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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM



Focus: The External Dimension of JHA and PIF

Dossier particulier: La dimension extérieure de la JAI et PIF

Schwerpunktthema: Die externe Dimension der Bereiche Justiz/Inneres und Finanzschutz

Guest Editorial

Danilo Ceccarelli

Eurojust and External Dimension of EU Judicial Cooperation

Boštjan Škrlec

Rethinking Judicial Cooperation between Africa and Europe

Annalisa Pauciullo and Chervine Oftadeh

Judicial Cooperation Between the EPPO and Third Countries

Nicholas Franssen

La coopération en matière pénale entre le Parquet européen et la Suisse comme État tiers

Dr Maria Ludwiczak Glassey

OLAF Investigations Outside the European Union

Claire Scharf-Kröner and Jennifer Seyderhelm

The Commission's New Anti-Fraud Strategy

Christiana A. Makri (LL.M Eur.) and Oana Marin

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.

Contents

News*

European Union

Foundations

- 154 Fundamental Rights
- 158 Area of Freedom, Security and Justice
- 159 Security Union
- 161 Schengen

Institutions

- 162 European Court of Justice (ECJ)
- 163 OLAF
- 164 European Public Prosecutor's Office
- 165 Europol
- 166 Eurojust
- 167 Frontex
- 167 Agency for Fundamental Rights (FRA)

Specific Areas of Crime / Substantive Criminal Law

- 168 Protection of Financial Interests
- 169 Corruption
- 170 Money Laundering
- 171 Tax Evasion
- 171 Cybercrime
- 173 Racism and Xenophobia

Procedural Criminal Law

- 173 Procedural Safeguards
- 175 Data Protection
- 176 Victim Protection

Cooperation

- 177 Judicial Cooperation
- 177 European Arrest Warrant
- 179 European Investigation Order
- 179 Law Enforcement Cooperation

Council of Europe

Foundations

- 182 European Court of Human Rights

Specific Areas of Crime

- 182 Corruption
- 185 Money Laundering

Articles

The External Dimension of JHA and PIF

- 188 Eurojust and External Dimension of EU Judicial Cooperation
Boštjan Škrlec
- 194 Rethinking Judicial Cooperation between Africa and Europe
Annalisa Pauciullo and Chervine Otiadeh
- 198 Judicial Cooperation Between the EPPO and Third Countries
Nicholas Franssen
- 205 La coopération en matière pénale entre le Parquet européen et la Suisse comme État tiers
Dr Maria Ludwiczak Glassey
- 209 OLAF Investigations Outside the European Union
Claire Scharf-Kröner and Jennifer Seyderhelm
- 218 The Commission's New Anti-Fraud Strategy
Christiana A. Makri (LL.M Eur.) and Oana Marin

* The news contain Internet links referring to more detailed information. These links are being embedded into the news text. They can be easily accessed by clicking on the underlined text in the online version of the journal. If an external website features multiple languages, the Internet links generally refer to the English version. For other language versions, please navigate using the external website.

Guest Editorial

Dear Readers,

Cross-border cooperation between prosecuting authorities in Europe can still be a challenging effort in 2019. Within the EU, in spite of the many improved tools available to prosecutors, such as the European Investigation Order, cooperation is still very much a matter of the willingness and readiness of the requested country to cooperate and of the allocation of resources. In fact, the EU's legal framework in this field is still based on the decision of the requested (judicial or prosecuting) authority to execute the requested activity, even when fundamental rights are not at stake. The basics of the legal system of judicial cooperation in criminal matters in the EU still rest to a large extent on the principles foreseen by the CoE Convention on Mutual Assistance in Criminal Matters concluded in Strasbourg in 1959. This Convention is also the fundamental legal tool for cooperating with European countries that are not part of the EU, including countries involved in the EU's neighbourhood and enlargement policy. The EU has been providing assistance and implementing actions in these countries for a long time already, thus supporting reform and democratic consolidation. This activity entails the use of funds from the EU's budget – any possible misuse or embezzlement of these funds, corruptive actions, or fraud would harm the EU's financial interests.

When OLAF contacted the Italian investigative and prosecuting authority in a case of transnational corruption, cooperation was certainly smooth in Italy and action was quickly taken. OLAF's final report and recommendations advised the immediate initiation of a criminal investigation at Milan Prosecutor's Office. The cross-border investigation in this case involved four different EU countries and, most importantly, a non-EU neighbour country, North Macedonia, where EU funds had been misused through corruptive actions. As any "best practice" handbook would suggest, the first and most important step towards cooperation is establishing contact. It was therefore important to involve the competent Skopje Prosecutor's Office through an effective channel. The Italian prosecutors could resort to the EU agency specifically tasked for this activity: since Eurojust works closely with liaison magistrates from several non-EU countries, including North Macedonia,

the Italian prosecutors therefore requested that Eurojust would facilitate and coordinate a parallel investigation between Italy and North Macedonia, including the reciprocal legal assistance.

Eurojust's professionalism, experience, and network proved invaluable to the success of the investigation. All the actors were present at the coordination meeting in The Hague, first and foremost

OLAF, whose contribution to the case was of the essence. Practical, operational, and legal issues were dealt with and resolved. The main legal issue was the transfer of evidence from OLAF to North Macedonia's prosecution, which was not admissible pursuant to Article 11 of the OLAF Regulation, since this provision applies to EU Member States only. However, admissible evidence gathered by OLAF had been handed over to Milan prosecution service. Therefore, the Italian authorities could transfer said evidence to the North Macedonian prosecutor, pursuant to the 1959 CoE Convention and to a recent bilateral agreement signed by the two countries. Coordinated action was undertaken by the respective prosecution offices, and the exchange of information followed. This complex investigation is still ongoing, and it will certainly require further coordination. Nonetheless, productive contacts, also in person, between the Italian and the North Macedonian prosecutors, OLAF, and Eurojust have been permanently established, and channels of communication are being actively maintained. Direct contact and communication, as well as the capability of the EU agencies to liaise with and coordinate authorities even from non-EU countries, once again proved to be the key to the success of transnational investigations.

Danilo Ceccarelli

Public Prosecutor, Milan Prosecutor's Office



Danilo Ceccarelli

News

Actualités / Kurzmeldungen



European Union*

*Reported by Thomas Wahl (TW), Cornelia Riehle (CR),
and Christine Götz (CG)*

Foundations

Fundamental Rights

10th Anniversary of Charter: Council Conclusions

On the occasion of the 10th anniversary of the Charter of Fundamental Rights, the JHA Council adopted [conclusions on the Charter, their state of play, and future work](#). At its [meeting on 7 October 2019](#), the ministers of justice of the EU Member States reaffirmed that the Union is based on common values, as enshrined in Art. 2 TEU, which is founded on respect for human dignity, freedom, democracy, equality, the rule of law, and respect for human rights, including the rights of persons belonging to minorities. These rights are a cornerstone of the European Union and must be fully respected by all Member States and EU institutions. At the meeting, the ministers also reaffirmed the commitment to the EU's accession to the ECHR (see separate news item).

Taking note of the Commission report on the application of the Charter and the FRA fundamental rights report

(see eucrim 2/2019, p. 82), the Council acknowledges that challenges persist, particularly in the area of non-discrimination, and that the fight against all forms of discrimination must continue.

Another problem is the public's low awareness of the Charter. The Council calls on Member States to strengthen their awareness-raising and training activities towards all key stakeholders, including policymakers, civil servants, legal practitioners as well as national human rights institutions, civil society organisations, etc. The e-justice portal is considered to be an important tool supporting this endeavour. Thematic discussions and the annual exchange of views on application of the Charter at the national level should also be promoted.

The Commission is to ensure the consistency of legislative and policy initiatives with the Charter and to further enhance fundamental rights impact assessments for all relevant legislative proposals.

While welcoming the Fundamental Rights Agency's Charter-related work – including awareness raising, e-tools, and training as well as expertise and

data that are useful for the preparation of initiatives –, the Council stressed that it will “consider carefully” any proposal on increasing the Agency's legal clarity and efficiency.

Ultimately, the conclusions recognise the essential role of civil society organisations in promoting fundamental rights. The Council emphasizes that Member States must refrain from any unnecessary, unlawful, or arbitrary restrictions on civil society. It also points out that transparent, sufficient, and easily accessible funding is crucial for civil society organisations. (TW)

Council: EU Should Accede to ECHR

At their Council meeting on 7 October 2019, the ministers of justice of the EU Member States [reaffirmed the EU's commitment to acceding to the European Convention on Human Rights \(ECHR\)](#). The ministers also agreed to supplementary negotiating directives. They will be addressed to the Commission so that it can resume negotiations with the Council of Europe in the near future. They will take into account the objections raised by the Court of Justice, which found a draft agreement negotiated in 2013 to be incompatible with the treaties of the European Union ([Opinion 2/13 of 18 December 2014](#)).

In May 2019, the Commission submitted an analysis on the legal issues of the CJEU's decision, which formed the basis for the adapted negotiation guidelines. It is expected that the Commission will resume the negotiations soon. The

* If not stated otherwise, the news reported in the following sections cover the period 1 August – 15 November 2019.

Treaty on European Union provides for the accession of the EU to the ECHR. Its objective is to reinforce the common values of the Union, improve the effectiveness of EU law, and enhance the coherence of fundamental rights protection in Europe. (TW)

Council Updates EU Guidelines Against Torture and Ill-Treatment

On 16 September 2019, the Council adopted revised [Guidelines on EU policy towards third countries on torture and other cruel, inhuman, or degrading treatment or punishment](#).

The purpose of the Guidelines is to provide practical guidance to EU institutions and Member States, which can be used in their engagement with third countries and in multilateral human rights fora, in order to support ongoing efforts to eradicate torture and other ill-treatment worldwide. They complement other instruments of the EU's human rights policy, e.g., the EU's Strategic Framework on Human Rights and Democracy with its Action Plan on Human Rights and Democracy, the EU's policy framework on support to transitional justice, and the Guidelines on promoting compliance with International Humanitarian Law.

The Guidelines set out various policy tools as well as operational measures to support third countries in their prohibition and prevention of torture and ill-treatment. (TW).

CJEU Rules on Independence of Poland's Disciplinary Chamber of the Supreme Court

In its judgment of 19 November 2019, the Grand Chamber of the CJEU established criteria under which the new Disciplinary Chamber of the Polish Supreme Court can be considered independent and impartial. The judgment is based on a reference for a preliminary ruling brought by the Labour and Social Insurance Chamber of the Polish Supreme Court ([Joined Cases C-585/18, C-624/18, and C-625/18](#)).

In the cases at issue, Supreme Court judges protested against their early retirement, following the new Polish legislation lowering the retirement age of Supreme Court judges (see also case C-619/18 and the CJEU's judgment of 24 June 2019 in this case in *eu-crim* 2/2019, p. 80). A new Disciplinary Chamber at the Supreme Court was established to hear such actions by a new 2017 law. The referring court, before which such actions were heard prior to the reform, calls into question whether the Disciplinary Chamber offers sufficient guarantees of independence under Union law and whether it can eventually disapply national legislation that transferred competence to the Disciplinary Chamber (for details about the case and the opinion of AG *Tanchev*, see *eu-crim* 2/2019, p. 81).

The judges in Luxembourg first had to deal with several objections against the admissibility of the reference and rejected the arguments put forward by the Polish Public Prosecutor General, *inter alia*, as follows:

■ Arg.: Laying down rules on the jurisdiction of national courts and national councils falls within the exclusive competence of Member States. ↔ As the CJEU has previously held, although the organisation of justice in the Member States falls within their competence, they are required to comply with their obligations deriving from EU law when exercising that competence.

■ Arg.: The provisions of national law at issue do not implement EU law or fall within its scope and therefore cannot be assessed under that law (especially Art. 19 para. 1 subpara. 2 TEU and Art. 47 of the Charter). ↔ The applicants in the main proceedings are relying on the prohibition against discrimination in employment provided for by Directive 2000/78; thus, a situation is given in which the Member State “implements EU law” in the sense of Art. 51(1) of the Charter. In addition, Art. 19 TEU does not require that Member States be implementing EU law.

■ Arg.: The CJEU is not allowed to interpret the Charter because it has to respect Protocol No. 30 on application of the Charter of Fundamental Rights of the European Union to the Republic of Poland and to the United Kingdom. ↔ The protocol does not concern the second subparagraph of Art. 19(1) TEU, and it neither calls into question the applicability of the Charter in Poland, nor is it intended to exempt the Republic of Poland from its obligation to comply with the provisions of the Charter.

■ Arg.: The reference is no longer necessary because the referring Labour and Social Insurance Chamber disregards the new composition and jurisdiction of the Polish courts. ↔ The arguments put forward concern matters of substance and cannot affect the admissibility of the questions referred.

