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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM



Focus: Evaluation of OLAF Regulation No. 883/2013

Dossier particulier: Évaluation du règlement n° 883/2013 concernant l'OLAF

Schwerpunktthema: Evaluierung der OLAF-Verordnung Nr. 883/2013

Guest Editorial

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The OLAF Regulation – Evaluation and Future Steps

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Learning Lessons – Reflecting on Regulation 883/2013 through Comparative Analysis

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The New Frontier of PFI Investigations – The EPPO and Its Relationship with OLAF

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OLAF at the Gates of Criminal Law

Petr Klement

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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Imprint

* News contain internet links referring to more detailed information. These links can be easily accessed either by clicking on the respective ID-number of the desired link in the online-journal or – for print version readers – by accessing our webpage www.mpicc.de/eucrim/search.php and then entering the ID-number of the link in the search form.

Guest Editorial

Dear Readers,

Efficient and proper spending of the Union's budget is a key element in preserving the trust of EU citizens and in boosting the strength of the European project. Fraud and corruption must be fought vigorously and effectively. The ultimate goal is a high and equivalent level of protection of the EU's budget throughout the entire territory of the EU.

Important milestones that changed the institutional and legal landscape for the protection of the Union's budget were reached in 2017. In July, the Directive on the fight against fraud to the Union's financial interests by means of criminal law (the PIF Directive) was adopted by the Parliament and the Council. In October, the Council adopted – in enhanced cooperation among 20 Member States – the Regulation establishing the European Public Prosecutor's Office (the EPPO). These are crucial developments in the protection of the Union's financial interests by means of criminal law.

The criminal law approach to be taken at the EU level by the EPPO will have as natural complement the administrative law approach ensured by OLAF since 1999 as its natural complement. We now need to provide for the highest complementarity between the actions of the EPPO and OLAF. Close cooperation between the EPPO and OLAF is necessary, while preserving OLAF's specific characteristics as an independent administrative investigation body.

Against this background, the adoption by the Commission of its evaluation report on the application of OLAF Regulation 883/2013 on 2 October 2017 is a most timely development. As you will read in this issue, the evaluation concludes that Regulation 883/2013 has allowed OLAF to continue delivering concrete results for the protection of the EU's budget. It brought clear improvements as regards the conduct of investigations, cooperation with partners, and the rights of persons concerned. At the same time, the evaluation highlights some shortcomings, which particularly impact the effectiveness and efficiency of OLAF's investigations.

In response to the evaluation findings and the establishment of the EPPO, the Commission is preparing a proposal for the amendment of Regulation 883/2013 in 2018. It will ensure that the legislation is fit for purpose, so that OLAF can cooperate

smoothly with the EPPO and has the tools it needs to continue fulfilling its mandate. The amendment should be in force by the time the EPPO becomes operational, ensuring a seamless transition into the new institutional framework (end of 2020).

First, it will be necessary to organise the relationship between the EPPO and OLAF in such a way as to create synergies and added value and to avoid overlaps. The EPPO and OLAF are different bodies with different mandates, structures, and tools, all of which contribute to the common goal of protecting the EU's budget – each within its specific mission.

Secondly, OLAF should have at its disposal investigative tools and powers appropriate to its mandate, which is to carry out administrative investigations. In particular, there is a need to increase the coherent application of OLAF's investigative tools across the Member States, to ensure their enforcement and to improve the use of OLAF's reports in judicial proceedings.

Furthermore, one needs to consider clarification of OLAF's mandate and investigative tools in the area of VAT. It is beyond doubt that VAT belongs to the financial interests of the Union, and we have succeeded in making the EPPO competent for the most serious criminal cases. Outside these cases lies an area in which OLAF can play a greater role, with its cross-border and multi-disciplinary approach, to support the Member States. Another issue worth considering is the need for and possibility for OLAF to have better access to bank account information, which is necessary to uncover many types of financial fraud.

With so many changes to the legal framework, OLAF will continue to play an essential and even enhanced role. It will be the EPPO's natural partner and will also continue to serve its purpose as an independent administrative office with a strong focus on the recovery of misused funds.

Margarete Hofmann, Policy Director OLAF



Margarete Hofmann



European Union*

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

Foundations

Fundamental Rights

CJEU: Term of Imprisonment Cannot be Sole Ground for Expulsion of Long-Term Residents

In a judgment of 7 December 2017, the CJEU strengthened the rights of third country nationals against their expulsion if they are long-term residents in EU Member States.

In the case at issue (Case C-636/16, *Wilber López Pastuzano v. Delegación del Gobierno en Navarra*), a Colombian national was granted a long-term residence permit in Spain in 2013. In 2014, he was sentenced to two prison sentences, one of 12 months and one of three months. Afterwards, Spanish authorities ordered his expulsion from Spanish territory.

The referring Juzgado de lo Contencioso-Administrativo No 1 de Pamplona (Administrative Court No 1, Pamplona, Spain) was in doubt as to whether this administrative decision was in line with Directive 2003/109/EC concerning the status of third-country nationals who

are long-term residents. The Directive provides for the reinforced protection against expulsion of long-term residents. According to its Art. 12, Member States may take a decision to expel a long-term resident solely where he/she constitutes an actual and sufficiently serious threat to public policy or public security. Before taking such a decision, Member States must consider a number of factors: the duration of residence in the territory; the age of the person concerned; the consequences for the person concerned and family members; and any links with the country of residence or the absence of links with the country of origin.

The referring court observed that there are two different sets of rules relating to the expulsion of long-term residents in the Spanish legal system. Accordingly, and as interpreted by several Spanish courts, the reinforced protection of long-term residents is only granted in the case of decisions to expel adopted as a penalty for certain administrative offences. In case of a sentence to a more than one-year term of imprisonment, expulsion is ordered by Spanish courts without further assessment, since expul-

sion is considered a legal consequence stemming from a conviction for willful misconduct.

The CJEU ruled that this practice is not compatible with said Directive. Union law precludes legislation of a Member State, which, as interpreted by some of the courts of that Member State, does not provide for the application of the requirements of reinforced protection to all administrative expulsion decisions against the expulsion of a third country national who is a long-term resident. The protection must be applied regardless of the legal nature of that measure or the detailed rules governing it. Therefore, the factors for weighing up whether an expulsion can be ordered or not must be considered even if the expulsion was the result of a criminal conviction. The term of imprisonment cannot be the sole reason for a decision to expel. (TW)

► [eucrim ID=1704001](#)

Dublin III Regulation: Effective Remedy for Asylum Seeker to Invoke Expiry of Removal Period

On 25 October 2017, the CJEU delivered a judgment on the interpretation of the Dublin III Regulation in the light of Art. 47 CFR, which provides for the right to an effective remedy (Case C-201/16, *Majid Shiri v Bundesamt für Fremdenwesen und Asyl*).

Regulation (EU) No 604/2013 (Dublin III) provides a mechanism for determining which country is responsible for examining an application for international protection lodged in one of the

* If not stated otherwise, the news reported in the following sections cover the period 16 October 2017 – 15 December 2017.

EU Member States by a third country national or a stateless person.

In the case at issue, an Iranian national, Mr. Shiri, entered EU territory via Bulgaria and lodged an application for international protection there. Shortly after, he lodged another application for international protection in Austria. The Bulgarian authorities agreed to take the applicant back according to the Dublin rules. However, Mr. Shiri challenged the decision to deport him to Bulgaria, arguing that the Republic of Austria had become the Member State responsible for examining his application for international protection because the six-month period for a transfer, as defined in Article 29(1) and (2) of the Dublin III Regulation, had expired.

The referring Austrian upper administrative court posed the question as to whether the expiry of the six-month period is sufficient in itself to result in a transfer of responsibility between Member States. It also raised the question as to whether an applicant for international protection can invoke such a transfer of responsibility before the court or tribunal of the Member State in which he is staying.

The CJEU confirmed both questions. First, it decided that if the transfer does not take place within the six-month time limit, responsibility is automatically transferred to the Member State which requested that charge be taken of the person concerned (in this instance, Austria), without the Member State responsible (in this instance, Bulgaria) having to refuse to take charge of, or take back, that person. The Court argued that this results not only from the wording of Art. 29 of the Dublin III Regulation but also from its objective to rapidly process applications for international protection.

Second, the CJEU ruled that the provision of the Dublin III Regulation which lays down that the applicant should have the right to an effective remedy – in the form of an appeal or a review, in fact and in law – against a transfer decision before a court or tribunal (Art. 27), must be read in the light of Art. 47 CFR. This

means that an applicant applying for international protection must have an effective and rapid remedy available to him that enables him to rely on the expiry of the six-month period as defined in Art. 29(1)

and (2) of the Dublin III Regulation. This holds true irrespective of whether the period expired before or after adoption of the transfer decision. (TW)

➤eucrim ID=1704002

Report

Area of Freedom, Security and Justice:

The Untapped Potential

The European Parliament is preparing another report on the cost of non-Europe in the Area of Freedom, Security and Justice (AFSJ).

On 7 November 2017, the EP, together with the European University Institute organised an event to reflect on this topic after an initiative of the European Parliament's Committee on Civil Liberties, Justice & Home Affairs (LIBE) in October 2016 (for the costs of non-Europe debate in the AFSJ, see eucrim 2/2016).

EPRS Policy Analyst *Dr. Wouter van Ballegooij* presented a briefing paper that maps the current gaps and barriers in the main policy areas covered by the AFSJ. It also estimates their impacts on the establishment of this area. It measures both economic impacts and those on individuals in terms of protecting their fundamental rights and freedoms. Ultimately, it assesses options for action at EU level to address the identified gaps and barriers together with an estimation of their potential costs and benefits.

At the event, *Van Ballegooij* reviewed the untapped potential of the AFSJ in light of challenges to the following issues:

- Upholding democracy, the rule of law, and fundamental rights in the Member States;
- Ensuring a high level of security in the fight against corruption, organised crime, and terrorism;
- Guaranteeing the right to asylum, protecting external borders; and
- Developing a common migration policy.

The intermediate results of the research conducted by EPRS show that the gaps and barriers in EU cooperation and action in the various areas covered by the AFSJ are interlinked. Free movement within the Schengen area was undermined by the EU's inability to respond properly to the refugee crisis. Effectively fighting corruption is illusory in a state in which the rule of law is not respected. Similarly, lack of action against discrimination and racism, and maltreatment in prison, undermine efforts in the fight against crime and terrorism.

Van Ballegooij stressed that more EU action and cooperation to complete the AFSJ is essential to allow individuals to fully enjoy their fundamental rights and improve their material and immaterial well-being, thereby enhancing their trust in the EU based on its ability to deliver concrete benefits in their daily lives. Further cooperation and action will also make EU societies more secure, free, and prosperous through the pooling of resources and boosting of economic growth.

A roundtable discussion between EUI experts followed, including statements by *Prof. Deirdre Curtin*, *Prof. Sergio Carrera*, and *Emilio De Capitani* (former head of the LIBE secretariat). Discussions showed the need to engage with citizens on the future development of an area that directly and profoundly touches their freedoms and collective security.

Wolfgang Hiller, Director of Impact Assessment and European Added Value at EPRS concluded that an economic assessment of the impacts in an area covering such heterogeneous and sensitive policies is often very difficult or less relevant. In general, Justice and Home Affairs policies are among the worst performers in terms of better regulation. Evidence based policies should however also be developed here, including through this Cost of Non-Europe report.

Next to the briefing paper, the event's website also leads to videos of the event on the EP's YouTube webpage and other related information. For a first product out of the new debate on the costs of non-Europe in the AFSJ regarding procedural rights and detention conditions, see below under "Procedural Criminal Law > Procedural Safeguards". (TW)

➤eucrim ID=1704003

Area of Freedom, Security and Justice

UK Government's Practice: JHA Opt-in and Schengen Opt-out

In October 2017, the UK Home Office published documents explaining how the UK applies Protocols 19 and 20 of the Lisbon Treaty. The Protocols lay down the UK's "special relationship" with the EU when it comes to measures in the area of justice and home affairs and Schengen rules. The UK is allowed to decide – on a case-by-case basis – whether or not it will be bound by such EU legislation (so-called opt-ins and opt-outs).

The first paper explains the background of the opt-ins and opt-outs, the UK government's approach to participation in EU JHA legislation, and the enhanced scrutiny arrangements in 2011 for government decisions on this participation.

The second paper outlines the actions that government departments will take to ensure JHA opt-in and Schengen opt-out decisions, in particular how the views of Parliament are taken into account in the process. The procedure was first outlined in 2008 and applied after the entry into force of the Lisbon Treaty; it was then further enhanced during 2011 and 2012.

The third paper describes JHA opt-in and Schengen opt-out decisions taken between 1 December 2009 and the present. It lists the proposals as well as those the government is currently considering and those on which a decision is expected in the next few months. It further provides links to ministerial statements on the decision to opt-in or not. (TW)

►eucrim ID=1704004

EU and USA Discuss Common Actions in Justice and Home Affairs

On 17 November 2017, the EU-U.S. Ministerial Meeting on Justice and Home Affairs took place in Washington, D.C. At the top of the agenda were common actions against the threat of terrorism and terrorist financing as well as drug

trafficking and access to electronic evidence.

One focus was the sharing of air passenger information, in particular PNR data, the importance of which for operational cooperation was highlighted. Furthermore, the state of play of the implementation of the EU PNR framework, which will be in place by May 2018, was discussed. Other issues included:

- Joint measures to address threats ranging from terrorism to aviation security;
- Better U.S.-EU cooperation in combating terrorism financing and money laundering, including cooperation within the Financial Action Task Force;
- Joint actions to counter the misuse of the Internet for terrorist purposes, in cooperation with multiple stakeholders, including the private sector and civil society;
- The conclusions of the 14 November 2017 EU-US Cyber Dialogue;
- Establishment of a regular dialogue on legislative and judicial developments as regards electronic evidence;
- Continuation of efforts (e.g., joint EU-U.S. operations) to counter the production and trafficking of cocaine and illicit opioids.

The participants at the ministerial meeting agreed to remain committed to continuing their mutual work. The next joint meeting will take place during the first half of 2018 in Sofia, Bulgaria. (TW)

►eucrim ID=1704005

Schengen

Legislation on Entry-Exit System Passed

On 30 November 2017, the Council and the European Parliament signed legislation for the establishment of the Entry-Exit System (EES). The final acts were published in the Official Journal of 9 December 2017, L 327.

The Commission proposed the EES in April 2016 within the framework of a "smart borders" package. It was consid-

ered a priority file; Council and EP were urged to swiftly adopt the EU legislation. For the legislative process, see also eucrim 3/2017, pp. 97-98 and 2/2017, pp. 57-58.

The system is an additional European large-scale IT system, designed to register information on non-EU nationals, e.g., name, travel documents, fingerprints, facial image, date and place of entry/exit/refused entry into the Schengen area. It will apply both to travellers requiring a visa and to visa-exempt travellers admitted for a short stay of 90 days (in any of a 180-day period), who cross the Schengen area's external borders. The main purpose is to facilitate Schengen border management by replacing the manual stamping of passports and speeding up border crossings. It will further aid in easily detecting over-stayers as well as document or identity fraud. Law enforcement authorities, including Europol, will have access to the travel history records, meaning that the EES has also been designed to strengthen internal security and the fight against terrorism.

A major issue during the negotiations was the data retention period. The final text now foresees that the personal data of third-country nationals who have respected the duration of authorised stay and third-country nationals whose entry into the EU for a short stay has been refused be kept for a period of three years; the personal data of third-country nationals who have not exited the territory of the Member States within the authorised period of stay are stored for a period of five years.

The EES will consist of the following:

- A central system;
- National uniform interfaces in each Member State;
- Technical features that ensure interoperability between the EES and the Visa Information System.

The European agency for the operational management of large-scale information systems in the area of freedom, security and justice (eu-LISA) will

establish the technical infrastructure together with the Member States. It is expected that the system will be operational by 2020. (TW)

►eucrim ID=1704006

Legislation

EU Sets Out Legislative Priorities for 2018–2019

On 14 December 2017, European Commission President *Jean-Claude Juncker*, President of the European Parliament, *Antonio Tajani*, and the holder of the rotating Council Presidency and Prime Minister of Estonia, *Jüri Ratas*, signed a Joint Declaration that sets out the EU's top legislative priorities for 2018-2019.

An additional working document to the Joint Declaration lists 31 new legislative proposals as tabled by the Commission. It also includes current proposals that are in the pipeline, which will be given priority treatment by the Parliament and the Council for adoption or substantial progress by the time the European Parliament elections take place in 2019.

In the area of home and justice affairs, the Declaration determines *inter alia* the following subject matters, which will play a central role in the upcoming months:

- Better knowledge of persons crossing the EU's common external borders;
- Interoperability of EU information systems for security purposes;
- Criminal records;
- Strengthening instruments on the fight against terrorism and money laundering;
- Enhancing cybersecurity.

In addition, the Declaration also calls for significant progress on tackling tax fraud, tax evasion, and tax avoidance as well as ensuring a sound and fair tax system.

The Joint Declaration on the EU's top legislative priorities in the coming year is part of the Interinstitutional Agreement on Better Law-Making between

the EU institutions in March 2016. It also reflects the promise of Commission President *Juncker* that the European Commission "will be big on the big things that really matter to our citizens" under his watch. (TW)

►eucrim ID=1704007

Institutions

OLAF

Pilot Group Meeting with African Partners

Fraud does not stop at the EU's borders. EU funds are also spent in third countries, e.g. for development and humanitarian aid. Therefore, strengthening partnerships with countries and institutions outside the European Union is important for the investigation of fraud.

This was the aim of the eighth conference organised by OLAF and involving its African partners on 19-20 October 2017 in Brussels. Participants included representatives from 12 African countries and 22 national, European, and international institutions (e.g., national financial inspection and audit bodies, anti-fraud offices, the African Development Bank, the Office of Integrity and Anti-corruption of the African Union Commission, the European Investment Bank, the World Bank, and several EU delegations).

Participants discussed emerging trends and solutions to challenges posed by fraud when it affects several countries and continents. OLAF contributed experience on recent investigations conducted in both Northern and Sub-Saharan Africa.

The conference is part of a series of so-called Pilot Group meetings, which started in 2007 and which aim to strengthen the cooperation between OLAF and African national authorities as well as to enhance EU-Africa and trans-African cooperation. (TW)

►eucrim ID=1704008

Joint Customs Operation "Cerberus" Takes €6.4 Million from Black Cash Market

With the support of OLAF and Europol, the customs services of 27 EU Member States and Norway succeeded in seizing €6.4 million from the illegal smuggling of cash across EU borders. The Joint Customs Operation, called "Cerberus," was coordinated by the French Direction Générale des Douanes et Droits Indirects and the Spanish Agencia Tributaria. It aimed at controlling the failure to declare cash in order to fight organised crime, money laundering, and terrorism financing. Controls focused on the physical cash entering or leaving the European Union. OLAF reported that the use of sniffer dogs that are able to detect cash considerably contributed to the success of the operation. They detected more than €978,000. (TW)

►eucrim ID=1704009

European Public Prosecutor's Office

Netherlands Willing to Join EPPO Scheme

According to the coalition agreement of the new government of the Netherlands, a decision will be taken to join the new European body designed to investigate, prosecute, and charge offenses affecting the EU's financial interests. To date, 20 EU Member States are participating in the Regulation establishing the European Public Prosecutor's Office by means of enhanced cooperation (for further details, see eucrim 3/2017, pp. 102-104). The previous government of the Netherlands had rejected participation in enhanced cooperation, arguing mainly that the EPPO will shift too many competences to Brussels. (TW)

►eucrim ID=1704010

Europol

New Executive Director

On 6 December 2017, the Council put *Catherine De Bolle* from Belgium for-

Report

Expert Workshop on the Amendment of OLAF Regulation 883/2013

On 15 December 2017, a workshop on the amendment of Regulation 883/2013 (hereafter “the Regulation”) took place involving Commission services, representatives of the Network of Associations for European Criminal Law and the Protection of the Financial Interests (PIF) of the EU, and representatives of the European Criminal Bar Association. The event was organised against the background of the targeted stakeholder consultation for amendment of Regulation 883/2013.

The discussion covered the main objectives of the announced proposal to amend the Regulation: adapting it to the establishment of the European Public Prosecutor’s Office (EPPO) and enhancing the effectiveness of OLAF’s investigative function.

