evidence gathered in another Member State at trial has become crucial, both for efficient law enforcement and for the protection of fundamental rights. National prosecution authorities often investigate offences where a part of the evidence is located abroad (the witness is abroad, the offence was committed by passing through foreign territory, the offender moved across borders, or the offence was committed in a digital environment, etc). In accordance with Art. 6 of the European Convention on Human Rights (ECHR) and Arts. 47 and 48 Charter of Fundamental Rights of the European Union (CFR), it must be ensured that evidence gathered in cross-border investigations does not lead to its unlawful or unfair use. Providing for both efficiency and fundamental rights protection in transnational cases is demanding, however, since each Member State has its own rules on investigative measures and the exclusion of evidence. To illustrate the case, it is useful to refer to the following *example* from daily practice:

The Czech prosecution service asks the Hungarian authorities to carry out a search of a private home in Hungary. Although the search of a private home requires a court order according to Czech law,<sup>1</sup> such a search does not require any judicial permission in Hungary – the investigating authority can decide on it alone. In order to ensure that the evidence collected during the search in Hungary can be admitted at trial in the Czech court, the Hungarian executing authority could ask for a court warrant from a Hungarian judge – in accordance with the *forum regit actum* principle.<sup>2</sup> In practice, this does not hap-

pen, as the otherwise overburdened Hungarian judges do not see any reason to issue a warrant for a search.<sup>3</sup> Consequently, the Hungarian authorities carry out the search without a court order and transmit the evidence to the Czech authorities. It is up to the Czech court to decide on the admissibility of the evidence that was lawfully obtained in Hungary but in violation of the Czech rules of criminal procedure.

With a view to the potential repercussions of divergent national rules on the admissibility of evidence in cross-border cases, the EU already proclaimed in the Tampere Programme that ensuring the admissibility of evidence is fundamental to the creation of an Area of Freedom, Security and Justice (AFSJ). The Tampere Programme states accordingly:

“The principle of mutual recognition should also apply to pre-trial orders, in particular to those which would enable competent authorities quickly to secure evidence and to seize assets which are easily movable; evidence lawfully gathered by one Member State’s authorities should be admissible before the courts of other Member States, taking into account the standards that apply there.”<sup>4</sup>

In response to the EU’s policy agenda, both academic studies<sup>5</sup> and practitioners<sup>6</sup> have examined to which extent the divergent national rules on admissibility and exclusion of evidence pose a problem as to whether or not to use evidence obtained through legal assistance at trial. All these studies acknowledge that the national laws of criminal procedure of the Member States attach differing consequence as to the unlawful gathering and/or use of evidence and that several national laws do not contain any specific rules at all as to where the evidence was obtained (i.e., no special rules for evidence obtained abroad).

The resulting problems and the appropriate measures to resolve them, however, are assessed differently. Starting from

the idea of mutual trust and adequate protection of fundamental rights across the EU, some argue in favour of using the *lex loci* for the collection of evidence requested by another Member State in combination with a harmonised set of rules on exclusion. The exclusionary rules are a logical corollary of the EU directives on the rights of the defendants: in order to make these rights effective, they should be accompanied by a rule that evidence obtained in breach of them is inadmissible. Conversely, other authors argue that the lack of national rules on admissibility of foreign evidence attest to the fact that Member States attach the same value to evidence obtained “domestically” as to that obtained via legal assistance, making the free movement of evidence possible in the future. Instead of common EU rules on exclusion, the rules governing exclusion according to the law of the Member State in which the evidence was obtained (*lex loci*) should be sufficient. Accordingly, instead of imposing exclusionary rules, some authors make the case for imposing inclusionary ones. Yet again, instead of exclusionary or inclusionary rules, others claim that a future EU instrument on evidence gathering should prescribe a set of “standard packages” for help in evidence-gathering, setting out the measures that national authorities and/or the defence could require the authorities in other Member States to carry out for them.<sup>7</sup>

This short – and non-exhaustive – panorama already reveals that the EU could theoretically choose between a more ambitious agenda of harmonisation of national rules on investigative measures, on the one hand, and prescribing either a rule of inclusion or a rule of exclusion for evidence obtained in another Member State, on the other. The exact design of any of the two options and their respective impact on national criminal procedure depends on the concrete choices that the EU legislator takes (whether a narrower or larger set of investigative measures would apply in case of approximation; whether they would be available to the prosecution only or also to the defence and, in case of inclusion or exclusionary rules, whether they apply to cross-border cases only or also to domestic cases; whether exclusion is linked to violation of the EU defence rights *acquis*, etc.).

The Lisbon Treaty gave new impetus for launching EU legislation on the admissibility of evidence. Art. 82(2) TFEU explicitly refers to the possibility to propose legislation on the mutual admissibility of evidence. The Stockholm Programme implementing the Lisbon Treaty confirmed the view of the European Council

“that the setting up of a comprehensive system for obtaining evidence in cases with a cross-border dimension, based on the principle of mutual recognition, should be further pursued. The existing instruments in this area constitute a fragmentary regime. A new approach is needed, based on the principle of mutual recognition but also taking into account the flexibility of the traditional system of

mutual legal assistance. This new model could have a broader scope and should cover as many types of evidence as possible, taking account of the measures concerned.”<sup>8</sup>

The Council invited the Commission to propose a new legal instrument. In response, the Commission published a Green Paper in 2009<sup>9</sup> outlining its aim to adopt an instrument that would (i) set up a scheme of mutual recognition to govern cross-border evidence-gathering<sup>10</sup> and (ii) create a regime of mutual admissibility of evidence. As the Commission stated in the Green Paper, there is “a risk that the existing rules on obtaining evidence in criminal matters [can] only function effectively between Member States with similar national standards for gathering evidence. [... Therefore,] the best solution to this problem would seem to lie in the adoption of common standards for gathering evidence in criminal matters.”<sup>11</sup> Shortly afterwards, the text for a Proposal for a Directive regarding the European Investigation Order in criminal matters was tabled,<sup>12</sup> albeit seeking to implement only the first aim specified in the Green Paper and leaving untouched the more controversial issue of common rules on admissibility of evidence in the EU.<sup>13</sup> This reflected the view of the majority of Member States, according to which proposing common rules for the admissibility of evidence would violate the principles of subsidiarity and proportionality.<sup>14</sup>

The rather reserved view of the Member States was once again confirmed during negotiations on the defence rights directives. In particular, the Commission’s original proposal for a directive on the presumption of innocence<sup>15</sup> stipulated in Art. 6(4) that any evidence obtained in breach of the right not to incriminate oneself and not to cooperate shall not be admissible, unless the use of such evidence would not prejudice the overall fairness of the proceedings. This exclusionary rule disappeared, however, during the negotiations and did not find its way back into the final text of the directive.

All this leads to a situation in which the rules on the collection, use, and admissibility of evidence are still left to the laws of national criminal procedure only. The resistance of the Member States is certainly the main reason why the Commission has not yet made use of the competence provided for in Art. 82(2) TFEU.<sup>16</sup> The recent negotiations on the Regulation on the European Public Prosecutor’s Office (EPPO) unequivocally demonstrated how far Member States are ready to go when it comes to the approximation of criminal procedure. Member States clearly refused to agree on rules for the gathering and admissibility of evidence in EPPO investigations.<sup>17</sup> For a future proposal based on Art. 82(2) TFEU, the Commission has to convince not only the Member States, but it must ensure that any proposal on this matter is compliant with the principles of subsidiarity (Art. 5(3) TEU) and proportionality (Art. 5(4) TEU). The Proposal for



the EPPO Regulation is a recent example of challenging the Commission's competence based on subsidiarity.<sup>18</sup> In this case, even if the subsidiarity challenge was not successful in legal terms (i.e., the Commission decided to maintain its proposal in its entirety), it came with a high political price and paved the way for more national control over the future text of the Regulation.

Even if the Commission will need to overcome the high hurdles that Member States may raise against EU harmonisation of evidence law, the reiterated request of the defence lawyer community for EU legislation on the matter cannot be overheard. Whereas law enforcement authorities are mainly concerned with the trial court's refusal of evidence gathered lawfully according to the *lex loci*, defence lawyers are worried about the unlawful or unfair use of evidence obtained in cross-border investigations. They rightly point out that the rights of the suspect are more important than ever, due to the frequency of cross-border evidence collection. Equally, the impact of cross-border law enforcement on complainants and witnesses should not be underestimated. Defence lawyers therefore advocate granting the right to the defence to challenge evidence obtained in cross-border investigations<sup>19</sup> and for common EU rules on exclusion.

In addition, one cannot disregard the increasing relevance of evidence transfer and linked questions of admissibility and exclusion beyond classical cross-border situations (i.e., evidence gathered in EU Member State A and assessed as to its admissibility in Member State B). With the EPPO taking up operations, there will be paramount questions linked to evidence transfer and subsequent admissibility/nullity of evidence between national authorities and supranational bodies (evidence gathered by Member State A and used by a European enforcement agency or gathered by a European enforcement agency and used by a national enforcement authority<sup>20</sup>). Moreover, the enforcement of EU law and resulting questions of evidence transfer are not limited to criminal procedures *stricto sensu* but has to take into account the larger sphere of punitive enforcement, raising questions as to the collection and use of evidence at the crossroads between administrative and criminal proceedings.<sup>21</sup>

This article therefore argues in favour of a new legislative proposal based on Art. 82(2), Subsection 2 TFEU laying down common rules for admissibility of evidence in criminal proceedings. Such a proposal needs to acknowledge the case law of the CJEU as to the independence of judicial authorities<sup>22</sup> and as to respect for the rule of law,<sup>23</sup> as this jurisprudence has important consequences for the implementation of the principle of mutual recognition and the underlying concept of mutual trust. Many of the academic studies on the

admissibility of evidence are almost a decade old, and the solutions and approaches outlined need to be reassessed in light of new developments. A fresh academic study on the admissibility of evidence is therefore necessary in order to give further guidance on the conceptual and technical choices that a future EU legislation would need to take. Such choices must include:

- The scope of EU intervention, answering the question of whether a future instrument should be restricted to cross-border situations or whether it also applies to purely domestic cases;
- The applicable safeguards (and how to deal with potentially higher standards of protection provided for by national law);
- The principles and rules to be included in a draft directive, tackling the question of whether the instrument should include only rules on admissibility or rules on admissibility and exclusion.

## II. National Approaches on Admissibility and Exclusion of Evidence: From Non-Inquiry to Judicial Balancing

Several comparative law studies<sup>24</sup> have revealed that rules of national criminal procedure on the collection and use of evidence differ extensively from one Member State to another, and this difference is not limited to the common law-civil law divide. First of all, no Member State provides for a pure system of free admissibility of evidence, in the sense that every piece of evidence gathered during the investigation would be admitted at trial, regardless of the respect for established procedures. This is not very surprising, given the increasing relevance of the case law of the ECtHR requiring states to scrutinise evidence that might impair the overall fairness of the proceedings.<sup>25</sup>

With this caveat in mind, two approaches adopted by the Member States have emerged. On the one hand, some legal systems give discretion to the judge as to whether or not to admit illegally obtained evidence: In this case, the inadmissibility is not an automatic procedural sanction for a previous violation. Thus, the judge is not obliged to exclude the "tainted" piece of evidence; instead, he/she can decide whether or not to disregard that element by assessing various factors, such as the seriousness of the breach, its intentional nature, the relevance of the information (including the fact that the evidence would have been discovered anyway by other means), the overall fairness of the proceedings, the gravity of the charge, etc. On the other hand, several Member States provide for the inadmissibility of evidence as a (non-discretionary but) automatic consequence for a violation of procedural rules.<sup>26</sup>

Another important difference between national systems concerns the modalities for not admitting the improperly obtained evidence. In some countries, the court is prohibited from basing a decision on that evidence (e.g., Germany); in other countries, the evidence is physically excluded from the file examined by the court (e.g., Italy). The rationale of the latter option is that only removal of the evidence from the file ensures that the deciding authority is not biased by the information that should have been gathered differently.

In conclusion, a twofold approach in Europe can be observed, namely legal systems strictly filtering the information to be admitted at trial (so-called “controlled systems”) and legal systems leaving it to the judge to assess whether it is appropriate to disregard illegal evidence (“free proof systems”).

Beyond this general difference, the details of evidence law vary considerably. So do the rules on the collection and admissibility of the various types of evidence (witnesses, interceptions, etc.). For instance, in Germany the examination of witnesses at trial cannot, in principle, be replaced by reading reports from a pre-trial interview (although there are some limited exceptions to this rule). In the Netherlands, on the contrary, the Supreme Court accepted several decades ago that a written statement obtained during pre-trial investigations can be used as evidence at trial, so that witnesses no longer have to come to court to give evidence – an official report containing their statements collected during the pre-trial phase is, in principle, sufficient. Further differences are linked to requirements and conditions involving “new” means of taking evidence, e.g., video-conferencing or other technical solutions to bridge the gap between the required presence of, for instance, a witness and the judge. Likewise, Member States have different approaches to parties’ possibility to challenge before competent courts the admissibility of a given piece of evidence. Most national systems provide for rules on the “nullity” (or invalidity) of evidence, but these rules vary from country to country.<sup>27</sup>

Considerable differences can also be observed as to the applicability of the “fruit of the poisonous tree” doctrine, whereby illegally obtained evidence is not only excluded from trial but also any further evidence derived from the illegal conduct of the authority conducting the investigations. A classic example relates to objects seized during a search conducted on premises mentioned by the suspect during an illegal arrest. From comparative studies<sup>28</sup> on the topic, groups of countries can be defined according to their rationale for the protective measure. Countries like France, Italy, and Spain aim to protect the rights of suspects. Thus, exclusion or nullity of evidence is strictly related to the infringement of fundamental rights (the vindication of rights approach). Countries like Canada, the UK, and

Germany use a so-called systemic integrity model. They only apply the exclusion of evidence to significant violations of important rights and only in cases in which the dismissal of the charges would not significantly undermine the state’s interest in convicting those who have committed serious crimes.

Since, in most Member States, evidence gathered abroad is treated the same way as evidence obtained by national authorities, the above-described, considerable differences between the national approaches to the gathering and use of evidence lead to divergent treatment of evidence obtained in cross-border investigations.<sup>29</sup>

### 1. EU rules on mutual legal assistance: balancing *lex loci* and *lex fori*

In order to facilitate the admissibility of evidence obtained in cross-border situations, the EU instruments on mutual legal assistance have gradually moved away from the principle of *locus regit actum*, according to which the law of the country where the evidence is gathered applies for the collection of evidence. Instead, they proclaim the principle of *forum regit actum*, whereby the requested authorities should follow the rules indicated by the requesting country for evidence gathering, i.e., the rules of the *forum* in which the trial will take place. By using the law of the *forum*, the admissibility of evidence should be guaranteed. Art. 4 of the 2000 EU MLA Convention<sup>30</sup> stipulates in this vein that “the requested Member State shall comply with the formalities and procedures expressly indicated by the requesting Member State, unless otherwise provided in this Convention.” The *forum regit actum* principle does not, however, provide for the general application of foreign law (*lex fori*). Under the 2000 EU MLA Convention, national investigative authorities are still allowed to use their national procedural laws (*lex loci*) when performing the measure asked and to use *lex fori* only upon request and within the possibilities provided by national law.

Although the shift to the *forum regit actum* principle shows the awareness of the EU legislator of the cross-border dimension of crime in the AFSJ, it does not solve the problems resulting from the current divergent national approaches.<sup>31</sup> In particular, Member States can retain their freedom to refuse assistance based on grounds linked to national law. As *Spencer* rightly pointed out, the requested State “has in principle an open-ended discretion to refuse, and an equally wide discretion as to how, in any given case, it will carry out the task.”<sup>32</sup> Even if Member States do not exercise such discretion, further practical problems may arise. It could happen, for instance, that information is gathered before the official request of another authority arrives indicating the rules to be followed. Furthermore, proceedings may be transferred from one Member State

to another. In both cases, information already gathered according to the procedure in one Member State may need to be used in another *forum*.

Despite the shortcomings of the *forum regit actum* principle, Directive 2014/41 on the European Investigation Order (EIO), which replaces the 2000 EU MLA Convention, does reaffirm the principle in its Art. 9(2).<sup>33</sup> Accordingly, the executing authority must comply with the formalities requested by the issuing authority, save that such formalities were to violate the fundamental principles of the legal system of the executing State. Although the strong language of the EIO Directive suggests that the executing state of the EIO will mostly apply the *lex fori*, practice seems to be different. Several practitioners report that, in many cases, the issuing Member State does not specify formalities for the execution of the EIO. Therefore, investigative authorities often use the *lex loci* when executing the EIO.

The EIO Directive does not include rules on admissibility of evidence or evidentiary exclusionary rules.<sup>34</sup> Nor does the latest Commission proposal regarding European Production and Preservation Orders for electronic evidence in criminal matters (draft e-evidence Regulation)<sup>35</sup> This proposal also maintains the present status quo and touches upon the admissibility of certain types of electronic evidence only in the specific context of immunities or privileges (in Art. 18 of the draft Regulation).

By simply restating the *forum regit actum* principle, the EU legislator has not resolved the problems referred to in the example given at the beginning of this article.<sup>36</sup> Practice shows that many reservations still exist towards applying the *lex fori*. The non-application of the *lex fori* in combination with the potentially wide discretion of the judge to decide on admitting unlawfully obtained evidence are significant in practice and can lead to a situation in which the defendant cannot anticipate the use of this evidence at trial.

## 2. European human rights law and exclusionary rules

Considering the lack of legislative standards in the EU for the gathering, use, and exclusion of evidence, the question arises as to the extent to which common standards can be derived from the human rights jurisprudence of the two European courts (the ECtHR and the CJEU) and whether these standards can be used as input for future legislative harmonisation.

The ECHR does not contain specific rules on the admissibility/exclusion of evidence. In relation to the protection offered in Art. 6, however, the ECtHR obliges countries to scrutinize the way evidence was obtained or is used in order to prevent unlawful evidence from impairing the overall fairness of the proceedings. Such scrutiny does not mean that evidence ob-

tained in breach of the ECHR (for example, breach of privacy or protection of the private home) is automatically excluded from the criminal proceedings. In the Court's own words:

“While the [ECHR] guarantees, under Article 6, the right to a fair trial, it does not lay down any rules on the admissibility of evidence as such, which is therefore primarily a matter for national law. The Court therefore cannot exclude that evidence gathered in breach of national law may be admissible ... The Court also recalls that it has already had occasion to find that the use of an illegal recording, moreover as the only item of evidence, does not, in itself, conflict with the principles of fairness laid down in Article 6[(1) of the ECHR], even where that evidence was obtained in breach of the requirements of the [ECHR], particularly those set out in Article 8 ...”<sup>37</sup>

At the same time, it emerges from ECtHR case law that evidence, the use of which could violate the integrity of the trial or the rule of law, must be excluded.<sup>38</sup> Cases fulfilling this high threshold refer to evidence collected in breach of absolute human rights (like the prohibition of torture and inhuman treatment laid down in Art. 3 ECHR). In addition, in relation to evidence collected in breach of certain relative human rights, the ECtHR found that their use at trial would amount to a flagrant denial of justice. Such cases involve evidence obtained by means of entrapment and incitement and for which there is no indication that the offence would have been committed without the intervention of law enforcement authorities,<sup>39</sup> evidence based on confessions that have been made without the assistance of a lawyer and which are used as key evidence without further legal assistance being given to the accused,<sup>40</sup> and serious violations of the right to remain silent<sup>41</sup> or of the right to cross-examination.<sup>42</sup> The scrutiny that the evolving ECtHR case law requires of states when it comes to the use of evidence at trial, however, cannot include detailed specifications as to the way evidence should have been gathered. The ECtHR instead assesses the overall fairness of the proceedings and looks into the concrete facts of the case, e.g., whether the restrictions in Art. 6 ECHR had been counterbalanced in the given case.

Although European human rights jurisprudence has not developed common standards for the gathering/admissibility/exclusion/nullity of evidence, certain forms of evidence gathering do infringe upon human rights to the extent that they automatically lead to the exclusion of evidence. These human rights standards could certainly be used as guidance for formulating exclusionary EU rules in the future.

## III. Future EU Rules on Cross-Border Evidence

Art. 82(2) Subsection 2 TFEU stipulates:

“To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European

Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern: (a) mutual admissibility of evidence between Member States [...]”.

Thus, the competence of the EU covers the adoption of a directive containing minimum rules to facilitate mutual recognition respecting the principles of subsidiarity and proportionality.

The first question for any future EU instrument on the admissibility of evidence concerns its scope of application. This raises manifold questions: Should a future directive be limited to stipulating a rule of inclusion and/or exclusion? Or should it provide for the approximation of rules on the gathering and use of evidence? Should it be limited to cross-border investigations or could it also cover purely domestic situations?

One could read the competence laid down in Art. 82(2) TFEU as being limited to providing for a mandatory inclusion rule<sup>43</sup> obliging the national authorities of a Member State to admit evidence collected by the judicial authority of another Member State pursuant to a mutual recognition instrument.<sup>44</sup> Such a mandatory rule of inclusion could then be flanked by rules of exclusion derived from European human rights law. Taking into account the instruments adopted so far on the basis of Art. 82 TFEU, there is room to argue that the EU has the competence to cover not only transnational but also domestic cases. As *Vervaele* rightly pointed out:

“Although the approximation is in theory limited to minimum rules in order to facilitate the mutual recognition of judicial decisions, it has become clear from the use of Article 82(2)(b-c) TFEU by the legislator that this approximation is in fact the harmonisation of domestic criminal procedure (so not limited to mutual recognition instruments) in order to facilitate potential mutual recognition. The harmonisation is not strictly limited to minimum harmonisation but to minimum rules, meaning that which is necessary for facilitating and enhancing mutual recognition between the Member States”.<sup>45</sup>

Accordingly, the future instrument could cover both cross-border and domestic cases. This would help avoid different evidentiary standards, depending on whether the evidence is used in domestic or foreign proceedings. That carries the risk of unequal treatment of defendants and unnecessary practical complications (national authorities would be required to apply different standards in national proceedings and in proceedings carried out in execution of a mutual recognition request).

In the same vein, the minimum rules mentioned in Art. 82(2) TFEU could be used to approximate rules on the gathering of evidence and thereby going beyond a mere rule of inclusion. However, recent negotiations on the EPPO reveal that Member States may fiercely fight a harmonisation of investigative measures.

If the Commission were to take the more viable approach of suggesting a rule of inclusion, the next important question for a future EU directive would be to define the safeguards that would lead to the exclusion of the evidence if violated. As pointed out above (II.2.), European human rights case law already gives a number of hints as to where the use of evidence would violate the fairness of the proceedings. However, the existing case law is by far not exhaustive and restating it would not contribute to added value for the defendant. In particular, existing case law focuses on domestic situations only (the same legal regime applies to the collection of evidence and to the trial) and does not address transnational cases. The EU legislator should consider going beyond the fair trial jurisprudence of the ECtHR and sanction certain violations of the rights laid down in the EU *acquis* (non-admissibility or nullity).

Ultimately, the EU legislator should consider the need for rules on specific types of evidence. A recent research project<sup>46</sup> on digital forensics rightly acknowledges the following:

“The current EU legal framework [...] whilst insisting on the need to exchange digital evidence, through cooperation mechanisms based on the principle of mutual recognition (not last in the EC Proposal for the European Production Order), does not provide for common rules establishing how digital investigations should be carried out.”<sup>47</sup>

#### IV. Conclusions

The relevance of evidence transfer in the day-to-day practice of law enforcement in the Member States necessitates the adoption of EU rules on the admissibility of evidence. The relatively broad EU competence laid down in Art. 82(2) TFEU is, however, in stark contrast to the lack of willingness on the part of Member States to accept harmonisation of the national rules on gathering evidence in criminal proceedings. A viable approach could be to propose a mandatory EU rule of inclusion of evidence obtained in another Member State, accompanied by a number of enumerated grounds allowing the exclusion of foreign evidence. Such exclusionary rules could be based on the already existing human rights law jurisprudence (as described in section II.2.) but should contain further rules addressing the cross-border nature of the investigation. By the same token, a future directive on obtaining and admitting evidence in the EU could also address other aspects of evidence law, e.g., the defence right to gather or request evidence.

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1 According to the Czech law of criminal procedure, permission from a judge is required to search a private home. Based on the judge's permission, the prosecutor will give the order to carry out the search.

2 See section II.1.

3 Practitioners confirm that their authorities often refuse to follow the formality indicated by the issuing authority due to the mere lack of corresponding national provisions in the executing state (see the intervention by *Jorge Espina Ramos* at the workshop on *Admissibility of E-Evidence in Criminal Proceedings in the EU* organised by the European Law Institute on 17 September 2020, available at <<https://www.europeanlawinstitute.eu/about-eli/bodies/membership/mm-2020/conference-recordings>>).

Practitioners primarily look at the national code of criminal procedure when it comes to the legal basis for an investigative measure. Laws on international cooperation or transposition of EU instruments are still often not regarded as having a sufficient legal basis. Such problems in practice can be best resolved, however, by judicial training.

4 Conclusions of the Presidency, SN 200/99, point 36.

5 See G. Vermeulen, W. De Bondt and Y. Van Damme, *EU cross-border gathering and use of evidence in criminal matters. towards mutual recognition of investigative measures and free movement of evidence?*, Vol. 37 IRCP-series, 2010; K. Ligeti (ed.), *Toward a Prosecutor for the European Union, Volume 1: A Comparative Analysis*, 2013; S.C. Thaman (ed.), *Exclusionary Rules in Comparative Law*, 2013; F. Giuffrida and K. Ligeti (eds.), *Admissibility of OLAF Final Reports as Evidence in Criminal Proceedings*, University of Luxembourg, June 2019, available at: <<http://hdl.handle.net/10993/40141>>.

6 See, e.g., CCBE's submission on the Green Paper on obtaining evidence in criminal matters from one Member State to another and securing its admissibility, available at: <[https://www.ccbe.eu/fileadmin/speciality\\_distribution/public/documents/CRIMINAL\\_LAW/CRM\\_Position\\_papers](https://www.ccbe.eu/fileadmin/speciality_distribution/public/documents/CRIMINAL_LAW/CRM_Position_papers)>.

7 J. Spencer, "The Green Paper on obtaining evidence from one Member State to another and securing its admissibility: the Reaction of one British Lawyer", (2010) *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)*, 602, 604–605; J.A.E. Vervaele, "Lawful and fair use of evidence from a European human rights perspective", in F. Giuffrida and K. Ligeti (eds.), *op. cit.* (n. 5), p. 56, pp. 59–62.

8 See Council of the European Union, The Stockholm Programme – An open and secure Europe serving and protecting the citizens, Brussels, 2 December 2009, Council doc. 17024/09, point 3.1.1.

9 Green Paper on obtaining evidence in criminal matters and transferring it from one Member State to another with the aim of securing its admissibility, COM(2009) 624 final, 11 November 2009.

10 Pursuant to the Tampere Programme, the Council adopted Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, *O.J. L* 350, 30.12.2008, 72. The Framework Decision was ultimately repealed on 21 February 2016 by Regulation (EU) 2016/95, *O.J. L* 26, 2.2.2016, 9. Both academics and practitioners criticized the Framework Decision for its limited scope and for the fact that it co-existed with other instruments on mutual legal assistance, thereby contributing to a piecemeal approach with a multiplicity of instruments.

11 COM(2009) 624 final, 11 November 2009, p. 7.

12 Initiative of the Kingdom of Belgium, the Republic of Bulgaria, the Republic of Estonia, the Kingdom of Spain, the Republic of Austria, the Republic of Slovenia and the Kingdom of Sweden for a Directive of the European Parliament and of the Council of ... regarding the European Investigation Order in criminal matters, *O.J. C* 165, 24.6.2010, 22.

13 The only exception is Art. 31 of Directive 2014/41/EU regarding the European Investigation Order in criminal matters (*O.J. L* 130, 1.5.2014, 1), which specifies rules in relation to findings involving interception of telecommunication carried out without technical assistance of the notified Member States: these "may not be used, or may only be used under conditions which it shall specify, in case where the interception would not be authorised in a similar domestic case."

14 Some Member States went even farther to argue that EU intervention in this field would call into question the national system of checks and balances inherent to criminal procedure. See Summary of the replies to the Green Paper on obtaining evidence in criminal matters from one Member

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State to another and securing its admissibility, document with the author.

15 Proposal for a Directive of the European Parliament and of the Council on the strengthening of certain aspects of the presumption of innocence and of the right to be present at trial in criminal proceedings, COM(2013) 821 final, 27 November 2013.

16 See L. Bachmaier Winter, "European investigation order for obtaining evidence in the criminal proceedings – Study of the proposal for a European directive", (2010) *Zeitschrift für Internationale Strafrechtsdogmatik (ZIS)*, 580, 581.

17 The Commission's Proposal for the EPPO (COM(2013) 534 final) stipulated an inclusionary rule but made two exceptions: the respect for the rights of the defence and the fairness of the procedure. Accordingly, the trial court can refuse to admit evidence if it would adversely affect the right of the defence as enshrined in Arts. 47 and 48 CFR or the fairness of the procedure. (Art. 30.) This approach was, however, refused by the Member States as attested by Art. 37 of Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's office ('the EPPO') [2017] *O.J. L* 283, 31 October 2017, 1). See K. Ligeti, "The European Public Prosecutor's Office", in: V. Mitsilegas, M. Bergström and T. Konstadinides (eds.), *Research Handbook on EU Criminal Law*, 2016, p. 480.