As regards the substance of the questions, the CJEU reaffirmed that the Polish disciplinary regime must comply with the right to effective judicial protection as enshrined in Article 47 of the Charter. This means, in particular, that everyone is entitled to a fair hearing by an independent and impartial tribunal. The CJEU then reiterated its settled case law on the requirement that courts be independent:

■ External dimension: The court concerned can exercise its functions entirely autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, thus being protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions;

■ Internal dimension (linked to impartiality): An equal distance is maintained from the parties to the proceedings and their respective interests with regard to the subject matter of those proceedings. This aspect requires objectivity and the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law;

■ Any guarantees of independence and impartiality require rules, particularly as regards the composition of the body, and the appointment, length of service, and grounds for abstention, rejection, and dismissal of its members, in order to dispel any reasonable doubt in the minds of individuals as to the imperviousness of that body to external factors and as to its neutrality with respect to the interests before it;

■ In accordance with the principle of the separation of powers, which characterises the operation of the rule of law, the independence of the judiciary must be ensured in relation to the legislature and the executive;

■ Organisational and procedural rules must be such as to preclude not only any direct influence, in the form of instructions, but also any more indirect forms of influence.

The CJEU concluded that it is up to the referring court to ascertain whether the framework of the new Disciplinary Chamber fulfills these requirements, but it provides several suggestions as to which specific factors should be considered:

For example, the mere fact that the judges of the Disciplinary Chamber were appointed by the President of the Republic of Poland does not infringe impartiality *if*, once appointed, they are free from influence or pressure when carrying out their role. The prior participation of the National Council of the Judiciary, which is responsible for proposing judicial appointments, would be acceptable *if* that body is itself sufficiently independent of the legislature, the executive, and the President of the Republic.

Furthermore, factors that characterise the Disciplinary Chamber more directly must also be taken into account, such as its exclusive jurisdiction, its constitution with newly appointed judges alone, and its high degree of autonomy within the Supreme Court.

Altogether, the judges in Luxembourg highlighted that, although any single factor is not capable of calling into

question the independence of the Disciplinary Chamber *per se* and seen in isolation, this may conversely not be true once the factors are viewed together.

Ultimately, the Grand Chamber of the CJEU examined the legal consequences that occur if the referring court negates the independence of the Disciplinary Chamber, and concluded: “If that is the case, the principle of the primacy of EU law must be interpreted as requiring the referring court to disapply the provision of national law which reserves jurisdiction to hear and rule on the cases in the main proceedings to the abovementioned chamber, so that those cases may be examined by a court which meets the abovementioned requirements of independence and impartiality and which, were it not for that provision, would have jurisdiction in the relevant field.”

New Polish regulations on the disciplinary regime against judges are also the subject of infringement proceedings initiated by the Commission (Case C-791/19; see also eucrim 2/2019, pp. 81–82). In previous judgments, the CJEU had already declared the lowering of the retirement age for judges at the Supreme Court and at the level of ordinary courts to be incompatible with Union law. (TW)

CJEU: Polish Retirement Rules at Ordinary Court Level Contrary to EU Law

On 5 November 2019, the Grand Chamber of the CJEU declared that another issue of the Polish justice reform was not in line with EU law. After having ruled on 24 June 2019 that lowering the retirement age of the Supreme Court judges is contrary to EU law (see Case C-619/18 in eucrim 2/2018, p. 80), the CJEU also affirmed non-compliance with regard to the new retirement scheme for Polish judges and public prosecutors ([Case C-192/18](#)).

A Polish law of 12 July 2017 lowered the retirement age of ordinary court judges and public prosecutors as well as the age for early retirement of Supreme

Court judges to 60 years for women and 65 years for men (previously 67 for both sexes). The power of the Polish Minister of Justice to extend the active service period of judges at the ordinary courts above and beyond the new retirement age was also the subject of the case. Since the European Commission found these rules to be contrary to EU law, it brought an action for failure to fulfil obligations before the Luxembourg Court.

The CJEU first held that the differences in retirement age between female and male judges/prosecutors is a direct discrimination based on sex. The CJEU rejected the argument Polish government that the difference is an “authorised positive action” under Article 157(4) TFEU and Article 3 of Directive 2006/54, because early retirement for women would indirectly compensate them for difficulties experienced in receiving promotions throughout their professional careers. The CJEU held on the contrary that “(t)he setting, for retirement, of an age condition that differs according to sex does not offset the disadvantages to which the careers of female public servants are exposed by helping those women in their professional life and by providing a remedy for the problems which they may encounter in the course of their professional career.” As a result, the new legislation infringes Art. 157 TFEU (principle of equal pay for male and female workers for equal work) and Directive 2006/54 (implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation).

Second, the CJEU also held that the discretion given to the Minister of Justice to decide whether or not to authorise that ordinary court judges may continue to carry out their duties above and beyond the new (lower) retirement age is contrary to Union law. It found that the substantive conditions and detailed procedural rules governing that decision-making power are contrary to the criteria for independence of judges, which can

be deduced from Art. 19 para. 1 subpara. 2 TEU and as set out in the first judgment on the Polish justice reform of 24 June 2019. The too vague and unverifiable conditions for extension and the potential length for the discretionary decision are not acceptable.

Moreover, the judges in Luxembourg found that the necessary imperviousness of judges to all external intervention or pressure is not guaranteed. They mainly argue that the combination of lowering the normal retirement age of judges at the ordinary courts and of conferring discretion for extension to the Minister of Justice fails to comply with the principle of irremovability. In this context, the judges remarked that “the combination of the two measures ... is such as to create, in the minds of individuals, reasonable doubts regarding the fact that the new system might actually have been intended to enable the Minister for Justice, acting in his discretion, to remove, once the newly set normal retirement age was reached, certain groups of judges serving in the ordinary Polish courts while retaining others of those judges in post.”

In sum, the CJEU follows the conclusion of AG *Tanchev* of 20 June 2019 (see eucrim 2/2019, pp. 80–81) and its judgment of 24 June 2019 on changes to the retirement age of Supreme Court judges (see above). It is the second of a series of pending cases before the CJEU that attack the justice reform in Poland for exerting more political influence into the judiciary. (TW)

AG: References Against Disciplinary Proceedings Against Polish Judges at Ordinary Courts Inadmissible

On 24 September 2019, Advocate General *Tanchev* proposed that references for a preliminary ruling of two Polish district courts voicing doubt as to the compatibility of the new disciplinary regime introduced in Poland via judicial reforms in 2017 with Art. 19(1) subpara. 1 TEU should be declared inadmissible.

The cases are registered as [Joined Cases C-558/18 and C-563/18](#) (*Miasto Łowicz v Skarb Państwa – Wojewoda Łódzki, joined parties: Prokuratura Regionalna Łodzi, Rzecznik Praw Obywatelskich and Prokuratura Okręgowa w Płocku v VX, WW, XV*).

The cases at issue refer first to a civil law suit between the municipality of Łowicz and the State Treasury before the District Court of Łódź, and, second, to a criminal trial before the District Court of Warsaw against a gang whose defendants seek protection from the state because of their cooperation with the law enforcement authorities. Both district courts submit that they may take decisions that are not in favour of the State authorities; therefore they fear becoming the subject of disciplinary proceedings. The referring judges are concerned that the disciplinary regime introduced in Poland in 2017 may entail politically motivated disciplinary penalties, which infringes the second subparagraph of Art. 19(1) TEU.

AG *Tanchev* first affirmed that the situation in the main proceedings falls within the material scope of Art. 19(1) subpara. 2 TEU (the obligation for Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law). Accordingly, the CJEU is vested with the authority “to rule on structural breaches of the guarantees of judicial independence, given that Article 19 TEU is a concrete manifestation of the rule of law, one of the fundamental values on which the European Union is founded under Article 2 TEU.” Structural breaches of judicial independence inevitably impact on the preliminary ruling mechanism under Art. 267 TFEU and thus on the capacity of Member State courts to act as EU Courts.

However, AG *Tanchev* found that requirements on admissibility for a preliminary ruling have not been met in the present case. The reference does not sufficiently explain the relationship between the relevant provisions of EU

law and the Polish measures in question. Furthermore, the AG observed that there seems to be mere subjective fear on the part of the referring court, because concrete disciplinary proceedings have not yet been initiated. Therefore, the questions remain hypothetical as to what makes the request inadmissible under Art. 267 TFEU.

The reference at issue is one of a series of proceedings before the CJEU in which Polish judges are taking a stand against the judicial reforms in Poland, which attack the rule of law. In total, they have brought forward around 14 references for preliminary rulings. In addition to these references, the Commission initiated infringement proceedings (see, *inter alia*, Case C-619/18 and Case C-192/18 on the lowering of the retirement rules for judges and public prosecutors – all reported in eucrim 2/2019, pp. 80 ff. and in this issue). In the Joined Cases C-585/18, C-624/18 and C-625/18, by judgment of 19 November 2019, the CJEU ruled on the independence of the Polish Disciplinary Chamber in cases involving Supreme Court judges taking legal action against their early retirement. (TW)

Commission Refers New Disciplinary Regime for Polish Judges to CJEU

After Poland failed to address the Commission’s concerns about the new disciplinary regime for Polish judges, set out in the reasoned Opinion of the Commission of 17 July 2019 (see eucrim 2/2019, pp. 81–82), the [Commission referred the case to the European Court of Justice on 10 October 2019](#). The Commission is mainly critical of the following issues:

- The possibility to initiate disciplinary investigations and sanctions against ordinary court judges is based on the content of their judicial decisions, including exercise of their right under Art. 267 TFEU to request preliminary rulings from the CJEU;
- The new Disciplinary Chamber of the Polish Supreme Court does not guarantee independence and impartiality in the

composition and selection process, as required by EU law and CJEU case law;

- The President of the Disciplinary Chamber has almost unfettered discretion to determine the disciplinary court of first instance, so that the principle that a court is “established by law” is not respected;

- There are no guarantees that disciplinary proceedings against judges are processed within a reasonable time-frame;

- The judges’ defence rights are undermined.

The case is registered at the CJEU as [C-791/19](#). The Commission applied for an expedited procedure, which is also in line with its new concept to strengthen the rule of law, as presented in the Commission Communication of 17 July 2019 (see [eucrim 2/2019](#), p. 79).

The new disciplinary regime against Polish judges of ordinary courts is also subject to a reference for preliminary ruling (Joined Cases C-558/18 and C-563/18). On 24 September 2019, AG *Tanchev* proposed declaring these references inadmissible; they were brought to the CJEU by two Polish district courts. Other reforms of the Polish judicial system that were introduced by Poland two years ago and that seek to increase political influence in the justice sector will keep the CJEU busy, since they are subject to other infringement proceedings and references for preliminary rulings. In total, Polish courts have made references for preliminary rulings in about 14 cases. On 19 November 2019, the Grand Chamber of the CJEU already indicated that the new Disciplinary Chamber of the Supreme Court, which is responsible for deciding complaints by Supreme Court judges, may infringe the guarantees of independence and impartiality. On 24 June 2019, the CJEU ruled that the Polish reform lowering the retirement age of Supreme Court judges is contrary to EU law (Case C-619/18, see [eucrim 2/2019](#), p. 80). On 5 November 2019, the CJEU declared that the new

retirement scheme for Polish judges and public prosecutors at the ordinary court level is not in line with EU law. (TW)

Hungary and Poland Impede Conclusions on Rule-of-Law Evaluation

Hungary and Poland blocked the adoption of Council conclusions on evaluation of the rule-of-law dialogue. The rule-of-law dialogue was established in 2014. It consists of a structured dialogue between the Commission and Member States that disrespect the rule of law and the Annual Dialogues on the Rule of Law, allowing national governments to discuss rule-of-law related issues within the Council. In 2016, the General Affairs Council agreed to reevaluate the framework by the end of 2019.

At its [meeting on 19 November 2019](#), the General Affairs Council discussed the evaluation and the draft conclusions. Ministers also exchanged views with FRA Director, Michael O’Flaherty. The Finnish Presidency stated that 26 delegations supported [the conclusions as published in Council Document 14173/19](#). They advocate a yearly stocktaking exercise revolving around the state of play and key developments in the rule of law. Such an annual stocktaking could draw on the Commission’s annual rule-of-law reports, which would in turn create synergies between the institutions. Furthermore, ministers wish “for the dialogue to be stronger, more result-oriented and better structured, for preparations for the dialogue to be more systematic, and for proper follow-up to be ensured.” The organisation and in-depth discussion of rule-of-law-related issues in other Council configurations is also encouraged.

Strengthening the rule of law is one of the top priorities of Finland’s Council Presidency during the second half of 2019. The Finnish Presidency welcomed the Commission’s new concept to strengthen the rule of law, as presented on 17 July 2019 (see [eucrim 2/2019](#), p. 79). It also supports the pro-

posal by Belgium and Germany for a periodic peer review mechanism on the rule of law, which could reinforce mutual understanding and unity among the EU Member States. (TW)

Area of Freedom, Security and Justice

New Eurobarometer: Strong Increase in Citizens’ Positive Perception of the EU

A [new Eurobarometer survey](#) was released on 5 August 2019. It shows a strong general increase in citizens’ positive perception of the European Union. The survey was conducted by means of 27,464 face-to-face interviews in the 28 Member States and five candidate countries in June 2019, shortly after the European elections.

According to the survey, trust in the EU is at its highest level since 2014 and remains higher than trust in national governments or parliaments. Trust in the EU increased in 20 Member States, with the highest scores in Lithuania (72%), Denmark (68%) and Estonia (60%).

Support for the Economic and Monetary Union with one single currency, the euro, has reached a new record high within the Eurozone. Throughout the EU, support for the euro has not changed since the last survey in autumn 2018 and remains at its highest level since spring 2007.