There was agreement on the first topic among the participants regarding the necessity to amend the Regulation in order to ensure that OLAF and the EPPO can exercise their respective mandates effectively. The following issues were discussed in particular:

- The principles, mechanisms, and arrangements that could ensure a flawless coordination between OLAF and the EPPO;
- The ways how the application of the principle of non-duplication of OLAF and EPPO investigations could be balanced with the need to carry out complementary measures for different purposes other than the investigation of criminal conduct;
- The main support activities that OLAF could offer in support of the EPPO and under which conditions.

The participants also explored and debated how to enhance the effectiveness of OLAF’s investigations across the Member States from a wide range of perspectives:

- Coherent application of the investigative tools available to OLAF across the Member States;
- Possibilities of reinforcing the enforcement of OLAF’s investigative powers;
- Possibilities by which to improve the admissibility of OLAF’s reports as evidence in national judicial proceedings.

The expressed views, ideas, and proposed solutions and approaches will be considered in preparation of the proposal for the amendment of Regulation 883/2013.

ward for selection as the next executive director of Europol. *Catherine de Bolle* was chief commissioner of the Belgian federal police since March 2012.

Europol’s executive director is selected from a list of candidates proposed by its management board. Once confirmed by the Council, the selected candidate is heard by the LIBE committee of the European Parliament, which then issues a non-binding opinion. Following this, the selected candidate can be appointed by the Council for a four-year term, renewable once. The term of the current executive director, *Rob Wainwright*, expires on 1 May 2018. (CR)

►eucrim ID=1704011

SIRIUS Platform Launched

On 30 October 2017, Europol officially launched a secure web platform called “SIRIUS” that allows law enforcement

professionals to share knowledge, best practices, and expertise in the field of Internet-facilitated criminal investigations, with a special focus on counter-terrorism.

Via SIRIUS, investigators will be able to quickly and efficiently exchange know-how, manuals, and advice as well as tools to help them analyse the information received by the different online service providers. Furthermore, SIRIUS shall help streamline requests to online service providers and improve the quality of the responses. (CR)

►eucrim ID=1704012

Eurojust**New Vice-President**

On 5 December 2017, *Filippo Spiezia*, National Member for Italy since Janu-

ary 2016, was elected Vice-President of Eurojust for a three-year term. He is successor to former Vice-President *Ladislav Hamran*, who was elected President of Eurojust in October (see eucrim 3/2017, p. 105).

Before joining Eurojust, Mr. *Spiezia* has served as public prosecutor for 28 years with several positions at the National Anti-mafia and Anti-terrorism Directorate in Rome. He also published a prize-winning book on the trafficking and exploitation of human beings. (CR)

►eucrim ID=1704013

New National Members for Belgium and Greece

In December 2017, *Hilde Vandevoorde* was appointed National Member for Belgium at Eurojust for a five-year period. Before joining Eurojust, Ms. *Vandevoorde* served as Head of the Special Missions Unit in charge of special investigation techniques at the Belgian Federal Prosecutor’s Office.

Furthermore, in October 2017, *Paris Adamis*, former Chief Prosecutor for the Police Office for International Cooperation at the Greek Ministry of the Interior (S.I.Re.N.E) was appointed National Member for Greece at Eurojust. (CR)

►eucrim ID=1704014

Letter of Understanding with EEAS Signed

On 10 October 2017, Eurojust signed a Letter of Understanding with the European Union External Action Service (EEAS), providing a framework for the regular exchange of non-operational strategic information and experience. This information particularly concerns the areas of counter-terrorism, cyber-crime, illegal immigrant smuggling, and trafficking in human beings.

The EEAS is the EU’s diplomatic service that helps the EU’s foreign affairs chief (the High Representative for Foreign Affairs and Security Policy) carry out the Union’s Common Foreign and Security Policy. (CR)

►eucrim ID=1704015

European Judicial Network (EJN)

Forms Assisting Mutual Enforcement of Financial Penalties

In November 2017, the EJN Secretariat published five standardised forms to facilitate the procedure for enforcement of cross-border financial penalties as laid down by Framework Decision 2005/214/JHA. The use of the forms is voluntary and has no legislative effect. The forms are available in 23 languages in the Judicial Library on the EJN website, together with an Explanatory Memorandum.

The standardisation of the procedure regarding the mutual recognition of financial penalties was initiated by Germany. Its purpose is to streamline the mechanism for the execution of cross-border financial penalties, and to reduce the financial and administrative burdens linked to the procedure. (CR)

➤eucrim ID=1704016

Frontex

Progress Report on European Border and Coast Guard

On 15 November 2017, the European Commission has published an Annex to its Progress Report on the European Agenda on Migration, looking at the European Border and Coast Guard Agency (Frontex). The report offers an overview on the number of human resources deployed to various EU Member States in 2017, Frontex' rapid reaction capabilities (including the rapid reaction equipment pool), and the state of play of Frontex' vulnerability assessments. (CR)

➤eucrim ID=1704017

Information Leaflet

In November 2017, the European Commission published a leaflet giving a short overview on the new mandate, role, and tasks of the European Border and Coast Guard Agency (Frontex).

The leaflet outlines the steps that have been completed to a fully operational

European Border and Coast Guard, e.g. the availability of 1.500 border guards under the Rapid Reaction Pool and the launch of three new return pools to support Member States in organising and coordinating return operations. (CR)

➤eucrim ID=1704018

Headquarter Agreement in Force

On 1 November 2017, Frontex Headquarters Agreement with the Republic of Poland entered into force. The agreement defines the legal status of the Agency and its staff in Poland and allows the Agency to build its new headquarters in Warsaw on land provided by the Polish government. It also foresees the establishment of an accredited European School for the children of Agency staff. Frontex celebrated this occasion on 21 November 2017. (CR)

➤eucrim ID=1704019

Vulnerability Assessment Completed

By mid-October, Frontex completed its first set of vulnerability assessments in all EU Member States, covering the management of information related to border control, border surveillance, border checks, and risk analysis as well as registration, screening, and referral mechanisms.

These annual assessments aim to allow Frontex to create an EU-wide overview of available border control means and capacities. They also help identify potential weaknesses in EU Member States' abilities to handle increased migratory pressure at their borders.

Frontex delivers an individual assessment for each EU Member State, followed by recommendations. (CR)

➤eucrim ID=1704020

Agency for Fundamental Rights (FRA)

Fundamental Rights Platform Takes Up Work

Following the election of its members in June 2017, the newly founded FRA Fundamental Rights Platform (FRP)

panel held its first meeting in Vienna on 9-10 November 2017. The Fundamental Rights Platform is a working method offered for developing a structured relationship and exchange of information with civil society organisations active in the fields of fundamental rights at the national, European and international level.

The FRP aims at:

- Facilitating the exchange of information and pooling of knowledge;
- Bringing relevant civil society expertise, knowledge and information to FRA work;
- Communicating FRA evidence in order to achieve impact (e.g. by bringing FRA project results to decision-makers and the media);
- Raising awareness of fundamental rights;
- Empowering and strengthening civil society.

FRA stressed that the FRP is only a "working method", i.e. a technical platform in order to bring together the relevant civil society organisations from EU countries or countries having an observer status with the FRA. It is not an organisational body, without any status of "membership". FRA is however coordinating the platform. (CR)

➤eucrim ID=1704021

Information on Violence Against Women

In December 2017, FRA published an easy-to-read booklet briefly informing women about the laws against hurting women and what can be done about it. The booklet is based on a survey conducted by FRA with 40.000 women in the EU. It asked if anyone had been violent to them in the form of physical violence, emotional abuse, rape, or stalking. According to the survey, the women replied as follows:

- 1 in 3 women was physically hurt from someone;
- Almost half of the women were emotionally abused by her partner;
- About 1 out of 20 women was raped;
- Almost 1 in 5 women was stalked.

The survey also revealed that only half of the women know that there are laws against hurting women. The booklet concludes that the survey will be repeated in order to see if the laws are working. (CR)

►eucrim ID=1704022

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

CJEU Avoids Clash with Italian Constitutional Court: “Taricco Rule” Need Not Be Followed Absolutely

On 5 December 2017, the CJEU delivered its highly anticipated judgment in Case C-42/17 (criminal proceedings against *M.A.S. and M.B.*). It comes after the rather tough opinion delivered by Advocate General *Yves Bot* on 18 July 2017 (see eucrim 3/2017, p. 107).

The CJEU had to respond to the Italian Constitutional Court (ICC), which sought clarification on the interpretation of the rule put forth by the CJEU in the landmark “Taricco judgment” of 8 September 2015 (Case C-105/14). In this judgment, the CJEU actually held that a national criminal court, if need be, is required to disapply national legislation on limitation periods that precludes, in a significant number of cases, the punishment of serious fraud affecting the EU’s financial interests or imposes shorter limitation periods for fraud affecting the EU’s financial interests than for fraud affecting the financial interests of the state. The CJEU argued that national courts must give full effect to Art. 325 TFEU, which anchors the Member States’ obligation to protect the EU’s financial interests in primary Union law.

In essence, Italian courts questioned whether the rule of disapplication in accordance with the Taricco judgment is also required even if:

- It may not comply with the principle of legality of criminal proceedings;

- It is at variance with the overriding principles of the Italian constitution or with the inalienable rights of the individual.

For the facts of the case and the arguments by the ICC, see further *eucrim* 3/2017, p. 107.

In its judgment of 5 December 2017, the CJEU reaffirmed that Art. 325 TFEU implies several obligations for the Member States, e.g.:

- In cases of serious fraud affecting the EU’s financial interests in relation to VAT, effective and deterrent criminal penalties must be adopted;
- Limitation rules must be laid down by national (criminal) law in such a manner that allows effective punishment of infringements linked to such fraud;
- National provisions, including rules on limitation, must be disapplied if their application prevents effective and deterrent penalties in proceedings concerning serious VAT infringements.

The CJEU concedes, however, that the national criminal court must ensure that the fundamental rights of accused persons are observed if they decide to disapply the provisions of the criminal code. Since the rules on limitation form part of substantive criminal law under Italian law, the Italian courts cannot disregard the principle that offences and penalties must be defined by law. This principle prevails over the effective collection of the EU’s financial resources, following from Art. 325 TFEU. In this context, the CJEU points out the importance accorded to the principle that offences and penalties must be defined by law, both in the EU legal order and in national legal systems. This concerns the requirements of foreseeability, precision, and non-retroactivity. In conclusion, the CJEU decided as follows:

- The national court has to ascertain whether the finding required by the Taricco judgment – that the provisions of the criminal code at issue prevents the imposition of effective and deterrent criminal penalties in a significant number of cases of serious fraud affecting the

financial interests of the Union – leads to a situation of uncertainty in the Italian legal system. This uncertainty affects the determination of the applicable limitation rules, which would be in breach of the principle that the applicable law must be precise. If this is indeed the case, the national court is not obliged to disapply the provisions of the criminal code at issue.

- The requirements of foreseeability, precision, and non-retroactivity preclude the national court from disapplying the provisions of the Criminal Code at issue in proceedings concerning persons accused of committing VAT infringements before the delivery of the *Taricco* judgment.

The CJEU’s ruling is one of the rare examples when the judges in Luxembourg do not follow the opinion of the Advocate General. While the AG argued that the Italian courts must also disapply the provisions on limitation in the present case, since none of the principles put forward are given, the CJEU clearly tries to reconcile the effective fight against VAT fraud affecting the EU’s financial interests with important principles of national criminal law, e.g., the legality principle. This is likely intended to prevent Italian courts from having to trigger the “counter limits” doctrine and disobey the CJEU’s ruling if the Taricco rule were to be applied without limits. (TW)

►eucrim ID=1704023

Commission Proposes New Legislation to Tackle VAT Fraud

On 30 November 2017, the European Commission tabled legislative proposals that include several key measures to combat VAT fraud. The measures essentially target the better exchange of more relevant information and closer cooperation in the fight against criminal activities that misuse the current EU’s VAT system. In particular, they aim at countering major problems in relation to various forms of VAT fraud, such as missing trader and carousel fraud, VAT

fraud arising from imports from outside the EU, and VAT fraud in the sale of second-hand cars.

The key measures of the planned legislation are the following.

■ *Strengthening cooperation between EU Member States:*

- Putting in place an online system for information sharing within “Eurofisc” – the EU’s network of national analysts working in different areas of fraud risk;
- Joint audits, which will allow officials from two or more national tax authorities to form a single audit team in order to combat fraud, especially in the e-commerce sector;
- New powers for Eurofisc to coordinate cross-border investigations.

■ *Cooperation with European law enforcement bodies:*

- Opening new lines of communication with OLAF, Europol, and the newly created European Public Prosecutor’s Office (EPPO) in order to tackle suspected cross-border activities;
- Cross-checking of national information with criminal records, databases, and other information held by Europol and OLAF.

■ *Sharing information on imports:* New rules will be introduced to share information among the tax and customs authorities on goods coming into the EU from outside.

- *Access to car registration data:* Eurofisc officials would be given access to car registration data from other Member States in order to tackle a specific type of fraud whereby recent or new cars, for which the entire amount is taxable, can be sold as second-hand goods, for which only the profit margin is subject to VAT.

The fight against cross-border VAT fraud is one of the top priorities of the Commission. The presented measures follow up on the “cornerstones” for a new definitive single EU VAT area, proposed by the Commission in a communication of October 2017, and on the VAT Action Plan towards a single EU VAT area,

presented in April 2016. Measures in the area of VAT must be unanimously adopted in the Council; the European Parliament is only consulted. (TW)

►eucrim ID=1704024

ECA Reprimands Commission and Member States for Ineffective Import Controls

On 5 December 2017, the European Court of Auditors (ECA) presented a special report on the import procedures of the Commission and Member States when they examine goods entering from outside the EU. The ECA members found significant weaknesses (both in the legislation and in the implementation of controls in Member States’ practice). They also identified loopholes, which indicate that the controls are not being applied effectively, therefore adversely affecting the EU’s financial interests.

The report makes several initial observations, *inter alia*:

- The current system does not prioritise the importance of custom duties as a financing source of the EU budget;
- The EU’s tools and programmes for exchanging customs information and increasing cooperation have not reached their full potential;
- Member States do not follow a uniform approach towards customs control of imports, which can lead to underpayment of customs duties.

The report lists the following loopholes in the customs control of imports:

- Member States do not carry out pre-arrival controls to protect the EU’s financial interests;
- Member States do not always carry out the controls suggested by their risk management systems;
- The level of post-release controls does not compensate for the decrease in release controls on simplified procedures;
- Post-release controls rarely cover imports in other Member States;
- The lack of checks on customs relief for low value consignments is leading to underpayment of customs duties.
- Ultimately, the report makes several

recommendations addressed to both the Commission and the EU Member States. Accordingly, the Commission should undertake the following:

- Develop a methodology and make periodic estimates of the customs gap (as from 2019), taking into account their results in the allocation of resources and when setting operational targets;
- Consider all available options to strengthen support for national customs services in their important EU role in the new Multiannual Financial Framework, including a review of the appropriate rate of collection costs;
- Propose that the next EU action programmes, supporting the Customs union, should be used to contribute financial sustainability to the customs European Information Systems;
- Formulate more precise requests in a Mutual Assistance communication, ensuring their uniform implementation by Member States;
- Propose amendments to customs legislation in 2018, making it compulsory to indicate the consignor in the customs import declaration.

The Member States are called on to implement the following recommendations:

- Make overrides of controls suggested by a particular risk filter conditional on prior or immediate hierarchical approval;
- Introduce checks in their electronic release systems to block import declarations applying for duty relief on goods with declared value above €150 or for commercial consignments declared as gifts;
- Set up investigation plans to tackle abuse of this relief on e-commerce goods trade with non-EU countries.

The special report by the ECA also includes the responses of the Commission to its findings. According to the Commission, the major findings concern shortcomings in the control by Member States that have full responsibility to ensure effective customs controls. In addition, the Commission explains whether or not it follows the recommendations made by the ECA to it.

The ECA's special reports present the results of its audits of EU policies and programmes or management topics related to specific budgetary areas. (TW)
 ➤eucrim ID=1704025

ECA Gives Background Information on Current Commission's Fraud Controls

On 19 October 2017, the European Court of Auditors (ECA) issued a so-called "audit brief" entitled "Fighting fraud in EU spending." The audit brief gives background information on the current examination by the ECA regarding whether the European Commission is following best practice in combating fraud in EU spending (see eucrim 2/2017, p. 64). The audit addresses questions as to whether:

- The Commission has appropriate fraud risk oversight at the corporate level;
- The Commission's Directorates-General are well prepared to prevent fraud;
- A robust response is given in those cases in which there is a suspicion of fraud.

The audit brief does not set out the results of the audit but is designed to provide some information on the ongoing audit tasks for interested persons.

The audit brief includes information on the following issues:

- Definition of fraud and corruption;
- Fraud risk management;
- Regulatory environment of the protection of the EU's financial interests against fraud;
- The roles and responsibilities of the actors involved in managing the risks of fraud against the EU budget, e.g. OLAF, Commission Directorates-General, Europol, Eurojust, the future EPPO, and national authorities;
- Specific anti-fraud measures at the Commission level;
- The Commission's estimates for fraud against the EU budget;
- Main risks identified when preparing the audit.

The ECA's audit will focus on fraud prevention and fraud response and will include contributions from NGOs, aca-

demics and prosecutors, as well as Europol and Eurojust. Publication of the final audit report is expected in spring 2018. (TW)
 ➤eucrim ID=1704026

Money Laundering

Political Agreement on Revision of 4th Anti-Money Laundering Directive

On 20 December 2017, a political agreement was reached between the Estonian Council Presidency and the European Parliament regarding the 2016 Commission proposal on strengthened EU rules to prevent money laundering and terrorist financing (see eucrim 2/2016, p. 73 for the proposal). The reform concerns amendments to the fourth anti-money laundering Directive (EU) 2015/849. Its main objectives are:

- Preventing the use of the financial system for the funding of criminal activities;
- Putting in place better transparency rules to prevent the large-scale concealment of funds.

The new measures are designed to support law enforcement authorities in better tracking financial flaws and in disrupting the financing of criminal networks. They include the following:

- Enhanced mutual access to beneficial ownership registers, the registers being interconnected;
- Extending customer due diligence control obligations to virtual currency exchange platforms and custodian wallet providers;
- Minimising the anonymous use of prepaid cards;
- Facilitating cooperation between the Financial Intelligence Units (FIUs);
- Extending the powers of FIUs, enabling them to identify holders of bank and payment accounts;
- Improving checks on risky third countries.

The political agreement paves the way for the final legislation to be adopted soon. It is planned that both the Council

and the EP adopt the proposed directive by a single first reading. (TW)
 ➤eucrim ID=1704027

Tax Evasion

MEPs Adopt Recommendations Following Inquiry into Panama Papers Scandal

On 13 December 2017, MEPs (by 492 votes to 50 with 136 abstentions) backed over 200 recommendations drafted by the EP's Special Inquiry Committee into Money Laundering, Tax Avoidance and Evasion (PANA). The Committee was set up in the context of the Panama Papers revelations in December 2015. The major recommendations include:

- Regularly updated, standardised, interconnected, and publicly accessible beneficial ownership registers of companies, foundations, trusts, and similar legal arrangements;
- New rules to regulate intermediaries, such as lawyers and accountants, who aid aggressive tax planning;
- A common international definition of what constitutes an offshore financial centre, tax haven, secrecy haven, non-cooperative tax jurisdiction, and high-risk country;
- Tools to support whistle-blowers in order to ensure that they are given effective protection and adequate financial assistance;
- Dissuasive penalties at both the EU and national levels against banks and intermediaries that are knowingly, wilfully, and systematically involved in illegal tax or money laundering schemes;
- A permanent committee of inquiry on the model of the US Congress.
- Reform of primary Union law by introducing qualified majority voting in the Council as regards EU legislation on tax policy.

The recommendations and the report of the Special Committee were submitted to the Council and the Commission for consideration. (TW)

➤eucrim ID=1704028

EU-Wide Track and Trace System Against Illegal Tobacco Trade

On 15 December 2017, the Commission adopted implementing and delegated acts laying down details on an EU-wide track and trace system as well as security features for tobacco products. These pieces of legislation are provided for by Arts. 15 and 16 of the EU Tobacco Products Directive (2014/40/EU). The contents of the acts are as follows:

- Setting technical standards for the establishment and operation of a traceability system through “unique identifiers” for each tobacco product manufactured in or destined for the EU;
- Establishing technical standards for security features where at least five types of authentication elements are required per unit packet of tobacco products placed on the Union market;
- Laying down Member States’ obligations to protect the security features against forgery or theft.

The track and trace system and the security requirements should be in place by 20 May 2019 for cigarettes and roll-your-own tobacco and by 20 May 2024 for all other tobacco products (such as cigars, cigarillos, and smokeless tobacco products).