- 18 See the Communication on “the review of the proposal for a Council Regulation on the establishment of the European Public Prosecutor’s Office with regard to the principle of subsidiarity, in accordance with Protocol No 2”, COM(2013) 851 final, 27 November 2013.
- 19 See ECBA Initiative 2017/2018 “Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards” available at: <[http://www.ecba.org/extdocserv/20180424\\_ECBA\\_Agenda2020\\_NewRoad-Map.pdf](http://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoad-Map.pdf)>.
- 20 In the larger sphere of punitive enforcement, evidence transfer can take place not only from the EPPO but also from national investigative authorities to, e.g., ECB, DG COMP, etc. See, in this context, *inter alia*, S. Allegrezza, “Information Exchange Between Administrative and Criminal Enforcement: The Case of the ECB and National Investigative Agencies”, <<https://doi.org/10.30709/eucrim-2020-024>>.
- 21 J.A.E. Vervaele, *op. cit.* (n. 7), pp. 56 et. seq.
- 22 CJEU, 12 December 2019, Joined Cases C-566/19 PPU and C-626/19 PPU, *JR and YC*; Case C-625/19 PPU, *XD*; Case C-627/19 PPU, *ZB*. See also T. Wahl, “CJEU Clarifies its Case Law on Concept of ‘Judicial Authority’ Entitled to Issue EAW, (2019) *eucrim*, 242.
- 23 CJEU, 25 July 2018, Case C-216/18 PPU, *LM* (cf. T. Wahl, (2018) *eucrim*, 104–105); CJEU, 24 June 2019, Case C-619/18 and CJEU, 17 December 2018, Case C-619/18 R, *Commission v Poland* (cf. T. Wahl (2018) *eucrim*, 191 and (2019) *eucrim*, 80).
- 24 See note 5.
- 25 For a recent summary of the respective ECtHR case law, see Council of Europe, Guide on Article 6 of the European Convention on Human Rights, updated on 31 August 2020, pp. 40–42, available at: <[https://www.echr.coe.int/documents/guide\\_art\\_6\\_criminal\\_eng.pdf](https://www.echr.coe.int/documents/guide_art_6_criminal_eng.pdf)>.
- 26 For a description of national systems, see K. Ligeti, *Toward a Prosecutor for the European Union*, *op. cit.* (n. 5).
- 27 See details at J.A.E. Vervaele, *op. cit.* (n. 7), pp. 59–62.
- 28 S. C. Thaman, “Fruits of the Poisonous Tree in Comparative Law”, (2010) 16 *Southwestern Journal of International Law*, 333; C. Slobogin, “A Comparative Perspective on the Exclusionary Rule in Search and Seizure Cases” Vanderbilt Public Law Research Paper No. 13–21 (9 April 2013) <<https://ssrn.com/abstract=2247746>>.
- 29 As Vermeulen, De Bondt, and Van Damme, *op. cit.* (n. 5) point out (p. 19): “Even though the results indicate that the member states are inclined to accept the validity of lawfully obtained evidence, member states still want to be able to refuse admissibility if the gathering of the evidence, was contrary to their fundamental principles of law. Furthermore, a distinction needs to be made, between the acceptability to introduce foreign evidence in criminal proceedings and the actual evaluation thereof which remains at the discretion of the judiciary.”
- 30 Convention on mutual assistance in criminal matters between the Member States of the European Union of 29 May 2000, *O.J. C* 197, 12.7.2000, 1.
- 31 For a recent analysis of the problems raised by these two principles, see M. Kusak, “Mutual admissibility of evidence and the European investigation order: aspirations lost in reality”, (2019) 19 *ERA Forum*, 391.
- 32 J. R. Spencer, *op. cit.* (n. 7), 602.
- 33 Directive 2014/41/EU, 1.5.2014, *O.J. L* 130, 1. The first mutual recognition instruments related to mutual legal assistance provided for a stricter application of the *lex fori*. So did the meanwhile repealed Framework Decision 2003/577/JHA on freezing orders (*O.J. L* 196, 2.8.2003, 45), stipulating in its Art. 5(1): “The competent judicial authorities of the executing State shall recognise a freezing order [...] without any further formality being required and shall forthwith take the necessary measures for its immediate execution in the same way as for a freezing order made by an authority of the executing State [...]” In fact, this provision implied that the executing authority carries out the freezing as ordered by the foreign issuing judicial authority based on the *lex fori*. The judicial decision of the foreign authority was thus directly executed using the same logic as that of the European Arrest Warrant. This ambitious application of the mutual recognition principle to the domain of legal assistance was later rejected, however, by the Member States. The EIO Directive therefore includes a new set of checks and balances in both the issuing the executing Member States.
- 34 L. Bachmaier, “Mutual Recognition and Cross-Border Interception of Communications: The Way Ahead for the European Investigation Order”, in: C. Brière and A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law: Past, Present and Future*, 2018, p. 313, p. 324. Given all the checks in both the issuing and the executing states (including respect for proportionality (Art. 6(1) lit. a) EIO Directive), fundamental rights, and the rights of the defence (Art. 1(4) EIO Directive), however, one could argue that evidence that has been obtained by complying with all these conditions should be admissible. Practitioners report that this largely corresponds to today’s practice, but rules on admissibility have nevertheless not been stipulated in the Directive.
- 35 COM(2018) 225 final, 17 April 2018 (for a summary, see T. Wahl, (2018) *eucrim*, 35–36).
- 36 For examples of refusal to admit evidence obtained via an EIO, see the report on Eurojust’s casework in the field of the European Investigation Order, November 2020, p. 27, available at: <[https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11\\_EIO-Casework-Report\\_CORR\\_.pdf](https://www.eurojust.europa.eu/sites/default/files/2020-11/2020-11_EIO-Casework-Report_CORR_.pdf)>.
- 37 ECtHR, 26 April 2007, *Popescu v Romania*, Appl. nos. 49234/99 and 71525/01, para 106.
- 38 ECtHR, 1 June 2010, *Gäfgen v Germany*, Appl. no. 22978/05, paras 98–99.
- 39 ECtHR, 9 June 1998, *Teixeira de Castro v Portugal*, Appl. no. 25829/94, paras 38–39.
- 40 ECtHR, 27 November 2008, *Salduz v Turkey*, Appl. no. 36391/02.
- 41 ECtHR, 5 November 2002, *Allan v the United Kingdom*, Appl. no. 48539/99.
- 42 ECtHR, 10 July 2012, *Vidgen v the Netherlands*, Appl. no. 29353/06.
- 43 Such a mandatory rule of inclusion is contained in Art. 11(2) of the recently revised OLAF Regulation (EU, Euratom) No 883/2013 according to which “(r)eports drawn up on that basis shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. They shall be subject to the same evaluation rules as those applicable to administrative reports drawn up by national administrative inspectors and shall have the same evidentiary value as such reports.” See also the new version of Art. 11(2) of Regulation 883/2013 by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor’s Office and the effectiveness of the European Anti-Fraud Office investigations, *O.J. L* 437, 28.12.2020, 49 (Art. 1(11)). For a summary of the amendments, see T. Wahl at: <<https://eucrim.eu/news/olafs-new-amended-legal-framework/>>.
- 44 Limiting future EU legislation to evidence obtained through a mutual recognition instrument seems to be overly narrow, however, as it would exclude Ireland and Denmark from the scope of the instrument; these two countries are not part of the EIO. Therefore, extending the scope to at least evidence from mutual legal assistance from another Member State seems to be more appropriate.
- 45 J.A.E. Vervaele, *op. cit.* (n. 7), p. 66.
- 46 The research project headed by the University of Bologna (Digital forensic EVidence: towards Common European Standards in antifraud administrative and criminal investigations – ‘DEVICES’) developed recommendations and common standards for antifraud administrative and criminal digital investigations throughout the EU. See M. Caianiello and A. Camon (eds.), *Digital Forensic Evidence. Towards Common European Standards in Antifraud Administrative and Criminal Investigations*, Kluwer CEDAM 2021.
- 47 L. Bartoli, R. Brighi, and G. Lasagni, “Working Paper – DEVICES Research Project Funded by Hercule III – 2018 Legal Training and Studies” (2019), pp. 1–2.

# Addressing the Problems of Jurisdictional Conflicts in Criminal Matters within the EU

Maria Kaiafa-Gbandi\*

The current EU approach to jurisdictional conflicts is discussed in the first part of this article. The article highlights the persistent problems of the existing legal framework as well as those emanating from Eurojust's approach to the matter. After linking the topic with the *ne bis in idem* principle, the Member States' interests in prosecuting criminal offenses under their competence, and the EU's objective in the AFSJ when fighting impunity, the author presents some pivotal reflections on a better solution in the second part. Any solution first and foremost has to respect the EU's main characteristic as a supranational organisation aligned to its constitutional treaties and to its Charter of Fundamental Rights. Within this framework, the article:

- Opts for models that not only solve but also prevent conflicts of jurisdiction;
- Highlights the possibility of distinguishing between more flexible and less flexible models;
- Illustrates a model based on the territoriality principle (*locus delicti* criterion) for both the assignment of jurisdiction and conflict resolution;
- Advocates a model with definitive and binding jurisdictional rules on: forum selection, proceedings and rights of concerned persons, arguing that it is of secondary importance whether such a model would be construed horizontally (i.e., through interaction between competent state authorities) or vertically (i.e., by giving a substantial role to Eurojust and the ECJ).

The article also discusses other critical issues that are affected by the EU's choice to safeguard the *ne bis in idem* principle within the framework of preventing and solving jurisdictional conflicts, e.g., the exclusion of parallel investigations, the rights of suspects and victims to intervene in the proceedings, judicial review of the relevant decisions, etc. Lastly, it addresses the legal basis of the EU's competence to regulate jurisdictional conflicts and the proper legal instruments to be used according to the characteristics of the model chosen.

## I. The Current EU Approach on Jurisdictional Conflicts and the Persisting Questions

Even after the entry into force of the Lisbon Treaty, the *ne bis in idem* principle, which was reformulated in Art. 50 CFR,<sup>1</sup> does not hinder several states from prosecuting and adjudicating against a person for the same criminal act. The pursuit and conclusion of such cases depend procedurally on the Member State that finalises the decision first ("first come-first served principle").<sup>2</sup> From that point on, *ne bis in idem* is applicable. This is *substandard for both the states and the persons involved*<sup>3</sup>.

To date, the majority of the EU's legislative instruments invite Member States to criminalize certain criminal behavior and to establish corresponding *extraterritorial* jurisdictional competence.<sup>4</sup> Thus, the odds for jurisdictional conflicts increase. It seems, however, that this is a way to avoid impunity in the EU. Fighting impunity is a legitimate objective in the EU area of freedom, security and justice. All the same, when this approach is pursued in the above-mentioned manner, it creates significant problems, on the one hand, as it is doubtful whether it presents any significant added value in terms of efficiency. On the other hand, common rules on jurisdiction do not exist

at the EU level. Indeed, EU legal instruments obligate Member States to coordinate actions when deciding which Member State is to prosecute when jurisdictional conflicts arise. However, they provide neither tangible criteria for such coordination nor a concrete relevant procedure.

Today, Eurojust for its part is actually maintaining or even triggering parallel criminal proceedings.<sup>5</sup> This amounts to maintaining or even triggering conflicts of jurisdiction. The justification of Eurojust with regard to triggering parallel criminal proceedings, i.e., causing conflicts of jurisdiction, obviously concerns the effectiveness of criminal investigations. This approach is quite problematic for several reasons.<sup>6</sup>

- First, it opposes the very concept of preventing conflicts of jurisdiction in the EU and overall it seems inconsistent with Art. 82 TFEU. Since preventing and settling conflicts of jurisdiction is a clear objective of EU primary law, conflicts of jurisdiction cannot be used as an instrument to enhance the effectiveness of investigations.

- Second, as a result of the fact that criminal proceedings directly affect the suspect's or accused person's fundamental rights – but also for the purpose of determining the truth regarding the commission of a criminal offence and thus serving the administration of justice –, the Member States and the

EU have established specific safeguards and rights that apply to criminal proceedings. Since many of these guarantees, which are also included in the Charter of Fundamental Rights of the European Union, are violated by criminal proceedings in which conflicts of jurisdictions occur, effectiveness is not a valid justification for maintaining the conflicts (and, incidentally, ECJ case law increasingly confirms that legality is superior to effectiveness).

■ Third, the problems emanating from parallel criminal proceedings should not be overlooked due to the lack of rules governing the practical aspects of such situations (for example, the fact that there are no procedures by which to end criminal proceedings in certain Member States in which Eurojust merely triggered the proceedings to collect evidence and no longer has any use for them).

■ Fourth, using the initiation of criminal proceedings before a national court as a tool to obtain evidence for criminal proceedings before another court would be unthinkable in the context of one and the same legal order. Obviously, this should be what the EU aims at when constructing the area of freedom, security and justice.

It is true, of course, that Eurojust – authorised under Art. 85 TFEU to aid in jurisdictional conflict resolution – has issued relevant guidelines on jurisdiction.<sup>7</sup> The guidelines, which follow no hierarchical pattern, are not binding on Member States and lack a set of fixed criteria.

This makes the competent forum in a transnational case impossible to foresee and thus renders the *nullum crimen nulla poena sine lege* principle (Art. 49 (1) CFR) void, given that the it also covers the forum for the criminal act, and consequently a person’s “legal and *ex ante* defined judge” in the EU common area of justice. Such a situation is not tolerable, especially for suspects, because it frankly jeopardizes their rights. But it is also unacceptable for the states themselves, which might be deprived from exercising their penal power, although they might have a stronger link to the case than the legal order that was the first to adjudicate.

*Framework Decision 2009/948/JHA* on the prevention and settlement of conflicts of jurisdiction does not exclude such effects either.<sup>8</sup> In fact, by lacking firm criteria and the outcome of consultation proceedings having a binding effect, it is likewise deficient, envisaging no safeguards whatsoever for the rights of involved persons as regards the forum choice. Above all, suspects have to carry the burden of uncertainty until a final decision on their case is issued in one of the EU Member States as well as that of ambiguity as to the exact forum that will adjudicate first. In this context, we should bear in mind that the forum might not even be the *locus delicti* or even one chosen by the prosecuting authorities as the most favorable for

them. As a result of the lack of firm criteria for selecting the adjudicating forum with regard to transnational cases, forum shopping both by prosecuting authorities and by perpetrators cannot be forestalled.

The existing institutional framework shows that the Union practically accepts its Member States’ sovereignty as a priority when deciding on forum selection and on possible jurisdictional conflicts. The wider the discretion afforded to states to resolve jurisdictional matters in criminal cases in a non-binding manner, the stronger the threat against citizens’ rights.

## II. Reflections on a Better Solution

Thus, the question raised is whether it is possible for the EU to reach a better solution. This question can be answered in the affirmative. A better solution with regard to the prevention and/or settlement of jurisdictional conflicts within the EU requires first and foremost a fundamental understanding that the Union is a *supranational organisation aligned to its constitutional treaties (TEU and TFEU) and to its Charter of Fundamental Rights*.

Different models could be suggested for addressing the problems of jurisdictional conflicts.<sup>9</sup> The one presently incorporated in FD 2009/948/JHA introduces a *horizontal* design entailing direct interaction and mutual consultation between competent Member State authorities to decide on jurisdiction, supplemented by a *vertical* component if there is lack of consensus (i.e., cooperation with Eurojust, Art. 13 FD 2009/948/JHA). This method covers the *settlement* of jurisdictional conflicts, but not their *prevention* and has the above-mentioned flaws. An alternative model could also be vertically focused, by envisaging a more active role for Eurojust – even from the very beginning.

However, in the absence of definitive and binding jurisdictional rules on: (i) forum selection, (ii) procedure, and (iii) rights of concerned persons, neither model can properly serve the essence of the EU selection to safeguard *ne bis in idem* as a fundamental right. Therefore, the core prerequisite concerns European rules that cover all relevant issues and hence set a minimum level of required protection and a clear procedural framework. It is of secondary importance whether or not these imperatives will be implemented mostly horizontally (i.e., through interaction between competent states’ authorities) or vertically (i.e., by acknowledging a substantial role for Eurojust and the ECJ).

One should, however, also consider models, already proposed by scholars and bar associations, which aim to *prevent* juris-



dictional conflicts in the first place. Such solutions better convey the essence of the selection made by the European constitutional legislator with the present system of safeguarding *ne bis in idem* in Art. 50 CFR.

Even within the framework of such models, one can distinguish between more and less flexible ones. For example, the “territoriality principle”<sup>10</sup> could become the rule for assignment of jurisdiction and conflict resolution without exception; when more Member States fulfill the *locus delicti* (territoriality) criterion, one of them could be selected to exercise jurisdiction by applying *additional* criteria. The latter could be prioritized according to their degree of relevance to the offence (e.g., *locus delicti* in terms of majority/center of criminal activities or of criminal outcome, defendant’s domicile or habitual residence). Such benchmarks constitute a much more transparent – albeit less flexible – formula when more states fulfill the territoriality criterion. By preventing jurisdictional conflicts before they even arise, such models defend the *ne bis in idem* principle much more effectively. However, conflicts might still occur when more Member States fulfill the set of criteria or when they have foreseen exceptions considered essential to protecting legitimate defendant interests or to focusing on the alleged acts, considering in particular the subsequent local prerequisites for obtaining evidence.

Nonetheless, the EU’s choice to safeguard the *ne bis in idem* principle within the framework of preventing and solving jurisdictional conflicts also affects *other critical questions*, e.g.: (i) Should the prevention of jurisdictional conflicts also cover the investigative phase by excluding parallel investigations?; (ii) What should the main characteristics of a procedure be that prevents and/or settles jurisdictional conflicts?; (iii) Should the right to intervene be recognized for the suspect or even for the victim?; (iv) Should settlement decisions be judicially reviewable?

One could argue that *parallel investigations* are neither reasonable nor necessary in a common area of freedom, security and justice under gradual yet unremitting enhancement.<sup>11</sup> The dynamics of the current regime of judicial cooperation in criminal matters render this approach understandable. *Exclusive jurisdiction models* (even including the investigative stage) naturally require an adequate and comprehensive regulatory framework and a provision for transferring proceedings to another Member State, if investigations push in such a direction at a later point in time. However, *such provisions need to safeguard suspects’ rights* and should thus foresee that any such transfer does not take place after conclusion of the investigation stage.

The 2009 initiative on transferring criminal proceedings has certain positive points, but it does not appear to be an appro-

appropriate solution for an EU legislative act based on the current developments. The positive aspects of the 2009 initiative are mainly the fact that it included a list of criteria in Art. 7 (“criteria for requesting transfer of proceedings”) as well as the fact that it was comparatively detailed. However, the overall approach of the proposal towards transferring proceedings (i.e., basically as the right of a Member State to ask for the transfer of proceedings in order to increase the efficiency of prosecution) does not correspond to the current legal bases of the Treaties, namely Art. 82 TFEU. Introducing a Member State’s right to ask for a transfer of criminal proceedings regardless of a conflict of jurisdiction severely adds to the problems emanating from conflicts. In addition, several elements of this initiative amounted to expressions of state interests and are thus alien to the legal regime introduced by the Treaty of Lisbon. Likewise, the initiative lacked any mention of concrete safeguards for individual rights, so it is not suitable for use as such today.

Thus, transferring criminal proceedings should be examined from the start and on a new basis. Most importantly, it should be examined within the context of resolving conflicts of jurisdiction and for the purpose of dealing with procedural challenges relating to these conflicts; hence, any EU provision on the subject would be covered by Art. 82(1)(b) TFEU. Transfers should be regulated as a stage of the procedure of resolving a conflict and, in particular, the stage that follows the choice of forum and the decision as to which Member State should prosecute and where to concentrate the proceedings. The respective provisions should thus be incorporated or, at least, be linked to the legal framework that will be constructed for resolving the conflicts. In comparison to the 2009 initiative, they should not include any criteria themselves (the choice of forum will have to be taken much earlier), whereas they should include rules on ceasing the proceedings in the transferring Member States, so that the defendant need not face multiple proceedings. They should also provide for the procedural rights of the individuals concerned, i.e., rights tailored to the transfer procedure.

Furthermore, allowing suspects to safeguard their rights makes sense, especially where models leave room for a decision on different or exceptional criteria. When exceptional criteria apply that serve the interests of the suspect/defendant, then victims could be allowed to challenge such decisions.

Arguments related to the essence of the principal mindset of integrating *ne bis in idem* into the Charter’s framework as a fundamental right are also helpful when deciding on the issue of *allowing the suspect to exercise a right to judicial review by the ECJ when the Member State argues for its right to prosecute*. Both sides should be heard during a procedure that attempts to weigh their conflicting interests and finalize a state’s

investigative and adjudicative competence. The legislative act (regulation/directive) that will provide for the prevention and resolution of conflicts of jurisdiction should attribute such criteria to the decision on which Member State should prosecute, so as to enable the application of Art. 263(4) TFEU (“act addressed to a natural or legal person or which is of direct and individual concern to them”). National authorities reporting to Eurojust are by no means equivalent to a judicial review. Triggering criminal proceedings to avoid impunity in *specific situations* should be considered only as an exception, in predetermined cases where *impunity actually occurs* (e.g., when there is unwillingness to prosecute due to high-level corruption in a Member State) and within a framework regulating the issue.<sup>12</sup>

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1 Several scholars (e.g., M. Böse, in Böse/ Meyer/ Schneider (eds.), *Conflicts of Jurisdiction in Criminal Matters in the European Union*, Vol. II, 2014, pp. 146 et seq.) and the ECJ in Spasic (27 May 2014, C-129/14 PPU) read in Art. 50 CFR the same restrictions as provided for in Arts. 54 and 55 CISA.

2 P. Asp, *The procedural criminal law cooperation of the EU*, 2016, pp. 91–93.

3 For further arguments and bibliographical references on the problems related to jurisdictional conflicts in criminal matters within the EU as well as on relevant proposals, see M. Kaiafa-Gbandi, “Jurisdictional conflicts in criminal matters and their settlement within EU’s Supranational settings”, (2017) *European Criminal Law Review (EuCLR)*, 30 et seq.; Ath. Giannakoula, “Impunity and conflicts of jurisdiction within the EU: the role of Eurojust and challenges for fundamental rights”, in: L. Marin/S. Montaldo (eds.), *The Fight Against Impunity in EU law*, 2020, pp. 117 et seq.

4 Cf. P. Caeiro, “Jurisdiction in criminal matters in the EU: negative and positive conflicts and beyond”, (2010) *KritV*, 366, 373.

5 See Eurojust, *Report on Eurojust’s casework in the field of prevention and resolution of conflicts of jurisdiction* (updated 2018), pp. 3, 9.

6 Ath. Giannakoula, “Impunity and conflicts of jurisdiction within the EU: the role of Eurojust and challenges for fundamental rights”, in: L. Marin/S. Montaldo (eds.), *The Fight Against Impunity in EU law*, 2020, pp. 126 et seq.

7 Eurojust, Guidelines for deciding “Which Jurisdiction Should Prosecute?” (revised 2016).

8 Giannakoula, *op. cit.* (n. 6), pp. 122 et seq.

### III. Does the EU Have Competence to Regulate Jurisdictional Conflicts?

Last but not least, the question of whether the EU has the competence to regulate jurisdictional conflicts is clearly to be answered in the affirmative by Art. 82 (1)(b) TFEU, which stipulates: “... The European Parliament and the Council acting in accordance with the ordinary legislative procedure, shall adopt measures to: ... b. prevent and settle conflicts of jurisdiction between Member States ...” Thus, both a regulation and a directive could be considered; the type of legal instrument preferred depends on the model to be chosen. Vertical models, for instance, would make a regulation more appropriate.

- 9 See, e.g., K. Ambos, *Internationales Strafrecht*, 3rd ed., 2011, § 4; Biehler/Kniebühler/Lelieur-Fischer/Stein (eds.), Freiburg proposal on concurrent jurisdictions and the prohibition of multiple prosecutions in the European Union, 2003; Bitzilekis/Kaiafa-Gbandi/Symeonidou-Kastanidou, “Alternative thoughts on the regulation of transnational criminal proceedings in the EU”, in B. Schünemann (ed.), *A programme for European Criminal Justice*, 2006, pp. 250 et seq., 493 et seq.; Böse/ Meyer/Schneider (eds.), *Conflicts of Jurisdiction in Criminal Matters in the European Union*, Vol. II, pp. 381 et seq.; Bundesrechtsanwaltskammer (Stellungnahme Nr. 33/2016, Oktober 2016), *Eckpunktepapier: Für eine klare, verlässliche und verbindliche Regelung zur Vermeidung paralleler Strafverfolgung in der Europäischen Union*; P. Caeiro, (2010) *KritV*, *op. cit.* (n. 4), 374; A. Eickert, *Transstaatliche Strafverfolgung: Ein Beitrag zur Europäisierung, Internationalisierung und Fortentwicklung des Grundsatzes ne bis in idem*, 2004; European Law Institute, *Draft legislative proposals for the prevention and resolution of conflicts of jurisdiction in criminal matters in the European Union* (Reporters: K. Ligeti/J. Vervaele/A. Klip), available via <<https://www.europeanlawinstitute.eu/projects-publications/publications/>> (accessed 26 October 2020); H. Fuchs, “Zuständigkeitsordnung und materielles Strafrecht”, in: B. Schünemann (ed.), *Ein Programm für die europäische Strafrechtspflege*, 2006, pp. 112 et seq.; W. Gropp, *Kollision transnationaler Strafegewalten nulla prosecution transnationalis sine lege*, in: A. Sinn (ed.), *Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität*, 2012, pp. 41 et seq.; L. Hein, *Zuständigkeitskonflikte im internationalen Strafrecht. Ein europäisches Lösungsmodell*, 2002; A. Klip, *Criminal Law in the European Union*, 2005, pp. 79 et seq.; O. Lagodny, *Empfiehl es sich eine europäische Gerichtskompetenz für Strafgewaltkonflikte vorzusehen? Gutachten im Auftrag des Bundesministeriums der Justiz*, 2001, <<http://www.uni-salzburg.at/strafrecht/lagodny>>, B. Schünemann (ed.), *Ein Programm für die europäische Strafrechtspflege*, 2006; A. Sinn (ed.), *Jurisdiktionskonflikte bei grenzüberschreitender Kriminalität*, 2012, pp. 575 et seq.; H. Thomas, *Das Recht auf Einmaligkeit der Strafverfolgung. Vom nationalen zum internationalen ne bis in idem*, 2002; Vander Beken/ Vermeulen/Stevelynck/Thomaes, *Finding the best place to prosecute*, 2002; F. Zimmermann, *Strafgewaltkonflikte in der Europäischen Union*, 2014, pp. 369 et seq. For a systematic presentation of different models proposed for the prevention and/or settlement of jurisdictional conflicts in criminal matters and their critical evaluation, see in particular F. Zimmermann, *ibid.*, pp. 320 et seq.
- 10 Cf. Bitzilekis/Kaiafa-Gbandi/Symeonidou-Kastanidou, *op. cit.* (n. 9), pp. 250 et seq., 493 et seq.; P. Caeiro, (2010) *KritV*, *op. cit.* (n. 4), 374; H. Fuchs, *op. cit.* (n. 9), 362 et seq.
- 11 See, for a relevant model, B. Schünemann (ed.), *op. cit.* (n. 9), pp. 257 et seq.
- 12 Ath. Giannakoula, *op. cit.* (n. 6), p. 135.

# Application Problems Relating to “Ne bis in idem” as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR

Helmut Satzger

The principle of *ne bis in idem* as an individual right is textually guaranteed in Art. 50 CFR / Art. 54 CISA, on the one hand, and in Art. 4 Prot. No. 7 ECHR, on the other. The CJEU and the ECtHR have delineated many issues in their detailed case law and have reciprocally influenced each other's jurisprudence. The article identifies three major problems: Firstly, the definition of “criminal proceeding” as a prerequisite for application of the principle relies on the *Engel* criteria identified by the ECtHR, but it is difficult to incorporate new forms of sanctions, such as “naming and shaming,” into this definition, and the fact that administrative sanctions do not fall within the ambit of *ne bis in idem* is not justifiably accounted for. Secondly, the courts may have determined which procedural acts meet the requirement of *res judicata* (terminating a criminal proceeding) and which ones do not. However, it is the Member State itself which determines whether a decision is final and whether national follow-up procedures are permitted, thus reinvigorating the issue of jurisdictional concentration. The author therefore proposes a solution relying foremost on *bona fides*, namely identifying to what extent the accused himself/herself was reasonably allowed to place trust in the finality of the proceeding. Thirdly, the normative nature of the process of identifying the precise act to which *ne bis in idem* applies proves problematic when legal entities are perpetrators, be it in characterising the legal interest protected or the identity of the criminal act itself. The author points to Art. 82 para. 1 TFEU, which provides a legal basis for a – potentially – convincing overall European approach to the concept of *res judicata*. The CJEU should only address problems of application of the principle of *ne bis in idem* in individual cases.

## I. Introduction

As long as the “conflict of jurisdiction” has not been clearly solved, the question of whether a second judgment is admissible is – according to the principle of mutual recognition – governed by the “ne bis in idem” principle. This guarantee, which on the one hand provides legal certainty within the EU and on the other hand also creates an individual right of the sentenced/acquitted person not to be prosecuted a second time, is guaranteed by Art. 50 CFR under the conditions set out in Art. 54 of the Convention implementing the Schengen Agreement (CISA). This guarantee can also be found in the ECHR – in Art. 4 Prot. No. 7 ECHR (which is meant to be a pure adoption of Art. 14 para. 7 of the International Covenant on Civil and Political Rights). *The ECHR guarantee* not only serves as a means of interpretation of the EU guarantee (Art. 53 CFR), but also provides a *minimum level of protection that cannot be restricted by the CFR* (see Art. 54 CFR). This is why both guarantees must be considered together in this paper. Both the Luxemburg and the Strasbourg Courts have developed the foundations and many details of this guarantee in their jurisprudence. Nevertheless, a number of important problems remain unresolved. The question is whether the jurisprudence should carry on with its case-by-case interpretation of the relevant provision. Or, alternatively, whether the EU legislator should interfere, at least in relation to the most pertinent problems.

