



Protection of the EU's Financial Interests in the Current Multiannual Financial Framework **La protection des intérêts financiers de l'UE dans l'actuel cadre financier pluriannuel** **Der Schutz der EU-Finanzinteressen im derzeitigen mehrjährigen Finanzrahmen**

Guest Editorial

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The European Anti-Fraud Office and the European Public Prosecutor's Office

Nadine Kolloczek and Julia Echanove Gonzalez de Anleo

Typologies of EU Fraud

Anca Jurma and Aura Amalia Constantinescu

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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Guest Editorial

Dear Readers,

This eucrim issue comes at a critical juncture in the protection of the EU taxpayers' money and the work of the European Anti-Fraud Office (OLAF). Like everyone, we at OLAF soon hope to see the light at the end of the pandemic tunnel and gradually return to a "new normal" lifestyle. For OLAF, these times mark an important turning point, namely confirmation that the EU has made substantial progress in modernising the EU framework to fight fraud against its financial interests. I especially welcome the start of operations of the European Public Prosecutor's Office (EPPO), which brings Regulation No. 2017/1939 into action. I also welcome the fact that we can work on the basis of Regulation No. 2020/2223, which reforms the previous "OLAF Regulation" No. 883/2013, and particularly aims to enhance the effectiveness of the administrative investigations carried out by OLAF.

After 20 years of reflection, followed by negotiations and subsequently intense preparations, the EPPO finally started its operations in June 2021. This is a major step towards creating a common criminal justice area in the European Union and definitely a step towards enhancing higher levels of prosecution and better protection of the EU's financial interests on the whole. One article in this eucrim issue examines the new framework and how OLAF is now equipped to work alongside – and in close cooperation with – the EPPO. It also assesses how the operational relationship of the two EU offices will ensure a coordinated approach towards expediting a reinforced and well-coordinated protection of the EU's financial interests. In order to facilitate this cooperation and coordination, OLAF and the EPPO signed a working arrangement in July of this year.

The EPPO started its operations at a particularly important time: the implementation of the Recovery and Resilience Facility (RRF), which is a key initiative of the European Union to mitigate the economic and social impact of the COVID-19 crisis and support EU citizens and businesses. The RRF will contribute to making European economies and societies more sustainable, resilient, and better prepared for the challenges and opportunities of the green and digital transitions.

In light of the unprecedented scale and delivery mechanism of the RRF, how are the EU's financial interests in the RRF pro-

tected against fraud and corruption? Another article provides an answer by analysing the legal safeguards in the RRF Regulation to protect the EU's financial interests. It also describes OLAF's role in the European Commission's assessment of the national Recovery and Resilience Plans and in the upcoming implementation phase of the Facility. I believe that our readers will reach the same conclusion as the authors: the combined efforts of all actors will be needed to ensure that the funds achieve their expected objectives and reach the intended recipients.



Beatriz Sanz Redrado

The Union's new Anti-Fraud Programme can also greatly contribute to these efforts. As part of the EU's new Multi-Annual Financial Framework for 2021–2027, the Programme merges the support previously offered under the Hercule III Programme and the support provided to Member States for the Anti-Fraud Information System and the Irregularity Management System (IMS). As outlined in a dedicated article on the Union Anti-Fraud Programme, both the increase in the new programme's budget and the launch of a dedicated Customs Control Equipment Programme shift the focus of support under the Anti-Fraud Programme towards fighting expenditure fraud.

Armed with these new instruments and especially with the strengthened cooperation between the different players in Europe's anti-fraud architecture, OLAF will be able to exercise its core tasks even more effectively in the future: to prevent, investigate, and protect the EU budget against fraud, corruption, and any other illegal activities affecting the Union's financial interests. In other words, to protect the EU taxpayers' money to the maximum.

Beatriz Sanz Redrado, European Anti-Fraud Office, Director of Directorate D (General affairs)

News

Actualités / Kurzmeldungen*



European Union

Reported by Thomas Wahl (TW), Cornelia Riehle (CR),
and Anna Pingen (AP)

Foundations

Fundamental Rights

Commission's 2021 Rule of Law Report

spot light On 20 July 2021, the Commission presented its second EU-wide Report on the Rule of Law.

The report consists of a [Communication](#) on the rule of law situation in the EU and of an assessment of the situation in [each Member State](#). The report follows the first Report on the Rule of Law presented on 30 September 2020 ([→eucrim 3/2020, 158–159](#)) and assesses the new developments that have occurred since.

Overall, there have been many positive developments in the Member States, including their response to the challenges identified in the 2020 report. According to the EU Commissioner for Justice, *Didier Reynders*, the “2020 Rule of Law Report has encouraged positive reforms related to the rule of law in a number of Member States.” The Vice-President for Values and Transparency, *Věra Jourová*, also addressed the importance of the Rule of Law Report as a useful preventive tool. She stressed that some serious

concerns remain, however, with regard to a number of Member States – especially pertaining to the independence of the judiciary and the freedom and pluralism of media.

The 2021 Report on the Rule of Law uses the same methodology and scope as that of the previous report, focusing on the following four pillars:

- The justice systems;
- The anti-corruption framework;
- Media pluralism and media freedom;
- Institutional issues linked to checks and balances.

Before dealing with the key aspects of the rule-of-law situation in Member States, the report addresses the special challenges the COVID-19 pandemic has posed for the rule of law. Beyond the immediate response to the health imperatives with emergency measures, it is necessary to reflect on how to better prepare for the impact of a crisis lasting for extended periods on the rule of law. In the Commission’s view, the COVID-19 pandemic represents an opportunity to increase awareness of the importance of the rule of law and the Member States’ responsibility to crises. Consequently, the Commission is pushing for further de-

bates at the EU level, in the European Parliament and the Council, and at the national level.

➤ *The justice system:*

While the report reveals that almost all Member States have continued their efforts to reform their justice systems, the objectives, scope, form, and state of implementation of these reforms vary. It notes that a number of Member States have taken steps to strengthen judicial independence and to reduce the influence of legislative and executive powers on the judiciary. Judicial independence is strengthened through the Councils for the Judiciary, reforms on the method of appointing judges, and reforms regarding the autonomy and independence of the prosecution services. However, the report raises concerns over a few Member States, in which the direction of reform efforts has been towards lowering safeguards for judicial independence. The Commission is concerned about the continued rise in political attacks against the judiciary and repeated attempts to undermine the reputation of judges in some Member States.

➤ *The anti-corruption framework:*

The 2021 report stresses that EU Member States continue to be among the world’s best performers, with ten Member States among the top twenty countries perceived as being least corrupt in the world. Several Member States have adopted or are in the process of adopting national anti-corruption strategies or

* Unless stated otherwise, the news items in the following sections (both EU and CoE) cover the period 1 July – 8 October 2021. Have a look at the eucrim website (<https://eucrim.eu>), too, where all news items have been published beforehand.

action plans. The report notes that most Member States have extensive legislation in place, providing the criminal justice system with tools to fight corruption, and that continuous efforts are being undertaken to fill gaps in existing frameworks. While efforts to repress corruption have significantly increased in several Member States, yet others are cause for concern as regards the effectiveness of investigation, prosecution, and adjudication of high-level corruption cases. The COVID-19 pandemic has also affected the fight against corruption, as it slowed down legal reforms or the adjudication of corruption cases in some Member States and increased the risk of corruption.

➤ *Media pluralism and media freedom:*

The COVID-19 pandemic has also affected media freedom and pluralism in the Member States. In comparison to the Media Pluralism Monitor 2020, a deterioration is apparent in three key indicators: freedom of expression, protection of the right to information and the journalistic profession, and protection of journalists. The lack of specific legislation in many Member States on the transparency and fair allocation of state advertising has not changed since the 2020 report. There is still a lack of regulation against political interference. The report stresses that pressure on the media has been manifest in a number of cases.

➤ *Institutional issues linked to checks and balances:*

The progress of constitutional reform processes to strengthen safeguards and checks and balances has continued since last year. The Commission reinforces that drawing on different views and the expertise of Member States can help in the system of checks and balances. During the COVID-19 pandemic, national checks and balances – including the parliaments, the courts, the ombudspersons, and other independent authorities – have played a crucial role. The Commission stressed, however, that the legislative process is a matter of concern in terms

of the rule of law in a few Member States (e.g., through frequent and sudden changes of legislation and through the expedited adoption of legislation for significant structural reforms of the judiciary). (AP)

Poland: Rule-of-Law Issues July – Mid-October 2021

This news item continues the overview of recent rule-of-law developments in Poland (as far as they relate to European law) since the last update in [eucrim issue 2/2021, 71–72](#).

- 29 June 2021: In the [cases *Broda and Bojara v. Poland*](#) (applications no. 26691/18 and 27367/18, →[eucrim 2/2020, 68](#)), the ECtHR holds that Poland violated the right of access to a court (Art. 6(1) ECHR) when the Polish Minister of Justice prematurely terminated the office of two vice-presidents of a Polish regional court on the basis of a law of 2017 implementing the judicial reform in Poland. The judges in Strasbourg emphasise the importance of safeguarding the independence of the judiciary and respect for procedural fairness in cases concerning the careers of judges. They observe that all the powers to remove judges from office were in the hands of the executive. The applicants had not been heard or informed of the reasons for the ministerial decisions and the law did not foresee any judicial, independent review of those removal decisions. The ECtHR also holds that Poland was to pay each of the applicants €20,000 in respect of pecuniary and non-pecuniary damage.

- 14 July 2021: The Vice-President of the CJEU grants interim measures in the infringement proceedings of Case C-204/21 and [orders Poland to immediately suspend](#) the application of the provisions recently introduced by the so-called “muzzle law” (→[eucrim 1/2020, 2–3](#)). In particular, Poland is requested to cease the exercise of the new competences by the disciplinary chamber. The interim injunction thus fully follows the request by the Commission, which

brought the action before the CJEU ([eu-crim 1/2021, 4](#)).

- 14 July 2021: The [Polish Constitutional Tribunal rules](#) that Poland is not obliged to comply with interim measures of the CJEU if they relate to the shape and functioning of the judiciary. This would counter the Polish constitution. The decision [triggers a debate](#) whether Poland steps towards a “legal polexit”.

- 15 July 2021: The Commission reacts to the decision of the Polish Constitutional Tribunal of 14 July 2021. The [Commission states](#) that it is “deeply concerned” by the decision and finds that it “reaffirms our concerns about the state of the rule of law in Poland.” Poland is expected “to ensure that all decisions of the European Court of Justice are fully and correctly implemented.”

- 15 July 2021: The CJEU [delivers its judgment](#) in the infringement proceedings brought by the Commission against Poland in October 2019 (→[eucrim 3/2019, 157–158](#)) and declares a central part of the judicial reform in Poland incompatible with EU law ([Case C-791/19](#)). The Commission opposed the disciplinary regime applicable to judges of the Polish Supreme Court and to judges of the ordinary courts that was introduced in 2017. Prior to the present judgment, which closes the proceedings, the CJEU, on 8 April 2020, granted interim measures by which Poland was ordered to suspend the relevant national provisions giving the powers to the Disciplinary Chamber of the Supreme Court (→[eucrim 1/2020, 4](#)). The CJEU now upholds all the complaints made by the Commission. In particular, the judges in Luxembourg find that the Disciplinary Chamber does not provide all the guarantees of impartiality and independence, and the disciplinary regime could be used in order to exert political control over judicial decisions or to exert pressure on judges with a view to influencing their decisions. Furthermore, Poland failed to guarantee essential rights in disciplinary cases against judges and to ensure that judges can decide to make

references for preliminary rulings to the CJEU without pressure. The judgment means that Poland must take the measures necessary to rectify the situation.

■ 15 July 2021: The Commission launches an infringement procedure against Poland enquiring statements on declarations of “LGBT-ideology free zones” by several Polish regions and municipalities since 2019. The Commission notes that Poland has failed to date to provide requested information on the matter. According to the Commission, this behaviour is “hampering the Commission’s ability to exercise its powers vested under the Treaties and failing to comply with the principle of sincere co-operation.”

■ 22 July 2021: In the case *Reczkowicz v. Poland* (application no. 43447/19, →eucrim 2/2020, 68), the ECtHR holds that the creation of the Disciplinary Chamber of the Polish Supreme Court, which was enacted in 2017 as part of the large-scale legislative reform of the Polish judicial system, was in breach of the ECHR. The underlying case concerned disciplinary proceedings against a barrister whose case was dismissed by the newly created Disciplinary Chamber of the Polish Supreme Court. The judges in Strasbourg find that the procedure for appointing judges had been unduly influenced by the legislative and executive powers. That amounted to a fundamental irregularity that adversely affected the whole process and compromised the legitimacy of the Disciplinary Chamber. The Disciplinary Chamber was not therefore a “tribunal established by law” within the meaning of the ECHR. The ECtHR also holds that Poland was to pay the applicant €15,000 in respect of non-pecuniary damage.

■ 27 July 2021: Hundreds of Polish judges sign an appeal to the government and the president of the Supreme Court demanding that “all obliged authorities [...] fully implement the order of the Court of Justice of the European Union of 14 July 2021 (C-204/21) and the judgment of this Court of 15 July 2021

(C-791/19), including the immediate cessation of the action of the Disciplinary Chamber of the Supreme Court.”

■ 14 August 2021: The Sejm (lower house of the Polish Parliament) passes legislation that intends to restrict ownership of Polish TV and radio companies. The ruling PiS party justifies the act based on the need to ward off the danger of takeovers of a TV station by companies from hostile countries. However, critics consider the law a disguised measure to get rid of the broadcasting network TVN, which the government perceives as preferring the opposition. TVN is indirectly controlled by a US company, which would be forced to sell its majority stake as a consequence of the reform. Hence, the law is also dubbed “Lex TVN”.

■ 7 September 2021: The Commission decides to further proceed against Poland since the country has not fully complied with the CJEU’s order of 14 July 2021 and its judgement of 15 July 2021. The Commission files a request to the CJEU to impose financial penalties on Poland to ensure compliance with the Court’s interim measures order. Since Poland continues to conduct disciplinary cases under the contested regime, the Commission sent a letter of formal notice (Art. 260(2) TFEU) restarting the infringement proceedings. If Poland does not comply, the Commission may bring the case to the CJEU again.

■ 10 September 2021: It is reported that Polish Minister for Justice, Zbigniew Ziobro, suspended a judge who implemented the CJEU and ECtHR judgments regarding the illegal Disciplinary Chamber of the Supreme Court. The judge was accused of having overstepped his powers when he examined the status of judges who were newly appointed by the politically influenced NCJ.

■ 16 September 2021: The European Parliament (EP) passes a resolution in which it condemns several recent rule-of-law developments in Poland. MEPs criticise, inter alia, the “Lex TVN” (bill passed on 14 August 2021 by the Sejm,

see above) as “an attempt to silence critical content and a direct attack on media pluralism.” MEPs also call on the Polish Prosecutor General and Minister of Justice to comply with the recent rule-of-law related judgments and orders of the CJEU (see above). They should also refrain from further questioning the primacy of Union law and withdraw their pending motion before the Polish Constitutional Tribunal to review the constitutionality of certain parts of the EU Treaties. Lastly, the resolution expresses other concerns over events deteriorating the rule of law in Poland, including smear campaigns against judges, journalists and human rights activists.

■ 6 October 2021: In a discussion with Commissioners Dombrovskis and Gentiloni, MEPs called on the Commission not to approve the Polish and Hungarian resilience and recovery plans unless the countries address all concerns over their rule-of-law deficiencies, in line with the conditionality rules for the access to EU funds. Although deadlines have expired, the Commission has not taken a final approval decision since it is not entirely satisfied with the measures against fraud and corruption in the submitted plans.

■ 6 October 2021: The CJEU raises again doubts on the independence of the Polish judiciary after the reforms of 2018. The case (C-487/19, W.Z.) concerned the transfer of a judge to another division of a regional court without his consent. The CJEU first notes that an ordinary court such as a Polish regional court forms part of the Polish system of legal remedies in the “fields covered by EU law” within the meaning of the second subparagraph of Art. 19(1) TEU. Thus, a transfer of a judge without consent is potentially capable of undermining the principles of irremovability of judges and judicial independence. Such transfer measure must be open to challenge before the courts in a procedure that fully safeguards the rights of the defence. In this context, the CJEU found that the circumstances by which the

judge of the Chamber of Extraordinary Control was nominated and who ordered dismissal of the actions against the transfer measure give rise to reasonable doubts concerning the independence of that body. Subject to final assessment, the referring court (civil chamber of the Polish Supreme Court) may declare such order null and void.

- 7 October 2021: [The Polish Constitutional Tribunal rules](#) on a motion submitted by Polish Prime Minister Mateusz Morawiecki of whether the CJEU is going too far in its rulings on Poland's judicial system and exceeds its competences under the European Treaties. The Constitutional Tribunal finds (case K 3/21) that Articles 1 and 19 of the EU Treaty as interpreted by the CJEU are inconsistent with the Polish Constitution. In doing so, the court not only denies the obligation to provide effective and independent legal protection in the area of Union law (a manifestation of the rule of law), but also the primacy of Union law over national constitutional law.
- 7 October 2021: In a first statement following the Polish Constitutional Tribunal's decision of the same day, [the Commission reaffirms](#) the primacy of Union law and stresses that it will make use of its powers under the Treaties to safeguard the uniform application and integrity of Union law.
- 8 October 2021: In a [press statement](#), Commission President Ursula von der Leyen voices her deep concerns over the judgment of the Polish Constitutional Tribunal of 7 October 2021. She stresses that the Commission will maintain the primacy of EU law.

- 19 October 2021: The [plenary session of the European Parliament](#) sees an exchange of blows between EU Commission President Ursula von der Leyen and MEPs on the one hand and Polish Prime Minister Mateusz Morawiecki on the other. They debated on the consequences of the Polish Constitutional Tribunal's ruling of 7 October that key provisions of the EU Treaty are inconsistent with the Polish Constitution (see above). In

her speech, von der Leyen reiterated that the ruling "puts into question the foundation of the EU and is a direct challenge to the unity of the European legal order". She listed the sanctions Poland will have to face: another infringement procedure, the use of the conditionality regulation to cut EU funds, and a renewed application of the Article 7-procedure determining a serious breach of EU values. The Polish Prime Minister denied that the Constitutional Court had acted illegally and argued that constitutional courts in other Member States issued similar rulings in the past. He also announced that the controversial Disciplinary Chamber of the Supreme Court would be dissolved and be replaced by new provisions. The majority of MEPs called on the Commission to use all the available tools to defend Polish citizens and to finally trigger the rule of law conditionality mechanism.

- 21 October 2021: Following the heated debate in plenary of 19 October, the [EP adopts a resolution](#) which "[d]eeply deplores the decision of the illegitimate [Polish] 'Constitutional Tribunal' of 7 October 2021 as an attack on the European community of values and laws as a whole, undermining the primacy of EU law as one of its cornerstone principles in accordance with well-established case-law of the CJEU." According to the resolution (adopted with 502 votes for, 153 against, and 16 abstentions), "the illegitimate 'Constitutional Tribunal' not only lacks legal validity and independence, but is also unqualified to interpret the Constitution in Poland." MEPs lists several actions that the Commission is called on to take urgently. (TW)

Hungary: Rule-of-Law Developments July – Mid-October 2021

This news item continues updates in previous eucrim issues on rule-of-law developments in Hungary (as far as they relate to European law). For the last overview, [→eucrim 2/2021, 72–73](#) with further references to previous reports.

- 8 July 2021: The [controversial law](#)

[enters into force](#) that was passed by the Hungarian Parliament on 15 June 2021 and, in particular, prohibits or limits access to content that propagates or portrays the so-called "divergence from self-identity corresponding to sex at birth, sex change or homosexuality" for individuals under 18 (dubbed by critics the "anti-LGBTIQ law", [→eucrim 2/2021, 72](#)).

- 8 July 2021: In a [resolution](#), the European Parliament (EP) "condemns in the strongest possible terms" the Hungarian anti-LGBTIQ law adopted by the Hungarian Parliament in June 2021 (see above). According to the EP, the law constitutes a clear breach of the EU's values, principles and law. The resolution also stresses that the introduced restrictive measures are part of a larger political agenda that is gradually dismantling fundamental rights in Hungary. The Council is called on to issue concrete recommendations to Hungary within the Article 7(1) procedure. MEPs call on the Commission to launch an accelerated infringement procedure and to use all tools in the CJEU, such as interim measures and penalties for non-compliance if necessary. Furthermore, the EP points to a number of issues in Hungary where the Rule of Law Conditionality Regulation ([→eucrim 3/2020, 174–176](#)) should be immediately triggered to protect the EU budget, and expresses serious concerns that the Hungarian Recovery and Resilience Plan may not comply with EU law.

- 15 July 2021: The Commission is [launching an infringement procedure](#) against Hungary over its "anti-LGBTIQ law" (see above). The Commission sees no valid justification why the exposure of children to LGBTIQ content as such would be detrimental to their well-being or not in line with the best interests of the child. Therefore, a letter of formal notice was sent to Hungary because the Commission considers that the law does not comply with a number of EU rules, including the Audiovisual Media Services Directive, the Treaty principles of

the freedom to provide services (Art. 56 TFEU) and the free movement of goods (Art. 34 TFEU) as well as several fundamental rights enshrined in the Charter, such as the right to human dignity, freedom of expression and information, the right to respect of private life, and the right to non-discrimination.

■ 15 July 2021: In the infringement case for unlawfully restricting access to the asylum procedure, the Commission decides to [refer Hungary to the CJEU](#).

In 2020, Hungary introduced an “asylum pre-procedure” before a non-EU national can make an application for international protection in Hungary. Hungary justified the measure based on the danger posed by the COVID-19 pandemic. By contrast, the Commission considers it a breach of the [Asylum Procedures Directive](#) (Directive 2013/32/EU), read in light with Art. 18 CFR (right to asylum).

■ 30 July 2021: Hungary’s National Election Committee [approves the government’s request for a referendum](#) on Hungary’s LGBTIQ law. In early 2022, before the parliamentary elections, Hungarians will be asked, *inter alia*, whether they support the holding of sexual orientation workshops in schools without parental consent and whether they believe that gender re-assignment should be promoted amongst children and made available to them. Critics see the referendum as a move by Prime Minister Victor Orban to back the controversial “anti-LGBTIQ law” against “attacks from Brussels.”

■ 1 September 2021: In a [letter to a number of UN special rapporteurs](#)

23 civil society organisations raise serious concerns over the Hungarian government’s attacks on the rights of LGBTQIA+ people. The letter calls on the UN special rapporteurs to put pressure on the Hungarian government to change track, and to call on the EU to launch further infringement proceedings against the country.

■ 6 October 2021: In a discussion with Commissioners Dombrovskis and Gentiloni, [MEPs called on the Commission](#)

not to approve the Hungarian and Polish resilience and recovery plans unless the countries address all concerns over their rule-of-law deficiencies, in line with the conditionality rules for the access to EU funds. (TW)

Area of Freedom, Security and Justice

2021 EU Justice Scoreboard: Focus on Digitalisation of Justice

spot light

On 8 July 2021, the Commission published the [2021 EU Justice Scoreboard](#). The Justice Scoreboard is an annual overview providing comparative data on the efficiency, quality, and independence of justice systems in all EU Member States (for the Scoreboards of previous years, see [eucrim 2/2020, 74–45](#), [eucrim 1/2019, 7](#); [eucrim 2/2018, 80–81](#), and [eucrim 2/2017, 56](#)). In comparison to the previous overviews, the 2021 Scoreboard refines different indicators and, for the first time, focuses on the digitalisation of justice, which has been of paramount importance in keeping the courts functional during the COVID-19 pandemic.

Overall, the 2021 Scoreboard showed that a large number of Member States continued their efforts to further improve the effectiveness of their justice systems. The COVID-19 pandemic created new challenges, indicating the need for an acceleration of the digitalisation of justice systems. The key findings of the 2021 EU Justice Scoreboard are as follows:

➤ Efficiency:

Since 2012, the efficiency of the judiciary in civil, commercial, and administrative cases has improved or remained stable in ten Member States, while it decreased in nine Member States.

➤ Quality:

■ Legal aid: Legal aid, which has a major impact on access to justice, has become less accessible in some Member States compared to 2019. The accessibility of legal aid has been tightened in

approximately one third of the Member States and expanded in five Member States, especially as regards partial legal aid.

■ Training of judges: The number of judges participating in training on IT skills grew slightly. Most Member States provide training on victims of gender-based violence, and more than half of the Member States provide training on gender-sensitive practices, asylum seekers, or persons with different cultural, religious, ethnic, or linguistic background.

■ Digitalisation: Almost all Member States provide access to some form of online information about their judicial system. Differences are evident regarding information content and how adequately it responds to people’s needs. While most Member States have case management systems, videoconferencing systems, and the possibility for teleworking in place, the Commission sees room for improvement in access to automatic case allocation systems, and artificial intelligence. Additional improvements are also needed with regard to communication between certain legal professionals and/or national authorities via secure electronic solutions. The Commission is also pushing for progress regarding online access to court judgments

➤ Independence:

The general public’s perception of courts’ and judges’ independence has improved in over two thirds of the Member States compared to 2016. Compared to last year, however, the general public’s perception of independence decreased in almost half of all Member States. The main reasons for the perceived lack of independence of courts and judges are interference or pressure from governments and politicians and pressure from economic or other specific interests.

➤ Background:

The EU Justice Scoreboard was launched in 2013 as one of the tools in the EU’s [Rule of Law toolbox](#), which is used by the Commission to monitor justice reforms in Member States and to find tailor-made responses. (AP)

Schengen

CJEU Rules on Obligation to Carry a Valid Identity Card when Traveling to Another Member State

On 6 October 2021, the [CJEU decided](#) that a Member State may require its nationals, on pain of sanctions, to carry a valid identity card or passport when travelling to another Member State, irrespective of the means of transport used and the route.

In the case at issue ([C-35/20](#)), Finnish national A took a round trip between Finland to Estonia on a pleasure boat in August 2015. During that trip, he crossed international waters between Finland and Estonia. Since A was travelling without his valid Finnish passport, he was unable to present it or any other travel document at the border check carried out in Helsinki on his return, even though his identity could be established with his driving licence. The Finnish public prosecutor charged A with a minor border offence: according to Finnish law, Finnish nationals must, on pain of criminal sanctions, carry a valid identity card or passport when they travel to another Member State or enter Finland by arriving from another Member State – by whatever means of transport and route.

The first instance court decided that A had committed an offence by crossing the Finnish border without being in possession of a travel document. No penalty was imposed on him, however, since the offence was minor. The fine that could be imposed on him under the Finnish Penal Code is not small, since the fine can be up to 20% of the offender's monthly net income (in the concrete case: over €95,000). The public prosecutor appealed before the Supreme Court of Finland, which asked the CJEU about the compatibility of Finnish law (in particular, the rules on criminal penalties) with the right of Union citizens to freedom of movement as laid down in Art. 21 TFEU.

The CJEU first interpreted Directive 2004/38/EC, which clarifies Art. 21

TFEU. With regard to the wording in Art. 4(1) of that Directive ("with a valid identity card or passport"), the CJEU found that a Member State may indeed require its nationals, on pain of sanctions, to carry a valid identity card or passport when travelling to another Member State, irrespective of the means of transport used and the route. Regarding the question of punishability for not having carried an identity card or passport when travelling, the judges in Luxembourg acknowledged the autonomy of the EU Member States and conceded that it is up to them to impose a fine to penalise failure to comply with a formal requirement relating to the exercise of a right conferred by EU law. The sanction must, however, be in line with the principles of EU law: in particular, it must be proportionate to the seriousness of the infringement. Since the offence at issue was not serious, a heavy financial penalty, such as a fine amounting to 20% of the offender's average net monthly income, is therefore not proportionate to the seriousness of that offence. (AP)

AG: Reintroduction of Internal Border Checks for Longer than Six Months

On 6 October 2021, Advocate General (AG) *Saugmandsgaard Øe* presented his [opinion in Joined Cases C-368/20 and C-369/20](#). According to the AG, "a Member State faced with persistent serious threats to public policy or internal security may reintroduce controls at its internal borders for longer than only six months."

► *Background of the cases:*

Austria reintroduced controls at the Slovenian border in conjunction with the migration crisis in September 2015. Those controls were continued on the basis of various exceptions provided for in the Schengen Borders Code. In 2018/2019, Austria made use of the legitimate exception in the Schengen Borders Code that allows Member States to temporarily reintroduce internal border controls in exceptional circumstances and when faced with a serious threat to

public policy or internal security. This happened twice in a row, each time for a period of six months.

NW was ordered to pay a fine of €36 in Austria for having crossed the Slovenian-Austrian border in August 2019 without being in possession of a valid travel document. He was controlled again trying to enter Austria by car from Slovenia in November 2019. The defendant challenged these two controls as well as the imposed fine before the *Landesverwaltungsgericht Steiermark* (Regional Administrative Court, Styria, Austria).

The Landesverwaltungsgericht Steiermark had doubts as to the lawfulness of the seamless juxtaposition of the exemption regulations, since such a cumulation is not provided for in the Schengen Borders Code. In essence, the referring court wished to know whether the Schengen Borders Code precludes the reapplication of the exception in the event that a Member State is still faced with a serious threat to public policy or internal security after expiry of the six-month period.

► *The AG's opinion:*

First, the AG takes the view that serious threats to public policy or internal security are not necessarily limited in time. This means that the Member States' powers and responsibilities in this area cannot be framed by absolute periods, as the Schengen Borders Code aims not only to ensure the absence of any internal border controls but also to maintain public policy and to combat all threats to public policy. Thus, reapplication of the exception several times in a row is to be admitted.

Second, the AG argues that, if the re-application took place several times in a row and on the basis that the "renewed threat" was similar to the preceding serious threat, the "enhanced proportionality condition" becomes stricter each time the exception is reapplied. The Member State concerned must clarify why the renewal of controls would be appropriate as a necessary measure by explain-

ing why another, less coercive measure would not be sufficient. The AG also stresses that the reapplication decision must be notified to the Commission before its adoption, and the Commission must critically examine the proportionality of the measure.

Third, the AG points out that checks on persons at internal borders must be consistent with the right to free movement of EU citizens. The AG concludes that the possible imposition of a penalty for a breach of the obligation to present a passport or an identity card is not contrary to EU law under these circumstances. (AP)

EDPS Opinion on the Commission's Proposed Regulation for a Stronger and More Resilient Schengen Area

On 27 July 2021, the European Data Protection Supervisor (EDPS) published his [Opinion](#) on the European Commission's proposal for a "Council regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis and repealing Regulation (EU) No. 1053/2013. The proposal was launched together with the new Commission strategy for a fully functioning and resilient Schengen area ([→eucrim 2/2021, 76](#)).

The EDPS welcomed the fact that the proposal acknowledged the protection of fundamental rights, including the protection of personal data, as one of the key building blocks of the Schengen area. The EDPS supports the objective to strengthen the implementation of fundamental rights safeguards under the Schengen acquis. The EDPS also appreciates the reinforcement regarding the cooperation with relevant Union bodies, offices and agencies that are involved in the implementation of the Schengen acquis.

The EDPS recommends, however, the establishment of a non-exhaustive list of relevant policy fields that would be subject to evaluation in order to clearly define the scope of the Schengen

evaluations. In addition, the EDPS calls on to further clarify the proposed extension of the scope of the evaluation and monitoring mechanism, which should clearly distinguish the competencies of different Union bodies, agencies and offices involved in the Schengen evaluation. In this sense, the new legislation must guarantee the EDPS' independence when he performs his supervisory tasks. (AP)

ETIAS and EES Progress

At the beginning of October 2021, Frontex welcomed 41 new staff members joining the Agency to work at the ETIAS Central Unit. They will contribute to [developing](#) the European Travel Authorisation and Information System (ETIAS) ([→news of 16 January 2019](#)). Since the beginning of October 2021, air and sea carriers as well as international carriers transporting groups over land by coach are also able to be [registered](#) for ETIAS as well as for the Entry/Exit System (EES) on the eu-LISA website. (CR)

Legislation

EP Resolution on AI in Criminal Law and Policing

On 6 October 2021, the European Parliament (EP) adopted a [resolution](#) regarding artificial intelligence (AI) in criminal law and its use by the police and judicial authorities in criminal matters. The resolution was adopted by 377 to 248 votes with 62 abstentions.