Beside the fight against tobacco as a health risk, the measures taken are also designed to tackle the loss of millions of euros in tax revenues every year as a result of the illicit tobacco trade. The amount of duty that EU tax administrations lose to illicit trade has been estimated at about €11.1 billion a year. Illicit tobacco trade has also been identified as a primary source of revenue for organised crime and, in some cases, for terrorist groups. (TW)

➤eucrim ID=1704029

Council Conclusions on Illegal Tobacco Trade

At their Council meeting on 7 and 8 December 2018, the ministers of justice and home affairs of the EU Member States adopted conclusions on stepping up the fight against illegally traded to-

bacco products in the EU. The conclusions include several recommendations to the EU Member States and the European Commission to take action on a number of different issues in view of tackling the phenomenon.

First, the Council calls for improvement of the operational capabilities at the national and European levels to detect and investigate illegally traded tobacco products by:

- Improving risk management;
- Enhancing the collection of data and information based on advanced analytical IT solutions and creating interoperability options to fight against illegal tobacco trade;
- Taking necessary measures to improve cooperation at all levels (national, EU, and international), in particular via better information sharing among the agencies involved, e.g., OLAF, DG TAXUD, Europol, Frontex, Eurosur, etc.

Member States are invited *inter alia* to make international law enforcement cooperation more effective, for example by setting up joint investigation and analysis teams under the Naples II convention. Moreover, Member States should ensure that investigations are comprehensive, encompassing criminal money flows and the recovery of illegal assets.

The Commission is particularly called on to do the following:

- Promote partnerships with third countries, especially with those where fiscal drivers underpin the illegal tobacco trade;
- Put forward an action plan with new measures to tackle the problem of “cheap whites” as a matter of urgency;
- Expand OLAF’s liaison officers’ network to source countries and transit countries supplying illegal tobacco products, and better use of the Europol liaison officers’ network;
- Provide strategic and operational overviews on the illegal tobacco trade to Member States’ authorities on a regular basis. (TW)

➤eucrim ID=1704030

Practice: Joint Customs Operation Results in Seizure of 19 Million Cigarettes

In the context of the operational fight against the illicit tobacco trade OLAF released information on a major joint customs operation, codenamed “MAGNUM II,” on 5 December 2017. During this operation, which ran between May and June 2017, more than 19 million cigarettes were seized. MAGNUM II was coordinated by OLAF and the Estonian Customs Administration. It involved 14 EU Member States, Europol, and Frontex. OLAF stressed that the law enforcement authorities used a secure communication system that allowed the real-time exchange of intelligence on consignments. This was considered a key factor for the success of the operation and the apprehension of suspects.

OLAF and the Estonian customs services had already coordinated a previous regional joint customs operation (MAGNUM I) that resulted in the seizure of 11 million smuggled cigarettes. (TW)

➤eucrim ID=1704031

Organised Crime

Strategic Report on the EU’s Illicit Drug Market Published

On 6 December 2017, Europol released its strategic report entitled “How Illegal Drugs Sustain Organised Crime in the EU.” The report provides a concise overview of the illicit drug market in the EU, emerging threats, and situational pictures with regard to cannabis, cocaine, heroin, and synthetic drugs and New Psychoactive Substances (NPS).

In its key judgments, the report found that the market for illegal drugs is the largest criminal market in the EU with an estimated revenue of around EUR 24 billion each year. Within this market, the market for cannabis remains the largest by far.

As regards Organised Crime Groups (OCGs), the report found that approximately 35% of groups active in the EU

on an international level are involved in the production, trafficking, or distribution of illegal drugs. Furthermore, 75% of the OCGs involved in EU drug trade deal in more than just one illegal drug.

According to the report, the markets for synthetic drugs and NPS are the most dynamic drug markets in the EU.

For today's trade and sale of drugs, online options on various platforms are prevalent. The sale of drugs via Darknet marketplaces is a significant threat and continues to expand.

Sadly, in 2015, deaths in Europe from drug overdose increased again by 6% to 8441. These fatalities are driven by the increasing use of synthetic opioids like fentanyl.

Lastly, the report outlines that the dimension of money laundering activities in the EU is immense. This finding brings to light the huge profits generated by the OCGs involved in the drug trade and other serious, organised crime. At the same time, the success rate in identifying and seizing illegal funds generated by criminal organisations remains low, with barely 1% of criminal proceeds confiscated by relevant authorities at the EU level. (CR)

►eucrim ID=1704032

Drugs and the Darknet

On 28 November 2017, Europol and the European Monitoring Centre for Drugs and Drug Addiction (EMCDDA) released a new report looking at the growing threat to health and security caused by the illicit trade of drugs on Darknet markets. The report summarises the agencies' current understanding of the functioning of Darknet markets and outlines potential countermeasures for policymakers and law enforcement professionals engaged in the fight against this phenomenon.

In its key findings, the report underlines that trade in illicit drugs on Darknet markets is a dynamic area subject to rapid change. This area is rapidly expanding and already affects most EU Member States in some way. Germany, the Neth-

erlands, and the United Kingdom are the most lucrative countries with respect to EU-based Darknet drug supply. In the period from 2011 to 2015, EU-based suppliers accounted for around 46% of all drug sales in terms of revenue for the Darknet markets analysed.

Although sales volumes on Darknet markets still seem modest compared with current estimates for the annual retail value of the overall EU drug market, they are significant and have the potential to grow. While large-volume sales seem relatively uncommon, Darknet markets appear to be most commonly used for mid- or low-volume market sales or sales directly to consumers.

Lastly, the report found that the overall ecosystem of Darknet markets appears to be fairly resilient to law enforcement measures, with new markets quickly becoming established after take-downs. (CR)

►eucrim ID=1704033

Practice: Operation Dragon

At the end of November 2017, law enforcement authorities from more than 60 countries joined forces to target organised criminal groups and their infrastructures across the EU in a series of actions in hundreds of locations. The actions were coordinated and supported by Europol and Frontex with the cooperation of Eurojust, INTERPOL, AMERIPOL, CLACIP, NCFTA, CCWP, UNODC, and IATA.

Operation Dragon was the fourth cooperative, international law enforcement operation under the EU Policy Cycle. (CR)

►eucrim ID=1704034

Organised Criminal Group Smuggling Hashish and Marijuana Dismantled

Based on a Joint Investigation Team that was formed in November 2016 (between Germany, Spain, and France and supported by Eurojust), operations conducted in Germany, Italy, and Spain this December led to the arrest of 23 people and the seizure of five tons of hash-

ish and marijuana. More than €500,000 in cash, firearms, precious metals, real estate, boats, vehicles, and drug processing equipment were confiscated. (CR)

►eucrim ID=1704035

Cybercrime

Council Conclusions on Cybersecurity

On 20 November 2017, the General Affairs Council adopted conclusions calling for the strengthening of European cybersecurity and enhancing cyber resilience across the EU. The conclusions refer to the European Commission's Joint Communication to the EP and the Council of 13 September 2017 in which the Commission outlines plans for better resilience, deterrence, and defense against cyberattacks in the EU (see eucrim 3/2017, pp. 110-111). They also take up conclusions of the European Council of 19 October 2017: "the Commission's cybersecurity proposals should be developed in a holistic way, delivered timely and examined without delay, on the basis of an action plan to be set up by the Council."

The conclusions of the General Affairs Council stress the need for an efficient EU-level response to large-scale cyber incidents and crises, while respecting the competences of Member States. Cybersecurity needs to be mainstreamed into existing crisis management mechanisms at the EU level.

The conclusions also focus on appropriate law enforcement measures to tackle cybercrime. According to the Council, the main benefit at the EU level would be the removal of obstacles to the investigation of crime and to effective criminal justice in cyberspace as well as the enhancement of international cooperation and coordination in the fight against crime in cyberspace. Furthermore, EU Member States and the EU institutions are invited to address the challenges posed by anonymising technologies; however, strong and trusted encryption is of high importance to cy-

bersecurity and for the trust in the Digital Single Market. Member States are also called upon to mutually arrive at Internet governance decisions, which impact law enforcement capability to fight crime in cyberspace.

The conclusions serve as encouragement for the ongoing work on cross-border access to electronic evidence. The Commission is now called on to present the following:

- By December 2017, a progress report on the implementation of practical measures for improving cross-border access to electronic evidence;
- In early 2018, a legislative proposal to improve cross-border access to electronic evidence.

In addition, work on data retention should be continued. Although the Council emphasises the need to respect human rights and fundamental freedoms as well as data protection, it favours that the EU addresses challenges in criminal proceedings. These are mainly posed by systems allowing criminals and terrorists to communicate in ways that competent authorities cannot access.

Other conclusions include backing plans to set up a Network of Cybersecurity Competence Centres in order to stimulate the development and deployment of cybersecurity technologies as well as the introduction of a European cybersecurity certification framework. The latter would be a key tool for enhancing trust and security in digital products – a standard-setter for future digital developments. (TW)

►eucrim ID=1704036

Council Discusses Commission's Cybersecurity Plans

The Commission's cybersecurity package (see news item above and eucrim 3/2017, pp. 110-111) was also on the agenda of the Council convening the telecommunications ministers on 24 October 2017. The Ministers held a policy debate on the EU's response to the crucial challenge of cybersecurity, particularly as regards:

- Transforming the EU agency ENISA to a fully fledged cybersecurity agency;
- Setting up an EU-wide certification framework to ensure that ICT products and services are cyber secure.

However, the ministers stressed that the certification network at the EU level should be voluntary and should not hamper innovation. A number of ministers also highlighted the need to allocate more resources to cybersecurity and to invest more in cybersecurity education and other preventive measures, thus improving "cyber hygiene" alongside legislation.

The Estonian Council Presidency announced that the implementation of several Commission proposals on cybersecurity will remain a priority for the upcoming presidencies held by Bulgaria and Austria. The presidencies will develop an action plan for implementation of the cybersecurity package, in line with the conclusions of the European Council of 19 October 2017. (TW)

►eucrim ID=1704037

Hit Against Online Piracy

Counterfeit goods such as luxury products, sportswear, electronics, pharmaceuticals could be seized during joint investigations conducted by Europol's Intellectual Property Crime Coordinated Coalition (IPC3), the US National Intellectual Property Rights Coordination Centre, law enforcement authorities from 27 EU Member States, and third parties. The investigations were also assisted by Interpol. Over 20,520 domain names linked to online piracy on e-commerce platforms and social networks were implicated in the investigations.

The Intellectual Property Crime Coordinated Coalition combines forces from Europol and the European Union Intellectual Property Office (EUIPO) in order to provide operational and technical support to law enforcement agencies and other partners in the EU and beyond. (CR)

►eucrim ID=1704038

Cyber Threats Posed by the Internet of Things

On 18-19 October 2017, Europol and the European Union Agency for Network and Information Security (ENISA) organised a conference on the security challenges posed by the Internet of Things (IoT), i.e., the ecosystem evolving from the fact that devices are becoming increasingly interconnected and that services collect, exchange, and process data in order to adapt dynamically to a context.

Over 250 participants from the private sector, security community, law enforcement, the European Computer Security Incident Response Teams (CSIRT) community, and academia attended the conference.

In their conclusions, participants agreed on the need for more cooperation and multi-stakeholder engagement to address interoperability as well as security and safety issues. While law enforcement needs to develop the technical skills and expertise to fight IoT-related cybercrime, end users must also be made more aware of the security risks of IoT devices. (CR)

►eucrim ID=1704039

Identification of Internet Subscribers

On 13 October 2017, Europol – together with the Estonian Presidency of the EU – organised a workshop to address the increasing problem of caused by the use of Carrier Grade Network Address Translation (CGN) technologies by Internet service providers.

CGN technologies are used by Internet service providers to simultaneously share one single IP address among multiple subscribers, with the effect that the identification of individual subscribers has become technically impossible.

35 policymakers and law enforcement officials attended the workshop to discuss technical and policy solutions that could be adopted at the European level. Solutions include a voluntary code of conduct for Internet access providers to reduce the use of CGN and the number

of subscribers behind each IP address, the possibility for electronic content providers to log source port numbers, and the possibility to adopt regulations for the Internet industry to increase Internet protocol (IPv6) deployment. (CR)

►eucrim ID=1704040

Procedural Criminal Law

Data Protection

Commission Presents Legislative Proposal on Interoperability of EU Information Systems

After extensive preparation and consultation, the Commission tabled a legislative initiative establishing a framework for the interoperability of EU information systems in the field of police/judicial cooperation, border and visa, and asylum management. The initiative, presented on 12 December 2017, consists of two proposals on regulations to ensure interoperability of existing and forthcoming information systems at the EU level. The two draft regulations were necessary because the initiative has to respect the different legal bases of the information system as well as the different levels of EU Member States' participation in the various databases.

Interoperability is defined as the ability of information systems to exchange data and enable sharing of information. The European Union sees an urgent need to overcome the current complex landscape of divergently governed, large-scale IT systems for security, border, and migration management. The main aim is to eliminate blind spots in the current IT architecture where people, including those involved in terrorist activities, may be recorded in different, unconnected databases under different aliases.

By making the information systems at the EU level (i.e., SIS, Eurodac, VIS, EES, ETIAS and ECRIS-TCN) talk to each other, several advantages are listed,

so that the EU should become more secure and better resilient against terrorism and other serious crime. The proposal does not cover national information systems or decentralised EU information systems, such as the "Prüm framework."

The Commission's initiative to ensure interoperability is not, however, built upon a complete interconnectivity of information systems, where data registered in one system would automatically be consulted by another. Indeed, the focus is on new technical components to facilitate searches across the individual information systems, which will remain untouched and their different access rights respected. The main technical components are as follows:

- A European search portal, which will allow authorised users (e.g., a police of-

ficer) to simultaneously search multiple EU information systems ("one-stop-shop");

- A shared biometric matching service, which will allow a more efficient search and cross-match of biometric data (fingerprints and facial images) stored in the different information systems;

- A common identity repository, which will allow authorised users to more easily access biographical information stored in the databases about non-EU citizens (e.g., names, and dates of birth), thus retrieving more reliable identification information;

- A multiple identity detector, which will verify whether the biographical data being searched for exists in multiple systems, thus enabling law enforcement authorities both to confirm the correct

New Cost of Non-Europe Report on Procedural Rights and Detention Conditions

Following the request of the European Parliament's Committee on Civil Liberties, Justice and Home Affairs (LIBE) of October 2016 to produce a cost of non-Europe report in the Area of Freedom, Security and Justice (see also above under "Foundations > Area of Freedom, Security and Justice"), a first study on the "Cost of Non-Europe in the area of Procedural Rights and Detention Conditions" was released on 8 December 2017. It was authored by *Dr. Wouter van Ballegoij* from the European Added Value Unit of the Directorate for Impact Assessment and European Added Value within DG EPRS.

The abstract of the study concludes the following:

"Despite the significant EU action and cooperation that has taken place the rights and detention conditions of those suspected of committing a crime and those serving a sentence in the Member States continue to fail to live up to international and EU standards. Judicial cooperation within the EU is not yet fully adapted to this reality; it operates in absence of an EU mechanism monitoring Member States' compliance with practical fundamental rights and lacks specific guidance for alleged violations.

EU legislation on suspects' rights is limited to setting common minimum standards. Even so, there are already indications of shortcomings concerning key rights to a fair trial, such as the right to interpretation, translation, information and legal assistance during questioning by the police. Furthermore, certain areas have not been comprehensively addressed, such as pre-trial detention, contributing to prison overcrowding in a number of EU Member States. The outstanding divergent levels of protection also create discrimination between EU citizens.

Criminal justice systems remain inefficient and fail to achieve the aims of convicting and rehabilitating the guilty, while protecting the innocent. This impacts on the individuals concerned, in terms of a denial of their rights and material and immaterial damage; on their families; and on Member States' societies more generally. The gaps and barriers identified also have substantial cost implications.

Finally, the study assesses the added value of a number of options for EU action and cooperation to contribute to closing these gaps and taking further steps to ensuring the effective protection of the rights of suspects and detained persons." (TW)

►eucrim ID=1704041

identity of *bona fide* persons and to combat identity fraud.

The Commission stresses that the new approach to interoperability does not undermine the EU's strong data protection rules. Indeed, it is based on the principles of data protection by design and by default. The proposal includes provisions on limiting data processing to what is necessary for a specific purpose and granting data access only to those who need to know. Data retention periods (where relevant) are limited.

Furthermore, the Commission emphasises that its approach does not modify the rights of access to the different systems but only simplifies and streamlines the processes to access the data. The purpose is to establish a more systematic consultation of and checks against the data available as well as to ensure availability to authorised users more swiftly and efficiently.

In this context, law enforcement access to non-law enforcement information systems is regulated by a two-step procedure: The response to a check in all systems will only be whether data on the searched person exists ("hit/no-hit" system) – first step. If a "hit" is affirmative, officers can obtain full access after placing a duly justified request in line with the respective rules and safeguards of the relevant legal basis of the information system (second step).

The initiative on interoperability was presented within the framework of the Commission's 12th Security Union report that takes stock of actions taken by the EU to counteract terrorist activities.

In accordance with the normal legislative procedure, the Council and the European Parliament will now examine the Commission's initiative. *Dimitris Avramopoulos*, Commissioner for Migration, Citizenship and Home Affairs, termed the initiative a "flagship" and called upon legislators to treat the proposal with priority in order to finalise the legislation in 2018.

Once the legal framework is adopted, the necessary institutional and

technical implementation is to be carried out. The Commission expects that interoperability could become reality in 2020/2021.

The overall costs for establishing interoperability at the technical level are estimated at approx. €155 million (one off costs). The budget for the action of interoperability over nine years is estimated at €425 million. (TW)

➤eucrim ID=1704042

Council Updates Its Roadmap on Information Exchange and Interoperability

In addition to the Commission's work on ensuring the future interoperability of the EU's information systems in the justice and home affairs area, the Council is also pushing to give political guidance on common interoperability actions. At its meeting on 7-8 December 2017, the JHA Council endorsed an update of the roadmap to enhance information exchange and information management, including interoperability solutions. This follows the adoption of Council conclusions on interoperability in June 2017, when the Council invited the Presidency to update the roadmap (see eucrim 2/2017, p. 72).

The roadmap was initially launched by the Council in June 2016 at the initiative of the then Netherlands Presidency. It gives an overview of specific, practical short-term and medium-term actions as well as long-term orientation for enhancing information exchange and information management. It aims to contribute to tackling migratory, terrorist, and crime-related challenges. In addition, the update briefly reports on the recent implementation of activities outlined in the roadmap.

The EU's approach towards establishing the interoperability of IT systems in the justice and home affairs area have been met with partly fierce criticism from civil society and EU institutions, such as the EDPS and FRA (see, recently, eucrim 3/2017, p. 116) (TW)

➤eucrim ID=1704043

EU-Canada PNR Agreement Renegotiated

At its meeting on 7-8 October 2017, the JHA Council authorised the Commission to open negotiations with Canada on a revision of the agreement regarding the transfer and use of Passenger Name Record Data (PNR). The negotiations became necessary after the European Court of Justice declared the draft of the current PNR deal with Canada incompatible with EU law, in particular Arts. 7 and 8 of the CFR (see also eucrim 3/2017, pp. 114-115).

The Council called upon the Commission to conduct the negotiations in consultation with the relevant Council working Party and in accordance with directives contained in an addendum to the decision authorising the opening of negotiations.

According to the addendum, the Agreement should contain all the safeguards required in order for it to be compatible with Articles 7, 8 and 21, and 52 (1) of the Charter of Fundamental Rights of the European Union, as specified in the Opinion 1/15 of the Court of Justice of the European Union of 26 July 2017. All other elements of the Agreement between Canada and the EU for the transfer and use of Passenger name Record (PNR) data signed on 25 June 2014 should not be affected.

The UK declared its wish to opt in and therefore to actively collaborate in the new agreement, whereas Ireland and Denmark will not be bound by the decision. (TW)

➤eucrim ID=1704044

Data Retention – Work is Ongoing

At its meeting on 7-8 October 2017, the JHA Council took stock of the progress achieved on data retention and provided guidance on future work at the expert level. The ministers specifically called for future work to focus on ensuring coherence with the draft e-privacy regulation, to restrict the scope of the data retention framework, and to set out strong safeguards for access to retained data. (TW)

➤eucrim ID=1704045

Victim Protection

EP Urges Commission to Draft EU Law on Protection of Whistle-Blowers

At its plenary session on 24 October 2017, MEPs voted in favour of a non-legislative resolution that calls upon the Commission to present a horizontal legislative proposal with a view to protecting whistle-blowers effectively in the EU.