For the time being, the interpretation, application, and scope of Art. 50 CFR and Art. 54 CISA are determined by the CJEU. Its jurisprudence – convincingly (!) – follows a *wide understanding* of all preconditions of *ne bis in idem* in order to secure the effective exercise of the fundamental freedoms of the person concerned (especially freedom of movement) under the TFEU. The CJEU's jurisprudence is *inspired by the ECtHR*, which is competent for the interpretation of Art. 4 Prot. No. 7 ECHR.

The effects of the *ne bis in idem* guarantee can be of greatest importance for national criminal proceedings. If the guarantee is applicable, the responsible national prosecutors are *prevented from starting/continuing investigations* – even if the (chronologically) first sentence rendered only covered part of the whole story and thus only part of the wrongdoing/damage caused. This is especially important in the economic context – recent cases have given rise to questions of interpretation that have not been solved by jurisprudence so far.

The present article deals with *ne bis in idem* as initially guaranteed by Art. 50 CFR and Art. 54 CISA. I will indicate some of the main problems that could be solved by the CJEU – at least in principle. Nevertheless, they are closely related to the context of solving “conflicts of jurisdiction” and therefore should best not be regulated randomly on a case-by-case basis but coherently in a legal act adopted by the EU. As already mentioned, due to the legal interrelation between CFR and

ECHR guarantees, this article will also provide short comparisons with the guarantee in the ECHR and its interpretation by the ECtHR.

## II. General Problems as to Art. 50 CFR, 54 CISA (Potentially Solved by a Legal Act to be Elaborated by the European Commission)

### 1. The criminal nature of the proceedings

Art. 50 CFR / Art. 54 CISA only apply to proceedings that are “criminal” in nature.<sup>1</sup> In order to define this notion, the CJEU, in principle, refers to the jurisprudence of the ECtHR. The latter’s position of taking a European-autonomous approach towards defining what is criminal in nature<sup>2</sup> has been (convincingly) adopted by the CJEU:

The ECtHR has held that the notion of “criminal procedure” in the text of Art. 4 of Protocol No. 7 must be interpreted in the light of the general principles concerning the corresponding words “criminal charge” and “penalty” in Art. 6 and 7 of the Convention respectively. The Court’s established case-law sets out three criteria, commonly known as the “Engel criteria” (*Engel and Others v. the Netherlands*), to be considered in determining whether or not there was a “criminal charge” (*Sergey Zolotukhin v. Russia [GC]*, § 53). For the consistency of interpretation of the Convention taken as a whole, the Court finds it appropriate for the applicability of the principle of *ne bis in idem* to be governed by the same criteria as in *Engel (A and B v. Norway [GC])*, §§ 105–107). The first criterion is the legal classification of the offence under national law, the second is the very nature of the offence and the third is the degree of severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative. This, however, does not rule out a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (*Sergey Zolotukhin v. Russia*, § 53, *Jussila v. Finland [GC]*, §§ 30–31; *Mihalache v. Romania [GC]*, § 54).

Nevertheless, fundamental problems remain to be solved:

- Considering the fact that “new forms” of sanctions have begun to appear, which do not correspond to the classical forms of either criminal or administrative sanctions (e.g., naming and shaming), are the *Engel* criteria sufficient to draw a line between criminal and non-criminal sanctions?
- Even if administrative sanctions are covered in principle, in the last several years, the problem of “double-track enforcement regimes” (administrative and criminal sanctions for same criminal behaviour in a number of Member States) arose and,

under strict conditions, these were held to be in conformity with *ne bis in idem*. If extended, this could lead to lowering the guarantee in general, which calls for some in-depth analysis of the matter.<sup>3</sup> At least the conditions for the non-application of *ne bis in idem* should be further clarified (irrespective of individual cases).

- All Member States use confiscation measures as a consequence of criminal behavior; the question is whether confiscation also amounts to a “criminal sanction”, with the consequence that confiscation orders in one Member State exclude subsequent convictions in other Member States and whether, *vice versa*, convictions (even without confiscation elements) in one Member State exclude subsequent confiscations abroad.

### 2. The *bis* requirement: The trial must be “finally disposed of” (CISA), the person “finally acquitted or convicted” (ECHR)

According to Art. 54 CISA, a person’s trial must have been “finally disposed of”. The exact meaning of this wording has raised many questions, but the CJEU’s and the ECtHR’s case law has at least produced useful clarifications:

- a) The ECtHR provides some guidance on the interpretation of the “finality” requirement. The leading decision here is *Zolotukhin v. Russia*.<sup>4</sup> The ECtHR held that a decision is final if, according to the traditional expression, it has acquired the force of “*res judicata*”. This is the case when the decision is irrevocable, that is to say when no further ordinary remedies are available or when the parties have exhausted such remedies or have permitted the time limit to expire without availing themselves of them.<sup>6</sup> However, the availability of extraordinary remedies is not taken into account for the purpose of determining whether the proceedings have reached a final conclusion. Art. 4 of the Additional Protocol No. 7 to the ECHR is not confined to the right not to be punished twice but also extends to the right not to be prosecuted or tried for a second time. It applies even where the individual has merely been prosecuted in proceedings that have not resulted in a conviction.<sup>5</sup> Art. 4 of Protocol No. 7 clearly prohibits consecutive proceedings if the first set of proceedings has already become final at the moment when the second set of proceedings is initiated.<sup>6</sup> However, Art. 4 of Protocol No. 7 does not prohibit several concurrent sets of proceedings (*litis pendens*). In such a situation, it cannot be said that an applicant is prosecuted once again “for an offence for which he has already been finally acquitted or convicted”.<sup>7</sup>

- b) The CJEU also made clarifications: To date, the Luxembourg Court has accepted as “a decision that has been finally disposed of” an out-of-court settlement with the public prosecu-

tor (*Gözütok and Brügge*), a court acquittal based on lack of evidence (*Van Straaten*), a court acquittal arising due to the prosecution of the offence being time-barred (*Gasparini*), and a decision of *non lieu*, i.e., a finding that there was no ground to refer the case to a trial court because of insufficient evidence (*M.*).

However, the CJEU rejected the application of Art. 54 CISA in cases in which a judicial authority had already closed proceedings without any assessment of the unlawful conduct that the defendant had been charged with (*Miraglia*); cases in which a police authority, following expiry of the limitation period and an examination of the merits of the case, had submitted an order to suspend the criminal proceedings (*Turansky*); and cases in which a decision of the public prosecutor to terminate the criminal proceedings against a person was adopted without having undertaken a detailed investigation (*Kossowski*). In relation to the possibility to reopen the proceedings, the CJEU considers such a possibility under national law if new facts/evidence are discovered (*M.*).

According to the CJEU’s jurisprudence, it is up to the legal order of the first sentencing state to determine whether the decision is final or not (cf. *M.*, *Kossowski*). The interpretation of the first Member State is not absolute, however, and can be set aside if it is not in line with the objectives of Art. 54 CISA or the TEU, which comprise not only the need to ensure the free movement of persons but also the need to promote the prevention and combating of crime within the area of freedom, security and justice (*Miraglia*, *Kossowski*). In this regard, another important factor for assessment of the finality requirement of the *ne bis in idem* principle is whether the decision at stake was rendered after determination of the merits of the case, i.e. after a detailed investigation had been carried out (*Kossowski*).

Insofar, however, the jurisprudence is far from being clear and is not completely convincing: In *my view*, as a general rule, the element of *legitimate trust* (*bona fide* solution) on the part of the person concerned should serve as a guideline:<sup>8</sup> Of course, the finality of a decision according to the national law of the first deciding state must serve as the *prima facie* aspect. But the decisive factor should eventually be whether the person concerned could have *bona fide* confidence in the final nature of the decision.<sup>9</sup>

c) One **special problem** deserves mention: it occurs within national jurisdictions that **apply criminal and administrative sanctions to the same acts**: In the jurisprudence of the ECtHR, according to the criteria set out above (see II.1.), for the definition of “criminal”, administrative sanctions will often also be covered by the term “criminal” or “punishment”. In principle, this entails the “*ne bis in idem* prohibition” (*Grande Stevens/*

*Italy*). In particular, the ECtHR has examined the cumulation of criminal and administrative tax sanctions in several cases. No violation of Art. 4 of Protocol No. 7 was found if there was a “sufficiently close connection in substance and in time” between the administrative and criminal proceedings and if the specific legislation indicated a uniform system of sanctions for the offence in question (*A and B v. Norway*).<sup>10</sup>

Similarly, the CJEU applied the *ne bis in idem* prohibition in principle to parallel administrative and criminal sanctions for the same act. It also allows an exception under Art. 50 CFR only under strict conditions (especially the principle of proportionality):<sup>11</sup>

“42 In that regard, it should be pointed out that the objective of protecting the integrity of financial markets and public confidence in financial instruments is such as to justify a duplication of proceedings and penalties of a criminal nature such as that provided for by the national legislation at issue in the main proceedings, where those proceedings and penalties have, for the purpose of achieving such an objective, additional complementary objectives covering, as the case may be, different aspects of the same unlawful conduct at issue (see, to that effect, judgment of 20 March 2018, *Garlsson Real Estate*, C537/16, EU:C:2018:193, para. 46).

43 However, the bringing of proceedings for an administrative fine of a criminal nature, such as those at issue in the main proceedings, following the final conclusion of criminal proceedings, is subject to strict compliance with the principle of proportionality (see, to that effect, judgment of 20 March 2018, *Garlsson Real Estate*, C537/16, EU:C:2018:193, para. 48).”

d) Moreover, the **problem of a “restricted *res judicata*”** according to national law arises: Can criminal proceedings be continued if, according to the national law (of the first sentencing state), such a follow-up procedure is allowed (even if only under strict conditions)? Following this line of jurisprudence, the national law is decisive. As a consequence, the continuation of the criminal proceedings must be possible – but only in the country where the first sentence was rendered (and in no other Member State!) and only if the national conditions for continuation are met. In the end, this results in a “jurisdiction concentration” as regards the continued proceedings.<sup>12</sup>

e) **Conclusion**: All these problems strongly suggest that *the concept of (partial) res judicata* in conjunction with Art. 50 CFR/54 CISA should be solved comprehensively and be regulated in general by European law instead of risking patchwork solutions based on case-by-case decisions taken by the CJEU (and the ECtHR).

### 3. The “same act” in relation to legal persons/enterprises and corporate groups

a) Originally, the ECtHR favored a factual notion of offence (same act: see *Gradinger*), then turned towards a normative

interpretation (“same essential elements”: see *Fischer/Austria*; even narrower, “same offence” in a material sense: *Oliveira/Switzerland*), and changed its jurisprudence in *Zolotukhin/Russia* towards an *idem factum* interpretation. The court argued that it wanted to avoid contradictory results in comparison with the jurisprudence of the CJEU, which always favored a factual interpretation of the “same acts/same offences”. According to the constant jurisprudence of the EU court, “offence” must be interpreted as the “identity of the material acts, understood as the existence of a set of facts which are inextricably linked together, irrespective of the legal classification given to them or the legal interest protected” (see *Van Esbroeck*, C-436/04). Nevertheless, some “normative elements” can be found, e.g., as to the (ir)relevance of a “uniform intention” and a certain flexibility as to the application of the conditions establishing a close connection in space and time, which form the basis of *idem factum*. So far, there is consistency between the jurisprudence of the ECtHR and the CJEU.

b) Uncertainty remains, however, regarding the development of the future jurisprudence of the EU courts, as to the necessity of a third normative element – in addition to the identity of the facts and the unity of the offender –, especially in EU competition law, when it comes to taking into account the “identity of the legal interest protected”. So far, this third requirement is still being upheld by EU courts, even though two influential opinions of Advocates General<sup>13</sup> point towards a parallel interpretation according to Art. 54 CISA/Art. 50 CFR:<sup>14</sup>

“In the context of cartel offences, the material acts to which the *ne bis in idem* principle is then applicable necessarily always include, therefore, the period of time and the territory in which the cartel agreement had anti-competitive effects (a restriction of competition ‘by effect’) or could have had such effects (a restriction of competition ‘by object’). *This has nothing to do with the legal interest protected or the legal characterisation of the facts.*”<sup>15</sup>

“I would tend to agree with Advocate General Kokott that the principle of *ne bis in idem*, as enshrined in Article 50 of the Charter, *should be interpreted uniformly in all areas of EU law*, having due regard to the requirements of the case-law of the ECtHR. Simply because competition law does not belong to the ‘core’ of criminal law, or because sanctions in competition law should have a sufficiently deterrent effect so as to ensure effective protection of competition, do not for me constitute sufficient reasons to limit the protection afforded by the Charter in the field of competition law.”<sup>16</sup>

c) It cannot be denied that Art. 50 CFR/Art. 54 CISA must also be applicable to **legal persons** as they also enjoy fundamental rights in the internal market (e.g., freedom of establishment and to provide services). Although there is abundant jurisprudence in relation to natural persons, the details of this guarantee in relation to legal persons/enterprises is far from being clear. Irrespective of whether national law provides for criminal sanctions for legal persons or whether “only” administrative sanctions exist for an enterprise for actions committed by its representatives or for failing to properly control the enter-

prise (e.g., in the German legal order: Sec. 30, 130 of the Ordnungswidrigkeitengesetz), the term “act” *must be interpreted differently* when it is applied to legal persons, as the latter act through all its representatives in different places and at different times. In the end, this must lead to a significantly broader comprehension of the term “same act” in relation to enterprises, which raises a number of consequential (and practically relevant) questions. Ultimately – in my opinion – the “identity of the act” must be established from an *objective viewpoint of the enterprise itself*.

d) Applied to legal persons, the question has to be answered as to whether – and if so, how far – a sanction imposed on an enterprise that is a member of a corporate group has a *ne bis in idem* effect on the other members of the group.

#### 4. Art. 55 CISA and the applicability of exceptions after entry into force of the Lisbon Treaty

Lastly, the “open question” remains as to whether the exceptions originally made available by Art. 55 CISA are still applicable. This should be regulated in order to clarify the uncertain legal situation.

### III. Excursus: Additional Issues Identified by Eurojust

#### 1. As to “same acts” and criminal organisation

According to the general rule, all acts of one person which form a set of concrete circumstances inextricably linked together in time, space and by their subject matter, form the *idem factum*. The consequence is that, if certain individual offences (theft, robbery, assault) are committed within the context of a criminal organisation, the person convicted of being a member of that organisation cannot later be convicted of the individual offence. As a rule without exceptions, this seems unacceptable. Similar problems arise in national law, e.g., in Germany, on the basis of a comparable *idem factum* definition of the offence. The original, very wide jurisprudence has been restricted. Whenever a person has been convicted of membership in a criminal organisation, an individual act (murder, etc.) is not regarded as being “covered” by the conviction, even though both offences (membership in the organisation and murder) are closely connected. The exact conditions for (not) applying *ne bis in idem* are of course far from being clarified. Sometimes it is argued that *ne bis in idem* cannot apply if the “dimension” of the offence was not covered by the first conviction – a criterion that is wide open to interpretation. Nevertheless, it is, in principle, accepted that there must be an exception to *ne bis in idem*.<sup>17</sup>

In my view, at least as regards European law, the *bona fide* solution described above (under II.2.a.) can be used as a criterion that is fair in respect to the defendant, on the one hand, and flexible enough to be applied to different cases, on the other hand. Nevertheless, as *ne bis in idem* is an important subjective legal position for the defendant, and one that is fundamental to any state based on the rule of law, this exception must be dealt with restrictively and in accordance with the principle of proportionality.

## 2. As to agreements between the suspect and the authorities

In addition, as regards agreements/deals between a suspect and the (judicial) authorities, the “*bona fide*” approach leads to fair and effective solutions. In my view, as a general rule, the element of legitimate trust on the part of the person concerned should serve as a guideline:<sup>18</sup> Starting with the finality requirement of the national law of the first deciding state as the *prima facie* aspect, it should be decisive *whether the person concerned could have bona fide confidence in the final nature of the decision*.

## IV. Summary: Need/Use of EU Action and EU Competence?

1. In principle, all – or at least most of the – questions mentioned above could be resolved by the CJEU on a case-by-case basis. But this would only be the result of a – rather high –

number of preliminary rulings which could take a considerable amount of time. Moreover, since the CJEU can only deal with a problem on the basis of individual cases, it is not in a position to develop consistent guidelines for the problem of “*ne bis in idem*” as such. The same applies in principle to the jurisprudence of the ECtHR that only reacts to individual complaints. Only in the long run these rulings could (if at all) bring about a (more or less) consistent system of mutual recognition of final judgments.

Considering the importance of the topic, a two-step solution is advisable:

- First, an EU legal act *partly summarizing, partly correcting, and partly developing further* the basic concept of a European *res judicata* and its consequences should be prepared.
- Second, all details of the application (and minor problems) can and should be left to the jurisprudence of the CJEU, as it would be impossible to deal with all these aspects in a legal act; the application of a guarantee to the special circumstances of a specific case is the traditional and classic task of the courts.

2. **Art. 82 para. 1 lit. a) TFEU** contains the necessary *competence to adopt a legal act* (directive or regulation) for laying down rules and procedures to ensure recognition throughout the Union of all types of judgments and judicial decisions. Rules for effective and consistent application of the *ne bis in idem* principle could be drafted (preferably – but not necessarily – in the same act as the rules on avoiding conflicts of jurisdiction). One small but important detail must finally be mentioned: Art. 82 para. 3 – the emergency brake – does not apply to a legal act based on Art. 82 para. 1 TFEU.

\* This article is the second of contributions by the Expert Group B on EU Criminal Policy, which dealt with “Avoiding impunity in the EU – rules on settling conflicts of jurisdiction, *ne bis in idem* and transfer of proceedings”. For the first part, see the contribution by Prof. Dr. Maria Kaiafa-Gbandi in this issue.

1 Art. 50, see heading: “Right not to be tried or *punished* twice in criminal proceedings for the same *criminal* offence”; Art. 54, “penalty”.

2 See H. Satzger, in: Satzger/Schluckebier/Widmaier, *Strafprozessordnung*, 4th ed., 2020 [SSW-StPO], Art. 50 GRC/Art. 54 SDÜ, mn. 23.

3 Cf. S. Mirandola and G. Lasagni, “The European *ne bis in idem* at the Crossroads of Administrative and Criminal Law”, (2019) *eu crim*, 126 et seq.

4 ECtHR (GC), 10 February 2009, *Sergey Zolotukhin v. Russia*, Appl. no. 14939/03.

5 ECtHR, *ibid*, paras. 110-111 in respect of an acquittal following the second set of proceedings.

6 ECtHR, *op. cit.* (n. 4).

7 Cf. ECtHR, 7 July 2003, *Garaudy v. France*, Appl. no. 65831/01.

8 See details in H. Satzger, in SSW-StPO, *op. cit.* (n. 2), Art. 54 SDÜ/Art. 50 GRC, mn. 26.

9 For more detail, see H. Satzger, “Auf dem Weg zu einer ‚europäischen Rechtskraft?‘”, in: Heinrich et al. (eds.), *Festschrift für Claus Roxin zum 80. Geburtstag*, 2011, p. 1515, 1534.

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10 As to further jurisprudence, see ECtHR, 18 May 2017, *Jóhannesson and Others v. Iceland*, Appl. no. 22007/11; ECtHR, 6 June 2019, *Nodet v. France*, Appl. No. 47342/14, para. 53, ECtHR, 8 July 2019, *Mihalache v. Romania* [GC], Appl. No. 54012/10, para. 84.

11 CJEU in *Enzo di Puma* C-596/16 and C-597/16 as to market abuse (emphasis added by the author).

12 E.g., C. Burchard, “Wer zuerst kommt, mahlt zuerst – und als einziger! – Zuständigkeitskonzentrationen durch das europäische *ne bis in idem* bei

beschränkt rechtskräftigen Entscheidungen“, (2015) *HRRS*, pp. 26, 29 et seq.  
 13 AG Kokott, opinion in C-17/10, *Toshiba*, paras. 122, 124; AG Wahl, opinion in C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A.*, paras. 43 et seq.  
 14 CJEU, 14 February 2012, case C-17/10 (*Toshiba Corporation and Others*); for further references, see G. Hochmayr, in: Pechstein/Nowak/Häde, *Frankfurter Kommentar*, GRC Art. 50 mn. 11.

15 AG Kokott, opinion in C-17/10, *Toshiba*, para. 130 (emphasis added).  
 16 AG Wahl, opinion in C-617/17, *Powszechny Zakład Ubezpieczeń na Życie S.A.*, para. 46 (emphasis added).  
 17 For more detail, see W. Beulke/S. Swoboda, *Strafprozessrecht*, 15th ed., 2020, mn.517 et seq.  
 18 See, for more detail, Satzger, in *SSW-StPO (op. cit. n. 2)*, Art. 54 SDÜ/Art. 50 GRC, mn. 26.

# Institutional Framework for EU Criminal Justice Cooperation

## Refining Relations between the EJM, Eurojust and the EPPO

Jorge Espina, Joachim Ettenhofer, François Falletti, and Anne Weyembergh\*

The article deals with the relations between the European Judicial Network (EJM), Eurojust, and the European Public Prosecutor's Office (EPPO), in particular the question of how to shape their relationship. Direct communication between Member States' judicial authorities is the underlying principle of international cooperation in criminal matters in the EU. This needs to be reflected in the legal instruments covering international cooperation. Technical platforms for secure electronic communication between judicial authorities must be designed in such a way as to facilitate direct communication and should not lead to an enhanced role for central authorities. The EJM and Eurojust are both important facilitators of international cooperation. Their tasks overlap and a lot of typical EJM cases are handled by Eurojust. Therefore, the delimitation between cases to be dealt with by the EJM and Eurojust should be more clearly defined by improving existing guidelines on the distribution of roles. At Eurojust, rules of procedure should reflect these guidelines, and a consultation process should be introduced if the requested National Desks wish to challenge the choice made by the Desk opening a case. Though knowledge and expertise concerning specific Member States within the EPPO will certainly be provided by the European Delegated Prosecutors, transnational investigations of the EPPO outside the territory of participating Member States requires international cooperation; therefore, this is still an area requiring support from Eurojust and the EJM. For Eurojust, "close cooperation" is already foreseen in Art. 100 of the EPPO Regulation. Possibilities to contact the EJM should be included in the rules of procedure of the EPPO, and a specific EJM contact point should be appointed at EPPO headquarters.

### I. General Framework of Cooperation

The basic assumption on which we have based our discussion is that this topic does not relate to "substantive judicial cooperation" (which is to be carried out among judicial authorities through direct contacts) but to the synergies and cooperation that must exist between EU structures/agencies/offices devoted to judicial criminal cooperation. This is important because it implies *the principle of direct communication* between competent authorities that must be respected as an underlying principle, not only as regards the types of institutional cooperation that could be set up but also as regards the technical solutions that might be offered to practitioners (see below).

We are concerned about how direct contacts and communication tend to be blurred and sometimes even forgotten when

things are viewed from the institutional perspective of the supranational actors (EJM / Eurojust / EPPO). It might be good if the EU were to establish this principle in a clear way. So far, it has always been floating around, but it is hard to say it is a clearly defined principle that is applicable for all existing instruments.

Additionally, we believe this principle must be enhanced and not diminished by the development of new technical platforms and protocols designed to strengthen cooperation. This is the case both in the area of judicial cooperation and in the area of cooperation with/through law enforcement authorities. Among the former, initiatives like the e-EDES, a secure online portal for transmission of European Investigation Orders (and possibly other instruments) must be developed in a way that does not hamper the role of EU agencies (EJM and Eurojust are to



be taken into account as actors) and, at the same time, avoids reverting to an enhanced role for central authorities. This portal is offered by the Commission as a way to connect Member States, not judicial authorities, and it remains to be seen how Member States will, in turn, connect it to individual authorities (budgetary and organisational difficulties may well result in central authorities being preferred as connections to this platform). As regards areas where the role of law enforcement authorities is defined, it would be good to keep in mind the existing legal framework for judicial cooperation so that both areas are compatible and coherent. Platforms like the EU-sponsored SIRIUS<sup>1</sup> project or the E-MLA initiative led by Interpol<sup>2</sup> show a certain degree of overlapping and confusion, and tend to attribute extended powers to law enforcement authorities, including transmission of MLA requests, even though this should remain within the judicial area.

#### Suggestions:

- Establish the principle of direct communication between Member States' judicial authorities as the default situation (not exclusively, as certain circumstances might require a different approach) in the field of judicial cooperation in criminal matters; this should be done by means of a binding legal instrument (perhaps in the context of the legislative development of the e-EDES or the Digital Criminal Justice project).
- Reinforce the validity of electronic communications (including the development of electronic signatures) between judicial authorities; in particular, the COVID-19 situation has proven that outdated paper-based communication can be replaced by electronic means.

## II. Relations EJM / Eurojust

This is an area in which overlap is very common and where greater clarity is desirable; in particular, the delimitation between cases to be dealt with by the EJM and Eurojust should be more clearly defined. Flexibility is the only practical and feasible approach to the issue.

As can be seen from the statistics provided by Eurojust, the majority of cases dealt with by Eurojust tend to be bilateral and do not always have the degree of complexity or require coordination that would justify the body's involvement. Additionally, the workflow and the attribution of resources within Eurojust is very much driven by sheer numbers, and this does not encourage the passing on of cases from Eurojust to the EJM as it should be. There is no internal mechanism in place to assess when cases need to be opened or not, and this results in clearly inflated figures for some Member States, without any possibility to control this approach (as neither Eurojust or the requested National Desk has the possibility to contest the

opening of a case). Unfortunately, the new Eurojust Regulation<sup>3</sup> has been a lost opportunity to introduce some rationality in this respect, and rules in domestic legislation that foresee a mechanism for channelling cases from one actor to the other are not used very much in practice.

The only determining factor when choosing between Eurojust and the EJM currently seems to be the degree of familiarity on the part of the individual judicial authority with one or the other. The 2018 version of the EJM - Eurojust Joint Paper "Assistance in International Cooperation in Criminal Matters for Practitioners"<sup>4</sup> contains a very generic approach and has no binding force whatsoever. It is even misleading, as it ends with a sentence that is not very accurate, to say the least: "Should you need assistance, the EJM and Eurojust can provide support. As both bodies are in close contact, your request will be dealt with by the most suitable actor."

The fact that some National Desks at Eurojust have double-hatted members (who are also EJM contact points) might be a good policy, but it is not enough to prevent unnecessary cases from being opened at Eurojust and certainly does not add any possibilities of reaction against this practice.

From the EJM perspective, it is less clear how cases are internally distributed, as the mere list of contact points does not always provide a clear idea of specialisation, territorial or material competence, etc. It is also worth noting that placing contact points at ministries of justice interferes with the direct communication principle and might deter some judicial authorities from using this cooperation mechanism. Last but not least, another shortcoming is that the data protection standard for EJM operational work is less clear than that for Eurojust cases.

Against this background, another consideration could be whether the relationship between the EJM and Eurojust can obtain guidance from the EU. In the affirmative – given the flexibility that is required – it might be better to think about guidelines rather than legislation. The latter might not be able to grasp the details of every possible case.

#### Suggestions:

- Improving existing guidelines on the distribution of roles and cases between Eurojust and the EJM, in order to better reflect the current reality and enable proper selection of the most adequate channel.
- Creation or amendment of the Rules of Procedure at Eurojust that reflect the above-mentioned guidelines as well as introduction of a consultation process (with the possible participation of the EJM), so that requested National Desks can challenge the choice made by the Desk opening the case.

### III. Relations Eurojust / EJM / EPPO

Several levels of relationship between Eurojust and the EPPO particularly exist:

**Institutional:** The reference in Art. 86 TFEU, “from Eurojust,” has proven to be little more than an empty declaration. No versions of the Commission’s proposal or of the various texts amended by the Council on the establishment of the EPPO contained any meaningful provision giving weight to that reference. Having established the seat of the EPPO in Luxembourg does not help either. In any case, the need for cooperation is obvious, despite the overly vague scenario depicted in Art. 100 of the EPPO Regulation<sup>5</sup> as “close cooperation.”

**Operational:** The operational field offers room for further cooperation and development of the mechanism to ensure that cooperation takes place. The assumption that Eurojust “loses” some of its competence with the establishment of the EPPO (see Art. 3(1) of the Eurojust Regulation) is misleading, because Eurojust never dealt with investigations the way the EPPO will. Further points of discussion should be the mechanisms for sharing information, compatibility between the Case Management Systems of both bodies, and other similar topics.

#### Suggestions:

The role of Eurojust should be enhanced by the following:

- Coordination and cooperation with Member States that do not participate in the EPPO and third countries;
- A possible role in deciding on ancillary competence, if there is a disagreement between the EPPO and the national prosecution authorities;
- Consultations from EPPO to Eurojust for the exercise of its competence (in cases of EU repercussions);

- Provision of a supporting role to the EPPO in Joint Investigation Teams and conflicts of jurisdiction.

**Administrative management:** It is important to establish mechanisms to ensure that general and mutual support can be offered (although it will be more necessary for the EPPO to receive support from Eurojust than the other way around, at least during the first several years). It must be kept in mind, however, that establishing the EPPO should not necessarily mean weakening Eurojust; the fact, mentioned above, that the EPPO has not really been established “from Eurojust” should not mean it must be established “at the expense of Eurojust.” When regulating the administrative links, it is equally important to keep in mind that the EPPO is a judicial investigating authority whose independence and autonomy must be preserved.