Across the EU, 73% of citizens feel they are citizens of the EU. In all 28 Member States, the majority of respondents feels this way (the national scores range from 93% in Luxembourg to 52% in Bulgaria).

Immigration is still seen as the main concern at the EU level, even though the number of respondents mentioning this concern has decreased since autumn 2018. The survey is marked by a significant rise in concern over climate change and the environment. Climate change, which was ranked fifth in autumn 2018, now ranks second as an issue for the first time. The concern over terrorism, which

New LLM Programme “European Criminal Justice in a Global Context” at Utrecht University

In the next academic year, the Utrecht Law School is starting a new master LLM programme. The programme focuses on the role of criminal justice systems in a Europeanized and internationalized legal environment, including enforcement and applicable human rights and constitutional standards. The content focuses on the following:

- The constitutional foundations for criminal justice in a Europeanized setting, including the fundamental rights dimension and the harmonisation of defence rights and safeguards;
- The effects and impact of EU law on domestic criminal justice and its relationship with administrative law enforcement in such areas as anti-money laundering, financial fraud, and other serious cross-border offences;
- The different legal regimes for transnational enforcement cooperation and the exchange of information, including the European Arrest Warrant and the European Investigation Order;
- The relationships between national criminal justice and EU authorities such as Eurojust and the European Public Prosecutor's Office;
- The relationship between European criminal justice and its global context (external dimension).

For details about the programme, its objectives, career prospects, admission and application procedures, etc., visit the [website on the master programme](#). (TW)

was ranked first in spring 2017, has once again slightly decreased since autumn 2018 and is now ranked third, together with concerns about the economic situation and the state of Member States' public finances. 9% of the respondents mention crime as one of their two main concerns (tenth rank). The number of people mentioning concern about crime has remained fairly stable, between 9 and 10%, since spring 2017. (CG)

Security Union

20th Progress Report on Security Union

spot light The EU achieved progress in fighting terrorism, stepping up information exchange, countering radicalisation, preventing violent extremism, and addressing cybersecurity; however, further efforts are needed. This is the main message of the “[20th progress report towards an effective and genuine Security Union](#)” that was presented by the European Commission on 30 October 2019. The report reveals that, since the attacks in Halle/Germany and in Paris/France at the beginning of

October 2019, both right-wing extremism/anti-Semitism and jihadi inspired terrorism continue to be security priorities in the EU.

Within the framework of the report series (for the 19th progress report, see eucrim 2/2019, p. 82), the 20th progress report focuses particularly on the following:

- Cybersecurity of 5G networks;
- Countering disinformation;
- External dimension of cooperation in the Security Union.

In the field of *legislative priorities*, the report highlights the following issues:

- In order to prevent radicalisation (both jihadi and right-wing violent extremism), the [legislative proposal to prevent the dissemination of terrorist content online](#) is considered essential. According to the Commission, this legislation would set clear rules and safeguards obliging internet platforms to take down terrorist content within one hour upon receipt of a reasoned request by competent authorities and to take proactive measures (for the proposal, see eucrim 2/2018, pp. 97–98 and the

article by *G. Robinson*, eucrim 4/2018, p. 234). The European Commission calls on the legislators (Council and EP) to swiftly conclude negotiations by the end of 2019.

- Within the framework of the EU Internet Forum, internet companies agreed on their commitment to the EU Crisis Protocol – an enhanced cooperation mechanism ensuring coordinated and rapid reaction to contain the spread of viral terrorist or violent extremist content online;

■ Implementation of interoperability of the systems for security and border/migration control is one of the top priorities for the Commission in 2020. The report points out the necessity of stronger and smarter information exchange. However, further legislation to complete established legislation on interoperability (see eucrim 2/2019, pp. 103–104) is needed. Therefore, the EP and Council are called on to swiftly reach agreement on the pending proposals on technical amendments to ETIAS and the reforms of the Visa Information System and Eurodac;

- While welcoming the launch of the European Judicial Counter Terrorism Register at Eurojust (see eucrim 2/2019, p. 100), the Commission calls on the EP to quickly advance the legislative proposal of law enforcement access to evidence (see, in this context, the latest news in the category “Law Enforcement Cooperation”);

■ Cybersecurity remains a key area of EU action. In this context, the report points to the EU cybersecurity certification framework (see eucrim 2/2019, p. 98), which now needs to be implemented. The [legislative initiative for a European Cybersecurity Industrial, Technology and Research Competence and Network of National Coordination Centres](#), however, is still pending and should be concluded soon. In addition, work continues on tackling hybrid threats. This includes the elaboration of a “conceptual model” framework to support Member States in identifying the

type of hybrid attack they might face. For hybrid threats on the EU agenda, see also eucrim 2/2019, p. 85.

Cybersecurity and resilience of 5G networks is another hot topic where EU action is required in the near future. The progress report highlights the [risk assessment report by the Member States](#) (with the support of the European Commission and the European Agency for Cybersecurity) published on 9 October 2019. The report identifies a number of important cybersecurity challenges for 5G that authorities, suppliers, and users are likely to face in the future. The report reveals that suppliers will be the focus of cyberattacks, in particular those from non-EU countries. The Commission calls on Member States to swiftly agree on a [toolbox of mitigating measures](#) to address the identified cybersecurity risks at the national and Union levels, as recommended by the Commission in March 2019.

The Commission also takes stock of the progress made in *countering disinformation* and in protecting elections against other cyber-enabled threats. The Commission, *inter alia*, [evaluated the Code of Practice on Disinformation for online platforms](#) and the advertising sector that became applicable in October 2018. It acknowledges efforts made by the signatories; however, more consistent actions are necessary because actions taken by the platforms vary in terms of speed and scope in order to ensure the implementation of their commitments.

As in previous reports, the Commission is not satisfied with the *implementation of core EU legislation* in the fields of terrorism and cybercrime. The Commission urges Member States to fully transpose, *inter alia*, the following EU legislation:

- The EU Passenger Name Record Directive;
- The Directive on combating terrorism;
- The Directive on control of the acquisition and possession of weapons;

■ The 4th Anti-Money Laundering Directive.

Ultimately, the report provides updates on the *external dimension of the EU's security policy*. It highlights the proposed opening of negotiations for an agreement allowing the exchange of personal data between Europol and the New Zealand authorities to fight serious crime and terrorism. New Zealand has been added to the list of priority countries for such agreements; negotiations with eight other priority countries from the Middle East/North Africa (MENA) region are ongoing.

Alongside the Europol cooperation with third countries, another cornerstone is the transfer of passenger name record data (PNR). The Commission points out its recommendation to the Council to authorise negotiations for an EU-Japan PNR agreement. It is envisaged that arrangements be in place before the start of the Olympic games in Tokyo in 2020. Negotiations with Canada on a new PNR agreement are on track. On the international level, the Commission presented a proposal to the Council for a decision on the EU position in the International Aviation Organization with regard to standards and recommended practices on passenger name record data.

Security cooperation with the Western Balkans remains at the top of the EU agenda. In this context, the progress report refers to the [bilateral anti-terrorism arrangements with Albania and North Macedonia](#), which were signed on 9 October 2019 and which implement the 2018 Joint Action Plan on Counter-Terrorism for the Western Balkans. The arrangements include tailor-made, concrete priority actions which the countries should take in the course of 2019 and 2020, and set out the Commission's support in this regard. In addition, the Commission signed an agreement with Montenegro on border management cooperation between Montenegro and the European Border and Coast Guard Agency.

In conclusion, the 20th progress report on the Security Union states that,

besides the need for the swift conclusion of pending legislative proposals, agreed measures and instruments must “be turned into an operational reality on the ground” in the EU Member States. (TW)

Self-Assessment Reports on EU Code of Practice on Disinformation

In October 2018, the industry agreed on a self-regulatory EU [Code of Practice](#) to address the spread of online disinformation and fake news. The signatories recognised the objectives outlined in the Commission [Communication “Tackling online disinformation – a European approach”](#) of April 2018. This was the first worldwide “private-public partnership” to fight disinformation. The Code of Practice is also one of the main pillars of the EU's [Action Plan](#) against the phenomenon of disinformation and fake news.

The Code has been signed by the leading IT companies Facebook, Google, Twitter, Mozilla, and Microsoft as well as seven European trade associations. They commit themselves to deploy policies and processes in relation to the scrutiny of ad placements, political advertising and issue-based advertising, integrity of services and the empowerment of consumers, and the research community. An annual account report from each company/association forms the basis for measuring and monitoring the Code's effectiveness.

These annual [self-assessment reports](#) were published on 29 October 2019. In addition, the Commission published [a summary and brief analysis](#) of the reports.

The Commission acknowledges that the signatories have made comprehensive efforts to fulfil their commitments over the last 12 months. The Code led to higher transparency regarding the platform's policies against disinformation and the ability to monitor structured dialogues. However, further serious steps by individual signatories and the community as a whole are still necessary.

The Commission observes that the reported actions taken by the platforms vary significantly in terms of scope and speed. In general, actions to empower consumers and the research community lag behind the original commitments (as evidenced prior to the European Parliament elections in May 2019). Furthermore, there are differences across the Member States as regards the deployment of the respective policies for the various commitments included in the Code.

Although cooperation between the platforms and stakeholders (e.g., fact-checkers, researchers, and civil organisations) improved, the provision of data and search tools is still episodic and arbitrary and does not respond to the demands of researchers for independent scrutiny. More efforts are also needed to establish sound cooperation with truly independent organisations.

The Commission observed that the platforms provided information on EU-specific metrics regarding the implementation of the Code; however, these metrics mainly focus on the number of accounts taken down or ads rejected. They do not enable a qualitative insight into the actual impact of the self-regulatory measures and mechanisms for independent scrutiny.

Lastly, the Commission notes that other IT platforms and advertising companies/services operating in the EU have not joined the Code.

The self-assessment reports are the starting point for a comprehensive assessment of the Code's effectiveness, which will be carried out by the Commission itself. The assessment is expected for the first half of 2020. The Commission will additionally take the following into account:

- Input from the European Regulators Group for Audiovisual Services (ERGA), as foreseen in the Action Plan against Disinformation;
- An evaluation from a third-party organisation selected by the signatories, as foreseen under the Code of Practice;

- An assessment from an independent consultant engaged by the Commission and expected in early 2020;

- A Commission report on the European Parliament elections.

On the basis of this comprehensive assessment, the Commission will decide whether the self-regulatory approach via the Code of Practice on disinformation is satisfactory or whether further regulatory measures should be taken. (TW)

Schengen

Commission: Croatia Ready for Schengen

On 22 October 2019, the [Commission issued a Communication](#) in which it confirmed that Croatia meets all necessary conditions for accession to the Schengen area. The Commission also confirmed that Croatia fulfilled commitments undertaken within the framework of the accession negotiations that are also relevant for the Schengen *acquis*. These areas mainly include the good functioning of the judiciary and the respect for fundamental rights.

Croatia declared that it wants to be part of the Schengen regime in March 2015, which triggered a long evaluation and monitoring process whether the country fulfils all parts of the Schengen *acquis*.

Since 2013, this process has been jointly carried out by the Member States and the Commission. They are supported by EU bodies, offices, and agencies; the Commission has an overall coordination role. The Commission prepares and plans the evaluation and adopts evaluation reports, while the Council has the responsibility to adopt recommendations for remedial actions. This is the first time that the new Schengen evaluation and monitoring mechanism has been applied.

A country that wishes to accede must show compliance in a number of policy fields, e.g.:

- In its capacity to take responsibility

for controlling the external borders on behalf of the other Schengen States and for issuing uniform Schengen visas;

- In its capacity to efficiently cooperate with law enforcement agencies in other Schengen States, in order to maintain a high level of security once internal border controls are lifted.

The Communication confirmed that Croatia has successfully implemented the Schengen rules in the areas of data protection, police cooperation, common visa policy, return, the Schengen Information System (SIS), firearms, and judicial cooperation in criminal matters. It also affirmed that Croatia meets the Schengen rules on external border management; however, Croatia must work continuously to keep the standard, especially in this field.

It is now up to the Council to verify the evaluation results. The Schengen *acquis* is only applicable after the Council takes a decision giving green light. (TW)

ECA: Use of Information Systems for Border Control Can Be More Efficient

The EU's information systems in the field of internal security supporting border controls are well designed; however, more efforts are needed to ensure completeness and timely entry of the data. This is the main outcome of the [European Court of Auditor's special report No 20/2019](#). The report examined whether the design and use of the major information systems utilised to perform border checks in the Schengen area are efficient. The systems at issue are:

- The Schengen Information System (SIS);
- The Visa Information System (VIS);
- Eurodac (European Asylum Dactyloscopy Database – fingerprint comparison system);
- The European Border Surveillance System (Eurosir);
- The Passenger Name Record systems (PNR).

The auditors found that border guards increasingly use and rely on these systems. The efficiency of border

checks, however, is hampered because some data is currently not included in the systems, while other data is either incomplete or not entered in a timely manner.

Furthermore, it was found that the systems are not used in a uniform way – including a discrepancy between the number of Schengen visas issues and the number of visa checks – which indicates that use of the information in the systems is not systematic.