While the European Commission currently seems to hesitate tabling such a proposal, the EP demanded action at the EU level on several occasions in order to establish harmonised rules on protecting European whistle-blowers (for the ongoing discussion, see also eucrim 1/2017, p. 17; 3/2016, p. 130, and 2/2016, p. 80).

In its latest resolution of 24 October 2017, MEPs recalled that whistle-blowers play an important role in reporting unlawful or improper conduct that undermines the public interest and the functioning of our societies (e.g., recently “Luxleaks”, “Panama Papers,”

and “Monsanto Papers”). However, they are often exposed to retaliatory action, intimidation, and pressure. According to MEPs, whistle-blowers acting in the public interest deserve proper protection and support. In addition, they pointed out that legislation on whistle-blowers is still very fragmented across Europe, leading to legal uncertainty, particularly in cross-border situations.

Against this backdrop, the MEPs asked the Commission to present a legislative proposal as soon as possible, establishing a comprehensive common regulatory framework to guarantee a high level of protection across the board, in both the public and private sectors as well as in national and European institutions. The resolution also contains various recommendations on how an effective protection of whistle-blowers should look in the future, e.g.:

- Establishing a clear procedure for the correct handling of alerts and for effective protection of whistle-blowers;
- Excluding companies that take fully verified retaliatory action against whistle-blowers from EU funds or contracts with public bodies;
- Promoting the positive role of whistle-blowers through awareness-raising and protection campaigns;
- Creating a reliable system for internal reporting to competent authorities and specialists outside the organisation;
- Encouraging employers/organisations to introduce internal reporting procedures and to establish clear reporting channels with an independent or impartial person or entity to collect reports;
- Ensuring that the reporting mechanism be confidential and that the report be handled within a reasonable period of time;
- Penalising and effectively sanctioning retaliation (with corresponding provisions in a potential EU directive);
- Giving whistle-blowers the opportunity to lodge an application for interim relief to prevent retaliation, such as dismissal;
- Introducing clearly regulated means

of reporting anonymously, including the effective protection of confidentiality of identity;

- Giving whistle-blowers psychological, social, and financial support;
- Establishing a centralised European authority for the effective protection of whistle-blowers and people who assist their acts.

The resolution also directly addresses the EU Member States and calls upon them, *inter alia*, to establish independent bodies, with sufficient budgetary resources and appropriate specialists responsible for collecting reports, verifying their credibility, following up on the response given, and providing guidance to whistle-blowers. Furthermore, investigations into issues raised by whistle-blowers should be conducted independently and as quickly as possible. (TW)

► eucrim ID=1704046

Freezing of Assets

Regulation on Mutual Recognition of Freezing and Confiscation Orders Moves Forward

On 8 December 2017, the JHA Council agreed on a common position (general approach) as regards the Commission's proposal for a new regulation on the mutual recognition of freezing and confiscation orders (for the proposal, see eucrim 4/2016, p. 165). It would be the first Union law instrument that would regulate cooperation under the format of a regulation instead of a directive. As a consequence, the legal provisions of the regulation would be directly applicable in the EU Member States. An implementation of EU law would no longer be necessary, thus avoiding drawbacks because of imperfect implementing rules in national law.

The main features of the regulation are:

- Legislating freezing and confiscation through a single legal instrument;
- Covering a wider scope of types of confiscation, such as non-conviction

Mutual Trust Under Pressure

Utrecht University, 26 January 2018

The Mutual Trust Under Pressure conference will bring to a conclusion the two year project awarded to Tony Marguery, (RENFORCE, University of Utrecht) by the European Union, on the topic of prisoner's fundamental rights in the European Union in regards to the transfer of conviction judgments in the application of mutual recognition.

This is an international conference, at which the audience will hear from speakers of various professional backgrounds such as the European Courts, the Commission, the Universities of Cambridge, Utrecht and Brussels, as well as representatives of the practice.

An accompanying book publication is also planned for the beginning of 2018. It will include national reports and findings on the topic. The project is co-funded by the European Union.

More information on the project can be found at: <http://www.euprisoners.eu>

Contact: secretariaat.ier@uu.nl

based confiscation, and including certain systems of preventive confiscation, provided that there is a link to a criminal offence;

- Standardising documents and procedures.
- Improving victims' rights in cross-border situations.

On the basis of the JHA Council's general approach, negotiations on the regulation will continue with the European Parliament as co-legislator. Putting forward a new legal instrument on better cooperation in the field of freezing the assets of crime is also part of the Commission's strategy to improve the fight against terrorist financing. (TW)

►eucrim ID=1704047

Cooperation

European Arrest Warrant

Updated Version of European Handbook on European Arrest Warrant

The European Commission released a revised version of the European handbook on how to issue a European Arrest Warrant.

The handbook was first issued by the Council in 2008 and revised in 2010. The Commission took over the task of regularly updating and revising the handbook. It mainly addresses prosecutors and judicial authorities. The handbook starts with an overview of the European Arrest Warrant, including information on its background, its definition and the main features of the EAW, and the EAW form. Part II contains information on issuing an EAW, Part III on executing an EAW.

The revised version takes into account the experience gained over the past 13 years of application of the EAW in the Union. The new revised 2017 version of the handbook includes updates, such as recent case law of the CJEU, and is more comprehensive and user-friendly. In preparation of this latest ver-

sion, the Commission consulted various stakeholders and experts, e.g., Eurojust, the Secretariat of the European Judicial Network, and Member States' government experts and judicial authorities.

The handbook is available in all official languages of the Union. It can be retrieved on the Internet at the European e-justice portal, via EUR-Lex (Official Journal, O.J. C 335, 6.10.2017, p. 1) or at the judicial library on the EJN website.

►eucrim ID=1704048

ECBA Publishes New Edition of Handbook on EAW

In October 2017, the European Criminal Bar Association (ECBA) published an updated version of its Handbook entitled "How to Defend a European Arrest Warrant Case." Since the update was presented at the autumn conference of the ECBA in Palma de Mallorca, the 2017 version is also called the "Palma edition." The ECBA Handbook on the EAW is designed for defence lawyers with little experience in the EU's surrender regime based on the FD on the European Arrest Warrant. It aims to offer a preliminary and quick guide when defense lawyers find themselves in the position of dispensing legal advice in a European Arrest Warrant case at short notice. The Handbook is mainly based on the findings of a joint ECBA, JUSTICE, and ICJ report of 2012, which looked into the impact of the EAW on the rights and procedural safeguards of requested persons in EAW proceedings. It is available for free, both as a web-based version and as a pdf document.

It should be noted that the ECBA Handbook is an ongoing project. The first part, "Understanding the EAW Framework Decision," has been released so far. It is in planning to supplement the general information on the EAW, its refusal grounds, and ECJ case law with national chapters. For the launch of the ECBA Handbook, see also eucrim 3/2016, pp. 131-132. (TW)

►eucrim ID=1704049

European Investigation Order

State of Play of Implementation

In December 2017, the legislation of Sweden and Romania implementing the Directive on the European Investigation Order (EIO) entered into force. As a result, 18 of 26 Member States (last reviewed: 21 December 2017) have now transposed the provisions of the Directive and can apply the EIO in the cross-border gathering of evidence in practice. The implementation process is currently ongoing in Austria, Bulgaria, Cyprus, the Czech Republic, Luxembourg, Poland, Slovenia, and Spain. Denmark and Ireland are not bound by the Directive.

The EJN created an own "EIO area" on its website. It allows for quick access to the most relevant information and tools for the practical application of the EIO Directive. Information is regularly updated and enriched. (TW)

►eucrim ID=1704050

Criminal Records

Council Adopts General Approach on New Legal ECRIS Framework

At its meeting on 7-8 December 2017, the JHA Council reached a general approach on two legislative Commission proposals for better use of the European Criminal Records Information System as regards third country nationals and stateless persons (referred to as "ECRIS-TCN"). The aim of this new legislative framework is to establish a more efficient mechanism to enable access to the criminal record information of third country nationals and stateless persons convicted in the EU. It is composed of:

- A regulation, which establishes a centralised system to identify the Member State(s) that may hold conviction information on a third country national;
- A directive, which amends the existing framework decision on ECRIS in light of this new centralised system for information on third country nationals.

The adopted position of the JHA min-

isters now allows the Council to start negotiations with the European Parliament as co-legislator. For further information on the legislative project, see eucrim 3/2017, pp. 120-121. (TW)

►eucrim ID=1704051

EDPS Assesses Current ECRIS-TCN Proposal

On 13 December 2017, the European Data Protection Supervisor (EDPS) published his opinion on the Commission's Proposal for a Regulation on ECRIS-TCN (see also the aforementioned news item).

The EDPS stated that efforts are justified to make the exchange of information on the convictions of third country nationals (TCN) more efficient. The EDPS, however, stresses the need for the new Union law to comply with the standards of Art. 16 TFEU and the EU Charter for Fundamental Rights. The provisions must particularly meet the requirements for any lawful limitation of the fundamental rights of the individuals concerned.

The EDPS raises four main concerns and recommends the following:

- An appropriate impact assessment of the fundamental rights of privacy and data protection, in particular in view of the necessity of a EU central database, the impact of interoperability of the new system, and the management of all EU large-scale IT systems in the area of freedom, security and justice by one single EU agency;
- Reconsideration by the EU legislator of the current text on the possible use of ECRIS and ECRIS-TCN for purposes of data processing other than for criminal proceedings. Any purpose must be clearly defined in substantial provisions and assessed in light of the data protection principles of purpose limitation and proportionality. This also applies to access by Union bodies, which should be assessed in light of the right to equal treatment of EU nationals and TCN;
- Appropriate insertion of provisions for the processing of the personal data at issue, which is very sensitive in na-

ture, so that it complies with the necessity principle: therefore, for instance, a "hit" should be triggered only when the requested Member State is allowed (under its national law) to provide information on criminal convictions for purposes other than criminal proceedings. The processing of fingerprints should be limited in scope and only take place when the identity of a particular TCN cannot be ascertained by other means. With regard to facial images, an evidence-based assessment should be conducted that focuses on the need to enrol such data and use them for verification or identification purposes;

■ Definition of the EU agency eu-LISA, central operational manager of the system, as controller together with the central authorities of the EU Member States.

In addition, the EDPS makes additional recommendations that concern *inter alia* data subjects' rights, statistics and monitoring, data security, and the role of the EDPS in the ECRIS-TCN system.

The EDPS closely followed the reform of the EU's electronic criminal records system from the outset. His opinion of 13 December 2017 is the third opinion issued on this matter. (TW)

►eucrim ID=1704052

Law Enforcement Cooperation

Better Cooperation between Military and Law Enforcement

At its meeting on 7-8 December 2017, the Home Affairs ministers of the EU Member States discussed improvements in cooperation between military and law enforcement. The aim is to better use information on crimes that is gathered by missions and operations carried out within the framework of the EU's Common Security and Defence Policy (CSDP) for law enforcement purposes.

The need to enhance cooperation between CSDP missions and operations and JHA agencies in order to combat

terrorism and organised crime, including human trafficking and smuggling, has been highlighted at different levels. Recently, in October 2017, the European Council called for enhancing information and data sharing within the EU between Member States, JHA agencies, and CSDP missions and operations in order to address trafficking and smuggling networks.

At its meeting in December, the ministers agreed on creating and further developing a pilot project for a crime information cell within a CSDP operation. The ministers requested an interim report on this pilot project by the end of the first trimester of 2018. (TW)

►eucrim ID=1704053

Law Enforcement Access to E-Evidence

Despite criticism from practitioners, academics and other civil society organisations, the European Commission is pursuing its proposal to frame a Union law on the collection and use of electronic evidence by law enforcement authorities in January 2018. The following issues, in particular, remain under discussion:

- How should law enforcement authorities obtain access to e-evidence? Should they be enabled to directly access data from telecommunication firms that could be in another Member State or should the current MLA framework be reformed first?
- Which contents should fall under the new Union law, i.e., full content of communications or metadata, which includes the time an electronic message is sent and to whom?
- Which private services are obliged by Union law, i.e., traditional phone calls and text messages or (also) data from digital services and communications apps?

In November 2017, the media reported that the European Commission is already in discussions with the U.S. to establish a new bilateral agreement that would allow police to access data from companies that may be located in other jurisdictions. (TW)

►eucrim ID=1704054



Council of Europe*

Reported by Dr. András Csúri

Foundations

Human Rights Issues

Statement for Human Rights Day 2017

On the occasion of the Human Rights Day on 10 December 2017, European Commission First Vice-President *Frans Timmermans* and Council of Europe Secretary General *Thorbjørn Jagland* called on governments and opposition politicians across Europe to recommit to promoting and maintaining human rights standards. Their joint statement recalls “worrying examples” of the freedom of expression being curtailed; discrimination being tolerated and in some cases incited; and the rule of law being applied selectively.

The statement also reminds that peace and stability of Europe depend on democracy, the rule of law and full respect for human rights and that one should never be used against the other. Indeed, the ECHR provides for the basic protections to which every adult and child is entitled. Every EU Member State and nineteen other European countries have ratified the Convention, while the EU’s Charter of Fundamental Rights of the European Union is built on the Convention. Therefore, the CoE and the European Commission work hand-in-hand to ensure that these human rights remain non-negotiable.

The statement mentions that the ECtHR handed down 488 judgments concerning EU Member States last year. Three quarters of them confirmed at least one violation of the ECHR. Mean-

while, six out of ten of the countries with most violations relative to population size were EU Member States.

The statement further calls on every European government and on European states to recommit to a culture of human rights, abide by the commitments that they have made, and implement the rule of law on that basis. Only then can every European enjoy the opportunity to live a full life without the threat of discrimination or abuse.

►eucrim ID=1704055

ECtHR: Launch of Spanish HUDOC Database

On 23 November 2017, on the occasion of the 40th anniversary of Spain’s accession to the CoE, the Court launched the HUDOC case law database in Spanish. The HUDOC database now contains 23,500 case law translations in 31 languages other than English and French. Some 1150 texts are in Spanish. The Spanish user interface joins the existing English, French, Russian, and Turkish versions. In addition, the Spanish Ministry of Justice is also translating a selection of the Court’s factsheets.

►eucrim ID=1704056

Specific Areas of Crime

Corruption

PACE Revises its Code of Conduct

Responding to allegations of corruption in its ranks (see eucrim 1/2017 p. 22),

the Parliamentary Assembly of the CoE (PACE) unanimously adopted a heavily revised Code of Conduct for its members. It has the aim of restoring public confidence in its actions and positions by guarding against risks of corruption and revealing any covert practices.

First, an independent external investigation body was set up, which was followed by the establishment of a sound and coherent integrity framework – with guidance from GRECO – that should provide for swift and fair investigations as well as stronger sanctions when wrongdoing takes place. Members of the Assembly must pledge not to “promise, give, request or accept” any fee, compensation, or reward in the course of their duties, and they must declare any interests at the opening of each session. These declarations will be posted online in the future. Additionally, rapporteurs and election observers must also declare any conflicts of interest. There are tighter restrictions now for lobbyists, including the creation of a “transparency register,” and steps were taken to ensure that former members who engage in paid consultancy do not benefit from any special privileges.

►eucrim ID=1704057

GRECO: Key Findings of the Fourth Evaluation Round

On 6 November 2017, GRECO published a study on the key findings of its fourth evaluation round entitled “Corruption Prevention of Members of Parliament, Judges and Prosecutors (Fourth Evaluation Round) – Conclusions and Trends.”

According to the report, corruption can be the source of the following:

- Severe political instability;
- Democratic crisis;
- Economic and financial collapse;
- Extremist and populist tendencies;
- Human rights violations;

* If not stated otherwise, the news reported in the following sections cover the period 16 October 2017 – 15 December 2017.

- Poverty;
- Environmental disasters;
- Looting of a country's natural resources.

Consequently, GRECO has called for timely prevention and effective sanctions (not solely in the form of criminal penalties). These preventive policies need to take into account each country's circumstances, as there is no "one-size-fits-all" approach to the complex problem of corruption. That said, during its evaluations, GRECO did identify a few basic principles that are applicable across the board. All three groups under examination (MPs, judges, prosecutors) are to provide for effective self-monitoring, to install proper oversight mechanisms, and to address unethical conduct swiftly when it occurs. Transparency is also very important and can be ensured by giving the public access to information about the prevention measures.

As regards MPs, the majority of recommendations referred to supervision and enforcement, incompatibilities, and rules of conduct. These recommendations call for:

- Adopting codes of conduct;
- Introducing a system that allows for *ad hoc* disclosure of conflicts of interest;
- Adopting rules that better govern the MPs' interactions with lobbyists and other third parties seeking to influence the legislative process;
- Making sure that immunity rules do not hinder corruption prosecutions;
- Ensuring the transparency of the legislative process.

As regards judges, most recommendations addressed three main areas: professional career, supervision and enforcement, and judicial ethics. The recommendations call for:

- Establishing greater transparency in recruitment processes and adequate safeguards against potential undue outside influence in the selection, transfer, and promotion of judges;
- Introducing codes of conduct and the provision of guidance/advice on ethical matters;

■ Assessing possible incompatibilities when judges move into the political arena;

■ Introducing some type of training on integrity matters for judges.

As regards prosecutors, the study groups the vast number of recommendations under three main headings: supervision and enforcement, ethical standards, and professional career. Like the recommendations for judges, most of the recommendations for prosecutors call for:

- Increased transparency in the selection, transfer, and promotion of prosecutors;
- Protection of the prosecution service from undue influence in the investigation of criminal cases;
- Supervision and enforcement of existing rules;
- Adoption of rules of conduct;
- Identification of incompatibilities linked to a move into the political field;
- Introduction of effective ethical training modules for prosecutors, as part of both initial and subsequent training programs.

In cooperation with other country's relevant authorities, GRECO is calling on each of the target groups to implement GRECO's recommendations, as each of these groups works in key national institutions whose effectiveness helps determine whether the seeds of corruption flourish in a given country or not. The overall conclusion of the evaluation round is that, despite solid foundations in most jurisdictions to tackle corruption in this field, effective implementation is lacking. In fact, one in every five recommendations refers to supervision and enforcement of the legislative framework already in place. Thus, actual implementation of the existing rules is the main challenge for the future.

►eucrim ID=1704058

GRECO: Fourth Round Evaluation Report on Andorra

On 2 November 2017, GRECO published its fourth round evaluation report

on Andorra. This latest 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. The report acknowledges Andorra's well-developed legal and organisational framework to prevent corruption amongst MPs, judges, and prosecutors, and it highlights the transparency of the legislative process, which gives civil society easy access to the work of parliament.

Nevertheless, there is room for improvement. The report stresses the need to adopt a code of conduct for MPs and to implement it in practice, with an obligation to make conflicts of interest public and establish a system of public declaration of assets and interests. The code should entail explanatory comments and examples and the compliance of the MPs be monitored. In addition to the MPs' declarations, *ad hoc* disclosure needs to be introduced for cases in which a potential conflict between specific private interests of individual MPs emerges in relation to a matter under consideration in parliamentary proceedings.

The report considers adequate the main career requirements pertaining to judges and prosecutors but recommends their appropriate representation (election by their peers) in the High Council of Justice, which plays a decisive role in the professional career of judges and prosecutors.

As regards judges, GRECO recommends that they be appointed for an indefinite term of office, with training on topics related to ethics and integrity provided on a regular basis. The report also recommends revising the arrangements for determining judges' disciplinary liability by increasing the time limits for such investigations and ensuring sufficiently detailed information on the investigations, including the possible publication of case law.

As regards prosecutors, GRECO recommends that decisions to remove a prosecutor from a case be justified in

writing. Furthermore, the possibility for prosecutors to obtain confidential advice on subjects related to ethics and integrity should be placed on a permanent and institutional footing.

►eucrim ID=1704059

Money Laundering

MONEYVAL: Fifth Round Evaluation Report on Andorra

On 14 November 2017, MONEYVAL presented its Fifth Round Evaluation Report on Andorra. This evaluation round builds on previous MONEYVAL assessments by strengthening the examination of how effectively Member States prevent and combat ML, terrorism financing (TF), and proliferation (see also eucrim 1/2016, p. 23; 2/2016, pp. 83-84; 4/2016, p. 169; 1/2017, p. 23; 3/2017 p. 123).

The report acknowledges the Andorran authorities' reasonably comprehensive understanding of the ML and TF risks that the country faces. In order to mitigate the risks, however, a clearer monitoring of the implementation of the adopted action plans is necessary.