Additionally, the definition of the role of the EJM in relation to the EPPO seems to have been forgotten. Even though knowledge and expertise concerning specific Member States will certainly be provided by the European Delegated Prosecutors, that does not mean a role for EJM contact points can be excluded, as the transnational dimension of EPPO investigations will require support from them as well. The right approach would be to see the EPPO as another judicial authority, in which case the same service that EJM contact points provide to national authorities should be offered to this new authority. The presence of a permanent contact point at the central seat of the EPPO in Luxembourg (in order to streamline the support that the EJM could offer) might also be worth exploring. These aspects will not need specific legislation but could be included in the internal rules of procedure of the EPPO.

Lastly, the relationship between EJM/Eurojust/EPPO will require the establishment of an appropriate framework for the necessary “close cooperation,” based on clear guidelines and regular mechanisms of contact and evaluation. The capacity of these actors to react efficiently in a fast way, if necessary (for example, regarding VAT carousel frauds and ancillary competences involving non-participating Member States or third states), should be taken into account. Enhanced links fostering operational cooperation with Europol and OLAF should also be considered.

#### Suggestions:

- To include in the Rules of Procedure of the EPPO possibilities to contact the EJM in an efficient manner. One option would be to establish a permanent EJM contact point at the EPPO headquarters (this could be implemented by appointing a specific contact point, by using a contact point who already works at the EPPO, or by using a Luxembourg contact point for this specific purpose).



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## IV. Conclusion

There is a necessity for a clear definition of the relations between the EJM, Eurojust and the EPPO to achieve the best results for international cooperation. For this definition legislation is not necessary, guidelines and internal rules of procedure suffice.

\* The authors are listed in alphabetical order. The views expressed are solely those of the authors and are not an expression of the views of their employer.

1 The SIRIUS project was created by Europol in October 2017 as a response to the increasing need of the EU law enforcement community to access electronic evidence for internet-based investigations. The SIRIUS project, spearheaded by Europol's European Counter-Terrorism Centre and European Cybercrime Centre, in close partnership with Eurojust and the European Judicial Network, aims to help investigators cope with the complexity and the volume of information in a rapidly changing online environment, by providing guidelines on specific Online Service Providers (OSPs) and investigative tools; and sharing experiences with peers, both online and in person.

2 Platform for exchanging judicial mutual legal assistance requests in electronic form.

3 Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal

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Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, *O.J.* L 295, 21.11.2018, 138.

4 <[https://www.ejn-crimjust.europa.eu/ejnupload/StaticPages/EJN-EJ-paper-on-judicial-cooperation-in-criminal-matters\\_2018-01\\_EN.pdf](https://www.ejn-crimjust.europa.eu/ejnupload/StaticPages/EJN-EJ-paper-on-judicial-cooperation-in-criminal-matters_2018-01_EN.pdf)> accessed 4 December 2020.

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

# The Need for and Possible Content of EU Pre-trial Detention Rules

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Pre-trial detention (PTD) is an inherently problematic concept. Not only does it conflict with the right to liberty and the presumption of innocence but its use is associated with an extensive range of problems that affect pre-trial detainees, their families, the fair administration of criminal justice and wider society. Many of these problems have an EU dimension. Case law of the CJEU confirms, for example, that deficiencies in Member States' PTD regimes threaten to undermine mutual trust and thus the effective functioning of mutual recognition instruments, such as the European arrest warrant (cf. the cases of *Aranyosi and Căldăraru*). Against this background, the article examines the need for, and possible content of, EU PTD rules.

It begins by summarising the problems that are associated with PTD and identifies their causal connection with deep-seated systematic practices and/or political and legal cultures at national level that tend to promote an over-reliance on PTD while serving to foment distrust in alternatives. Referring to the 2009 Roadmap for Strengthening Procedural Rights and other relevant texts, it is argued that EU action is necessary to address these deficiencies. This will provide the added value of enhancing justice, fairness and the overall effectiveness of legal and judicial systems, on the one hand, and strengthening the Area of Freedom, Security and Justice, on the other. The article then makes a number of proposals for the nature of such action, the most significant being that the EU should adopt a directive based on Art. 82(2) TFEU that establishes minimum rules relating to the use of PTD. This though would be insufficient in itself and should be complemented by a range of other measures that relate to the implementation of existing EU legislation and engagement in a variety of soft law actions. A detailed analysis of the content of these measures, including recommendations for the content of the mooted directive, is provided.

## I. Introduction

Pre-trial detention (henceforth PTD) is an inherently problematic concept. Compulsorily to detain an individual who has not (yet) been convicted of an offence is in clear conflict with the right to liberty (Art. 5(1) ECHR) and the presumption of innocence (Art. 48(1) CFR; Art. 6(2) ECHR, Art. 14(2) ICCPR). It follows that PTD must be grounded in a lawful arrest and should always be an exceptional measure, to be used only (i) when doing so can be justified on objective grounds; (ii) if no other less intrusive means are available or effective in securing its aim; and (iii) for a reasonable length of time. The exceptionality of PTD is reflected in criminal laws of EU Member States, which specify the criteria and procedures for its use, requirements of regular monitoring, judicial review and priority in scheduling for trial. Measures of this type are meant to ensure that PTD is used sparingly but research demonstrates that they are not always respected.<sup>1</sup>

Many of PTD-related problems have an EU dimension. To cite one example, the notable differences between Member States in the legal conditions for, and actual execution of, PTD have provided grounds for challenging or even refusing the execution of European Arrest Warrants (EAWs) (cf. the cases of *Aranyosi and Căldăraru*).<sup>2</sup> They therefore have the capacity to compromise mutual trust, constituting an impediment to the functioning of mutual recognition and consequent effectiveness of existing EU criminal law instruments. A number of empirical studies, moreover, reveal several other problems with the practical implementation of PTD (see the list below), which reinforce the case for EU action in this area, particularly in light of the evolving CJEU case law.

## II. Need and Reasons for EU Action

### 1. Existing problems and objectives of EU action

The problems that are associated with PTD can be grouped under four headings:

(1) Issues relating to the pattern of use of PTD by the Member States

- Inconsistent use of PTD across the Member States, reflecting a significant divergence in PTD rules, e.g. the criteria for deciding on detention, and significant differences in the average duration,<sup>3</sup> providing prima facie evidence of arbitrariness of use;<sup>4</sup>
- Excessive use due to a presumption of PTD rather than a presumption of liberty or use of criteria that focus on the alleged offence rather than the risk posed by the individual;<sup>5</sup>
- Lack of alternatives to detention or excessive use of, or

over-reliance on, PTD when alternatives are available or better suited (i.e. less intrusive means to achieve the same goal);<sup>6</sup>

- Over-representation of foreign nationals suggesting bias against them that is founded in the automatic assumption that they pose a flight risk;<sup>7</sup>
- Contribution of PTD to the general problem of prison overcrowding;<sup>8</sup>
- Evidence that PTD is associated with an increased risk of receiving a custodial sentence following conviction,<sup>9</sup> thereby exacerbating overcrowding and many other problems.

(2) Issues relating to the conditions of detention and impact of PTD on pre-trial detainees<sup>10</sup>

- The poor state of detention conditions in certain EU Member States that are often worse than for sentenced prisoners,<sup>11</sup> e.g. due to the use of facilities that are not designed for long-term detention,<sup>12</sup> lack of education and rehabilitative training courses, etc.;<sup>13</sup>
- Restrictions on contact with outside world, e.g. regarding entitlement to telephone calls or visits, or due to use of solitary confinement;<sup>14</sup>
- Risk of intimidation and ill-treatment by staff or officials;<sup>15</sup>
- Exposure to the violence and/or criminogenic influence of other inmates;<sup>16</sup>
- Risks to health, e.g. through spread of contagious disease or exposure to illicit drugs;<sup>17</sup>
- Adverse psychological impacts, e.g. the suicide rates among pre-trial detainees is known to be higher than for sentenced prisoners;<sup>18</sup>
- Particularly harmful impact on children<sup>19</sup> and other vulnerable groups, e.g. pregnant women, those with physical or mental disabilities, older people, etc.;
- Adverse impact of pre-trial detention experience on longer-term attitudes to custody, i.e. research suggests that the experience of PTD influences behaviour during any subsequent custodial sentence, attitudes to rehabilitation, etc.<sup>20</sup>

(3) Impact on fairness of criminal proceedings

- Violations of fundamental rights, and consequent undermining of the credibility of mutual recognition and the EAW system;
- Increase in refusals to execute EAWs if issues are not addressed;
- Difficulties in preparing the case for the defence,<sup>21</sup> including those caused by the psycho-social consequences of PTD for the suspect;<sup>22</sup>
- Structural imbalances between the prosecution and defence in terms of power and resources, e.g. problems in securing access to a lawyer, access to translation, access to the case file, and legal aid;<sup>23</sup>
- Unjustified use of PTD, e.g. in order to coerce a confession;<sup>24</sup>

- Potential opportunities for corruption incurring the risk of undermining public confidence in the criminal justice system;<sup>25</sup>
- Failure to subtract the time spent in PTD from the final sentence;
- Absence of compensation for time spent in PTD that was unjustified/unlawful.

(4) Impact on persons other than the suspect and/or on wider society

- Punitive impact on suspects' families: human consequences of prolonged separation,<sup>26</sup> impact on child care responsibilities, loss of income, loss of housing or accommodation,<sup>27</sup> exposure to spread of infectious disease contracted by suspects while in detention;<sup>28</sup>
- Direct economic costs to society: PTD is expensive compared with alternative measures;
- Indirect economic costs to society: loss of revenue linked to pre-trial detainees' loss of employment,<sup>29</sup> associated demand for social assistance for family members, equivalent costs relating to former employees in cases where PTD causes business failures;<sup>30</sup>
- Loss of harm reduction potential: resources devoted to unjustified PTD could be invested more productively, e.g. in rehabilitation or crime prevention measures or victim support.<sup>31</sup>

Many of these problems are associated with deep-seated systemic practices and/or political and legal cultures at national level that promote the perception that governments are "tough on crime" at the expense of the presumption of innocence.<sup>32</sup> The recent DETOUR comparative report, for example, identifies lack of prosecutorial restraint, closeness between prosecutors and judges, and societal pressure to focus on types of offences (e.g. burglary) and not the individual's unique circumstances as relevant factors.<sup>33</sup> Other research has pointed to a "culture of distrust in alternatives" to PTD.<sup>34</sup> As the DETOUR report highlights, the existence of these deeper factors militates against a consistent EU-wide approach to PTD as a last resort. Further practical problems concern the lack of resources that are needed to address deficiencies in the Member States and the existence of inconsistent terminology,<sup>35</sup> which can affect methodology of data collection and validity of comparisons.

Emphasising the need for EU action in view of obvious shortcomings, criminal defence lawyers and their organisations, such as the European Criminal Bar Association (ECBA), have stressed the following:<sup>36</sup>

[t]here are no EU standards for time limits for pre-trial detention or less intrusive measures or specific remedies and/or regular judicial control by the responsible authorities. [...] Practical issues arise repeatedly regarding access to the file and intentional non-disclosure of (exculpatory) information by the state authorities throughout Europe [...].

The main objective of EU action should be to address these issues based on sound and current empirical data through the provision of (legislative and soft-action) tools, thereby enhancing justice, fairness and overall effectiveness of legal and judicial systems in the EU and strengthening the Area of Freedom, Security, and Justice (AFSJ). Significant divergences among Member States affect the mutual trust between them, the internal legitimacy of their justice systems and consequently the quality of criminal justice (and the perception thereof) in the EU.<sup>37</sup> The 2009 Roadmap on Criminal Procedural Rights recognised that "excessively long periods of pre-trial detention are detrimental for the individual, can prejudice judicial cooperation between the Member States and do not represent the values for which the European Union stands."<sup>38</sup> The European Commission in its 2011 Green Paper<sup>39</sup> further recognised that while detention issues, including pre-trial detention, are the responsibility of Member States, "there are reasons for the European Union to look into these issues, notwithstanding the principle of subsidiarity. Detention issues come within the purview of the European Union as first they are a relevant aspect of the rights that must be safeguarded in order to promote mutual trust and ensure the smooth functioning of mutual recognition instruments, and second, the European Union has certain values to uphold." The case law on the EAW in the eight years since the Green Paper was published has borne out the relevance of detention-related issues to its operation.

Minimum standards with respect to PTD, such as provisions on review of the grounds of PTD and maximum time limits on PTD, could thus enhance mutual trust between Member States, increase the effectiveness of mutual recognition instruments and demonstrate commitment to upholding the EU's fundamental values. Where applicable, measures that are taken as part of any initiative on PTD should align with other relevant EU policies, such as those relating to the combating of illicit drugs and the promotion of public health.

## 2. EU legal basis and competence, possible added value of EU action

EU action on pre-trial detention could be grounded in Art. 82(2) TFEU. As regards the EU rule of PTD as a last resort<sup>40</sup> specifically, finding a legal basis for such an overarching EU rule to be applied in all (cross-border and domestic) cases would arguably have the effect of obliging parties in the process to recalibrate the embedded domestic practices that favour PTD (as identified in the DETOUR project) to lead to a focus on the individual accused person and fact-based assessments of risk. The current provision on decisions on pre-trial detention in the Framework Decision on the European Arrest Warrant (FD EAW) – Art. 12 – currently achieves the opposite in terms

of default in providing that “the person may be released provisionally at any time in conformity with the domestic law of the executing Member State, *provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding*” (emphasis added). The possible added value of EU action would include:

- The promotion of a common platform of fundamental rights relating to PTD across the EU, based in the ECHR guarantees, but with the potential to offer more extensive protection (e.g. in relation to remedies);
- Further, logical development of the Area of Justice: EU action to tackle the problem of PTD would complement the existing directives on procedural rights and mutual recognition instruments, most notably the EAW, the Framework Decision on probation and alternative sanctions,<sup>41</sup> and the European Supervision Order;<sup>42</sup>
- Enhancement of mutual recognition through increased mutual confidence, fairness, effectiveness and legitimacy of EU criminal law, policy and justice;
- Elimination of obstacles to free movement through the promotion of fundamental rights and of unjustified discrimination based on nationality (i.e. by tackling the flight risk issue) and consequent enrichment of EU citizenship;
- Subsidiary impacts on public health and the combating of illicit drug use, strengthening EU policies in these areas.

These benefits would be difficult, if not impossible, to achieve through independent actions by the Member States because of their scale or effects.

### III. Discussion

#### 1. Possible contents of EU action

The contents of EU action could include:

- The introduction of a common legal framework for the use of PTD that lays down minimum rules relating to decision-making and minimum safeguards for suspects while they are in custody;
- The initiation of a dedicated programme of training for judges and prosecutors to support the adoption of the proposed directive and address other issues relevant to them, e.g. lack of prosecutorial restraint, closeness between prosecutors and judges, mistrust in alternatives to PTD;
- The development and facilitation of initiatives to encourage the transfer across the Member States of knowledge and best practice regarding PTD and how to combat the problems to which it gives rise;
- The commissioning and dissemination of research into matters that are relevant to addressing problems that are associated with the use of PTD, e.g. the development of sophisti-

cated risk assessment tools; the use of technology to develop effective, but less restrictive, alternatives to PTD; deepening understanding of cultural attitudes to PTD and its alternatives, and of trust in the alternatives by politicians, criminal justice professionals and the general public;

- The continuation of support for the work of the Council of Europe and its agencies in this field, including that of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT);<sup>43</sup>
- Consideration of whether the creation of an EU prisons inspectorate or network of prison inspectorates across the Member States would add value to existing mechanisms for monitoring, and encouraging the improvement of, detention conditions and, if so, of whether it is possible and feasible for the Union to engage in such an initiative;
- The taking of steps to ensure that measures taken in the PTD field are consistent with, and serve to promote, the Union’s developing policies in other areas of its competence, e.g. the combating of illicit drugs, the promotion of public health and the safeguarding of the rights of children;
- The provision of financial and other resources to the Member States in order to support their efforts to address deficiencies in PTD;
- The publication of information in a variety of formats and via a variety of platforms to ensure transparency regarding the Union’s initiatives in this field and explain their contribution to the fair and effective administration of criminal justice, the safeguarding of fundamental rights and the promotion of public safety;
- The development of a common terminology and set of statistical indicators that can be utilised for the purposes of monitoring impact and progress at national level, and inform the further development of policy in this field.

Regarding the specific question of legislation-related actions, EU interventions could take place at the level of the adoption of new EU legislation and at the level of implementation.

#### a) Adoption of EU legislation

Art. 82(2) TFEU can serve as a legal basis for EU legislation approximating elements of pre-trial detention in Member States.<sup>44</sup> The link to mutual recognition could render Art. 82(2) also an appropriate legal basis for inclusion of provisions on standards of detention (such as prison conditions) in such an instrument. This argument may be based on the extensive litigation on the EAW, especially post-*Aranyosi*. However, this view is contested and it is unclear how precise these standards could be (how much detail can in general be prescribed by EU law). However, some such standards have already been formulated in the ECtHR jurisprudence and EU action could start with codifying those.

Recent EU case law on standards of detention and the EAW, in particular the decision in *ML*,<sup>45</sup> clearly engages the rights of *individuals* in obliging the executing judicial authority to focus not on the general situation in an issuing state but on the specific and precise risk to an individual requested person of inhuman and degrading treatment arising from conditions they will experience in an issuing state. Where, as seems likely, legislation on EU minimum standards on detention conditions would be resisted in particular if sought to apply to both cross-border and domestic cases, a case could be made for ‘Lisbonising’ the FD EAW to at a minimum enshrine these court rules and introduce data provision obligations on Member States regarding conditions in their prisons.<sup>46</sup>

The adoption of a specific EU instrument on pre-trial detention would provide grounds for the Commission to monitor or scrutinise in detail the situation on the ground in Member States, which is another added value of such an action. However, there is currently scope – under the existing legal instruments – for a greater focus on implementation.

#### b) Implementation of EU legislation

The Commission would be encouraged to embark on the scrutiny of the implementation of the FD EAW focusing specifically on pre-trial detention. The evaluation procedure under Art. 70 TFEU can also be used with a mutual evaluation round devoted specifically to pre-trial detention.

Any evaluation of existing EU secondary law – and in particular the FD EAW – should include a detailed assessment of national detention regimes to the extent that they have an impact on the operation of the mutual recognition regime. The current evaluation round mentioned by the Commission (2019–2021) is a first-class opportunity to focus on detention in this context. Evaluation should not be limited to monitoring the implementation of specific provisions of the FD, but should examine national systems as a whole in view of the range of issues arising before national courts and the CJEU regarding detention conditions as ground for refusal to execute EAWs. Evaluation reports must aim to provide credible sources for national courts to rely on in their scrutiny of fundamental rights in mutual recognition post-*Aranyosi*.

An Article 70 mutual evaluation round on pre-trial detention could take a cross-cutting approach looking at the provisions in the various mutual recognition and procedural rights instruments that already provide some provisions on pre-trial detention, e.g. Arts 12 and 26 FD EAW; the quite extensive provisions in Directive 2016/800 on childrens’ rights; the rights of access to a lawyer and to third party / consular assistance in Directive 2013/48 on the right of access to a lawyer; and the

information rights for detainees, including the right to challenge their detention, in Directive 2012/3 on the right to information.

The Commission can also be encouraged to focus on the evaluation of the implementation and use made of the European Supervision Order (ESO) as an alternative to detention. Such an evaluation could also investigate whether the availability of the ESO is having the unintended consequence of causing excessive restrictions on liberty. This would be the case if it is being used in cases where unrestricted liberty would be justified, backed by the potential to apply for an EAW in the event an accused person from another Member State fails to appear for trial. Consideration could also be given to the merits of incorporating the ESO provisions in a “Lisbonised” FD EAW.

## 2. Form (e.g. soft actions, legislative intervention)

There is a clear and growing case for EU legislation to establish minimum rules with respect to PTD. Similar to the existing measures to safeguard procedural rights,<sup>47</sup> this should be in the form of a directive based on Art. 82(2) TFEU. Consistent with their approach, the starting point for determining the contents of the new directive should be the principles that have been developed by the ECtHR in this field. Attention should also be paid to the European Prison Rules<sup>48</sup> and other relevant instruments to which the Member States are a party and to the norms that stem from their constitutional traditions. This is a sensible approach because it reflects established practice and, in principle, the Member States have already accepted that the relevant principles should apply to them. Where appropriate, the directive should seek to improve upon these existing guarantees, especially in cases where there is evidence that the Member States (or a critical mass of them) already provide superior protections.

The adoption of a legislative instrument alone is, however, unlikely to prove sufficient in itself to tackle the complexity of problems to which PTD gives rise or which its use exacerbates. Therefore, as indicated above, the new directive should form one element in a package of measures, that also includes a wide variety of soft actions, through which to combat the deficiencies in PTD.

Soft measures might include the exchange of good practices, e.g. as regards alternatives to detention; the formulation of guidelines on the increased effectiveness of PTD-relevant judicial procedures and improving the quality of judicial decision-making;<sup>49</sup> actions to raise awareness of relevant ECtHR case law among national judges; and the scientific develop-

ment of risk assessment tools (e.g. tools for assessing the risk of absconding) and EU-wide dissemination of information on their optimal use.

In addition, further empirical studies should be conducted (and include all EU Member States)<sup>50</sup> to ascertain the current practices and problems as regards PTD across the EU, including studies among judges examining their reasons for not imposing alternatives and opting for PTD instead; studies on the ways of deducting the time spent in PTD from the final custodial sentence; studies among national governments, scholars, civil society, defence practitioners, etc., as to the possibility and desirability of introducing the common law practice of bail into Continental jurisdictions and so forth. More rigorous collection of data on who is being detained (age-offences-foreigners/nationals-proportionality) is desirable, as is the development of communication, fact-finding and information mechanisms in partnership with the Council of Europe and key NGOs.

### 3. Scope of the intervention

Following the model of the existing procedural rights directives, the new directive should not be restricted to cross-border cases, but should apply to PTD in general. This would avoid legal complexity and uncertainty and double standards in national proceedings. An EAW-specific provision should be included; this would be consistent with the scope of the other procedural rights directives.

### 4. Issues to be regulated in the initiative – varying options

The proposed directive should enshrine the presumption of liberty and the complementary principle that PTD is to be used only as a last resort, when less restrictive alternatives would be inadequate or ineffective. PTD for minor offences (i.e. those for which a custodial sentence cannot, or is unlikely to, be imposed) should be ruled out.

Regarding the remainder of the directive, the issues can be divided into two categories: those where the approach appears (relatively) clear and that definitely should be regulated; and those where policy choices or other issues arise but that might be considered for inclusion.

(1) Issues where the approach appears (relatively) clear and that should be regulated:

- *Grounds upon which PTD can be justified*: the directive should provide an exhaustive list of grounds for PTD. They should reflect relevant ECtHR case law on Art. 5 ECHR,<sup>51</sup> including by requiring consistent application of the “reasonable

suspicion” standard that it has established and by requiring an individual assessment in each case;<sup>52</sup>

- *Authority competent to make decisions on PTD*: substantive PTD decisions (excluding initial decisions on arrest and time-limited initial investigative detention) should be made by a court, having regard to the need for effective judicial protection; that is, incorporating judicial independence and access to remedies, in line with the requirements that the CJEU has established in the different, but relevant, context of Opinions and judgments on the issuing judicial authority in the context of the EAW;<sup>53</sup>

- *Burden of proof*: the directive should stipulate that the burden of proof rests with the prosecution;<sup>54</sup>

- *Reasons for PTD*: the directive should stipulate the requirement to justify, i.e. provide relevant and sufficient reasons for pre-trial detention;

- *Foreign nationals/non-residents*: the directive should stipulate that foreign nationality and/or non-domestic residence are not in themselves evidence that a suspect poses a sufficient risk of absconding to justify PTD;

- *Judicial review of detention*: the directive should provide the right to judicial review of the initial decision to subject the suspect to PTD and, if s/he remains in custody, of the continuing grounds for detention at regular intervals thereafter. The criteria and standards to be applied should be consistent with relevant Convention law;<sup>55</sup>

- *Right to be heard/right to legal representation*: the directive should provide the right to be notified of judicial review hearings including appeals, and for the suspect and her/his legal representative to attend in person;<sup>56</sup>

- *Principle of ‘special diligence’*: the directive should place an obligation on Member States, in bringing proceedings to trial, to prioritise cases where the suspect(s) are in PTD;<sup>57</sup>

- *Rights during PTD*: the directive should establish a minimum set of basic rights to be provided to all pre-trial detainees. They should include, e.g., rights to communication with the outside world; education; exercise and recreation; health care; nutrition; and work.<sup>58</sup> Some of these rights are afforded to children who are suspects in criminal proceedings under Directive 2016/800, which could therefore be used as a model. A provision could also be included to the effect that the provision of these specific rights or the conditions of detention in general should not be inferior to those enjoyed by sentenced prisoners;

- *Right of pre-trial detainees to be detained separately from sentenced prisoners*: the directive should provide this right<sup>59</sup> with a tightly drawn exception to cover circumstances where it is impossible to do so;

- *Special needs of certain detainees*: the directive should place a specific obligation on Member States to take account of the special needs of women, children,<sup>60</sup> those with physical or mental disabilities, older people, foreign and ethnic minority detainees and other minority/vulnerable groups;



- *Remedies*: the directive should enshrine a right to appeal / to an effective remedy against the decision to impose PTD;
- *Compensation*: the directive should provide the right to compensation for unjustified/unlawful detention;
- *Calculation of subsequent custodial sentence*: the directive should provide the right to have time in PTD deducted from any subsequent custodial sentence for the offence;
- *Provisions specific to EAW proceedings*: the directive should include a provision amending or repealing the current Art. 12 FD EAW, so that it will not be at variance with the principle that PTD is to be used only as a last resort in domestic and cross-border cases.
- *Alternatives to PTD*: to be effective, the provisions of the directive that relate to decision-making will need to refer to less restrictive alternatives. A number of issues arise in relation to this. For example, PTD having been ruled out, should the directive include criteria/principles to be applied in determining what an appropriate alternative might be? This can be a more complex decision than appears because the relevant considerations may not be limited to the degree of restriction on liberty and factors relating to the administration of justice and prevention of further offending. They may also include factors relating to the welfare of the suspect, including access to resources, such as facilities for religious observance.<sup>61</sup>
- Secondly, there is the question of the alternatives themselves. In the absence of harmonisation, should the directive mirror the approach of Directive 2016/800, which merely states that “Member States shall ensure that, where possible, the competent authorities have recourse to measures alternative to detention [...]”<sup>62</sup> Or should it be more specific, and provide a list of some sort? A non-exhaustive list that named those alternatives that are already common to the Member States might be an effective approach. It would build on existing practice, promoting political agreement, and leave scope for future development, both through the transfer of practices between the Member States and technological innovation.
- *Length of PTD*: the aim of the directive should be to minimise the time that suspects spend in PTD. One approach is to follow the model of Directive 2016/800 and the ECHR/ECtHR. The former creates an obligation on Member States “to ensure that deprivation of liberty [...] is limited to the shortest appropriate period of time”.<sup>63</sup> The second creates the right “to trial within a reasonable time”.<sup>64</sup> Another approach, akin to the EAW, is to specify time limits. In terms of setting the maximum length of pre-trial detention, there is also similar EU legislation in the context of the EU Return Directive (Directive 2008/115/EC), where maximum periods of detention serve as a safeguard for the individuals and have led the CJEU to develop important case law, setting limits to criminalisation and detention imposed by national law.<sup>65</sup> Bearing in mind the diverse range of circumstances to which the directive will apply, the first approach (which reflects that of the exist-

ing procedural rights directives) may be more feasible from a practical point of view.

(2) Issues where policy choices or other issues arise but that might be considered for inclusion:

- *Influence of PTD on subsequent decision to pass a custodial sentence*: the directive could contain a provision that requires Member States to ensure that courts exclude the fact that an offender has been subject to PTD when determining whether it is appropriate to impose a custodial sentence for the offence.
- *Relevance of alternatives to PTD to subsequent custodial sentence*: consideration should be given to whether the principle that time in PTD should be offset against a subsequent custodial sentence should also apply to alternatives to detention, notably those that entail considerable restrictions on liberty, e.g. house arrest.<sup>66</sup>

## IV. Recommendations and Conclusions

### 1. Adoption of a directive on pre-trial detention under Art. 82(2) TFEU

The directive could be drafted to apply specifically to mutual recognition instruments. However, we would support the approach that has been taken in the case of the existing procedural rights directives, which are not limited to cross-border cases but cover domestic cases as well. This would avoid legal complexity and uncertainty and double standards in national proceedings.

The legislation should cover, as a minimum, rules on the maximum length of pre-trial detention, and enshrine the presumption of liberty and the complementary principle that PTD is to be used only as a last resort. An EU instrument could also include rules on effective remedies and requirements to justify and give reasons for pre-trial detention and to introduce rules on alternatives to detention, rules on vulnerable persons as well as rules on compensation for unlawful detention and other issues listed above (in section III.4). The inclusion of rules on prison conditions can be further discussed.

As a practical matter, taking steps to refine the use of PTD, which is a primary aim of the suggested directive, would tend, indirectly, to have a beneficial impact upon detention conditions even in the absence of specific provisions to regulate the latter. By reducing the numbers of suspects/defendants made subject to PTD and restricting its duration, the degree of exposure to the problems that were identified above would be minimised. In addition, in principle, resources would be freed up that could then be redeployed in improving prison conditions for those pre-trial detainees who remained and, conceivably, for prisoners as a whole.