According to the majority of MEPs, AI applications offer great possibilities for the field of law enforcement. The use of AI not only helps improve working methods in law enforcement and judicial authorities but is also useful in combatting certain types of crime more efficiently (e.g., money laundering and terrorist financing, online sexual abuse, etc.).

MEPs are also aware of the potential for bias and discrimination arising from the use of AI applications. They noted that biases can be inherent in underly-

ing datasets and that these biases tend to gradually increase, perpetuate, and amplify existing discrimination.

Another point of contention concerned the fact that many AI identification systems currently misidentify and misclassify racialised people, individuals belonging to certain ethnic communities, LGBTI people, children, the elderly, and women. In order to counter these problems, strong efforts should be made to avoid automated discrimination and bias. For this purpose, interdisciplinary research and input is required, including input from the fields of science and technology, critical race studies, disability studies, and findings from other disciplines.

Specific human oversight is necessary before operating certain critical applications, in order to avoid data leaks, data security breaches, and unauthorised access to personal data and other information related to critical applications. Law enforcement and judicial authorities should only use AI applications that adhere to the principle of privacy and data protection by design.

The resolution reinforces the fact that individuals working in the area of law enforcement and justice should not rely blindly on the seemingly objective and scientific nature of AI and always keep in mind that the results delivered by AI might be incorrect, incomplete, irrelevant, or discriminatory. It follows that decisions giving legal or similar effect always need to be taken by humans. Judicial and law enforcement authorities need to uphold extremely high legal standards and ensure human intervention. In this context, MEPs have called for a ban on the use of AI to propose judicial decisions. They cautioned that predictive policing cannot constitute the sole basis for an intervention, because it cannot answer the question of causality and cannot make reliable predictions on individual behaviour.

The resolution also calls for permanent prohibition of the use of automated analysis and recognition of human fea-

tures in publicly accessible spaces. Critics also voiced concern over the use of private facial recognition databases, such as Clearview AI, by law enforcement actors and intelligence services.

Ultimately, MEPs are in support of a ban on AI mass-scale scoring of individuals, especially if used by law enforcement authorities and representatives of justice. In their opinion, this practice represents a loss of autonomy and a danger to the principle of non-discrimination and to fundamental rights.

The resolution from the EP comes after the proposed regulation from the European Commission laying down Harmonized Rules on Artificial Intelligence from April 2021 (→ see also [eucrim 2/2021, 77](#)) and after the EDPB/EDPS Joint Opinion on the AI Proposal that pointed the danger of the use of real time remote biometric identification systems by law enforcement authorities out (→[eucrim 2/2021, 77–78](#)). (AP)

Study on Biometric Recognition and Behavioural Detection

In August 2021, a [study](#) assessing the ethical aspects of biometric recognition and behavioural detection techniques with a focus on their current and future use in public spaces was released. The study was commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs at the request of the JURI and PETI Committees.

The study notes that biometric identification, biometric categorisation, behavioural detection, emotion recognition, brain-computer-interfaces (BCIs), and similar techniques are serving a broad variety of purposes (e.g., healthcare, law enforcement) and are being used to an increasing extent by public and private bodies. The aim of the study was therefore to analyse different types of biometric techniques and to draw conclusions for EU legislation. The study provided the following:

- A suggestion for a comprehensive definition of “biometric techniques” and

for grouping them into authentication/identification, categorisation and detection techniques;

- A stock-taking of related legal instruments, case-law and literature;
- A thorough ethical and legal assessment of the implications raised;
- Recommendations on a possible legislative framework for responsible use of biometric techniques.

The study stressed that the main ethical issue of biometric identification lies within the so-called enrolment phase – the creation and storage of a unique template that identifies a particular person. By creating this template, unique physical features of a human being are being transformed into digital data (a process called the “datafication of humans”). The study pointed out that the collection and use of features that are part of the human body interferes with the human’s personal autonomy and dignity. A person whose features have been collected and stored cannot escape biometric identification as there is a risk that the template can come into the possession of anyone.

Biometric identification methods in public spaces, understood as large-scale surveillance of individuals, also raise ethical issues. The study warns that the use of biometric categorisation of human individuals may lead to risks of discrimination, stigmatisation, and the drawing of inappropriate inferences. Categorising individuals may lead to a standardised profiling or scoring to achieve a given goal in a given social context.

The potentially intrusive nature of biometric detection of human conditions (e.g., intention to commit a crime, fear, fatigue or illness) is one of the major ethical concerns because often very intimate traits can be analysed.

The study raised the question of whether the existing and proposed legislation adequately addresses the ethical and fundamental rights issues occurring due to the use of biometric recognition. This especially concerns the Commiss-

sion [proposal for an Artificial Intelligence Act \(AIA\) of 21 April 2021](#) (→ [eucrim 2/2021, 77](#)). According to the study, the proposal is a step in the right direction, but it failed to address ethical concerns in a consistent manner. Therefore, several recommendations are made in this respect. These include, *inter alia*:

- A new Title IIa on “restricted AI applications” should be inserted. The new title should deal with “real-time” remote biometric identification in a more comprehensive way, without the limitation to law enforcement purposes. It should also include a provision on other biometric identification systems, emotion recognition systems and biometric categorisation systems in order to limit the admissibility of such systems;
- Art. 5(1)(d) and (2) to (4) of the proposal on real-time remote biometric identification should be removed from Art. 5 (entitled “prohibited AI practices”) and transferred to a new Title IIa on “restricted AI practices”;
- The list of prohibited AI practices’ (Art. 5 (1)) should be supplemented by a prohibition of total or comprehensive surveillance of natural persons in their private or work life and of infringements of mental privacy and integrity;
- The Commission should have the possibility to adapt the list of prohibited AI practices periodically, potentially under the supervision of the European Parliament. (AP)

Institutions

Council

Slovenian Presidency: State of Play of Legislative JHA Items

At the meeting of the Justice and Home Affairs Ministers of the EU Member States on 7 October 2021, the Slovenian Council Presidency presented an overview of the [state of play of current legislative dossiers](#) in the fields of security and criminal/civil justice. These include:

- Proposal for a Regulation introducing a screening of third-country nationals at the external borders (presented by the Commission in September 2020);
- Proposal for amending the Europol Regulation as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol's role on research and innovation;
- Proposal for a new Regulation on the establishment and operation of an evaluation and monitoring mechanism to verify the application of the Schengen acquis;
- Legislative package on e-evidence;
- Proposals regarding alignment of EU instruments in the field of criminal law with EU rules on the protection of personal data;
- Regulation on e-CODEX. (TW)

European Court of Justice

CJEU Clarifies Duty to Refer for National Last Instance Courts

On 6 October 2021, the CJEU handed down a judgment in which it clarifies its case law in *Cilfit* regarding the conditions under which national last instance courts may refrain from making a reference for a preliminary ruling. The reference ([C-561/19 – Consorzio Italian Management and Catania Multiservizi SpA/Rete Ferroviaria Italiana SpA](#)) concerned a situation where a reference for a preliminary ruling has already been made in the case at issue, but the parties asked the referring court to refer other questions for a preliminary ruling at an advanced stage of the proceedings.

The Grand Chamber judgement of the CJEU reasserts the criteria identified in the 1982 judgment in *Cilfit*, which provides for three situations in which national courts or tribunals of last instance are not subject to the obligation to make a reference for a preliminary ruling – an obligation laid down in Art. 267 TFEU:

- The question is irrelevant for the resolution of the dispute;

- The provision of EU law in question has already been interpreted by the Court;
- The correct interpretation of EU law is so obvious as to leave no scope for any reasonable doubt.

The CJEU then further clarifies the third situation: The absence of reasonable doubt must be assessed in the light of the characteristic features of EU law, the particular difficulties to which the interpretation of the latter gives rise, and the risk of divergences in judicial decisions within the EU. The national last instance court/tribunal must observe the following:

- It must be convinced that the matter would be equally obvious to the other last instance courts/tribunals of the Member States and to the CJEU;
- It must vigilantly assess diverging lines of case law (among the courts of a Member State or between the courts of different Member States) of whether there is any reasonable doubt as to the correct interpretation of the provision in question;
- It must state the reasons for the decision to be relieved from the obligation to make a reference for a preliminary ruling, whereby the reasoning must show that the matter involves one of the three situations as established in *Cilfit*;

If the question concerning the interpretation of EU law does not involve any of those situations, the last instance court/tribunal must bring the matter before the CJEU. The fact that that court or tribunal has already made a reference to the CJEU for a preliminary ruling in the same national proceedings does not affect the obligation to make a reference for a preliminary ruling when a question concerning the interpretation of EU law the answer to which is necessary for the resolution of the dispute remains after the CJEU's decision. Nonetheless, the national court/tribunal can refrain from a new reference for a preliminary ruling if national procedure law provides for the inadmissibility of the parties' pleas.

By its judgment, the CJEU basically maintains its case law on *acte éclairé* and *acte clair*. The Advocate General advised the CJEU to fully revise its previous case law on the exceptions from the obligation for last instance courts/tribunals to request preliminary rulings ([→eucrim 1/2021, 12](#)). (TW)

General Court of the EU: New Member

On 10 September 2021, Mr Pēteris Zilgalvis entered office as Judge of the General Court of the European Union for the period from 10 September 2021 to 31 August 2025.

Before joining the General Court, Mr Zilgalvis served as Head of Unit for Digital Innovation and Blockchain at the European Commission and also held several positions at the European Commission, Council of Europe, and in the Latvian administration. (CR)

New Judges and Advocates General Appointed

On 7 July 2021, representatives of the governments of the EU Member States appointed two judges and two advocates general to the European Court of Justice. All four terms of office end on 6 October 2027.

For the Court of Justice, Ms *Küllike Jürimäe* was reappointed as judge. Ms *Jürimäe* has been a judge at the CJEU since 2013, formerly having served as judge at the General Court of the EU from 2004 to 2013. Before joining the Courts, Ms *Jürimäe* held several positions in the Estonian judiciary.

Maria Lourdes Arastey Sahún was also appointed to the post of judge at the Court of Justice. Before joining the CJEU, Ms *Arastey Sahún* served as judge at the Spanish Supreme Court. She has also been an associate professor in labour law at the University of Barcelona and vice-president of the European Association of Judges for Mediation (GEMME).

Having held the position since October 2015, Mr *Manuel Campos Sánchez-Bordona* was reappointed as advocate

general of the Court of Justice. Before joining the CJEU, Mr *Campos Sánchez-Bordona* held various positions in the Spanish judiciary, the last one as judge at the Administrative Chamber of the Spanish Supreme Court (1999–2015).

Ms *Tamara Ćapeta*, former professor of European public law at the University of Zagreb and holder of the Jean Monnet Chair, was also appointed to the post of advocate general of the Court of Justice.

Lastly, Ms *Maja Brkan* took up office as judge at the General Court of the European Union for the period from 10 June 2021 to 31 August 2025. Before joining the Court, Ms *Brkan* held the position of associate director of the Maastricht Centre for European Law and was an associate professor of EU law at the University of Maastricht. (CR)

OLAF

General Court Defines Conditions for Public Access to OLAF Final Report

On 1 September 2021, the General Court annulled the decision of the European Anti-Fraud Office (OLAF) not to grant (partial) access to its final investigation report. The case (T-517/19, Homoki v. Commission) concerned the request of an activist from a civil association to grant access to the final report of OLAF's investigation into a street lighting project carried out in Hungary with the financial participation of the EU.

The General Court had to interpret the limits for the exceptional refusal of public access to Commission documents pursuant to Regulation 1049/2001 (Art. 4). The General Court found that, in principle, OLAF can rely on the general presumption that access to the administrative file processed by OLAF would undermine the protection of the purpose of its investigations. However, there must be limits to this general presumption, otherwise public access would be made subject to an uncertain, future and possibly distant event, de-

pending on the speed and diligence of the various authorities.

OLAF could no longer invoke the objective of protecting its own investigative activities if the investigations had already been completed. This was the case here, since the Hungarian authorities had already closed the follow-up procedure by a decision finding that there was no infringement. Hence, also the presumption of innocence of the persons concerned can no longer justify a refusal of access.

The decision of the General Court is not final yet. An appeal against the decision may be lodged to the ECJ, limited to points of law, within two months. (TW)

OLAF Supported Strike against Illegal Cigarette Production

On 22 July 2021, OLAF reported on a successful strike against a criminal network that illegally produced and sold cigarettes. The operation dubbed “Alecrín” mainly involved Spanish and Portuguese law enforcement authorities and already started in 2019. Targeted enforcement activities were carried out between May and July 2021. They resulted in 29 arrests and the seizure of €2 million in cash. In total, 27 million cigarettes and 51 tonnes of tobacco were seized. It is estimated that the criminal gang defrauded over € 10 million from public revenue. OLAF supported the exchange of information, coordinated investigations and assisted in defining an international investigation strategy. (TW)

Operation OPSON X: Over 15,000 Tonnes of Illegal Food and Beverages Taken off the Market

On 22 July 2021, Europol, Interpol and OLAF reported on the successes of operation “OPSON X”. This operation, which is carried out each year, targets trafficking of counterfeit and substandard food and beverage. For operations in previous years →[eucrim 2/2020, 80](#) and [eucrim 2/2019, 90](#). The meanwhile tenth operation of this kind was carried out

from December 2020 to June 2021 and involved law enforcement authorities in 72 countries (including 26 EU Member States). In total, 15,451 tonnes of illicit products with a value of about €53.8 million were seized; about 68,000 checks were carried out, 663 arrest warrants were issued, 2,409 locations were searched and 42 criminal networks were disrupted.

OLAF mainly supported actions against counterfeit and substandard beverages. The Office coordinated actions in 19 EU Member States and three non-EU countries. As a result, law enforcement authorities seized more than 1.7 million litres of wine, beer and other alcoholic beverages. Not only fiscal infringements but also food safety violations were reported. *Catherine De Bolle*, Europol's Executive Director, and *Ville Itälä*, OLAF's Director-General, stressed that illicit trade with food and beverages does not only harm the economic interests of the EU, but also pose a real health risk to European consumers. Interpol Secretary General *Jürgen Stock* pointed out that operation OPSON demonstrates the massive profits food crime can generate which can then fund other organised crime activities. (TW)

OLAF-Assisted Operation Dismantles Organisation Smuggling Refrigerant Gases

Within the framework of the biggest operation against trafficking of refrigerant gases (Operation Verbena), Spanish authorities were able to dismantle a criminal organisation that illicitly traded and smuggled the gases. The business is lucrative since the import of refrigerant gases (also called F-gases or hydrofluorocarbons (HFCs)) is subject to strict quotas and regulations in the EU. Operation Verbena was supported by OLAF which delivered intelligence to Spanish law enforcement authorities. The operation led to the arrest of five persons and the seizure of 27 tonnes of illicit refrigerant gases. According to estimates, the criminal group is responsible for the

emission of over 234,000 tonnes of carbon dioxide into the environment – that is roughly equivalent to a car driving all the way around the globe almost 9,000 times. The criminal organisation smuggled the gases from China to Spain by falsifying customs declarations and then sold HFCs to companies in Spain, Germany, France, Portugal, and Senegal.

OLAF's Director-General *Ville Itälä* praised the excellent cooperation between OLAF and the Spanish police and tax authorities. He pointed out that OLAF is increasingly involved in smuggling activities that damage the environment. (TW)

Joint Action Day “Arktos 3”

During the [Joint Action Day “Arktos 3”](#) carried out in June 2021, law enforcement authorities in seven EU Member States succeeded in seizing more than 6.7 million cigarettes, and 2.6 tonnes of raw tobacco, along with half a tonne of illegal drugs. Fifteen smugglers were arrested and more than 220 fraudulent documents detected. Operation Arktos targeted criminal activities at the EU's northeastern land border, which is a popular route for smuggling goods into the EU. The operation was led by Frontex and assisted by OLAF, Europol, Eurojust, and Interpol. [OLAF supported](#) mainly by exchanging information between EU Member States and customs authorities. The operation was coordinated under the umbrella of the European Multidisciplinary Platform against Criminal Threats (EMPACT), a four-year plan for the fight against serious and organised crime ([→eucrim 2/2021, 89–90](#) and [eucrim 2/2020, 114](#)). It was the third time that operation Arktos was carried out. It focuses on detecting excise goods smuggling via EU external borders ([→eucrim 4/2020, 278](#)). (TW)

OLAF Helps Knock Down Rum Smugglers

With the support of OLAF, law enforcement authorities in Spain, the Netherlands, Honduras, and Guatemala suc-

ceeded in stopping the activities of a criminal group that smuggled fake rum from Central America via the Netherlands to Spain. [OLAF reported on 6 July 2021](#) that the network invented a sophisticated scheme and production process, which involved not only the liquor but also bottles and labels. Investigations resulted in the seizure of roughly 340,000 bottles with an estimated value of €4.5 million. Hundreds of suspicious containers were detected, and an illegal production plant was dismantled in Honduras. OLAF mainly coordinated the exchange of information between the national customs and law enforcement authorities and provided risk analyses, which helped detect suspicious containers. In February 2020, OLAF already reported on the seizure of a part of the fake rum bottles which were destined for the Spanish market ([→eucrim 1/2020, 12](#)). Investigations against the network lasted several years. (TW)

European Public Prosecutor's Office

EU Chief Prosecutor: EPPO Is Understaffed

In a discussion with MEPs of the Budgetary Control Committee on 1 October 2021, [European Chief Prosecutor Laura Kövesi stressed the staff shortages](#), which prevent the EPPO from effectively fulfilling its duties. Kövesi reported on the first results of EPPO's activities since its operational start on 1 June 2021, but she also pointed out that additional human resources are urgently needed. She called for at least 130 staff (in addition to the existing 120 employees), in particular financial investigators, IT specialists and support staff. MEPs promised support during the upcoming negotiations on the EU budget for 2022. (TW)

EPPO: Successful German-Austrian Operation against Controversial Mask Deal

EPPO investigations into COVID-19-related frauds become increasingly

important. On 29/30 September 2021, the [EPPO conducted searches in Austria](#) as part of a cross-border investigations into customs fraud in relation to the import of FFP2 masks from China to the EU. The investigations are led by a German European Delegated Prosecutor. They revealed that the masks were allegedly deliberately undervalued in order to circumvent customs duties. Since the masks were imported to Austria via Frankfurt (Germany), searches had to be carried out in Vienna and other locations in Austria and several witness statements were taken. The EPPO closely cooperated with the Austrian Central Specialised Prosecution Office for the Fight Against Economic Crimes and Corruption (*WK-StA*), which is conducting parallel investigations. (TW)

EPPO and ECA Sign Working Arrangement

On 3 September 2021, the EPPO and the European Court of Auditors (ECA) [signed a working arrangement](#). Both bodies emphasise their common interest in the effective fight against fraud, corruption and any other criminal offence or illegal activity adversely affecting the EU's financial interests as well as the need to receive appropriate information so that they can fulfil their respective mandates. Therefore, the arrangement sets out a structured framework for cooperation and the establishment of a cooperative relationship between the EPPO and the ECA. The arrangement includes the following:

- Designation of permanent contact points for the exchange of information;
- Transmission of information from the ECA to the EPPO that is relevant for the EPPO to exercise its competence and investigative powers;
- Access to relevant information in ECA's databases;
- Precautionary measures by the ECA so that the EPPO can pursue its investigations;
- Specific provisions on EPPO's investigations involving ECA members or staff;

- Information duties by the EPPO regarding dismissals and transfers of cases;
- Information exchange in the context of ECA's audits concerning the EPPO;
- Cooperation on trainings and workshops and exchange of staff.

The two bodies also agreed to meet on a regular basis. (TW)

EPPO Concluded Working Arrangement with European Commission



The European Public Prosecutor's Office (EPPO) and the European Commission [signed a working agreement](#). The agreement implements Art. 103(1) of Council Regulation (EU) 2017/1939, which provides that the EPPO shall establish and maintain a cooperative relationship with the European Commission for the purpose of protecting the financial interests of the Union. This arrangement shall set out the modalities for their cooperation. The agreement applies to the European Commission services except for OLAF (if it exercises its investigative functions) and the European External Action Service (EEAS). The main features of the [Working Agreement](#) between the EPPO and the Commission are:

- The Commission will report to the EPPO without undue delay any criminal conduct in respect of which the EPPO could exercise its competence;
- The Commission will transfer to the EPPO any information and evidence relating to the criminal conduct;
- Reporting by the Commission will be made via templates and contact points (the latter are specified in Annex I of the Working Arrangement);
- The EPPO is entitled to request further relevant information available to the Commission in specific cases, including information on infringements that caused damage below the threshold indicated in Art. 25(2) of Regulation 2017/1939;
- Such information requests will be addressed via the contact points;
- The Commission will encourage its Members and staff members to contrib-

ute to the investigations carried out by the EPPO and will facilitate such contribution, subject to the provisions of the Staff Regulations regarding disclosure of information and the analogous requirements for Member of the Commission;

- The EPPO will be obliged to send a reasoned request to the Commission in order to receive permission for disclosure of information by Commission staff officials, in particular the authorization of staff to appear as witness or expert witness in the different stages of the criminal proceedings; the Commission is obliged in this context to cooperate closely with the EPPO throughout the process;
- The EPPO has several information obligations towards the Commission – it will, for instance, inform the Commission “without undue delay” of the initiation of an investigation if the Commission had reported criminal conduct and “as soon as possible” if the EPPO has no ground to initiate investigations, decided not to be competent, or did not exercise its competence;
- The EPPO will also provide the Commission with sufficient information (in particular information on the decision to bring a case to judgment) in order to allow the Commission to take appropriate measures in view of its responsibility for the implementation of the budget as well as its responsibility as Appointing Authority for its staff;
- The mutual obligations as regards such appropriate measures are further detailed in the Working Agreement – measures include precautionary administrative measures for the protection of the EU's financial interests, disciplinary actions, and intervention of the Commission as civil party in criminal proceedings;
- The EPPO will have access to the databases and registers of the Commission, whereby an annex to the Working Agreement lists the relevant databases to which the EPPO can have direct access or only indirect reading access;

- In case of indirect access EPPO's requests for information stored must be made via the contact points; the Commission must extract the information from the databases and submit it to the EPPO “without undue delay”;
- The EPPO and the Commission will cooperate closely and in a timely manner as regards the application of the “general conditionality mechanism” for the protection of the EU's financial interests set out in Regulation (EU, Euratom) 2020/2092 ([→eucrim 3/2020, 174–176](#)). In particular, the EPPO may send to the Commission, via the contact points, information on individual or systemic issues that may be relevant for the purpose of that Regulation.

Other provisions in the Working Arrangement deal with the following:

- Waiver of immunities;
- Waiver of inviolability of premises, buildings, and archives;
- Protection of personal data;
- Institutionalised cooperation (e.g. regular consultations);
- Revision of the Agreement and supplements.

The Agreement entered into force on 19 June 2021. It is another important arrangement which the EPPO concluded with EU institutions after it had assumed its investigative and prosecutorial activities on 1 June 2021. On 5 July 2021, the EPPO signed a working arrangement with OLAF ([→eucrim 2/2021, 80](#)). (TW)

EPPO: First Results

Six weeks after the European Public Prosecutor's Office (EPPO) started its operational and investigative activities, the body took stock of its work. In a brief [press release dated 16 July 2021](#), the EPPO informed the public that it processed more than a thousand reports of fraud affecting the financial interests of the European Union. €7 million of goods were already seized.

[On 14 September 2021, the Office informed](#) the public that that it is currently investigating various suspected frauds

having caused an estimated damage of almost €4.5 billion to the EU budget. Since 1 June 2021, the EPPO has registered more than 1700 crime reports from participating EU Member States and private parties, and 300 investigations have been opened. (TW)

EPPO Successfully Cooperates with Guardia di Finanza

In September 2021, the EPPO reported on two cases in which the Office successfully cooperated with the Guardia di Finanza in Italy. In the [first case](#) (reported on 8 September 2021), the Guardia di Finanza of Genoa executed a preventive seizure order of over €200,000, at the request of the EPPO, against a Ligurian company that evaded the payment of border duties by declaring a false origin of imported goods.

The [second case](#) (reported on 17 September 2021) concerned a smuggling case involving personal protective equipment during the first phase of the COVID-19 pandemic in 2020. At the request of the EPPO, the Guardia di Finanza of Ravenna seized more than €11 million assets and over 3.5 million FFP 2 medical masks. Investigations, which are led by the EPPO, revealed that an Italian company doing business with paramedical products gained unlawful benefits from tax exemptions. It also sold FFP 2 medical masks to hospitals that turned out to be unsuitable and put hospital staff at health risks. (TW)

EPPO: First Major Corruption Case Investigated

On 16 July 2021, the European Public Prosecutor's Office ([EPPO](#)) informed that it started a criminal investigation against four Croatian citizens being allegedly involved in a corruption scheme. It is presumed that the mayor of a Croatian city received bribes from a company manager in return for the manipulation of a procurement procedure in order to secure the assignment of a project, co-financed by the EU Cohesion Fund. The total amount of the

EU funding was around €562,000. The third and the fourth defendants are suspected of having adjusted the technical requirements of the tender and ensuring that the company under suspicion was awarded the contract for the project. It is estimated that the Croatian city was damaged for no less than around €12,000 and the EU Cohesion Fund was damaged for no less than around €57,000. The EPPO started the investigations on the basis of a report from the Croatian National Police Office for the Suppression of Corruption and Organised Crime. (TW)

Europol

General Court Rules on Damage Claim against Europol

In its judgment of 29 September 2021, the [General Court dismissed](#) the action brought by Mr Kočner against Europol. The plaintiff was seeking compensation for damage from data leaks.

Following the murder of Slovak journalist *J. Kuciak* and his fiancée *M. Kušnírová* in Slovakia on 21 February 2018, the Slovak authorities conducted an extensive investigation. As part of this investigation and at the request of the Slovak authorities, Europol secured and transferred data stored on two cell phones suspected to belong to Mr Kočner and stored on a USB storage device.

In May 2019, the Slovak press published extensive information, in particular transcripts of private conversations that originated, among other things, from the cell phones in question. Mr Kočner then brought an action before the General Court ([Case T-528/20](#)), claiming that Europol had breached its data protection obligations by disclosing the information at issue to the public before the reports had even been communicated to the Slovak authorities.

The General Court pointed out that the EU can incur non-contractual liability for damage allegedly caused by its

agencies only if three cumulative conditions are fulfilled:

- The unlawfulness of the conduct alleged against the agency;
- The fact of damage;
- The existence of a causal link between that conduct and the damage being complained about.

In the given case, the General Court found no evidence that disclosure of the transcriptions at issue could be imputable to Europol. Hence, the damage allegedly resulting from the development of the terms used by the Slovak press when they mentioned Mr Kočner is not imputable to Europol. (CR)

Europol Reform: Council Mandate for Negotiations Adopted

In the legislative process surrounding the proposal for a Regulation amending Regulation (EU) 2016/794 on Europol, the following is especially expected to change:

- Rules on Europol's cooperation with private parties;
- The processing of personal data by the agency in support of criminal investigations;
- Europol's role in research and innovation ([→eucrim 4/2020, 279](#)).

The [Council adopted a negotiating mandate](#) on the draft regulation on 30 June 2021. Once the European Parliament (EP) adopts its position on the Commission proposal, negotiations between the EP and Council can begin. (CR)

Agreement with Armenia Signed

On 16 September 2021, Europol and Armenia signed a [strategic cooperation agreement](#) with the aim of enhancing their cooperation in the fight against cross-border crime. Under the agreement, both parties may exchange general strategic intelligence, strategic and technical information, and operational information – with the exception of personal data. Furthermore, Armenia may second a Liaison Officer to Europol. Key areas covered by the agreement in-

clude migrant smuggling, cybercrime, drug trafficking, asset recovery, money laundering, organised property crime, and trafficking in human beings. (CR)

Eurojust

Cooperation Plan between Eurojust and eu-LISA

On 11 October 2021, the EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA) and Eurojust signed a three-year [cooperation plan](#). Among other issues, the plan establishes access for Eurojust to eu-LISA's new large-scale IT system ECRIS-TCN (European Criminal Records Information System – Third Country Nationals). It also covers future cooperation in the context of the Digital Criminal Justice initiative and e-CODEX, a cross-border judicial tool that will be managed by eu-LISA starting 2023. The plan implements the existing Memorandum of Understanding signed between Eurojust and eu-LISA on 19 September 2017 ([→eucrim 3/2017, 104–105](#)). (CR)

New Liaison Prosecutor for the USA

In September 2021, Mr *Philip Mirrer-Singer* took up his position as [Liaison Prosecutor \(LP\) for the United States](#) at Eurojust. Alongside his duties as Liaison Prosecutor at Eurojust, Mr *Mirrer-Singer* is serving as a trial attorney with the Europe and Eurasia Team of the United States Department of Justice. Mr *Mirrer-Singer* succeeds *Rachel Miller Yasser*, who had held the position since August 2019. (CR)

Eurojust Assesses its Cooperation with Serbia

Since the appointment of the first liaison officer from Serbia at Eurojust (Ms *Gordana Janicijevic*) in March 2020, [the number of cases](#) with Serbian involvement at Eurojust has increased considerably. Eurojust registered 65 new cases originating in or concerning Serbia in

its first year, representing an increase of 62.5% compared to the situation before the appointment. In 2021, Eurojust registered 20 new cases with regard to Serbia.

Eurojust and Serbia signed a cooperation agreement in 2019. It also foresees an annual evaluation of the cooperation. In a press statement of 28 June 2021, *Zagorka Dolovac*, Serbia's chief public prosecutor, and *Ladislav Hamran*, president of Eurojust, expressed their satisfaction with the implementation of the agreement and the successful fight against cross-border crime. (CR)

Report on Follow-Up to Eurojust's Written Recommendations on Jurisdiction

On 29 September 2021, Eurojust published a [report](#) analysing national authorities' compliance with Eurojust's written recommendations. They address which State is best placed to prosecute, what the challenges to jurisdiction at the national level are, and corresponding judicial cooperation needs. Eurojust's written recommendations (or requests) are issued by National Members to assist national authorities when jurisdictional issues arise between two or more Member States.

A look back at the written recommendations issued by Eurojust between 2016 and 2019 shows that the national authorities transferred or accepted a transfer of the case, fully in line with the solution suggested by Eurojust, in all cases except one. In conclusion, the requests are an effective tool for addressing jurisdictional issues in transnational criminal proceedings. They can especially prevent duplication of work or risks of infringements of the *ne bis in idem* principle and they ensure a more effective prosecutorial strategy.

Furthermore, the analysis indicates that Eurojust's assistance is frequently required in relation to follow-up issues, in particular concerning the practical and timely execution of a transfer of proceedings.

The report also revealed, however, that, in the given period, National Members did not very often use Eurojust written (joint) recommendations

on which State is best placed. The report describes the hope that new powers (as conferred under the new Eurojust Regulation in 2019) in conjunction with the autonomous initiative assigned to the National Members will result in wider recourse to this tool in the future. (CR)

Eurojust Guidelines on How to Prosecute Investment Fraud

To combat the rising number of investment fraud cases, Eurojust (supported by Europol) has issued [guidelines](#) for prosecutors on how to prosecute investment fraud. The guidelines, presented on 5 July 2021, are divided into four parts:

- Information on the phenomenon of investment fraud;
- Challenges linked to investment fraud cases;
- Practical guidelines on various issues;
- Support that Eurojust can offer in the different stages.

Lastly, an infographic outlines the fundamentals of investment fraud cases.