MONEYVAL recognises the political commitment in Andorra to make far-reaching changes to ML legislation. The country has enacted a robust legal framework for criminalising TF, and the low number of prosecutions for this criminal offence appears to be broadly in line with the country's risk profile. There is, however, a clear gap between the ratio of investigations and prosecutions to subsequent convictions in ML cases. Large financial institutions assess and broadly understand their ML and TF risks, but smaller financial institutions and designated non-financial businesses and professions (such as lawyers and accountants) appear to be less aware of these risks.

The FIU has limited available re-

sources, which hinders its supervising role. In this regard, MONEYVAL is also calling for better strategic engagement and coordination of activities between the FIU and other supervisory authorities.

Lastly, the report praises Andorra for proactively seeking and providing legal assistance to foreign jurisdictions, and it recommends the removal of dual criminality as a requirement for rendering mutual legal assistance.

►eucrim ID=1704060

Cooperation

Convention on Transfer of Sentenced Persons Further Developed

On 22 November 2017, a new protocol reforming the CoE's rules on the transfer of prisoners was made open for signature. The Protocol will amend the 1997 Additional Protocol to the Convention on the Transfer of Sentenced Persons.

The Convention itself dates back to 1983 (CETS No. 112) and is the CoE's main legal framework enabling the assistance in the enforcement of criminal sentences that was handed down in a State Party in the convicted person's country of origin. The overall aim of the scheme is the facilitation of social rehabilitation of (foreign) prisoners. The Convention is founded to a great extent on humanitarian principles, being based on the consideration that communication difficulties, language barriers and deprivation of contact with the family can have adverse effects on foreign prisoners.

The 1997 Additional Protocol (CETS No. 167) mainly sets out the rules applicable to transfer of the execution of sentences, firstly where sentenced persons have absconded from the sentencing State to their State of nationality, and secondly where they are subject to

an expulsion or deportation order as a consequence of their sentence.

The 2017 Protocol (CETS No. 222) will bring about further modernisation and improvements to the Additional Protocol, taking into account the evolution in international cooperation on the transfer of sentenced persons since its entry into force in June 2000. The following changes are introduced to the Additional Protocol:

- Extension of the scope of Art. 2 to situations where the person, subject to a final sentence, did not flee but moved freely to the country of his or her nationality;
- Deletion of the consequential link between the expulsion or deportation order and the sentence imposed in Art. 3(1) of the Additional Protocol;
- Extension of the scope of Art. 3(3a) to cases where the person concerned refuses to give an opinion on the transfer (it was felt that transfer should also be possible in those cases);
- Introduction of a time-limit (90 days) as regards the decision making related to the application of the rule of speciality in the Additional Protocol (Art. 3(4a));
- Reduction of the time limit of immunity against prosecution, due to the speciality principle, from 45 to 30 days of final discharge, where the person, having had the opportunity to leave legally the territory of the administering State, has not done so. (Art. 3 (4b)).

The amending protocol will only enter into force when all 38 State Parties to the Additional Protocol have deposited their instrument of ratification, acceptance or approval with the Secretary General of the Council of Europe. However, every State Party to the Additional Protocol can declare that it will apply the amending protocol on a provisional basis. As a result, the provisions of the amending protocol can be immediately applied among the parties that make the same declaration.

►eucrim ID=1704061

File Rouge

OLAF has contributed to the protection of the Union's financial interests by conducting administrative investigations since 1999. It performed this task over the last 18 years by relying on a legal framework that has remained largely stable. During this time, it was also the sole EU body with the ability to investigate in the area of the protection of the Union's financial interests.

Significant developments in 2017 will alter this framework. The agreement on the European Public Prosecutor's Office (EPPO) will allow for the creation of a truly European prosecutor responsible for the criminal investigations and prosecution of offences against the Union's financial interests. In the meantime, the Commission has completed the evaluation of Regulation 883/2013 concerning the conduct of OLAF investigations (OLAF Regulation). It concluded that OLAF's investigations remain a very relevant element of the overall strategy on how to protect the EU budget and identified room for improvement in several areas. In response to these developments, the Commission is now conducting an

assessment with a view to a legal proposal for the amendment of Regulation 883/2013 in 2018.

Against this background, the following articles explore key issues related to the future of OLAF and provide food for thought regarding the upcoming revision of the OLAF Regulation. They suggest that there is wide scope for the coexistence of OLAF and the EPPO and that the new architecture at the EU-level will be very demanding as regards loyal and close cooperation as well as information exchange between the two bodies. Further clarification of the relationship between administrative and criminal investigations at the EU level might be necessary in order for the system to deliver its maximum added value. Lastly, the contributions explore possible strategies by which to enhance OLAF's framework for conducting investigations, with a view to further ensuring a level playing field in the exercise of OLAF's mandate across the Union.

Irene Sacristán Sánchez, Head of Unit, Policy Development & Hercule, OLAF

The OLAF Regulation:

Evaluation and Future Steps

Mirka Janda, Romana Panait

I. Introductory Remarks

Since its establishment in 1999, the European Anti-Fraud Office (OLAF) has had the purpose of increasing the effectiveness of the fight against fraud and other illegal activities det-

rimonial to the financial interests of the Union.¹ It also has the double task of carrying out administrative investigations concerning fraud, corruption, and any other illegal activity affecting the EU's financial interests and of acting as Commission service responsible for developing EU antifraud policies.

In its investigative function, OLAF has been operating under a legal framework that has evolved over time. OLAF conducts external investigations into areas of EU expenditure and EU revenues as well as internal investigations into suspicions of serious misconduct by EU staff and members of EU institutions. In addition, it carries out coordination activities of the Member States' authorities in their fight against fraud. The necessity to adapt OLAF's investigative framework to the evolving anti-fraud policies and fraud trends in Europe has led to a number of legislative changes. The core features of OLAF, however, date back to its creation in 1999.

The current legal framework – the Regulation 883/2013 concerning investigations conducted by OLAF (hereinafter “the OLAF Regulation”),² which replaced Regulations 1073/1999 and 1074/1999, – was recently the subject of an evaluation of its application. The evaluation was required by the OLAF Regulation itself (Art. 19). The evaluation was concluded on 2 October 2017, and its results are contained in a report by the European Commission to the European Parliament and the Council (hereinafter “the evaluation report”).³ The report is based on a Commission's staff working document⁴ and is accompanied by an opinion of the OLAF Supervisory Committee on the application of the regulation.⁵

The evaluation coincided with a time during which important milestones in the Commission's ambitious agenda to strengthen the protection of the Union's financial interests were reached. In July 2017, the European Parliament and the Council adopted the Directive on the fight against fraud to the Union's financial interests by means of criminal law (the “PIF Directive”).⁶ In October 2017, the Council adopted the Regulation establishing the European Public Prosecutor's Office (“the EPPO”) – in enhanced cooperation among 20 Member States.⁷ The EPPO will be responsible for investigating, prosecuting, and bringing to judgment acts constituting criminal offences affecting the financial interests of the Union as provided for in the PIF Directive.⁸

The future shape of the OLAF Regulation should thus not only be based on the results of its evaluation but also take into account the changed landscape in which OLAF will operate in the EU anti-fraud area in the near future.

II. The Evaluation as Part of the Better Regulation Policy

In order to ensure that the European *acquis* is fit for purpose, the Commission has committed itself to the so-called Better Regulation policy. The Better Regulation policy defines principles that need to be applied at every stage of the policy

cycle: planning, proposal, implementation, evaluation, and subsequent revision. It is “a way of working to ensure that political decisions are prepared in an open, transparent manner, informed by the best available evidence and backed up by comprehensive involvement of stakeholders.”⁹

Over the past decade, growing emphasis was placed particularly on retrospective evaluation. The Commission applies the “evaluate first” principle. This principle ensures that a retrospective evaluation be available before work on a (revision of a) related initiative begins. The evaluation results then largely define the issues that are to be targeted by a proposal for a subsequent revision of the initiative.

In principle, evaluation provides a critical, evidence-based assessment of the following five evaluation criteria:

- Effectiveness, i.e. have the objectives been achieved?
- Efficiency, i.e. were the effects achieved at reasonable cost?
- Coherence, i.e. is the intervention coherent with other initiatives in the given policy area?
- Relevance, i.e. do the objectives correspond to the current needs and to those also identified prior to the adoption of the regulation?
- EU added value, i.e. what is the additional value resulting from EU intervention that could not be achieved at the national level?

These criteria can be complemented by other ones as necessary for policy-making or as required by the legal basis of the evaluated initiative.

Evaluation timing is critical to the quality of evaluation results and their usefulness in the policy cycle. Ideally, there should be enough time between the start of the evaluated initiative and the moment the evaluation takes place to ensure that there has been enough time for the impacts of the initiative to materialise. At the same time, in order to be useful, the evaluation needs to fit well in the policy cycle and be available on time for work on any potential revision.

As regards the evaluation of Regulation 883/2013, its Art. 19 asked for an evaluation report also covering the assessment of the need to revise the regulation by 2 October 2017. The evaluation work was based on approximately three years of application of the regulation, and its timing was perfect from the point of view of policy developments that require a revision of the regulation as explained above.

The scope of the evaluation was defined in an evaluation roadmap¹⁰ in compliance with said Art. 19 and the Better Regulation Guidelines. The evaluation assessed the following criteria: *effectiveness* and *efficiency* in the application of key elements

of the regulation, as well as *coherence* and *relevance* of the regulation in accomplishing its objectives.¹¹

Aspects related to the *future outlook* were also addressed. While covering the regulation as a whole, the evaluation focused in particular on the changes introduced in 2013 compared to the 1999 legal framework. It covered the period between October 2013 (when the regulation entered in force) and December 2016.

The evaluation was based on a wide-ranging consultation of a high number of stakeholders. Although consultation of stakeholders is an important aspect of any evaluation, it was especially important for the evaluation of the OLAF regulation, as little data and evidence were readily available due to the short implementation period since the entry into force. In order to gather the relevant evidence, the Commission contracted a study to an external contractor, who carried out online surveys, interviews, and expert workshops with relevant stakeholders across the anti-fraud spectrum. 267 representatives of different stakeholder groups were consulted – 160 through interviews and 168 via an online survey, with 61 of them being consulted through both channels. They included OLAF staff, the OLAF Supervisory Committee, EU institutions, bodies, offices and agencies (IBOAs), Member States' and third countries' authorities, international organisations, associations of lawyers, prosecutors, etc.¹²

Furthermore, on 1–2 March 2017, OLAF organised a conference on the evaluation of the OLAF Regulation, involving approx. 250 participants from the above-mentioned groups of stakeholders. The conference allowed for an interactive, open discussion on topics key to the evaluation: OLAF external and internal investigative activities, governance, and the future relationship between OLAF and the EPPO. Results of the discussion were fed into the evaluation report.¹³ The evaluation's detailed findings and the methodology employed are described in the Commission staff working document accompanying the Commission's evaluation report.

III. Main Findings of the Evaluation of the OLAF Regulation

OLAF's mandate and its investigative tools and powers (scrutinized from the perspective of their relevance, effectiveness, efficiency and coherence during the evaluation) contributed to defining its essential role in the protection of the European Union's financial interests.

Entrusted with a pan-European mission, OLAF performs specific tasks at the EU level, which could not be carried out at the

national level alone. Its EU added value is acknowledged by stakeholders, and the relevance of its mandate was confirmed by the evaluation. In the evolving institutional landscape of the anti-fraud area, the added value of OLAF's administrative investigations will coexist alongside the EPPO's criminal investigations under the guiding principles of complementarity and of avoiding undue duplication.

While the EPPO will be competent for criminal investigations and prosecutions in the participating Member States¹⁴ as regards the offences harmonised by the PIF Directive, OLAF's mandate encompasses administrative investigations into both fraudulent and non-fraudulent irregularities in all Member States. The distinct aspects of the fight against fraud affecting the EU's financial interests are thus covered by the EPPO and OLAF – criminal and administrative, respectively – making their activities largely complementary. The EPPO Regulation already governs the future relationship between the EPPO and OLAF on this basis. The evaluation of the OLAF Regulation has shown the continued relevance of its objectives after the creation of the EPPO.¹⁵

OLAF's investigative mandate is structured by an array of provisions in the regulation defining its tools and powers, procedural safeguards to be followed in investigations, the essential cooperation with its partners, and its governance. They have allowed OLAF to deliver concrete results, and the evaluation indicated a clear improvement in the effective conduct of investigations.¹⁶ Taken individually, a number of these provisions clearly appear to contribute to an improved investigative function. For a number of others, the evaluation identified shortcomings impacting the application of the regulation.

One of the specific objectives pursued by the adoption of the current OLAF Regulation was the strengthening of OLAF's cooperation with its partners: Member States, EU institutions/bodies/offices/agencies, third countries, and international organisations. The creation of anti-fraud coordination services (known as "AFCOS") in the Member States, with the purpose of enabling a structured collaboration between OLAF and the Member States, was clearly a significant development. This has succeeded in spite of the considerable diversity in the role and profile of the AFCOS among the Member States, since the regulation only requires the Member States to designate the AFCOS¹⁷ but leaves at their discretion what competences and powers are granted to them.

The evaluation concluded that OLAF's cooperation with its EU, national, and international partners is effective overall. However, certain duties to cooperate (either on the part of the Member States' authorities, as they are committed to national law, or on that of the IBOAs that sometimes differ from exter-

nal to internal investigations¹⁸) appeared to impact the coherent exercise of OLAF's mandate across the Member States or in external, compared to internal, investigations.

As regards the exercise of OLAF's investigative powers, one of the most prominent results of the evaluation concerns their dependency on the national law of the Member States. In order to fulfil its mandate, OLAF operates on the basis of its European powers, but they are subject to conditions of national law. References to the national law of the Member State in which OLAF makes use of its competences are present in the OLAF Regulation at every stage of an investigation, e.g.: in the selection phase of incoming information with a view to opening investigations; in the cooperation and exchange of information with the national authorities; when carrying out investigative activities; and in the follow-up to OLAF's investigative work when its reports are to be used in national proceedings.¹⁹

It followed from the evaluation that the extent to which national law is applicable is not completely clear, and this emerged particularly as regards on-the-spot checks and inspections of economic operators and digital forensic operations conducted in the territory of the EU Member States.²⁰ The various interpretations of the relevant provisions in the OLAF Regulation referring to national law, and differences between the national legal systems, were identified as leading to a fragmentation in the exercise of OLAF's powers in the Member States. Similarly, as the regulation does not provide OLAF with tools to enforce its powers if there is resistance from the persons investigated, divergences arise across Member States, depending on the ability of national competent authorities to support OLAF with their own enforcement tools.²¹

At the end of the investigative chain,²² the admissibility of OLAF's investigative reports in national judicial proceedings is subject to a rule in the regulation that puts them on a par with the administrative reports drawn up by national administrative inspectors.²³ According to the evaluation, this appeared to insufficiently ensure the "*effet utile*" of the provision, particularly in the Member States in which such equivalence is not specifically spelled out in the national legislation.²⁴

OLAF's relationship with IBOAs operates within a different framework. At the European level, the EU institutions, bodies, offices and agencies are a key partner of OLAF in its investigative function; they share the responsibility for the protection of the EU's financial interests and their role is essential in both internal and external investigations. In the context of the EU institutional setting, the evaluation identified areas for even closer cooperation between OLAF and IBOAs. These areas are directly linked with the protection of the EU's budget during and at the end of OLAF's investigations: the use of

precautionary measures²⁵ and the financial impact as established by the investigations and recommended to the IBOAs for financial recovery.²⁶

In the overall context of the follow-up to OLAF's investigations, the discretion afforded to recipients of OLAF's recommendations to follow-up or not was a main factor leading to differences in the recipients' response. This is only one side of the coin, however, as the quality and timeliness of the OLAF's reports was also identified as another factor directly impacting the rate and quality of the follow-up.

The protection of rights of individuals subject to an OLAF investigation has been substantially increased by including new provisions on procedural guarantees in the OLAF Regulation.²⁷ The evaluation specifically assessed the balance between OLAF's powers and procedural rights and did not conclude that they are insufficient in the context of OLAF's current investigative powers and tools.

As regards the institutional governance of OLAF and the controls over its activity, the evaluation acknowledged that divergent views and practices with regard to the provisions regulating the role and mandate of OLAF's Supervisory Committee, and of the Committee's access to case-related information held by OLAF,²⁸ impacted its work and its cooperation with OLAF. The Commission's evaluation report acknowledges the need for working arrangements between OLAF and its Supervisory Committee and indicates that the Commission will reflect on whether further measures are necessary.²⁹

From the perspective of the internal and external coherence of the regulation, the evaluation identified that the legal basis, under which OLAF is to provide Member States with assistance in organising close and regular cooperation between their competent authorities, potentially gives rise to difficulties during so-called "coordination cases."³⁰ The evaluation observed different situations, depending on the areas: in structural funds, the lack of other acts of EU law providing OLAF with a supporting and coordinating role is particularly limiting; in the area of customs and intellectual property, the unclear relationship between the OLAF Regulation and other legal acts³¹ was found to lead to complexity in their combined application.³²

The evaluation also dealt with the operation of the OLAF Regulation in the wider context of EU policies for the protection of the financial interests, thus leading to an analysis of OLAF's role and mandate as regards VAT. The current legal framework appeared insufficient to enable OLAF to fulfil its mandate in the area of VAT. The same holds true for its duty to cooperate with and support the future EPPO. Both findings must be seen against the background of the evolving policy and legal frame-

work for VAT since the adoption of the OLAF Regulation in 2013, that is mainly illustrated by the following:³³ The Commission adopted an Action Plan on VAT (entitled “Towards a single EU VAT area”) on 7 April 2016³⁴ that includes actions to enhance cooperation between different authorities and calls for possible cooperation and partnership between Member States, Europol, and OLAF on the exchange of information. The PIF Directive of 5 July 2017 clarified that VAT is part of the EU’s financial interests. Very recently, on 30 November 2017, the Commission adopted a proposal to amend Regulation 904/2010 on Administrative Cooperation in the area of VAT.³⁵ Its aim is to make the EU’s VAT system more fraud-proof; an important element of the proposal is to strengthen the operational cooperation between Member States’ tax administrations (in the Eurofisc network³⁶) and relevant authorities at the EU level (OLAF, Europol, and the EPPO). In particular, the proposal provides a legal basis for the transmission of information on VAT fraud trends, risks, and serious cases from Eurofisc to OLAF and Europol, thus acknowledging OLAF as a key partner of the Member States in this area.³⁷

Future adaptation of OLAF’s investigative framework will build on these main findings of the evaluation. Taking into account the envisaged operational start of the EPPO in three years, the Commission announced an assessment with a view towards a legal proposal to amend the OLAF Regulation in spring 2018.³⁸

IV. Future Steps for the OLAF Regulation

The Commission’s evaluation report sets out the main issues to be assessed in the preparation of the future proposal to amend the OLAF Regulation:³⁹

- Adaptation to the establishment of the EPPO;
- Enhancement of the effectiveness of OLAF’s investigative function based on the most unambiguous findings of the evaluation;
- Clarification or simplification of certain provisions, or improved application through implementation measures.

A full overhaul of OLAF’s legal framework is not envisaged at this point.

The first step to be taken in 2018 could be followed by a more far-reaching process to modernise the framework of OLAF investigations. In another, future step, account should be taken of the experience gained in the cooperation between EPPO and OLAF. This should also put the focus on aspects of the legal framework where further reflection and discussion May be needed. In line with Better Regulation principles, the Commission is currently preparing an assessment to underpin the legal proposal.⁴⁰ This primarily concerns the impact of the establishment of the EPPO.

Once the EPPO is established, OLAF’s overall mandate will not change, but its operation will need to adapt to the existence of the EPPO in several ways. With the first-time creation of an EU-level body for criminal investigations and prosecutions, strong synergies need to be established between the EPPO and OLAF in order to allow both offices to perform their tasks in the most efficient and productive manner possible, thus ensuring a swift and effective response to cases of suspected fraud in the entire EU.

By amending the OLAF Regulation to mirror the EPPO Regulation, the Commission is pursuing its past strategy of reinforcing the fight against fraud affecting the Union’s budget through an integrated policy of criminal and administrative investigations.⁴¹

Secondly, the Commission will consider targeted changes to streamline OLAF’s investigative function, based on the most unambiguous findings of the evaluation. The Commission’s evaluation report identifies the following main priorities for assessment:⁴² coherent and more effective application of OLAF’s investigative tools, by considering the current references to national law in the OLAF’s Regulation; the admissibility of OLAF’s reports as evidence in national proceedings in the Member States; the duties to cooperate where necessary to ensure a coherent and effective framework at all stages of an investigation; the clarification of OLAF’s mandate and investigative tools in the VAT area; the better access to bank account information; and the conduct of coordination cases.