## 2. Scrutiny and implementation

The EU should also strengthen the scrutiny of national practices and implementation on the ground by doing the following:

- Embarking on the scrutiny of the implementation of the FD EAW focusing specifically on pre-trial detention;
- Using the evaluation procedure under Article 70 TFEU and initiating a mutual evaluation round devoted specifically to pre-trial detention (building on the upcoming findings of the 9th round of mutual evaluations on FD EAW, FD 2008/909, FD 2008/947 and FD 2009/829 (November 2019 to January 2021));
- Focusing on the evaluation of the implementation and use made of the European Supervision Order as an alternative to detention;
- Considering the merits of a “Lisbonised” FD EAW that codifies the CJEU case law relating to PTD, given the (per-

haps originally unanticipated) significance of detention issues to its functioning:

- Setting up mechanisms to enable the rigorous collection of data on detainees (age-offences-foreigners/nationals-proportionality);
- Carrying out/commissioning further empirical studies on relevant PTD issues that include all Member States and gather quantitative and qualitative current data on issues mentioned above (e.g. judges’ reasons for not considering alternatives to PTD);
- Setting up various soft actions (see above), aimed at providing awareness and support or guidance to national practitioners;
- Developing communication, fact-finding and information mechanisms in partnership with the Council of Europe and key NGOs.

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\* The authors are listed in alphabetical order. Additional note by Tricia Harkin: The views expressed are solely those of the contributor and are not an expression of the views of her employer.

1 See e.g. the report by Fair Trials, “A Measure of Last Resort? The practice of pre-trial detention decision making in the EU” (2016), 1 <<https://fairtrials.org/wp-content/uploads/A-Measure-of-Last-Resort-Full-Version.pdf>> accessed 31 October 2020.

2 CJEU, 5 April 2016, case C-404/15, *Aranyosi*, and CJEU, 9 December 2015, case C-659/15 PPU, *Căldăraru*.

3 Fair Trials (2016), *op. cit.* (n. 1), 2.

4 Quaker Council for European Affairs, *Pre-Trial Detention: A Challenge for the New Justice Commissioner and for EU Member States*, 2014, p. 2.

5 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, “CPT urges European states to hold persons in remand detention only as a measure of last resort and in adequate conditions”, 2017 News, 20 April.

6 Fair Trials (2016), *op. cit.* (n. 1), 32.

7 “Risk of flight was routinely invoked disproportionately against foreign nationals in Italy, Ireland and Spain, while alternatives such as confiscation of passport and travel bans were not usually considered.” Fair Trials (2016), *op. cit.* (n. 1) 20; Quaker Council for European Affairs (2014), *op. cit.* (n. 4), p. 9; Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights, “Abuse of Pre-Trial Detention in States Parties to the European Convention on Human Rights”, 2015, AS/Jur 16, para. A.8; CPT (2017), *op. cit.* (n. 5).

8 CPT (2017), *op. cit.* (n. 5).

9 Quaker Council for European Affairs (2014), *op. cit.* (n. 4), p. 5.

10 We were not asked to address post-conviction detention. Therefore, prima facie, the potential for differential treatment between those subject to an EAW for prosecution and for execution is outside our remit. In principle, however, it is possible to argue that some difference in treatment (in the direction of preferential treatment of pre-trial detainees) can be justified on the basis that the former remain subject to the presumption of innocence, whereas the latter do not. This is not necessarily a position with which we agree. But regardless of the merits of that argument, we would also suggest that the fact that a directive on PTD might lead to adverse comparisons with the treatment of those subject to detention following conviction is not a good reason to fail to take action to improve PTD if it is possible to do so. Among other considerations, tackling the latter is liable to strengthen legal and political pressure to improve detention conditions for all prisoners.

11 CPT (2017), *op. cit.* (n. 5).

12 CPT (2017), *op. cit.* (n. 5).

13 Quaker Council for European Affairs (2014), *op. cit.* (n. 4), pp. 6–7.

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14 CPT (2017), *op. cit.* (n. 5).

15 CPT (2017), *op. cit.* (n. 5).

16 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights (2015), *op. cit.* (n. 7), para. A.2.1.2.

17 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights (2015), *op. cit.* (n. 7), para. A.2.1.2.

18 CPT (2017), *op. cit.* (n. 5).

19 Noted already in the Commission’s 2011 Green Paper (Commission, “Green Paper from the Commission, Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention”, COM (2011) 327 final), pp. 10–11.

20 Quaker Council for European Affairs (2014), *op. cit.* (n. 4), p. 7.

21 Quaker Council for European Affairs (2014), *op. cit.* (n. 4), p. 5.

22 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights (2015), *op. cit.* (n. 7), para. A.2.1.3.

23 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights (2015), *op. cit.* (n. 7), para. A.11.2.

24 Fair Trials (2016), *op. cit.* (n. 1), 1.

25 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights (2015), *op. cit.* (n. 7), para. A.2.2.3.

26 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights (2015), *op. cit.* (n. 7), para. A.2.1.1.

27 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights (2015), *op. cit.* (n. 7), para. A.2.1.1.; CPT (2017), *op. cit.* (n. 5).

28 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights (2015), *op. cit.* (n. 7), para. A.2.2.2.

29 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights (2015), *op. cit.* (n. 7), para. A.2.2.2.

30 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights (2015), *op. cit.* (n. 7), para. A.2.1.1.; CPT (2017), *op. cit.* (n. 5).

31 Quaker Council for European Affairs (2014), *op. cit.* (n. 4), pp. 5–6.

32 Council of Europe Parliamentary Assembly Committee on Legal Affairs and Human Rights (2015), *op. cit.* (n. 7), para. A.11.1.

33 The report notes, at p. 71, the following: “Our research shows that, besides the official grounds for detention, there are also hidden and extra-legal motives influencing the decisions. In addition, some reports also referred to limited or weak reasoning for decision-making. PTD practice across most countries therefore appears somewhat arbitrary, and which does not pay sufficient attention to the ultima ratio principle and the drastic infringement PTD means for the personal rights. Understanding that this practice is longstanding and persistent, we do not assume this can be improved by directives or legal changes. Changing this situation

requires continuing efforts including awareness raising and training for prosecutors and judges.” See W. Hammerschick, C. Morgenstern, S. Bikelis, M. Boone, I. Durnescu, A. Jonckheere, J. Lindeman, E. Maes, and M. Rogan, *DETOUR: Towards Pre-Trial Detention as Ultima Ratio*, 2017, 34 *Fair Trials* (2016), *op. cit.* (n. 1), 27.

35 PTD is used sometimes (as in the Commission’s 2011 Green Paper) to cover the entire period of detention “until the sentence is final” (p. 8), while in other cases (as the name itself suggests), it is used to designate only the period of detention before the beginning of the trial.

36 ECBA, “ECBA Initiative 2017/2018: Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards”, p. 3 <[http://www.ecba.org/extdocserv/20180424\\_ECBA\\_Agenda2020\\_NewRoadMap.pdf](http://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf)> accessed 31 October 2020.

37 “In many respects the differences between legal systems and the lack of protection provided by national laws lead to mistrust and general scepticism in relation to Europe” (*ibid.*, p. 1).

38 Resolution of the Council, “Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings”, 2009/C 295/01 (at C 295/3).

39 See above in n. 19.

40 Given that for pre-trial detention, the presumption of innocence (as guaranteed by Article 48 CFR) is engaged, some consider that TFEU provisions on free movement of persons (Article 21 and 45) might also be used as a legal basis – together with Article 82(2) – for rules at EU level stipulating that pre-trial detention must be a last resort. While Article 45(3) envisages limitations on this right, justified on grounds of public policy and public security, these exceptions must, however, be strictly construed and while they will be engaged in individual cases, they are arguably not a barrier to an EU-wide requirement that Member States must guarantee that systems are in place to ensure PTD is used as a last resort. It is worth noting that existing ECtHR case law already stipulates the exceptionality of PTD.

41 Council framework decision 2008/947/JHA on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, *O.J. L 337*, 16.12.2008, 102.

42 Council framework decision 2009/829/JHA on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, *O.J. L 294*, 11.11.2009, 20.

43 Accession to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CETS 126), and thus acceptance of the jurisdiction of the CPT, is a compulsory element of the AFSJ *acquis*. Therefore, this should not be controversial.

44 In terms of the content of the proposed EU legislation, the issues to be regulated are set out in detail in section 4 below.

45 CJEU, 25 July 2018, case C-220/18 PPU, *ML*.

46 The ECBA agenda proposal (*op. cit.*, n. 36) similarly suggests modernising and “Lisbonising” the FD EAW in this regard (p. 2). While we recommend the adoption of a directive on PTD, if there was too much resistance to such a directive, a case could be made for tackling problems relating to PTD that have been affecting the EAW by Lisbonising it to incorporate codification of relevant CJEU case law. However, this would be a far less satisfactory option than the adoption of a dedicated directive, as well as opening up a separate set of contentious issues to do with the EAW itself.

47 Directive (EU) 2010/64 on the right to interpretation and translation in criminal proceedings, *O.J. L 280*, 26.10.2010, 1; Directive (EU) 2012/13 on the right to information in criminal proceedings, *O.J. L 142*, 1.6.2012, 1; Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty, *O.J. L 294*, 6.11.2013, 1; Directive (EU) 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, *O.J. L 65*, 11.3.2016, 1; Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, *O.J. L 132*, 21.5.2016, 1; Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, *O.J. L 297*, 4.11.2016, 1.

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48 Council of Europe, *European Prison Rules* (2006).

49 Fair Trials researchers, for example, observed “proceedings in which judges made poorly-reasoned decisions to detain suspects unnecessarily, relying on minimal information. Judicial reasoning was often vague and formulaic, and failed to engage sufficiently with practical alternatives to pre-trial detention that can protect the investigation, limit the possibility of reoffending and ensure defendants’ presence at trial”, *Fair Trials* (2016), *op. cit.* (n. 1), p. 1.

50 The above-mentioned Fair Trials study, for example, included only ten EU Member States (England and Wales, Greece, Hungary, Italy, Ireland, Lithuania, Netherlands, Poland, Romania, and Spain).

51 See, for example, ECtHR, 7 April 2009, *Tiron v Romania*, Appl. no. 17689/03.

52 Grounded in specific facts and the suspect’s personal circumstances: ECtHR, 22 December 2008, *Aleksanyan v Russia*, Appl. no. 46468/06.

53 CJEU, 10 November 2016, case C-452/16 PPU, *Poltorak*; CJEU, 10 November 2016, case C-477/16 PPU, *Kovalkovas*; CJEU, 10 November, case C-453/16 PPU, *Özcelik*; CJEU, 27 May 2019, Joined Cases C-508/18, *OG*, and C-82/19 PPU, *PI*; CJEU, 29 July 2019, case 209/18, *PF*; CJEU, 9 October 2019, case C-489/19 PPU, *NJ*; CJEU, 12 December 2019, Joined cases C-566/19 PPU, *JR*, C-626/19 PPU, *YC*, C-625/19 PPU, *XD*, C-627/19 PPU, *ZB*.

54 ECtHR, 10 March 2009, *Bykov v Russia (GC)*, Appl. no. 4378/02.

55 Articles 5(1)(c) and 5(3) ECHR and applicable ECtHR case law, e.g. ECtHR, 5 July 2016, *Buzadji v Republic of Moldova (GC)*, Appl. no. 23755/07. Rules on regular review by the deciding judge of decisions to order PTD could be considered with provisions for a possibility to have a review very soon after the initial decision to order PTD is taken, acknowledging that this often happens against a background of inadequate information.

56 ECtHR, 11 July 2017, *Oravec v Croatia*, Appl. no. 51249/11. The right of access to the case file is already established under Article 7(1) of Directive 2012/13.

57 ECtHR, 18 December 1996, *Scott v Spain*, Appl. no. 21335/93.

58 See further European Prison Rules, Part II (Conditions of Imprisonment).

59 European Prison Rules, para. 18.8.a.

60 See also Directive (EU) 2016/800 of the European Parliament and of the

Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, *O.J. L 132*, 21.5.2016, Articles 10–12. Of particular note, and as a useful precedent regarding legislation on PTD, is Art. 10, para. 2, stipulating that “deprivation of liberty, in particular detention, shall be imposed on children *only as a measure of last resort*.”

61 See, e.g., ECtHR, 5 January 2016, *Süveges v Hungary*, Appl. no. 50255/12.

62 Art. 11.

63 Art. 10 Directive 2016/800.

64 Art. 5(3) ECHR.

65 E.g. CJEU, 28 April 2011, case C-61/11 PPU, *El Dridi*.

66 In this regard, see CJEU, 28 July 2016, Case C-294/16, *JZ*.

## Improving Defence Rights

### Including Available Remedies in and (or as a Consequence of) Cross-Border Criminal Proceedings

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The rights of individuals in criminal procedures have been prominent on the agenda since the entry into force of the Lisbon Treaty. In this article, the authors take stock of the state of the art, evaluating the content and implementation of the 2009 “Stockholm Roadmap Directives” (ABC Directives). Furthermore, they identify the main challenges for the years ahead. The work is organised around three, closely connected issues, i.e. the need for additional minimum rules in the area of cross-border cooperation proceedings, the need for additional minimum rules on defence rights and procedural safeguards beyond the first generation of the Roadmap Directives and the need for minimum rules on remedies, in cases where rights have been violated. The authors suggest topics and strategies for legislative intervention, backed up by soft law measures.

#### I. Introduction – our Approach

This document reflects the results of our discussions over the last months. In our approach, we have focussed on collecting, to the largest extent possible, ideas which have been suggested in doctrine, policy, etc. It is for the expert group as a whole to take further positions. In this document, a number of questions came up that have structured this article. These questions are as follows:

- Should the EU focus on obligatory legislative interventions or (strive for) voluntary convergence by its Member States with the EU framework?
- In the wake of the ECJ’s decisions on the *Akerberg Fransson*<sup>1</sup> and *Melloni*<sup>2</sup> cases, a number of institutional conflicts have arisen between the EU and national courts. The ECJ has thus far taken an intermediate stance: a wide claim of jurisdiction over anything that comes within the scope of EU law, yet also a willingness to mitigate the principle of effectiveness (*Taricco IP*<sup>3</sup>) or fundamental rights (*Menci*<sup>4</sup>) where no specific secondary EU law is applicable. This is an important context-

ual finding for any future legislative agenda, both in the EU and in the national setting. At the EU level, the degree of preciseness of secondary law has become an important factor in the EU institutions’ role as arbiters and facilitators of a level playing field. At the national level, the challenge is not only to ward off the influence of EU law on criminal justice as much as possible, but also to think through criminal justice in light of European integration.

- Another relevant factor we have identified is that the European Court of Human Rights in Strasbourg extensively applies the margin of the appreciation doctrine in criminal matters.<sup>5</sup> That is not a welcome development for the EU *per se*, given the need for a transnational level playing field to fight crime and to ensure fair trials. It could require increasing interventions at the EU level.
- Should a new agenda focus on the harmonization of transnational cooperation procedures or (also) tackle the criminal justice systems of the Member States as such? In the former case, should the focus be on the laws of the executing state or also on those of the issuing state?

- We did not take a final stance on this issue. Some of the below proposals go one way, others take an opposite direction. In light of the above arguments – the need to increase mutual trust and to expand the possibilities for EU institutions to take up their role as arbiters, *as well as* because of the apparent reticence of the Strasbourg Court in the area of criminal justice –, there is a strong case to keep focusing on the approximation of the Member States’ criminal justice systems as a whole via minimum rules (including a new ABC set of Directives). This also has strong positive effects on legal certainty all over the EU. The disadvantages of this approach are centred on subsidiarity, competence creep and legitimacy concerns. Where do the minimum rules stop? With those on the right to appeal? With the legal professional privilege? Arguably, the area of cross-border procedures (as has been done with *in absentia* procedures in a number of framework decisions on mutual recognition)<sup>6</sup> raises less issues with respect to legitimacy while reducing chances of national institutions focusing on warding off EU law, rather than on the development of the EU dimension of their tasks (which may lead to voluntary convergence).
- Should the EU focus on minimum rules for defence rights or for all types of safeguards, with a view to ensuring mutual trust?
- Almost all legislative efforts have so far focused on fair trial rights. That limitation does not necessarily follow from Art. 82 TFEU (“the rights of individuals in criminal procedure”). The rights of individuals may also cover the right to privacy, liberty, property, etc. – and thus touch upon such issues as procedural safeguards for investigatory powers or even judicial independence. This is where the notion of defence rights starts to overlap with related concepts like human rights, fundamental rights, procedural safeguards, etc.
- Should the EU focus on minimum rules for the content of rights/safeguards or also intervene through legislation in cases of violations of those rights/safeguards?
- As rapporteurs, we feel that there is little point in minimum rules for rights if there is no common understanding on how violations of those rights should be redressed or remedied. It is vital for enhancing mutual trust. There is very little material, however, on how this should be achieved, as much for cross-border/transnational cooperation cases as in purely national cases.

In the following, we will first clarify a number of key concepts (II) and then deal in substance with the areas of possible EU intervention (III). The latter will include the issues of cross-border cooperation procedures (III.1), the extension of the ABC Directives (III.2),<sup>7</sup> and the issue of (minimum rules for) remedies (III.3). A certain overlap of these issues could not be avoided. As a sort of structuring principle (though not applied very strictly), we have included those issues that not only affect cooperation procedures but also purely national, intrastate

criminal procedures under the section on the extension of defence rights. Matters that particularly refer to issues of cross-border cooperation (interstate coordination, etc.) have been listed under cross-border cooperation procedures. This article does neither deal with victim’s rights nor with the concept of criminal charge and administrative sanctions. It focuses on criminal law *sensu stricto*. We also have excluded the relationships with third states (the external dimension of the AFSJ).

## II. Definition of Key Concepts

### 1. Cross-border criminal proceedings

There is no unanimous definition of “cross-border criminal proceedings”.<sup>8</sup> The corresponding concept adopted for this paper is hence a broad one: any proceeding with any link whatsoever to another jurisdiction<sup>9</sup> within the EU. We will restrict this geographically to links to other EU Member States. Within this broad concept, different definitions may be identified: i) cross-border cooperation proceedings; ii) cross-border<sup>10</sup> criminal proceedings (domestic or European).

*i. Cross-border cooperation proceedings* are those stages of criminal proceedings in which the authorities from different countries directly cooperate with a view of undertaking specific procedural actions. This includes, *inter alia*, European Arrest Warrant proceedings, European Investigation Order (EIO) proceedings, proceedings for the enforcement of criminal sanctions or confiscation decisions, proceedings for the enforcement of pre-trial supervision orders alternative to detention, proceedings for the transfer of criminal proceedings, and joint investigations. These proceedings are by nature intertwined with the main criminal proceedings in the issuing states. Thus, for the purposes of this study, they form an integral part of criminal proceedings. This definition also includes cooperation proceedings between the national authorities of Member States using Eurojust, or cooperation proceedings with the European Public Prosecutor’s Office (EPPO). Hard-law measures adopted in these areas could have Arts. 82(1) subpara. 2, 85(1) or 86(1) and (3) TFEU as a legal basis and hence be adopted by means of Directives or Regulations.

*ii. Criminal proceedings with a cross-border dimension* may be understood as those with any cross-border link, including the ones referring to (a) cross-border criminality<sup>11</sup> – which will normally but not necessarily entail police or judicial cooperation or the involvement of persons from Member States different to the state of the trial – but also (b) criminal proceedings referring to intra-state criminality – in which a person from another Member State is involved or where there is a need

for undertaking acts in cooperation with other Member States (which could be clear from the outset or supervening – for example, the suspect or accused, or the victim, being moved to another Member State). Within this definition, *European Criminal Proceedings* could be distinguished. These include proceedings led under the authority of entities that by nature may act across borders, such as the EPPO.

Hard-law measures adopted in these areas could have Art. 82(2) TFEU as a legal basis and hence be adopted by means of Directives, or, in respect of the EPPO, Art. 86(1) TFEU and hence be adopted by means of a Regulation.

*iii.* Since our topic also includes defence rights and remedies available “*as a consequence of cross-border criminal proceedings*”, this could ultimately lead to the inclusion of all criminal proceedings in the EU, since in any of these a decision may be issued that may have to be recognized and enforced in another Member State; hence any regulation with a view to improving defence rights and available remedies may impact on the recognition and enforcement of such decisions in another Member State. This is especially relevant since it is impossible to know from the beginning whether or not a criminal case will be of a cross-border nature. This shows the difficulty (*or impossibility?*) of separating “cross-border” cases from others for the purposes of EU legislation.

On the other hand, as mentioned above, minimum rules for rights also affecting purely domestic proceedings might require a particular justification in light of subsidiarity concerns. However, it should be noted that if problems arising in a cross-border situation or shortcomings in the operation of mutual recognition or cooperation in the field of criminal law generally justify the adoption of measures with respect to defence rights, they will normally have to be extended to purely domestic situations, in order to avoid reverse discrimination and legal fragmentation within the domestic systems. This approach has been adopted as a basis for the procedural rights Directives (EU) 2010/64, 2012/13, 2013/48, 2016/343, 2016/800 and 2016/1919.

Hard-law measures adopted in these areas will normally have their legal basis in Art. 82(2) TFEU and hence be adopted by means of Directives.

## 2. Rights of individuals: defendants, defence rights, safeguards and remedies in criminal procedure

Art. 82(2) lit. b) and c) TFEU refer to the “rights of individuals” and “victims”. However, for the purposes of this article, the notion “defence rights” refers only to the rights of the sus-

pect or accused during different stages of the criminal process (pre-trial investigation, trial and appeal), bearing in mind that some aspects of particular rights may be engaged in more than one of those stages.

Defence rights have been interpreted broadly in this article. That is because Art. 82(2) lit. b) TFEU refers to the “rights of individuals”. Those rights also include the right to privacy, liberty, property as well as the right to an effective remedy. Hence, Art. 82 TFEU is broader than the rights set in Arts. 47 and 48 of the EU Charter of Fundamental Rights.<sup>12</sup> The concept of procedural safeguards is indeed a topic which has already been noted as a potential candidate for future “hard-law” minimum rules *ex* Art. 82(2) TFEU.<sup>13</sup> The rights of individuals also include the right to an effective remedy, a quintessential aspect for improving the quality of criminal proceedings, which is also noted as a candidate for future legislation.<sup>14</sup>

The necessity to ensure effective defence rights arises both from provisions of EU law setting out explicit requirements (including requirements with respect to the operation of cross-border criminal proceedings), the EU Charter,<sup>15</sup> and the ABC Directives, as well as from provisions that give rise to a range of implicit requirements for the same.<sup>16</sup> The aim of this article is therefore to examine, on the one hand, if the explicit provisions are both sufficient and sufficiently clear in order to provide adequate safeguards and, on the other hand, whether it is necessary to codify some of the implicit requirements. The list is not exhaustive, since authors have chosen what they consider to be the most pressing needs. In the following section, we present three possible areas that merit attention in our view.

## III. Areas for Possible EU Intervention

### 1. Cross-border cooperation proceedings

Cross-border cooperation procedures are the most obvious link to the legislative competences of the EU for the AFSJ. Within the framework of such procedures, defence rights are known to fall into the gap between the legal systems involved. But diverging rights also hamper the law enforcement community. So far, the procedures in the executing state have received most attention. This may be the time to remove a number of remaining flaws, particularly when it comes to the legal systems of the issuing and those of the trial state (as this may be yet a different state). We have recently seen – under the EAW regime – that the ECJ has increased the requirements of what constitutes a judicial authority. Through its case law, the Court has introduced (and at the same time tried to remove) a number of flaws. For instance, it has introduced a proportionality check in the regime.<sup>17</sup>

Minimum rules for defence rights in the area of cross-border procedures have at the least three important positive effects:

- It is arguably the least intrusive of all legislative options (subsidiarity), as it does not necessarily cover purely national procedures, and it is also the option with the strongest link to the AFSJ.
- It tackles a number of flaws which the ABC Directives do not address properly (see below).
- It provides the EU institutions – particularly the ECJ and the Commission – with a solid statutory basis to further develop the AFSJ. As said, recent case law suggests that the ECJ requires the existence of a specific legislation for the further development of its case law and the AFSJ, as well as to steer away from conflicts with national (constitutional) courts. As such, that is detrimental to the development of a level playing field for transnational crime control and due process.

The ABC Directives aim at enhancing mutual trust but have quite a wide scope. They explicitly cover rights in national criminal procedures. By contrast, other defence rights have been harmonized only for cross-border procedures (e.g. EAW & *in absentia* procedures). It is somewhat surprising that the ABC Directives do not take away two of the oldest, well-documented problems in interstate cooperation: those of the systemic flaw and of the fragmentation of legal protection as a direct consequence of the rule/principle of mutual trust. The ABC Directives are based on the assumption that – where all legal orders involved have equivalent standards – fundamental rights can no longer block cooperation.<sup>18</sup> That assumption, however, is not entirely justified. As the Directives contain minimum rights, they will not do away with interstate differences.

The systemic flaw refers to the situation that EU states are not prevented from designing their procedures in different ways, although all of them have Charter-proof legal systems – at the least on paper (because they must offer effective remedies, which is also a Charter requirement). Some jurisdictions, for instance, require *ex ante* judicial authorization for on-site inspections or searches, while others offer redress after the act. In itself, the latter is not in violation of the right to privacy.<sup>19</sup> Yet obviously, situations occur under this heading where judicial protection is offered twice, or not at all.

Fragmented legal protection occurs where – because of the rule of mutual trust/non-inquiry – courts refrain from assessing the proportionality and legality of actions by actors from other jurisdictions. Many courts focus only on what has happened on their territory and not on what has happened in other Member States. Surrender courts, for instance, will not enter into an assessment of the proportionality of the issued EAW, but the FD EAW does not guarantee a full proportionality re-

view either. That means that – compared to a purely national situation – the legal position of the person concerned is flawed (the right to liberty and the right to privacy [coercive/covert measures]).<sup>20</sup> Irregularities can only be challenged in the state where the acts took place. The question is to which extent such remedies can be considered to be “effective”, as they will not (be likely to) have consequences in, for instance, the trial state. The Netherlands Supreme Court, as one example, refuses to hear any argument on the basis of Art. 8 ECHR if such irregularities took place under the auspices of foreign authorities (at the least not when concerning an EU state).<sup>21</sup>

To some extent, the foregoing problems have been recognized. The EIO, for instance, obliges authorities to take account of their own legal requirements before issuing an order. The EPPO regulation also has some requirements, controlling the element of pre-trial authorizations. These measures, however, apply to individual instruments which – certainly when applied in multilateral investigations (networks, joint investigation teams, etc.) – have become mutual alternatives. The EIO requirements can easily be bypassed when, for instance, one party collects the evidence partly for its own purposes in the framework of common or parallel independent investigations and then transfers it as information that has already been available to another party. Not only can requirements be bypassed – the question is moreover why we would require an application of the legal regimes of two states for investigative measures. This seems to be both an impediment to law enforcement and detrimental to the position of the accused.

We propose a legislative agenda that aims at aligning the legal position of those who are confronted with cooperation procedures as much as possible with those in purely national procedures. Cooperation and criminal procedures are “inextricably linked” in substance and time. Furthermore, the ECtHR case law suggests, though cautiously, that it is time to start treating cooperation procedures as part of the main procedures.<sup>22</sup>

On the basis of a quick scan of literature, we have come up with the following ideas for discussion. Particularly for the most intrusive coercive or covert measures of investigation, additional efforts could include as follows:

#### a) The legal order of the issuing state

- A statutory framework guaranteeing a full legality and proportionality review before issuing the request.<sup>23</sup> For intrusive (i.e. coercive and covert) measures,<sup>24</sup> rules on *ex ante* court authorization (where the measure is not ordered by a court itself) prevent later problems with respect to the use of materials obtained. Other measures guaranteeing a proportionality review include a test of the degree of suspicion on the basis of

the case file or, possibly, a purpose limitation of the collected information.<sup>25</sup> Where the secrecy of investigations does not hamper this, it may be an *intra partes* procedure.

- Depending on the substance of harmonization, conditions in the executing state arguably need no longer be applied (full recognition of the harmonized laws of the issuing state). Such a far-reaching proposal may, however, be connected to rules on the choice of jurisdiction.

- In EAW cases: a right to be brought promptly before a judge of the issuing state (one with jurisdiction to evaluate the sufficiency of the evidence and the existence of the risks that might justify pre-trial detention) and to have bail in the issuing state decided within the context of EAW for investigation/prosecution (e.g. by organising interrogation by video link with access to a lawyer as well as the file in order to challenge detention in the issuing state).

- Remedies in the issuing state to guarantee a full (*ex post*) review on the substance/merits of the outgoing order, for measures that do not require *ex ante* authorization.

- Establishing minimum rules on the right of the defence to request investigative measures, including the availability of remedies should their request be turned down.

#### b) The legal order of the executing state

- Access to the file and sufficient time for preparation, even within the strict timeframes of mutual recognition procedures. Legal practice has shown that this is possible, also with the help of digital means (e.g., once a person is arrested and brought before the courts in the executing state, there is a time limit to lodging a defence to the EAW, which is often extended in order to allow for coordination with the lawyer in the issuing state while respecting the time limits of the FD). The scope comprises access to the case file in the issuing state via cooperation with the issuing state lawyer, which could entail i) that the issuing state recognizes the right to fully access the case file at the latest from the moment of detention (in application of Art. 7 of Directive 2012/13; this could even entail an extension of that Directive in order to specifically include a provision on EAW cases); ii) that the executing state awards enough time to the person subject of the EAW for locating and contacting the issuing state lawyer and for him to access and analyse the case files (see also the example from French case law mentioned below).