The guidelines give detailed advice on how to ensure successful coordination and cooperation, explaining how to identify parallel and other investigations, centralise proceedings at the national level, and how to coordinate operations at the international level. They explain how to investigate money flows and recover defrauded funds as well as how to deal with a large number of victims. How to cooperate within the framework of a JIT and how to successfully conduct action days are also outlined. (CR)

Successful Blow against Investment Fraud

On 8 September 2021, German, Spanish, Dutch, and Swedish authorities took down a criminal group committing [large-scale investment fraud](#). The coordinated action also received the support of Eurojust. It resulted in the arrests of numer-

ous suspects. Phones, electronic devices, documents, and money were also seized. The criminal network had defrauded its victims by selling false financial investment products, shares, and bonds via false websites. The damage caused amounted to over €55 million. (CR)

Pyramid Fraud Scheme Dismantled

An [action day](#) conducted by Italian authorities and supported by Eurojust as well as Bulgarian, French, and Swedish authorities brought a long-standing fraud scheme to an end. Using a pyramid system, fake websites, and shell companies, perpetrators evaded an estimated €120 million in taxes and cheated thousands of customers whose product orders were never delivered. The operation resulted in the arrest of 15 suspects, the seizure of properties and vehicles worth an estimated €72 million, and in the freezing of 750 bank accounts and financial assets. (CR)

European Judicial Network (EJN)

EJN 2019–2020 Activity Report

At the beginning of July 2021, the EJN published its [Report on Activities and Management for the period 2019–2020](#). The report deals with the following:

- The EJN's contribution to judicial co-operation in criminal matters, especially regarding the European Arrest Warrant (EAW), the European Investigation Order (EIO), and other instruments of mutual recognition;
- Functioning and management of the EJN;
- Cooperation between the EJN and other criminal justice bodies, e.g., Eurojust, Europol, and the EPPO.

The report also provides case examples as well as links to publications of the EJN in the given period. In the years 2019 and 2020, judicial practitioners used the EJN as a channel for cooperation in more than 14,000 cases. The EJN website had more than 2.5 million visits per year. (CR)

Frontex

Budget for Frontex Partly Frozen

At the end of September 2021, the Budget Control Committee of the European Parliament recommended granting Frontex discharge for its 2019 budget but asked for part of the budget to be frozen. Looking at a number of outstanding issues, the Committee asked to freeze part of the 2022 Frontex budget and to make it available once the agency has fulfilled a number of specific conditions, such as the recruitment of 20 fundamental rights monitors and three deputy executive directors. Also on the Committee's list: setting up a mechanism for reporting serious incidents at the EU's external borders and setting up a functioning fundamental rights monitoring system. (CR)

First Report from Frontex's Fundamental Rights Office

On 27 August 2021, Frontex published its first [Annual Report](#) on the activities of its Fundamental Rights Office (FRO) and its Fundamental Rights Officer in 2020. The report gives a situational overview of migration data and fundamental rights at the EU's borders. It looks at the fundamental rights compliance in Frontex's operational activities, the Agency's fundamental rights monitoring, and cooperation involving European Integrated Border Management (IBM). Information on the complaint mechanism is annexed.

The report concludes that 2020 was a very challenging year during which the landscape of migration was reshaped by the COVID-19 pandemic. The pandemic also limited monitoring by the team of the Fundamental Rights Officer, especially regarding on-site visits to review Frontex's operational activities.

2020 was also marked by accusations of malpractice, including alleged serious and persistent violations of the fundamental rights of persons irregularly crossing (or attempting to cross) the Schengen borders. According to the

report, the Fundamental Rights Office consistently monitored the situation, proactively gathered reliable information on these issues, and advised the Agency and the EU institutions accordingly.

Another key feature of the past year 2020 concerned the procedural and administrative changes within the Agency to expand its mandate. The Fundamental Rights Office accompanied the process by paying strict attention to fundamental rights.

The Fundamental Rights Office made multiple observations on operations and made recommendations regarding Frontex's involvement in operational activities. It revised and enhanced the components of the Agency's fundamental rights promotion and monitoring system. It accompanied the development of new rules for the Agency's complaints mechanism and the relevant elements of the Standard Operating Procedures and worked on the Agency-wide Fundamental Rights Strategy.

Lastly, by the end of 2020, the Fundamental Rights Office had also finalised its Fundamental Rights Due Diligence Policy – an internal tool for fundamental rights impact assessment and a basis for the advisory capacity of the Office. (CR)

Scrutiny Working Group Report on Fundamental Rights Violations by Frontex

On 14 July 2021, the Frontex Scrutiny Working Group (FSWG) of the European Parliament's LIBE Committee published its [report](#) on the fact-finding investigation into Frontex's alleged fundamental rights violations ([→eucrim news of 1 April 2021](#)). In general, the report concludes that there is no conclusive evidence supporting allegations of direct pushbacks and/or collective expulsions by Frontex in the serious incident cases that were examined by the FSWG. Nevertheless, the FSWG accuses Frontex of failing to promptly and effectively address and follow up allegations of violations and therefore not con-

tributing to the prevention of violations or reducing the risk of future fundamental rights violations.

Furthermore, the FSWG criticises the following:

- The delay in the recruitment of fundamental rights monitors;
- The lack of cooperation on the part of the executive director in ensuring compliance with several provisions of the Frontex Regulation;
- The passive role of the management board in acknowledging the serious risk of fundamental rights violations and its lack of action to ensure that Frontex fulfils its fundamental rights obligations as enshrined in the Frontex Regulation.

Ultimately, the FSWG highlights the responsibility of the Member States and the European Commission to step up their efforts to ensure that the agency's border surveillance efforts go hand in hand with adequately preventing and combating fundamental rights violations.

The second part of the report takes a detailed look at the agency's fundamental rights compliance and sets out concrete conclusions and recommendations on implementation of the Frontex Regulation. It looks at the division of responsibilities between the agency and Member States and analyses the roles of border guards and coastguards, the Fundamental Rights Officer, the Consultative Forum, the executive director, and the management board – all in relation to allegations of fundamental rights violations.

Recommendations are made in the following areas:

- Frontex governance and accountability to the European Parliament, the Council, and the European Commission;
- Oversight of the body;
- Reporting procedures;
- Procedures for handling complaints.

The report was welcomed by Frontex, which acknowledged the report's conclusions and its recommendations. (CR)

Handbook on Coast Guard Functions

Frontex, together with the European Maritime Safety Agency (EMSA) and the European Fisheries Control Agency (EFCA), developed a Practical Handbook to enhance cooperation between coast guard functions across the EU. The handbook aims at further improving cross-border and cross-sector collaboration between civilian and military authorities carrying out coast guard functions, e.g.:

- Search and rescue;
- Border control;
- Fisheries control;
- Customs activities;
- Law enforcement;
- Maritime safety;
- Environmental protection.

The handbook presents a compilation of services and information provided by the three agencies, including co-operation frameworks, best practice guidelines, and country factsheets with details on the structure and organisation of coast guard functions in EU countries and European Free Trade Association (EFTA) states. In addition, an online platform will be launched in autumn 2021, containing the practical information featured in the handbook. The EU Member States, the EFTA States, and the European Commission also contributed their support to the handbook. (CR)

Handbook on Firearms

At the beginning of July 2021, Frontex published a Handbook on Firearms for Border Guards and Customs Officers, providing the latest information on

- Types of weapons;
- Modalities of firearm trafficking;
- Tactics and equipment to be used during border checks.

The Handbook aims to assist border guards, customs officers, and police officers in effectively fighting gun trafficking and the criminal networks behind this illicit trade. The handbook was developed under the umbrella of the European Multidisciplinary Platform

against Criminal Threats (EMPACT) FIREARMS and received the support of numerous border management, customs, and law enforcement authorities as well as several EU agencies and international organisations. (CR)

Rapid Border Intervention Launched

Following an official request by the Lithuanian authorities asking for assistance with growing migration pressure at the country's border with Belarus, Frontex launched a rapid border intervention to assist the EU Member State by supplying officers and equipment. In the first week of July 2021, Lithuanian authorities recorded more than 800 illegal border crossings at its borders with Belarus. (CR)

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

32nd Annual PIF Report



On 20 September 2021, the European Commission released the 32nd annual report on the protection of the EU's financial interests. It gives an overview of the main developments in 2020 on the EU's legislative, practical, and cooperation framework to fight fraud affecting the EU budget. In addition, the report addresses the irregularities and fraud reported in 2020 (both for revenue and for expenditure) and their related risks. The risks analysis includes risks that emerged with the onset of the COVID-19 pandemic and risks in relation to the new Recovery and Resilience Facility (RRF), which will pour a huge amount of money into the Member States in order to mitigate the consequences of the pandemic (→eucrim 3/2020, 174). The report also describes the tools available to strengthen the fight against fraud, such as ARACHNE and the Early Detection and Exclusion System (EDES). It focus-

es on initiatives adopted, implemented, or ongoing in 2020, e.g., the Commission's Anti-Fraud Strategy (CAFS) and the rule-of-law conditionality mechanism ([→eucrim 1/2019, 15](#) and [eucrim 3/2020, 174–176](#)).

The report highlights the following key events protecting the EU taxpayers' money in 2020 and the first half of 2021:

- Start of operations by the EPPO;
- Revised OLAF Regulation, which makes the office fit for cooperation with the EPPO and strengthens its investigative powers;
- Introduction of the "conditionality regime," which allows the EU to react to breaches of the rule of law affecting the EU's financial interests;
- Notable achievements as regards implementation of the Commission's new Anti-Fraud Strategy (two thirds of the planned actions already implemented and the remaining third ongoing).

In total, 1056 fraudulent irregularities were reported in 2020. They had a financial impact of approx. €371 million, a 20% decrease compared to 2019.

Regarding fraud and irregularities in *revenue* reported by the EU Member States, the PIF report found the following:

- The number of reported cases on both fraudulent and non-fraudulent irregularities declined in 2020 compared to the five-year average (2016–2020);
- The corresponding financial sum increased for fraudulent irregularities but decreased for non-fraudulent irregularities;
- Although some Member States have been impacted by COVID-19 harder than others, the figures for the cases reported as fraudulent and non-fraudulent remain within the usual annual range; this leads to the conclusion that the COVID-19 pandemic had less of an effect than anticipated in 2020;
- Most cases reported as fraudulent or non-fraudulent in 2020, affecting EU revenue, relate to undervaluation, incorrect classification/false description of goods, and smuggling;

■ Footwear, textiles, vehicles, and electrical machinery and equipment were the types of goods most frequently affected by fraud and irregularities as regards number of cases and in monetary terms.

Regarding fraud and irregularities in *expenditure*, the report shows a varying picture – depending on the budgetary sector:

- The number of fraudulent and non-fraudulent irregularities with regard to agricultural spending increased 5% in 2020, compared to the five-year average (2016–2020);
- The financial amount linked to fraudulent irregularities in agriculture decreased 37%, the sum linked to non-fraudulent irregularities decreased by 5%;
- The most frequently detected irregularities in the agriculture sector concern falsification of documents, creation of artificial conditions, and incomplete implementation of the action;
- Spending for cohesion policy saw a 34% decrease in the number of fraudulent and non-fraudulent irregularities in 2020 compared to the five-year average (2016–2020);
- The financial amounts linked to fraudulent irregularities in cohesion policy decreased 37%, the sum linked to non-fraudulent irregularities decreased by even 42%.

Since not all drops in the figures for expenditure can be explained by cyclical effects, the Commission has expressed concern over detection and reporting rates. In this context, the Commission also points out that Member State authorities have had to cope with new risks. These new risks are linked, for instance, to new ways of managing and spending EU funds as well as reinforced spending in new areas like the European Green Deal, digital transition, and health care.

In order to cope with the new risks and new ways of managing EU funds, an ever closer and more effective cooperation between the EU bodies (EPPO, OLAF, Europol, and Eurojust) and national authorities is needed. Management of the RRF and spending pro-

grammes in the 2021–2027 multi-annual financial framework call for a renewed and joint European vision to fight fraud, corruption, and other illegal activities affecting the EU's financial interests. The Commission considers the following elements important to achieving this vision:

- More efficient collection and use of data;
- Improved transparency for beneficiaries of public funding;
- Better anti-fraud strategies at the Member State level;
- Increased cooperation within national authorities, between EU Member States, and at the European level.

Lastly, the 32nd annual PIF report includes several recommendations on the future protection of the EU's financial interests:

For revenue:

- Member States should assess the risks and shortcomings of their national customs control strategies as revealed during the COVID-19 pandemic, and they should report lessons learned and remedial measures taken;
- Member States should also establish catch-up plans for carrying out appropriate customs checks.

For expenditure:

- If not already being carried out, EU Member States are invited to launch targeted risk management exercises linked to the impact of COVID-19 and the upcoming implementation of the RRF;
- The quality and reliability of data must be improved;
- All EU Member States should make use of the integrated and interoperable information and monitoring system that the Commission will make available in conjunction with the RRF and the EU budget.

In general, the Commission recommends that EU Members States that have not yet joined the EPPO should consider doing so. Furthermore, Member States should adopt national anti-fraud strategies or adapt them, in order to cope with the significant new risks.

The 32nd annual PIF report includes the following [documents](#):

- Figures on Member States' reported (fraudulent and non-fraudulent) irregularities ([Annexes I and II](#));
- Overview of [implementation of the Hercule III Programme](#) in 2020;
- [Activity report by the EDES panel](#);
- A detailed report on [follow-up by Member States](#) in response to recommendations in the 2019 PIF report;
- Report on measures taken by the EU Member States to [implement Art. 325 TFEU](#) in 2020;
- Overview of actions taken to [implement the Commission's Anti-Fraud Strategy \(CAFS\)](#) – state of play in June 2021;
- [Statistical evaluation](#) of irregularities reported in 2020: own resources, agriculture, cohesion and fisheries policies, pre-accession and direct expenditure (two parts).

The annual report will be discussed in the European Parliament, which will issue a resolution on the situation of the protection of the EU's financial interests and likely make further follow-up recommendations. For the 2019 annual report →[eucrim 3/2020, 172–173.](#) (TW)

EU Activated Next Generation Project

Between August and September 2021, Union institutions made the Next Generation EU (NGEU) operational. The NGEU is the EU's economic recovery instrument in order to overcome the adverse impacts of the COVID-19 pandemic. The NGEU fund will operate from 2021–2023 and tied with the EU's 2021–2021 budget of the multiannual financial framework (MFF). The centrepiece of the NGEU is the Recovery and Resilience Facility (RRF) that allows the Commission to borrow money from financial markets. The RRF has a total of €723.8 billion (in current prices). Before the money is allocated, a number of conditions have needed to be met and preparatory steps completed.

This process includes the drawing up of national recovery and resilience plans by the Member States, their evaluation by the European Commission, and their approval by the Council of the EU.

By August 2021, the Commission executed the first disbursements for Member States under the RRF. By the beginning of October 2021, most of the submitted national plans have already been positively assessed by the Commission (22) and approved by the Council (19). Transfers, which were disbursed to 16 Member States, amounted to €51.5 billion (approx. 7% of the total RRF). The deadline for submission of the national plans has been postponed for Bulgaria and the Netherlands, where recent elections and negotiations on the formation of new governments delayed the preparation of the plans. The plans from Hungary and Poland have not been finally approved yet, as the Commission is not satisfied with their content. In addition, the EP exercised pressure by requesting that the recovery plans can be approved only if the countries address concerns about the rule of law and attacks on the judiciary, primacy of EU law, public procurement, corruption, and unequal treatment of minorities (→[news item on the current rule-of-law developments in Hungary and Poland from July to Mid-October 2021](#) > Foundations > Fundamental Rights).

A major challenge for the EU remains how the unprecedented amount for reforms and investments under the RRF scheme can be protected from fraud and misappropriation (→[contributions in this issue](#)).

Information on the current state of play of the EU's recovery plan is made available by the [EP Research Service](#) and on a dedicated [Commission website](#). (TW)

Implementation Report on PIF Directive

On 6 September 2021, the European Commission published a report that assesses deficits as regards the Member States' legislation implementing [Direc-](#)

[tive 2017/1371](#) on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive"). For details on the PIF Directive, see the article by [A. Juszczak and E. Sason, eucrim 2017, 80–87](#). The Directive aims to facilitate enforcement of Member States' responsibilities towards revenue and expenditure of the EU budget by setting standards for Member States' criminal law. In particular, the Directive harmonizes fraud and fraud-related criminal offences, sanctions and limitation periods. The Directive also forms the basis upon which the EPPO is exercising its competences and is seen as an essential element of the Commission's Anti-Fraud Strategy (CAFS) of 2019 (→[eucrim 1/2019, 15](#)).

The [implementation report](#) (as foreseen by Art. 18(1) of the PIF Directive) points out that by 6 July 2019 – the deadline for transposition of the Directive into national law – only 12 Member States have notified full transposition of the Directive. Only after having initiated infringement procedures, the Commission received notifications of transpositions from the remaining 14 Member States (the last in April 2021).

In general, the Commission concluded that all Member States have transposed the PIF Directive's main provisions. However, there are outstanding conformity issues to be addressed, including issues that must be addressed to enable effective investigations and prosecutions by the EPPO. Shortcomings are mainly seen in the following:

- National legislation transposing the criminal definitions in Arts. 3, 4, and 5 of the Directive;
- Liability of legal persons;
- Sanctions;
- Limitation periods.

The Commission stressed that it will further monitor the correct implementation of the PIF Directive and initiate infringement proceedings, if necessary. For details, see also the article by [Dr Wouter van Ballegooij](#), in this issue p. 177 ff. (TW)

EP: Budget Conditionality Mechanism for Rule-of-Law Breaches Must Be Launched Immediately

The European Parliament (EP) increased pressure on the European Commission to apply the budget conditionality regulation of 16 December 2020 ([Regulation 2020/2092/EU](#)). The Regulation lays down the rules how the EU budget and the NextGeneration EU resources can be protected against breaches of the principles of the rule of law by an EU country that adversely affect the [sound financial management](#) of the EU budget or the EU's financial interests.

In a [resolution adopted on 8 July 2021](#) (with 529 to 150 votes and 14 abstentions), MEPs regretted that the Commission has decided to abide by the non-binding [European Council conclusions](#) of December 2020 ([→eucrim 3/2020, 176](#)) and delay the application of the budget conditionality regulation by developing application guidelines first. MEPs reiterated their standpoint (already expressed in two resolutions in March 2021 and June 2021 →[eucrim 1/2021, 19](#) and [eucrim 2/2021, 85–86](#)) that the guidelines are unnecessary. They urge the Commission “to avoid any further delay in the application of the Regulation and to investigate swiftly and thoroughly any potential breaches of the principles of the rule of law in the Member States that affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way”, stressing that the situation in some Member States already warrants immediate action. Furthermore, the Commission is requested “to report to Parliament regularly and proactively at least twice a year on new and ongoing cases under investigation, starting with the first cases as soon as possible”.

The resolution also clarified the EP’s stance on how breaches of the rule of law affecting the EU’s financial interests should be handled and how measures must be adopted and implemented.

These considerations should be taken into account by the Commission when drafting the guidelines. Ultimately, MEPs pointed out that the legitimate interest of final recipients and beneficiaries must be properly safeguarded. The Commission must set out a clear, precise and user-friendly system for submitting complaints under the regulation.

MEPs showed their will to continue preparations to sue the Commission for failure to act (in accordance with Art. 265 TFEU) if the Commission does not apply the budget conditionality regulation from autumn onwards. In this context, it was deeply regretted that the Commission has not taken action after the letter of EP President *David Maria Sassoli* in which he called on the Commission to fulfil its obligations and ensure the full and immediate application of Regulation 2020/2092 ([→eucrim 2/2021, 85–86](#)).

On 30 August 2021, the [Conference of Presidents of the EP](#), comprising the EP President and heads of political groups, decided to initiate preparations for an action for failure to act against the EU Commission at the CJEU. [Dutch MEP Sophie in 't Veld](#) called the Commission’s prior response to the EP’s request “the bluntest provocation ever.” However, she also questioned the sluggishness of the Parliament itself. The ponderous approach to file the action for failure to act may delay the process for months.

In its [resolution of 16 September 2021](#) “on media freedom and further rule of law deterioration in Poland”, the EP calls on the Commission not to approve the draft Polish Recovery and Resilience Plan (necessary to open the COVID-19 cash tap), as long as Poland has not ensured the independence of the judiciary. Furthermore, it must be ensured that the plan does not subsequently lead to the EU budget actively contributing to breaches of fundamental rights in Poland. Similar demands were voiced in an [EP resolution on Hungary in July 2021](#) in the context of the coun-

try’s recent approaches against LGBTIQ rights ([→eucrim reports on the recent rule-of-law developments in Poland and Hungary](#) in the section “Foundations > Fundamental Rights”). (TW)

Study Backs EP Position: Rule of Law Conditionality Regulation Must Be Triggered Immediately

On 7 July 2021, three legal experts (Prof. *Kim Scheppeler*, Princeton University; Prof. *Daniel Kelemen*, Rutgers University; and Prof. *John Morijn*, University of Groningen) call on the Commission to trigger the new Rule of Law Conditionality Regulation ([EU, Euratom](#)) 2020/2092 with respect to Hungary. Their [study](#) on the case of Hungary was solicited by the Greens/EFA group in the European Parliament and backs the EP’s position that said Regulation ([→eucrim 3/2020, 174–176](#)) has been immediately applicable since its entry into force on 1 January 2021. Applicability does neither require guidelines nor a CJEU decision on the action for annulment of the Regulation initiated by Hungary and Poland ([→eucrim 1/2021, 19](#)).

The study states that the glaring rule-of-law deficits in Hungary (analysed in detail in the paper) fulfil the legal requirements to trigger the rule-of-law mechanism. In order to initiate sanction proceedings, the Commission must prove that a Member State has at least one of the eight rule-of-law deficits listed in Regulation 2020/2092 with an impact on the EU budget. According to the legal opinion, Hungary has six of the eight deficits. These relate to the following three areas:

- Lack of transparent management of EU funds;
- Lack of an effective national prosecution service to investigate and prosecute fraud;
- Lack of guarantee of independent courts to ensure that EU law is reliably enforced.

The legal experts also draft a written notification by means of which the

Commission can initiate the suspension of EU funds pursuant to Art. 6 of Regulation 2020/2092.

Lastly, they provide a detailed analysis of Regulation 2020/2092 on a general regime of conditionality for the protection of the Union budget and its legal context which shows that the Commission should not see any hindrances to go ahead. (TW)

Corruption

EP: Corruption Must Lead to Restrictive Measures against Third Countries

In a [resolution of 8 July 2021](#) on the EU Global Human Rights Sanctions Regime (EUGHRSR, also called the EU Magnitsky Act →eucrim 4/2020, 258), the European Parliament called on the Commission and the High Representative of the EU for Foreign Affairs and Security Policy to make a legislative proposal in order to include corruption as a punishable offence that can trigger restrictive measures under the EUGHRSR. The resolution stressed that corruption can have a devastating impact on the state of human rights and often undermines the functioning and legitimacy of institutions and the rule of law. The regime that allows the EU to address serious human rights violations and abuses worldwide, should also target economic and financial enablers of human rights abusers, MEPs said. If acts of corruption are not included in the revision of the existing regime, MEPs propose drawing on legislation in the UK, the US and Canada which established anti-corruption sanctioning mechanisms in their foreign policy.

In addition to the corruption issue, the resolution includes several proposals on how the legitimacy of the EUGHRSR can be improved, *inter alia*:

- Enabling MEPs to propose cases of serious human rights violations;
- Introducing qualified majority voting in the Council when sanctions are adopted;

- Swift and coordinated EU response if third countries impose retaliatory sanctions. (TW)

Money Laundering

Commission Presents AML/CFT Reform Proposals

On 20 July 2021, the [Commission presented an ambitious package](#) of legislative proposals that are designed to overhaul the EU's anti-money laundering and countering the financing of terrorism (AML/CFT) rules. The [package includes](#) the creation of a new EU AML/CFT authority, an EU single rulebook for AML/CFT, and the full application of the EU AML/CFT rules to cryptocurrencies. The reform proposals have been announced by the Commission for some time, in particular after its comprehensive evaluation of the EU's AML/CFT framework presented in July 2019 (→[eucrim 2/2019, 94](#)) and in its Action Plan on preventing money laundering and terrorist financing of May 2020 (→[eucrim 2/2021, 87](#)).

The proposed set of measures aim to establish a robust and future-proof enforcement system, which will improve detection of money laundering and terrorism financing in the EU and close existing loopholes that are used by criminals to launder illicit proceeds of crime. The package consists of [four legislative proposals](#), which are analysed in more detail in separate news items:

- A Regulation establishing an EU AML/CFT Authority in the form of a decentralised EU regulatory agency ([COM\(2021\) 421](#));
- A new Regulation, containing directly applicable AML/CFT rules, including a revised EU list of entities subject to AML/CFT rules and a revised policy on third countries whose AML/CFT approach pose a threat to the EU's financial system ([COM\(2021\) 420](#));
- A sixth AML Directive, replacing the existing EU AML/CFT Directive (Directive 2015/849 as amended) and con-

taining provisions not appropriate for a Regulation and requiring national transposition, e.g., rules concerning national supervisors and Financial Intelligence Units in Member States ([COM\(2021\) 423](#));

- A recast of Regulation 2015/847 on Transfers of Funds ([COM\(2021\) 422](#)).

The measures implement some objectives of the Commission's AML/CFT Action Plan of May 2020. (TW)

AML Package I: Creation of an EU AML Authority

spot light At the heart of the legislative proposal to overhaul the EU's AML/CFT rules as presented on 20 July 2021 is the [creation of a new EU authority which will be tasked with AML/CFT supervision in the EU](#) and support of EU Financial Intelligence Units (FIUs). The EU AML Authority (AMLA) is designed to become the centrepiece of an integrated system of national AML/CFT supervisory authorities and will ensure their mutual support and cooperation. It is expected that the new authority can overcome the existing deficiencies in the quality and effectiveness of AML/CFT supervision in the EU and contribute to better convergence of high supervisory standards.

► Tasks and powers

According to the proposal, the AMLA will have the task and powers to directly supervise some of the riskiest financial institutions that operate in a large number of Member States or require immediate action to address imminent risks. In the context of direct supervision, the AMLA will, *inter alia*, be entitled to carry out supervisory reviews and assessments at individual entity and group-wide basis, and to develop and maintain up-to-date a system in order to assess the risks and vulnerabilities of the selected obliged entities. It will also be able to adopt binding decisions, administrative measures, and pecuniary sanctions towards directly supervised obliged entities.

Furthermore, the AMLA will monitor and coordinate national supervisors

responsible for other financial entities as well as coordinate supervisors of non-financial entities – a task that will establish indirect supervision of entities.

With respect to FIUs in the Member States, the AMLA will have a number of supportive tasks, including the conduct of joint analyses by FIUs. It will also make available to FIUs IT and artificial intelligence services, promote expert knowledge on detection, analysis, and dissemination methods of suspicious transactions, and prepare/coordinate threat assessments.

The Commission proposes that the AMLA take over the management of two existing infrastructures: (1) the AML/CFT database, currently managed by the European Banking Authority, and (2) the secure communication network for FIUs (FIU.net), which has been hosted by Europol.

General powers of the authority, which relate to all aforementioned tasks, will include the power to adopt regulatory technical standards and implementing technical standards where this is provided for in the applicable EU AML/CFT legislation; the new authority will get a broad power to adopt guidelines or recommendations addressed to obliged entities, AML/CFT supervisors or FIUs.

➤ Organisation and governance

Regarding the organisation and governance of the new body, the Commission proposes that it will be comprised of two collegial governing bodies, namely (1) an Executive Board of five independent full-time members and the Chair of the Authority and (2) of a General Board composed of representatives of Member States.

Depending on the tasks to be fulfilled, the General Board shall meet in two alternative compositions, i.e. a “supervisory composition” with heads of public authorities responsible for AML supervision, and a “FIU composition”, with heads of FIUs in the Member States. The General Board will adopt all regulatory instruments, draft technical implementation standards, guidelines and recommendations. In its supervisory composi-

tion, it may also provide its opinion on any decision about directly supervised obliged entities prepared by a Joint Supervisory Team before the adoption of the final decision by the Executive Board.

The Executive Board will be the governing body of the AMLA. It will take all decisions towards individual obliged entities or individual supervisory authorities if the AMLA is carrying out its direct or indirect supervisory functions. The Executive Board will also take decisions regarding the draft budget and other matters relating to operations and the functioning of the authority.

An Administrative Board of Review will deal with appeals against binding decisions of the AMLA addressed to obliged entities under its direct supervision; decisions of the Administrative Board of Review will be appealable to the CJEU. According to the Commission’s proposal, the Executive Board should take into account the opinion of the Administrative Board of Review, but not be bound by it.

➤ Next steps

The Commission plans that the AMLA will be established in 2023 and starts its operational activities in 2024. Full staffing (estimated are 250 staff members) should be reached in 2026. In 2026, the new body should also start direct supervision of certain high-risk financial entities. The Commission pointed out, however, that full operational activity as regards direct supervision will be largely dependent on the adoption of the harmonised AML/CFT rulebook, which was proposed alongside the proposal for the AMLA (→separate news item). The European Parliament and the Council were asked to prioritise the negotiations on the AML/CFT package. (TW)

AML Package II: Commission Proposes AML Regulation

**spot
light**

By means of its legislative [proposal for a Regulation on the prevention of the use of the financial system for the purposes of mon-](#)

[ey laundering or terrorist financing](#), the Commission responded to calls for stricter, more uniform and directly applicable EU rules on money laundering. The proposal that was presented on 20 July 2021 must be seen in connection with the accompanied legislative proposals for a sixth AML Directive and for a recast of Regulation 2015/847 dealing with the traceability of money transfers (→separate news items). The legislative package is designed to fulfil the objective of establishing an EU single rulebook on AML/CFT as announced in the Commission action plan of 7 May 2020 (→[eucrim 2/2021, 87–88](#)).

The proposed Regulation aims at addressing shortcomings identified in the context of an evaluation of the current EU approach, which lays down obligations for private entities to curb money laundering activities by way of not directly applicable directives (the AML/CFT directives). According to the Commission, lack of direct applicability and granularity in the existing legislation led to a fragmentation in the application of the EU AML/CFT rules along national lines and divergent interpretations. This also disturbs effective handling of AML/CFT risks in cross-border situations and therefore endangers the adequate protection of the EU’s internal market. The current situation also generates additional costs and burdens for operators providing cross-border services and causes regulatory arbitrage.

The envisaged legislation will transform all AML/CFT rules that apply to the private sector to a Regulation, whereas the organisation of the institutional AML/CFT system at national level continue to be regulated by a Directive (the latter are included in the proposal for a 6th AMLD →separate news item). However, the proposal for a Regulation does not only simply transfer the rules from the existing AML Directives, but also makes a number of changes, in order to achieve a greater level of harmonisation and convergence in the application of AML/CFT rules across the

bloc. The main changes and novelties are the following:

- The list of entities obliged to prevent money laundering and terrorist financing is expanded to include crypto-asset service providers and other sectors, such as crowdfunding platforms and investment migration operators;
- Internal policies, controls, and procedures for risk management are clarified, in particular customs due diligence (CDD) measures are detailed;
- The approach to tackle third countries whose AML/CFT policy pose a threat to the Union's financial market is revised, in order to apply enhanced CDD measures in a more harmonised way;
- The definition of "politically exposed person" is clarified;
- Beneficial ownership requirements are streamlined to ensure an adequate level of transparency across the Union, and new requirements are introduced in relation to nominees and foreign entities to mitigate risks that criminals hide behind intermediate levels;
- Requirements for the processing of personal data are made more consistent with EU data protection rules;
- Measures against the misuse of bearer instruments are strengthened;
- An EU-wide maximum cap for large cash transactions (€10,000) is introduced.