These future changes, both ambitious and pragmatic at the same time, will put into place a more coherent and overall stronger framework for the protection of the EU’s financial interests.

1 See in this respect recital 6 of Commission Decision of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (SEC(1999) 802), 1999/352/EC, ECSC, Euratom, *O.J.* L 136, 31.5.1999, 20.

2 Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, *O.J.* L 248, 18.9.2013, 1.

3 Report from the European Commission to the European Parliament and the Council, “Evaluation of the application of Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999”, COM(2017) 589 final, 2.10.2017. The report is available in the Internet under: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2017:589:FIN> (accessed 14 December 2017). For a summary, see also T. Wahl, (2017) *eu crim*, p. 100–101.

- 4 Commission Staff Working Document “Evaluation of the application of Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999” accompanying the document, Commission report to the European Parliament and the Council, SWD(2017) 332 final, 2.10.2017 (hereinafter the “Staff Working Document”). It is available in the Internet under: <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1507191059043&uri=CELEX:52017SC0332> (accessed 14 December 2017). The preparation of the Staff Working Document was supported by a study by an external contractor. See ICF Consulting Services Limited, “Evaluation of the application of Regulation no 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF), Final report”, 2017, <https://ec.europa.eu/anti-fraud/sites/antifraud/files/evaluation_of_the_application_regulation_883_en.pdf> (accessed 14 December 2017).
- 5 Opinion No 2/2017 “Accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council No 883/2013 (Article 19)” <http://europa.eu/supervisory-committee-olaf/sites/default/files/opinion_2_2017.pdf> (accessed 14 December 2017). The opinion of the Supervisory Committee of OLAF was adopted pursuant to Article 19 of the OLAF Regulation. The evaluation report of the Commission and the opinion of the Committee are independent documents and were drafted in parallel. See also T. Wahl, (2017) *eu crim*, 101–102.
- 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, 29. See for an explanation of the Directive A. Juszczak and E. Sason, (2017) *eu crim*, 80–87.
- 7 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office, *O.J. L* 283, 31.10.2017, 1 (hereinafter “the EPPO Regulation”).
- 8 Art. 4 of the EPPO Regulation.
- 9 Better Regulation Guidelines, p. 4 <http://ec.europa.eu/smart-regulation/guidelines/toc_guide_en.htm>.
- 10 The scope of the evaluation was set out in the evaluation roadmap, which was open to stakeholder feedback during the evaluation on the following website: http://ec.europa.eu/smart-regulation/roadmaps/docs/2017_olaf_001_evaluation_of_regulation_883_2013_en.pdf.
- 11 A further criterion required by the Better Regulation Guidelines, *EU added value*, was considered addressed. It was not covered by the evaluation, as OLAF ensures the protection of the EU’s financial interests by performing specific tasks at the EU level that cannot be performed at the national level.
- 12 For the study conducted by ICF, see endnote above n. 4.
- 13 All available presentations from the conference are available on the Commission website at https://ec.europa.eu/anti-fraud/policy/olaf-regulation-evaluation/conference_en (accessed 14 December 2017).
- 14 20 Member States are currently participating in the EPPO.
- 15 See, in this respect, the Commission’s Staff Working Document, *op. cit.* (n. 4), section 5.1, p. 12.
- 16 See, in this respect, the Commission’s evaluation report, *op. cit.* (n. 3), for example, p. 3 and p. 6.
- 17 Article 3(4) of OLAF Regulation; see, in this respect, section 5.2.2.2 of the Commission’s Staff Working Document, *op. cit.* (n. 4), p. 24.
- 18 For example, OLAF’s powers to access relevant information in IBOAs are stronger in internal investigations, compared to external investigations, according to Articles 4(2)(a) and 3(5), respectively.
- 19 See, in this respect, Articles 3(3), 4(3), 7(3), 8(2)–(3), 11(2) and 12(3) of the OLAF Regulation.
- 20 OLAF carries out on-the-spot checks and inspections of economic operators and digital forensic operations based on a combined legal framework composed of the OLAF Regulation, Council Regulation (Euratom, EC) No 2988/95 of 18 December 1995 on the protection of the European Communities’ financial interests, *O.J. L* 312, 23.12.1995, 1, and Council Regulation (Euratom, EC) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities’ financial interests against fraud and other irregularities, *O.J. L* 292, 15.11.1996, 2, to which the OLAF Regulation makes a number of references.
- 21 For more details, see the Commission’s Staff Working Document, *op.*

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- cit.* (n. 4) section 5.2.1.2, pp. 15–16. For example, as indicated therein, information collected by OLAF by means of a questionnaire in Member States on the conduct of on-the-spots-checks in 2015, reveals that the possibility to use coercive powers to assist OLAF in conducting a check was possible (at the time of the questionnaire) in approx. half of the Member States as regards both revenue and expenditure; in the remaining Member States, coercive powers to support OLAF were available only in revenue cases, only in expenditure cases, or not at all.
- 22 It must be noted that the evaluation has also shown that, during the investigations, references to national law result in considerable differences across the Member States as regards cooperation with judicial authorities. It can lead to one-way exchanges from OLAF to the judicial authorities, which do not share information in return; see, in this respect, the Commission’s Staff Working Document, *op. cit.* (n. 4), section 5.2.2.2, p. 25.
- 23 Art. 11(2) of the OLAF Regulation.
- 24 See the Commission’s Staff Working Document, *op. cit.* (n. 4), section 5.2.1.3, p. 20–21.
- 25 Art. 7(6) of the OLAF Regulation.
- 26 See, in this respect, the Commission’s evaluation report, *op. cit.* (n. 3), point 5.3.
- 27 Art. 9 of the OLAF Regulation.
- 28 These aspects have also largely been developed in the Opinion of the Supervisory Committee, *op. cit.* (n. 5), in particular in chapter V.
- 29 See, in this respect, the Commission’s evaluation report, *op. cit.* (n. 3), points 5.3 and 5.4.
- 30 These are currently regulated by Art. 1(2) of the OLAF Regulation.
- 31 Council Regulation (EC) No 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, *O.J. L* 82, 22.3.1997, 1, last amended by Regulation (EU) 2015/1525 of the European Parliament and of the Council of 9 September 2015, and Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003, *O.J. L* 181, 29.6.2013, 15.
- 32 See the Commission’s Staff Working Document, *op. cit.* (n. 4), section 5.4.2, p. 34.
- 33 For more details, see Commission’s Staff Working Document, *op. cit.* (n. 4), section 5.4.5.2, pp. 38–39.
- 34 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an action plan on VAT “Towards a single EU VAT area – Time to decide”, COM(2016) 148, 7.4.2016.
- 35 Amended proposal for a Council Regulation amending Regulation (EU)

No 904/2010 as regards measures to strengthen administrative cooperation in the field of value added tax, COM(2017) 706 final, 30.11.2017.

36 The EUROFISC network was established by Council Regulation (EU) No 904/2010 of 7 October 2010 on administrative cooperation and combating fraud in the field of value added tax, *O.J.* L 268, 12.10.2010, 1. EUROFISC is a mechanism provided for Member States to enhance their administrative cooperation in combating organised VAT fraud and especially carousel fraud; it allows for quick and targeted sharing of information between all Member States on fraudulent activities.

37 Linked with OLAF's role in the VAT area, but not exclusively, the evaluation pointed out the need to assess the need for and possibility of better access to bank account information under appropriate conditions, which could be central to uncovering many cases of fraud or irregularity.

38 The Roadmap is available for feedback on <<https://ec.europa.eu/>

[info/law/better-regulation/initiatives/ares-2017-5676334_en](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2017-5676334_en)> (accessed 14 December 2017).

39 The possible way forward for the OLAF legal framework was set out in the Commission's evaluation report, and it is described mainly at point 5 therein.

40 This assessment will also take into account the opinion of the OLAF Supervisory Committee, *op. cit.* (n. 5).

41 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, "On the protection of the financial interests of the European Union by criminal law and by administrative investigations – An integrated policy to safeguard taxpayers' money", COM(2011) 293 final, 26.5.2011.

42 Point 5.3 of the Commission's evaluation report, *op. cit.* (n. 3).

Learning Lessons

Reflecting on Regulation 883/2013 through Comparative Analysis

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I. Introduction: Context of the Evaluation of Regulation 883/2013

In 1999, the Commission established the European Anti-Fraud Office – OLAF – to give a deterrent answer to fraud, corruption, and other illegal activities detrimental to the financial interests of the Union.¹ OLAF's primary instrument to provide such deterrence is its ability to conduct administrative investigations in the Union's institutions, bodies, offices, and agencies (during internal investigations) and in the Member States (during external investigations).² Initially OLAF conducted its investigations under the overarching framework of Regulations 1073/1999 and 1074/1999: the former covered the EC; the latter covered Euratom.³ After a number of evaluations (which identified a series of drawbacks),⁴ long negotiations, and three legislative proposals,⁵ Regulation 883/2013 repealed and replaced both Regulations and currently constitutes the umbrella under which OLAF carries out its investigations.⁶

The aim of Regulation 883/2013 was to repair a number of shortcomings found in the above-mentioned evaluations. The specific objectives of Regulation 883/2013 are the following: (i) to strengthen the protection of procedural guarantees and fundamental rights;⁷ (ii) to enhance the relationship and cooperation between OLAF and the Member States, the Union's institutions, bodies, offices, and agencies as well as between

OLAF and third countries and international organisations;⁸ (iii) to improve the efficiency, effectiveness, and accountability of OLAF while simultaneously ensuring its independence;⁹ and (iv) to reinforce existing governance structures.¹⁰

To achieve these objectives, Regulation 883/2013 implemented several changes compared to the previous legal framework. In order to strengthen the legal position of persons concerned and witnesses, a number of procedural safeguards, such as the privilege against self-incrimination and the right to be assisted by a person of choice, were incorporated.¹¹ Regulation 883/2013 also addressed the need that OLAF better cooperate with its partners at the EU, national, and international levels by providing for rules facilitating the exchange of information,¹² the establishment of anti-fraud coordination services (AFCOS) in the EU Member States,¹³ and the signing (and revision) of administrative cooperation agreements.¹⁴ Efficiency and effectiveness were realized by including an obligation incumbent on the Director-General of OLAF to devise more detailed rules on investigation procedures,¹⁵ introducing criteria for the selection and opening of investigations¹⁶ as well as the consolidation and extension of OLAF's investigative tools and powers.¹⁷ Lastly, the Regulation of 2013 sought to improve OLAF's governance and control mechanisms by clarifying the monitoring role and function of OLAF's supervisory committee,¹⁸ clearly circumscribing the Director-General's mandate,¹⁹

and by providing a political forum in which views between OLAF and the Union's institutions on OLAF's policies can be exchanged and discussed.²⁰

To assess whether the shortcomings identified in the previous regulations were remedied and to ascertain the continuing relevance of OLAF's current investigative framework – particularly in light of the rapidly evolving field of EU anti-fraud policy²¹ – Regulation 883/2013 obliges the Commission to carry out an evaluation of its application by October 2017.²² The Evaluation Roadmap set the wheels in motion in late 2015 and clarified the scope of the evaluation.²³ The time period covered by the evaluation is 1 October 2013 until the end of 2016. The output consists of a report from the Commission on the evaluation of Regulation 883/2013,²⁴ supported by a Commission Staff Working Document²⁵ and an opinion of the supervisory committee.²⁶ An external consultancy company provided important input for these reports.²⁷ One of the key evaluation criteria (in addition to the Commission's standard criteria of efficiency, coherence, and relevance) featured in the evaluation is the *effectiveness* of Regulation 883/2013.²⁸ In particular, the evaluation assesses whether and, if so, how Regulation 883/2013 has contributed to the achievement of the aims of the Regulation in practice and repaired the shortcomings identified.²⁹

As the evaluation has now drawn to a close, this article will focus on the evaluation's key findings with regard to the effectiveness of Regulation 883/2013, paying particular attention to the interaction with national law, to the effectiveness of external, autonomous³⁰ investigations, and to the exchange of information between OLAF and Member State authorities prior to and during investigations. The evaluation devotes ample attention to these topics, as they will be an important component of any proposal wishing to amend the current Regulation 883/2013 or of a far-reaching overhaul of OLAF's investigatory framework.³¹ These topics are also the subject of academic interest, particularly – but certainly not only³² – in two comparative studies being carried out by an international group of researchers from a host of EU universities (headed by Utrecht University)³³ under the Hercule III programme to promote activities in the field of the protection of the financial interests of the European Union.³⁴ As a result, this article further draws on the insights of both studies by reflecting on points that may be of use in the follow-up to the evaluation.

Against this backdrop, the article proceeds as follows. First, it will discuss the evaluation's key findings, especially the shortcomings identified in relation to the effectiveness of the conduct of investigations (section II.1). The crucial issue of the exchange of information between OLAF and Member State authorities will be discussed under section II.2. Second, this article touches

on the findings of the mentioned two academic studies under the Hercule III programme with the aim of offering input on further efforts to improve OLAF's investigative legal framework in the near future (section III). At the end, the article draws conclusions summarising the analysed results (section IV).

II. Key Findings of the Evaluation

1. Conducting Investigations

The extension of investigative tools and powers by Regulation 883/2013 allows OLAF to deliver on its mandate with concrete results.³⁵ OLAF's annual reports demonstrate a clear upward trend both in investigations opened and concluded and in recommendations issued.³⁶ Notwithstanding the positive impact of Regulation 883/2013 on OLAF's investigative output, the evaluation reveals the limitations of the powers and tools available to OLAF. These limitations are largely due to the references to national law in OLAF's legal framework: OLAF does not operate on the basis of an exhaustive EU code of procedure. Instead, for the scope, content, and enforceability of its powers, OLAF depends largely on national provisions.³⁷

During on-the-spot inspections – one of OLAF's crucial investigative powers – OLAF staff must act, subject to the Union law applicable, in compliance with the rules and practices of the Member States concerned.³⁸ In conformity with national law, competent authorities of the Member States must give OLAF the necessary assistance to enforce such checks.³⁹ References to national law are also prevalent in digital forensic operations. While OLAF is endowed with the power to gain access to digital data, such access is subject to the same conditions as those for national administrative inspectors and must comply with national law.⁴⁰

The dependency of OLAF's powers and their enforceability on national law – in conjunction with persistent procedural differences between these national laws – results in jurisdictional fragmentation of OLAF's investigatory tools and competences during external investigations. Such fragmentation hampers the effectiveness of OLAF investigations, as it can delay investigations and be detrimental to their quality. Ultimately, such fragmentation also negatively affects OLAF's ability to ensure equivalent protection of the Union's financial interests.⁴¹

2. Exchange of information between OLAF and the Member States

As OLAF relies heavily on Member States when carrying out its investigations, the creation of Anti-Fraud Coordination

Services (hereinafter AFCOS) has proven to be a clear improvement with regard to the exchange of information and the strengthening of ties between OLAF and the Member States.⁴² However, while Member States are obliged by Regulation 883/2013 to establish an AFCOS,⁴³ the regulation is silent on the structure, powers, and functioning of these AFCOS. The diversity of the services across Member States results in an uneven level of support, which can, in turn, inhibit cooperation and the exchange of information between OLAF and AFCOS.⁴⁴

With regard to the exchange of information between OLAF and other administrative and judicial authorities, the evaluation points to more serious shortcomings in the current investigative framework. While administrative and judicial authorities are under an obligation to exchange information with OLAF, they only have to do so within the limits provided for by national law.⁴⁵ These references to national law, like the investigative powers and tools touched on above, result in a fragmented landscape in which there are great divergences between Member States that can impede the exchange of information and the effective conduct of investigations.⁴⁶

III. Input on Further Efforts: Results and Recommendations of the Hercule III Studies

Is there a need to recalibrate and improve the OLAF legal framework for the (i) gathering and (ii) exchange of information related to suspicions of irregularities or fraud affecting the EU's financial interests? This question is the subject of analysis in two Hercule III projects (being) carried out by an international group of researchers under the lead of Utrecht University.⁴⁷ In response to this question, the two projects compare the OLAF framework with the frameworks of three other European law enforcement authorities – Directorate-General for Competition (DG COMP), the European Central Bank (ECB), and the European Securities and Markets Authority (ESMA) – and their respective modes of interaction with six national legal orders. The studies are premised on the problematic position of OLAF in the gathering and exchange of information due to the jurisdictionally fragmented framework of OLAF investigations.⁴⁸ The findings of the evaluation of Regulation 883/2013 (see section II above) mirror the truth of this premise.

The studies show that, due to their design, all four authorities are integrated in – and to a certain extent dependent on – national legal systems. At the same time, however, European law enforcement authorities are, as a result of their Union-wide mandate, required to ensure a level European playing field. Divergent national laws can (and most likely will) thereby im-

pede the effectiveness of EU-authorities' operations. Where an EU authority can act autonomously, i.e., where it can perform acts by itself based on Union law, that authority has the advantage of operating on a level European playing field, but only if the authority has been endowed with truly European powers. Autonomous action necessitates a great degree of both procedural and substantive harmonisation. A good example of an authority that can act autonomously is DG COMP under Regulation 1/2003. Article 20 of Regulation 1/2003, for instance, grants the Commission the power to conduct all necessary inspections of undertakings and associations of undertakings.⁴⁹ ESMA and ECB also have powers granted to them by EU law, which allows them to carry out inspections. A uniform and European legal framework defines these powers and their enforceability. While it also remains true that these authorities do not have coercive powers at their disposal to enforce their competences, they can impose fines in case of non-cooperation and/or ensure that national authorities are obliged to provide assistance in the enforcement of their powers.⁵⁰

The situation is radically different for OLAF. While OLAF is also vested with the power to conduct on-the-spot inspections, it is completely dependent on national law for both the scope and enforceability of this competence. For instance, in the Netherlands, no use can be made of criminal law powers to carry out on-the-spot inspections for administrative investigations which OLAF does. The sealing off of premises falls outside the scope of an on-the-spot inspection, and private dwellings may not be entered and/or searched.⁵¹ In contrast, the Italian means of cooperation with OLAF do allow the use of criminal powers; premises may be sealed off and private dwellings may be entered and searched under certain conditions.⁵² Therefore, while OLAF's powers have formally been drawn up in the guise of an EU regulation, the instruments OLAF uses do not work autonomously and uniformly. The regulations indicate only that the information listed therein should *in the end* be made available to OLAF via powers laid down in national law.⁵³ For this reason, OLAF's legal framework is significantly different from those of other EU law enforcement authorities. The result can be "nothing other than a conflict between its mandate and the instruments necessary to execute it."⁵⁴

The first study, on investigatory powers and safeguards, answers the question as to whether OLAF's legal framework requires recalibration in the affirmative. It concludes that there are possible strategies to enhance OLAF's legal framework for conducting investigations. One such strategy would be to define, in a regulation, a clear set of autonomous EU-level investigative powers, without thereby referring to national law. This would allow OLAF to conduct autonomous investigations in the territories of all the Member States without the drawback of jurisdictional fragmentation. To enforce its power, OLAF

could, like DG COMP, be granted the competence to impose fines in case of non-cooperation in order to ensure the effectiveness of inspections and, ultimately, provide for better and equivalent protection of the Union's financial interests.⁵⁵

References to national law are not only problematic when it comes to OLAF's powers and their enforceability. OLAF's framework for the exchange of information is plagued by similar troubles. Here we also find that OLAF is dependent on national law to obtain a strong information position. The research currently being conducted under the direction of Utrecht University aims to discover whether there is also a need to recalibrate OLAF's framework for the exchange of information. Whether this leads to the same conclusions remains to be seen.

IV. Conclusion

Regulation 883/2013 was adopted to step up the fight against fraud, corruption, and any other illegal activity affecting the financial interests of the Union.⁵⁶ The Regulation intended to do so by correcting a number of shortcomings in its older le-

gal framework, which stemmed from the Office's inception in 1999. In particular, it aimed to make OLAF more effective by facilitating the exchange of information between OLAF and the Member States and by consolidating and extending OLAF's investigative powers. An evaluation by the Commission intended to assess whether the shortcoming identified had been resolved by Regulation 883/2013. The evaluation concluded that the changes introduced by Regulation 883/2013 allowed OLAF to deliver concrete results in the protection of the Union's financial interests. With regard to external investigations, however, the evaluation confirmed the well documented⁵⁷ effectiveness problems that emerge from the framework's various references to national law, particularly in relation to the performance of investigations and the exchange of information: OLAF's dependence on national law results in jurisdictional fragmentation of its investigations. These problems are not new to Regulation 883/2013 but date primarily back to OLAF's creation in 1999. Should an overhaul of OLAF's investigatory framework be considered in 2018, the academic studies conducted or currently (being) conducted under the umbrella of the Hercule III programme, which emphasise the need for a common Union-wide framework for external investigations, will surely provide useful points of reflection.