- Remedies to check the lawfulness of the execution of investigative measures and the lawful transfer of materials, including the possibility of arranging for bail via dual defence mechanisms (EAW cases).

- Mechanisms to notify the authorities of the trial state – responsible for the procedures as a whole – in the case irregularities were established, during the execution of the measures or during the transfer of the obtained materials to the trial state.

#### c) The legal order of the trial state

On the basis of the assumption that violations of the right to privacy may as well violate the right to a fair trial,<sup>26</sup> trial courts must be in the position to obtain a – legally binding – stance on the legality of gathering and transferring the materials by the competent authorities of the jurisdiction where these materials were obtained. Points to be discussed in that regard are not only the question of who – i.e. which authority – assesses the legality of the measures, but also of which legal order determines the legal consequences should the unlawfulness (or unfairness) of investigative action in the executing state indeed be established. Some authors have proposed some sort of a horizontal preliminary reference procedure.<sup>27</sup> In such a system, a court of the executing state may, for instance, be called upon by the authorities of the trial state – if necessary via an expedited procedure – to assess the legality of the investigative action that took place on its soil and to issue a binding decision. Other options could be the creation of remedies in the issuing state in cross-border proceedings, as mentioned above. Subsequently, the question arises as to what would be the consequences of any finding of unlawfulness or unfairness, and which legal order defines this. Where irregularities have been established, the procedural consequences of such a finding could be determined by the laws of the trial state,<sup>28</sup> taking account of the principles of effectiveness, proportionality and equivalence/non-discrimination. Others may argue, however, that, in line with the principle of mutual recognition of judicial decisions, the legal consequences attached to a court decision in the executing state also merit recognition by the courts of the trial state. No need to say that this tremendously complicated area of law would require further study. At the same time, the topic is important enough to undertake such an effort.

## 2. The extension of defence rights and procedural safeguards beyond the ABC Directives

### a) The need for strengthening the legal framework

The mission of achieving mutual trust has not been completed because partial distrust as an empirical phenomenon still clearly exists among EU Member States and judicial authorities. From the EU citizens' perspective, the absence of judicial oversight due to mutual trust is often not counteracted by corresponding strong procedural safeguards and remedies in all Member States – or else when operating in a cross-border setting, even where such safeguards and remedies are in place, they are detached from the background legal framework upon which their effectiveness is built (the systemic flaw, as mentioned above).



Brexit, legal actions in relation to Hungary<sup>29</sup> and Poland,<sup>30</sup> the CJEU cases in relation to the concept of “judicial authority”,<sup>31</sup> and cases asking the CJEU whether national law is obliged to foresee a remedy against an EIO<sup>32</sup> demonstrate this reality. But the impact of mutual distrust as well as of lack of procedural safeguards in practice is much deeper and is felt by practitioners and citizens in their daily practice and life. Soon, the EPPO will enter into operation, and its regime does not establish further procedural safeguards or remedies.

This scenario is due to, among others, the lack of common procedural rules and the ensuing legal fragmentation between the legal systems of the Member States, which becomes most apparent whenever there is a cross-jurisdictional interaction or link.

As outlined above, one way of addressing the existing imbalance is to focus on improving defence rights in the scope of cross-border cooperation proceedings. However, this solution does not tackle all other situations in which the cross-border or cross-jurisdictional link is not discovered until certain procedural acts have already been conducted (for example, if it is discovered during investigative acts that a witness interview or search is needed in another Member State). In addition to this, focussing on cross-border cases only in order to reduce legal fragmentation between Member States could have the undesired effect of creating legal fragmentation within Member States, too (for example, if a witness was heard in the scope of an EIO, or if the rights of the defence to intervene were different in EPPO proceedings than their rights in a “domestic” interview).

The only way to efficiently tackle this fragmentation are common rules that will establish a strong procedural framework. This procedural framework must allow Member State authorities and citizens to trust that fundamental rules are respected wherever in the EU procedural acts are conducted. Currently, each Member State has different regulations on procedural rights. While some fall below the desired *standards*, others – which are satisfactory in a domestic setting due to checks and balances within the system – will not be satisfactory when applied in a cross-border setting. Hence, mutual trust and mutual recognition may only be achieved if defence rights and legal remedies are strengthened, even outside the framework of cross-border cooperation proceedings. This will contribute to improving the effectiveness in criminal prosecution in the Member States (including cooperation via EU agencies such as Eurojust or the EPPO) on the one hand, and the respect for the fair trial and the rights of the defence established in Arts. 47 and 48 CFR on the other hand. This is an important aspect to justify why a legislative intervention by the EU in this area would respect the principle of subsidiarity.

## b) Focus areas

One of the grounds for undermining mutual trust and for implementing a true AFSJ – impairing both the effectiveness of criminal prosecution and the citizens’ rights in the criminal justice system – is the circumstance that procedural safeguards and the rights of the defence are regulated in a very different manner among Member States. Although it could be said that, at least in theory, all Member States comply with the requirements of ensuring the rights of the defence and to a fair trial, Member States may lay a different focus on them in the different stages of the criminal procedure. Some Member States, for instance, restrict the participation of the accused or of his/her lawyer in procedural acts during the pre-trial stage (by not allowing for participation in witness interviews, restricting access to the case files, etc.), but then establish trial rules that compensate for this shortcoming (e.g. full access to the case files, an impossibility of or restrictions to the use of evidence gathered without the presence of the accused or his/her lawyer, the right to call witnesses and do full cross-examination during the trial, the right to challenge the lawfulness of the evidence gathered before the trial and to have such evidence excluded, etc.).<sup>33</sup> Other Member States allow for an extensive use of evidence gathered pre-trial, but they also allow for the defence to participate in the evidence-gathering acts before the trial. These differences may impact criminal justice in the AFSJ in two ways:

- The evidence gathered in one Member State cannot be used in another one, thereby creating obstacles to the establishment of the facts (for example an expertise conducted during the pre-trial stage without the accused having had the opportunity to have his own expert or consultant intervene).
- The evidence gathered in one Member State will be used in another one, irrespective of the restrictions attached thereto in the legal framework of the Member State where it was gathered, which results in a negative impact on the position of the accused and his/her rights of defence, as well as on a fair trial.

In order to tackle this problem, the EU could focus on setting some standards for the rights of defence and procedural safeguards at both the pre-trial and trial stages. The intervention could focus on improving the participation rights of the accused and on the use of new technologies as a means of both facilitating the exercise of defence rights and improving the reliability of the evidence as well as the possibility for the defence to challenge evidentiary acts it did not participate in.

### aa) The right to legal assistance during the pre-trial stage

The right to legal assistance involves both a reactive and a proactive intervention of the criminal defence lawyer. In this regard, his/her work during the pre-trial stage goes far beyond

that of reactively assisting his/her client during interrogations<sup>34</sup> or of challenging his/her detention.

In *Dayanan v. Turkey*,<sup>35</sup> the ECtHR stated in this respect that “[i]n accordance with the generally recognised international norms [...] an accused person is entitled, as soon as he or she is taken into custody, to be assisted by a lawyer, and not only while being questioned [...] the fairness of proceedings requires that an accused be able to obtain the *whole range of services* specifically associated with legal assistance. In this regard, counsel has to be able to secure without restriction the fundamental aspects of that person’s defence: discussion of the case, organisation of the defence, collection of evidence favourable to the accused, preparation for questioning, support of an accused in distress and checking of the conditions of detention”.<sup>36</sup> The ECtHR identified other services, the lack of which may have undermined the fairness of proceedings: “refusal or difficulties encountered by a lawyer in seeking access to the criminal case file, at the earliest stages of the criminal proceedings or during the pre-trial investigation”;<sup>37</sup> and “the non-participation of a lawyer in investigative measures such as identity parades or reconstructions”.<sup>38</sup>

Looking at Art. 3 of Directive (EU) 2013/48, it becomes clear that such a regulation does not ensure the *whole range of services* associated with legal assistance. An extension should be discussed of the provisions of the Directive to include legal assistance in acts other than those in which the accused is required to attend and establish a common definition of acts that he/she or his/her lawyer must be permitted to attend (in particular witness interviews, expert evidence, etc.). This is without prejudice of establishing limitations for exceptional cases (for example danger for the life or limb of third persons). A common definition on the safeguards that should be afforded for those cases where the presence of the accused was not permitted due to a lawful limitation could also be discussed (for example being granted access to the records of evidence-gathering acts as well as being able to call and confront the witness at a later procedural stage, and to challenge the lawfulness of the act). This would be a significant improvement, in particular in cross-border cases, where the balance established in domestic law in this respect is often broken due to the circulation of the evidence between Member States. These safeguards are also an important feature for ensuring the reliability of the evidence since the risk of an unreliability of evidence gathered in an inquisitorial fashion is much higher than if such evidence was subject to an adversarial or contradictory evidence-gathering method.

Another area of improvement is the proactive involvement of defence lawyers in the pre-trial stage. In many legal systems, such as in Portugal, defence lawyers are not allowed to actively

investigate the case, and actions undertaken in this regard may even be seen as an illegitimate interference with the investigation (this also applies to the trial stage).<sup>39</sup> In others, such as Germany, defence lawyers are not only allowed to participate in certain evidence-gathering acts but also to request certain evidence activities from state authorities, to conduct their own investigations and even to contact as well as obtain statements from witnesses.<sup>40</sup> The legal basis is Art. 6 para. 3 ECHR. Regimes where pro-active defence is not permitted may fall short of the requirements of the ECHR and thus of the CFR. In addition, the variance of standards between Member States means that in cases with cross-border links the defence is impaired to exercise its right to proactive investigation whenever evidence is located in another Member State.<sup>41</sup> At the very minimum, effective and fair procedures should be granted for the defence to be able to have the authorities order the gathering of defence-requested evidence and to let the defence lawyer participate in the evidence-gathering act (e.g. witness interviews, searches) during the pre-trial stage.

In particular in cross-border cases (EIO, JIT, EAW) and EPPO investigations, it is apparent that the lack of certain (minimum) rules on the active involvement of defence lawyers will result in disparate protection levels for a right that should be guaranteed – at least in its minimum content – in a harmonized or equivalent manner in all Member States. It is not acceptable that in criminal proceedings of a European-wide nature, the rights of the suspect in relation to the lawyer’s active involvement depend on the *forum* – especially when the *forum* may be chosen under highly flexible criteria, thereby giving prosecuting authorities discretion to choose which rights are granted to the accused in a given case. The CFR should be interpreted as granting, at the very least, the same rights as its equivalent in the ECHR, which could perhaps allow for arguing that the current situation is in contravention of the CFR in domestic cases where proactive defence is not permitted. Furthermore, the CFR allows for establishing further protections, which should be the case in areas where the legal-political nature of the EU creates a different legal framework than in the Member States – this is the case in criminal proceedings of a cross-border dimension. In relation to the type of legislative intervention by the EU in this domain, it could be discussed whether a distinction should be made at least for EPPO cases – or also for cross-border cases (especially EIO, JIT, freezing orders/confiscation) – in relation to domestic cases.

Finally, the right to dual (or multiple) legal assistance in cross-border cases (which is regulated only for the EAW) should be extended to all proceedings with cross-border links. The regulation should establish provisions to compensate for the difficulties arising in the context of dual defence, e.g. the need for more time for the defence to act; the need to have legal

assistance by specialized lawyers with sufficient linguistic knowledge (or interpreters to assist them); the need for both defence lawyers to act together in the evidence-gathering acts, if needed; provisions on legal aid compensating for the additional costs resulting from the cross-border dimension of the case. Legal assistance to the accused in cross-border cases cannot be less effective than in domestic cases. Due to the legal fragmentation and the geographical, cultural and linguistic barriers, measures should be put in place for compensating the additional difficulties faced by defence lawyers.

Many points show why this level of protection is not in line with the current legal-political structure of criminal proceedings in the EU:

- The ECHR does not explicitly look at dual defence in the cross-border context (but it does state that a violation in one state must be taken into account in another state – see *Stojkovic v. France and Belgium*<sup>42</sup>).
- Where the investigative (or trial) acts conducted in a criminal case affect multiple jurisdictions in the EU (or are led by an institution with European-wide powers, such as the EPPO), the rights of defence cannot be effective if there are no EU law measures to compensate the imbalance created by the cross-border or European nature of the case: this nature blurs the definition of the applicable law by multiplying the potential applicable legal frameworks and remedies, as well as by creating a fragmented criminal procedure which affects the balance between the positions of prosecution and defence.
- The rights of defence in cross-border cases can only be somehow effective if lawyers are highly specialized and speak foreign languages, as well as if their clients have adequate funding. But even in these situations, lawyers face severe difficulties in providing adequate representation to their clients due to the fragmented legal framework and the *lacunae* in domestic regulations.
- In addition to this, there is no possibility to provide effective assistance at all if i) the lawyers have no appropriate training and specialization is not required to act in cross-border cases (as is the case in most Member States); ii) the lawyers do not speak the relevant languages (thereby requiring assistance by interpreters, as is often the case); iii) the client has no funds (i.e. because even in white-collar cases, funds are often frozen and there are no common rules or no rules at all on whether moneys from frozen funds may be used to pay the lawyers' fees); iv) there is no appropriate legal aid covering cross-border cases and no freedom to choose your lawyer on legal aid.
- The majority of the current legal frameworks of Member States does not include specific rules to be applied in cross-border or EPPO cases, neither with respect to the rights available to the accused (for example the right to challenge evidence obtained abroad or to challenge evidence which was sent abroad at an earlier stage without the knowledge of the

accused) nor in relation to the exercise of rights (for example, even if there is a cross-border dimension or an EPPO case, the time limits for the defence to act are the same as in merely domestic cases), nor in respect of legal aid provisions (there are no provisions requiring special qualifications for lawyers to act in such cases, or financial legal aid to support additional costs required by the cross-border nature of the case as a precondition for proper legal assistance).

There could be legislative intervention in this area, by means of a Regulation, under Art. 82(1) subpara. 2 lit. a) or d) TFEU (if restricted to cross-border cooperation procedures), or Art. 86(1) TFEU for the EPPO, or for a Directive under Art. 82(2) lit. b) TFEU.

***bb) Access to the case files as a pre-condition for effective legal assistance, effective legal remedies and rights of the defence, especially in cross-border cooperation cases (EAW, EIO, freezing orders, etc.)***

Establishing an effective right to legal assistance is only possible if defence lawyers are able to have access to the materials of the case that will allow them to properly discharge their duties arising from the provision of the *whole range of services* associated with legal assistance.

It could be discussed whether it should be guaranteed as a minimum standard that the complete file which is submitted by the prosecutor's office to a court in order to get any judicial decision (for example search order, seizure order, arrest warrant, etc.) must be disclosed to the defence lawyer upon his/her request.

In this regard, the provisions of Art. 7 of Directive (EU) 2012/13 could be extended.<sup>43</sup> This is especially relevant in cross-border cases. How can a lawyer in the issuing state assist a lawyer in the executing state during EAW proceedings if the former is not able to access the case file before the surrender of the person? How can a lawyer in the issuing state, prompted by the lawyer in the executing state, challenge the substantive reasons for issuing an EIO under Art. 14(2) of Directive (EU) 2014/41 (and to do so before the EIO is executed, in order to make sure that evidence will not have been unlawfully gathered) without having access to the case files? How can a lawyer in the executing state assist an accused in an interrogation requested by means of an EIO without having access to the case file in the issuing state and without knowing the evidence against his/her client so as to obtain advice of a defence lawyer in the issuing state?<sup>44</sup> How can a lawyer challenge an evidence-gathering act, assist his/her client in an interrogation, or exercise the rights of defence in a witness interview ordered by a European Delegated Prosecutor from his/her or another Member State without having access to the file?

**Example:**<sup>45</sup> the Cour de Cassation considers that when France is executing an EAW, the suspect arrested is sufficiently informed of the charges even when provided only with the EAW decision emanating from the issuing state.<sup>46</sup> Following the same reasoning, in a situation where France is the issuing state and the suspect has been arrested in the executing state facing EAW proceedings, it does not consider that he/she should have access to the investigative case file before being brought to France to be presented to the French judge. This is true no matter whether access to the case files is requested by the lawyer from the executing state or the French lawyer who is instructed for the French proceedings. In practice, French lawyers are often contacted by colleagues from executing states asking them to access the case file in France in hope that it will provide grounds to oppose surrender. Since there is no requirement for the French investigative judge to do so, access will be hindered; it will be refused to communicate the case file before the person has been interrogated and indicted. France has transposed Art. 7(1) of Directive (EU) 2012/13 in the most right-restrictive version possible: right of access to the case file has been interpreted as compelling the authorities to grant access to only three documents at the investigation stage: the arrest reports, the reports made during the medical check, and the interrogation records.<sup>47</sup> When this law was challenged on the basis that it did not constitute a proper and complete transposition of Directive 2012/13, the Cour de Cassation ruled that the Law was compliant since

“Article 7 § 1 of the Directive of 22 May 2012 (...) requires, at all stages of the proceedings, only access to documents relating to the case in question held by the competent authorities which are essential to effectively challenging the lawfulness of the arrest or detention; on the other hand, §§ 2 and 3 of Article 7 of the said Directive allow Member States to grant access to all the documents in the file only during the judicial phase of the criminal proceedings, which means that Article 63-4-1 of the Code of Criminal Procedure constitutes a complete transposition of Article 7 of the Directive”.<sup>48</sup>

France was thus able to adopt this interpretation because of the wording of the Directive itself, which provides that the case material shall be provided “in due time (...) and at the latest upon submission of the merits of the accusation to the judgment of a court”. This legal situation constitutes an insufficient protection against the exercise of the right of the defence, as it prevents individuals from properly challenging the grounds for their detention and surrender before a court promptly after they have been arrested (which could be an infringement of Arts. 6 CFR and 5 ECHR).

Granting access to the case files in the issuing state is possible within the strict timeframes established in the mutual recognition instruments<sup>49</sup>.

There could be legislative intervention in this area, by means of a Regulation under Art. 86(1) for the EPPO, under Art. 82(1),

subpara. 2 lit. a) (if restricted to cross-border cooperation procedures), or for a Directive under Art. 82(2) lit. b) TFEU.

**cc) The right to be informed (and the need to inform the accused) on important procedural acts**

The right to be informed on the most significant procedural acts (as well as on the rights, duties and remedies available as a consequence of those acts) is a quintessential component of the rights of the defence and the right to a fair trial. Service of procedural documents and summons to attend are essential *inter alia* to exercise i) the right to be informed about the nature of the charge and about judgments; ii) the rights to be present in procedural acts, both at the investigative and at the trial stage, as well as to effectively participate in those acts; iii) the right to avail oneself of the rights arising from such acts, including any legal remedies; iv) the right to be informed about duties arising from those acts.

This is recognized in EU secondary law and also in the CJEU case law,<sup>50</sup> for example in relation to the acts of decisions depriving a person of their liberty<sup>51</sup>, charge or indictment<sup>52</sup>, judgements<sup>53</sup>, summons for attending trial<sup>54</sup>, and freezing orders<sup>55</sup>.

At the domestic level, problems in this area (especially in respect of summons to attend trial and trials *in absentia*) have been identified by scholars and made it to the CJEU, affecting mutual recognition.<sup>56</sup> However, it might be difficult to legislate in this field due to the circumstance that this issue has been an object of already two legislative initiatives (FD 2009/299/JHA and Directive (EU) 2016/343).<sup>57</sup>

At the cross-border level, however, problems are much more striking. Surprisingly, while in the realm of cooperation in civil matters, there is a directly applicable Regulation on the service of judicial (and extrajudicial) documents in the Member States,<sup>58</sup> there is no mutual recognition instrument whatsoever in the domain of cooperation in criminal matters. Art. 5 of the 2000 MLA Convention between the EU Member States<sup>59</sup> and Arts. 8, 9 and 12 of the CoE Convention on Mutual Assistance in Criminal Matters<sup>60</sup> are applicable. To the contrary of the EU Regulation in civil and commercial matters, these provisions do not establish standard rules for service – or a standard form which would make it easy not only to serve persons abroad but also to effectively inform them of their rights. The lack of such common procedures often leads to the service of documents being made incorrectly, or in a language that the respective person does not understand, thereby hampering the continuation of proceedings, because the service proved irregular or evidence is lacking that the person actually received the document. This scenario also impedes the persons receiv-

ing those documents of understanding their rights and duties in relation to the same. Furthermore, there is no deadline for the authorities of the requested state to serve the person. This often results in EAWs being disproportionately used because it was not possible to serve a defendant to appear, or because he failed to appear (although there is no evidence that he had actually received the summons), or simply because using an EAW is much faster than trying to serve the accused or defendant.<sup>61</sup> Moreover, it is often impossible to proceed with a case because the authorities cannot serve the accused at all, or not properly, or not timely. Ultimately, accused persons and defendants facing procedures in another Member State are often confronted with the lack of effective remedies because they are not being informed (or not in a language that they understand) of which remedies they may use in order to react to documents received. Another aggravating factor is that the persons have no extended deadlines to react, which puts them in a worse position than accused persons located in the Member State where the case is pending. Lack of knowledge of the language and rules of the forum Member State makes it even more difficult to be able to find legal assistance within the given deadlines.

**Example:** a Portuguese person born and living in another EU Member State – who cannot properly speak Portuguese – has been indicted of several sexual offences committed against a child. His summons for trial had not been translated, hence his trial was cancelled and a new service was ordered. Authorities from the executing (requested) Member State returned the request for service to attend trial multiple times due to the poor translations, lack of understanding of what was being requested, and legal requirements on the formalities of the papers (number of copies, explanations to be given to the defendant, etc.). The service of the indictment was sent by regular mail (there is no evidence on file that the accused received it), the acknowledgment of receipt has an illegible signature, and there is no identification of the person by his or her ID number. The signature is not the signature of the defendant. This means that once the defendant is served, he can allege that he had never been served on the indictment, which could imply that the case was statute-barred due to the passage of time. In any event, after multiple attempts of serving the summons for trial, the court decided to declare him “absent” and suspend the case for an undetermined time limit. An EAW was not issued because the facts go back more than ten years already and the defendant himself was very young at the time, hence the Portuguese court does not find it appropriate to order pre-trial detention and therefore cannot issue an EAW. Problems with the service of procedural papers are abundant.

There could be legislative intervention in this area, by means of a Regulation under Art. 82(1), subpara. 2 lit. a) or d) (if re-

stricted to cross-border cooperation procedures) or Art. 86(1) for the EPPO, or for a Directive under Art. 82(2) lit. b) or d) TFEU.

#### *dd) The right to participate in criminal proceedings at trial and appeal stages*

Those who have observed or participated in trials in different Member States know how different this procedural stage is. Even where common principles are in place, their interpretation and practical implementation is not alike. This is natural, since trials are, by their very nature, procedural stages the form of which is determined not only by positive law or regulations, but above all by a series of customary practices inherited from decades or centuries of local court practice.

At the appellate level, differences are even more striking: the scope of review (facts or law); the (im)possibility to produce evidence; the right for the accused to intervene in person (or the lack thereof) or through his/her lawyer; the right to be informed in person on appellate judgements; the (im)possibility of a constitutional review of decisions; the formal requirements for appellate briefs and judgements – these aspects vary widely from one Member State to another.

As stated by the ECBA,<sup>62</sup> “[a]part from the right to be present at trial (Directive 2016/343/EU), the entire trial phase suffers, or may suffer, from a lack of protection (including remedies) for defendants due to national differences without any legally binding and functional concrete minimum standards. Despite the general clauses in Articles 6 and 13 ECHR, in Article 14 ICCPR and in Article 47 Charter et seq. and the corresponding case law, daily practice in certain Member States produces multiple violations of the rules applicable to the accused and/or defence counsel.”<sup>63</sup>

In relation to the right to be present at trial, we refer to the issues of presence by video link and of service of summons to appear in trial referred to below and above, respectively. In addition to this, the following are examples of differences that might hamper mutual trust and recognition:

- In some Member States, the defendant does not have the right to sit next to his/her lawyer, which impedes from continuously exchanging views and adequately exercising their rights; in some Member States, the lawyer has to get up to speak to his/her client, which might hamper the conduct of the trial; in others, not even this is possible, and asking for a recess is needed, since the defendant literally sits in a “cage”.
- The right to call witnesses and to cross-examine them widely differs between Member States, which may result in violations of the fair trial, especially where evidence obtained abroad is used.

- The possibility for the defence to request for evidence and to actively conduct one’s own investigation (on this topic, the above comments in relation to the pre-trial stage also apply here).
- The (un)availability of expert evidence to the defence (and the [un]availability of financial legal aid to that end).
- The existence (or the lack thereof) of training or special qualification requirements for lawyers to act in (certain) criminal cases.
- The lack of safeguards in relation to the special needs of detained defendants in relation to their preparation for trial (access to materials of the case in prison, to a lawyer and interpreter, to a computer in order to prepare statements or to read lengthy case files, etc.).
- The availability of legal aid, its quality and the possibility to have a lawyer of one’s choice while on legal aid.
- The possibility to change the indictment during trial and the procedural safeguards surrounding such changes, where admissible.

There could be legislative intervention in this area, by means of a Regulation under Art. 86(1) for the EPPO, or for a Directive under Art. 82(2) lit. b) or d) TFEU. This is a particularly sensitive area, but the need to establish an AFSJ where it is possible – on the basis of mutual trust – to “import and export” pieces of evidence, accused or convicted persons or decisions between Member States without a review of procedures conducted in another Member State requires corresponding safeguards in order to reduce the legal fragmentation and systemic gaps for the rights of defence arising from the “free movement of evidence, persons and decisions” in the criminal justice area. The sensitivity of this area might recommend an approach whereby, in a first stage, studies (including in-court empirical ones) are conducted in order to gain a better understanding of the differences and reasons for particular local regulations or customary practices, developing a Green Paper and/or soft-law measures before regulating concrete trial rights. The same applies – even more so – to appeal stages.

### c) Improving defence rights by using technologies

A different type of approach could be taken by focusing on how new technologies could be used, both as a means of facilitating the exercise of defence rights and of improving the reliability of the evidence and the possibility for the defence to challenge evidentiary acts it did not participate in.

On the one hand, the use of videoconferencing technologies could be encouraged as a means for the accused to participate in procedural acts.<sup>64</sup> There are many criminal cases in which an accused is situated in a different Member State than the forum Member State. In many instances, the physical presence

of the accused is not necessary for the investigation or trial. However, some Member States require his/her presence for certain procedural acts (arraignment, trial). Or they make the exercise of the accused’s rights dependent on such physical presence. The possibility for the accused to participate in the procedural acts, upon his/her request, by means of a videoconference would be beneficial since i) this would make it unnecessary for Member States to issue an EAW to bring a person to an arraignment or trial hearing, where his/her physical presence is not necessary but the law still requires it; ii) it would enable the accused to be present, take part in the procedures and exercise his/her rights. This is highly relevant for cases of low and medium criminality.

**Example:** in Portugal, many courts understand that the accused must be physically present in court. If he/she does so, he/she is able to make a confession. That will enable him/her to pay less court costs and to have a lower (sometimes special or mitigated) sentence. Many EU citizens from other Member States are subject to criminal proceedings for low or medium criminality (for example driving under the influence of substances and driving without a license, resisting the authorities, simple bodily harm, defamation/slander, illegal graffiti, etc.). If they are primary offenders, they are very likely to be sentenced to a fine of less than € 1,000 (depending on the circumstances of the case). Typically, they will make a confession. However, they cannot make it in writing or by video link. Hence, if they wanted to benefit from the confession, they would be obliged to travel to Portugal – which may require several days – and bear the direct costs of their travel (several days absence at work, travel, and accommodation) just in order to be present at a court hearing that may only take one hour. If the accused does not want to be physically present and asks to participate by video link, he/she should be entitled to this, since otherwise his/her position in relation to an accused living in Portugal is much worse.

In addition to this, if being able to participate by video link, upon his/her request, the accused would be at least able to hear the evidence and to follow the proceedings against him/her, instead of being tried *in absentia* due to the impossibility or significant difficulty of attending in person. Initiatives in this field should also address the particularities of legal assistance in this special constellation.

Another area where the use of modern communication technologies may be considered is the facilitation of dual defence and defence in cross-border cases. If there is an ongoing investigation in Member State A and the accused is to be interviewed in Member State B (and if he/she has sufficient financial means), he/she will be assisted in Member State B by a local lawyer as well as a lawyer from the issuing state.

However, if the person does not have enough financial means to instruct a lawyer in both states and to fund the issuing state lawyer's travel costs to the executing state, only the local lawyer will assist him/her. This type of legal assistance is often not effective, in particular if it comes to more complex cases where dual representation is important. It is the lawyer of the issuing state who is in a better position to assess the strength of the evidence there – so as to make sure that the procedures applicable there are respected (especially if their application was requested by the issuing state) – and to advise on the applicable laws and practices in the issuing state. Even when lawyers are able to cooperate closely, the linguistic barrier often makes it impossible to ensure adequate legal assistance (the case files are normally not translated into the executing state's and the accused's language). Clearly – at least when the authorities of the issuing state are also physically present in the executing state –, there should be legal aid to cover the travel/time costs of the issuing state's lawyer to be able to attend the act in the executing state, as a matter of equality of arms. This is clearly not the case in the overwhelming majority of Member States. In any event, the presence of the authorities of the issuing state in the territory of the executing state usually only happens in a small number of cases. In the remainder of cases, which are the overwhelming majority, a middle-ground solution could be discussed, e.g. the participation of the issuing state's lawyer by means of videoconferencing (which is already the case where the issuing state asks for this means, which is conducted by the issuing state's authorities). This could also apply to other evidence-gathering acts, such as witness or expert interviews. Initiatives in this field should also address the particularities of legal assistance in this special constellation.