Regarding third countries policy, the Commission proposes that the EU will run two lists, whereby the lists are closely aligned with the lists of the FATF. However, the Commission may also identify third countries, which are not listed by the FATF, but pose a specific threat to the EU's financial system. Countries on the *black list* showing persistently serious strategic deficiencies in their AML/CFT framework will be subject to enhanced due diligence measures and country-specific countermeasures that are proportionate to the risk the third country poses to the EU's financial system. Countries with compliance weaknesses in the AML/CFT regimes will appear on a *grey list* and

be subject to country-specific enhanced due diligence measures. The Commission proposes more harmonised and more granular rules on how the EU will mitigate external threats. A key role is envisaged for the proposed new AML authority (→separate news item), which will monitor specific risks, trends and methods to which the Union's financial system is exposed. The new authority will adopt guidelines defining external threats and inform obliged entities about them on a regular basis.

The Commission expects that the new rulebook, including technical standards, can apply by the end of 2025. (TW)

AML Package III: 6th AML Directive Proposed

On 20 July 2021, the Commission presented its [proposal for a sixth Directive on money laundering](#) and terrorist financing (AMLD 6), which will replace the existing Directive 2015/849. Together with the accompanied proposals on a Regulation on money laundering/terrorist financing and on the recast of Regulation 2015/847, the AMLD 6 will form the EU single rulebook on AML/CFT as announced as one of the objectives in the Action Plan of 7 May 2020 for a comprehensive Union policy on preventing money laundering and terrorist financing (→[eucrim 2/2021, 87–88](#)).

Parts of the existing fourth and fifth AML/CFT Directives will become directly applicable rules in the Regulation. The AMLD 6 will contain provisions that need to be transposed by the Member States in order to keep the necessary flexibility of the national AML/CFT systems. The AMLD 6 will therefore include the rules on the organisation and institutional set up of the future AML/CFT system at the national level. The AMLD 6 not only takes up the existing rules (e.g., those on risk assessments and the collection of statistics) but also includes a number of changes in comparison with the current legal framework, which are designed to bring about improvement in the practices of supervi-

sors and FIUs and cooperation among the competent authorities. These changes include the following:

- Powers and tasks of FIUs are clarified, a minimum set of information to which FIUs should have access is defined;
- A framework for joint analyses of FIUs is laid down and a legal basis for the FIU.net system is provided;
- Clearer rules on feedbacks from FIUs to obliged entities and vice versa are proposed;
- Powers and tasks of supervisors are clarified;
- A common risk-categorisation tool is introduced, in order to ensure a harmonised risk-based supervision;
- Cooperation among supervisors is improved by setting up AML/CFT colleges and putting in place a supervisory mechanism for operators that provide services across borders;
- The powers of the registers of beneficial ownership are clarified to make sure that they can obtain up-to-date, adequate and accurate information;
- An interconnection of the bank account registers will be provided for.

The Commission pointed out that the new rules will improve the consistency of implementation of the AML/CFT framework across the EU, facilitate the integration of an EU supervisory mechanism and improve detection of suspicious flows and activities. It calls on the European Parliament and Council to swiftly negotiate the final legislative act, so that the new EU rules on AML/CFT can be applied three years after adoption. (TW)

AML Package IV: EU Traceability of Funds Legislation to Be Extended to Crypto-Assets

EU rules on providing information on money transfers have left aside so far transfers of virtual assets. However, illicit money laundering activities can be done through the transfer of crypto-assets (e.g., Bitcoin) and damage the integrity of the financial system in the

same way as wire funds transfers. In order to close this loophole, the Commission [proposed a recast of Regulation 2015/847](#), which, as an important AML/CFT measure, lays down rules on the information on payers and payees, that accompanies transfers of funds. Hence, the Commission proposal will extend the scope of the Regulation to transfers of crypto-assets.

This means that crypto-asset service providers will be obliged to provide information on the sender and beneficiary with all transfers of virtual assets, so that the identity of persons who conduct business with crypto-assets and suspicious transactions in this sector can be identified for AML/CFT purposes. The crypto-asset service provider of the beneficiary must also implement effective procedures, including, where appropriate, ex-post monitoring or real-time monitoring, in order to detect whether the required information on the originator or the beneficiary is missing. The new provisions would align EU legislation with key standards of the FATF, which recommended the extension of AML/CFT measures to the crypto sector in 2019.

The recast of Regulation 2015/847 is closely connected with the proposal for an EU AML/CFT Regulation ([→separate news item](#)). In future, all crypto-asset service providers will be obliged to conduct due diligence on their customers. In addition, anonymous crypto-asset wallets will be prohibited in the EU. The proposals presented on 20 July 2021 are part of a comprehensive overhaul of the existing EU AML/CFT framework, which will, *inter alia*, comprise a single EU rulebook against money laundering and terrorist financing. (TW)

CJEU: Union Law Does Not Preclude Criminalisation of Self-Laundering

On 2 September 2021, the [CJEU](#) decided that EU law (i.e. Directive 2005/60/EC) does not preclude national legislation that provides that the offence of money laundering can also be committed by

the perpetrator of the predicate offence, i.e. the criminal activity from which the money concerned was derived. As a result, the CJEU follows the opinion of AG *Hogan* in this case ([→eucrim 1/2021, 20–21](#)).

The CJEU's judgment was delivered in a reference for a preliminary ruling that concerned Romanian legislation ([Case C-790/19, LG and MH](#)). Romania criminalised money laundering by literally taking up the definitions of conduct of money laundering in Directive 2005/60/EC – definitions that were later taken over also in Directive 2015/849. The provisions have not clarified whether the so-called "self-laundering" can be punished as well. According to the referring Romanian court, the perpetrator of the offence of money laundering – which is, by its nature, a consequential offence resulting from a predicate offence – cannot be the perpetrator of the predicate offence (in the case at issue: tax evasion).

In its judgment, the CJEU shared the AG *Hogan*'s viewpoint and stressed that EU law does not preclude Member States from interpreting Art. 1(2)(a) of Directive 2005/60 as meaning that also the perpetrator of the predicate offence can commit money laundering. This conclusion follows from the wording, the context of the provision, and the objective of the EU's legal instrument. In this context, the CJEU mainly argued:

- Art. 1(2)(a) of Directive 2005/60 only concerns the conversion or transfer of property, with the knowledge that such property is derived from criminal activity or from an act of participation in such activity – this conduct can be committed both by the perpetrator of the criminal activity from which the property in question is derived and by a third party;
- Both the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the FATF Recommendations leave it to the Member States to decide whether self-laundering should be criminalised when transposing provisions harmonising criminal law;

- The objective of Directive 2005/60 is to prevent or, at the very least, to restrict as far as possible activities that destabilise the integrity of the financial market, by establishing, for that purpose, barriers – at all stages which those activities may include – against money launderers and terrorist financers. Hence, the objective of the EU instrument confirms the interpretation that self-laundering can be criminalised.

Ultimately, the CJEU dispels doubts that the *ne bis in idem* principle as enshrined in Art. 50 CFR may be incompatible with the found interpretation. Like the AG, the CJEU stressed that the facts in respect of which the prosecution of money laundering is brought are not identical to those constituting the predicate offence. (TW)

Tax Evasion

EP Suggests New Framework on Harmful Tax Practices

On 7 October 2021, the European Parliament adopted a [resolution that calls for a reform of the EU policy on harmful tax practices](#). The resolution, which was adopted by 506 to 81 votes (with 99 abstentions), stresses that tax evasion and tax avoidance result in an unacceptable loss of substantial revenue for Member States, currently needed to address the devastating consequences of the coronavirus pandemic. Estimates of corporate tax avoidance range between €160–190 billion. The resolution acknowledges that tax competition among countries is not problematic per se, however, common principles on the extent to which they can use their tax regimes and policies to attract businesses and profits are needed.

The resolution makes several recommendations for the future EU work on harmful tax practices. MEPs called on the Council to finalise negotiations on important legislation in this field, recommend establishing more binding instruments, and proposed a further de-

velopment of the European Semester as a tool to support curbing aggressive tax planning within the EU.

Ultimately, MEPs called for a fundamental reform of the EU's Code of Conduct on Business Taxation (CoC) – a soft law instrument that currently sets out the main framework against harmful tax practices. MEPs urge to revise the criteria, governance and scope of the CoC through a binding instrument. The resolution therefore provides for a concrete proposal for a "Framework on Aggressive Tax Arrangements and Low Rates" (FATAL), which would replace the current CoC.

The EP's initiative came shortly after the revelation of the "[Pandora Papers](#)" – the most recent global media investigation into the use of offshore tax havens by politicians, businesspeople, and celebrities to hide assets worth hundreds of millions of dollars. On 6 October 2021, [MEPs unanimously expressed](#) indignation and disgust at the Pandora Papers revelations and blamed governments' for their woefully inadequate response to tax avoidance/evasion for over a decade. In particular, MEPs criticised the EU's listing process of non-cooperative jurisdiction for tax purposes, with third countries having been removed from the black list in the same week that the Pandora Papers came to light and mentioned these countries as tax havens. MEPs urge to update this process as well as to conclude an international agreement on business taxation. (TW)

VAT Fraud with Mobile Phones Dismantled

At the beginning of July 2021, an [operation](#) conducted by the Hungarian National Tax and Customs Administration (NTCA) and supported by Europol led to the seizure of assets worth €14.2 million as well as 14 arrests. The respective organised crime group had used non-existing traders to import and sell mobile phones as well as brokers to resell the phones with the aim of reclaiming VAT that was effectively never paid. The

tax evasion scheme caused tax losses of about €29.8 million to the Hungarian national budget. (CR)

Organised Crime

Cocaine Insights Report

On 7 September 2021, Europol and UNODC introduced their new [Cocaine Insights Report](#). The report reveals a significant increase in cocaine supply to Europe. Cocaine is the second most commonly used drug in Western and Central Europe. Estimates this year suggest some 4.4 million past-year users.

According to the report, changes in Colombia's crime landscape (shift from few to many small crime groups) have also had implications for Europe, such as the diversification of the trafficking groups. New alliances among criminal groups are being forged, creating new opportunities for European criminal networks to establish new contacts with providers in South America. This has also led to an erosion of the oligopoly of the main criminal networks, such as the Italian 'Ndrangheta. Cocaine availability on the European consumer market has increased as a result. In addition, the report details a northward shift in the epicentre of the European cocaine market, consolidating the role of the Netherlands as a staging point.

On top of the increasing trade in cocaine, violence associated with the cocaine trade has also increased, e.g., assassinations, shootings, bombings, arson, kidnapping, torture, and intimidation. In view of the perspective for the European cocaine market, the report identified a twofold need:

- Intervention at source;
- The need to address the driving factors behind coca bush cultivation and the related, illicit economy in the source countries.

Measures to address these driving factors could include alternative development programmes, the promotion of

sustainable livelihoods, the consolidation of governance structures, the presence of the state, and the rule of law. (CR)

Cybercrime

Five Years of No More Ransom

Since 2016, the descriptors available in the [No More Ransom repository](#) ([→eucrim news of 10 September 2019](#)) have succeeded in helping more than six million people recover their files for free and prevented criminals from earning almost a billion euros through ransomware attacks. Today, No More Ransom comprises 121 free tools able to decrypt 151 ransomware families and unites 170 partners from the public and private sectors. The portal is available in 37 languages. On the occasion of its fifth anniversary, a revamped No More Ransom [website](#) with the following features was launched:

- Prevention advice;
- Q&A on ransomware;
- Support for reporting a crime;
- A "Crypto Sheriff" to help define the type of ransomware affecting a device. (CR)

Takedown of DoubleVPN

At the end of June 2021, law enforcement and judicial authorities from Europe, the United States, and Canada, together with Europol and Eurojust, [took down the web domains and server infrastructure of DoubleVPN](#), a virtual private network service used to compromise networks all around the world. Cyber-criminals were using the service to mask the location and identities of ransomware operators and phishing fraudsters. This coordinated takedown was carried out within the framework of the European Multidisciplinary Platform Against Criminal Threats (EMPACT). EMPACT is an *ad hoc* management environment to develop law enforcement activities in order to achieve pre-set goals ([→eucrim 2/2021, 89–90](#)). (CR)

Terrorism

Annual Report on Online Jihadist Propaganda Published

On 13 August 2021, Europol published the third edition of its [annual report on Online Jihadist Propaganda](#). The report provides a comprehensive analysis of major trends and developments in the online propaganda of the most prominent jihadist organisations, namely the Islamic State (IS), al-Qaeda (AQ), and Hay'at Tahrir al-Sham (HTS) for the year 2020. Last year was a critical moment in the development of the IS and AQ, with both groups striving to remain relevant, striving for online resilience, and being on a collision course with each other.

According to the report, the IS is displaying increasing insurgent activity – under its new leadership – in its traditional heartlands. The terrorist organisation is also extending its global reach, and the report highlights Africa's importance to the overall objectives of the IS. The group seems focused on attempting a resurgence in Iraq and on expanding its international presence by further empowering its global network of affiliates. A look at its official propaganda reveals that limited capabilities combined with the loss of infrastructure and personnel seems to have reduced its media production capabilities, resulting in dwindling official propaganda. Nevertheless, the IS is still successful in maintaining an online presence.

As regards AQ, the report confirms that the group has weathered a series of major blows and lost a number of important senior leaders. Nevertheless, it continues to capitalise on current events to advance its ideological leanings. While Al-Qaeda in the Arabian Peninsula (AQAP) seems keen on demonstrating that it is still capable of carrying out external operations, even if events seem to suggest a decline in abilities on the ground, Al-Qaeda in the Islamic Maghreb (AQIM) and Jama'a Nusrat ul-Islam wa al-Muslimin (JNIM)

tend to engage in negotiations with local governments, following the Taliban approach.

Lastly, HTS seems to be working towards its goal of expanding and consolidating its control over Idlib/Syria. The HTS' jihadist agenda is pursued locally, but the group aspires to be recognised internationally and has political pretensions. (CR)

Racism and Xenophobia

Commission: 6th Evaluation of Code of Conduct on Countering Illegal Hate Speech Online

On 7 October 2021, the European Commission released the [results of its sixth evaluation of the Code of Conduct on countering illegal hate speech online](#). Since the introduction of the Code of Conduct on countering illegal hate speech online on 31 May 2016 ([→eucrim 2/2016, 76](#)) by the European Commission and four major IT companies (Facebook, Microsoft, Twitter, and YouTube), other IT companies have joined the Code, including Instagram, Google+, Snapchat, Dailymotion, Jeux-video.com, and TikTok. LinkedIn joined on 24 June 2021.

Each monitoring exercise was carried out following a commonly agreed methodology which makes it possible to compare the results over time. The sixth exercise was carried out over a period of six weeks (from 1 March to 14 April 2021) by 35 organisations, which reported on the outcomes of a total sample of 4543 notifications from 22 Member States. The report indicates that, although the average of notifications reviewed within 24 hours remains high (81%), it has decreased compared to 2020 (90.4%); the average removal rate was also lower than in 2019 and 2020.

Regarding the assessment of notifications of illegal speech, the Code of Conduct prescribes that the majority of notifications should be assessed within 24h. The report noted that, in 81% of the

cases, the IT companies assessed the notifications in less than 24 hours, an additional 10.1% in less than 48 hours, 8.1% in less than a week, and it took more than a week in 0.8% of cases.

In comparison to 2019 and 2020, IT companies have a lower removal rate for notified content (62.5% of the content notified to them was removed, while 37.5% remained online). The report notes that the removal rates varied, depending on the severity of the hateful content. On average, 69% of content calling for murder or violence against specific groups was removed, while content using defamatory words or pictures to name certain groups was removed in 55% of cases. Twitter and Instagram made progress compared to 2020. Facebook and YouTube had higher removal rates in 2020.

IT companies responded with less feedback than in the previous monitoring exercise, going from 67.1% to 60.3%. The most commonly reported grounds for hate speech in this monitoring exercise were sexual orientation and xenophobia, including anti-migrant hatred (18.2% and 18% respectively), followed by anti-gypsyism (12.5%).

In conclusion, the Commission calls upon IT companies to reinforce the dialogue with trusted flaggers and civil society organisations in order to address the gaps in reviewing notifications, taking action, and improving their feedback to users. The Commission advocates more binding rules on the matters foreseen in the Digital Services Act ([→eucrim 4/2020, 273–274](#)). (AP)

Procedural Criminal Law

Procedural Safeguards

Commission and Council Discuss Way Forward on Pre-Trial Detention and Detention Conditions

On 7 October 2021, the Justice Ministers of the EU Member States [discussed](#)

the need for action on pre-trial detention and detention conditions in the EU. The discussion was based on a [non-paper](#) by the European Commission of 24 September 2021. The Commission concluded that minimum standards for detention conditions and procedural rights in pre-trial detention „have the potential to avoid inhuman or degrading treatment concerns in the context of the EAW and to lead to a smoother surrender process.” In an Annex, the non-paper provides an overview of the most relevant minimum standards for detention conditions and procedural rights in pre-trial detention, which should be adhered to by the EU Member States. The baseline of the overview is the ECtHR case law and the standards developed within the Council

of Europe (e.g., the European Prison Rules). This is supplemented by a brief evaluation of the legal orders of the EU Member States in the fields of detention conditions and pre-trial detention.

As minimum standards for material detention conditions, the non-paper identified the following items:

- Cell space;
- Hygiene and sanitary conditions;
- Time spent outside the cell and outdoors;
- Access to healthcare;
- Protection from inter-prisoner violence.

The main areas of pre-trial detention (PTD) are:

- Reasonable suspicion and ground for PTD;

- Measure of last resort;
- Alternatives to PTD;
- Reasoned decisions on PTD;
- Decision-making on PTD;
- Regular review of PTD cases;
- Hearing the pre-trial detainee in person;
- Effective remedy and right to appeal;
- Deduction of time spent in PTD from final sentence.

At the JHA meeting of 7 October 2021, the Justice Ministers of the EU Member States discussed which minimum standards should be prioritised in order to enhance mutual trust. The majority of ministers were in favour of [not taking additional legislative measures](#) at EU level since the standards already exist in the various international fora

Report

Criminal Proceedings in the EU – the need for more procedural rights?

Thursday, 8 July 2021, 12.00–14.00 CEST, Zoom, organised by the Academy of European Law (ERA)

This webinar presented an insight into the state of play regarding procedural rights in criminal proceedings in the EU and discussed the possible need for further procedural rights. It was attended by around 50 participants, including defence lawyers, prosecutors and judges as well as government officials and members of NGOs from different EU Member States as well as third countries. The webinar took place in the form of a lunch-break debate via Zoom and aimed at contributing to the Conference on the Future of Europe.

Main subjects discussed during the workshops

Cornelia Riehle, ERA, kicked off the debate by introducing participants to the [2009 Roadmap for strengthening procedural rights](#) of the Council of the European Union, the [Agenda 2020](#) on minimum standards of certain procedural safeguards, designed by the European Criminal Bar Association (ECBA) in 2017/2018 and supported by the Council of Bars and Law Societies of Europe (CCBE), as well as to the legal basis for harmonising the EU Member States criminal procedure law, i.e. [Art. 82 TFEU](#).

Ideas regarding the future development and assessment of procedural rights in criminal proceedings were discussed as deeply as possible under the guidance of Prof. *Holger Matt* and *Vânia Costa Ramos*, both defence lawyers and active in the ECBA. For the ECBA, representing practitioners from all EU Member States, there still is a need to control the implementation of the procedural guarantees already in place regarding criminal proceedings, but there is as well a need to develop new tools and guarantees for accused and defendants to ensure a fair environment during criminal proceedings. The ECBA identified seven areas altogether in which changes are still needed:

- Pre-Trial-Detention and the European Arrest Warrant (EAW);
- Procedural Rights in trials;
- Witnesses' rights, legal privileges and confiscatory bans;
- Admissibility and exclusion of evidence;
- Conflicts of jurisdictions and *ne bis in idem*;
- Remedies and appeals;
- Compensation in criminal proceedings.

According to these measures, Prof. *Matt* and *Costa Ramos* led the participants through the “new” roadmap agenda and triggered many different but still fruitful discussions forming around the different measures.

Main ideas suggested by participants

Regarding *pre-trial detention and the EAW*, the EAW was highlighted as a big accomplishment by *Costa Ramos*, but it was pointed out that there are still problems to solve around the complexity of the instrument. From a practitioner's perspective, there are significant differences in terms of proportionality assessment when issuing an EAW in different Member States, in particular compared to domestic cases. *Costa Ramos* told the audience and gave a personal example deriving from her daily work with defendants in Portugal. Regarding legal shortcomings in relation to the EAW, Prof. *Matt* also added the problem of different rules regarding the minimum legal requirements of an arrest warrant and an EAW, the length and the recognition of time spent in pre-trial detention before surrender during the execution of an EAW in different EU Member States as well as different prison conditions and problems arising out of these conditions when executing an EAW. There definitely should be

an additional ground for refusal resulting out of serious infringements of human rights when executing an EAW, *Costa Ramos* added. Triggering a discussion, the audience was asked whether they evaluate the existing measures and their execution as enough or which ideas there are among the audience regarding possible future legislation in this area. *Thomas Wahl*, Senior Researcher at the Max-Planck Institute for the Study of Crime, Security and Law added that there are measures flanking the EAW but they are not used. The existing rules should be made more precise. Other than that, *Wahl* said he sees the danger of opening a "Pandora's Box" when amending the EAW and getting no added value out of this. Other participants added that they trust in the measures that are already at hand, but there is a need to rebuild and rethink based on the already existing fundament, building upon projects already started on these issues. A Europe "united in diversity" was proposed, maybe resulting in a common "European Code of Criminal Justice Mutual Recognition Measures" as the measures are already at hand but are scattered in different legal documents and established differently in different EU Member States. Examples were given how they are executed in different EU Member States and the newly created European Public Prosecutor's Office (EPPO) was mentioned as a possible influence since it will highlight the need for more streamlined solutions in this matter.

Moving forward, the issue of *minimum standards in trials* was discussed. Regarding the newly created European Public Prosecutor's Office (EPPO), on the one hand, the fundamental idea in the respective Regulation is that criminal proceedings should be conducted in a national legal framework, but on the other hand, the EPPO will be a European institution, so there could be a need to harmonise existing national rules. In reference to this, the choice of forum was mentioned as extremely important, and harmonising national rules would resolve the gravity of this issue in a significant manner. Prof. *Matt* also mentioned the different national rules regarding the right to refuse judges and their impartiality, sitting orders in trials prohibiting contact of the defendant with his lawyer, access to the complete case files, giving defence statements and the right to confront (key) witnesses during trial as well as the absence of European rules on these issues. For these issues, there should be minimum rules implemented at least to level the differing levels of protection in the different EU Member States. Also, the question of recordings of trials and the access to these recordings was mentioned. *Paola de Franceschi*, Judge at the Court of Appeal of Venice, added the problem of the right of the defendant being present at trial and the presumption of innocence in these cases: "The right to be present at the trial is enshrined in Article 8 of Directive (EU) 2016/343 of 9 March 2016 'on the strengthening of certain aspects of the presumption of innocence.' In accordance with the Italian Procedural Criminal Code, the trial can be held in *absentia* when, *inter alia*, the suspect/accused person at the beginning of the proceedings (*i.e.* when he/she was identified by the police or even arrested) indicated an address for service (*elezione di domicilio*) at the studio of the lawyer who was appointed *ex officio* (*i.e.* he/she is a foreigner and doesn't know any lawyer in Italy). In this case there is a kind of presumption that the accused person had knowledge of the charges and of the date of the trial. But if he/she could prove not having had any information about the trial, he/she has the right to appeal against the sentence issued in *absentia*. A recent decision of the United Chambers (Sezioni Unite) of the Court of Cassation, in order to

grant an effective knowledge of the trial, requires that – in the above-mentioned case – the judge should verify if a real professional link does exist between the lawyer appointed *ex officio* and the suspected/accused person." *Costa Ramos* added that there are also problems regarding these issues in Portuguese criminal proceedings where the burden of proof regarding the service of documents and the knowledge of what happens in criminal proceedings is put upon the defendants.

Next up were *evidentiary issues* to be discussed, an issue often called upon as "too difficult for politics." Prof. *Matt* pointed out that it is indeed a difficult issue to look upon, but it must be addressed, as not only guilty people but also innocent people are the subjects of criminal proceedings. We cannot exclude legal issues just because they are difficult – witnesses' rights and the right to remain silent if incriminating oneself otherwise, for instance, pose problems where no common European Rules are set. According to Prof. *Matt*, the good news is that the European Commission has already started its work in this area but these are only first steps into a different legal future. *Costa Ramos* added that the issue of remedies regarding unlawful collection and use of evidence for defendants should be addressed, especially as there are still many different rules in the different EU Member States regarding how defendants are compensated in these cases. Consequences of violations and rules of exclusion of evidence should be harmonised in the EU to ensure a union-wide standard of safe and fair trials. One participant insisted on the Directive regarding the European Investigation Order as a good starting point on questions regarding evidentiary issues, whereas *Costa Ramos* added that this all depends on the interpretation of this legal instrument by the relevant national authorities, in particular Art. 14(7).

Prof. *Matt* concluded the discussion with his intervention on three points made during the debate: First, the idea of a unified Criminal Procedure Code for the EU would not be convincing to him because of different legal cultures throughout the Union. Second, the idea of Art. 82(2) TFEU was only meant to establish minimum rules on different legal issues, but not blocking EU Member States from establishing a higher standard of protection in these questions. Third, all issues in criminal proceedings will lead sooner or later to the question of remedies which should therefore be a focal point in the discussion.

General atmosphere and expected follow-up

In her closing remarks, *Cornelia Riehle* pointed out how fruitful the discussion was and summarised the main issues voiced during the debate. She highlighted the focus on questions regarding the EAW and detention issues as well as the question of proportionality in these cases. There is also a pressing need for minimum standards in relation to the question of impartiality as well as admissibility and exclusion of evidence. She pointed out the issue of *ne bis in idem* in criminal proceedings where ERA offers further training. Finally, she mentioned the possibility to gain more information on procedural rights in criminal proceedings in the EU via a special subsite provided by ERA and co-financed by the European Commission that contains further presentations, podcasts, videos, and reading material. The seminar ended with a short presentation on the cycle of the "Conference on the Future of Europe."

Cornelia Riehle LL.M., Academy of European Law, Trier

(particularly Council of Europe). The next steps should focus on the effective application of the existing standards, the sharing of best practices, the facilitation of training, and the funding for the improvement of material detention conditions.

At the [press conference](#) after the Council meeting, Commissioner for Justice *Didier Reynders* said that the Commission will first present recommendations on best practices in 2022. (TW)

Victim Protection

Commission Recommends Measures to Improve Journalists' Safety

On 16 September 2021, the Commission [presented a recommendation](#) that sets out guidance for Member States to take effective, appropriate and proportionate measures to ensure the protection, safety and empowerment of journalists. The [Recommendation \(C\(2021\) 6650 final\)](#) is designed to complement other EU actions that support media freedom and pluralism. Several actions were already announced in the European Democracy Action Plan in December 2020 ([→eucrim 4/2020, 258–259](#)).

In order to ensure and safeguard an enabling environment for journalists and other media professionals, the Recommendation covers a series of issues pertaining to different key aspects of it. This includes horizontal recommendations regarding effective and impartial prosecution of criminal acts, dialogue and cooperation with law enforcement authorities, rapid response mechanisms, support services, training, access to information and venues, as well as economic and social protection. Moreover, the Recommendation includes specific recommendations related to protests and demonstrations, online safety and digital empowerment, as well as the situation of female journalists, those belonging to minority groups or reporting on equality. Regarding the debate on EU action against strategic lawsuits against jour-

nalists and other persons with watchdog function ([→eucrim 2/2021, 102](#)), the Commission announced an upcoming legislative initiative for media freedom, in which SLAPPs should be banned.

The Commission will further support the Member States in the implementation of the Recommendation (e.g. by EU funding) and it will monitor the progress achieved. Member States must report in 18 months on the measures and actions taken to put the Recommendation into practice. Analyses of the safety of journalist will continue to be part of the annual Commission's rule-of-law report ([→separate news item](#)).

UPDATE: On 4 October 2021, the European Commission started a [public consultation](#) on the protection of journalists and rights defenders against abusive litigation (SLAPPs). With this consultation, the Commission would like to know from the public which legislative and non-legislative measures against SLAPP claims are considered useful. For example, the Commission is considering raising awareness among legal professionals about SLAPPs and introducing civil procedural safeguards against this type of abusive litigation (e.g. early dismissal of claims or accelerated proceedings). Feedback is possible until 10 January 2022.

The issue of SLAPP was also discussed at the [JHA Council meeting on 7 October 2021](#). Justice Ministers shared national experience and good practices in fighting SLAPP and talked about the cross-border dimension of this phenomenon. (TW)

Cooperation

Police Cooperation

Commission Launches Action against Italy for Non-Compliance with Prüm Legislation

On 15 July 2021, the European Commission [referred Italy to the CJEU](#) for

the country's failure to comply with the requirements for the exchange of information on terrorism and serious crime cases in accordance with Council Decisions [2008/615/JHA](#) and [2008/616/JHA](#) – the so-called "Prüm Decisions". The "heart" of the Prüm framework is the swift access and exchange of information on DNA, fingerprints and national vehicle registration data, enabling law enforcement authorities to identify suspects and make links between criminal cases throughout the Union. The infringement procedures against Italy already started four years ago. After having urged Italy to comply with its obligations from the Prüm Decisions in a reasoned opinion in 2017, the Commission repeated enquiries on the progress made. Since Italy still does not allow other Member States access to its DNA, fingerprint and vehicle registration data, the Commission decided to launch the next step of the infringement procedure and take Italy to court. (TW)

European Arrest Warrant

Eurojust Updates its EAW Report

On 6 July 2021, Eurojust published an [update of the report on its casework in the field of the European Arrest Warrant \(EAW\)](#), analysing the application of the [Framework Decision on the EAW](#) in the EU Member States from 2017 to 2020. Based on 2235 EAW cases registered at Eurojust in the given period, the report addresses the following issues:

- The validity of the EAW;
- Grounds for non-execution;
- Guarantees and fundamental rights;
- Requests for information;
- Competing requests for (subsequent) surrender and extradition;
- Time limits;
- Postponement of surrender;
- Problems with actual surrender;
- How to prosecute and/or carry out custodial sentences in the context of the speciality rule;
- The relationship of the EAW to other

EAW e-Learning Course: Implementing EAW and Promoting Human Rights

Partners of the AWARE network developed an [e-learning course on “Implementing the European Arrest Warrant \(EAW\): Promoting Human Rights”](#). The course is designed for judges and prosecutors (estimated duration: 5h). A circumscribed version is aimed at judicial practitioners, including lawyers, NGOs, academia and researchers (estimated duration: 2h). The e-learning course is free of charge and pursues the following objectives:

- Deepened knowledge of the operational aspects of the EAW;
- Improved understanding of the assessment of detention conditions;
- Increased practitioner knowledge of the reality of detention conditions and executions of EAWs in Germany, Italy, Portugal, and Romania;
- Promotion of good or promising practices on the use of the EAW.

The course is divided into three modules. After participants had learned the basic concepts of the EAW and its role in the EU judicial cooperation scheme, attention is drawn to sensitive issues surrounding European Arrest Warrants, e.g. proportionality, efficiency and human rights. The course concludes with reflections on the future of the EAW, considering recent developments, such as the COVID-19 pandemic. Participants receive a certificate of participation upon completion of the course. They can [register](#) via the AWARE project website.

This e-learning course was developed under the [AWARE-EAW project](#), which is funded by the European Commission –DG JUST, and coordinated by the Bremen Senate of Justice and Constitution (Germany). Partners are the NGO Antigone (Italy), the Portuguese organisation Innovative Prison Systems (IPS), and the Romanian Superior Council of Magistracy (SCM). The project brings together different perspectives stemming from practitioner experience in order to address the challenges of EAW implementation and policy: decision-making information, use of existing provisions in national law, and informal judicial cooperation. A particular focus is on the obligations of the executing Member State courts to examine the detention conditions in the issuing Member States, alongside broader issues involving the protection of human rights of the requested person ([→eucrim 4/2019, 243](#)). (TW)

instruments, e.g., the European Investigation Order (EIO).