* The author also serves as national rapporteur for the Netherlands for the forthcoming Hercule III study entitled "Exchange of information with EU and national enforcement authorities: Improving OLAF's legislative framework through a comparison with other EU authorities (ECN/ESMA/ECB)". See below.

1 L. Kuhl, "Cooperation between Administrative Authorities in Transnational Multi-Agency Investigations in the EU: Still a Long Road Ahead to Mutual Recognition", in: K. Ligeti and V. Franssen (eds.), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, 2017, pp. 135, 137.

2 See recital 4 and Art. 2(1) and 2(2) of Commission Decision (EC, ECSC, Euratom) 1999/352 establishing the European Anti-Fraud Office (OLAF) [1999] O.J. L 136, 20.

3 J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF). An Analysis with a Look Forward to a European Public Prosecutor's Office*, 2011, p. 57.

4 See, for instance, Report from the Commission, "Evaluation of the activities of the European Anti-Fraud Office (OLAF)", COM(2003) 154 final; Court of Auditors, "Special report 1/2005 concerning the management of the European Anti-Fraud Office (OLAF)", 2005/C 202/01; its follow-up in Court of Auditors, "Special report 2/2011: Follow-up of Special Report 1/2005 concerning management of the European Anti-Fraud Office" <https://www.eca.europa.eu/Lists/ECADocuments/SR11_02/SR11_02_EN.PDF> (accessed 7 November 2017); and OLAF Supervisory Committee, "Opinion 2/03 accompanying the Commission's report. Evaluation of the activities of the European Anti-Fraud Office (OLAF)", OLAF/460/03-EN Rev. 1.

5 The first proposal, tabled by the European Commission in 2004, was presented in two documents: (i) European Commission, "Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)", COM(2004) 103 final and (ii) European Commission, "Proposal for a Council Regulation amending Regulation

(Euratom) 1074/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)", COM(2004) 104 final. In 2006, a second proposal followed: European Commission, "Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF)", COM(2006) 244 final. The 2006 proposal was modified by the one tabled in 2011: European Commission, "Amended Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EC) 1073/1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing regulation (Euratom) 1074/1999", COM(2011) 135 final. The modified 2011 proposal constituted the basis for Regulation 883/2013.

6 Cf. Art. 20 of Regulation (EU, Euratom) 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) 1074/1999 (hereinafter Regulation 883/2013).

7 Recitals 23 through 28 of Regulation 883/2013.

8 Recitals 29 through 36 of Regulation 883/2013.

9 Recitals 8 through 22 and recitals 42 through 48 of Regulation 883/2013.

10 Recitals 37 through 42 of Regulation 883/2013.

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- 11 Art. 9 of Regulation 883/2013. In addition to these safeguards, Regulation 883/2013 put in place rules on confidentiality and data protection (Art. 10) and introduced a legality check to ensure the respect of procedural guarantees (Art. 17(7)).
- 12 See, in particular, Art. 6, 8, 11, 12, 13, and 14 of Regulation 883/2013.
- 13 Art. 3(4) of Regulation 883/2013.
- 14 Art. 1(5) of Regulation 883/2013, applies in relation to Member States and the EU's institutions, bodies, offices, and agencies; Art. 13(1) applies in relation to Eurojust and Europol; and Art. 14(1) applies in relation to third countries and international organisations.
- 15 Art. 7 of Regulation 883/2013 regulates the investigations in general. In addition, Art. 17(8) obliges the Director-General to put in place guidelines on investigation procedures for OLAF staff. These guidelines were provided for by OLAF, "Guidelines on Investigation Procedures for OLAF Staff", Ref. Ares(2013)3077837 (hereinafter GIP).
- 16 Art. 5 of Regulation 883/2013 mentions the following criteria: investigation policy priorities, annual management plan, efficient use of OLAF's resources, and proportionality. With regard to internal investigations, specific account shall be taken of the institution, body, office, or agency best placed to conduct them, based, in particular, on the nature of the facts, the actual or potential financial impact of the case, and the likelihood of any judicial follow-up. Detailed rules on the case selection procedure are the provided for by the Art. 1 through 7 of the GIP.
- 17 Art. 3 and 4 of Regulation 883/2013.
- 18 Art. 15 of Regulation 883/2013.
- 19 Art. 17 of Regulation 883/2013.
- 20 Art. 16 of Regulation 883/2013.
- 21 Think, in particular, of a redefinition of OLAF's investigative role with the establishment of the European Public Prosecutor's Office. See recital 103 through 105 and Art. 101 of Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"), *O.J. L* 283, 31.10.2017, 1.
- 22 Art. 19 of Regulation 883/2013 stipulates that by 2 October 2017, the Commission must submit to the European Parliament and the Council an evaluation report on the application of Regulation 883/2013. Said report must be accompanied by an opinion of the Supervisory Committee and shall state whether there is a need to amend this Regulation.
- 23 European Commission, "Evaluation of the application of Regulation (EC, Euratom) 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)" <http://ec.europa.eu/smart-regulation/road-maps/docs/2017_olaf_001_evaluation_of_regulation_883_2013_en.pdf> (accessed 7 November 2017).
- 24 Report from the European Commission, "Evaluation of the application of Regulation (EU, Euratom) 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) 1074/1999", COM(2017) 589 final.
- 25 European Commission, "Commission staff working document. Evaluation of the application of Regulation (EU, Euratom) 883/2013 of the European Parliament and of the Council of 11 September concerning investigations conducted by the European Anti-fraud Office (OLAF) and repealing regulation (EC) 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) 1074/1999", SWD(2017) 332 final.
- 26 OLAF Supervisory Committee, "Opinion 2/2017 accompanying the Commission Evaluation report on the application of Regulation (EU) of the European Parliament and of the Council 883/2013 (Article 19)", Ref. Ares(2017)4762494.
- 27 ICF, "Evaluation of the application of Regulation 883/2013 concerning investigations conducted by the European Anti-fraud Office (OLAF): final report", <https://ec.europa.eu/anti-fraud/sites/antifraud/files/evaluation_of_the_application_regulation_883_en.pdf> (accessed on 8 November 2017).
- 28 European Commission, "Commission staff working document: Better Regulation Guidelines", SWD(2017) 350, §3, pp. 58–64.
- 29 See the roadmap, *op. cit.* (n. 23) p. 4; COM(2017) 589 final, *op. cit.* (n. 24), p. 2; SWD(2017) 332 final, *op. cit.* (n. 25), p. 13; ICF report, *op. cit.* (n. 27), pp. 54–55
- 30 Autonomous investigations are those in which OLAF perform acts by itself. Member State authorities can be present and assist and do not do so in the fulfilment of their own tasks but for the fulfilment of OLAF's tasks. An example of an autonomous investigative act is an on-the-spot check. For further information, see M. Simonato, "OLAF investigations in a multi-level system. Legal obstacles to effective enforcement", (2016) *eu crim*, 136, 137.
- 31 COM(2017) 589 final, *op. cit.* (n. 24), pp. 3, 6–8.
- 32 Next to studies and earlier evaluations conducted by the EU (see n. 4), the ICF Report (n. 27), Ecorys and CONT-committee studies deserve mention. See Ecorys, "Study on impact of strengthening of administrative and criminal law procedural rules for the protection of the EU financial interests", JUST/A4/2011/EVAL/01; and Directorate-General for Internal Policies, "The protection of the procedural rights of persons concerned by OLAF administrative investigations and the admissibility of OLAF final reports as criminal evidence: in-depth analysis" IP/D/CONT/IC/2017-066.
- 33 Academics from Queen Mary University of London, University of Luxembourg, the Polish Academy of Sciences, the University of Bonn, and Paris Nanterre University were instrumental in the design of both studies.
- 34 Regulation (EU) 250/2014 of the European Parliament and of the Council establishing a programme to promote activities in the field of the protection of the financial interests of the European Union (Hercule III programme) and repealing Decision (EC) 804/2004, *O.J. L* 84, 20.3.2014, 6.
- 35 COM(2017) 589 final, *op. cit.* (n. 24), p. 3; SWD(2017) 332 final, *op. cit.* (n. 25), p. 14.
- 36 OLAF, "The OLAF report 2016", §12, p. 50, figure 17.
- 37 COM(2017) 589 final, *op. cit.* (n. 24), p. 3; SWD(2017) 332 final, *op. cit.* (n. 25), p. 40; ICF, *op. cit.* (n. 27), p. 95.
- 38 Article 3(3) of Regulation 883/2013.
- 39 Art. 7(3) of Regulation 883/2013.
- 40 Art. 7(1) of Council Regulation (Euratom, EC) 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, 15.11.1996, *O.J. L* 292, 2.
- 41 COM(2017) 589 final, *op. cit.* (n. 24), p. 3; SWD(2017) 332 final, *op. cit.* (n. 25), p. 16; ICF, *op. cit.* (n. 27), pp. 88–98.
- 42 COM(2017) 589 final, *op. cit.* (n. 24), p. 3; SWD(2017) 332 final, *op. cit.* (n. 25), p. 23–24; ICF, *op. cit.* (n. 27), p. 103.
- 43 Art. 3(4) of Regulation 883/2013.
- 44 SWD(2017) 332 final, *op. cit.* (n. 25), p. 24; ICF, *op. cit.* (n. 27), pp. 103–104.
- 45 Arts. 8(2) and 8(3) of Regulation 883/2013. Article 12(3) deals with the exchange of information in the follow-up phase, which is not the subject of this article.
- 46 SWD(2017) 332 final, p. 25.
- 47 The project on the gathering of information, focusing in particular on investigatory powers and procedural safeguards, was carried out in 2016 and 2017. The results of this project can be found at: <<https://dspace.library.uu.nl/handle/1874/352061>> (accessed 13 November 2017). The second project, on the exchange of information, is presently being conducted. Results are to be published in spring 2018. For this reason, references will only be made to the published report on the gathering of evidence.
- 48 M.J.J.P. Luchtman, "Introduction", in: M.J.J.P. Luchtman and J.A.E. Vervaele (eds.), *Investigatory powers and procedural safeguards: improving OLAF's legislative framework through a comparison with other EU law enforcement authorities (ECN/ESMA/ECB)*, 2017, p. 1.
- 49 Art. 20 of Council Regulation (EC) 1/2003.
- 50 M. Scholten and M. Simonato, "EU report", in: M.J.J.P. Luchtman and J.A.E. Vervaele (eds.), *op. cit.* (n. 48), pp. 47–48.
- 51 J.J.M. Graat, "The Netherlands", in: M.J.J.P. Luchtman and J.A.E. Vervaele (eds.), *op. cit.* (n. 48), pp. 111–125.
- 52 S. Allegrezza, "Italy", in: M.J.J.P. Luchtman and J.A.E. Vervaele (eds.), *op. cit.* (n. 48), p. 144.
- 53 Art. 7(1) of Regulation 2185/96.
- 54 M.J.J.P. Luchtman and J.A.E. Vervaele, *op. cit.* (n. 48), p. 321.
- 55 M.J.J.P. Luchtman and J.A.E. Vervaele, *op. cit.* (n. 48), pp. 328–329.
- 56 Art. 1(1) of Regulation 883/2013.
- 57 See the studies mentioned in note 47, and the ECORY and CONT-committee studies mentioned in note 32.

The New Frontier of PFI Investigations

The EPPO and Its Relationship with OLAF

Andrea Venegoni

I. Introduction

On 20 November 2017, twenty days after its publication in the Official Journal of the European Union, Regulation 1939/2017 establishing the European Public Prosecutor's Office – commonly referred to as the EPPO – entered into force. It is the most advanced stage in the creation of a common criminal justice area in the EU, as the EPPO is a true prosecutor's office for conducting criminal investigations. It is – from the outset – not a coordination office, like Eurojust, and it is not an office for administrative investigations, like OLAF, but indeed a criminal investigation and prosecution office. The field in which the EPPO is competent to conduct such investigations is precisely the protection of the Union's financial interests,¹ the so-called "PFI area." It addresses specific offences concerning the revenue and expenditure of the Union's budget, as defined in Directive 1371/2017 (the so-called PFI Directive).² Once more, the PFI area proves to be the most important sector in EU law involved in the creation of a true area of European criminal justice.

To date, the establishment of the EPPO completes a development, the start of which is traditionally seen in the ruling of the European Court of Justice in the 1989 "Greek Maize" case, when the Union's criminal law was born and advanced. This always happened with a view to the creation of a common legal and judicial space. In all honesty, however, one cannot be completely enthusiastic about the approved version of the EPPO Regulation yet, because further steps could have been accomplished. This opinion will be made clearer in the following, when we will go through some of the most significant parts of the EPPO regulation: the EPPO's powers and structure, the cross-border investigations and the relationships with the other existing bodies of the EU dealing with investigations and judicial cooperation, especially with OLAF.

II. The EPPO: General View

1. Powers and structure

At first, it should be recalled that the EPPO Regulation originates from a European Commission proposal of 17 July 2013.³

When comparing the text of this Commission proposal and the final version of the regulation, several differences now become clearly apparent. One of the most striking, even symbolic, difference is that Art. 25 of the proposal explicitly proclaimed the establishment of a "single legal area" as the objective of the EPPO investigations. This provision genuinely envisaged the practical accomplishment of the concept of "common European legal space."

However, the above-mentioned article no longer appears in the final version of the regulation. In the negotiations, the Member States agreed to rule it out, as they do not entirely share such an idea. It has also come to pass that not all EU Member States have decided to join the new office. In line with Art. 86 TFEU, the EPPO has been approved with enhanced cooperation, which allows a closer cooperation on certain subjects only among a limited number of Member States. To date, twenty Member States decided to join the EPPO on this basis. The United Kingdom, Ireland, and Denmark (which, according to the Treaty, already enjoy a specific regime on criminal justice issues), but also Poland, Malta, Sweden, and Hungary are not taking part to it, in addition – at least and at present – to a founding State of the EEC, the Netherlands (although there might be some expectation that they will join at a later stage⁴). Twenty states, however, are still a significant number for establishing an office that will carry out criminal investigations in the field of the protection of the EU's financial interests.

The EPPO will consist of two layers: a central level and a decentralised one. The central office, based in Luxembourg, will comprise the European Chief Prosecutor and – unlike the 2013 proposal – a college of twenty prosecutors: one for each participating Member State. However, so-called European Delegated Prosecutors will carry out investigations exclusively at the local level. They are members of the national judiciary as regards their administrative status, but, when dealing with an "EPPO case," they will operationally belong to the European office.

2. Cross-border investigations

The critical point of the described entire structure of the EPPO is cross-border investigations. In principle, a common Euro-

pean legal area, in the true sense of the word, requires the same procedural rules regardless of the state in which an investigation is carried out, especially once a single investigation office is set up. The EPPO Regulation, however, does not foresee any sort of European criminal procedural code. It is true that the 2013 proposal was also lacking such common rules, but it at least tried, in Art. 26, to provide for a unification of investigative measures, by establishing the conditions and pre requisites for their adoption at the European level.

The practical problem that arises concerns which law is applicable when European Delegated Prosecutor, conducting an investigation into allegations of crime that took place in the territory of his home country, needs to carry out some investigative actions in another Member State. According to Art. 31 of the EPPO Regulation the European Delegated Prosecutor who is handling the case “shall decide on the adoption of the necessary measure” and then “assign it to a European Delegated Prosecutor located in the Member State where the measure needs to be carried out.” The regulation does the split between the EPPO acting within one territorial area and national sovereignty. On the one hand, the solution of the regulation is certainly more advanced than any cooperation instrument so far used, including the European Investigation Order.⁵ This is an example of language that truly represents the office’s unity beyond geographic barriers. On the other hand, the problem of the applicable law remains. In the absence of a common procedural law, the regulation seeks to achieve a difficult balance between *lex fori* and *lex loci*, tending to favour the latter (Art. 32) but without prejudice to the different level of guarantees that May be provided for in national legislation. The system is certainly not an expression of a common legal area, namely the “single legal area” mentioned in the Commission proposal of 2013. It leaves fully open the differences that national laws can engender regarding the adoption and execution of individual investigative measures. The contradiction of this system with the unity of the investigative office is, therefore, even greater.

The decision-making system within the investigation also seems rather complicated. The functioning of the “Permanent Chambers” mitigates the foreseeable disproportion of workload among the European Prosecutors at the central level, depending on the number of cases opened by the European Delegated Prosecutors. In principle, a Permanent Chamber could take a decision on a case involving a legal system whose European Prosecutor is not sitting in that chamber. In order to ensure proper knowledge of the legal system involved in the case, Art. 10 para. 9 of the EPPO Regulation stipulates the following: “In addition to the permanent Members, the European Prosecutor who is supervising an investigation or a prosecution in accordance with Art. 12(1) shall participate in

the deliberations of the Permanent Chamber.” In some cases, the European Delegated Prosecutor May also attend the Permanent Chamber’s meeting (without any right to vote). The compatibility of a sort of “collegial” decision-making system in a prosecutorial office with the requirements of efficiency and speediness in an ongoing criminal investigation remains to be seen; only practice will show how effective it is in countering crimes that the EPPO must pursue.

These few aspects already show the dilemma between starting with something imperfect, but still existing, or waiting for a text that fully corresponds to the ideal. Of course, even ten years ago – after failure of the 2004 European Constitutional Treaty following the referendums in France and the Netherlands in 2005 – the concrete establishment of the European Public Prosecutor’s Office appeared very difficult, despite the studies and analysis that preceded its inception, e.g. the “Corpus Iuris” project (1997–2000), directed by *Prof. Mireille Delmas-Marty* and, more recently, the project for the creation of EPPO “model rules” (2011–2012), directed by *Prof. Katalin Ligeti*.⁶ Against this background, the approval of the Office’s founding regulation is certainly an important achievement for those who care about European integration and the creation of an authentic area of criminal justice in the Union. Nevertheless, regret remains that the Office was not set up in a more ambitious way, in full expression of the concept of a common legal area referred to above. This was not completely achieved, and some aspects of the future functioning of the EPPO, such as relations with national authorities, as well as with European bodies, especially Eurojust and OLAF, need to be verified in practice.

III. Relationship with OLAF

The EPPO’s relationship with the other important body for the protection of the Union’s financial interests, OLAF, is a very interesting and sensitive issue. OLAF conducts administrative inquiries in the PFI area, including the possibility to transfer its investigation report and related evidence to the national judicial authorities for admission in criminal proceedings under the national legislations. The OLAF Regulation stipulates that the OLAF report has the same value as the reports drawn up by the national administrative authorities in each national jurisdiction.⁷ OLAF is therefore a body – indeed the only body in the Union prior to the EPPO – which has the task of carrying out effective investigations in the area of the protection of the EU’s financial interests – albeit of an administrative nature. In this sense, it can be considered the true progenitor of the new office, despite the formulation of Art. 86 TFEU that envisages that the EPPO should be “established from Eurojust”.

From the time of drafting of the Commission proposal in 2013, the problem of relations between the two offices was analysed, in order to avoid the risk of having two bodies with overlapping investigative powers in the same matter, although both operate on two different levels. Art. 101 of the EPPO Regulation is the starting point for looking at the relationship between the two bodies; it establishes the general principle that no parallel administrative investigation led by OLAF be carried out when a criminal case at the EPPO is open. It also draws a line on the cooperation between the two offices in terms of exchanging information, in situations requiring assessment in relation to the concrete case, without excluding the possibility of parallel and simultaneous investigations.

Hence, the first, basic conclusion that can be drawn from the text of the EPPO Regulation is that OLAF will not disappear because of the EPPO's establishment. Regarding OLAF's role in the upcoming scenario, we have to keep in mind, however, that the final text of the regulation derives from the Commission proposal of 2013. In this proposal, the EPPO central level was smaller; no college of the prosecutors was foreseen but just a Chief Prosecutor and four prosecutors. The rest of the central office was composed of administrative and investigative staff. Indeed, under the proposal, the central department of the EPPO was empowered to carry out criminal investigations directly, albeit in specific, exceptional, and limited situations. In these cases, the plan was for the central office that the prosecutors could avail themselves of the investigative experience of investigative staff, which was supposed to be transferred from OLAF. In this version, therefore, it was planned that OLAF substantially contributes to the EPPO by also supplying part of its investigative staff for the limited cases in which the EPPO central office would be carrying out investigations personally in a single legal area.