Regarding the completeness of data, one problem is that officers often receive hundreds of results – mainly false positives – when they check names. This not only impacts efficiency, but also increases the risk of overlooking real hits.

Long delays in putting IT solutions for surveillance and passenger records into practice are another critical point, preventing border authorities from sharing important information efficiently.

The ECA made the following recommendations to the Commission:

- Promote further trainings, especially as regards the use of SIS II and VIS;
- Shorten the time to correct weaknesses identified during Schengen evaluations;
- Analyse discrepancies in visa checks;
- Improve data quality control procedures;
- Reduce delays in data entry.

The Commission provided statements to the ECA's findings and recommendations. The response is annexed to the report. (TW)

Institutions

European Court of Justice (ECJ)

Additional Area Offered on Website

The Court of Justice of the European Union has added a new area to its website, which offers the following information:

- Open access to preliminary ruling cases;

- A compilation of relevant decisions delivered by national courts;
- Notes and studies in relation to research and monitoring works;
- Factsheets on various subjects;
- Legal monitoring documents presenting current legal, judicial, and case-law developments by one or more Member States and by the Courts of the European Union.

The new area is based on the database of the Judicial Network of the European Union (Réseau judiciaire de l'Union européenne, RJUE), which was established in 2017 between the CJEU and participating national courts from the EU Member States. (CR)

New Judges Jääskinen and Wahl

On 7 October 2019, two new judges, *Niilo Jääskinen* and *Nils Wahl*, [took up their positions at the Court of Justice](#).

Niilo Jääskinen, appointed for the period from 7 October 2019 to 6 October 2021, last served as Judge and Vice-President of the Supreme Administrative Court of Finland. He replaces Mr *Allan Rosas*.

Nils Wahl, who last served as Advocate General at the Court of Justice of Sweden, was appointed for the period from 7 October 2019 to 6 October 2024. He replaces Mr *Carl Gustav Fernlund*. (CR)

Presidents of Chambers of the General Court Elected

On 30 September 2019, the Judges of the General Court elected the [Presidents of their ten Chambers](#). The ten presidents elected for the period from 30 September 2019 to 31 August 2022 are *Heikki Kanninen*, *Vesna Tomljenović*, *Anthony Michael Collins*, *Stéphane Gervasoni*, *Dean Spielmann*, *Anna Marcoulli*, *Ricardo da Silva Passos*, *Jesper Svenningsson*, *Maria José Costeira*, and *Alexander Kornezov*. (CR)

New Presidents of the General Court

At the end of September 2019, *Marc van der Woude* was elected [President of](#)

[the General Court](#) for the period from 27 September 2019 to 31 August 2022. Mr Van der Woude has been serving as Judge at the General Court since 2010 and as Vice-President of the General Court since 2016. He succeeds *Marc Jaeger*, who served as President of the General Court from 2007 to 2019.

The newly elected Vice-President of the General Court for the period from 27 September 2019 to 31 August 2022 is [Savvas Papasavvas](#). Mr Papasavvas has been serving as Judge at the General Court since May 2004. He succeeds *Marc van der Woude*. (CR)

New Members of the General Court

For the period from 1 September 2019 to 31 August 2025, [the terms of office of the following 12 Judges of the General Court were renewed](#): Ms *Vesna Tomljenović*, Ms *Mariyana Kancheva*, Ms *Inga Reine*, Ms *Ramona Frendo*, Mr *Anthony Collins*, Mr *Stéphane Gervasoni*, Mr *Eugène Buttigieg*, Mr *Fredrik Schalin*, Mr *Ulf Öberg*, Mr *Jan Passer*, Mr *Alexander Kornezov*, and Mr *Colm Mac Eochaidh*.

In addition, the following persons were newly appointed as Judges of the General Court: Mr *Laurent Truchot* (former Judge at the French Court of Cassation), Ms *Mirela Stancu* (former Director for European Affairs, International Relations and Programmes of the Romanian Superior Council of Magistracy), Ms *Tuula Riitta Pynnä* (former Judge at the Supreme Court of Finland), Ms *Tamara Perišin* (former Special Adviser to the Croatian Ministry of Science and Education), Ms *Petra Škvařilová-Pelzl* (former Legal Secretary at the Court of Justice), Ms *Gabriele Steinfatt* (former Judge at the Higher Administrative Court of Bremen), Mr *Johannes Christoph Laitenberger* (former Director-General of the Directorate-General for Competition of the European Commission), Mr *José Martín y Pérez de Nanclares* (former Director of the Office of the Presidency of the Spanish Council of State), Mr *Rimvydas Norkus* (former President

of the Judicial Council of Lithuania), Mr *Miguel Sampol Pucurull* (former Deputy Director-General of EU and International Affairs at the Abogacía General del Estado (Spanish Ministry of Justice), Mr *Iko Nõmm* (former Judge at the Estonian Court of Appeal), Ms *Ornella Porchia* (former Legal Adviser to the Permanent Representation of Italy to the European Union), Mr *Roberto Mastroianni* (former Adviser to the Italian Government for legislative affairs in the Department of European Affairs), and Mr *Gerhard Hesse* (former Director-General of the Legal Service of the Austrian Federal Ministry of Constitutional Affairs, Reforms, Deregulation and Justice). The oaths were taken on 26 September 2019, at which time the entry into office of the new Members also took place. (CR)

30th Anniversary of the General Court

On 25 September 2019, the [General Court of the European Union celebrated its 30th anniversary](#). On 25 September 1989, the first members of the Court took up their duties after the General Court of the EU had been set up by a Council Decision of 24 October 1988. (CR)

Building Extension

On 19 September 2019, the Court of Justice of the EU inaugurated its new, [fifth extension to the building complex](#). Among the guests of honour were His Royal Highness, the Grand Duke of Luxembourg; the Prime Minister of the Grand Duchy of Luxembourg, Mr *Xavier Bettel*; the President of the Court, Mr *Koen Lenaerts*; and the architect, Mr *Dominique Perrault*. (CR)

OLAF

OLAF Report 2018

On 3 September 2019, the European Anti-Fraud Office (OLAF) released its [annual report for 2018](#). The key figures for 2018 are:

- OLAF concluded 167 investigations;
- OLAF issued 256 recommendations to

the relevant national and EU authorities;

- As a result of the investigations concluded in 2018, OLAF recommended the recovery of €371 million to the EU budget;

- 219 new investigations were opened in 2018.

The report also analyses a number of trends revealed by OLAF's anti-fraud investigations. According to the report, setting up fake companies and disguising falsified business transactions is a very common method used by fraudsters in order to obtain EU funds. Moreover, fraud in the promotion of agricultural products (often in combination with money laundering through third countries) and evasion of customs duties were often investigated by OLAF. OLAF was successful in solving complex, transnational, and intricate cases. This helped not only to stop (organised) criminals from defrauding the EU budget, but also protected the health and well-being of European citizens, as emphasized by OLAF Director-General *Ville Itälä*.

This year's report includes a focus chapter that explains how OLAF cracks down on organized criminals, e.g., fraud in the promotion of agricultural products, organised crime in IT projects, VAT fraud with high-value electronics, etc. The report highlights that OLAF investigators have the necessary experience to quickly identify patterns of fraud and detect new areas of fraud. This is especially the case in cross-border situations in which suspicious behaviour cannot be detected by national authorities alone.

In addition to its investigative work, OLAF also regularly plays a substantial role in the negotiation of legislative instruments on the protection of the EU's financial interests against fraud and corruption. In 2018, OLAF was involved in the development of a new Commission Anti-Fraud Strategy that aims to reinforce OLAF's analytical capacity, the cooperation between OLAF and Commission services, and the Commission's corporate oversight in anti-fraud matters

(see eucrim 1/2019, p. 15). As a new task, OLAF will coordinate and monitor the implementation of anti-fraud strategies. OLAF also worked on supporting the entry into force of a new global anti-smuggling treaty, the Protocol to Eliminate Illicit Trade in Tobacco Products, and on a new Commission Action Plan to fight the illicit tobacco trade.

From a legal perspective, a major event in 2018 was the Commission's proposal to amend the Regulation concerning investigations conducted by the European Anti-Fraud Office in order to enable OLAF to complement the work of the new European Public Prosecutor's Office (EPPO) and to ensure a close and effective cooperation (cf. eucrim 1/2018, p. 5 f.). (CG)

Spanish Supreme Court Backs OLAF's Findings on Tuna Customs Fraud

On 6 August 2019, OLAF reported that the [Spanish Supreme Court confirmed the findings of OLAF investigations](#) on evaded customs duties with regard to tuna imports from El Salvador. OLAF had investigated allegations of irregularities in tuna exports from El Salvador into the European Union, which did not meet the origin requirements of the EU's Generalised System of Preference scheme.

The investigations extended beyond European borders and involved close cooperation between OLAF, Member States, and third countries. In 2010, OLAF concluded its investigations and recommended the recovery of €9.7 million to the EU budget. Since 2010, the case had been subject to Spanish court proceedings that were concluded in June 2019. The judgment of the Spanish Supreme Court is in line with OLAF's findings and confirms the amount of €9.7 million to be recovered to the EU budget. (CG)

Conference Highlights Need for Strong AFCOS in Candidate Countries

Governments must "give law enforcement and public administration the tools

Report

Workshop on the Network of Associations for European Criminal Law and for the Protection of the Financial Interests of the EU

On 16 September 2019, OLAF organised a one-day workshop to discuss the future of the Network of Associations for European Criminal Law and for the Protection of the Financial Interests of the EU. The workshop took place in Brussels and was attended by 25 practitioners and academics from all over Europe.

The purpose of the workshop was also to encourage the establishment of new associations or for existing associations to join the Network. As a result, the Network was already able to welcome new members, but institutions and associations that might be interested in joining the Network are warmly encouraged to get in contact (info@eucrim.eu).

In her opening speech, OLAF Policy Director *Margarete Hofmann* recalled that the Network, which started with the creation of the first association in Rome in October 1990, will turn 30 next year. Over that period, the protection of the financial interests of the Union had seen an enormous evolution, which culminated in the adoption of the Directive on the fight against fraud to the Union's financial interests by means of criminal law (the PIF Directive) and the Regulation on the establishment of the European Public Prosecutor's Office (EPPO) in 2017. She underlined that the Network has contributed to this success in no small measure, citing the *Corpus Iuris* studies that laid the theoretical foundation for the EPPO. The Honorary President and founder of the Network, *Francesco de Angelis*, provided an overview of the origins and achievements of the Network and made a passionate plea for turning the PIF Directive into a regulation in order to strengthen its uniform application. He also thought that the time is ripe for a more comprehensive codification of European criminal law, both substantive and procedural.

Following this introduction, the workshop was split into four sessions on 'Membership and structure of the Network'; 'Work and priorities' (moderated by Professor *John Vervaele*, Utrecht); 'Annual Meetings and Conferences' (Professor *Rosaria Sicurella*, Catania); and the use of the *eucrim* journal and website (*Thomas Wahl*, MPI Freiburg).

It was agreed to renew efforts to reactivate associations that had become less involved in recent years, as well as to find new members. There was also agreement to identify new topics and strategic projects in which a significant number of network members could get involved, and some suggestions for such topics were made. Finally, it was felt that more importance should be attributed to the annual meetings of the presidents of the associations, by extending their duration and strategic focus. OLAF would organise the annual meeting of the presidents of the associations in 2020 under the new format.

Oliver Landwehr
Legal and Policy Officer, OLAF

they need to detect and to prosecute fraudsters," said OLAF Director-General *Ville Itälä* at the [annual conference of Anti-Fraud Coordination Services \(AFCOS\)](#) in reference to EU candidate and potential candidate countries. The conference was held on 18–20 September 2019 in North Macedonia. It focused on translating operational knowledge into efficient fraud prevention measures.

The conference also highlighted the importance of cooperation between OLAF and AFCOS in the candidate and potential candidate countries in order to protect the EU budget. Between

2014 and 2020, pre-accession funding amounts to €12 billion. AFCOS facilitate the effective cooperation and exchange of information with OLAF. They are active in the implementation of comprehensive anti-fraud strategies at the national level and share information on possible irregularities in relation to the management of EU funds.

OLAF will continue to maintain its investigatory role in candidate countries and potential candidate countries, even after the European Public Prosecutor's Office (EPPO) becomes operational. The EPPO has no jurisdiction to directly

investigate fraud in third countries outside the EU. Hence, the solid cooperation established by the OLAF network remains crucial. (TW)

European Public Prosecutor's Office

Ms Kövesi Appointed European Chief Prosecutor

After the [decision by the Conference of Presidents](#) (EP President *David Sassoli* and political group leaders) on 17 October 2019, Ms *Laura Codruța Kövesi* is the first European Chief Prosecutor. She can now start her seven-year mandate. The Council endorsed the nomination on 14 October 2019. The EP and the Council [laid their dispute on the candidate to rest](#) in September.

Ms Kövesi, a Romanian national, comes from the Prosecutor's Office attached to the High Court of Cassation and Justice of Romania. She held various positions as prosecutor during her professional career in Romania. She gained renown as chief of the National Anticorruption Directorate (DNA), where she initiated several corruption prosecutions against top Romanian officials.