According to the report, many of the issues already identified in the previous report (2014–2017) remain, while new issues have also emerged. Regarding the content of EAWs, the report identifies the need to provide national authorities with more guidance on how to fill in EAWs. Missing, unclear, or inconsistent information has often put the execution of EAWs on hold.

In addition, national authorities should be provided with updates on the CJEU’s EAW case law, given its strong impact on issues such as the validity of EAWs, grounds for non-execution, and fundamental rights. The report also strongly recommends benefitting from direct contacts at Eurojust and/or the European Judicial Network (EJN).

The report stresses that investing in good translations and good language training is a key factor in improving the functioning of mutual recognition instruments, although this is often neglected in practice. Other issues identified include problems with unanswered requests for information and compliance with time limits.

The interpretation and application of specific grounds for non-execution and the assessment of fundamental rights grounds in line with the case law of the CJEU and the ECtHR are to be improved further. The report recommends providing practitioners with further guidance on these issues.

Regarding the relationship between the EAW and other instruments, Eurojust also offers assistance to practitioners by selecting the most appropriate mutual recognition instruments and coordinating their use. National authorities are invited to bring more cases on competing requests for surrender and/or extradition to Eurojust and to closely cooperate in situations in which actual surrender must be postponed. Ultimately, the report sees a need to further clarify the scope of the principle of speciality. (CR)

European Investigation Order

CJEU: Public Prosecutor Executing EIO Cannot Request Preliminary Ruling

On 2 September 2021, the [CJEU declared the request for a preliminary ruling by the Public Prosecutor’s Office of Trento, Italy, inadmissible](#). By its request, the Public Prosecutor’s Office of Trento wished to know whether the German tax authority, which has also investigative powers in criminal tax matters pursuant to the German Fiscal Code, can issue European Investigation Orders (EIOs) without validation by a judge or public prosecutor ([case C-66/20](#)).

The judges in Luxembourg argued that when the office of an Italian public prosecutor, such as the Public Prosecutor’s Office, Trento, acts as an authority for the execution of an EIO within the meaning of Art. 2(d) of Directive 2014/41, it is not called upon to rule on a dispute and cannot, therefore, be regarded as exercising a judicial function. As a consequence, the referring body cannot be recognised as a “court or tribunal” within the meaning of Art. 267 TFEU.

With its judgment, the CJEU departs from the Advocate General’s opinion in this case. He advocated admissibility and advised the ECJ to rule on the merits ([→eucrim 1/2021, 37](#)). The question now remains unanswered. (TW)

Financial Penalties

CJEU: Lack of Translation Can Be Refusal Ground to Execute Financial Penalty

spot light On 6 October 2021, the [CJEU delivered an important judgment](#) on the implications of fundamental rights in the mutual recognition scheme. The case concerned the question of whether an executing authority may refuse the recognition of a financial penalty (on the basis of FD 2005/214/JI) if the issuing authority did not notify the decision to the person concerned in a language he/she understands.

► *Facts of the case*

In the case at issue ([C-338/20](#)), the Centraal Justitieel Incassobureau, Ministerie van Veiligheid en Justitie (CJIB) (Central Fine Collection Agency, Ministry of Justice and Security) of the Netherlands wished to enforce a financial penalty in Poland that was imposed on Polish citizen *D.P.* in the Netherlands in respect of a road traffic offence. The CJIB confirmed that the decision imposing the financial penalty had not been notified to the addressee along with a translation into Polish. The decision had been drafted in Dutch and included additional explanations in English, French and German, as well as a reference to the website www.cjib.nl, where information is provided concerning, *inter alia*, the ways in which the person concerned can pay the fine, appeal against it and contact the CJIB in order to ask questions or obtain further explanations. *D.P.* explained that he received the letter of the CJIB but he was unable to understand its content, so that he was unable to reply. The referring District Court of Łódź, Poland had doubts whether it can refuse the request by the CJIB on the basis of the provisions implementing Art. 20(3) of Framework Decision 2005/214 on the grounds of a breach of the right to a fair trial.

► *Findings of the CJEU*

The CJEU decided that the person concerned against whom a financial penalty is imposed must be notified in a language he/she understands. It is important that the addressee of the order understands the charge against him/her and the way how to exercise his/her defence rights, at least in a case where the addressee has not been afforded the opportunity to obtain the necessary translation on request.

The CJEU on the one hand stressed its standing case law on the effectiveness on which the mechanism of mutual recognition of judicial decisions in the EU is based (i.e. cross-border enforcements without formality, limited and restrictively interpreted refusal grounds, etc.). On the other hand, the CJEU ac-

knowledges that the mutual recognition instruments include the clauses that they “shall not have the effect of amending the obligation to respect fundamental rights and fundamental legal principles as enshrined in Article 6 of the [EU] Treaty”. In this context, the CJEU makes reference to the ECtHR case law and states that the financial penalty for the offence at issue falls within the scope of Art. 6(1) and (3) ECHR. Therefore, the authorities must ensure that the fundamental rights enshrined in Art. 6 ECHR and the correspondent rights in Art. 47 and Art. 48(2) CFR are respected.

According to the CJEU, the right to effective judicial protection requires not only the guarantee of actual and effective receipt of decisions, that is to say, the notification of those decisions to the addressees thereof, but also that such notification allow those addressees to ascertain the reasons upon which the decision taken in relation to them is based, as well as the legal remedies against such a decision and the time limit prescribed to that end, so as to allow them to defend their rights effectively. Hence, adequate information on a language the defendant understands is required. It is up to the competent authorities of the issuing Member State to take all necessary steps to ensure that such a translation is prepared as soon as possible. If the translation is missing, the executing authority is entitled to oppose the recognition and execution on the basis of Art. 20(3) of FD 2005/214. The CJEU clarified, however, that the executing authority is obliged to examine if the addressee had understood the language in which that decision was notified to him or her.

► *Put in focus*

In its judgment, the judges in Luxembourg partly deviate from the [Advocate General's opinion](#) (presented on 2 September 2021). AG *Bobek* mainly focused on whether the essential information had already been communicated to the driver on the spot by the Dutch police in a language he could understand, which would mean that the violation of Art. 6 ECHR

could not have consequences due to the lack of translation. The AG accepted refusals only in exceptional cases, such as full *in absentia* procedures. In contrast, the CJEU primarily focuses on the lack of translation of the served criminal decision. Thus, while the AG’s main line of argument is based on the responsibility of the individual, the CJEU sees the responsibility with the issuing authority. Overall, the judgment strengthens fundamental rights in the system of mutual recognition of judicial decisions, because the CJEU explicitly recognises that the requirement of effectiveness of (criminal) prosecution must be reconciled with respect for fundamental rights of the person concerned. (TW) ■

CJEU: Hungarian Court Must Enforce Austrian Fine for Refusal to Name Driver

In a [judgment of 6 October 2021](#), the CJEU ruled on the question of the extent to which an executing authority may challenge the legal classification of an offence by the issuing authority in a category where double criminality is no longer to be examined.

► *Facts of the case*

The case ([C-136/20](#)) concerned the request by an Austrian authority to a Hungarian authority to execute a financial penalty against a Hungarian national on the basis of Framework Decision 2005/214/JI. That penalty was imposed because *LU*, as the owner of a vehicle involved in the commission of a road traffic offence in Austria, failed to comply with the obligation on her to identify the driver suspected of being responsible for committing that offence. Whilst the Austrian competent authority considered that the breach of that obligation to identify the driver constitutes an offence that falls within the scope of “conduct which infringes road traffic regulations” within the meaning of the thirty-third indent of Art. 5(1) of FD 2005/214, in respect of which verification of the double criminality of the act is precluded, the Hungarian competent authority submits,

for its part, that the offence cannot be classified as such. The referring Hungarian court therefore asked the CJEU of whether it has additional discretion to refuse the execution of the financial penalty if the indication of the conduct as a “list offence” by the issuing authority is considered too excessive.

➤ *Finding of the CJEU*

The CJEU emphasised that FD 2005/214 aims to establish an effective mechanism of mutual recognition of final decisions that imposed financial penalties on natural or legal persons for criminal and regulatory offences as defined in Art. 5(1). Considering that the executing authority is, in principle, obliged to recognise the decision of the issuing authority without any formality and given that Art. 5(1) FD 2005/214 excludes verification of double criminality for offences “as [...] defined by the law of the issuing State”, the executing authority is bound by the legal classification of a sanctioned conduct made by the issuing authority. Moreover, an interpretation of Art. 5(1) FD 2005/214 which would allow the executing authority to classify the offence in question itself on the basis of its national law would be contrary to the principle of mutual trust. Under these circumstances, the Hungarian authorities cannot refuse the recognition and execution of the submitted sanctioning decision of the Austrian counterpart.

➤ *Put in focus:*

The CJEU partly deviates from the [opinion of Advocate General de la Tour](#) in this case (delivered on 20 May 2021). The AG concluded that the executing authority can, on the basis of Art. 7(1) FD 2005/214, refuse to recognise and to execute a decision where the offence, as defined in the law of the issuing State, does not fall within the scope of the offence or the category of offences to which the competent authority in the issuing State refers in the certificate attached to that decision. However, the AG also concluded that the offence at issue is covered by the notion “conduct which infringes road traffic regulations”,

so that the Hungarian authorities would not have been entitled to refuse the request. Overall, the CJEU indicates in its judgment a stricter line of the mutual recognition principle and reaffirms its standing case law that possibilities to refuse judicial decisions must be interpreted narrowly in a system based on mutual recognition and mutual trust. (TW)

Law Enforcement Cooperation

Negotiations on E-Evidence Legislation: State of Play

At the end of its Council Presidency, [Portugal reported](#) on the state of play of negotiations on the Draft Regulation on European Production and Preservation Orders for electronic evidence in criminal matters (e-evidence legislation →[eucrim 1/2021, 38](#)). The Portuguese Council Presidency stated that, despite the very opposing starting points of the co-legislators, a compromise text could be reached on several issues, such as the definition of service providers and categories of data, on the grounds for non-execution of an Order for reasons of a formal nature, and on the acceptance of additional languages for the transmission of Orders and certificates. A clause that will give the possibility for suspects or accused persons or their lawyers to request Orders will be inserted as well.

The Portuguese Council Presidency emphasised that it defended the Council position during the negotiations that the e-evidence Regulation must have an added value in relation to the instruments and forms of cooperation. This viewpoint is also shared by the current Slovenian Council Presidency.

A central point of dispute remains the notification system. On 16 September 2021, the [Slovenian Council Presidency outlined](#) the main issues for a possible compromise. This would include that there will be no notification obligation for preservation orders, and that notifications will in general not have any suspensive effect.

In public debate the planned e-evidence package remains controversial. On 18 May 2021, European media and journalists, civil society groups, legal professional organisations and technology companies called on the negotiators to fully recognise fundamental rights (→[eucrim 2/2021, 105–106](#)). (TW)

Third Report of the Observatory Function on Encryption

On 2 July 2021, Eurojust published its [Third Joint Report of the Observatory Function on Encryption](#). The report deals mainly with the following issues:

- Legal aspects of handling encryption in criminal investigations;
- Overview of legal frameworks in the Member States relating to encryption, including relevant jurisprudence and casework experience;
- Technical developments (e.g., hardware-based encryption, Bcrypt password hashing) and their effects on investigation efforts, including upcoming opportunities and challenges in the context of quantum computing;
- The EncroChat case as good practice;
- Policy developments influencing and shaping the debate on encryption, including developments within the EU and – for the first time – outside the EU with a focus on the efforts being made in Australia and the USA.

In conclusion, encryption is an essential component in safeguarding fundamental rights, digital sovereignty, and innovation. At the same time, however, it is being increasingly used for illegitimate purposes. Criminals exploit encryption services to safeguard their communication, and they make use of off-the-shelf and home-grown solutions. This has led law enforcement and the judiciary to call for proportionate and adequate tools by which to obtain lawful access to electronic evidence that would finally also be admissible in court. Policymakers are left with the dilemma of finding solutions providing for proper privacy safeguards that, at the same time, allow to effectively protect citizens from crime. (CR)

Cooperation Tools with South Partner Countries

In order to further implement the EuroMed Justice (EMJ) programme (→news of 29 November 2020), the CrimEx expert group is developing [a series featuring six key tools](#) for judicial and law enforcement cooperation with the programme's South partner countries, i.e., Algeria, Egypt, Israel, Jordan, Lebanon, Libya, Morocco, Palestine, and Tunisia. These tools include:

- A cross-Mediterranean legal and gap analysis on the transfer of e-evidence in criminal matters;
- A tool for the protection of personal

data in judicial cooperation between South partner countries and EU Member States;

- A mechanism for joint investigations, parallel investigations, and the spontaneous exchange of information between South partner countries and judicial authorities in EU Member States;
- A mechanism to guarantee the procedural rights of defendants and victims;
- A tool to enable the confiscation of proceeds of crime and asset recovery;
- Guidelines for bilateral agreement(s) on judicial cooperation in criminal matters between South partner countries and EU Member States. (CR)

published so far. The complaint forms that are available online, however, should still be sent to the ECtHR by post.

New Factsheet on ECtHR Case Law on Independence of Justice

On 28 July 2021, the ECtHR published a new [factsheet on the independence of justice systems](#) (available in English and French). The cases are broken down as follows:

- Key aspects of independence and the right to a fair trial;
- Independence criteria for a “tribunal established by law” and stable legislation;
- Statutory independence, including freedom from external influence and objective guarantees for the professional careers of judges.

In addition, the factsheet juxtaposes the independence of justice with other Convention rights, including the principle of impartiality, the right to respect for private life, freedom of religion, freedom of expression, and permissible restrictions on freedom of assembly and association.



Council of Europe

Reported by Dr András Csúri (AC)

Foundations

Human Rights Issues

Protocol No. 15 to ECHR Enters into Force

On 1 August 2021, [Protocol No. 15](#) (adopted in 2013) amending the ECHR, entered into force. The Protocol amends the Preamble to the Convention, which now includes a reference to the subsidiarity principle and to the margin of appreciation doctrine (→eucrim 1/2021, 39).

In addition, the ECtHR is being reformed, in particular by reducing the time limit for submitting an application to the Court following a final domestic decision from six to four months starting 1 February 2022. Other changes include:

- Deletion of the admissibility criterion “significant disadvantage,” i.e. that a

case cannot be rejected if it has not been duly considered by a domestic tribunal;

- The parties to a case may no longer object to its relinquishment by a Chamber in favour of the Grand Chamber;
- Candidates for a post as judge at the ECtHR must be younger than 65 years of age on the date on which the list of three candidates was requested by the Parliamentary Assembly.

ECtHR: New Website for Applicants

The European Court of Human Rights (ECtHR) has launched a [new website for applicants](#). It is available [in all official languages](#) of the CoE Member States.

The site clearly explains the formalities of the application process, the admissibility requirements, and the procedure before the ECtHR. It also includes the most important handbooks and guides

ECtHR: Right of Access to a Court in Respect of Administrative Decisions

On 20 July 2021, the ECtHR held in a chamber judgment in *Loquifer v. Belgium* that the right of access to a court (Art. 6 § 1 ECHR) in respect of administrative decisions implies the possibility of remedy by a judicial body. The case involved a Belgian national/former judge who had been appointed to the High Judicial Council (“the CSJ”), an administrative body, but was suspended from all duties in view of criminal proceedings against her. Following her acquittal, the CSJ found that the criteria for her reinstatement were satisfied. The ECtHR, however, found that the right of access to a court had been violated, as the suspension decisions in question had not been taken by a “tribunal” or other body exercising judicial powers and the applicant had had no remedy to have the decision reviewed *ex post* by such a body and to have it set aside or to obtain a stay of execution.

ECtHR: Disciplinary Chamber of the Polish Supreme Court in Breach of the ECHR

On 22 July 2021, the ECtHR held in a chamber judgment in *Reczkowicz v. Poland* that the Disciplinary Chamber of the Polish Supreme Court is not a tribunal established by law within the meaning of the ECHR. The case is one of 38 applications against Poland, lodged between 2018–2021, concerning various aspects of the reorganisation of the Polish judicial system initiated in 2017.

The applicant in this case was a Polish national and barrister suspended for three years following several incidents when she was representing a client. She appealed the decision before the Polish courts, with her case ultimately being dismissed in 2019 by the Disciplinary Chamber of the Supreme Court – one of the two new chambers created following the changes to the judiciary.

The applicant argued that her case had not been heard by an “independent and impartial tribunal established by law” (Art. 6 § 1 ECHR). The Disciplinary Chamber is composed of judges appointed by the President of Poland on the recommendation of the National Council of the Judiciary (“the NCJ”). The NCJ is the constitutional organ in Poland that safeguards the independence of courts and judges, which has been the subject of controversy since the entry into force of new legislation stipulating, among other things, that its judicial members be elected by the Sejm (the lower house of Parliament).

The ECtHR found that the appointment procedure for judges was unduly influenced by the legislative and executive branches of government. In particular, the 2017 Amending Act deprived the judiciary of the right to elect judicial members of the NCJ, a right it had had under the previous legislation. This, in effect, meant that the legislative and executive powers were able to directly or indirectly interfere with the appointment of judges. It constituted a fundamental irregularity, which adversely affected

the entire procedure and jeopardised the legitimacy of the Disciplinary Chamber of the Supreme Court examining the applicant’s case. According to the ECtHR, the Disciplinary Chamber therefore lacks the attributes of a “tribunal established by law” within the meaning of the European Convention on Human Rights.

ECtHR: Judicial Reform in Ukraine Seriously Undermined Independence of the Judiciary

Following judicial reforms in Ukraine, the ECtHR dealt with the independence of the Ukrainian judiciary in a chamber judgment in the case of *Gumenyuk and others v. Ukraine* on 22 July 2021. The case concerned eight judges of the former Supreme Court of Ukraine, elected for an indefinite term, who had been prevented from exercising their functions without having ever been formally dismissed. The applicants did not have a right of individual petition to the Constitutional Court, the sole court empowered to repeal a statutory provision, yet the courts of general jurisdiction in Ukraine also did not have the power to set aside laws as being unconstitutional.

Following the change in governmental powers in late 2013 and early 2014, amendments to Ukraine’s constitution were adopted with regard to the organisation and functioning of the domestic judiciary. In 2016, the Supreme Court was dissolved and a new law on the judiciary and the status of judges (“the Judiciary Act 2016”) simultaneously came into effect in September 2016. According to the new law, the judges of the future Supreme Court were to be appointed on a competitive basis. The judges of the former Supreme Court had the right to participate in the competition for the new Supreme Court appointments.

The plenary of the former Supreme Court challenged the provisions of the Judiciary Act 2016 before the Constitutional Court of Ukraine, which ruled in their favor. It stated that the applicants should be able to continue to work as judges of the new Supreme Court. That

said, the applicants were removed from their functions.

In November 2016, a competition for the new Supreme Court was announced. Among the candidates were 17 of the 21 judges of the former Supreme Court. In the case at issue, seven of the eight applicants in the current case participated in the competition, but none of them succeeded. The new Supreme Court began operating on 15 December 2017.

On 18 February 2020, the Constitutional Court of Ukraine declared the relevant legislative measures unconstitutional and ruled that, under the Constitution, only one supreme judicial body existed and that, in view of the principle of irremovability, the judges of the “old” Supreme Court should continue performing their functions as judges of the “new” Supreme Court. Despite this ruling, the issue of the applicants’ resumption of their judicial functions was still under examination by Parliament in June 2021.

The ECtHR held that the legislative amendments in 2016 and their subsequent implementation prevented the applicants from exercising their judicial functions while they had not been being formally dismissed, despite the Constitutional Court confirming the validity of their tenure and their right to remain judges of the highest judicial body. The ECtHR called to mind the special role of the judiciary in a democratic society and its duty to provide checks on governmental wrongdoing and abuse of power. Therefore, members of the judiciary need to be protected against any measures affecting their status and professional career that could threaten their judicial independence and autonomy.

The ECtHR found that the right of access to a court (Art. 6 § 1 ECHR) is a fundamental procedural right for the protection of members of the judiciary. Hence, the applicants should, in principle, have been able to go to court with their allegations on an individual level. In addition, the ECtHR ruled that the fact that they had been prevented from

exercising their function as Supreme Court judges since December 2017, despite a Constitutional Court ruling in their favour, constituted an interference with the right to respect for private life (Art. 8 ECHR), as the applicants have been deprived of the opportunity to continue their judicial work and pursue professional and personal development goals. This interference was not lawful within the meaning of the Convention, as it went against the principle of irremovability of judges, which is fundamental for judicial independence and public trust in the judiciary. The ECtHR, therefore, held that there had been a violation of Art. 6 § 1 ECHR.

Procedural Criminal Law

European Commission for the Efficiency of Justice (CEPEJ)

CEPEJ: Guidelines on Videoconferencing in Judicial Proceedings

On 1 July 2021, the European Commission for the Efficiency of Justice (CEPEJ) published [guidelines on videoconferencing in judicial proceedings](#). They were adopted at CEPEJ's plenary meeting on 16 and 17 June 2021. Since the beginning of the health crisis, the courts have had to develop and manage the use of videoconferencing in judicial proceedings. Member States asked the CEPEJ to adopt relevant guidelines, which now set out principles that states and courts should follow to ensure that the use of videoconferencing for remote hearings is in line with the right to a fair trial as enshrined in Art. 6 ECHR.

The guidelines apply to all judicial proceedings and also, *mutatis mutandis*, to prosecution services, with the first part of the document also containing specific provisions for criminal proceedings. The second part contains technical and organisational requirements, while the appendix features a checklist of essential

requirements for the use of videoconferencing in judicial practice. As a fundamental principle, the guidelines require that all guarantees of a fair trial under the ECHR should also apply to remote hearings in all judicial proceedings.

As regards judicial proceedings, in general, the guidelines set out the following:

- Decision and review to hold a remote hearing: The states are to establish a legal framework that provides a clear basis allowing courts to hold remote hearings in judicial proceedings. The courts in turn will decide, within the applicable legal framework, whether a certain hearing should be held remotely, with the aim of ensuring the overall fairness of the proceedings. The courts should also safeguard the right of a party to be effectively assisted by a lawyer in all judicial proceedings, including the confidentiality of their communication.
- Right to participate effectively: There should be opportunities to test the audio and video quality prior to/at the start of the hearing and to carry out continuous monitoring of image and sound quality of the video link during the remote hearing. The situation of and challenges for persons in vulnerable positions are to be taken into consideration, and the hearing must be suspended in case of a technical incident.
- Identification and privacy: Identification should not be excessively intrusive or burdensome, and all necessary measures must be taken to eliminate any risk of a violation of the parties' right to privacy.
- Publicity and recording: The public should be allowed to join the remote hearing in real time or, alternatively, the recordings should be uploaded to the court's website.
- Examination of witnesses and experts: The practice adopted when a witness or expert is present in the courtroom should be followed as closely as possible.
- Evidence: The courts should provide instructions on the procedure for the presentation of documents and other material; the presentation of new evidence at a remote hearing should follow the adversarial principle; and interpreters should have visual contact with the person being translated.

As regards criminal proceedings in particular:

- If domestic legislation does not require the free and informed consent of the defendant, the court's decision on the defendant's participation in the remote hearing should serve a legitimate aim based on such values as the protection of public order; the protection of public health; the prevention of offences; the protection of the defendant's rights to life and liberty; and the preservation of the safety of witnesses and victims of crime.
- The effective participation of the defendant should be provided for by ensuring that the video link enables him/her to see and hear the participants at the remote hearing. Furthermore, the court should react to any technical incidents reported by the defendant. If a defendant continuously conducts himself/herself improperly, the court must inform the defendant of its power to mute him/her and to interrupt or suspend the defendant's video link; if the court decides to mute the defendant, it has to ensure that the defendant's legal representative is still able to exercise the right to legal assistance during the remote hearing and during the proceedings as a whole.
- The defendant should have effective access to legal representation before and during the remote hearing, and the court must adjourn or suspend the remote hearing in the absence of the defendant's legal representative. The defendant should be able to confer with his/her legal representative and exchange confidential instructions without surveillance and should be able to communicate with his/her legal representative over a secured system. Specific arrangements should also be made to ensure that the interpretation of communication between the defendant and his/her legal representative does not undermine confidentiality.

Articles

Articles / Aufsätze

Fil Rouge

The future protection of the EU's financial interests is faced with manifold challenges at both the EU and national levels. The Council and the European Parliament agreed on a record budget for the years 2021–2027, consisting of the EU's spending in the next seven years (the multiannual financial framework) and the COVID-19 recovery package (NextGenerationEU). It amounts to a total of €2.018 trillion (in current prices). As indicated in the guest editorial by *Beatrix Sanz Redrado*, Director at OLAF, it is predominantly of utmost importance to answer the question of how the unprecedented spending of EU money designed to boost the EU's economy after the constraints experienced during the COVID-19 pandemic can be effectively protected against fraud, corruption, misappropriation of funds, and other irregularities detrimental to the EU budget. This mainly concerns the Recovery and Resilience Facility (RRF) programme – the cornerstone of the NextGeneration EU – which will support the EU Member States with over €723 billion in the coming years and by which the EU also breaks new ground. In her special contribution to this eucrim issue (following this fil rouge), *Marta Cartabia*, the Italian Minister of Justice, stresses the need for a robust criminal justice system to tackle the new challenges, and highlights the relevant Italian reforms that were made in the context of the Italian recovery and resilience plan. In the subsequent article, *Clemens Kreith* and *Charlotte Arwidt* describe which anti-fraud measures have been laid out in the Recovery and Resilience Facility. The record budget has also shifted the EU's focus towards a better fight against expenditure fraud by means of its new Anti-Fraud Programme – another important flanking measure to support Member States in their protection efforts. *Georg Roebling* and *Sorina Buksa* provide an overview of the main features of the programme and explain major changes in comparison to the previous funding scheme, the "Hercule III Programme."

Based on the recent implementation report of September 2021, *Wouter van Ballegooij* subsequently presents the Commission's concerns as regards the EU Member States' compliance with Directive 2017/1371 on the fight against EU fraud by criminal law. Known as the "PIF-Directive," it is considered a key tool on the repressive side of protection, but transposition has nonetheless entailed challenges for national legislators as exemplified by *Markus Busch*'s article, which presents a German perspective on the negotiations on and implementation of the legal act. Uniform implementation of the PIF Directive is also indispensable for the proper functioning of the European Public Prosecutor's Office (EPPO), enabling the new actor in EU criminal justice to effectively investigate and prosecute PIF crimes. Alongside this substantive issue, another considerable challenge in the near future is to reconcile the Office's criminal investigations with the administrative investigations carried out by OLAF. Beginning with the new legal framework for OLAF, the article by *Nadine Kolloczek* and *Julia Echanove Gonzalez de Anleo* then elaborates on the operational relationship between the two bodies as set out in the recently concluded Working Arrangement between the EPPO and OLAF. The authors also give a preview of future opportunities, so that the common goal of the two actors, namely the protection of the EU's financial interests, can be achieved as successfully as possible. All actors in the fight against fraud need expertise on the methods offenders use to defraud and misuse EU funds. In the last article, *Anca Jurma* and *Aura Amalia Constantinescu* round up this special issue on the protection of the EU's financial interest in the context of the current multiannual financial framework by presenting the main findings of an interesting study conducted by the specialised Romanian Anti-Corruption Directorate (DNA), which has brought to light the main typologies of fraud.

Thomas Wahl, Managing Editor of eucrim

Italian Recovery and Resilience Plan and the Protection of EU Financial Interests

Enhancing the Criminal Justice System in the Age of Structural Reforms

After long months of deadlock due to the coronavirus pandemic, the time has come to make use of valuable resources and valuable possibilities. All necessary energies and means must be invested to ensure that support for national economies from European and national funds do not lead to the undue enrichment of a few. Perpetrators of organized crime are attracted by easily available sources of wealth and money. We can neither allow the EU's recovery funds to end up in the wrong hands nor permit illegal interests that thwart this extraordinary opportunity for a new beginning. More than ever, it is necessary to develop coherent projects and reforms, which should also include initiatives aimed at making the application of criminal law more rational and more efficient.

From this perspective, the European Public Prosecutor's Office (EPPO) plays a fundamental role, because it is an essential tool to combat financial crime, tax fraud, and all forms of misuse of European funds. In various European forums, I have already expressed my appreciation for the progress already made by the EPPO with regard to the nearly completed recruitment of staff, the signing of bilateral agreements with other European Union bodies, the initiatives taken regarding judicial cooperation with third countries and, above all, the results already achieved since June 2021 with the launch of investigations into criminal acts that have caused an estimated loss of more than €4 billion to the Union budget.

Italy's commitment to the effective operation of the EPPO was manifested with the approval and entry into force of Legislative Decree no. 9 of 2 February 2021 and subsequent legislative acts adjusting domestic legislation to the EPPO Regulation. I am confident that the virtuous and loyal cooperation between the European Delegated Prosecutors and the national judicial and law enforcement authorities will benefit the effectiveness of their respective actions and the results achieved.

Effective criminal protection also needs a speedy and efficient (criminal justice) process, which the reform recently approved by the Italian parliament, Law no. 134 of 27 September 2021, ensures by making essential improvements in this regard. A number of reform measures serve this purpose, which are intended to apply at every stage of criminal procedure – from the beginning of the investigation, to the trial phase, and even to the stage of appeal. In particular, the provisions on “bar to prosecution for having exceeded the maximum duration of appeal proceedings” are intended to strengthen the guarantee of a reasonable length of trial. Other significant improvements concern pecuniary penalties, the particular tenuousness of the fact (*de minimis* offence provision), probation, restorative justice as well as a series of measures aimed at promoting digitalization. In addition to regulatory measures, organisational improvements have also been made, such as the investment in the Trial Office (*Ufficio per il Processo*), which has more than 16,000 employees and constitutes a major innovation in the way justice is organised.



Marta Cartabia



Reform commitments in the Italian Recovery and Resilience Plan modernize the criminal justice system and increase the effectiveness and efficiency of criminal protection against EU fraud, in line with constitutional rights and guarantees.



I would like to mention that this reform effort is part of the commitment made with the approval of the Italian Recovery and Resilience Plan. While it is true that national recovery and resilience plans are indeed all about reform, the inclusion of the criminal justice chapter in the “structural” or “contextual” reforms signals a direction aimed at consolidating the results that can be accomplished with the extraordinary resources from the Recovery and Resilience Fund, above and beyond the time horizon marked by the National resilience and recovery plan. In short, reform commitments in the Italian Recovery and Resilience Plan are sure to modernize the criminal justice system and increase the effectiveness and efficiency of criminal protection against EU fraud, in line with constitutional rights and guarantees.

Marta Cartabia, Italian Minister of Justice

Protecting the EU's Financial Interest in the New Recovery and Resilience Facility

The Role of the European Anti-Fraud Office

Clemens Kreith and Charlotte Arwid*

The Recovery and Resilience Facility (RRF) is a key initiative providing up to €723.8 billion in support of Europe's economic and social recovery from the Covid-19 pandemic. In light of the unprecedented scale and delivery mechanism of the Facility, the question arises as to how the European Union's financial interests in the RRF will be protected against fraud and corruption. To answer this question, this article provides an analysis of the legal safeguards in the EU's Regulation establishing the Recovery and Resilience Facility for the protection of the EU's financial interests. It also gives a practitioner's view of the role of the European Anti-Fraud Office (OLAF) in the Commission's assessment of the national recovery and resilience plans and describes the part OLAF will have during the upcoming implementation phase of the Facility. Ultimately, it is argued that the combined efforts of all actors will be needed to ensure that the funds help accomplish the objectives of the initiative and reach the intended recipients.