The underlying provisions of the proposal supporting this idea were vastly modified in the final version of the Council. Regulation 2017/1939 does not provide any possibility for the EPPO central office to carry out investigations through European investigative staff. This might raise a number of questions as to OLAF's future, considering that the EPPO will have the power to carry out criminal investigations in the same substantial matter. However, the existence and continuing role of OLAF (and also Eurojust) in relation to the EPPO is necessary for at least two reasons:

The first reason is purely geo-political. The establishment of the EPPO through the mechanism of enhanced cooperation implies non-adherence to the office of all the EU Member States as mentioned above. The EPPO will have to deal with three categories of States:

a) "EPPO States," all belonging to the European Union;

- b) "Non-EPPO states," but still members of the European Union;
- c) "Non-EPPO States" that are not members of the European Union⁸.

For investigations involving the second and third category of States where the EPPO cannot directly take actions in their territories, the coordination and facilitation action by bodies such as OLAF (and Eurojust) will remain essential, as it is the case today, even though there is a diversity of legal frameworks that will distinguish relations with the last two categories of States.

The second reason is that OLAF has some specificities that will make it very much involved in the relationships with the EPPO, although Art. 86 TFEU only refers to Eurojust. They are, as already mentioned previously:

- a) the field of action: both OLAF and the EPPO deal with offences in the framework of the PFI area;
- b) the powers: they both have effective investigative powers and not just coordination powers.

IV. Conclusion

So far, OLAF was the only European investigative body in the PFI area. It is true that OLAF investigations are on the administrative, not criminal, side. Under Art. 11 of Regulation 883/2013, however, an OLAF report (with evidence gathered during the enquiry) can be transferred to the judicial authorities, and used in criminal proceedings. OLAF has so far also been the only European body that has the power to carry out investigations into offences (affecting the Union's financial interests) in a European common space and to let evidence circulating in the same common space. These two features bring OLAF much closer to the new European investigation and prosecution office than any other European body in the field of judicial cooperation.

The EPPO would do well to make use of the OLAF's experience in the PFI field, within the scope of Art. 101 of the EPPO Regulation: as regards the exchange of information, OLAF can certainly provide added value in investigations to protect the Union's financial interests.⁹ Today, OLAF already deals with several issues alongside the investigations in the PFI area. We recall the management of databases with information on fraud or the "financial follow-up" of cases, which involve not only the administrative investigations but also specifically the criminal ones that are carried out in the Member States.

In sum, the current legal framework still leaves a wide margin for the co-existence of the two bodies – a loyal and close cooperation between them is highly recommended. The future ahead

of us is thus very exciting. The coming years, during which the EPPO will be made operational, will be sure to reveal more about the new frontiers of the protection of the Union's financial interests – a sector that deserves to be deeply analysed.

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- 1 M. Scholten and M. Luchtman, *Law Enforcement by EU Authorities: Implications for Political and Judicial accountability*, 2017; A. Bernardi and D. Negri, *Investigating European Fraud in the EU Member States*, 2016.
- 2 A. Juszcak and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive)", (2017) *eu crim*, 80.
- 3 Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final, 17.7.2013.
- 4 See the news section on EPPO, in this issue.
- 5 Cf. Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *O.J. L* 130, 1.5.2014, 1.
- 6 See K. Ligeti (ed.), *Toward a prosecutor for the European Union. A comparative analysis*, Volume I, Oxford et al., 2013.
- 7 See M. Simonato, "OLAF Investigations in a Multi-Level System. Legal Obstacles to Effective Enforcement", (2016) *eu crim*, 136.
- 8 Commonly referred to as "third countries".
- 9 See also: European Parliament, Policy Department for Budgetary Affairs – Directorate General for Internal Policies of the Union, *The future cooperation between OLAF and the European Public Prosecutor's Office*, June 2017.

OLAF at the Gates of Criminal Law

Petr Klement

I. Introductory Remarks: OLAF and the Setting of the EPPO

There were certain periods in the past that brought expectations of change in the legal position and powers of OLAF (hereinafter also referred to as "the Office") together with the entire layout of the system of protection of the Union's financial interests. Since establishment of the Office, the expected changes seemed to be inextricably linked with the destiny of the European Public Prosecutor's Office (the "EPPO"). The first proposals concerning the project of the European Prosecutor¹ were later rejected, however, and had no effect on functioning of OLAF.

Discussions affecting the future existence of the Office gave OLAF a strong motivation and the ambition to play a decisive role in designing the EPPO. The actual influence of the Office would not be diminished, even if OLAF were to be "just" absorbed by the EPPO² and become one of its chambers.³ Art. 86 TFEU envisaged, however, the establishment of the EPPO from Eurojust, and it became obvious that international judicial co-

operation and financial investigations were two different disciplines. In this context, OLAF, unlike Eurojust, disposed of a well trained staff, functioning administration, and technical background. The Office was particularly interested in building up the EPPO when model studies on a more authoritative European Prosecutor appeared.⁴ Later on the interest declined, when ideas about such a model were ultimately abandoned and it became clear that the EPPO would be designed in a decentralised manner. In addition, it appeared that OLAF was to further exist as a separate body, was not to investigate into the same facts (unless requested by the EPPO), that it would focus on the investigation of administrative irregularities, and that it would only assist and support the EPPO. This co-existence is referred hereinafter as the "complementarity model".⁵

Apparently overlapping competences of the future EPPO and OLAF gave even rise to opinions that OLAF might not be needed anymore⁶ or that it would be possible to significantly reduce its staff, budget, and capacity. But, if we look into the problem a little more closely, we inevitably come to the opposite conclusion.

II. OLAF's *raison d'être*

After the adoption of Regulation 2017/1939 (“the EPPO Regulation”),⁷ the EPPO will mainly deal with investigations of carousel fraud/missing trader fraud/VAT fraud involving €10 million and above as well as criminal offences infringing the financial interests of the EU above €10,000 according to Art. 22 of the EPPO Regulation. OLAF will retain its competence to investigate irregularities and acts on suspicions of fraud, corruption, or any other illegal activity affecting the financial interests of the EU. The Commission is counting on OLAF – especially as regards investigations into VAT fraud⁸ – not to mention the recent adoption of the “PIF Directive”,⁹ which broadened the criminal law competence for the protection of the EU’s financial interests and expanded the scope of OLAF investigations to cover VAT. Of course, OLAF will keep its exclusive powers in the field of internal investigations¹⁰ and continue to proceed with coordinating the actions of the Member States’ authorities in so-called “coordination cases.”¹¹ The Office will still join national administrative investigations opened on its request and take part in so-called mixed inspections.¹² All these actions have remained and will stay in place in the course of administrative proceedings, because only a small percentage of OLAF’s agenda concerns clearly criminal cases or, in other words, only a very small percentage of OLAF investigations are followed up by criminal proceedings in the Member States.

In addition to the existing powers and corresponding competences, however, OLAF will be obliged to broadly assist the EPPO in preparatory steps for investigations of criminal offences. The Office will also assist the EU institutions, bodies, offices, and agencies with the preliminary evaluation of suspicions of offences to be reported to the EPPO. OLAF (together with Eurojust and Europol) will be obliged to actively support the investigations and prosecutions of the EPPO, which in turn will supply OLAF with information on cases falling outside the competence of the EPPO but in which an administrative follow-up or recovery would be desirable. This solution – to refer a case to OLAF after its dismissal by the EPPO¹³ – May become particularly popular at the EPPO in order to show that the EU authorities did not completely abandon the case (and the rights or interests of the damaged party).¹⁴

III. Challenges Ahead

1. Challenges from the complementarity model

Notwithstanding, the established complementarity model (see above) will entail several problems and challenges. It will be particularly demanding on the exchange of information and

on the compatibility of the case management systems of both OLAF and the EPPO. The necessity of the information exchange also requires building secure lines between Brussels and Luxembourg, as it will have to run electronically and remotely. The same holds true for cooperation and coordination of work in the EPPO, OLAF, and EUROPOL triangle.¹⁵ It should be noted that the entire system of protection of the financial interests of the EU needs a certain extent of authoritative coordination and supervision.¹⁶

The aim of the complementarity model is to avoid duplication of work. Indeed, OLAF shall not open any parallel administrative investigation into the same facts¹⁷ if the EPPO is already conducting a criminal investigation. It May also be derived from the EPPO Regulation that OLAF should even discontinue its already initiated investigation if such another exists. The key points are, however, the time needed for assessment before concluding that a particular case falls within the competence of the EPPO and the nature of both administrative and criminal investigations.

In the new architecture of protection of the financial interests of the EU, OLAF will continue to analyse and assess information coming from various sources (including from the EPPO) in order to determine whether there is a founded suspicion of occurrence of irregularities or more serious facts. If the preliminary information leads to the opening of an administrative investigation, the national authorities and other subjects are usually asked for their cooperation and further information and evidence. Their assistance as well as gathering other evidence in the administrative investigation in order to determine whether elements of crime exist and, therefore, whether the case falls within the competence of the EPPO May take considerable time. In the majority of cases, the time needed for assessment before transferring the case to the EPPO May be equal to the time currently needed for investigation before the final report is sent to national authorities.¹⁸ Moreover, the EPPO Regulation does not contain provisions on resolution of conflicts of competence between the two offices in situations in which either both of them wish to investigate or both would like to refer a case to the other. While one can discern from the recitals and provisions of the EPPO Regulation that the opinion of the EPPO should prevail, the legislator has left this question open and subject to conclusion of a working agreement between OLAF and the EPPO.

Even more complex becomes the procedure if one looks at the way of transferring cases. Even after transferring of a case, the EPPO May request OLAF to provide information, analyses, expertise, and operational support in order to coordinate specific actions of the competent national administrative authorities and EU bodies or to conduct an administrative investiga-

tion.¹⁹ Therefore, a case May be opened by OLAF, followed by a period of administrative investigation in which elements of crime are determined and proven by the collected evidence; the case May then be transferred back to the EPPO, which will continue it in a criminal investigation. At the same time, the latter May task OLAF with launching its (now parallel) investigation into the same facts, because, e.g., a part of the investigation May concern a Member State not participating in the EPPO project. Hypothetically, after dismissal of such a case by the EPPO, it May formally come back to OLAF,²⁰ even if, in reality, OLAF has never stopped dealing with the case.

Because of the duty to support the EPPO in multiple ways, OLAF will have to keep its force of current structures. It May even have to create a new unit specializing in information flow and “case flow” between the Office and the EPPO. OLAF will keep its full competence over cases in which damage to the financial interests of the EU is less than €10,000²¹ and it will also be fully operational in the Member States not participating in the EPPO project.²² From all the above-mentioned facts, the only possible conclusion is that OLAF’s workload will not remain the same but instead be even heavier than it is today. Lastly, together with the alleged agenda transfer from OLAF to the EPPO,²³ transfer of some staff positions is also envisaged, but this administrative step May be reconsidered, especially after the system becomes fully operational.

2. Challenges from the different types of investigations

Another more serious point concerns the different nature of both types of investigations/proceedings in situations in which OLAF would be acting on request of the EPPO in the sense of Art. 101(3) of the EPPO Regulation. The EPPO will investigate, prosecute, and bring to judgment offenders against the Union’s financial interests exclusively in the criminal proceedings. No matter which structural unit of the EPPO requests OLAF to undertake an action (most probably the Permanent Chambers will request on behalf of the EPPO), the request itself will originate from the criminal proceedings and be for the purposes of collecting and giving evidence in criminal proceedings, including the criminal trial. Even if OLAF’s subsequent investigation is “administrative” in nature, its clear purpose is collection of evidence for criminal proceedings on request of the prosecutor – one of the parties to criminal trial. OLAF investigations on request of the EPPO will be performed within the strict regime of supervision and guarantees provided both by the EPPO Regulation²⁴ and by national law.

This situation May be particularly painful in those Member States in which the rights of the defence to take part in the pre-trial investigation are strong, and the evidence May be later

declared inadmissible by a court in the trial if such defence rights are not taken into account.²⁵

The Member States that decided not to participate in the EPPO project had various reasons for doing so – one of them being to keep complete control over their national criminal law jurisdiction. These Member States then could consider an intervention of OLAF acting on request of the EPPO as bypassing the standards of mutual legal assistance in criminal matters and even as interfering with their sovereignty.

But also OLAF’s involvement in the mechanisms of investigations within the participating states will pose problems. The national law enforcement authorities and the European Delegated Prosecutors will be bound by strict rules in criminal proceedings relating to fundamental rights and procedural guarantees. OLAF should not be allowed to avoid mechanisms of control and supervision within the regime of Art. 101 of the EPPO Regulation and to implement the investigation acts planned in the criminal proceedings under the cover of an administrative investigation.²⁶

The Permanent Chambers of the EPPO can hardly order prosecution in a Member State if documents gathered by OLAF up to that point are not admissible evidence according to the procedural law in the given state. Furthermore, the evidence gathered as part of such investigations performed on the request of the EPPO could be subject to serious challenges based on lacking judicial control as well as on the lower level of procedural rights and guarantees compared to (20 different) national criminal proceedings.

Another issue worth mentioning here are factual impacts on the proceedings. One of the reasons for the establishment of the EPPO was the inability (lack of expertise), incapacity (lack of resources), or reluctance (lack of will) of the national law enforcement authorities to proceed with criminal cases affecting financial interests of the Union. In many situations, if this inability/incapacity/reluctance were to be in favour of national investigating authorities, the EPPO would desperately need a partner body that could step in if the national authorities cannot or do not wish to proceed with individual investigative steps. The EPPO, as a prosecuting body, will need an effective, reliable investigator. Although the EPPO Regulation has supplied one with OLAF, the Office is not equipped with updated status, powers, and policies.

IV. Needed Solutions

Against this backdrop and in order to become an effective partner providing admissible evidence to the EPPO, OLAF

not only needs to raise its standards of guarantees, control, and supervision, but its powers should also be levelled up to correspond to current threats in the field of financial fraud and to the future further involvement of OLAF in VAT fraud investigations. Easy access to banking accounts and to databases facilitating the exchange of information and international cooperation should be a standard if the EU institutions as well as the OLAF Supervisory Committee wish the Office to act effectively within the due process of law and the 12-month time limit set for its investigations. Any extension of powers, however, should always go hand in hand with strengthened control over the empowered body, especially if the evidence gathered serve to prove guilt or innocence in criminal trials and thereby change the destinies of legal entities and individuals.

In order to avoid challenges stemming from the different nature of both types of proceedings, the acts OLAF performs at the request of the EPPO should be considered actions of the EPPO itself, and, as such, they should be subject to judicial control by national judicial authorities and to review by the European Court of Justice.²⁷ In order to enhance the admissibility of evidence, the procedural guarantees and standards set for the EPPO's actions should apply equally to OLAF acting within the regime of Art. 101 of the EPPO Regulation.²⁸ OLAF can only benefit from self-reflection if it is based on judicial decisions controlling its individual actions. It gives the Office a chance to shift away from practices that were challenged by the persons concerned and defendants at the national courts and the Court of Justice of the EU in the past and from doubts raised as to its independence and respect for fundamental rights and guarantees.

Lastly, even if OLAF is supposed to act independently from the Commission, the lack of legal personality and organisational dependence on the Commission has always cast a shadow on the perception of OLAF's independence, and the Office has always had to defend itself against allegations of being the "armed hand of the Commission." It is a fact that OLAF performs its investigations fully independent of the Commission and is, in fact, more independent than some satellite bodies that are not part of the Commission.²⁹ In order to dispel lasting doubts about the influence of the Commission on OLAF's work, the Office should be given a legal personality that would also raise its direct accountability and facilitate judicial review of OLAF investigations.

V. Conclusion

The new legislation concerning the establishment of the EPPO has brought OLAF closer to the gates of criminal proceedings than ever by making the Office "the right hand" of the European Prosecutor. However, questions as to OLAF's powers, supervision, judicial review, and procedural guarantees remain open. The EPPO deserves a strong partner with equal standards in order to avoid the drawbacks of different types of proceedings and levels of procedural guarantees, which could ultimately be reflected in decisions of the constitutional courts of the Member States. OLAF has already become a partner of the EPPO that is supposed to collect evidence for the purpose of criminal proceedings and criminal trials and, as such, should not be forced to act "under the cover" of an administrative investigation. Instead, it should finally get a well-deserved official invitation to enter through the gate.

1 Including the compact solution offered in *Corpus Juris* 2000. See: M. Delmas-Marty, J.A.E. Vervale (eds.), *Corpus juris* 2000, Florence version. Antwerp, Intersentia, 2000.

2 Committee of Independent Experts, "Second Report", Vol. II, 1999, pp. 181–186.

3 C. Stefanou, S. White and H. Xanthaki, *OLAF At the Crossroads: Action against EU Fraud*, 2011, pp. 163–164.

4 University of Luxembourg, "Model Rules the Procedure of the EPPO", <http://www.eppo-project.eu/index.php/EU-model-rules/english>, accessed 7 November 2017; K. Ligeti (ed.) *Toward a Prosecutor for the European Union. Draft Rules of Procedure*, Vol. 1, Oxford, Hart, 2014.

5 A. Marletta, "Interinstitutional Relationship of European Bodies in the Fight against Crimes Affecting the EU's Financial Interests", (2016) *eu crim*, 144.

6 V. Covolo, "From Europol to Eurojust – towards a European Public Prosecutor. Where does OLAF fit in?", (2012) *eu crim*, 86.

7 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, pp. 1–71. See in this context also the articles in *eu crim* 3/2017.

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8 See: Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on an Action Plan on VAT, "Towards a single EU VAT area – Time to decide", COM(2016) 148 final.

9 Directive (EU) 2017/1371 of The European Parliament and of The Council on the fight against fraud to the Union's financial interests by means of criminal law, *O.J. L* 198, 28.7.2017, 29. See in this context A. Juszczak and E. Sason, (2017) *eu crim*, 80 et seq.

10 Art. 4 of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, *O.J. L* 248, 18.9.2013, 1.

11 Art. 1(2) of Regulation No 883/2013.

12 E.g., Art. 18(4) of Council Regulation No. 515/97 of 13 March 1997 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the Commission to ensure the correct application of the law on customs and agricultural matters, *O.J. L* 82, 22.3.1997, 1.

13 Art. 39(4) Council Regulation (EU) 2017/1939.

14 See recitals 51, 69, 105 of Council Regulation (EU) 2017/1939.

15 Recital 100 of Council Regulation (EU) 2017/1939.

16 A. Weyembergh and I. Armada and C. Brière, *The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area*, Study for the LIBE Committee, European Parliament, 2014, available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2014/510000/IPOL_STU\(2014\)510000_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/510000/IPOL_STU(2014)510000_EN.pdf), accessed 7 November 2017, pp. 59–62.

17 Art. 101(2) of Council Regulation (EU) 2017/1939

18 Art. 11 of Regulation No 883/2013.

19 Art. 101(3) of Council Regulation (EU) 2017/1939.

20 Art. 39(4) of Council Regulation (EU) 2017/1939.

21 Art. 25(2) of Council Regulation (EU) 2017/1939, with exceptions under a) and b).

22 Currently, the United Kingdom, Ireland, Denmark, Malta, The Netherlands, Poland, Sweden, and Hungary.

23 Setting up the exclusive competence of the EPPO over investigation of offences affecting the financial interests of the EU (as specified in the EPPO Regulation) should reduce workload of OLAF, which shall not investigate into the same facts. Reduction of workload implies reduction of staff positions as specified in working documents, e.g. Council of the EU, Working Paper, “EPPO: non-paper on the initial estimates of cost and benefits Analysis of the EPPO at the stage of enhanced cooperation”, Doc. WK 5745/2017, 22.5.2017.

24 Mainly in the sense of Art. 42 of Council Regulation (EU) 2017/1939.

25 See also: P. Palcu, “The Warranty of The Right to Defense Under an Operating European Department of Public Prosecution”, (2017) 19 *Journal of legal studies*, DOI: 10.1515/jles-2017-0009, 122–134.

26 In fact, Art. 101 of the EPPO Regulation allows the EPPO to request OLAF to make an „investigatory act“ for the purpose of an open criminal investigation (e.g. to “interview a person”, make an on-spot-check, obtain documents, etc.) outside of any judicial control and criminal law standards of procedural rights and guarantees.

27 In the sense of Art. 42 of Council Regulation (EU) 2017/1939.

28 Cf. European Ombudsman, 19 December 2014, case no. 1663/2014/OV.

29 J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF). An Analysis with a Look Forward to a European Public Prosecutor’s Office*, 2011, p. 278.

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