**Example:** a Greek citizen is charged in Portugal with “intentional bodily harm”, aggravated by risk for the life of the victim and permanent consequences, due to a traffic accident<sup>65</sup> while she was spending her holidays there. An EIO is sent to Greece in order to interrogate the defendant. This interrogation could have major implications: what she says will mean that the case is either closed due to lack of evidence of violation of the duty of care while driving; or that she is indicted. It could also make the difference between being indicted for an intentional crime, carrying a sentence of over 10 years (for which an EAW could be issued and she could be remanded in pre-trial detention), or a negligent homicide that would carry either a maximum sentence of three or five years and does not allow for an EAW to be issued in Portugal or for her to be remanded in pre-trial detention. This difference in legal qualification also implicates that it might be possible – or not – to make a “plea bargain” and avoid trial. In order to prepare for her interrogation, she needs to find a lawyer in the issuing state who will be able to advise her on the legal framework, to analyse the evidence in the case file (all in Portuguese), and to advise her

on whether to make a statement or not, whether she should rather come to make her statement in person in Portugal, etc. If she does make a statement, it is important that her Portuguese lawyer is able to assist her in its course, in order to ask for certain clarifications that might be relevant for the consequences indicated above. While the presence of the Greek lawyer (provided that he/she and the Portuguese lawyer are even able to communicate in a common language) is necessary to analyse the implications from the Greek standpoint as well as to oversee the respect for Greek rules, it is not equivalent to an intervention by the Portuguese lawyer. The dual intervention of the lawyers will also improve the quality of the gathered evidence and the conduct of proceedings (for example, it will prevent the lawyers from raising violations of procedure in relation to this interrogation at a later stage).

From a different perspective, new technologies could be used to improve the reliability of the evidence, to avoid wrongful convictions, and to improve the ability of the defence to challenge evidentiary acts in which it could not have participated. Audio-visual recording of police interrogations could have several advantages<sup>66</sup>:

- It helps prevent undue compulsion, torture and other ill-treatment during questioning, and it provides protection to police officials against false allegations.<sup>67</sup>
- It permits to record how information on rights has been administered.
- It permits to record interpretation and to perform after-the-fact controls of its quality.
- It permits to capture reactions and nuances a later written statement cannot reproduce (facial expressions, remorse, tension).
- It allows officers to focus on questioning rather than note-taking.
- It allows other officers to observe questioning from outside the room and to make suggestions.
- It reduces the number of motions to suppress evidence.
- It improves public trust in the police or judicial authorities.
- It allows experts, the defence, and prosecution to re-analyse the questioning.
- It allows the trial court to better assess evidence than by merely consulting written minutes.
- It allows the defence to verify how evidence has been gathered, whether the record was complete and accurate, and how statements should be interpreted in cases in which the defence could not participate.
- It improves trust in the evidence obtained in other jurisdictions, thereby strengthening the AFSJ.

Finally, audio-visual recording during the trial and the appellate stages could also strengthen the rights of the defence, since it provides an accurate track record of the procedure and

the evidence, which is essential not only for lodging appeals in general, but in particular for exercising the right of the accused to know what happened in his/her trial and to request a new trial or an appeal where it has been conducted in his/her absence. The audio-visual recording of both the hearings (especially in relation to the interview of the suspect/accused) and the trial/appeal is the law and practice in some Member States.

Another use of new technologies which should be encouraged is the provision of electronic access to the case files, making it easier for the defence lawyer and the accused to have full and swift access and thereby having sufficient means and time to prepare for the defence in the different procedural stages. This is already in place in some Member States. For example in Portugal, lawyers have access to the electronic case files after the indictment; although case files are not yet fully digital, digitization is being progressively implemented; in some cases, the public prosecutor's office also provides digital copies of the investigative file once an indictment has been pronounced. In Germany, lawyers do not need to go to the prosecutor's office regularly to look into the case file or to receive copies of them, they can make an application, and either a digital copy will be provided, or the original file or complete copies will be sent to the lawyer's office in paper ("*Duplo*"), with the request to return those files to the prosecutor's office in order to give the defence lawyer the chance to produce complete copies and/or an electronic file by using the technical facilities in the lawyer's office. There could be legislative intervention in this area, by means of a Regulation, under Art. 82(1), subpara. 2 lit. a) or d) (if restricted to cross-border cooperation procedures), under Art. 86(1) for the EPPO or for a Directive under Art. 82(2) lit. a) or b) TFEU.

#### d) Instruments and strategies

Strengthening the rights or safeguards in these areas could be achieved through the following strategies:

- By regulating the rights within the framework of EPPO cases, which could start with internal regulations and guidelines, then followed by a hard-law measure (Regulation).
- By regulating the rights in general, with specific provisions adapted to cross-border cases by means of Directives (or eventually Regulations if restricted to cross-border cases).
- By supplementing those hard-law measures with soft-law or other measures.

At the level of soft-law measures, the following could be developed:

- Guidelines on the requirements of legal assistance in cases involving foreign elements or cross-jurisdictional links or supranational entities, such as EUROJUST or the EPPO (spe-

cialization of lawyers; training requirements; language requirements; special legal aid provisions).

- Developing (and/or improving) practical handbooks for authorities on good practices in respect of defence rights (how to apply provisions on the rights of the defence and procedural safeguards in cases involving foreign elements or cross-jurisdictional links or supranational entities, such as EUROJUST or the EPPO; information about remedies, deadlines, identification of the lawyer or how to get a lawyer, etc.) and specific indications on the coordination between EU instruments in the AFSJ; developing handbooks on the role of lawyers, including in proceedings involving JITs, Eurojust and the EPPO (both for prosecutors and judges and for lawyers); developing and improving existing practical handbooks for the defence (e.g. ECBA EAW Handbook)<sup>68</sup>.

- Guidelines and template forms for summons in cross-border and EPPO cases.

- Guidelines on the access to case files.

- Guidelines on the coordinated application of EU instruments in the AFSJ (a kind of "systematic" presentation of the existing AFSJ instruments and their appropriate use, as if they made up a "code").

- Developing funding mechanisms for legal aid in cases with cross-border or cross-jurisdictional links.

- Strengthening training – in this regard, funding initiatives is not enough; soft-law and likely hard-law measures or minimum training requirements for authorities and defence lawyers to act in cases with cross-border or cross-jurisdictional links might be necessary (for example, defence lawyers in Portugal are not obliged to have any specialty for working in criminal law, the least in cross-border matters, and they are not obliged to do any training at all).

- Supporting networks of lawyers.

### 3. Remedies

Effective judicial protection is a general principle of EU law, stemming from the constitutional traditions common to the Member States, which is enshrined in Arts. 6 and 13 ECHR and reaffirmed by Art. 47 CFR.<sup>69</sup> In accordance with the subsidiarity principle, it is primarily for the national authorities to redress the alleged violations of the ECHR or EU law.

The right to an effective remedy, enshrined in Art. 13, in terms of the ECHR requires that a "remedy" be such as to allow the competent domestic authorities both to deal with the substance of the relevant complaint and to grant appropriate relief. A remedy is only effective if it is available and sufficient. It must be sufficiently certain not only in theory but also in practice, and must be effective in practice as well as in law, having regard to the individual circumstances of the case. Art. 13 ECHR does



not require any particular form of remedy, with states having a margin of discretion in how to comply with their obligation, but the nature of the right at stake has implications for the type of remedy the state is required to provide. Even if a single remedy by itself does not entirely satisfy the requirements of Art. 13 ECHR, the aggregate of remedies provided for under domestic law may do so. In assessing effectiveness, account must be taken not only of the formal remedies available but also of the general legal and political context in which they operate, as well as the personal circumstances of the applicant.

The EU instruments seem to offer the same flexibility for states to choose how they address the right to an effective remedy. Although this legislator's choice might be justifiable from the perspective of subsidiarity, it leads to a series of problems that may affect the very core of the right: i) there is a lack of a common understanding on the applicability of remedies (access, speediness, procedure, costs, suspensive effect, exclusionary rule, etc.); ii) Member States will understandably choose a minimal implementation of the corresponding rights in the Directives (as for example, the minimal implementation of the procedural rights Directives); iii) it leaves too much room for intervention by the ECJ to define the concept of "effectiveness". One of the most striking examples in this respect is the right to counsel in Art. 12 of the Directive 2013/48/EU,<sup>70</sup> which provides that states should ensure an effective remedy without specifying the criterion of effectiveness. Not only the formulation in the Directive is very vague, leaving states with a large choice of procedural means to give content to this right; but not even references to ECtHR case law seem to help any longer, as the Court has not only lowered its previous standards<sup>71</sup> but has also opened the door for states to apply an extremely restrictive approach.<sup>72</sup>

In this context, elaborating a theoretical framework of effectiveness of remedies in a European context seems necessary. This may raise strong opposition from the Member States, therefore a first step towards opening the discussions could be the elaboration of a guide to good practice with respect to domestic remedies<sup>73</sup> across EU Member States and instruments. The aim is to identify the fundamental legal principles that apply to effective remedies across EU instruments, the characteristics required for remedies in specific situations for them to be effective, as well as to identify good practices which can provide a source of inspiration for other Member States.

Discussions on a more binding instrument could also be opened; however, although desirable from the point of view of the defendant, it is a very difficult endeavour, given the major differences between legal systems across the EU and subsidiarity requirements. But since *there is no right without a remedy*<sup>74</sup> – a principle that is well-established in EU Law –,

we believe that the Commission should be bold enough to start tackling this matter. How can it be approached?

A Green Paper on remedies would probably be the best way. As regards **procedural remedies**<sup>75</sup> – i.e. minimum requirements for obtaining effective judicial oversight in respect of alleged violations of EU rights (the need to establish a remedy; the judicial nature of the competent authority; the requirement that such authority has jurisdiction to grant relief if an EU right was violated; an extension of national deadlines if there is a cross-border link, etc.<sup>76</sup>) – the challenge is to create *standards* that are sufficient yet flexible enough to be introduced into the domestic systems without affecting their balance.<sup>77</sup>

As regards **substantive remedies** – i.e. the appropriate relief that has to be made available<sup>78</sup> – the problems are even bigger. In order to be effective, remedies will have to ensure *restitutio in integrum*. According to the ECtHR's case law, a decision or measure favourable to the applicant is only sufficient if the national authorities have acknowledged, either expressly or in substance, a violation of the Convention, and then afforded redress for it. The principle of subsidiarity does not mean renouncing all supervision of the result obtained from using domestic remedies, otherwise the rights guaranteed by the Convention would be devoid of any substance. Therefore, as far as appropriate remedies are concerned, two types of relief are generally required: (1) bringing the violation to an end and (2) affording compensation for any damage sustained as a result of the violation. The compensatory element of the remedy is particularly important in view of the subsidiarity principle, so that aggrieved persons are not forced to refer to international courts complaints. Both the fact-finding and the fixing of monetary compensation should, as a matter of principle and effective practice, be the domain of domestic courts.<sup>79</sup> In other words, preventive and compensatory remedies have to be complementary to be considered effective.<sup>80</sup> Translated into EU criminal matters, this principle could be understood to imply that the person needs to have the possibility to ask for redress of his/her situation *within the criminal case*; an extra-procedural remedy, such as compensation, would not be sufficient to consider the remedy effective.

This initiative follows from the Charter of Fundamental Rights (Art. 47) – in combination with the principle of effectiveness of EU law (the ABC Directives and their objective, i.e. to ensure an AFSJ)<sup>81</sup> and the uniform application of EU law –, as the application of EU defence rights also depends on the remedies that are available to protect them.<sup>82</sup> As indicated, such a position also seems necessary as the ECHR system – based on the margin of appreciation and "living instrument" doctrines – may not be sufficient for achieving a common European justice area.

Given the above, EU law should and/or could establish the features remedies must have in order to be considered effective. However, this principle of effectiveness should not be understood as an automatic requirement to annul the procedures (only appropriate for structural or fundamental errors), since in certain cases the violation might have had no impact on the exercise of the rights of defence or on the outcome of the case.<sup>83</sup> In addition to this, the implementation of effective judicial protection may be achieved through a wide array of remedies, depending on the rights that have been violated.<sup>84</sup>

Hence, a rather feasible approach for the proposed Green Paper would be to choose a set of rights instead of addressing remedies in a general manner – for example the right to information on rights, the right against self-incrimination, and the right to access to a lawyer, or the right to privacy in criminal investigations. In principle, the mentioned rights are those for which remedies are well-established in both ECtHR case law and domestic legal systems.<sup>85</sup> The right to privacy is a more complex field, since here the ECtHR does not offer strong guiding caselaw for the use of evidence obtained in violation of the right to privacy.<sup>86</sup> But it is a field in which the ECJ has developed a body of case law defining the substance of the right of privacy, e.g. in connection with data retention for the purposes of criminal investigations.<sup>87</sup> The right of privacy includes a right to the deletion of data if they were obtained in violation of such a right. The EIO also knows the legal consequences of data deletion in cases of telecommunication interceptions: if a Member State has obtained data without authorization (and technical assistance) of the Member State on whose territory the person is situated, that Member State may order the deletion (after having been notified of the interception).<sup>88</sup> Hence, there could be enough ground to start a discussion. Data retention is quite likely also one of the areas where there is more need to establish a common legal framework, since the lack thereof could hamper both the effectiveness of cross-border investigations and EU citizens' rights. Within these rights, a distinction could then be made between types of violations and appropriate remedies.<sup>89</sup> Using a Green Paper would enable assessing the impact of the remedies that could possibly be established. Subsequently, a legislative proposal for a Directive or Regulation (depending on the field – for EPPO: a Regulation) could be drafted.

In the field of remedies, scholars have advanced the following proposals:<sup>90</sup>

At the national level:

- Monitoring the implementation of the ABC Directives in order to identify deficiencies undermining the effectiveness of EU defence rights, with a special focus on the following: (1) national legislation that does not provide the appropriate

standards for the defence rights enshrined in the Directives; (2) national judicial remedies, which do not enable the accused to seek effective judicial control against breaches of defence rights; (3) ineffective procedural sanctions against ascertained defence rights that ultimately undermine the right to a fair trial.

- Dissemination of relevant information and training of practitioners, in particular judges with regards to their role as EU law courts in a functional sense, as well as exchanges of good practices.

At the EU level:

- Minimum rules for judicial review to the extent necessary to grant the *effet utile* to the provisions of EU law that grants defence rights by strengthening the remedial obligations in the ABC Directives with regard to particularly serious breaches of defence rights, for example the obligation for prompt judicial review.

- Adopting minimum rules harmonizing procedural sanctions against breaches of those rights, thereby enhancing mutual trust and recognition by means of a “roadmap” on procedural sanctions; this should be preceded by comparative studies, which aim at identifying adequate minimum sanctions against the different breaches of the different rights.<sup>91</sup>

- Development of CJEU case-law to interpret the legal framework, including the creative application, where necessary, in particular in the most sensitive areas, of the principles elaborated by the European Court of Human Rights in the relevant fields.

- A more stable and reliable legal environment as concerns remedies would greatly contribute to improving fairness and effectiveness of proceedings across EU countries, which is essential to increase trust in the justice system and democratic values.

#### IV. Conclusion

EU Law has travelled a long way since the first debates on procedural rights of the suspect and accused persons in the 2000's, which initially failed to produce any legislative instrument. The adoption of the Stockholm Roadmap in 2009 and of the corresponding Directives were significant steps.

However, these steps have failed to address the issues of legal fragmentation and systemic flaw in the cross-border context, even when new institutions such as the European Public Prosecutor were created.

Domestic criminal procedures remain disparate and the disparity is such that it undermines mutual trust and consequently the operation of the mutual recognition principle. The development of an area where persons, evidence and decisions may

circulate freely and without duplication of controls by the authorities of Member States may not be further deepened without additional reflection and intervention at EU level in the field of defence rights and procedural safeguards. In this paper we tried to set out a few areas that should merit attention in the years ahead, touching upon three, closely connected issues: i) the need for additional minimum rules in the area of cross-

border cooperation proceedings; ii) the need for additional minimum rules on defence rights and procedural safeguards beyond the first generation of the 2009 Stockholm Roadmap Directives (ABC Directives); iii) and the need for minimum rules on remedies, in cases where rights have been violated. The road ahead for the EU is still long. Hopefully our contribution will bring an additional spark to the ongoing discussion.

\* The text was submitted on 25 September 2019. It reflects the state of affairs at the time of its drafting, with minor amendments. The article reflects the personal views of the authors and not necessarily that of the institutions they are affiliated with.

1 ECJ, 26 February 2013, case C617/10, *Åkerberg Fransson*.

2 ECJ, 26 February 2013, case C-399/11, *Melloni*.

3 ECJ, 5 December 2017, case C-42/17, *M.A.S., M.B.*

4 ECJ, 20 March 2018, case C-524/15, *Menci*.

5 See, for example, ECtHR, 15 November 2016, Appl. nos. 24130/11 and 29758/11, *A and B. v. Norway*; ECtHR (GC), 28 June 2018, Appl. nos. 1828/06 and 2 others, *G.I.E.M. S.R.L. and Others v. Italy (merits)*.

6 Council Framework Decision 2009/299/JHA amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA, and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, *O.J. L 81, 26/02/2009, 24*. This instrument was later complemented by the intrastate approach of Directive 2016/343 on the presumption of innocence.

7 The ABC Directives refer to the legislative agenda for strengthening the procedural rights of suspected or accused persons in criminal proceedings, adopted in the respective Roadmap by the Council in 2009 (*O.J. C 295, 4.12.2009, 1*).

8 Cf. J. Arnold, *Grenzüberschreitende Strafverteidigung in Europa*, 2015, p. 49, who explains that the concept varies for practising defence lawyers according to their practical experience; it ranges from a limited concept of international cooperation proceedings (conventional or pursuant to the mutual recognition principle) to a broad one including any criminal proceedings with connections to other European countries (the majority preferred the latter concept). For the academic view, see Arnold, *ibid.*, pp. 167–169, and L. Bachmaier, “Transnational Criminal Proceedings, Witness Evidence and Confrontation: Lessons from the ECtHR’s Case Law”, (2013) 4 *Utrecht Law Review* 127, pp. 128–129.

9 This corresponds to the semantic meaning of the word “cross-border”: “between different countries or involving people from different countries”; available at: <<https://dictionary.cambridge.org/dictionary/english/cross-border>>, accessed 31/10/2020>.

10 As defined below, this category could be named “criminal proceedings with a cross-border link” or “criminal proceedings with a cross-jurisdictional link”.

11 See definition in the Palermo Convention.

12 Right to an effective remedy and to a fair trial; presumption of innocence and right of defence.

13 E. Sellier and A. Weyembergh, *Criminal procedural laws across the European Union: A comparative analysis of selected main differences and the impact they have over the development of EU legislation*, 2018, available at: <[https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL\\_STU%282018%29604977](https://www.europarl.europa.eu/thinktank/en/document.html?reference=IPOL_STU%282018%29604977)>, accessed 03/11/2020.

14 E. Sellier and A. Weyembergh, *op. cit.* (n. 13).

15 Relevant explicit requirements are set in the Charter of Fundamental Rights mainly in Arts. 6–8, 19, 47–50. As set in Art. 52(3) CFR, the Charter rights are to be interpreted in light of the corresponding rights deriving from the ECHR, which concretely means the right to liberty and security in Art. 5 and the right to a fair hearing in the determination of a criminal

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charge in Art. 6 ECHR, but also the right of appeal in criminal matters, the right to compensation for wrongful conviction, and the right not to be tried or punished twice pursuant to Arts. 2, 3 and 4 of Protocol No. 7 respectively.

16 Implicit requirements stem particularly from the right to life and the prohibition of torture (which are of significance for matters such as the use of force in law-enforcement action, the investigation of alleged offences and the conduct of interrogation); the right to respect for private and family life, home and correspondence (which not only sets important limitations to the way in which offences can be investigated and evidence gathered, but is also relevant for the restrictions to which persons arrested and remanded in custody can be subjected to and the publicity that can be given to certain aspects of criminal proceedings); the right to property (which must be respected in the course of law-enforcement action and may also be relevant for measures taken to secure either evidence of the commission of an offence or the proceeds derived from this).

17 ECJ, 27 May 2019, case C-509/18, PF (as well as joined cases C-508/18 and C-82/19 PPU, OG and PI).

18 See also ECJ, 18 December 2014, Opinion 2/13.

19 See, for example, ECJ, 18 June 2015, case C-583/13 P, *Deutsche Bahn and Others v. Commission*.

20 Other examples: the case for “being brought promptly before a judge” who will decide on the lawfulness of detention – the executing authority in an EAW will say there is no violation since the person is brought promptly before a judge there (even if this judge cannot rule on the sufficiency of the evidence, flight risk, etc. in the criminal case), and the issuing authorities will also consider that the requisite is met, since the person will be brought promptly to a judge as soon as he/she enters their Member State after surrender. Similar examples can be found with respect to access to the case file.

21 See Hoge Raad, 5 October 2010, case 08/03813.

22 See, for example, ECtHR, 27 January 2012, *Stojkovic v. France and Belgium*, Appl. no. 25303/08.

23 E. Sellier and A. Weyembergh, *op. cit.* (n. 13).

24 The case law of the ECtHR contains some guidance on this. Some measures may be ordered only by a court, after all.

25 Cf. M. Luchtman, European cooperation between financial supervisory authorities, tax authorities and judicial authorities, 2008.

26 In *Khan v. UK*, the ECHR found no violation of the right to a fair trial (see case no. 35394/97, 12 May 2000 and subsequent cases). It is not entirely clear whether the ECJ will follow this – ECtHR case law in *Khan*. In light of the specifics of the AFSJ, it may well be that the ECJ finds that the use of evidence obtained in violation of the right to privacy also violates the fair trial principle; cf. ECJ, 17 December 2015, case C-419/14, *Web Mind Licenses*. This is (incidentally) also the state of the art in many EU jurisdictions.

27 M. Böse, “Die Europäische Ermittlungsanordnung – Beweistransfer nach neuen Regeln?“, (2014) *ZIS*, pp. 152, 160.

28 Suggestions have been made by A. Klip, “Violations of Defence Rights’ Directives“, (2018) 26(4) *European Journal of Crime, Criminal Law and Criminal Justice*, pp. 271–281.

29 The European Parliament has adopted a Resolution asking the Council to determine whether Hungary is in breach of Article 7 TEU – see European Parliament Resolution of 12 September 2018, P8\_TA(2018)0340, available at <[http://www.europarl.europa.eu/doceo/document/TA-8-2018-0340\\_EN.html?redirect](http://www.europarl.europa.eu/doceo/document/TA-8-2018-0340_EN.html?redirect)>, accessed 2 November 2020>. Hungary has filed to annul the Resolution – see case C-650/18, *Hungary v. Parliament*. The Commission has launched infringement proceedings in relation to laws criminalising activities in support of asylum seekers and has also launched new proceedings in relation to the non-provision of food in transit zones – see <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_19\\_4260](https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4260)>, accessed 2 November 2020. For an overview of the recent developments on the threats to the rule of law in Hungary, see T. Wahl, “Rule-of-Law Developments in Hungary“, *eu crim*, <<https://eu crim.eu/news/rule-law-developments-hungary/>>, accessed 2 November 2020.

30 ECJ, 24 June 2019, case C-619/18, *Commission v. Poland* (ruling that the Polish reform lowering the retirement age of the Supreme Court judges is contrary to EU law) – for a short note on the case see T. Wahl, “CJEU: Polish Supreme Court Reform Infringes EU Law“, *eu crim* <<https://eu crim.eu/news/cjeu-polish-supreme-court-reform-infringes-eu-law/>>, accessed 2 November 2020; ECJ, 8 April 2020, case C-791/19 (granting interim measures against the powers of the Disciplinary Chamber of the Supreme Court with regards to disciplinary cases concerning judges). Article 7 TEU proceedings were launched by the Commission in 2017 – see <[https://europa.eu/rapid/press-release\\_IP-17-5367\\_en.htm](https://europa.eu/rapid/press-release_IP-17-5367_en.htm)>, accessed 2 November 2020; and again in 2020 – see <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_772](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_772)>, accessed 2 November 2020. For an overview of the recent developments on the threats to the rule of law in Poland, see T. Wahl, “Threat of Rule of Law in Poland – Recent Developments“, *eu crim* <<https://eu crim.eu/news/threat-of-rule-of-law-in-poland-recent-developments/>>, accessed 2 November 2020.

31 ECJ, 27 May 2019, case C-509/18, PF, and joined cases C-508/18 and C-82/19 PPU, OG and PI.

32 ECJ, 24 October 2019, case C-324/17, *Criminal Proceedings against Ivan Gavanzov*. See also AG Bot’s Opinion of 11/04/2019. See further the

summaries by T. Wahl in *eu crim* <<https://eu crim.eu/news/first-cjeu-judgment-european-investigation-order/>>, regretting the restrictive approach followed by the ECJ, and <<https://eu crim.eu/news/ag-bulgaria-must-bring-its-law-line-eio-directive/>>, accessed 2 November 2020.

33 See, for example, the Portuguese legal system described in V. Costa Ramos and B. Churro, “Report on Portugal“, in: S. Quattrocolo and S. Ruggeri (eds.), *Personal Participation in Criminal Proceedings. A Comparative Study of Participatory Safeguards and in absentia Trials in Europe*, 2019, pp. 305, 319–323.

34 After the ECtHR’s judgment in *Salduz* (Appl. no. 36391/02), some states had alleged that the judgement did not imply that the lawyer had to be present during questioning, as regards the right to access to a lawyer attached from the moment when the person was held in pre-trial or police custody and was subject to police interrogation. The ECtHR established otherwise in *Karabil v. Turkey* (Second Section judgement of 16/06/2009, Appl. no. 5256/02) that the suspect must benefit from legal assistance during his/her questioning, which was underlined in *Navone and others v. Monaco* (First Section judgement of 24/10/2013, Appl. nos. 62880/11, 62892/11, 62899/11), paras. 79–80. For a comprehensive comparative study on the role of defence lawyer at the investigative stage, see A. Pivaty, *Criminal Defence at Police Stations: A Comparative and Empirical Study*, 2019.

35 ECtHR, 13 October 2009, Appl. no. 7377/03, *Dayanan v. Turkey*, para. 32 (citations omitted, highlighted by the authors).

36 See also ECtHR, 9 November 2018, Appl. no. 71409/10, *Beuze v. Belgium*, para. 136.

37 ECtHR, *Beuze v. Belgium*, *op. cit.* (n. 36), para. 135 (citations omitted).

38 ECtHR, *ibid.*

39 See V. Costa Ramos, B. Churro, *op. cit.* (n. 33), p. 319 with further references. This is a tendency also observed in other European countries, e.g. Bulgaria: “[t]he use of private detectives for the collection of evidence is practically unknown and, apart from the questioning of witnesses, there is little other new evidence that could be presented by the defence at trial” – Y. Grozev, “Bulgaria“, in: E. Cape and Z. Namoradze (eds.), *Effective criminal defence in Eastern Europe*, 2012, p. 100. In white-collar and complex criminality, such investigations nonetheless tend to become the rule and to receive acceptance or, at least, tend not to be seen as illegitimate interference with the investigation. E. Cape, Z. Namoradze, R. Smith and T. Spronken, “The European Convention on Human Rights and the right to effective defence“, in: E. Cape et al. (eds.), *Effective Criminal Defence in Europe*, 2010, pp. 44–45, state that “[existing research shows that inquisitorially-based criminal justice systems often prohibit active defence at the pre-trial phase and merely allow reactive defence: only when the results of the official (pre-trial) investigation are made known to the accused is he in a position to propose further investigations such as the questioning of (additional) witnesses or counter-investigation by an expert [...] In some jurisdiction investigation by the accused or his lawyer is even regarded as obstructing the course of the official investigations.”

40 T. Wahl, Fair Trial and Defence Rights in: Sicurella et al. (eds.), *General Principles for a Common Criminal Law Framework in the EU*, 2017, p. 140.

41 In this regard, it is important to notice that defence lawyers acting in other MS will normally have to obey the local professional rules of conduct – see Article 2.4 of the CCBE Code of Conduct (“when practising cross-border, a lawyer from another Member State may be bound to comply with the professional rules of the host Member State. Lawyers have a duty to inform themselves as to the rules which will affect them in the performance of any particular activity” – and, as an example, Article 207(1) of the Statute of the Portuguese Bar Association – Law 145/2015, of 9 September 2015, obliging foreign lawyers to comply with the local rules.

42 ECtHR, 27 January 2012, Appl. no. 25303/08, *Stojkovic v. France and Belgium*.

43 See also the ECBA Agenda 2020 – V. Asselineau, “Agenda 2020: A new Roadmap on minimum standards of certain procedural safeguards“, (2018) 9 *NJECPL*, pp. 184, 188–189, also available on <[http://www.ecba.org/extdocserv/20180424\\_ECBA\\_Agenda2020\\_NewRoadMap.pdf](http://www.ecba.org/extdocserv/20180424_ECBA_Agenda2020_NewRoadMap.pdf)>, accessed 2 November 2020 (see III.4.6), stressing that such an access is a precondition for effective legal remedies.