I. Introduction

The Recovery and Resilience Facility (RRF) is a key initiative of the European Union (EU) to counteract the economic and social impact of the Covid-19 crisis. Both the scale of support and delivery mechanism are unique. With regard to scale, the Facility comprises financial contributions of €723.8 billion¹ in loans and grants. These funds aim to help Europe bounce back from the crisis by supporting EU citizens and businesses as well as to contribute to Europe's green and digital transitioning.

In addition, the RRF employs a specific delivery mechanism. Member States will receive financial support subject to the implementation of national reforms and investments that are outlined in their recovery and resilience plans, provided that these plans have been endorsed by the European Commission and approved by the Council. The Commission will authorise payment based on the fulfilment of milestones and targets reflecting progress on these investments and reforms (which cover areas like public procurement, justice, and public finances). In other words, payment will be linked to performance and not directly to the ultimate costs.

Consequently, the specific features of the RRF affect how the EU's financial interests are protected. This article aims to explore the impact on the fight against fraud in general and on the role of the European Anti-Fraud Office (OLAF) in particular. The analysis will follow three steps:

- First, the article will explore the legal framework set up by the EU's Regulation establishing the Recovery and Resilience Facility (hereinafter "RRF Regulation")² for the protection of the EU's financial interests;
- Second, it will give an overview of the anti-fraud measures in the national recovery and resilience plans;
- Third, it will consider the implementation phase of the Facility and examine how OLAF could accompany this phase.

II. Legal Dimension – Anti-Fraud Measures Enshrined in the RRF Regulation

In many ways, the creation of the RRF resembled a journey into unchartered territory, especially with regard to the measures to be implemented to protect the EU's financial interests. Of interest in this context is which modality of financial implementation was chosen – a question that is not a mere technicality. This refers to the "management mode,"³ which has a significant impact not only on the implementation of the funds as such but also on the corresponding control and anti-fraud framework.

In this respect, Art. 8 of the RRF Regulation clearly states that the "[f]acility shall be implemented by the Commission in direct management." Compared to other programmes implemented under direct management, however, the RRF is considered a *sui generis* version of direct management. The main difference lies in the nature of the immediate beneficiary⁴.

Whereas a beneficiary under direct management is usually a natural person or entity, including private companies,⁵ the beneficiary (or borrower in the case of loans) under the RRF is an EU Member State.⁶

Under this set-up, how does the RRF Regulation aim to ensure sound control and anti-fraud measures? The answer can be found mainly in Art. 22 of the Regulation, which contains comprehensive provisions on the protection of the EU's financial interests. A closer analysis of Art. 22 reveals several key features. For the purpose of this article, four features are relevant, namely:

- The concept of “serious irregularities”;
- The central role of Member States in the protection of the EU's financial interests;
- The explicit empowerment of the Commission, OLAF, the Court of Auditors and, where applicable, the European Public Prosecutor's Office to exert their rights;
- The collection of data on final recipients of funds.

The first feature is of a conceptual nature, as the RRF Regulation introduces the notion of “serious irregularities,” which cannot be found as such in the rules governing the previous and current Multiannual Financial Frameworks.⁷ Recital 53 of the RRF Regulation defines serious irregularities as “fraud, corruption and conflicts of interest.” This is particularly interesting, as it provides an alternative to the dichotomy of “criminal” versus “administrative” acts used in other areas, for example in the annual reports on the protection of the EU's financial interests, which distinguish between “fraudulent” and “non-fraudulent” irregularities.⁸ Following conventional logic, fraud and corruption would fall into the “criminal” category, while conflicts of interest are often considered “administrative” offences in many jurisdictions.⁹

Nevertheless, for the purpose of the RRF, these three offenses (fraud, corruption, conflicts of interest) are grouped together. This is of particular practical relevance, as the RRF attaches specific importance to the treatment of serious irregularities. In addition to the arrangements to avoid double funding from the RRF and other Union programmes, for example, Member States are required to lay out in detail in their national recovery and resilience plans their system to prevent, detect, and correct serious irregularities; the Commission, in turn, must assess the measures outlined in the plans.¹⁰ Another example is the possibility for the Commission to reduce financial support proportionately and recover amounts from the Member States in case of serious irregularities that were not corrected by the Member States or in case of a “serious breach of an obligation” involving the financing agreement concluded between the European Commission and the respective Member State.¹¹

The second salient feature is Art. 22(1) of the RRF Regulation, which clearly identifies Member States and their internal control systems as the main instrument for safeguarding the financial interests of the Union. The provision reads as follows:

In implementing the Facility, the Member States, as beneficiaries or borrowers of funds under the Facility, shall take all the appropriate measures to protect the financial interests of the Union and to ensure that the use of funds in relation to measures supported by the Facility complies with the applicable Union and national law, in particular regarding the prevention, detection and correction of fraud, corruption and conflicts of interests. To this effect, the Member States shall provide an effective and efficient internal control system and the recovery of amounts wrongly paid or incorrectly used. Member States may rely on their regular national budget management systems.

Art. 22(1) is pivotal, as it further clarifies the responsibility of Member States above and beyond the previously specified treatment of serious irregularities. While Art. 22(1) stresses “*in particular* [the fight against] fraud, corruption and conflicts of interest” [emphasis added], it also clearly recognises the obligation of Member States to protect the EU's financial interests in their entirety, i.e., to “take all the appropriate measures to protect the financial interests of the Union and to ensure that the use of funds [...] complies with the applicable Union and national law.” As a logical consequence of this wording, Member States are expected to correct all types of irregularities¹² without distinguishing whether these irregularities were fraudulent, i.e., committed intentionally, or merely “administrative” in nature.

As a third key feature, the RRF Regulation confirms the competence of EU control bodies and investigation bodies applies. In this context, the RRF Regulation implements a general requirement of Art. 129(1) of the Financial Regulation, namely the need to expressly authorise in financial agreements the ability of the Commission, OLAF, the Court of Auditors and, where applicable, the European Public Prosecutor's Office to exert their competences. This is ensured in Art. 22(2)(e) of the RRF Regulation. Similarly, and in line with the Financial Regulation, this requirement also applies to “all final recipients of funds paid for the measures for the implementation of reforms and investment projects included in the recovery and resilience plan, or to all other persons or entities involved in their implementation.” Hence, Member States must ensure that these rights are properly “cascaded down” to the final recipients of funds.

The fourth feature is the explicit requirement for Member States to collect certain data, in particular the names of final recipients, contractors, sub-contractors, and beneficial owners of RRF expenditure. This constitutes a true novelty compared to the rules in the Multiannual Financial Framework 2014–2020. Given that “following the money” is crucial in financial investigations, these requirements are of particular

value in the fight against fraud, keeping in mind especially the performance-based nature of the RRF.

III. Anti-Fraud Measures in National Recovery and Resilience Plans

A further novelty of the RRF process is the drafting of national recovery and resilience plans in advance of the disbursement of funds. In light of the performance-based nature of the RRF, the main purpose of these plans is to develop and describe the foreseen reform and investments, including corresponding milestones and targets. However, the plans are also crucial from an anti-fraud perspective. As mentioned previously in section II, the plans must contain an explanation of the Member States' proposed systems to prevent, detect, and correct serious irregularities as well as the arrangements taken to avoid double funding from the Facility and other Union programmes. The Commission will subsequently assess the measures outlined in each plan. If a plan fails this assessment with regard to the audit and control elements, it fails in its entirety in accordance with Annex V of the RRF Regulation. These consequences reflect the importance attached to the anti-fraud actions. By assessing each national recovery and resilience plan the Commission also fulfils its role of performing an *ex ante* check of the Member States' audit and control systems for the RRF.

The European Anti-Fraud Office (OLAF) has contributed to the screening and assessment of the national plans. OLAF can build on over twenty years of experience in investigating fraud as well as on its prevention work, which includes practical anti-fraud advice to the relevant Commission services. OLAF has provided its input on whether the control and audit mechanisms described in the plans were solid enough to protect the EU's financial interests, with the aim of ensuring that the measures were as concrete and operational as possible.

As of September 2021, a majority of Member States' plans had been approved.¹³ This confirms that the majority of Member States have put audit and control arrangements into their respective plans that meet the requirements of the RRF Regulation. From a more general perspective, i.e., going beyond the specific conditions of the RRF Regulation, an analysis of the audit and control elements in the available national plans allows for the identification of certain areas that will require close attention in the future:

- The plans show that Member States predominantly use existing systems and bodies based on national budget procedures and/or on shared management. In this context, it is important to observe that the RRF will represent an additional source of funding for Member States that already

receive contributions from other European funds.¹⁴ This may increase pressure on the management and control systems. The implementation deadline for RRF expenditure by 2026 could also be another reason contributing to this pressure.

- For some Member States, the Commission will specifically monitor the implementation of certain measures that still need to be developed after approval of the plans, e.g., defining new rules or making technical adaptions to IT systems in order to collect data on the final recipients of RRF funds. This monitoring will be linked to milestones that need to be fulfilled before the first payment request is submitted to the Commission. Beyond the measures to be implemented as part of these milestones, it will be important for Member States to continue to implement other types of anti-fraud measures, such as training and awareness-raising measures.
- As the RRF Regulation does not foresee the use of a single IT tool for the collection and storage of data on final recipients, Member States will collect and store this information at the national level. While the EU institutions will have access to this data upon request, the efficiency of such a two-tier structure remains to be tested in practice and will depend on smooth cooperation between the national and EU levels.
- With regard to risk analysis, the European Commission strongly recommends the use of "ARACHNE"¹⁵ as a single data mining and risk scoring tool, and many Member States have announced that they plan to use this system for the purpose of the RRF. To the extent that some Member States continue to rely on national systems, the Commission will have to make sure this does not create a situation that would reduce the ability of different actors and authorities to analyse risk patterns/trends and to identify risky beneficiaries. Consistent use of ARACHNE by all Member States would be beneficial in the long run.

IV. Implementation Phase and OLAF's Involvement

These measures to protect the EU's financial interests will soon be tested in practice when the implementation phase begins and the first payments are issued. During this phase, OLAF will fulfil its mandate by conducting administrative investigations into RRF-related expenditure, which the Office has already been doing in other areas of EU funding. Similarly, OLAF will also provide financial support to Member States for anti-fraud measures via a dedicated funding instrument, the Union Anti-Fraud Programme.¹⁶

In addition to these "traditional" actions, extra effort will be necessary to ensure that the RRF is securely and effectively

protected against fraud. For this purpose, OLAF intends to team up with national authorities and its partners at the EU level, e.g., Europol and, where relevant, the European Public Prosecutor's Office. Several avenues of cooperation are possible. For example, based on its past experience in shared management operations, OLAF will support the Commission's services in relation to RRF expenditure by continuing to share dedicated anti-fraud advice on Member States' management systems. Looking ahead, lessons learned from the screening of the national plans and upcoming investigative experiences gathered in conjunction with RRF expenditure can be integrated into future fraud prevention measures and used to issue warnings and red flags. Reaching out to Member States to raise awareness and, where necessary, developing tailor-made support measures should round off these efforts.

Against this background, the challenge – and ultimate test of success – will be how well different actors cooperate to fulfil their common goal of protecting the EU's financial interests and ensuring that this extraordinary effort to relaunch Europe after the devastating effects of the pandemic is not undermined by fraud.

V. Conclusion

The legal framework of the RRF Regulation to protect the EU's financial interests can be considered robust. Member States, as beneficiaries or borrowers of RRF funds, are obliged to detect and correct all irregularities, especially serious irregularities, such as fraud, corruption, and conflicts of interest. The requirements on the collection and storage of data for final recipients, (sub-) contractors, and beneficial owners are particularly valuable from a control and investigatory perspective. The majority of Member States have submitted national recovery and resilience plans, including outlines of the audit and control systems, which the European Commission has assessed positively with the practical input of OLAF. In addition, Member States' management and control systems will be supported and complemented by bodies at the EU level, whose power to audit and investigate RRF expenditure has been confirmed. No authority can shoulder the burden of protecting the RRF against fraud on its own. It is therefore fitting that the RRF requires all anti-fraud actors to rethink their priorities, adjust their working methods as necessary, and work together even more closely to ensure the smooth functioning of the control system.

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

1 The amount of funding is expressed in 2020 prices, see: <https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en>, accessed 4 November 2021. In contrast, the amount in the RRF regulation is expressed in 2018 prices – hence the number in the RRF Regulation itself appears lower.

2 Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, *O.J. L* 57, 18.2.2021, 32.

3 Art. 62 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union (the "Financial Regulation"), *O.J. L* 193, 30.7.2018, 1, outlines three different methods of budget implementation: direct management (by Commission departments and Union delegations), shared management (with Member States), and indirect management (by entrusting budget implementation tasks to certain entities, such as international organisations, third countries, or individual Member State organisations).

4 Please note that for the purpose of the RRF and for this article, the term "beneficiary" refers to Member States, while the term "final recipient" refers to the entity or natural person ultimately receiving funding with a Member State.

5 For 2020, the European Commission's Financial Transparency System identifies private entities as the top beneficiary group receiving 50% of funding from direct management programmes, see: <<https://ec.europa.eu/budget/financial-transparency-system/analysis.html>>, accessed 4 November 2021.

6 See, for example, Recitals 8 and 18, Art. 4(2) and Art. 22(1) of Regulation (EU) 2021/241, *op. cit.* (n. 2).

7 See, for example, the Common Provision Regulations for the respective Multiannual Financial Frameworks, i.e., Regulation (EU) 2021/1060 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund, and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, *O.J. L* 231, 30.6.2021, 159–706 and Regulation (EU) No 1303/2013 of the European Parliament and of the Council laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development, and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and

Fisheries Fund, *O.J. L* 347, 20.12.2013, 320–469. Please note that the current Financial Regulation (*op. cit.* (n. 3)) uses the term “serious irregularity” in Art. 236 in relation to budget support to a third country, yet without further defining the term.

⁸ See, for example, the 31st Annual Report on the protection of the European Union’s financial interests – Fight against fraud – 2019, pp. 13–14. Available at <https://ec.europa.eu/anti-fraud/sites/default/files/pif_report_2019_en.pdf> accessed 4 November 2021.

⁹ See, for example, N. Nikolov (2013), “Conflict of interest in European public law”, (2013) 20 (4) Journal of Financial Crime, pp. 406–421; J. Oldfield, “Overview of conflict of interest and related offences”, Transparency International <<https://knowledgehub.transparency.org/helpdesk/overview-of-conflict-of-interest-and-related-offences>> accessed 4 November 2021.

¹⁰ See Art. 18(4)(r) and Art. 19(3)(j) of Regulation (EU) 2021/241, *op. cit.* (n. 2).

¹¹ Art. 22(2)(5) of Regulation (EU) 2021/241, *op. cit.* (n. 2).

¹² In the sense of Art. 1 Council Regulation (EC, Euratom) 2988/95 of 18 December 1995 on the protection of the European Communities financial

interests, *O.J. L* 312, 23.12.1995, 2, which defines irregularity as “any infringement of a provision of Community law resulting from an act or omission by an economic operator, which has, or would have, the effect of prejudicing the general budget of the Communities or budgets managed by them, either by reducing or losing revenue accruing from own resources collected directly on behalf of the Communities, or by an unjustified item of expenditure.”

¹³ See: <https://ec.europa.eu/info/business-economy-euro/recovery-coronavirus/recovery-and-resilience-facility_en> accessed 4 November 2021.

¹⁴ See, for example, Z. Darvas, “Will European Union countries be able to absorb and spend well the bloc’s recovery funding?”, bruegel Blog Post <<https://www.bruegel.org/2020/09/will-european-union-countries-beable-to-absorb-and-spend-well-the-blocs-recovery-funding>> accessed 4 November 2021.

¹⁵ ARACHNE is an IT tool for data mining and data enrichment developed by the European Commission. It aims to support the controls and checks by Member State authorities in the area of Structural Funds, see: <<https://ec.europa.eu/social/main.jsp?catId=325&intPageId=3587&langId=en>> accessed 4 November 2021.

¹⁶ On the new Union Anti-Fraud Programme, see also the article by G. Roebling and S. Buksa in this issue.

The New Union Anti-Fraud Programme

Georg Roebling and Sorina Buksa*

As part of its current Multiannual Financial Framework (MFF), the European Union (EU) adopted a new Anti-Fraud Programme on 29 April 2021. It merges the support previously offered under the Hercule III Programme with the Anti-Fraud Information System. Both the increased MFF budget and the launch of a dedicated Customs Control Equipment Programme shift the focus of support under the new programme towards fighting expenditure fraud, including fraud related to the Recovery and Resilience Facility. This article provides an overview of the main features of the new Anti-Fraud Programme and compares it to the Hercule III Programme.

I. Introductory Remarks

The Union’s new Multiannual Financial Framework (MFF) foresees a budget of some €1.8 trillion for the period 2021–2027, if one includes the Recovery and Resilience Facility (RRF)¹ created in response to the coronavirus pandemic. This is a record level of funding and inevitably raises questions as to whether all funds will achieve their intended purpose.

In an effort to limit any losses incurred as a result of fraud, corruption, or other activities affecting the EU’s financial interests, the MFF is accompanied by a modernised EU framework to fight fraud. Notably, this encompasses the start of operations by the European Public Prosecutor’s Office (based on Regulation 2017/1939,² and the reform of “OLAF Regulation” 883/2013³ by modifying Regulation 2020/2223),⁴ which particularly intends to enhance the effectiveness of the administrative investigations carried out by the European Anti-Fraud Office (OLAF).

These developments, without doubt, mark a qualitative step forward in protecting the EU’s financial interests – something the EU is required to achieve by virtue of Art. 325(1) of the Treaty on the Functioning of the European Union (TFEU). However, this obligation is shared by Member States. The EU is thus well advised not only to strengthen its own tools but also to pursue a double track by also equipping Member States in legal, operational, and material terms, so that they can deliver on their respective obligations.

In this context, the Union has moved forward in approximating national provisions of criminal law at the regulatory level via Directive 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law, the “PIF Directive.”⁵ The deadline for transposition of the PIF Directive into national law was 6 July 2019. As part of its examination of the Directive’s transposition in all Member States, the European Commission adopted a transposition report on 6 September 2021.⁶ In addition, the recent reform of Council Regulation

515/97 on mutual administrative assistance in customs and agricultural matters⁷ provides Member States with enhanced operational support, for example in the form of increased access to data. In parallel, the EU is also providing direct financial support to Member States based on Regulation 2021/785 establishing the new Union Anti-Fraud Programme (hereinafter UAFP).⁸ The following will give a brief overview of the main features of the programme (II.) and explain the main changes in comparison to the previous funding scheme, the “Hercule III Programme” (III.).

II. The Main Features of the EU Anti-Fraud Programme

The UAFP is the only spending programme specifically dedicated to fighting fraud affecting the EU's financial interests. It brings together two previously separate support schemes under one set of rules: firstly, the financial support previously offered under the Hercule III Programme⁹ and, secondly, the support provided to Member States for both the Anti-Fraud Information System (AFIS) and the Irregularity Management System (IMS). The support for AFIS and IMS was previously established under Art. 42a of Regulation 515/97.

The new common framework for all of these activities is expected to facilitate a more integrated and strategic use of financial resources and to simplify their management. The new design of the support scheme also strengthens the visibility of the EU's activities in the anti-fraud field. The merger of the three financing components allows for more budgetary flexibility in case of emerging needs and political priorities, as the anti-fraud landscape is constantly changing.

De ratione temporis, the support provided by the UAFP Regulation is aligned with the seven-year period (2021–2027) covered by the current MFF. Over this period, the amount of €181 million will be made available to beneficiaries. This represents about 0.1% of the total MFF package. The Commission's first Implementing Decision¹⁰ under the UAFP allocated a budget of around €24 million for the year 2021.

In substance, the UAFP essentially maintains previous operational objectives of the Hercule III programme. Support is provided for technical assistance to Member States, on the one hand, and, on the other, for training, conferences, staff exchanges, and legal studies in areas relevant to the protection of the Union's financial interests. Financial intervention is ensured through grants as well as procurement and administrative arrangements with the Joint Research Centre, the Commission's scientific arm. The programme will finance practical projects with a high added-value for its beneficiaries, such as the purchase of investigative equipment, IT and forensic tools,

data analytics technologies, the organisation of specialised trainings in anti-fraud matters, and the acquisition of access to commercial databases used in analytical work.

III. Key Changes Compared to the Former Hercule III Programme

The new programme consistently builds upon the success and experience of the previous Hercule Programmes, as will be confirmed by the Final Evaluation to be published in December 2021. At the same time, the legal basis of the new programme introduces novel elements to better address additional needs and priorities in the anti-fraud area.

As for the major changes introduced by the UAFP compared to the Hercule III Programme, the new Regulation clarifies, firstly, the circle of **entities eligible** for support. As a matter of principle, pursuant to Arts. 4 and 10 of the UAFP Regulation, the eligibility of third countries now generally depends on the conclusion of agreements binding these countries to the implementation of the UAFP. As a novelty, Art. 10(2)(c) of the Regulation also opens up participation in the programme to international organisations.¹¹

Another change that will impact the practical focus of UAFP support arises out of the parallel adoption of Regulation No 2021/1077 establishing a **Customs Control Equipment Programme** (CCEP).¹² Equipped with a substantial budget of €1 billion for the current MFF period, support now can be offered in an area that had received substantial support under past Hercule Programmes. The Commission pointed out¹³ that technical assistance under the UAFP will be targeted at the acquisition of types of equipment not covered by the new CCEP, in order to avoid any duplication of Union support.

As a result, the implementation of the UAFP will **focus on expenditure fraud** to a much greater extent. At the time of writing, it remained to be seen which priorities Member States choose when presenting their first set of applications in response to the first call under the new programme. The possibility exists, however, that some of them might wish to use the funding to build up their national capacities in order to protect expenditure against fraud under the new RRF.

In a shift away from costly customs equipment, the UAFP will also free up resources to strengthen support for other state-of-the-art equipment for operational anti-fraud work, such as advanced data analytics technologies or data mining tools. This more data-orientated approach is also in line with the Commission's updated Anti-Fraud Strategy¹⁴ (“CAFS II”), which emphasises **data analysis** as a tool for detecting fraud.

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

1 Established on the basis of Regulation (EU) 2021/241 of the European Parliament and of the Council of 12 February 2021 establishing the Recovery and Resilience Facility, *O.J. L* 57, 18.2.2021, 17.

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

3 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.

4 Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013, as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations, *O.J. L* 437, 28.12.2020, 49. For a summary of the Regulation, see T. Wahl "OLAF's New Amended Legal Framework", (2020) *eucrim*, 276–277.

5 *O.J. L* 198, 28.7.2017, 29. For details, see A. Juszczałk and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PFI Directive), Laying down the foundation for a better protection of the Union's financial interests?", (2017) *eucrim*, 80–87.

6 European Commission, "Report from the Commission to the European Parliament and the Council on the implementation of 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", COM(2021) 536 final. For a summary, see the article by Dr Wouter van Ballegooij in this issue.

7 Council Regulation No. 515/97, *O.J. L* 82, 22.3.1997, 1, as notably amended by Regulation No 2015/1525, *O.J. L* 243, 18.9.2015, 1, with an overview by E. Porebska, "Paving the Way for Improved Mutual Assistance in the Context of Customs Fraud", (2016) *eucrim*, 52–55.

8 Regulation (EU) 2021/785 of the European Parliament and of the Council of 29 April 2021 establishing the Union Anti-Fraud Programme and repealing Regulation (EU) No 250/2014, *O.J. L* 172 17.5.2021, 110.

9 Regulation (EU) No 250/2014 of the European Parliament and of the Council of 26 February 2014 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 No 804/2004/EC, *O.J. L* 84, 20.3.2014, 6.

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10 Commission Implementing Decision C(2021) 5338 of 23.7.2021.

11 Recital 22 of Regulation 2021/785 specifically mentions in this regard the "Secretariat of the World Health Organisation Framework Convention on Tobacco Control in its functions related to the Protocol [to Eliminate Illicit Trade in Tobacco Products].

12 Regulation (EU) 2021/1077 of the European Parliament and of the Council of 24 June 2021 establishing, as part of the Integrated Border Management Fund, the instrument for financial support for customs control equipment, *O.J. L* 234, 2.7.2021, 1.

13 See Commission Implementing Decision C(2021) 5338 of 23.7.2021, section 4.2.1.1.

14 COM(2019) 196 final of 29.4.2019. For details, see the article by C. Makri and O. Marin, "The Commission's New Anti-Fraud Strategy – Enhanced Action to Protect the EU Budget", (2019) *eucrim*, 218–222.

Protecting the EU's Financial Interests through Criminal Law

The Implementation of the "PIF Directive"

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This article provides a summary of a recent Commission report on the implementation of Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (the "PIF Directive"). This Directive, which is part of the Commission's overall anti-fraud strategy, harmonises the definitions, sanctions, jurisdiction rules, and limitation periods related to fraud and other offences affecting the EU's financial interests. A proper transposition of the PIF Directive by the Member States is necessary to enable the European Public Prosecutor's Office (the "EPPO") to conduct effective investigations and

prosecutions. The Commission's report contains a general and a specific article-by-article assessment of the transposition of the Directive. It concludes that, although all Member States have transposed the Directive, further action is needed to address outstanding compliance issues. These notably relate to the transposition of the definitions of criminal offences and the liability of – and sanctions for – legal persons and natural persons.

I. Introduction

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 (the "PIF Directive") was adopted on 5 July 2017¹ as part of the Commission's overall anti-fraud strategy.² For the Member States bound by it,³ the PIF Directive replaces the 1995 Convention on the protection of the European Communities' financial interests and its Protocols (the "PIF Convention").⁴

Based on Art. 83(2) TFEU, the PIF Directive sets common standards for Member States' criminal laws. These common standards seek to protect the EU's financial interests by harmonising the definitions, sanctions, jurisdiction rules, and limitation periods of certain criminal offences affecting those interests. These criminal offences (the "PIF offences") are: (i) fraud, including cross-border value added tax (VAT) fraud involving total damage of at least €10 million; (ii) corruption; (iii) money laundering; and (iv) misappropriation. This harmonisation of standards also affects the scope of investigations and prosecutions by the European Public Prosecutor's Office (EPPO)⁵ because the EPPO's powers are defined by reference to the PIF Directive as implemented by national law.⁶

The deadline for transposition of the Directive into national law expired on 6 July 2019. Only 12 Member States had notified full transposition of the Directive by that date. Therefore, the Commission launched infringement procedures against the remaining 14 participating Member States by sending them letters of formal notice in September 2019. As of April 2021, the number of notified complete transpositions had gone up to 26, which means that all Member States bound by the Directive have now notified its full transposition into national law.

II. Implementation of the PIF Directive's Main Provisions

1. Scope and methodology

In accordance with Art. 18(1) of the PIF Directive, the Commission's implementation report of 6 September 2021⁷ assesses the extent to which Member States have taken the necessary measures to comply with the PIF Directive. In particular, the

report assesses whether Member States have implemented the Directive and whether national legislation achieves the objectives and fulfils the requirements of the legal instrument. The report does not affect the powers of the Commission under Art. 258 TFEU to assess the compliance of individual national transposition measures.

The report is primarily based on the information that Member States provided to the Commission through notification of their national measures transposing the PIF Directive. This information was complemented by external research commissioned by DG JUST under one of its framework contracts. On the basis of this assessment, the Commission launched systematic exchanges with the Member States. The additional information and explanations provided by the Member States during these exchanges allowed the Commission to refine its analysis as regards the most pertinent conformity issues.

2. Conformity issues identified

A detailed assessment of notified transposition measures confirmed that all Member States have transposed the PIF Directive's main provisions. Outstanding conformity issues still need to be addressed, however, including issues that must be dealt with in order to enable effective investigations and prosecutions by the EPPO. Conformity issues relate to (a) criminal definitions; (b) sanctions; (c) jurisdiction rules; and (d) limitation periods; they will be discussed in further detail in the following.

a) Criminal definitions

Fraud

Art. 3 of the PIF Directive states that Member States must take the necessary measures to ensure that fraud affecting the Union's financial interests constitutes a criminal offence when committed intentionally. For this purpose, it sets out four categories of conduct constituting fraud affecting the Union's financial interests. These four categories relate to acts or omissions concerning: (i) non-procurement-related expenditure (Art. 3(2)(a)); (ii) procurement-related expenditure (Art. 3(2)(b)); (iii) revenue other than revenue arising from VAT own resources (Art. 3(2)(c)); and (iv) revenue arising from VAT own resources (Art. 3(2)(d)).

With respect to fraud regarding non-procurement-related expenditure and procurement-related expenditure, the conformity issues identified include the narrower scope of national legislation on fraud related to non-procurement-related expenditure as such. Other compliance issues concern the following aspects of these offences:

- “The use of false, incorrect or incomplete statements”, with certain national legislation only covering written documents;
- “Assets from the Union budget or budgets managed by the Union, or on its behalf” not being covered by national legislation;
- The incrimination of “non-disclosure of information” for either not being transposed or for being transposed by a more limited legal notion;
- Narrower wording being used in national legislation to transpose “the misapplication of such funds or assets for purposes other than those for which they were originally granted”.

For revenue fraud (both revenue arising from VAT own resources and revenue not arising from it), the Commission also identified conformity issues, again due to the narrower scope of national legislation. Other issues relate to the following aspects of these offences:

- “The use of false, incorrect or incomplete [VAT-related] statements or documents” not covered by national legislation;
- Certain national legislation not (fully) covering “resources of the Union budget” and “budgets managed by the Union, or on its behalf”;
- The “non-disclosure of [VAT-related] information” as either not being transposed or as being transposed by a more limited legal notion;
- Narrower wording transposing the “misapplication of a legally obtained benefit”;
- The “presentation of correct VAT-related statements for the purposes of fraudulently disguising the non-payment or wrongful creation of rights to VAT refunds” as either not being transposed or as being transposed by a more limited legal notion.

Other offences (money laundering, corruption, misappropriation)

Art. 4(1) of the PIF Directive states that Member States must take the necessary measures to ensure that money laundering involving property derived from the criminal offences covered by the Directive constitutes a criminal offence as described in Art. 1(3) of Directive (EU) 2015/849.⁸ In several Member States, this provision has not yet been fully transposed, due either to some deficiencies in the definition of money launder-

ing itself or to the lack of a criminal offence covered by the PIF Directive among the predicate offences.

Moreover, under Art. 4(2) of the PIF Directive, Member States must take the necessary measures to ensure that passive and active corruption, when committed intentionally, constitute criminal offences. In several Member States, an additional aspect – “breach of duties” – is required for both active and passive corruption. This additional aspect significantly narrows the scope of the PIF Directive’s definitions of corruption and makes its prosecution dependent on proving such a breach of duty.

For the offence of “passive corruption,” a conformity issue concerns the aspect of “refrain[ing] from acting in accordance with his duty.” In a small number of Member States, this aspect is not covered by national legislation. As for “active corruption,” a specific conformity issue concerns the scope of the criminal definition, as some of the aspects (“promises, offers or gives, directly or through an intermediary, an advantage,” and “for a third party”) are missing or have not been correctly transposed in some Member States.

Art. 4(3) of the PIF Directive states that Member States must take the necessary measures to ensure that misappropriation, when committed intentionally, constitutes a criminal offence. Conformity issues concern a narrower transposition of this offence or a lack of transposition altogether.

Art. 4(4) of the PIF Directive provides a definition of “public official” with a view to protecting Union funds adequately from corruption and misappropriation. Some aspects of the definition of “public official” have not been transposed into the legislation of about half of the Member States. The following conformity issues have been identified:

- The obligation to extend criminalization to a “national official of another Member State and any national official of a third country,” has not been implemented in general or as regards the offence of misappropriation;
- The definition of “Union official” does not include: (i) persons “seconded to the Union by a Member State or by any public or private body, who carries out functions equivalent to those performed by Union officials or other servants”; or (ii) the “Members of the Union institutions, bodies, offices and agencies, set up in accordance with the Treaties and the staff of such bodies”;
- The definition of “national official” was made subject to additional conditions, only covering public officials of other Member States when the crime has been committed within the territory of that Member State,⁹ and not covering “any person holding an executive, administrative [...] office” generally or in relation to the offence of misappropriation only.