As European Chief Prosecutor, she will be tasked mainly with organising the work of the EPPO and representing the Office in contacts with EU institutions, Member States, and third countries. She will be assisted by two deputies and will chair the college of prosecutors, which will be in charge of defining strategy and internal rules and ensuring coherence across and within PIF cases. (TW)

State of Play of EPPO Implementation

The Commission informed the justice ministers of the EU Member States on the [state of play in implementation of the EPPO Regulation](#) at the JHA Council meeting on 7 October 2019. European Prosecutors who were nominated by the participating Member States were heard by the Selection Panel. However, some Member States still have not submitted their nominations.

The Commission also updated the ministers on other statuses of preparation:

- The EPPO's internal rules of procedure;
- Conditions of employment for European Delegated Prosecutors;
- Creation of the case management system (CMS);
- The EPPO's budget.

As regards the EPPO's inclusion into the Council of Europe conventions (especially the Convention on Mutual Legal Assistance), in order to ensure a smooth cooperation with non-EU countries, the Commission has started informal discussions with the Council of Europe.

The Commission closely accompanies and monitors the necessary adaptations in the legal and administrative framework in the Member States to comply with the EPPO Regulation. To this end, a secured and restricted website was created ("EPPO Wiki"), where Member States have been requested to submit information on the adaptation process.

Lastly, the Commission stressed that full implementation of the PIF Directive is essential, so that the EPPO can start operational business. Some Member States have not notified the Directive's implementation and the Commission started the first phase of the infringement proceedings. (TW)

Europol

Plans for Europol-New Zealand Operational Agreement

Together with its 20th progress report towards an effective and genuine Security Union, the European Commission addressed a [recommendation to the Council to authorise the opening of negotiations for an EU-New Zealand agreement](#). The initiative aims to allow Europol and New Zealand law enforcement authorities to exchange personal data to fight serious crime and terrorism.

The EU and New Zealand agreed on reinforcing law enforcement coopera-

tion in the aftermath of the Christchurch attacks. On the basis of a working agreement signed in April 2019 (see eucrim 2/2019, p. 89), Europol and New Zealand can exchange strategic information, but not personal data.

New Zealand has been taken up on the list of priority countries, which the Commission intends to conclude operational security agreements with in order to combat terrorism, migration, and other forms of serious crime. To date, these countries include those in the Middle East/North Africa (MENA) region. The Commission stressed that the EU and New Zealand are like-minded partners sharing similar views and approaches on many global issues. From Europol's viewpoint, there are common operational interests in the following areas: terrorism, cybercrime (including child sexual exploitation), outlaw motorcycle criminal gangs, and drug trafficking. Europol and New Zealand authorities have successfully worked together in these areas in the past. (TW)

More Cooperation with EUIPO

On 7 November 2019, [Europol and the European Union Intellectual Property Office \(EUIPO\)](#) signed a formal agreement to enhance their cooperation in the fight against intellectual property crime. The agreement continues the work that was already started in 2016, when the two agencies created a specialised unit within Europol that was funded by the EUIPO. Since then, this Intellectual Property Crime Coordinated Coalition (IPC3) has been coordinating and supporting cross-border operations tackling IP crime across the EU. (CR)

Cooperation with Palo Alto Networks

On 23 October 2019, Europol [has signed a Memorandum of Understanding \(MoU\)](#) with [Palo Alto Networks](#), an American multinational cybersecurity company. The MoU enables the exchange of threat intelligence data and details of cybercrime trends as well as technical expertise and best practices,

focusing on new adversary behaviours, malware families, and attack campaigns around the world. (CR)

Cooperation with FS-ISAC

On 19 September 2019, Europol's European Cybercrime Centre (EC3) [signed a Memorandum of Understanding \(MoU\) with the Financial Services Information Sharing and Analysis Center \(FS-ISAC\)](#). Stronger cooperation with the European financial services sector aims to strengthen the law enforcement response to financially motivated cybercriminals targeting banks and other financial institutions. Under the MoU, information sharing will be facilitated, and training exercises and informational summits will be fostered.

[FS-ISAC](#) is an industry consortium with almost 7000 member firms and users in over 70 countries. By offering an intelligence platform, resiliency resources, and a trusted peer-to-peer network of experts to anticipate, mitigate, and respond to cyber threats, FS-ISAC is dedicated to reducing cyber-risk within the global financial system. (CR)

Explanations in 120 Seconds

Europol has launched a [new video series explaining law enforcement in 120 seconds](#). In a series of five clips, the videos illustrate how drugs are produced, trafficked, and distributed by serious and organised criminal organisations, what the negative consequences are for society, and the international law enforcement response to dismantling drug cartels. Drugs make for the largest criminal market in the EU with an EU retail drug market estimated to be worth at least €24 billion a year. (CR)

Europol in Brief 2018

In September 2019, Europol published a brochure [offering statistics and updates of Europol's year 2018](#). In 2018, Europol supported 1748 operations, the majority related to terrorism, cybercrime, and drug trafficking. 8266 operational reports were generated,

mainly in the area of serious and organised crime. With 370 deployments in 2018, Europol's mobile office support was a key feature of its support in 2018: overall, mobile offices were deployed to 43 countries. In addition, a record 1.1 million SIENA (Secure Information Exchange Network Application) messages were exchanged, the top five crime areas being robbery, drugs, fraud, immigration, and terrorism. Another record was achieved with regard to the number of searches conducted in the Europol Information System (EIS), with 4 million searches having been conducted in 2018. This constitutes an increase of 65% compared to 2017. The Europol Platform for experts (EPE) allows its users to share non-personal data on crime and is used by law enforcement in more than 100 countries.

Thanks to the European Union Serious and Organised Crime Threat Assessment (SOCTA), the Internet Organised Crime Threat Assessment (IOCTA), and the EU Terrorism Situation and Trend Report (TE-SAT) ([see eucrim news of 9 September 2019](#)), Europol provides a series of detailed threat assessment reports outlining key threats and trends.

Lastly, citizens are becoming involved in fighting crime via Europol's websites, tracking the EU's most wanted fugitives as well as items leading to locations where child abuse is perpetrated. The 'No more ransom' portal offers decryption for different types of ransomware infections ([see eucrim news of 10 September 2019](#)). In 2018, Europol reached its current maximum of staff at 1294 staff members. (CR)

Major Action Day to Tackle EMPACT Priorities

From 5 to 8 September 2019, [Joint Action Day \(JAD\) Western Balkans 2019](#) was carried out. 6708 officers on the ground, 50 officers in the Operational Centre at Europol's headquarters, and eight agencies and international organisations teamed up to tackle firearms trafficking, illegal immigration, document

fraud, and drug trafficking. As a result, 214,147 persons, vehicles, and premises were checked and 175 individuals arrested. (CR)

Eurojust

Cooperation Agreement with Serbia Signed

On 12 November 2019, [Eurojust and the Republic of Serbia signed a cooperation agreement](#) allowing for the sharing of personal data and creating the possibility to appoint a Serbian Liaison Prosecutor to Eurojust.

One of the requirements for the cooperation agreement was new Serbian legislation on data protection which meets the EU standards.

Eurojust maintains close connections to the Western Balkan countries: It has already signed cooperation agreements with North Macedonia (2008), Montenegro (2016) and Albania (2018). Before the agreement with Serbia, Eurojust already closely cooperated with the country, e.g., through Serbia's involvement in a number of cases regarding serious organised crime and Serbia's participation in joint investigation teams that mainly dealt with drug trafficking offences. For Eurojust's collaboration with non-EU countries, see also the article by *Boštjan Škrlec* (in this issue). (CR)

Cooperation Agreement with Denmark

On 7 October 2019, Eurojust and the Kingdom of Denmark signed an [agreement to continue their criminal justice cooperation](#). In light of the new Eurojust Regulation entering into force in December 2019, the agreement was needed to be able to continue judicial cooperation with Denmark, which is a Member State of the European Union but not a Member of Eurojust. Under the agreement, Denmark has the status of an observer at Eurojust College meetings and the possibility to set up a full Desk. It is subject to democratic oversight by its National Parliament and bound by the

jurisdiction of the European Court of Justice and the European Data Protection Supervisor. Furthermore, Denmark will financially contribute to Eurojust's budget. In operational terms, Denmark will maintain its access to Eurojust's information systems and be able to second a representative to Eurojust. (CR)

Council Conclusions on Eurojust

At its [meeting on 7–8 October 2019](#), the JHA Council [adopted Conclusions on Eurojust](#), underlining the unique and vital role of Eurojust in the coordination of serious cross-border investigations and prosecution between national investigating and prosecuting authorities.

The Conclusions put emphasis on Eurojust's role and capabilities with regard to digital criminal justice. Key measures in this regard are:

- A strong and modern IT infrastructure and Case Management System (CMS) on the part of Eurojust;
- Access to the e-Evidence Digital Exchange System built by the Commission and operated by Member States.

When looking at other EU agencies, the Council sees Eurojust and Europol as complementary to each other and urges them to continue their efforts to work together closely. Looking at the EPPO, the Council has asked that the EPPO and Eurojust establish and maintain a close relationship and set up a working agreement as soon as possible. Lastly, cooperation between Eurojust and other EU bodies, offices, and agencies, such as OLAF and Frontex, should be continued.

Regarding Eurojust's cooperation with third states, the Council is satisfied with Eurojust's efforts to conclude cooperation agreements with the countries of the Western Balkans. It also encourages the agency to examine the conclusion of cooperation agreements with other third countries.

Looking at the newly created Judicial Counter-Terrorism Register at Eurojust, the Council reminds Member States of their obligation to transmit relevant information to the register.

The entering into force of the new Eurojust regulation as of 12 December 2019 should allow Eurojust to deal more efficiently with the increasing demands of the national authorities, to draft its new rules of procedure, and to implement changes allowing the agency to better concentrate on its operational work. In view of the above, the Council also feels that Eurojust should be provided with adequate financial and human resources. (CR)

New National Member for Lithuania

On 20 August 2019, *Margarita Šniutytė-Daugėlienė* took up her [position as National Member for Lithuania at Eurojust](#). Before joining Eurojust, Ms *Šniutytė-Daugėlienė* served as Deputy Prosecutor General of Lithuania and Chief Public Prosecutor of the 2nd Criminal Prosecution Division at the Regional Prosecutor's Office of Klaipėda. She was also an EJM contact point for several years. Ms *Šniutytė-Daugėlienė* replaces Ms *Laima Čekelienė*, Eurojust National Member for 11 years. (CR)

New National Member for France

On 1 September 2019, *Baudoin Thouvenot* took up his position as [National Member for France at Eurojust](#). Before joining Eurojust, he served as Dean of the Investigative Judges for the Court of Paris and as an investigative judge for the Court of Paris. Mr Thouvenot replaces *Frédéric Baab*, who had served as Eurojust National Member since October 2014. (CR)

Judicial Counter-Terrorism Register Launched

On 5 September 2019, a [Counter-Terrorism Register \(CTR\)](#) was launched ([see also eucrim 2/2019](#)). The CTR is managed by Eurojust on a 24-hour basis. In the CTR, key judicial information on proceedings against suspects of all kinds of terrorist offences is centralised, with the aim of establishing links between them and, in this way, helping judicial authorities to more actively coordinate

their work and identify the suspects or networks being investigated in specific cases with potential cross-border implications. All Member States can use the CTR and are called upon to register information on suspects and cases via a special template. As the CTR focuses entirely on judicial proceedings and convictions, an overlap with the criminal analysis carried out by Europol is not to be expected. (CR)

Frontex

Cooperation with OSCE

At the beginning of October 2019, Frontex and the OSCE Secretariat agreed on a [working agreement](#) to strengthen their co-operation in combating cross-border crime, trafficking in human beings, and in addressing migratory challenges. The agreement covers the following areas:

- Fostering good practices in border management;
- Ensuring fundamental rights protection of people at the borders;
- Developing capacities to address emerging forms of cross-border crime.

The document was signed by OSCE Secretary General *Thomas Greminger* and Frontex Executive Director *Fabrice Leggeri*. (CR)

Operation Mobile 2

At the beginning of October 2019, a 12-day [operation, entitled Joint Action Day \(JAD\) Mobile 2](#), led to the detection of 439 stolen cars as well to the seizure of 11.9 million cigarettes, 20 tonnes of raw tobacco, 38 firearms and 296 pieces of ammunition, and some 200 kilos of hashish, marijuana, and cocaine. 166 suspected people smugglers, drug smugglers, and persons involved in the possession of smuggled excise goods and weapons were arrested. The operation was led by Frontex and supported by thirteen EU and five non-EU countries, Europol, and Interpol. It also led to the detection of 4365 irregular migrants. (CR)

Seamless Border Control

In October 2019, Frontex – together with the Border Service of Portugal (SEF) and the Lisbon Airport Authority (ANA) – tested [new technologies for border control](#) at Lisbon airport to see whether biometric solutions can decrease the waiting time at borders. The technology uses face recognition and touchless scanning of fingerprints with the aim of allowing passengers to pass through border checks without taking out their passports or other documents. The current trial covers EU citizens leaving the Schengen Area. (CR)

Ilkka Laitinen Passed Away

On 29 September 2019, Lieutenant General [Ilkka Laitinen](#) passed away at the age of 57. Laitinen was first Executive Director of Frontex upon its establishment, serving from 2005 to 2014. Since 2018, he served as Head of the Finnish Border Guard.