- 44 See below the example on an EIO between Portugal and Greece.
- 45 This example was given to us by two ECBA Members from France.
- 46 See Cour de cassation, Chambre criminelle, 18 February 2014, case 14-80.484.
- 47 See Art. 63-4-1 of the Code of Criminal Procedure.
- 48 Cour de cassation, Chambre criminelle, 4 October 2016, case 16-82.309; see also Cour de cassation, 31 January 2017, case 84613.
- 49 See above on page 234, section b), indicating how legal practice has shown that this is feasible.
- 50 In the context of UN sanctions and in relation to the right to be informed, see ECJ, 18 July 2013, joined cases C-584/10 P, C-593/10 P and C-595/10 P, *Kadi II*, as well as joined cases C-508/18 and C-82/19 PPU, OG and PI, paras. 97, 98, 100 (“the Courts of the European Union must, in accordance with the powers conferred on them by the Treaties, ensure the review, in principle the full review, of the lawfulness of all Union acts in the light of the fundamental rights forming an integral part of the European Union legal order [...] That obligation is expressly laid down by the second paragraph of Article 275 TFEU. Those fundamental rights include, inter alia, respect for the rights of the defence and the right to effective judicial protection [...] [T]he second of those fundamental rights, which is affirmed in Article 47 of the Charter, requires that the person concerned must be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons, without prejudice to the power of the court having jurisdiction to require the authority concerned to disclose that information, so as to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court having jurisdiction, and in order to put the latter fully in a position to review the lawfulness of the decision in question” (citations omitted).
- 51 Art. 3(2) Directive (EU) 2010/64; Arts. 4 and 5 Directive (EU) 2012/13.
- 52 Art. 3(2) Directive (EU) 2010/64; Art. 6 Directive (EU) 2012/13.
- 53 Art. 3(2) Directive (EU) 2010/64; Art. 8(4) Directive (EU) 2016/343.
- 54 Arts. 8(2) and (4) and 9 Directive (EU) 2016/343.
- 55 Art. 8(2), (4), (6) and (8) Directive (EU) 2014/42; Arts. 32 and 33 Regulation (EU) 2018/1805.
- 56 E. Sellier, A. Weyembergh, *op. cit.* (n. 13).
- 57 E. Sellier, A. Weyembergh, *op. cit.* (n. 13).
- 58 Regulation (EC) No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000, *O.J. L* 324, 10/12/2007, 79.
- 59 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, *O.J. C* 197, 12/07/2000, 3.
- 60 European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (ETS No. 030).
- 61 For example, since it is often difficult or uncertain to determine whether a person has been served leads to an overuse of the EAW at the investigative stages of proceedings, as a means to serve a person to appear for the arraignment in order to be notified of the charges pending against him/her, being able to make a statement and to receive a decision on bail. This often happens and the consequence is that after the person is surrendered, he/she will not remain in custody, rendering the detention manifestly disproportionate in many cases.
- 62 The ECBA Agenda 2020 – V. Asselineau, (2018) 9(2) *NJECL*, *op. cit.* (n. 43), see III.2.
- 63 Some of the areas identified are: admission and limitation function of bills of indictment; impartiality and independence of judges and prosecutors (right to refuse); continuous and confidential access to the lawyer; access to the complete case file; right to make a defence statement; right to ask questions to witnesses directly (cross-examination); right to request for evidence; recording of trials and right to access recordings and minutes.
- 64 On the topic of the use of videoconferencing in criminal cases, see European Criminal Bar Association, “Statement of Principles on the use of Video-Conferencing in Criminal Cases in a Post-Covid-19 World”, <[http://www.ecba.org/extdocserv/20200906\\_ECBASStatement\\_videolink.pdf](http://www.ecba.org/extdocserv/20200906_ECBASStatement_videolink.pdf)>, accessed 2 November 2020.
- 65 Although a traffic accident usually does not cause *intentional bodily harm*, this was stated in the charges.
- 66 See the ProCam Study by the Hungarian Helsinki Committee, <[https://fairtrials.org/sites/default/files/ProCam\\_Comparative\\_Report.pdf](https://fairtrials.org/sites/default/files/ProCam_Comparative_Report.pdf)>, accessed 2 November 2020, and the Fair Trials Desk Report, <[https://fairtrials.org/sites/default/files/ProCam\\_international\\_desk\\_report.pdf](https://fairtrials.org/sites/default/files/ProCam_international_desk_report.pdf)>, accessed 2 November 2020, pp. 19–20 with further references. These advantages are referred to in the context of interviews of accused persons. We believe they apply mutatis mutandis to witness interviews and other procedural acts, such as searches, reconstructions of the crime-scene, lineups, etc.
- 67 See European Committee for the Prevention of Torture (CPT) Standards [CPT/Inf/E (2002) 1 – Rev. 2011], § 36; Fair Trials Desk Report, *op. cit.* (n. 66), p. 4.
- 68 European Criminal Bar Association, “How to defend a European Arrest Warrant Case. ECBA Handbook on the EAW for Defence Lawyers”, <<http://handbook.ecba-eaw.org>>, accessed 2 November 2020.
- 69 See ECJ, 18 March 2010, joined cases C-317/08 to C-320/08, *Rosalba Alassini v. Telecom Italia SpA et al.*
- 70 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.
- 71 In the ECtHR *Salduz* judgement (27 November 2008, Appl. no. 36391/02), the ECtHR recognised that the right of everyone charged with a criminal offence to be effectively defended by a lawyer is one of the fundamental features of a fair trial (para. 51). This right becomes applicable as soon as there is a “criminal charge” within the meaning given to that concept by the ECtHR’s case law and, in particular, from the time of the suspect’s arrest, whether or not that person is interviewed or participates in any other investigative measure during the relevant period. Being confronted with a certain divergence in the approach to be followed in cases dealing with the right of access to a lawyer, the Court recently had occasion to further examine the matter in the *Beuze* judgement (*op. cit.*, n. 36), in which it departed from the principle set out before. In *Beuze*, the Grand Chamber gave prominence to the examination of the overall fairness approach and confirmed the applicability of a two-stage test, namely whether there are compelling reasons to justify the restriction as well as the examination of the overall fairness.
- 72 For example, in light of a restrictive understanding of *Salduz*, the Constitutional Court of Malta attaches weight to the defendant’s vulnerability in those cases where it finds a violation of his/her right to legal assistance. In their joint dissenting opinion in *Farrugia v. Malta* (4 June 2019, Appl. no. 63041/13), ECtHR judges Serghides and Pinto de Albuquerque considered this approach as being much more restrictive than that of the Grand Chamber in *Beuze*; they also believe that such an abusive and restrictive interpretation of that right contradicts its essence.
- 73 On the basis of the model of the Council of Europe Guide to good practices in respect of domestic remedies, <<https://edoc.coe.int/en/european-convention-on-human-rights/6608-guide-to-good-practice-in-respect-of-domestic-remedies.html>>, accessed 4 November 2020.
- 74 See in this respect A. Soo, “Potential Remedies for Violation of the Right to Counsel in Criminal Proceedings: Article 12 of the Directive 2013/48/EU (22 October 2013) and its Output in National Legislation”, (2016) 3 *EuCLR* 284, 292: “This principle could be summarised as *Ubi ius ibi remedium* – if there is a right, there also is a remedy. On the other hand, the right exists only to the extent its violation is remedied: if the breach of a right is not followed by proper remedy, the right is not applicable in the proceedings in question. This principle could be described as *Ubi remedium ibi ius* – there is a right only if there is a corresponding remedy. In that sense, the fact that the legislation provides for the right does not automatically lead to a conclusion that this right is exercised in practice in a state. The right acquires true meaning only if there is an adequate remedy provided in case of its violation”; S. Allegrezza and C. Covolo, “Conclusions”, in: S. Allegrezza and C. Covolo, *Effective Defence Rights in Criminal Proceedings*, 2018, pp. 499, 507–508, state that the full effectiveness of rights granted by the ABC Directives must

be ensured by a three-fold shield of protection: “the formal protection of defence rights under national law, the effective judicial control over alleged breaches and an effective sanction against the ascertained violation”.

75 A. Klip, (2018) 26(4) *European Journal of Crime, Criminal Law and Criminal Justice*, *op. cit.* (n. 28), 279, calls them “legal remedies”.

76 For a definition on the requirements for effective judicial review, see S. Allegrezza and C. Covolo, *op. cit.* (n. 74), pp. 499, 502–507.

77 In this field, access to the CJEU could be discussed, too, at least in a long-term perspective: availability of remedies to challenge a decision to refuse to refer a matter to the CJEU; availability of a full remedy/appeal to the CJEU. The challenge here is that – except maybe for the field of the EPPO – such changes might entail a need to amend the Treaties, making them more difficult.

78 A. Klip (2018), 26(4) *European Journal of Crime, Criminal Law and Criminal Justice*, *op. cit.* (n. 28), 279, calls them “procedural sanctions”.

79 See, for example, ECtHR, 2 May 2016, Appl. no. 40828/12, *Mironovas and Others v. Lithuania*, for the necessity of both preventive and compensatory remedies in the context of prison conditions.

80 See ECtHR, 17 December 2009, Appl. no. 20075/03, *Shilbergs v. Russia*, para. 67.

81 Cf. M. Caianello, “To Sanction (or not to Sanction) Procedural Flaws at EU Level?”, (2018) 22(4) *European Journal of Crime, Criminal Law and Criminal Justice*, 317, explaining that the speciality of criminal procedure rules lies in sanctions attached thereto. Without them, the nature of the rule changes from that of an order to that of a guideline.

82 Cf. A. Klip, (2018) 26(4) *European Journal of Crime, Criminal Law and Criminal Justice*, *op. cit.* (n. 28), 277.

83 In some jurisdictions, for the less serious irregularities, reduction of a sentence or even the mere establishment of a violation is also considered to be an appropriate response to irregularities.

84 A. Klip, (2018) 26 (4) *European Journal of Crime, Criminal Law and Criminal Justice*, *op. cit.* (n. 28), 278, says: “[a]s a general rule, one can presume that the violation of a procedural rule has consequences for the issue to which it relates.” For example: if the accused was not granted enough time to study the case against him/her, the remedy would normally be to grant him/her such time; if the accused was not informed on a change made to the facts or offences stated in an indictment and was convicted for different facts or offences, the remedy could be either an annulment of procedures whereby he/she would receive such information and be able to defend him-/herself before a new judgement is pronounced; or it could be to reverse the judgement and acquit him/her in relation to those

new facts; if a piece of evidence is obtained in violation of a right, the remedy could be the exclusion of the evidence or, in certain cases, also of derivative evidence and causally linked procedural acts. Another example is the case that the violation of the right to be made aware of the contents of the indictment must be redressed by putting the person in the situation by which he/she would benefit from the objection deadline (cf. ECJ, 22 March 2017, joined cases C-124/16, C-188/16 and C-213/16, Criminal proceedings against Tranca, Reiter and Opria, para. 46).

85 For example, there might be discussions on the substantive scope of the right against self-incrimination – i.e. whether it can be restricted in certain circumstances –, but where it applies, the remedy for its violation is by its very nature the exclusion of the evidence (subject to possible exceptions for derivative evidence). The same applies to violations of the right to access to a lawyer, but the ECtHR case law seems to be fragile in this respect and the standards might be further lowered in the future.

86 Which is a subject of criticism by dissenting judges, see, for example, ECtHR, 10 March 2009, Appl. no. 4378/02, *Bykov v. Russia*.

87 See, for example, ECJ, 21 December 2016, case C-203/15, TELE2 Sverige.

88 Art. 31(3) lit. b) Directive (EU) 2014/41.

89 See the suggestion made by A. Klip, (2018) 26(4) *European Journal of Crime, Criminal Law and Criminal Justice*, *op. cit.* (n. 28), 279–280: violations that can be repaired; violations that affect a single piece of evidence; violations that affect the proceedings against the accused as a whole.

90 S. Allegrezza and C. Covolo, *op. cit.* (n. 74), pp. 499, 508–512.

91 A. Soo, (2016) 3 *EuCLR*, *op. cit.* (n. 74), 284, 307, suggests that “the remedy for violation of the right to counsel is ‘effective’ in the meaning of Article 12 § 1 of the Directive [2013/48] only if it aims at restoring the person’s position back to that which it would have been had the violation not occurred. The requirement that a person’s pre-violation situation should be reinstated reduces the list of remedies significantly as there are only a few that have such potential.” Hence she proposes that “main remedies worth considering are the exclusionary rule, the doctrine of the ‘fruit of poisonous tree’, and re-trial. At the same time, the application of a principle that a person’s pre-violation situation should be restored raises a number of questions as it is often difficult to determine what the pre-violation position actually is. In addition, due to a number of practical reasons, it is almost impossible to reinstate such a position to the full extent.” Since “[i]t is impossible to turn back the clock”, “a viable solution might focus on determining preventative ‘remedies’ much more than has been done so far.” The author also acknowledges the need for more studies.

## Strengthening the Fight against Economic and Financial Crime within the EU

Luigi Foffani, Valsamis Mitsilegas, and Pedro Caeiro

**EU legislation in the field of financial and organised crime is affected by different issues. The anti-money laundering (and counter-terrorist financing) legislation is dense, but it still lacks effectiveness. Although the approximation between the Member States still presents some concerns, what seems to be desirable is not further legislative intervention from the EU but to foster monitoring activities (on criminal law usage, suspicious transaction reports, and FIU functioning, etc.). In this context, a specialised agency could be of remarkable value, but the corresponding draft needs accurate analysis. With regard to organised crime, FD 2008/841/JHA features too narrow a scope, on the one hand, when it requires the aim of obtaining “financial or other**

material benefit.” On the other hand, the EU definitions on the matter are too broad (e.g., as to what concerns participation in a criminal organisation). A more specific set of autonomous definitions oriented towards the specific forms of crime that criminal organisations aim their activities at would considerably enhance and facilitate judicial cooperation. In this regard, not only a review of the broad EU definitions is encouraged, but the FD itself should be quickly replaced. The current EU legal framework on corruption in both the public and private sectors also seems outdated, notwithstanding the pivotal role of such matters on EU criminal policy. Although EU law already provides for a duty to criminalise corruption in the private sector, it does not sufficiently clarify the object of protection, i.e., “fair competition.” This enables possible national transpositions that may thwart the utility of the relevant criminalising provisions. In addition, a definition of EU officials in EU law is desirable as well as the introduction of corruption-related crimes concerning such subjects in the Euro-crimes list.

## I. General Remarks on the Need for Action

EU action in the field of financial and organised crime has been uneven. On the one hand, there has been a plethora of anti-money laundering (AML)/countering financing of terrorism (CFT) legislation, with new EU standards justified as necessary to align with international developments, in particular the FATF recommendations. Yet notwithstanding these laws, concerns remain regarding both the effectiveness of EU rules to tackle money laundering and their impact on fundamental rights and national criminal law systems. On the other hand, EU standards in the fields of the criminalisation of organised criminal activity and corruption (in particular corruption in the private sector) are limited and dated. Thus, there is a need to examine rigorously and critically the implementation of EU AML measures as well as to consider the development of new EU standards on organised crime and corruption.

## II. Money Laundering

1. The starting point regarding AML is that the Expert Group should link its reflections, inasmuch as possible, to the *criminal law dimension* of money laundering (ML). Of course, AML is an integrated policy, composed of the regulatory (preventive) system and the criminal law system, but the fact is that the very definitions of ML are different (both at the EU level as well as in the FATF recommendations), depending on the tier they are meant to apply to. This dual approach to money laundering should be encouraged, because the purpose of the prevention system may well differ (and, in our view, it *actually* does) from the purpose of the criminal law system. Whereas the regulatory framework aims at the sanitisation and the preservation of public trust in the financial system, thereby addressing every form of laundering dirty proceeds from any kind of illegal source (which could theoretically encompass proceeds from purely administrative violations), the criminal law system aims at protecting the State’s claim to detect and forfeit the proceeds of serious offences (which means already a selection of some forms of laundering and some kinds of sources).

The double-tiered nature of this policy is clearly reflected in the history of AML in the EU, already in the very first directive (with its unusual “joint declaration” on the criminalisation of ML) as well as in the instruments that followed (the directives and the 2001 Framework Decision). The directives regarding the prevention system were adopted under the competences of the (former) first pillar, whereas Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law (the 6th AML Directive)<sup>1</sup> was adopted, as is proper, under Art. 83 TFEU. The rhetoric in the respective preambles is also instructive in respect of the different aims pursued.

We should also bear in mind that there is another Expert Group working alongside the European Commission with a specific mandate to provide expertise on the entire AML policy,<sup>2</sup> which gives leeway for a more limited and specific approach from our side.

2. If we look at the most recent documents produced by the Commission in the present context,<sup>3</sup> it seems clear that the existing concerns and shortcomings relate to the regulatory system and, more precisely, to the lack of implementation of the EU instruments on the regulatory system and operational issues. For instance, it is striking that neither the Report on the assessment of recent alleged money laundering cases involving EU credit institutions<sup>4</sup> nor the Communication “Towards better implementation of the EU’s anti-money laundering and countering the financing of terrorism framework”<sup>5</sup> address any deficiencies of the criminal law framework at all in the jurisdictions where the analysed cases took place – and such an assessment, had it been made, might even have served as a (post-factum) justification for the adoption of the 6th AML Directive, or as a call for further amendments thereto. In any case, the diagnosis presented by the Commission basically points at the need for improvement of implementation and correct fulfilment of the duties impending on the stakeholders. If this is the case, innovation at the legislative level not only dodges the real issues but also incurs the risk of complicating them further.

3. As a consequence, we do not see much room or need for further legislative intervention of the EU on the criminal law dimension of AML/CFT. Some criminal policy concerns in this realm still remain, because there are a number of open questions to which national laws provide differentiated answers (e.g., regarding the protected legal interest, the punishable conduct, the sources of the proceeds, the (non-) punishment of the perpetrators of the predicate offence, the applicable penalties and proportionality to the punishment provided for the predicate offences, the (non-)criminalisation of negligence, etc.). This evidently leads to a variable criminal law framework across the EU. True, the “minimum rules” scheme does not allow for setting uniform laws (for example, limiting the mens rea of ML to intent); however, the current suggestions enshrined in the legislation that “Member States may” choose to adopt a certain course of action (see Art. 3 of the 6th AML Directive) do not help to approximate the legislations at all.

4. Nevertheless, minor adjustments could be effected. As a matter of fact, there are a number of inconsistencies regarding the definition of ML as an offence between the PIF Directive<sup>6</sup> (which refers to Art. 1(3) of the 4th AML Directive<sup>7</sup>) and the 6th AML Directive, namely concerning the laundering of proceeds from offences committed abroad<sup>8</sup> and the punishability of self-laundering.<sup>9</sup> In this case, the EU could perhaps reach a uniform definition of ML as an offence within EU law.

5. If there is not much need to take action at the legislative level, it seems clear that there is a need for better monitoring of effectiveness and implementation, in particular: How is criminal law being used? What is happening with the various regimes of suspicious transaction reports (STR)? What are the current challenges underpinning Financial Intelligence Units (FIUs)? In the latter context, attention should be paid to the significant data protection and privacy implications of FIUs’ work and their cross-border cooperation (in view of their different nature and powers). The same goes for their placement within a broader EU interoperability regime – perhaps there is a need for further EU standards in this field. In order to assess the effectiveness of the criminal law in countering ML/FT as well as to detect possible abuses of AML/CTF legislation by national authorities, the EU needs further information on prosecutions in Member States and on the challenges national courts are facing when defining money laundering.

6. As far as the creation of a specialised EU coordinating structure is concerned, a specialised agency would ensure a joint approach between the criminal law and the market levels. It might also play an important role in collecting the information gathered by the regulatory and criminal law systems and in integrating it into a meaningful whole. The coexistence of this

coordinated structure with Eurojust and the EPPO should be thoroughly examined in order to avoid collisions and complications. The competences of a potential new AML agency should also be carefully drafted so as not to bring more fragmentation to the execution of policies or create new burdens and duties for the private sector in an already over-regulated field.

### III. Organised Crime

1. We were asked whether the Framework Decision (FD) 2008/841/JHA on the fight against organised crime<sup>10</sup> should be “further strengthened.”

Indeed, the definitions laid down in Arts. 1 and 2 of the FD are not the most fortunate piece of legislation produced by the EU. In the first place, it is open to debate whether the aim of the criminal organisation should be, mandatorily, the obtaining of a “financial or other material benefit.” Organised crime aiming at disrupting or sabotaging the social and/or political structures of the EU and the Member States (e.g., through the hacking of cybersystems that are vital for the functioning of health services, prosecution services and courts, public administration, electoral systems, etc.) should arguably be countered with the same or even more concern. The current restriction of the definition to organisations that pursue financial/material gain – in line, admittedly, with Art. 1(a) of the Palermo Convention – is a constraint that should perhaps be revised, in order to encompass organised crime other than the mafia-oriented type.

2. Secondly, the way in which the FD drafted the “offences relating to participation in a criminal organisation” (Art. 2), departing from the definitions provided by the Palermo Convention, does not seem appropriate for a number of reasons. It does not make sufficiently clear that Member States must criminalise participation in a criminal organisation (as suggested by the very heading of Art. 2). The norms providing for the criminalisation do not contain the caveat “offences distinct from those involving the attempt or completion of the criminal activity” present in Art. 5(1) lit. a) of the Palermo Convention. Consequently, Member States will have fulfilled their duties if they only criminalise conspiracy, for instance, or even mere complicity or incitement to the intended offences (entailing an agreement to that purpose). This has little to do with the offence of participating in a criminal organisation, not least because it dispenses with the existence of an actual criminal organisation. Furthermore, such disposition does not tackle any conduct that is not directly connected with the perpetration of a relevant offence, e.g., providing means for the general functioning of the organisation or recruiting new members.



3. When reviewing the very broad and general, all-encompassing definitions of EU law involving organised crime, it might be a positive course of action to make them more specific and varied in relation to specific forms of crime, such as those against the EU's financial interests or the very AML.

The use of different concepts of organised crime for specific crimes would indeed improve judicial cooperation, as the current concept is so broad that, instead of favouring the cooperation between national authorities, it risks giving rise to very different interpretations, thus decreasing mutual trust. The advantages would also go beyond judicial cooperation. All legal sectors that rely on such concepts would benefit from more specific definitions. An example is the criminal (or administrative) responsibility of legal entities: the latter are nowadays obliged to establish organisational models ("compliance programmes") in order to prevent the commission of crimes, but they have to use a definition of organised crime that is poorly comprehensible.

4. In sum, the 2008 Framework Decision on organised crime seems outdated and it definitely should be quickly replaced, taking into account that participation in a criminal organisation falls under the EPPO's competence.

5. The connection between participation in a criminal organisation and confiscation is also an unresolved issue, which is too complex, however, to be addressed within the scope of this article.

#### IV. Corruption

1. The current EU legal framework on both public and private corruption is outdated. Yet, the criminalisation of corruption plays a central role in the development of EU criminal law. It is expressly included in the list of conduct that the EU is competent to criminalise under Art.83(1) TFEU. It is a money laundering predicate offence under EU law; it is one of the categories of conduct for which the requirement to verify dual criminality has been abolished in the light of mutual recognition; and it forms part of the remit of the PIF Directive – and, as a consequence, of the EPPO. In view of the key elements of corruption in the development and enforcement of EU criminal law, there is a need to revise the EU criminal law framework on corruption in order to update and provide legal certainty with regard to criminalisation at the EU level. Clarity in criminalisation is essential in view of the growing links between anti-corruption monitoring and rule-of-law monitoring in the EU.

2. There is a strong connection between the criminalisation of corruption in the private sector and the internal market, which may need further intervention on the part of EU legislation.

Although EU law already provides for duties to criminalise that focus on the protection of "fair competition", it does not prevent from possible national transpositions that do not contemplate such a value as the object of the legal protection. In Italy, for instance, the criminal provision on corruption in the private sector originally attributed to the breach of "fair competition" had the sole effect of changing the rules on prosecution from "on complaint" to "*ex officio*"; once the most recent legislative intervention set the prosecution regime to "*ex officio*" for all the hypothesis of corruption in the private sector, the reference to "fair competition" disappeared. EU legislation should therefore reinforce the reference to fair competition as the true aim of the criminal provision on corruption in the private sector.

3. On a different note, it seems clear that the (passive and active) corruption of EU officials should be included among the Euro crimes. There is the 1996 Protocol to the Convention on the protection of the European Communities' financial interests<sup>11</sup> and the definitions laid down in the PIF Directive – but, again, they were drafted from the perspective of damage to the financial interests of the EU. The situation is similar to that of the restriction of the definition of organised crime to the pursuance of financial or material gain (see above). The corruption of EU officials – as such, irrespective of damage to the financial interests of the EU – should be defined by EU standards and not by the Member States. Arguably, this is one of the few cases (together with fraud and misappropriation) where the adoption of directly applicable *regulations*, containing uniform definitions of the offences and penalties, would be fully justified, and the Commission should push for a change in the TFEU to allow it.

#### V. Recommendations

##### 1. On money laundering

- There may be a need to revise the EU criminal law provisions on ML in order to have the same definition of the offence in the PIF Directive and in the 6th AML Directive – or at least to justify why they should be different.
- There is a need to monitor the effectiveness of the implementation of EU law in this respect and to gather information on how it is being applied by the national authorities.
- The creation of a central AML agency could help in the implementation of an effective EU policy on ML, especially as a means of building an institutional bridge between the prevention and the criminal law systems.
- FIU legislation should be revised in order to include a detailed legal framework on cross-border exchanges of suspicious transaction reports, underpinned by a clear data protection framework.

## 2. On organised crime

- EU legislation on organised crime should be modernised and focus on a sound definition of the phenomenon it purports to counter, to be determined at the criminal policy level, taking due account of the existing international law instruments.
- It is important to determine whether the criminalisation of organised crime should follow a unitary definition or instead a differentiated approach, depending on the type of criminal activity pursued by the organisation.



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## 3. On corruption

- Given the close links of corruption to the rule of law and the internal market, there is a need to modernise EU criminal law on the criminalisation of corruption by establishing clear-cut, binding definitions of the offences.
- The criminalisation of corruption in the private sector should focus on the protection of fair competition.
- The (passive and active) corruption of EU officials (just like fraud to the EU budget) should be defined and punished by (directly applicable) regulations and the Commission should push for an amendment to the TFEU that allows for it.

1 *O.J. L* 284, 12.11.2018, 22.

2 <<https://ec.europa.eu/transparency/regexpert/index.cfm?do=groupDetail.groupDetail&groupID=2914>> accessed 4 November 2020.

3 See the communication and several related reports at: <[https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/anti-money-laundering-and-counter-terrorist-financing\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/criminal-justice/anti-money-laundering-and-counter-terrorist-financing_en)> accessed 4 November 2020.

4 COM(2019) 373 final <[https://ec.europa.eu/info/sites/info/files/report\\_assessing\\_recent\\_alleged\\_money-laundering\\_cases\\_involving\\_eu\\_credit\\_institutions.pdf](https://ec.europa.eu/info/sites/info/files/report_assessing_recent_alleged_money-laundering_cases_involving_eu_credit_institutions.pdf)> accessed 4 November 2020.

5 COM(2019) 360 final <[https://ec.europa.eu/info/sites/info/files/communication\\_from\\_the\\_commission\\_to\\_the\\_european\\_parliament\\_towards\\_better\\_implementation\\_of\\_the\\_eus\\_anti-money\\_laundering\\_and\\_countersing\\_the\\_financing\\_of\\_terrorism\\_framework.pdf](https://ec.europa.eu/info/sites/info/files/communication_from_the_commission_to_the_european_parliament_towards_better_implementation_of_the_eus_anti-money_laundering_and_countersing_the_financing_of_terrorism_framework.pdf)> accessed 4 November 2020.

6 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, p. 29–41.

7 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, *O.J. L* 141, 5.6.2015, p. 73–117

8 Compare Art. 1(4) of the 4th AML Directive and Art. 3(4) of the 6th AML Directive.

9 See Art. 3(5) of the 6th AML Directive, which has no correspondence either in the PIF Directive or in the 4th AML Directive.

10 *O.J. L* 300, 11.11.2008, 42.

11 *O.J. C* 313, 23.10.1996, 2.

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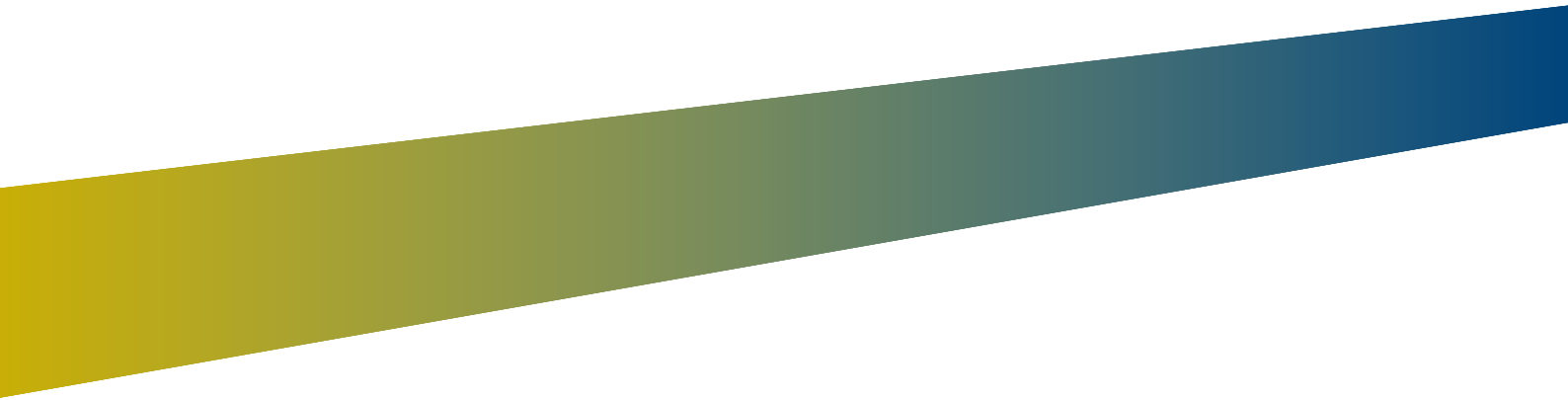
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