Lastly, some Member States have not transposed Art. 4(4)(b) referring to “any other person assigned and exercising a public service function.”

Art. 5 of the PIF Directive states that: (i) Member States must take the necessary measures to ensure that inciting, and aiding and abetting, the commission of any of the criminal offences referred to in Arts. 3 and 4 of the Directive are punishable as criminal offences (Art. 5(1)); and (ii) any attempt to commit any of the criminal offences referred to in Art. 3 and Art. 4(3) of the Directive is punishable as a criminal offence (Art. 5(2)). In a number of Member States, the Commission identified non-conformity issues as regards Art. 5(2) of the PIF Directive. These issues concern the failure to make the following a punishable criminal offence: (i) an attempt to commit subsidy abuse; (ii) some specific customs offences; and (iii) misappropriation.

b) Sanctions

Member States must provide for the liability of and sanctions for legal persons: (i) for any of the criminal offences referred to in Arts. 3, 4, and 5 committed for their benefit by other persons having a leading position within the legal person; or (ii) for the lack of supervision or control of these other persons, by any person under their authority (Art. 6 of the PIF Directive). Art. 9 of the PIF Directive obliges Member States to provide certain sanctions (fines and other sanctions) for the legal persons held liable, but the sanctions must be “effective, proportionate and dissuasive.” In a quarter of the Member States, a number of conformity issues have been identified in this regard. These include:

- A lack of transposition of Art. 6(1) related to criminal offences committed by persons having a leading position within the legal person;
- Only covering the criminal acts of persons committed within the scope of the activities of the legal person;
- The exclusion of corporate criminal liability in case of certain predicate offences.

Another compliance issue concerns the conflation of the requirements for persons having a leading position within the legal person and persons under their authority. Here, it should be pointed out that Art. 6(1) does not require “the lack of supervision or control” when a PIF offence is committed for the benefit of a legal person by a person “having a leading position within the legal person.” In reference to Art. 9, the Commission emphasises that corporate liability should not be made dependent on the final conviction of a natural person, as is the case in one Member State, because this undermines the possibility to impose “effective, proportionate and dissuasive” sanctions on legal persons.

Member States also have to draw up minimum rules on criminal penalties for natural persons, including minimum-maximum sanctions of at least four years for the criminal offences referred to in Arts. 3 and 4 when these offences involve considerable damage or advantage (Art. 7 of the PIF Directive). Like Art. 9, Art. 7 provides that the criminal sanctions must be “effective, proportionate and dissuasive”. For Art. 7, conformity issues have been identified in a quarter of the Member States. The legislation of several Member States contains provisions that allow individuals to escape criminal liability or the imposition of sanctions if they report the crime or repay the damage caused to the Union’s financial interests at various stages prior to or during criminal proceedings. Such provisions could make sanctions ineffective and prevent them from being dissuasive. Yet other conformity issues relate to the failure to meet the sanctions’ threshold of four years, notably for: “non-disclosure of information” in the context of procurement- and non-procurement-related expenditure fraud, preparatory acts for money laundering, passive and active corruption, and misappropriation.

c) Jurisdiction rules

The PIF Directive obliges Member States to: (i) establish jurisdiction over the criminal offences referred to in Arts. 3, 4, and 5 where the offence is committed in whole or in part within their territory or the offender is one of their nationals and where the offender is subject to the EU Staff Regulations at the time of the criminal offence;¹⁰ and (ii) avoid making the exercise of jurisdiction over PIF offences committed abroad by their nationals subject to certain conditions (Art. 11).

As for the establishment of jurisdiction on the basis of territoriality, the Commission has identified two conformity issues. The first relates to the lack of jurisdiction on money laundering as defined in Art. 4(1) of the PIF Directive. The second relates to additional conditions such as those for incitement and aiding and abetting PIF offences:

- The main perpetrator should be acting within the territory of the Member State;
- The punishment provided by national law must be above a certain threshold.

The extension of jurisdiction to offenders subject to the EU Staff Regulations, with or without imposing specific conditions, has been provided for by the national legislation of about half of the Member States bound by the Directive. A similar number of Member States have extended their jurisdiction over PIF offences committed: (i) by habitual residents in their territory; or (ii) for the benefit of a legal person established in their territory; and/or (iii) by one of their officials acting in his/her official duty. A last conformity issue concerns

the fact that certain Member States impose the condition that prosecution for PIF offences can be initiated only following a report made by the victim in the place where the criminal offence was committed or they require a complaint from the injured party (if such a complaint is required for prosecution under foreign law).

d) Limitation periods

According to Art. 12 of the PIF Directive, Member States have to: (i) prescribe limitation periods for a sufficient period of time after commission of the criminal offences referred to in Arts. 3, 4, and 5 in order for those criminal offences to be tackled effectively, with minimum limitation periods applying to offences punishable by a maximum sanction of at least 4 years of imprisonment; and (ii) take the necessary measures to enable penalties to be enforced. A specific transposition issue relates to the provision of a limitation period for the execution of a judgment imposed following a final conviction for a criminal offence referred to in Arts. 3, 4, or 5 that is shorter than the five years required by Art. 12.

III. Conclusion and the Way Forward

The PIF Directive was adopted with the aim of strengthening the protection against criminal offences affecting the Union's financial interests. The Directive provides added value by setting: (i) common minimum rules for defining criminal of-

fences; and (ii) sanctions for combating fraud and other illegal activities affecting the Union's financial interests. All Member States have transposed the PIF Directive's main provisions.

However, the Commission's implementation report of 6 September 2021 shows that the transposition of the Directive still needs to be improved, notably to ensure: (i) the consistent transposition of the definitions of the criminal offences referred to in Arts. 3, 4, and 5; and (ii) the liability of – and sanctions for – legal persons and natural persons in accordance with Arts. 6, 7, and 9. The provisions on the exercise of jurisdiction (Art. 11) and limitation periods (Art. 12) also need to be transposed.

Proper transposition requires further legislative action by the Member States to fully align their national legislation with the requirements of the PIF Directive. This is especially important in order to enable the EPPO to conduct effective investigations and prosecutions. In this regard, it should also be noted that it is essential for Member States to report statistical data to the European Commission on criminal proceedings and their outcome (Art. 18(2) of the PIF Directive). This reporting is crucial for assessing whether the protection of the Union's financial interests has been achieved on the basis of the PIF Directive. In accordance with Art. 18 of the PIF Directive, the Commission will continue to assess Member States' compliance with the PIF Directive and will take every appropriate measure to ensure conformity with its provisions throughout the European Union.

* Any views expressed in this article are solely those of the author.
1 O.J. L 198, 28.7.2017, 29–41; for background, see A. Juszczał and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PIF Directive), Laying down the foundation for a better protection of the Union's financial interests?", (2017) eurim, 80–87.

2 European Commission, "Commission Anti-Fraud Strategy: enhanced action to protect the EU budget", COM (2019) 196 final, 29.4.2019.

3 In accordance with Protocol 22 to the Treaties, Denmark did not take part in the adoption of the PIF Directive and is therefore not bound by it or subject to its application. However, it remains bound by the PIF Convention. Ireland, in contrast, did exercise its right to take part in the adoption and application of the PIF Directive in accordance with Protocol 21 to the Treaties.

4 Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, O.J. C 316, 27.11.1995, 49–57.

5 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), O.J. L 283, 31.10.2017, 1–71.

6 Art. 22(1) of Regulation (EU) 2017/1939.

7 European Commission, "Report from the Commission to the European Parliament and the Council on the implementation of 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", COM(2021) 536 final, 6.9.2021.

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8 Directive (EU) 2015/849 of the European Parliament and of the Council of 20 May 2015 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, amending Regulation (EU) No 648/2012 of the European Parliament and of the Council, and repealing Directive 2005/60/EC of the European Parliament and of the Council and Commission Directive 2006/70/EC, O.J. L 141, 5.6.2015, 73–117.

9 This means that Member State A would only prosecute officials of other Member States (B, C, etc.) if they commit a crime within the territory of Member State A.

10 In accordance with Art. 11(2), Member States may refrain from applying this rule or may apply it only in specific cases or only where specific conditions are fulfilled, and they must inform the Commission if they take this course of action.

Negotiation and Transposition of the PIF Directive

The German Perspective

Markus Busch*

This article reflects on the negotiations concerning 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 (the "PIF Directive") and discusses some of the controversial issues at that time from a criminal law policy perspective. Germany's approach to the transposition of the PIF Directive is explained, and the article also presents the corresponding amendments made to the German Criminal Code as well as the provisions in the newly created Act to Strengthen the Protection of the EU's Financial Interests (EU-Finanzschutzstärkungsgesetz).

In 2001, the European Commission presented its "Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor."¹ The intention was to "broaden and deepen the debate on the Commission proposal [to establish a European Public Prosecutor] with a view to its being considered by the Convention which is to prepare for the next Treaty revision."² Reactions from Germany were not very enthusiastic. "The notion that effective protection of the Communities' financial interests can only be guaranteed by instituting a European Public Prosecutor's Office is far from compelling," cautioned authors of the Joint Statement by the Federal Government and States of the Federal Republic of Germany.³ On harmonisation of substantive criminal law, it reads: "Because of their different legal traditions, limits are imposed on harmonisation through the different systems of sanctions in the Member States."⁴ Twenty years later, things have changed. The European Public Prosecutor's Office started its operations on 1 June 2021 and prosecutes criminal offences affecting the financial interests of the Union that are provided for in 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 (the "PIF Directive"),⁵ as implemented by national law.

I. A Look Back at the Negotiations

Seeing where the EU and its Member States started might help us understand why negotiations on legislative acts in the area of the protection of the EU's financial interests, in particular on the PIF Directive, were difficult and took quite long. The proposal for a PIF Directive was presented in 2012⁶ and adopted five years later in 2017. There were a number of controversial issues that could only be resolved by reaching compromises in

intensive negotiations.⁷ The spirit of compromise is obvious in the structure and language of many of the PIF Directive's provisions. The following outlines some of the most controversial issues during the negotiations on the legal instrument.

1. Legal basis

The position of the Council was that the PIF Directive should rely on Art. 83(2) of the Treaty on the Functioning of the European Union (TFEU), i.e., the legal basis for the "approximation of national criminal law to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures."⁸ The Commission instead opted for Art. 325(4) TFEU, i.e., the legal basis for "necessary measures in the fields of the prevention of and fight against fraud affecting the financial interests." Backed by an opinion of its Legal Service,⁹ the Council prevailed and the PIF Directive was based on Art. 83(2) TFEU. In practical terms, the choice of legal basis did not make much of a difference, except for Denmark not being bound by a directive based on Art. 83(2) TFEU. Ireland had opted in, unlike the United Kingdom;¹⁰ however, it must be borne in mind that the UK would leave the EU a few years later anyway. The "emergency brake" for the harmonisation of substantive criminal law, which would give a Member State the possibility to suspend the legislative procedure and which is only foreseen in Art. 83 (para. 3) TFEU, but not for the measures under Art. 325 TFEU, was never an issue in the negotiations. Another difference was the wording of the two articles under debate, which did not seem to have had any impact either: under 83(2) TFEU, the approximation of criminal laws is only allowed if proven "essential" to ensuring the effective implementation of a Union policy; under Art. 325(4) TFEU, "necessary measures" may be adopted.

2. Value added tax fraud

A second conflict between the Council, on the one hand, and the Commission and the European Parliament, on the other, was about the inclusion of value added tax (VAT) fraud in the scope of the directive. A certain percentage of the Member States' contribution to the EU budget is based on their VAT revenues. From a national perspective,¹¹ however, VAT must be considered a domestic tax and, hence, national revenue going to the national budget. The fact that VAT revenue also serves as a parameter for the mathematical calculation of Member States' contributions to the EU budget does not make VAT either an EU tax or EU revenue. There was little possibility to resolve this conundrum. A compromise was only found after a long deadlock in the negotiations, namely after the Council conceded that "cases of serious offences" against the common VAT system could fall under the PIF Directive. Such cases must have a cross-border dimension (connected with the territory of two or more Member States) and involve a total damage of at least €10 million (Art. 2(2) PIF Directive).¹² The CJEU's decision in *Taricco* had a major impact on this outcome: during trilogue negotiations in 2015, the judgement held that "the concept [of the EU's financial interests] [...] covers revenue derived from applying a uniform rate to the harmonised VAT assessment bases determined according to EU rules."¹³ According to the Court, "[t]hat conclusion cannot be called into question by the fact that VAT is not collected directly for the account of the European Union [...]."¹⁴ This decision considerably weakened the Council's position, although it would have been possible to separate the legal question of whether or not there is a legal basis for the EU to harmonise national VAT fraud laws from the political question of whether or not the EU should actually make use of such a competence.

3. Minimum-minimum sanctions

A third issue of controversy concerned the provisions requiring certain minimum imprisonment terms for serious offences. The Commission would have liked Member States to introduce minimum sentences of at least six months that would have to be imposed in cases in which the damage or advantage involved is above a certain threshold.¹⁵ This was contrary to the Council's conclusion of 2009 on "Model provisions, guiding the Council's criminal law deliberations,"¹⁶ according to which the approximation of criminal laws under Art. 83(2) TFEU should follow the practice of setting the minimum level of a maximum (not minimum) penalty. Common levels for minimum sanctions can be challenging for national legislators, as they are not easily integrated into traditional sentencing frameworks.¹⁷ In particular, taking the approach that a certain damage or advantage threshold should automatically

trigger an increased minimum sentence, irrespective of other aggravating and mitigating factors in the case at hand, seems contrary to traditional sentencing criteria that include a variety of circumstances in addition to damages and advantages. The Council prevailed on this issue and no levels for minimum sentences were set in the PIF Directive.

4. Limitation periods

An agreement on limitation periods was also not easily reached because of the different systems and approaches in the Member States. In this respect, the PIF Directive's compromise solution (Art. 12) cannot be considered overly ambitious. For the offences referred to in Art. 3, 4 and 5 PIF-Directive, which are punishable by a maximum sanction of at least four years of imprisonment, the PIF-Directive requires a limitation period for prosecution of no more than three years provided that this period "may be interrupted or suspended in the event of specified acts" (Art. 12(1)(2)). The limitation period for the enforcement of penalties is five years where the penalty is more than one year or where the underlying criminal offence is punishable by a maximum sanction of at least four years of imprisonment; this five-year limitation period may also be reached by counting in "extensions arising from interruption or suspension" (Art. 12(4) PIF-Directive).

5. No irregularity without a criminal penalty?

There has been some criticism that the PIF Directive is a missed opportunity and that its provisions are not robust enough to effectively protect the EU's financial interests.¹⁸ It is certainly true that the directive reflects a compromise and that it may not be the most coherent and easy-to-read document. However, the directive is not directly applicable by law enforcement authorities and courts but instead addresses Member States and, to a certain extent, also the EPPO. The other question is whether the PIF Directive is "too soft" on fraudsters and leaves serious loopholes, as claimed by some. This depends on the standards and expectations by which the PIF Directive is to be assessed. If one comes from a traditional approach regarding the harmonisation of the internal market, measures should aim to be as comprehensive as possible and at a high level. If this kind of thinking is applied to criminal law, the objective would be to criminalize as widely and as stringently as possible and to create a common European area of maximum criminalization.¹⁹ This position was not shared by those who believe that criminalization should be limited to serious wrongdoings for which a criminal law response is essential (as required by Art. 83(2) TFEU). Two provisions from the Commission's proposal might illustrate this point.

a) Good information, bad intentions?

According to Art. 4(1) of the Commission proposal,²⁰ “Member States shall take the necessary measures to ensure that any provision of information, or failure to provide such information, to contracting or grant awarding entities or authorities in a public procurement or grant procedure involving the Union’s financial interests, by candidates or tenderers, or by persons responsible for or involved in the preparation of replies to calls for tenders or grant applications of such participants, when committed intentionally and with the aim of circumventing or skewing the application of the eligibility, exclusion, selection or award criteria, is punishable as a criminal offence.”

This is certainly intricate and might be paraphrased as follows in concise language: “The provision of [true and accurate] information to authorities in a public procurement procedure with the aim of circumventing or skewing the application of award criteria is punishable as a criminal offence.” What kinds of cases would that cover? Imagine, for example, an entrepreneur bidding on a construction contract. The contractor is aware that the official who will award the contract is a big soccer fan. To take advantage of this, the contractor includes in his bid not only the required information on himself and his company but also mentions that his two children are aspiring professional soccer players, with the clear intent that this unsolicited piece of information does the trick and helps him win the contract.

Different opinions exist on the need for and proportionality of punishing (with fines or imprisonment) conduct that does not result in any damage to the EU’s financial interests and cannot even be qualified as preparatory conduct for any substantial wrongdoing.²¹ In any case, criminalizing it does not seem to be “essential” in the meaning of Art. 83(2) TFEU. In the end, the provision did not become part of the PIF Directive.

b) Fraud without misrepresentation, breach of trust without entrustment?

Art. 3 – the PIF Directive’s fraud provision – is modelled after the PIF Convention,²² which is itself inspired by common law fraud doctrine. Art. 3 includes different rules for expenditure/revenue, and within these categories there are again different rules, depending on the type of expenditure/revenue and on the conduct to be criminalized. This complex structure is not self-explanatory and is the result of compromises reached during the negotiations, particularly as regards the provision on misapplication of funds or assets. The initial proposal by the Commission for the misapplication of expenditure read as follows: “the misapplication of [...] expenditure for purposes other than those for which they were granted [is a criminal offence].”²³

From a civil law perspective, one might note that this is supposed to be a fraud provision, yet there is neither a misrepresentation required, nor any kind of damage to the fraud victim, let alone intent on the part of perpetrators to enrich themselves. The proposed provision could also be interpreted as being an offence of breach of trust, yet there is no requirement that the perpetrator be entrusted with the management of EU funds and, again, no element of damage is included. The provision is, of course, not completely new and, in principle, had already been stipulated in Art. 1(1)(a) of the PIF Convention.²⁴ In fact, the provision makes sense for fraud relating to subsidy and aid expenditure, and it can be argued that the PIF Convention was meant to apply only to such type of expenditures.²⁵ In the case of subsidies and aid, the EU spends money without typically expecting any contractual return. Therefore, it can be challenging to identify fraud damage. Subsidies and aid are predominantly granted for specific purposes, and any intentional misapplication in contravention of their purpose can already be considered criminal conduct. This is why a misapplication provision for subsidies and aid that criminalizes without requiring an offence element of deception, damage, or entrustment is justifiable. Unlike the PIF Convention, however, the PIF Directive does not apply only to subsidy and aid expenditure but also to any other type of expenditure. Yet, other types of expenditure, such as salaries and procurement payments, typically lack a specific purpose and therefore cannot be “misapplied.” Even if a specific purpose is stipulated by a contract, misapplication amounts to nothing more than a mere breach of contract that might only justify criminalization if it involves misrepresentation and results in a damage.

Take the following example: Contractor A is awarded a contract in an EU public procurement procedure. There were neither irregularities in the entire procedure, nor any indication of fraudulent intent; no false statements or documents were presented. In line with the terms of the contract, A received an advance payment. The contract required A to use the advance payment only for the purposes of the contract (e.g., to purchase the goods necessary to perform the contract). At the time of receipt of payment, A had no intention to use the payment for any other purpose. Later on, he decided to use the money for a different purpose. No damage was caused to the EU’s financial interests, however, as A managed to fulfil the contract by using money from another source.

Criminalizing a breach of contract not involving any misrepresentation and not resulting in any damage would go rather far and, again, does not seem “essential” for the protection of the EU’s financial interests in the sense of Art. 83(2) TFEU. The final text of the PIF Directive reflects this in its different provisions on non-procurement-related expenditure, i.e., aid

and subsidy (Art. 3(2)(a) PIF Directive), on the one hand, and procurement-related expenditure (Art. 3(2)(b) PIF Directive), on the other.

II. Transposition of the PIF Directive in Germany

In principle, there are two options for the transposition of the PIF Directive: On the one hand, establishing a new stand-alone act for PIF offences, i.e., a more or less full-fledged criminal code for all crimes affecting the EU's financial interests, would make provisions applying to PIF cases easier to identify and apply. Also, by starting from scratch, the legislator could use "directive-like" language and would not need to build on and refer to existing traditional descriptions of fraud elements. On the other hand, replicating the directive in a new stand-alone act would largely create a parallel framework existing alongside rules already in place, causing considerable overlap and doubts as to which provisions take precedence in mixed cases, i.e., in cases where not only the EU's financial interests but also domestic or private parties' interests are affected. The latter approach also would not easily fit into traditional fraud concepts and create inconsistencies.

The second option would mean identifying gaps in the existing framework and, where necessary, making tailor-made amendments in order to ensure comprehensive and accurate transposition. This option offers the advantage that it could draw on an existing and well-known legal framework. It would integrate new provisions into this framework, avoid overlap, and ensure consistency. Germany basically took this path by screening the existing legislation for implementation needs. As a result, the German legislator adopted amendments to the (German) Criminal Code and created a new, complementary legal act with provisions required by the directive but not lending themselves to integration in the Criminal Code. The following outlines the amendments made to the Criminal Code and the provisions of the new Act to Strengthen the Protection of the EU's Financial Interests (*EU-Finanzschutzstärkungsgesetz*). As far as the Directive had already been transposed by existing legislation, an in-depth analysis will not be made; reference is made in this context to the transposition bill's detailed explanatory memorandum.²⁶

1. Amendments to the Criminal Code

Art. 3(2)(a) PIF Directive, which covers non-procurement-related fraud, was already largely implemented by the Criminal Code's stand-alone subsidy fraud offence (section 264 Criminal Code); the provision also applies to misapplication without requiring proof of any damage. Since attempted mis-

application as mandated by Art. 5(2) PIF Directive was not punishable in Germany, however, the Criminal Code had to be amended accordingly (cf. section 264(4) Criminal Code).

Concerning the money laundering offence (Art. 4(1) PIF Directive), the German government's transposition bill referred to section 261 in the Criminal Code, which had used a combined serious crime and list approach for its predicate offences. A comprehensive reform of the money laundering offence entered into force on 18 March 2021,²⁷ which abolished the limited list of predicate offences and introduced an all-crime approach.

2. Act to Strengthen the Protection of the EU's Financial Interests – EU-Finanzschutzstärkungsgesetz

a) Fraud concerning procurement-related expenditure

Art. 3(2)(b) PIF Directive regulates fraud concerning procurement-related expenditure. The provision includes a damage as an element of the offence and allows Member States to require, as an additional element, that the fraud have been committed "in order to make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests."

In Germany, the provision was largely covered by the existing fraud offence definition, which does not apply, however, in cases of a mere misapplication of "funds or assets for purposes other than those for which they were originally granted, which damages the Union's financial interests" (Art. 3(2)(b) (iii)). The new Act to Strengthen the Protection of the EU's Financial Interests establishes a tailor-made misapplication offence (section 1). It includes the elements explicitly permitted by the directive, namely the intent to "make an unlawful gain for the perpetrator or another by causing a loss to the Union's financial interests."

b) Non-VAT-related revenue fraud

Fraud affecting the Union's financial interests in respect of revenue other than revenue arising from VAT own resources (Art. 3(2)(c) PIF Directive) was largely covered by the already existing tax offences applying to the evasion of customs duties and agricultural levies. The tax offences do not cover other types of revenue, however, such as income from real estate sales or rentals, interest on deposits, or fees on EU staff salaries. For these types of revenue, the "ordinary" fraud offence (section 263 Criminal Code) would apply, but it does, however, require that the perpetrator have acted with the intent to make an unlawful gain by causing a loss to the victim – an element not permitted under the PIF Directive. For this reason,

a new provision (Section 2 Act to Strengthen the Protection of the EU's Financial Interests) was created to close this gap. It can be described as a streamlined fraud offence modelled after the existing tax offences, which also do not require the intent of enrichment.

c) Corruption offences

The provision of the PIF Directive requiring criminalisation of passive and active corruption (Art. 4(2)) had already been largely transposed by existing corruption legislation (sections 331 et seq. Criminal Code). However, these provisions were not fully in compliance with the directive's requirements relating to the bribery of foreign public officials. The broad offences of giving and taking advantages (sections 331, 333 Criminal Code) do not generally apply to the bribery of foreign public officials and also would not meet the minimum-maximum sanctions required by the PIF Directive. Under the foreign bribery offence (sections 332, 334 in conjunction with section 335a Criminal Code), the bribe must have been given or taken in return for an official act that breaches the official's duties. While this element is not permitted by the PIF Directive, the PIF Directive has its own qualifications for the official's act, namely that the official must have acted "in a way which damages or is likely to damage the Union's financial interests."

In practice, an official act that damages or is likely to damage the Union's financial interests would also very likely violate official duties. Hence, one could have argued that, despite the limiting element of "breaching official duties," all relevant

bribery cases would have been covered by the existing foreign bribery offence. Nevertheless, a new provision was created (Section 3 Act to Strengthen the Protection of the EU's Financial Interests) to clarify this issue by equating acts damaging or likely to damage the EU's financial interests to acts breaching official duties.

III. Conclusion

The PIF Directive only applies to offences against the EU's financial interests. On the one hand, its scope of application is therefore quite limited, covering only cases in which the EU is the "victim." On the other hand, despite its limitation on the victim's side, the PIF Directive addresses offences that are cornerstones of any national criminal law system: fraud, misappropriation, corruption, and money laundering. Member States have the option of either maintaining their traditional offences in non-PIF cases and creating a new corpus exclusively applicable to PIF cases. Or they can adapt their traditional offences to the PIF Directive's requirements – an approach that risks breaking with long-standing principles of their criminal law. Germany's transposition of the PIF Directive combined both approaches: Its implementing legislation amended the Criminal Code and created PIF-only provisions in a separate Act (the *EU-Finanzschutzstärkungsgesetz*). On the implementation of the PIF Directive, the Commission reports that "in roughly half of the Member States, [...] conformity issues in the transposition of the main aspects of these [Article 3 fraud] offences" exist,²⁸ which gives an idea of how challenging the PIF Directive's transposition can be.



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* The views set out in this article are those of the author and do not necessarily reflect the official opinion of his employer, the German Federal Ministry of Justice and Consumer Protection.

1 Green Paper from the European Commission on "The Criminal-law protection of the financial interests of the Community and the establishment of a European Prosecutor", COM(2001) 715 final.

2 Green Paper, *op. cit.* (n. 1), p. 9.

3 Joint Statement by the Federal Government and States of the Federal Republic of Germany, "Green Paper on criminal-law protection of the

financial interests of the Community and the establishment of a European Prosecutor", p. 2 (available at: <https://ec.europa.eu/anti-fraud/sites/default/files/docs/body/gp_gba_st_de_en.pdf> accessed 30 September 2021).

4 Joint Statement, *op. cit.* (n. 3), p. 5.

5 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.

6 Proposal by the Commission for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, COM(2012) 363 final; L. Kuhl, "The Initiative for a Directive on the Protection of the EU Financial Interests by Substantive Criminal Law", (2012) *eucrim*, 63.

7 A. Juszczałk and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by Means of Criminal Law (PFI Directive)", (2018) *eucrim*, 80, 81; M. Kaiafa-Gbandi, "The protection of the EU's financial interests by means of criminal law in the context of the Lisbon Treaty and the 2017 Directive (EU 2017/1371) on the fight against fraud to the Union's financial interests", (2018) *Zeitschrift für Internationale Strafrechtsdogmatik* (ZIS), 575.

8 With some Member States noting their reservation on Art. 83(2) TFEU as the legal basis (General Approach, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, Council doc. 10729/13 of 10 June 2013, p. 2), also available at: <<https://data.consilium.europa.eu/doc/document/ST%2010729%202013%20INIT/EN/pdf>> accessed 30 September 2021.

9 Council of the European Union, Opinion of the Legal Service, Council doc. 15309/12, available at: <<https://data.consilium.europa.eu/doc/document/ST-15309-2012-INIT/en/pdf>> accessed 30 September 2021.

10 Recital 36 of the PIF Directive, *op. cit.* (n. 5).

11 Not shared by all Members States, c.f. Council, General Approach, Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union's financial interests by means of criminal law, Council doc. 10729/13 of 10 June 2013, p. 2, available at: <<https://data.consilium.europa.eu/doc/document/ST%2010729%202013%20INIT/EN/pdf>>.

12 The notion of total damage refers to the estimated damage that results from the entire fraud scheme, both to the financial interests of the Member States concerned and to the Union, excluding interest and penalties (Recital 36 of Directive (EU) 2017/1371, *op. cit.* (n. 10)).

13 CJEU, 8 September 2015, case C-105/14, *Ivo Taricco and others*, para. 41.

14 Ibid.

15 Art. 8 of the Commission proposal, COM(2012) 363, *op. cit.* (n. 6).

16 Council Conclusions of 30 November 2009 on model provisions, guiding the Council's criminal law deliberations, <https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/jha/111543.pdf> accessed 30 September 2021.

17 See also H. Satzger, "The Harmonisation of Criminal Sanctions in the European Union – A New Approach", (2018) *eucrim*, 115.

18 C.f., e.g., C. Di Francesco Maesa, "Directive (EU) 2017/1371 on the Fight Against Fraud to the Union's Financial Interests by Means of Criminal Law: A Missed Goal?", (2018) *European Papers*, 1456, <<https://www.europeanpapers.eu/en/europeanforum/directive-EU-2017/1371-on-fight-against-fraud-to-union-financial-interests>> accessed 30 September 2021.

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19 N. Persak, "EU Criminal Law and Its Legitimation: In Search for a Substantive Principle of Criminalisation", (2018) *Eur J*, 20; N. Corral-Maraver, "Irrationality as a Challenge to European Criminal Law Policy", (2017) *EuCLR*, 124.

20 COM(2012) 363 final, *op. cit.* (n. 6).

21 Another question would be why the proposal included this type of conduct but excluded bid-rigging.

22 Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, *O.J. C* 316, 27.11.1995, 49.

23 Art. 3 (a) (iii) of the Commission proposal, COM(2012) 363, *op. cit.* (n. 6).

24 *Op. cit.* (n. 22).

25 Explanatory Report on the Convention on the Protection of the European Communities' Financial Interest, *O.J. C* 191, 23.6.1997, 1, 14: "Expenditure means not only subsidies and aid directly administered by the general budget of the Communities but also subsidies and aid entered in budgets administered by the Communities or on their behalf. This basically means subsidies and aid paid by the European Agricultural Guidance and Guarantee Fund and by the Structural Funds ...".

26 Regierungsentwurf eines Gesetzes zur Umsetzung der Richtlinie (EU) 2017/1371 des Europäischen Parlaments und des Rates vom 5. Juli 2017 über die strafrechtliche Bekämpfung von gegen die finanziellen Interessen der Union gerichtetem Betrug, *Bundestagsdrucksache 19/7886*.

27 Gesetz zur Verbesserung der strafrechtlichen Bekämpfung der Geldwäsche vom 9. März 2021, *BGBI. I*, S. 327.

28 Report from the Commission on the implementation of 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 of 6 September 2021, COM (2021) 536 final, p. 4; also available at: <<https://data.consilium.europa.eu/doc/document/ST-11630-2021-INIT/en/pdf>> accessed 30 September 2021. For the report, see also the contribution of W. van Ballegooij, in this issue.

The European Anti-Fraud Office and the European Public Prosecutor's Office

A Work in Progress

Nadine Kolloczek and Julia Echanove Gonzalez de Anleo*

The European Anti-Fraud Office (OLAF) and the European Public Prosecutor's Office (EPPO) are the two investigative bodies at the EU level that together will effectively detect, investigate, and protect the EU's financial interests by combining the strengths of an administrative investigation with those of a criminal investigative approach. This article outlines in concrete terms how this cooperation is being organised. It illustrates how both offices have been equipped to follow the trail of money irregularly spent on criminal organisations, fraudsters, and corrupt individuals. It also explains the links between the two offices, the new legal framework at the basis of their cooperation, and their operational relationship. Lastly, the authors give a preview of future challenges and opportunities, with a view to outlining improvements that will contribute to the common goal of both bodies: the protection of the EU's financial interests.