Operation Against Foreign Terrorist Fighters

From July to September, Frontex supported [Operation Neptune 2](#) with two experts to assist in sea border control. The operation was targeted at suspected foreign terrorist fighters potentially using maritime routes between North Africa and Southern Europe. It was coordinated by Interpol and supported by the World Customs Organization (WCO). As a result, more than a dozen suspected foreign terrorist fighters could be detected travelling across the Mediterranean.

Agency for Fundamental Rights (FRA)

Handbook on How to Apply the CFR in Lawmaking and Policymaking at National Level

FRA recently published a [handbook of-fering guidance on use of the EU Charter of Fundamental Rights](#) (the Charter) at the national level. The handbook aims to provide practical orientation on the scope of the Charter based on the

case law of the CJEU. It is targeted at all persons working in national legislative and administrative authorities, such as governments, parliaments, regional and local authorities, and at individuals working in courts and human rights institutions in the EU Member States.

The handbook is structured in three parts – parts I and II and an annex. While the first part offers an introduction to the Charter for all target groups, the second part consists of two checklists designed for persons engaged in legislative and policy processes at the national level. The annex gives a summary of the Charter rights and how they relate to various other human rights catalogues, e.g., the ECHR and human rights’ instruments of the UN.

In detail, Part I focuses on the following issues:

- The EU system of fundamental rights protection;
- The Charter’s relation to other fundamental rights instruments such as the ECHR;
- Reasons for applying the Charter, its scope of application, and situations in which it applies;
- The interpretation of and limitations on Charter rights.

Part II provides for the following:

- A checklist to assess the applicability of the Charter with regard to national law and policymaking;
- A checklist to promote an initial understanding of whether or not a (draft) national act is in line with the Charter.

[The handbook is available in English, Finnish, and French.](#) (CR)

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

30th Annual PIF Report



On 11 October 2019, the European Commission published its [2018 report on the protection of the European Union’s financial inter-](#)

[ests – fight against fraud](#). It is the 30th annual report, the first report having been published in January 1990. Hence, the 2018 report not only contains information about the measures, results, and initiatives in 2018, but also outlines the major achievements of the EU’s fight against fraud and the protection of the EU budget over the last three decades. This historical review has also been summarised in the [brochure “Protecting the European Union’s financial interests – 30 years of joint efforts”](#).

A wealth of information is provided on achievements and challenges in 2018. A first section outlines the cross-cutting policies, measures, and results in 2018 as follows:

- Legislative acts adopted by EU institutions;
- European institutions’ legislative and policy initiatives;
- CJEU jurisprudence;
- Measures taken by the Member States;
- Summary of statistics on detected fraud and irregularities.

The report continues with measures and results in the areas of revenue and expenditure. It also covers the following:

- Recovery and other preventive/correctional measures;
- Cooperation with Member States;
- Early Detection and Exclusion System (EDES);
- Follow-up to the European Parliament’s resolution on the 2017 PIF report.

The report highlights the following *cross-cutting measures that were adopted*:

- Work on implementation of the Regulation on the establishment of the European Public Prosecutor’s Office (EPPO), the Netherlands and Malta having joined to the EPPO in August 2018;
- Regulation (EU, Euratom) 2018/1046, the “Omnibus regulation,” which revises the EU’s financial rules to simplify them and make them more result-oriented. It includes revisions that simplify the use of financial instruments under the European Structural and Investment Funds.

It also redefines conflicts of interest for all financial actors implementing the EU budget in the various management modes, including at the national level;

- Commission proposal to revise Regulation (EU, Euratom) No 883/2013. The revision of the Regulation is primarily driven by the need to adapt the operation of OLAF to the functioning of the future EPPO (see also eucrim 1/2018, pp. 5–6);
- Council Regulation (EU) 2018/1541 on administrative cooperation and the fight against fraud in the field of VAT to increase the capacity of the Member States to address the most damaging VAT fraud schemes and diminish the VAT gap (see eucrim 3/2018, pp. 161–162);
- Commission Anti-Fraud Strategy of 29 April 2019 (see eucrim 1/2019, p. 15 and the article by *Marin/Makri* in this issue).

In addition, the anti-fraud provisions in the legal framework of the next multi-annual spending period 2021–2027 were refined. This includes the persons’ obligation to fully cooperate in the protection of the EU’s financial interests and to grant access rights to the Commission, OLAF, the EPPO, and the European Court of Auditors (ECA) as well as to other third parties who are involved in implementing EU funded grants.

As regards traditional, own resources (mainly customs duties) on the *revenue side*, detected fraudulent and non-fraudulent irregularities decreased in 2018 compared to the five-year average for the period 2014–2018; however, the financial amount affected was larger.

In 2018, solar panels were the goods most affected by fraud and irregularities in monetary terms as was the case in 2017 and 2016. The most challenging problem, however, remains the undervaluation of goods, in particular footwear and textiles imported from China. Furthermore, fraudsters increasingly abuse the low-value consignment reliefs when it comes to cross-border e-commerce. As a result, the 2018 PIF report makes several recommendations to the Member States; they must enhance and

enforce customs control strategies for cross-border e-commerce trade and ensure the correct collection of traditional, own resources.

As for the *expenditure side*, the report acknowledges that the Member States have put in place a number of measures; however, they differ widely in nature and purpose. In 2018, Member States' operational measures included the introduction of IT risk scoring tools, fraud risk assessments, and training courses to raise general fraud awareness. Statistical data paint a picture similar to that for revenue: fewer fraud cases detected, but a larger financial amount affected.

The report also shows that findings concerning the patterns and conclusions presented in previous annual reports can be verified: as regards the agricultural sector, most problems persist on the local level, which makes prompt action on the part of national authorities necessary. As regards the cohesion funds, improvements were made in 2018, and the strengthened prevention capabilities seem to show promising results. However, the Commission has still to assess whether they are actually due to more efficient systems rather than to under-detection and under-reporting.

As in previous years, the current report calls on Member States to adopt or further develop their national anti-fraud strategies in order to ensure correct spending of EU funds. In this context, the following aspects should be taken into account:

- Risk analysis conclusions contained in the present and previous reports;
- The need to structure the coordination between administrative and criminal checks and investigations;
- Incorporation of tips from the media and from whistleblowers into the control system;
- Opportunity to strengthen the risk analysis-based approach to detect irregularities and fraud, including the use of IT tools.

Since the 2018 PIF report is the last report in the era of the Juncker Com-

mission, it ultimately takes stock of the *achievements during this mandate*. The most important achievements were:

- The Directive on the fight against fraud by means of criminal law (see also eucrim 2/2017, pp. 63–64);
- The Regulation to establish the EPPO by enhanced cooperation (see also eucrim 3/2017, pp. 102–103);
- The revision of the financial regulation (see above);
- The proposal for a targeted revision of OLAF Regulation 883/2013.

When presenting the report *Günther Oettinger*, Commissioner for Budget and Human Resources at the time, also pointed out the launch of the “EU Budget Focused On Results” (BFOR) initiative, which aims at joint efforts on the part of EU institutions, governments, and civil society with a view to better spending, increased accountability, and transparency.

The PIF 2018 report concluded that the new anti-fraud strategy of April 2019 will be the main basis for the new Commission under *Ursula von der Leyen* in order to meet the future challenges posed by the changing environment, in particular by new technologies.

The 2018 PIF report is accompanied by five staff working documents addressing the following issues:

- Implementation of Article 325 by the Member States in 2018 ([SWD\(2019\) 364](#));
- Statistical evaluation of irregularities reported for own resources, natural resources, cohesion policy and pre-accession assistance, and direct expenditure (SWD(2019) 365 final – [part 1](#), [part 2](#), and [part 3](#));
- Follow-up to recommendations to the Commission report on the protection of the EU's financial interests – fight against fraud, 2017 ([SWD\(2019\) 363](#) final);
- Early Detection and Exclusion System (EDES) – Panel referred to in Article 108 of the Financial Regulation ([SWD\(2019\) 362](#) final);
- Annual overview, with information

on the results of the Hercule III Programme in 2018 ([SWD\(2019\) 361](#) final).

The PIF report will now be discussed in the European Parliament, which will issue a resolution on the situation of the protection of the EU's financial interests. (TW)

Council Advances Legislation Against VAT Fraud in E-Commerce

On 8 November 2019, the ECOFIN Council reached a political agreement on future EU legislation that would [make VAT-relevant data in e-commerce trade available](#) to anti-fraud authorities. The new rules will oblige payment service providers to keep records of cross-border payments related to e-commerce. These data can then be accessed and analysed by anti-fraud specialists (the “Eurofisc” network). The aim is to facilitate the identification of both EU and non-EU online sellers if they do not comply with VAT obligations. Amendments to the regulation on administrative cooperation in the area of VAT will pave the way for national tax authorities to cooperate in this area in order to detect VAT fraud and control compliance with VAT obligations.

The envisaged legislation has yet to be confirmed by the European Parliament. It is expected that the new rules will apply as of 2024. (TW) ■

Corruption

Council Discusses Way Forward in Prevention of and Fight Against Corruption

At the JHA Council meeting in Luxembourg on 7 October 2019, the justice ministers of the EU Member States held a [debate on EU action against corruption](#). Points of discussion were:

- Additional action at the EU level to ensure a coordinated, comprehensive and coherent approach to preventing and fighting corruption in EU institutions and Member States;
- Possible added value of an EU-wide

assessment instrument for anti-corruption policies;

- Role of the EU in the global fight against corruption;
- Streamlining and modernization of current EU legislation against corruption.

The ministers mainly agreed that a new, comprehensive EU strategy or action plan to fight and prevent corruption should be developed. In this context, the EU should focus on areas in which the EU's work can bring added value. Possible synergies with existing international instruments should be reviewed in order to avoid duplication of efforts. Lastly, it was concluded that the EU should become a full member of the Council of Europe's Group of States against Corruption (GRECO) in the future, although further discussion is needed as to what this accession would mean for the EU in practice. (TW)

Money Laundering

MEPs Concerned about Member States' Implementation of EU's AML Legislation

On 19 September 2019, MEPs adopted a [resolution on the state of implementation of the Union's anti-money laundering legislation](#). MEPs expressed serious concerns about the lack of implementation of the 4th AML Directive by a large number of Member States and about the fact that the transposition deadlines for the 5th AML Directive in 2020 will also not be met by many Member States.

The resolution also addresses the shortcomings of the EU's fight against money laundering and terrorist financing due to regulatory and supervisory fragmentation, the weak enforcement of EU rules, and inefficient supervision.

MEPs believe that the current legislative approach, by means of which minimum standards are established in the Directives, is a barrier to effective supervision, the seamless exchange of information, and coordination. Therefore, the resolution backs the Commis-

sion's plans to replace the Directives by an AML/CFT regulation that would establish a harmonised, directly applicable Union law (see also the AML package tabled by the Commission in July 2019 as reported in *eu crim* 2/2019, pp. 94–97).

Greater impetus should be given to improving cooperation between the administrative, judicial, and law enforcement authorities within the EU and, in particular, the Member States' Financial Intelligence Units (FIUs).

Ultimately, the resolution favours the establishment of a new methodology to identify high-risk third countries with strategic deficiencies in efficient AML/CFT actions. In this context, the Commission is called on to apply a transparent process with clear and concrete benchmarks for these countries and to ensure public scrutiny. (TW)

ESAs Concerned about ML/TF Monitoring and Reporting

spot light On 4 October 2019, the European Supervisory Authorities (ESAs) published their [second joint opinion on the risks of money laundering \(ML\) and terrorist financing \(TF\) affecting the European Union's \(EU\) financial sector](#). The opinion is based on Art. 6(5) of Directive (EU) 2015/849, the 4th Anti-Money Laundering Directive (4th AMLD). The provision calls on the ESAs to issue an opinion every two years on the risks of money laundering and terrorist financing affecting the Union's financial sector. The [first opinion](#) was issued in February 2017. The "ESAs" are the European Banking Authority (EBA), the European Insurance and Occupational Pensions Authority (EIOPA), and the European Securities and Markets Authority (ESMA).

The ESAs' report is based on information provided by national anti-money laundering (AML) and countering the financing of terrorism (CFT) competent authorities (CAs) and on information obtained in the context of the ESAs' work.

Underpinning the risk-based ap-

proach introduced by the 4th AMLD, the joint opinion is, above all, designed to help identify, understand, manage, and mitigate the risks of money laundering and terrorist financing that the EU and its Member States face. The risks are grouped into two broad categories: cross-sectoral risks and sector-specific risks. The opinion identifies the following issues as the main ML/TF risks that cut across all sectors:

- The UK's withdrawal from the EU which, inter alia, results in relocations of companies, thus making adequate supervision difficult;
- New technologies, making it difficult to understand new products and services available to credit institutions;
- Virtual currencies, bringing about challenges due to the absence of a common regulatory regime and the anonymity associated with them, and requiring CAs to engage in more cooperation with the private sector;
- Divergent national legal frameworks: although this is a direct consequence of the minimum level of EU harmonization, diverging transposition especially in the area of prevention of the use of the financial system for the purpose of ML/TF is apparent;
- Divergent supervisory practice: here, the CAs' engagement in the same sector varies significantly; in some sectors, a large number of CAs do not even carry out an assessment of controls;
- Weaknesses in the implementation of internal controls within firms, in particular as regards customer due diligence;
- Application of non-adequate de-risking methods, i.e., a firm's decision to no longer offer services to some categories of customers associated with a higher ML/TF risk, which leads to the increased use of informal and unregulated channels by customers.

The ESAs propose a number of actions to the CAs, which could mitigate the identified ML/TF risks. These include:

- Better cooperation and information exchange between CAs and UK authorities in order to cope with the chal-

lenges that result from re-establishment of firms in EU Member States following the UK's withdrawal from the EU;

- Familiarization with new technical developments, in particular in the FinTech and RegTech sectors, and engaging directly with private companies;
- Close monitoring of developments associated with virtual currencies and assessment of whether changes to the AML/CFT regulatory and legal framework is required;
- Setting of clear regulatory expectations as regards internal controls, taking account, for instance, of the ESAs' risk factor guidelines;
- Support for the exchange of information and cooperation between law enforcement, firms, and CAs;
- Guidance for the de-risking policies of the firms.

In the second section, the opinion examines the risks in specific sectors, e.g., credit institutions, life insurance companies, payment institutions, bureaux de change, investment firms, etc. Each sector is assessed according to the following five aspects:

- (1) Inherent risk in the sector;
- (2) Quality of controls and common breaches in the sector;
- (3) Overall risk profile of the sector;
- (4) Emerging risks in the sector;
- (5) Recommendations for the CAs.

In the sector-specific context, the ESAs are alarmed by the fact that a number of CAs have not carried out an assessment of controls in certain sectors. Poor quality controls result in a higher number of breaches.

An [interactive tool](#), available on the EBA website, completes the joint opinion. It provides a snapshot of all ML/TF risks covered in the joint opinion. (TW)

Tax Evasion

Commission: Benefits of Administrative Cooperation in Direct Taxation Unclear

On 12 September 2019, the Commission presented its [first evaluation report](#)

on Directive [2011/16/EU](#) regarding administrative cooperation in the field of taxation. The Directive lays down rules and procedures for the cross-border exchange of tax information between the national tax administrations. The Directive has been applied since January 2013. It aims at effectively managing the taxpayer's obligations and preventing tax evasion in his/her country of residence rooted in abuse of the freedom to move, operate, and invest across national borders. In the end, the Directive shall contribute to fairer taxation and transparency.

The information in the evaluation report is based on a study by an external contractor, on material provided by the tax administrations of the EU Member States, and on earlier Commission reports in the area of administrative tax cooperation. The report aims to analyse the application of the Directive according to five fundamental aspects: effectiveness, efficiency, coherence, relevance, and EU added value.

The evaluation report mainly concludes that assessment of the aspects was difficult because the evidence submitted was limited and thin. For most Member States, there is no answer to the question of whether the needs addressed by the Directive have been met in an efficient and effective way. In particular, the monetary benefits of the Directive's mechanisms remain unclear. For the next evaluation cycle, the Commission will focus more strongly on obtaining clearer information from Member States on the use of the information exchanged. (TW)

EP: Plans to Set up a Subcommittee on Tax and Financial Crime

In September 2019, the coordinators of the Economic and Monetary Affairs Committee (ECON) in the European Parliament officially [decided to create a permanent subcommittee on tax and financial crime](#). The initiative was mainly propelled by the Greens/EFL Group, which feels that the new subcommittee

is needed to follow up on special or inquiry committees that were established in the aftermath of several tax avoidance scandals, such as the Panama Papers or LuxLeaks. The subcommittee would be the successor to the special committee TAX 3, which had continued the work of the ad hoc committees TAXE, TAX2, and PANA. In its [final report of 26 March 2019](#) on financial crimes, tax evasion, and tax avoidance, TAX 3 stated that "there is an urgent and continuous need for reform of the rules, so that international, EU and national tax systems are fit for the new economic, social and technological challenges of the 21st century."

The permanent subcommittee can build on the work of the previous committee and investigate tax evasion, tax avoidance, and money laundering. It could become a major driving force for reform legislation, preventing multinational companies from failing to pay corporate taxes or a small amount of taxes on their profits in Europe.

"The decision is a victory for all of us who want to see an end to the dodgy tax practices and illicit activities that undermine the global financial system and fracture our societies," *Sven Giegold* said. *Giegold* is a German MEP from the Green Party and one of the initiators of the decision.

The establishment of the subcommittee has [yet to be approved](#) by the Conference of Presidents of the Parliament, and the precise mandate has yet to be agreed. (TW)

Cybercrime

The Current Cybercrime Landscape: IOCTA 2019

On 9 October 2019, Europol published its 2019 [Internet Organised Crime Threat Assessment \(IOCTA\)](#). The 2019 IOCTA provides key findings and recommendations regarding the cybercrime threat landscape, focusing on six crime priorities:



- Cyber-dependent crime;
- Online child sexual exploitation;
- Payment fraud;
- Criminal abuse through the Darknet;
- The convergence of cybercrime and terrorism;
- Cross-cutting crime factors.

Looking at cyber-dependent crime (meaning any crime that can only be committed using computers, computer networks, or other forms of information communication technology), the overall volume of ransomware attacks has declined. Attackers seem to focus on fewer but more profitable targets. Nevertheless, ransomware remains the most significant threat in the field of cybercrime. In its recommendation on how to tackle cyber-dependent crime, the report finds that targeting major crime-as-a-service-providers is the most successful approach. Furthermore, the report recommends the following:

- Strong cooperation between law enforcement and the private sector;
- Collaboration between the network and information security sector and cyber law enforcement authorities;
- The use of existing cooperation channels.

Low-level cybercrimes should also be targeted as a means of intervention in the criminal careers of young, developing cybercriminals.

As regards child sexual exploitation online, the report finds a continued increase in available child sexual exploitation material (CSEM), self-generated explicit material (SGEM), and even live distant child abuse (LDCA). In order to reduce CSEM material, the report recommends coordinated action with the private sector and the deployment of new technology, a structural educational campaign across Europe, and law enforcement cooperation with developing countries. One concrete measure to prevent child sex offenders from travelling to third countries to sexually abuse children would be the use of passenger name record (PNR) data by EU law enforcement authorities (accessible

through the Travel Intelligence team within Europol).

In the area of payment fraud, the report sees CNP (card not present) fraud as the main priority; however, skimming also continues to evolve as do jackpotting attacks. To combat payment fraud, the report recommends cooperation between the public and private sectors, the exchange of information, training of employees, and raising awareness among customers.

The report emphasizes the key role of the Darknet in the increasing number of single-vendor shops and smaller, fragmented markets as an enabler of trade in an extensive range of criminal products and services. To combat criminal abuse through the Darknet, the report identifies the following measures as key:

- Coordinated investigation and prevention actions;
- The ability to maintain accurate real-time information;
- Improved coordination and standardisation of undercover online investigations;
- An EU-wide legal framework to clarify jurisdiction despite anonymity issues.

Challenges with regard to the convergence of cybercrime and terrorism include the wide array of online service providers (OSPs) and the use of new technologies being exploited by terrorist groups. To counter terrorist groups' online propaganda and recruitment operations, the report recommends addressing the entire spectrum of abused OSPs. In order to manage a crisis after a terrorist attack, the report emphasizes the need for cross-platform collaboration and a multi-stakeholder crisis response protocol on terrorist content online.

New cross-cutting crime factors include hackers and fraudsters now routinely targeting crypto-assets and enterprises. In order to tackle these factors, the report recommends that law enforcement develop and share knowledge with the judiciary, establish relationships with cryptocurrency-related

businesses, and share information with Europol. (CR) ■

Guidelines and Recommendations on Spear Phishing

On 4 November 2019, Europol's European Cybercrime Centre (EC3) [published a report](#) on how to prevent, respond to, and investigate spear phishing attacks.

Spear phishing describes the practice of targeting specific individuals within an organisation or business for the purposes of distributing malware or extracting sensitive information.

The report gives an overview of the threat of spear phishing from the perspective of law enforcement and industry. It explains the background of the concept of spear phishing, outlines the most common *modi operandi*, and offers guidance and recommendations on technical solutions, prevention, and awareness as well as on attribution and operational response.

According to the report, email is the most widely used vector for spear phishing. The most commonly used *modus operandi* is reconnaissance, i.e., deceiving the target. In order to achieve this aim, phishing emails try to include as much content that is familiar to the recipient as possible. Information used to create this familiar content is usually simply found online.

When attacking, a fraudulent link is often sent, leading to a replica of a trusted website (phishing site). Attackers also attempt to make the target download and open a malicious file in order to gain access to the system. Business Email Compromise (BEC) is often aimed at convincing employees to transfer large sums of money to the criminal's bank account.

Depending on the goal of the attacker, the target's files may be encrypted and a ransom payment (ransomware) demanded, remote control may take over the target's system (Remote Access Trojan), relevant credentials may be stolen (key loggers), or the network may be monitored and files extracted.

In order to respond to phishing, the report recommends two sorts of technical solutions, namely policies and software. By means of security policies, users can be prevented from engaging in risky behaviour. Commercial and open source software solutions can help mitigate the threat of phishing and automatically detect phishing attempts. Furthermore, the report recommends investing in prevention and awareness raising measures to establish a resilient user base, e.g., by offering anti-phishing training to employees.

When launching an investigation, law enforcement should have in place procedures and methods for handling this type of incident, e.g., reporting tools between the private sector and law enforcement and other public-private partnerships.

In order to reduce abuse of the Domain Name System (DNS), the report recommends that registrars and registries adopt aggressive anti-abuse measures. Ultimately, the report regrets the loss of the WHOIS data. The WHOIS database contained personal information on registrants of domain names. Law enforcement have no longer direct access due to the new GDPR rules. (CR)

Cyber-Attack Simulation Exercise

On 31 October 2019, Europol conducted the first law enforcement exercise of this kind (CyLEEx19), [simulating a cross-border cyberattack on critical infrastructure](#). The exercise, which was organised by EC3 and ENISA, brought together 20 cybercrime investigators and cybersecurity experts from the public and private sectors. By means of a faked scenario, participants were asked to test the EU Law Enforcement Emergency Response Protocol ([see eucrim news of 13 May 2019](#)) by reacting to, responding to, and collectively deciding on simulated large-scale cyberattacks. The attacks were related to incidents, such as misuse of IT resources, unauthorised access to systems, vulnerability exploitations, Distributed Denial of Service (DDoS), and malware infections. (CR)

Racism and Xenophobia

Regulation on Removal of Internet Content Promoting Terrorism – State of Play

On 24 September 2019, the European Parliament's [LIBE Committee backed the position](#), as agreed by the plenary before May's European elections, on the proposed Regulation seeking prevention of the dissemination of online content promoting terrorism (for the EP's resolution of 17 April 2019, see eucrim 1/2019, p. 21). The LIBE Committee's decision paved the way for the start of negotiations with the Council on the legislative dossier. The Council already agreed on its position in December 2018.

MEPs accented that the following points are important in their position:

- Obligation for internet companies to remove content promoting terrorism within one hour of receiving an order from national authorities;
- Regarding sanctions, companies that systematically and persistently fail to abide by the law should be fined up to 4% of their global turnover;
- Implementation of a clause that protects free speech and press freedom;
- Obligation for hosting service providers to establish user-friendly complaint mechanisms;
- No obligation for hosting service providers, such as Facebook or YouTube, to proactively identify terrorist content, because this would be a too great a burden for these platforms; monitoring the information or actively seeking facts indicating illegal activity should be the responsibility of the competent national authority only;
- No obligation to use filters or automated tools;
- Increased support for small platforms, which may not be familiar with removal orders.

Swift agreement on the new EU rules to tackle the dissemination of terrorist content online is one of the priorities of the EU's security policy. (TW)

Procedural Criminal Law

Procedural Safeguards

Commission Implementation Report on Access to Lawyer Directive

On 27 September 2019, the European Commission published its [implementation report on Directive 2013/48/EU](#) on the right of access to a lawyer. The Directive is one of the six EU procedural rights directives that aim to harmonise safeguards of suspected or accused persons in criminal proceedings throughout the European Union.

The so-called [A2L Directive ensures, *inter alia*](#), that individuals have a lawyer from the first stage of police questioning and throughout criminal proceedings. Adequate, confidential meetings with the lawyer are also guaranteed. In European Arrest Warrant proceedings, the Directive lays down the right of access to a lawyer in the executing EU country and the right to appoint a lawyer in the issuing country.

Beyond the right of access to a lawyer, the Directive also includes the rights for persons deprived of their liberty to have a third person informed thereof, to communicate with third persons, and to communicate with consular authorities/ to have legal representation arranged for by them.

The report concludes that considerable progress has been made in the protection of fair trial rights in the EU, but difficulties regarding key provisions of the Directive exist in a number of Member States.

Points of concern are as follows:

- The scope of rights enshrined in the Directive: some jurisdictions require a formal act that triggers the right of access to a lawyer or do not apply the right to persons who have not been deprived of liberty;
- The extent of possible derogations;
- Waiver of the right of access to a lawyer;
- Conditions governing how people

can access a lawyer in the issuing Member State of a European Arrest Warrant.