I. Introduction

On 1 June 2021, the European Public Prosecutor's Office (EPPO) started its operations.¹ The establishment of the EPPO marks an important step towards creating a common criminal justice area in the European Union as a whole, enhancing efficiency in prosecutions. A first of its kind, the entrance of this new player into Europe's anti-fraud architecture also marks a collective success for the institutions that have advocated for and contributed to its creation. The EPPO embodies a new era in the investigation and prosecution of financial crime at a judicial level in the EU and is likely to significantly change the European enforcement landscape. With over 20 years of experience in successfully investigating fraud related to European funds at the EU and international levels, the European Anti-Fraud Office (OLAF) will be EPPO's privileged partner and continue to contribute to the fight against fraud affecting the EU's financial interests. Undoubtedly, the EPPO's arrival has triggered change and from now on will lead to the implementation of new forms of cooperation among its partners within the European anti-fraud environment, both at the EU and national levels. This new cooperation scheme is not only reflected by changes to the existing legislative framework but also in the operational thinking of all those involved. OLAF is no exception in this regard.

Against this background, this article first examines the new legal framework, including the ways in which OLAF has been equipped to work alongside, and in close cooperation with, the EPPO. Second, the article assesses the operational relationship of both EU bodies, which has already benefitted immensely from the preparatory steps taken before the EPPO became operational. Ultimately, future challenges and opportunities are examined, with a view to outlining improvements contributing to the common goal of the two offices: the protection of the EU's financial interests.

II. New Adjustments and Framework

Both OLAF and the EPPO have distinct but interlinked and complementary mandates. The protection of the EU's financial interests is a common objective for both. The EPPO's mandate to conduct criminal investigations and prosecutions in the anti-fraud field is achieved by means of criminal law enforcement, but OLAF remains the body responsible for administrative investigations at the Union level, which ensures that both avenues award the full financial protection of the EU budget. An effective, immediate, and full response to a fraud case requires from the outset that criminal liability is established by the EPPO and that that anti-fraud action is accompanied by an administrative investigation. In concrete terms, this

means that the EPPO conducts criminal investigations (limited to the Member States participating in the EPPO cooperation scheme), while OLAF conducts administrative investigations as an administrative body, which also encompasses investigations in EU Member States currently not participating in the EPPO and third countries.²

The EPPO Regulation³ sets out rules to ensure efficient cooperation among European bodies and agencies and to prevent the duplication of activities. This new framework necessitated adjustments to the rules and legal frameworks of its partners, including OLAF. On 17 January 2021, Regulation 2020/2223 amending Regulation 883/2013 (the OLAF Regulation) came into force.⁴ The new Regulation stipulates the necessary provisions in the OLAF legal framework governing the overall relationship with the EPPO. This includes the efficient exchange of information between the two bodies, the possibility of OLAF's support in EPPO investigations, the complementarity of actions on the part of both bodies, and the non-duplication of investigative work. More specifically, the new provisions⁵ in the amended Regulation set out how this new cooperation will take shape in practice, providing both offices with a solid legal foundation for their interactions:

- Obliging OLAF to report any criminal conduct to the EPPO, mirroring Art. 24(1) of the EPPO Regulation;
- Ensuring that the principle of non-duplication in investigations is respected by guaranteeing the discontinuity of OLAF's investigations if the EPPO is conducting an investigation into the same facts;
- Establishing a system of hit/no-hit in the case management systems of both offices in order to ensure that the principle of non-duplication in investigations is respected;
- Regulating OLAF's support to the EPPO;⁶
- Enabling OLAF to conduct, where necessary and approved by the EPPO, complementary investigations with a view to facilitating the adoption of precautionary measures or of financial, disciplinary, or administrative action;
- Obliging and enabling the EPPO to provide information of potential investigative interest to OLAF with a view to taking administrative action when the EPPO has dismissed⁷ a case or decided not to conduct an investigation (including together with OLAF);⁸
- Enabling the two offices to conclude operational working arrangements, which will govern their operational relationship.

On 5 July 2021, the latter aspect was implemented when OLAF and the EPPO signed a working arrangement.⁹ This working arrangement sets out, *inter alia*, the practicalities of how the two offices will exchange information, report and transfer potential cases, and support each other in their respective investigations.

Overall, the combination of the provisions in the EPPO Regulation and the newly introduced articles in the amended OLAF Regulation lay out a solid and reliable legal framework, which enhances both offices' capacities without prejudice to their independence and respective mandates.

III. Operational Relationship Established in Working Arrangement

The working arrangement between OLAF and the EPPO (see above) marks an important milestone, as it will serve as the major operational framework for both offices. It will contribute to the efficient and transparent cooperation between OLAF and the EPPO and help achieve their common goal: the protection of the EU's financial interests. The agreement aims to establish a close partnership between the two offices in the exercise of their respective investigatory and prosecutorial mandates, in particular through the exchange of information and mutual support. The working arrangement further simplifies the cooperation and sets up an operational framework (on the basis of the legislation described above). The working arrangement provides that both offices can assess the text after an appropriate period of time and address any potential shortcomings. In accordance with the legal framework, the working arrangement specifically includes the following aspects of mutual cooperation:

- **Mutual exchanges of information:** Both offices will be able to exchange operational information where necessary. In practice, this can be done spontaneously or upon request; the necessary confidentiality and data protection rules must be respected. This exchange is crucial to the enhancement of operational cooperation and to the enrichment of each other's capacities, while fully respecting the remits of their mandates. Additionally, this aspect applies to the hit/no-hit approach in each other's case management systems, which is an effective tool for streamlining and accelerating the bodies' work by enabling checks on whether an investigation is already ongoing in the partner institution.
- **Mutual reporting and transmission of potential cases:** An effective system for mutual reporting of information needs to be in place. This allows both offices to share relevant information on allegations that fall under their respective mandates, so that unwarranted delays in starting an investigation can be avoided. On the one hand, OLAF can transmit to the EPPO any cases, in which it has identified possible criminal offences that could fall under the EPPO's mandate. On the other hand, the EPPO can transmit to OLAF any allegations, which it has received outside the EPPO's mandate but which affect the Union's financial interests, such as non-fraudulent irregularities and cases relating to non-

participating Member States or international cases. The Union legislator established this system to ensure that no case goes undetected at the Union level, thus guaranteeing maximum protection of the EU's financial interests. This system is without prejudice to the action taken at the national level by competent authorities with whom both EU bodies work closely.

- **Support in investigations:** The working arrangement provides a non-exhaustive list of instances covering where OLAF may support the EPPO in its investigations by means of operational, forensic, and analytical expertise and tools, with a view to enhancing OLAF's and EPPO's activities in full respect of applicable procedural guarantees. The EPPO will also be in a position to support OLAF by identifying necessary protective measures to be taken during the course of its investigations and by exchanging information on any fraud patterns discovered.
- **Complementary investigations by OLAF:** The working arrangement provides for a scheme that allows the EPPO to request OLAF to conduct a complementary investigation in parallel to its own criminal investigation. In the same vein, OLAF can propose such complementary action to the EPPO. Complementarity of action means that OLAF can address essential aspects of the protection of the EU's financial interests, such as speedy recovery, the adoption of administrative precautionary measures, and the development of systemic recommendations for improvement, where shortcomings are identified in administrative investigations, e.g., procurement procedures. These actions represent a fundamental added value for a comprehensive approach towards protecting the EU budget.

The application of the above will help ensure a seamless administrative and criminal response to fraud at the Union level – the joint forces of OLAF and the EPPO, and the exercise of their powers will lead to maximum protection of the Union's financial interests.

IV. OLAF and the EPPO – Future Challenges and Opportunities

To date, only a few months have passed since the EPPO started its operational activities. This means that practical aspects of the framework described above have already been triggered and are currently undergoing a first test. It will be essential for both offices draw lessons from this initial experience and then to streamline, enhance, and intensify their cooperation both in the short and medium terms. This reflection process must also include a longer-term, strategic view of the entire European anti-fraud architecture. The development of a solid and reliable technical solution for a

hit/no-hit system, for instance, will be crucial to ensuring an efficient and flexible way of checking whether an investigation is ongoing in the partner institution. The interoperability of case management systems within the limits required by EU legislation will be of particular importance. The operational aspects of cooperation, in the form of supporting cases or by conducting complementary investigations, will become more defined once operational personnel has had the occasion to work side by side. In practice, this will also trigger the need for a thorough knowledge exchange and for clarification of the applicable procedural guarantees and rules in each Member State participating in the EPPO – an exercise that both offices will have to perform together.¹⁰ Common trainings, regular exchanges of experiences, and close cooperation at all levels will also be key elements.

In the future, both offices should look at how to enhance their cooperation by benefitting from each other's networks and experiences, namely by leveraging their respective strengths and taking into account their different set-ups. OLAF brings years of operational experience and the analysis of complex data sets in various forms and languages to the EU's anti-fraud work.

The EPPO now contributes experienced national prosecutors with their vast know-how, a newly established cooperation scheme across the Member States participating in the EPPO, and their national practices and networks. By exchanging information on trends and patterns in fraud offences, OLAF and the EPPO will enhance and strengthen the EU's anti-fraud detection and prevention work overall. In this system, OLAF can be considered the knowledge centre for the European Commission. The resources of both bodies must be used, however, in order to benefit from and enhance each other's potential, with a view to carrying out effective, successful, cross-border investigations.

Ultimately, OLAF's newly adapted legal framework and the recently agreed operational working arrangement between OLAF and the EPPO provide a solid basis for both offices to ensure a newly efficient, effective, and reliable European response to fraud. Close cooperation and transparency between the two offices will be key to ensuring that future anti-fraud efforts benefit from the combined powers and results of both offices – a future driven by the capability to protect EU taxpayers' money to the maximum.

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

1 For this event, see also the special eucrim issue no. 1/2021 "EPPO Now Operational – Perspectives from European Prosecutors" (<<https://eucrim.eu/issues/2021-01/>>).

2 Denmark, Hungary, Ireland, Poland, and Sweden.

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

4 A consolidated text of Regulation (EU, Euratom) No 883/2013 of 11 September 2013 as amended by Regulation (EU, Euratom) 2020/2223 of 23 December 2020 (*O.J. L* 437, 28.12.2020, 49) is available here: <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0883-20210117>>.

5 Arts. 12c–12g of the amended OLAF Regulation, *op. cit.* (n. 4).

6 Cf. Art. 101(3) of the EPPO Regulation, *op. cit.* (n. 3).

7 Art. 39 of the EPPO Regulation, *op. cit.* (n. 3).

8 This mirrors Art. 8(1) and (4) of the amended OLAF Regulation, *op. cit.* (n. 4).

9 For the legal basis of this working arrangement, see Art. 12g of the amended OLAF Regulation, *op. cit.* (n. 4). The full text of the working arrangement is available here: <https://ec.europa.eu/anti-fraud/sites/default/files/working_arrangement.olaf.eppo_en.pdf> accessed 11 November 2021.

10 Art. 12e of the amended OLAF Regulation, *op. cit.* (n. 4).

Typologies of EU Fraud

Study by the National Anticorruption Directorate, Romania

Anca Jurma and Aura Amalia Constantinescu

Until the European Public Prosecutor's Office was set up, the competence for investigating and prosecuting criminal offenses against the financial interests of the EU in Romania belonged to the specialized anticorruption prosecution office, the DNA (National Anti-Corruption Directorate). The DNA looks back on 18 years of experience in tackling this type of criminality, which has resulted in a significant number of court decisions. An analysis carried out by the DNA in 2019, which was based on data obtained from convictions handed down during the period 2015–2018, brought to light the main typologies of EU fraud. The study revealed that the most frequently occurring cases of fraud concerned the claims for payment of agricultural subsidies and the implementation of projects with non-reimbursable financing. Most defendants involved in these cases operated in the private sector. However, even civil servants from the responsible authorities or mayors were also convicted for participating in EU fraud. This article presents the main findings of the study; it provides a general overview and gives examples of the most typical patterns and modi operandi of the offenders committing offences against EU funds.

I. Background

In 2003, soon after the entry into force of the 1995 Convention on the protection of the European Communities' financial interests (the PIF Convention),¹ Romanian legislation included specific criminal offenses against the EU's financial interests in a separate chapter of Law no. 78/2000 on preventing, discovering and sanctioning of corruption. At that time, the National Anticorruption Directorate (DNA),² a prosecution office specialized in countering high- and medium-level corruption was set up; its competence mainly derived from the criminal offenses defined in Law no. 78/2000, whereby certain financial and non-financial thresholds aimed at differentiating between high-, medium- and low-level corruption had to be observed. High and medium level corruption falls within the competence of DNA, while low-level corruption is still to be investigated and prosecuted by the usual prosecution offices. In 2003, following the implementation of the PIF Convention, and bearing in mind the high emphasis placed on the investigation of EU fraud by successive Romanian governments, the legislator entrusted the National Anticorruption Directorate with the investigation and prosecution of EU fraud.

However, unlike corruption offences, in relation to which the DNA has a limited competence, the Directorate obtained full competence on EU fraud, regardless of the gravity of the offense or the value of the damage caused. This measure was intended to ensure uniformity in the investigation of these offenses, a unitary jurisprudence, and thus better protection of the EU's values.

Since 2003 and until the European Public Prosecutor's Office (EPPO) was set up and assumed jurisdiction in 2021, the DNA was the only prosecution office competent to investigate and prosecute EU fraud in Romania, as provided for by the PIF Convention. The offenses against the common VAT system, as outlined in EU Directive 2017/1371 (and subsequently implemented in Romanian legislation), are not included in Law no. 78/2000, meaning that the DNA carried out investigations on such matters only if they related to other criminal offenses falling under its competence.

As a prosecution office, the DNA does not have preventive functions like awareness raising. However, considering the positive results of the DNA's activity and the expertise it has gathered in the investigation and prosecution of specific offenses that define its competence, the office has often been requested to contribute to the more general strategic measures taken by the governing bodies at the national level. Thus, data resulting from the DNA's prosecution of cases and their respective adjudication by the courts have been periodically analysed not only from a statistical point of view but occasionally also from a criminological perspective, with the purpose of identifying patterns and typologies related to commission of specific PIF-related offenses. The competent administrative bodies are able to use such analyses to take the necessary administrative, preventive measures towards eliminating or limiting the opportunities for corruption or fraud.

One of the studies carried out by the DNA in 2019 examined the typologies of EU fraud in 238 cases that the office sent to

trial and that were concluded in final court convictions from 2015 to 2018.³ Obviously, there is an inherent limit to such an exercise, in the sense that it does not provide a full picture of the current trends in EU fraud, especially keeping in mind that the offenses that were the subject of the analysis had been committed a few years before 2015. The conclusions remain relevant, however, as experience has taught us that the *modi operandi* of the offenders do not change much rapidly.

In terms of methodology, the study consists of two parts. The first part provides a qualitative analysis of data gathered from the indictments issued by DNA prosecutors and the conviction decisions handed down by the courts. The second part contains descriptions of several cases that formed the basis of the analysis; the authors of the study considered these cases relevant in the context of the identified typologies. The study revealed that the most frequently found typology for EU fraud cases in which conviction decisions had been handed down during the period 2015–2018 concerned two specific areas.

The first and predominant area of fraud investigations pertained to **claims and payment of subsidies for agriculture**. The EU funds that were misappropriated in this context were mainly the Special Accession Programme for Agriculture and Rural Development (SAPARD) fund, the European Agricultural Guarantee Fund (EAGF), and the European Agricultural Fund for Rural Development (EAFRD), which dealt with modernisation of agricultural holdings, construction of micro-enterprises in rural areas, installation of young farmers, water supply systems, infrastructure development, etc. In addition, cases involved the granting of direct payments to farmers, impacting increased competitiveness of the agricultural and forestry sectors as well as the quality of life in the rural areas.

The second area of fraud investigations related to **the implementation of projects with non-reimbursable financing**; cases affected the PHARE programme,⁴ the European Social Fund (ESF), and the European Regional Development Fund (ERDF). The fraud affected mainly the fields of professional training, road modernisation, construction/rehabilitation works, the extension and rehabilitation of sewerage and water systems, the promotion of cultural traditions, the reintegration of persons deprived of liberty, integration of the unemployed into the labour market, etc. Most of the defendants in these investigations and the ensuing court decisions involved natural or legal persons operating in the private sector. In some cases, public officials, i.e., civil servants from city halls or the Payment Agency in Agriculture or even mayors, were also charged and convicted for their participation in EU fraud.

The study analysed the main defrauding mechanisms and patterns characteristic of the above-mentioned, misappropriated EU funds. These patterns differ, depending on the specific procedure used to access the EU funds and subventions and to implement the projects.

The following describes the typologies of fraud related to the two aforementioned, basic categories, i.e., claims and payment of subsidies for agriculture (II.) and the implementation of projects with non-reimbursable financing (III.). For the purpose of exemplification, one of the above-mentioned case studies is subsequently summarised to illustrate the typologies (IV.) before overall conclusions are drawn from the project (V.).

II. Typologies of Fraud Related to Claims and Payment of Subsidies for Agriculture

Background: Defendants claimed agricultural subsidies under the pretence of holding a legal right over land lots. The DNA's investigations revealed that the patterns of offences either involved misleading the responsible public officials (1.) or were committed with the support/on the initiative of public officials (2.). The following section outlines the methods most frequently used to create said appearance of holding rights and to receive payment of subsidies.

1. Fraud committed by applicants using methods aimed to mislead the responsible public officials

The most common methods that were used by perpetrators to mislead public officials were the following:

- Forging lease contracts
Lease contracts were forged, signatures were counterfeited, and documents presented to city hall and the payment agency by the defendants, even though they did not have the right to use the specified plots of land. In other cases, the defendant obtained information about uncultivated plots of land and their owners and subsequently drafted and signed, by forging the name of the owner, false lease contracts for these plots in favour of his/her family members. Later, the defendant used the contracts and certificates falsely attesting the quality of his/her family members as lessees in order to obtain the subvention.
- Forging the signature of members of the association of farmers
- Presenting false declarations on the fulfilment of eligibility conditions
In one case, the mayor, as a representative of the local council, presented incomplete declarations on the use of

pastures belonging to the community when requesting the payment of subsidies for these lands. He neglected to state that the local council (the beneficiary of the subsidy) did not carry out its own agricultural activity and that the declared pastures were rented to animal breeders against a tax.

- Declaring larger plots of land than those actually owned in order to obtain larger subventions
- Requesting subventions for land sold before the payment request was submitted
- Requesting subventions in the name of persons who fulfilled the eligibility conditions

In another case, for instance, the beneficiary of the subventions did not fulfil the age conditions imposed to be able to access the funds and therefore falsified lease contracts and funding requests using the names of his daughter and of a friend, even though these persons' professions and lives had nothing to do with agriculture.

2. Offenses committed with the support/on the initiative of the responsible public officials

The public officials were either persons with functions in the local public administration (mayors, secretaries from city hall, etc.) or civil servants within the Agency for Payment and Intervention in Agriculture (APIA). The following fraud methods were identified:

- The responsible APIA civil servant used his/her function to help relatives or friends obtain illegal agricultural subventions.

In many cases, the offenders were civil servants in the APIA and accepted subvention applications, even though they knew that the applications contained false or incorrect information. In other cases, the civil servants accessed the Integrated Administration and Control System (IACS) database in order to identify land plots for which no subsidies had been requested and provided this data to friends/relatives who later used it to fill in and submit false applications in their own name. In one case, an APIA civil servant was found guilty of blocking the oversight of the procedure by failing to draw up a report for the second application check and thus preventing another civil servant from verifying the data entered into the IACS.

- The mayor or city hall representatives illegally approving documents submitted by the applicants for plots of land under lease contracts larger than their actual size
- The mayor or vice mayor falsely stating before an Agency for Payment and Intervention in Agriculture official that city hall had leased the communal pastureland to the applicant, although neither a contract nor a decision by city hall in this respect existed in reality

III. Typologies of Fraud Related to the Implementation of EU Funded Projects

DNA cases identified fraud in relation to EU projects in several fields, e.g.: young farmers support, construction/upgrading/rehabilitation/extension of farms, factories, tourist units, wastewater treatment plants, business centres, education, and vocational training, etc. Two major typologies of fraud have been encountered in these cases:

1. Creating the appearance of fulfilling the eligibility conditions

Cases frequently involved offenders who falsely claimed that they fulfilled the eligibility conditions for support in the form of young farmers payment. The following fraud patterns in the applications were encountered:

- Falsely attesting that the applicant fulfils the eligibility conditions or using forged documents for this purpose
The applicant falsely claimed that he is the family member of a farmer or that he used to work in a farm for at least 12 months. In other cases, the offenders – veterinarians – issued false certificates and forms attesting the transfer of a number of animals belonging to the household of the person who wished to access the funds.
- Qualification diplomas or certificates were also forged for use in an application for EU funds. The fulfilment of a number of administrative conditions by the company requesting the financing (number of employees, specific technical tools, lack of fiscal debt, etc.) were also falsely certified.

Documents (such as bank reports or bank account statements) were frequently falsified in order to cover the lack or insufficiency of the minimum co-financing assurance that the applicant has to provide according to the conditions of the project. In addition, the offenders counterfeited and presented false letters of bank guarantee in order to obtain advance payment. In one case, which concerned a hotel modernization project, the applicant falsified the document attesting the real estate title for the building by deleting the information that the hotel was under mortgage.

- Artificial division of the project and submission of several funding applications

In order to obtain grants higher than the legally defined financial threshold, the offenders used companies they controlled via family members and/or friends and artificially divided the business projects up among these companies; as a result, they submitted a grant application for each of them that was below the threshold imposed by the financing programme.

2. Defrauding public procurement procedures

The analysed cases showed that manipulating various phases of the procurement procedure for EU funded projects played an important role in illegally obtaining EU or national funding. The most common patterns identified were the following:

- Simulating the procurement procedure for execution of the project's objectives in order for the contract to be awarded to a preferred company
Fictitious offers and letters of intent were included in the tender dossier, together with those of the preferred company.
- Creating preconditions to artificially increase the procurement price (a pattern that also avoids payment of intra-community VAT)
In one case, the beneficiary purchased equipment directly from the manufacturer, but the fiscal invoice falsely stated that the acquisition was made through an intermediary company, this intermediary allegedly being the regional dealer of the manufacturer. Furthermore, the beneficiary simulated a tender in which only the intermediary presented an offer and was then “selected.”
- Dissimulating conflicts of interest in the process of selecting offers
- Companies (participating in a public tender) falsifying documents or falsely stating they fulfil the qualification and selection conditions
- Simulating the purchase of goods, as provided in the contract, and submitting to the contracting authority fictitious supporting documents together with the payment request
In one case, the beneficiary paid the supplier a first instalment of money, received the equipment, and returned the equipment after the inspection by the contracting authority. The beneficiary did not pay the rest of the money to the supplier but instead falsified documents creating the appearance of having bought and received the goods. The beneficiary then presented the documents to the contracting authority together with the payment request.
- Simulating the carrying out of several project activities and their settlement based on false documents
- Falsifying documents in order to cover non-compliance with several contractual obligations (e.g., forging the reception report and the final report in a construction contract, lying about the completion date of works)
- Receiving payment for unexecuted or improperly executed works, based on supporting documents falsely certifying that the contractual conditions were respected
- Subcontracting in full the works to another company after the beneficiary company won the contract but never intended to execute it

IV. Case Study

To illustrate some of the typologies described by this analysis, the study included two case studies: one explaining fraud related to agricultural subsidies and the other explaining fraud related to EU funded projects. They were drawn from the DNA indictments that formed the basis of the study. For reasons of personal data protection, names and other identification data have been anonymized. One of these studies is described in the following.

Two businessmen, close friends A and B, set up a scheme to obtain EU funds for their companies through the National Plan for Rural Development (NPRD)⁵ that exceeded the maximum legal financial thresholds. The NPRD provides that, as part of the measure “Modernisation of agricultural holdings,” the eligible value of a project in the livestock sector should be limited to €2,000,000, of which the share of non-reimbursable support should be 40%, meaning €800,000. The same document also states that no sum be reimbursed to the beneficiaries if it is discovered that they artificially created the necessary conditions to access the funds.

The two businessmen, aiming to obtain double the maximum amount allowed, used two of the companies they each owned and controlled to artificially divide their business plans for the development of chicken farms. Being close friends, the defendants decided to use the same *modus operandi*, but they acted independently in their relations with the state authorities by means of companies, which each of them controlled. Each defendant presented two almost identical grant applications for two companies which he controlled, as if they were both seeking funding for two different projects; in reality, however, defendant A owned only one chicken farm and defendant B, in his turn, owned only one chicken farm. In fact, the business projects submitted were artificially divided, with a funding request being made for each of the four companies, in order to formally remain below the ceiling imposed by the NPRD.

In the case of defendant A, the evidence revealed that the investments were located on neighbouring lands, owned by A, which were protected by a common fence. The same employees worked for both of defendant A's companies and the alleged two farms had one single administrative building, one egg sorting conveyor belt, and shared the same water supply equipment. A very similar *modus operandi* was used by defendant B in relation to his two farms.

Both A and B requested non-reimbursable sums very close to the limit of €800,000 (€799,410, €799,071, etc.) for each of their two companies (four companies in total). In order to set these budgets, the defendants used fictitious offers from the same providers/manufacturers.

Moreover, together with the grant application, the defendants presented bank statements falsely attesting that each applicant possessed the co-financing sum required. In reality, one sum of money was transferred back and forth from one company's account to another to create the illusion of the required sum of money existing in each account.

After the grants were awarded, the defendants simulated the process of procuring equipment and commissioning the works according to the grant agreement in order to illegally maximise their profit. Regarding the equipment, they used fictitious offers and letters of intent and awarded the contracts to preferred companies (chosen by defendant B, both for projects operated by defendant A and for those operated by himself) at an inflated price. Among the two defendants, defendant B was the mastermind and the one gaining most of the profit. For instance, after defendant A signed the contract to purchase the equipment, the winning company transferred 30% of the contract's value to defendant B, via a company controlled by him, allegedly as the price for equipment assembly but, in reality, representing repayment of a loan previously granted to this company by defendant B. The works contract, also awarded to a company chosen by defendant B, was successively subcontracted to other companies controlled by the same defendant (B). The sum paid to the companies that effectively executed the works was 25 times lower than the sum provided for in the initial, signed contract. The difference was returned to defendant B in the form of fictitious payments for fictitious contracts.

The fraudulent activity of the defendants was facilitated by two civil servants from two agencies subordinate to the Ministry of Agriculture and responsible for the monitoring and control of the use of such funds. These officials identified both irregularities and commission of fraud but did not mention them in their reports. Moreover, they even confirmed that there was no evidence of artificial conditions having been created. They even offered advice to the defendants on how to cover up the illegalities they observed and alerted them with regard to imminent control actions from higher authorities. In exchange for their support, the civil servants received payoffs in the form of accommodation in touristic areas and food.

The defendants A and B were both indicted for the use of false, incorrect, and incomplete documents, which resulted in the misappropriation of EU funds, and for active bribery. The four companies involved were indicted for use of false, incorrect, and incomplete documents, which resulted in the misappropriation of EU funds.⁶ The two civil servants were indicted for complicity in the use of false, incorrect, and incomplete documents, which resulted in the misappropriation of EU funds, and for passive bribery. Defendant A and the two companies

controlled by him admitted guilt⁷ and were therefore tried and convicted in expedited proceedings. The proceedings continue for defendant B and the companies controlled by him. They were convicted in the first instance, and the case is currently under appeal.

V. Conclusions

At the time it was drafted, the study on fraud typologies conducted by the DNA was meant to be a practical instrument not only for Romanian prosecutors and investigators but also (and predominantly) for the public administration and the government, in order for them to better understand the phenomenon of EU fraud and the factors contributing to this type of criminality. Public/government officials were enabled to calibrate legal and organisational measures to prevent and tackle this criminal phenomenon. The study examined the offences initially provided by the PIF Convention as transposed into Romanian law, i.e., the chapter of Law no. 78/2000 as it was in force in 2018. Therefore, the scope of the study did not cover other relevant criminal offenses related to EU fraud that may complete the picture, e.g., active/passive corruption and money laundering. The study also does not include offences against the common VAT system, as provided by Directive (EU) 2017/1371, which had not yet been implemented into Romanian law at the time. To complete the picture, a follow-up to this study could be carried out in the future, but this would require a joint effort by the EPPO and the DNA.

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- 1 Convention drawn up on the basis of Article K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests, *O.J. C* 316, 27.11.1995, 49–57.
- 2 At that time, the name of the office was the National Anticorruption Prosecution Office. However, after several Constitutional Court decisions and amendments of its statute, the name was changed to National Anticorruption Directorate (DNA).
- 3 The analysis can be found in Romanian on the website of the DNA at: <<http://www.pna.ro/obiect2.jsp?id=420>>, accessed 29 September 2021.
- 4 "PHARE" stands for "Poland and Hungary: Assistance for Restructuring their Economies"; it is the main pre-accession financing instrument of the EU that assists the applicant countries of Central and Eastern Europe. Initially directed to Poland and Hungary, the instrument was extended and covered the Central and Eastern European countries that acceded the EU in 2004 and 2007, including Romania.
- 5 NPRD is a document issued by the Romanian government and approved by the Decision of the European Commission no. C(2008) 3831 of 16 July 2008.
- 6 According to the Romanian criminal law, legal persons can be held criminally liable for any offense if committed in the carrying out of the object of activity of the legal person, in its interest or on its behalf.
- 7 According to Romanian law, the subjective element of the legal person to engage its criminal liability is required. According to the Romanian Criminal Procedure Code, the defendant may admit guilt and request the trial to be concluded (based only on the evidence gathered during the criminal investigation) at the first hearing before the court and in an expedited procedure. In this case, the court will impose a penalty reduced by a third. This procedure can apply both to natural and legal persons.

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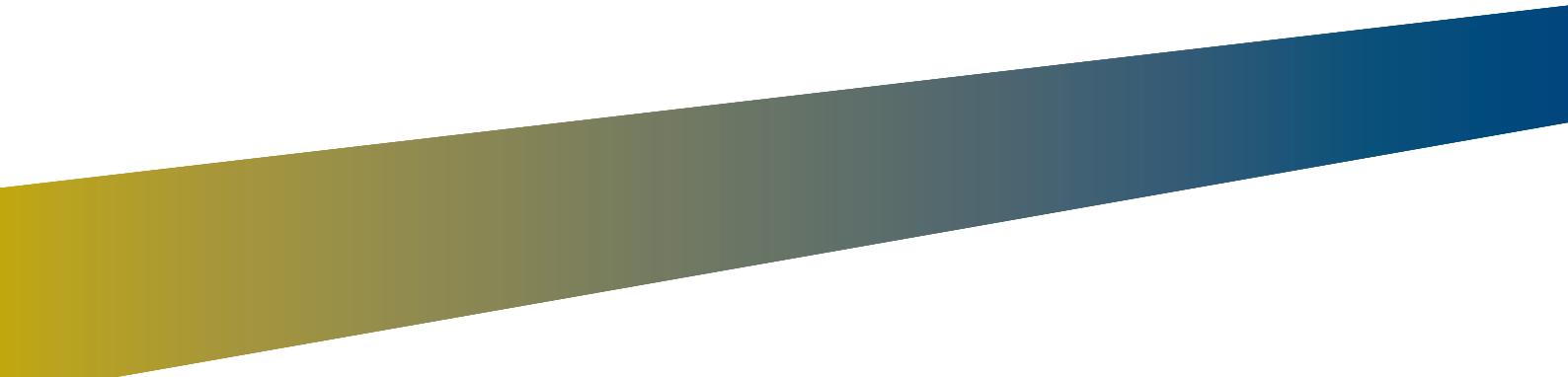
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