On 12 November 2019, the Commission discussed the report with MEPs in the EP's LIBE Committee. The Commission announced that it will continue to assess Member States' compliance with the Directive and take every appropriate measure, including possible infringement proceedings, to ensure conformity with the provisions of the Directive throughout the European Union.

The Commission's implementation report comes alongside a report from the Fundamental Rights Agency on the practice of eight EU Member States. The latter investigated the implementation of certain defence rights, including the right to be advised and represented by a lawyer. (TW)

FRA Report on Information about Defence Rights and Rights to Access to a Lawyer

spot light Full access to justice is not guaranteed, at least not in an equal way, because defendants are often poorly informed or access to legal assistance is inadequate. This is one of the main results of a report issued by the European Union Agency for Fundamental Rights (FRA) on 27 September 2019.

The [report entitled "Rights in practice: access to a lawyer and procedural rights in criminal and European arrest warrant proceedings"](#) summarises the views of over 250 interviewed professionals and defendants in eight Member States: Austria, Bulgaria, Denmark, France, Greece, the Netherlands, Poland, and Romania. FRA investigated how the following defence rights of suspected or accused persons (set out in primary and secondary Union law) are implemented in said Member States in practice:

- Information about defence rights;
- Right to be advised and represented by a lawyer;
- Rights of persons arrested on the basis of an EAW.

Key findings of the report include:

- Information provided to defendants

differs in both scope and content and in how it is conveyed;

- Treatment of defendants other than a suspect at the initial stage of the criminal proceedings, lack of practice on the part of police officers, lack of practice in verifying defendants' understanding of the situation or identifying his/her vulnerabilities, and other factors lead to defendants not being fully aware of their procedural rights;

- Defendants very often receive minimal or unclear information about the charges against them;

- Sometimes individuals are questioned as witnesses or are "informally" asked questions instead of being treated suspected persons; in this way, persons are deprived of their right to remain silent and not to incriminate themselves;

- Police officers sometimes discourage defendants from exercising their right to a lawyer;

- Particularly people who are deprived of their liberty often do not receive legal assistance promptly and directly;

- Defendants deprived of liberty are not always allowed to talk to their lawyers in private before their first questioning; instead, conversations with lawyers are short or take place in public corridors in the presence of police officers;

As regards the specific case of upholding defence rights in EAW proceedings, the report mainly discovered the following:

- Many respondents said that they did not understand their rights as regards warrants and the meaning of their consent to surrender;

- Language barriers often impede the effective enjoyment of rights in EAW cases;

- Defendants regularly face significant difficulties in establishing a double defence, i.e., not only access to a lawyer in the executing, but also in the issuing State. The reasons for this are manifold, including linguistic difficulties, police officers' lack of knowledge, and unwillingness to interfere in another country's jurisdiction. The report revealed system-

ic deficiencies in the context of the executing authorities' obligations to inform on and assist in appointing a lawyer in the issuing state.

The FRA report includes several recommendations to the Member States on how to improve the effective exercise of said defence rights and to remedy the detected flaws. The FRA report is a preparatory work which the Commission asked for. It complements the Commission report on [how EU Member States have implemented the EU's Access to a Lawyer Directive](#). This report was issued on the same day as the FRA report. Furthermore, the FRA reported on earlier FRA activity on procedural rights, such as the 2016 report on Member States' legal frameworks, policies, and practices regarding the right to information, translation, and interpretation in criminal proceedings (see [eucrim 4/2016, p. 163](#)). (TW)

CJEU: Scope of EU's Procedural Rights Directives in Procedures Ordering Committal to Psychiatric Hospital

On 19 September 2019, the CJEU delivered a judgment dealing with the applicability and interpretation of the procedural rights directives in a situation where the judicial authorities of a Member State ordered a person be committed to a psychiatric hospital. The case ([C-467/18 – criminal proceedings against "EP"](#)) was brought to the CJEU by a Bulgarian court, which voiced doubts as to whether the Bulgarian provisions governing compulsory admission of mentally ill persons to a medical facility are in conformity with the rights guaranteed in Directive 2012/13 (right to information), Directive 2013/38 (access to a lawyer), Directive 2016/343 (presumption of innocence), and the Charter of Fundamental Rights of the EU.

The referring court has to deal with the legality of the procedure against "EP" who killed his mother in a state of paranoid schizophrenia and was ordered to adopt compulsory medical measures by means of a special proce-

cedure defined in the Bulgarian code of criminal procedure.

First, the CJEU dealt with the question of the applicability of Directive 2012/13 and Directive 2013/48. By above all referring to the wording of the provisions on the applicability of the Directives (Articles 2 of each) and on the interpretation of the fundamental right to liberty and security (as enshrined in Art. 6 CFR, Art. 5 ECHR), the CJEU concluded that the Directives' scope covers judicial proceedings in which an order may be made for the committal to a psychiatric hospital of a person who, at the conclusion of earlier criminal proceedings, was found to be the perpetrator of acts constituting a criminal offence. As a consequence, this person must also be informed of his/her rights as soon as possible, at the latest before his/her first official questioning by the police.

Second, the CJEU ruled on the review powers of the national court. In this context, the CJEU considers national legislation not to be in line with EU law (right to an effective remedy) if the court is not able to rule on the respect of procedural safeguards in the proceedings that took place prior to those before the court.

Third, the CJEU clarified, however, that Directive 2016/343 on the presumption of innocence does not apply if the order for the committal to a psychiatric hospital was based on a law aiming at preventing danger, such as the Bulgarian Health Law. As a consequence, EU law is not the yardstick to assess whether the rights enshrined in the Directives were upheld in such preventive procedures.

However, Art. 3 of Directive 2016/343 is applicable if the judicial proceedings for the committal to a psychiatric hospital and thus the deprivation of liberty do not pursue merely therapeutic, but also safety purposes. Therefore, the public prosecutor's office has the burden of proof that the person whose admission is sought is the perpetrator of acts deemed to constitute such a danger. (TW)

Data Protection

Security Union: Commission Wants Mandate for EU-Japan PNR Agreement

During the EU-Asia Connectivity Forum held in Brussels on 27 September 2019, Commission President [Jean-Claude Juncker announced](#) that the Commission recommended that the Council give green light to open negotiations with Japan on the transfer of Passenger Name Records (PNR). PNR are travel information data necessary to enable reservations to be processed by air carriers. Nowadays, PNR data are considered a building block in preventing and prosecuting terrorism and serious crime.

The Commission's recommendation to the Council to authorise the opening of negotiations for an EU-Japan PNR agreement ([COM\(2019\) 420 final](#)) is accompanied by an annex setting out directives for the negotiations. The directives define not only the objectives of the envisaged agreement but also the parameters necessary to safeguard and control respect for the protection of personal data, fundamental rights, and freedom of individuals, irrespective of nationality and place of residence, in the context of the transfer of PNR data to Japan.

The Commission's initiative concretely implements an idea in the [EU-Japan Strategic Partnership Agreement](#) (signed in July 2018), which specifically encourages both parties to use "available tools, such as passenger name records to prevent and combat acts of terrorism and serious crimes." The agreement aims at further strengthening the key strategic partnership between the EU and Japan in the fight against terrorism and other forms of serious crime. The EU already concluded [an agreement on mutual legal assistance in criminal matters with Japan](#) for this purpose.

Currently, the EU has two PNR schemes in force with Australia and the United States of America. The EU is also negotiating a PNR agreement with Canada after the CJEU declared a previously planned agreement with Canada void in

2017 (see [eucrim 3/2017](#), pp. 114–115). The transfer of the PNR data of passengers on international flights to the European Union (EU) countries and the processing of these data by law enforcement authorities in the EU Member States is regulated by the [EU PNR Directive 2016/681](#) (see also [eucrim 2/2016](#), p. 78). At the global level, the International Civil Aviation Organisation (ICAO) is currently working with its Member States to establish a standard for the processing of PNR data.

Regarding the envisaged EU-Japan PNR accord, it is now up to the Council to consider the recommendation and to adopt a Decision authorising the Commission to open negotiations. (TW)

EU Governments Look into Future of Interoperability

After having agreed on the legal framework of the interoperability of EU Information Systems designed for border/migration control and police/judicial cooperation (see [eucrim 2/2019](#), p. 103), delegations from the Member States' governments are now discussing further extensions. The Finnish Council Presidency continued discussions that started earlier this year during the Romanian Presidency to explore further needs of law enforcement and possible EU support (see the [discussion paper of 6 September 2019](#), published by Statewatch).

The Council Presidencies aim at driving forward interoperability through automation. Discussions have, for instance, taken place on possibilities to interconnect queries through the Prüm regime (featuring cross-border access to DNA, dactyloscopic and vehicle registration databases) with the centralised EU information systems. The Council Presidency also referred in this context "to increased interoperability, which means adding possibilities for end users to reach new data sources with a single query." The latter also means including new data categories into the Prüm regime, e.g., firearms, driving licences, or facial images. Another aspect concerns

making data held at Europol interoperable with other EU-level data, where projects are already running.

The discussion paper also mentions other ongoing projects that promote automation and interoperability, such as EPRIS-ADEP – a system for making available certain biographical data contained in national police records.

It concludes that the EU should not stop at the implementation of the agreed interoperability package of May 2019 and a potential reform of the Prüm regime, but take a proactive approach to the future of interoperability. (TW)

Federal Administrative Court Refers German Data Retention Law to European Court of Justice

On 25 September 2019, the German Federal Administrative Court (*Bundesverwaltungsgericht*) [decided to refer to the European Court of Justice](#) in order to clarify whether the German data retention law is compatible with Union law.

The German Federal Administrative Court now has to decide on the lawsuits of an Internet provider and a telephone provider who are opposing their obligation to retain the telecommunication traffic data of their users as laid down in Sections 113a, 113b of the Telecommunications Act. According to these provisions, introduced in the new German data retention law of 2015 (the first national law implementing the Data Retention Directive 2006/24/EC having been declared unconstitutional by the German Federal Constitutional Court – FCC), telecommunications providers are obliged to retain the traffic data of their users for a period of 10 weeks and location data for four weeks in order to be able to provide them to the law enforcement authorities, if necessary. The retained data may only be used by the authorities for the prosecution of serious criminal offences or for the prevention of danger to the life, body, or freedom of a person or of threats to the existence of the Federation or a Land (§ 113c Telecommunications Act).

In the previous instance, the Administrative Court (*Verwaltungsgericht*) of Cologne had stated that the applicants were not obliged to retain the telecommunication traffic data, arguing that this obligation set by the German data retention law contravenes European Union law. As a result of a previous, very similar decision by the Higher Administrative Court of Münster (cf. eucrim 2/2017, p. 71), the Federal Network Agency (*Bundesnetzagentur*) has already decided not to enforce the retention obligations for telecommunications and Internet providers for the time being.

The Administrative Court of Cologne and the Higher Regional Court of Münster both referred to the judgment of the CJEU of 21 December 2016, in cases C-203/15 and C-698/15, *Tele 2 Sverige et al.* (cf. eucrim 4/2016, p. 164), which established very narrow conditions for national laws to maintain data retention rules. This decision has led to serious doubts on whether there is a general prohibition of blanket retention systems that can be justified neither by the gravity of threats to public security nor by stringent security and access requirements.

The CJEU found in its judgment that the British and Swedish legislations on data retention were not compatible with Union law. Compared to the British and Swedish legislation, however, the German provisions are more restrictive (e.g., in terms of the period of retention) and set strict security and access rules in order to protect the data. The German Federal Administrative Court therefore decided not to simply take over the findings of the 2016 judgment, but to make reference for a preliminary ruling to the CJEU.

The judges in Luxembourg now have to deal with the question of whether a national law (and the German data retention law in particular), providing a blanket retention measure that clearly interferes with Art. 5 of Directive 2002/58/EC, can be justified under Art. 15 of the

same directive or whether it is generally forbidden by Union law. If the Court finds that the German data retention law contravenes Union law, it will not be applicable anymore due to the primacy of Union law.

There is also a complaint against the current German data retention law pending before the FCC. The Constitutional Court has repeatedly [dismissed motions for a temporary injunction](#), arguing that, even after the CJEU 2016 decision, questions still remain that are not suitable for clarification within summary proceedings. It is uncertain whether a final Constitutional Court decision can be expected soon.

In addition to the reference from Germany, courts in Belgium, France, and Estonia referred questions to the CJEU regarding the compatibility of their countries' data retention legislation with EU law, notably Art. 15 of Directive 2002/58/EC ("the e-privacy Directive") – see pending cases [C-520/18](#); [C-511/18](#); and [C-746/18](#) (see also eucrim 1/2019, p. 26). The Investigatory Powers Tribunal, London, posed the question on applicability of the "*Tele2 Sverige/Watson* requirements" in the national security field (Case [C-623/17](#)). (CG)

Victim Protection

CJEU: Victims of Crime Can Be Re-Examined if Judge's Bench Changed

By judgment of 29 July 2019, the CJEU shared the opinion of Advocate General Yves Bot in case [C-38/18](#) (*criminal proceedings against Massimo Gambino and Shpetim Hyka*), namely that Arts. 16 and 18 of Directive 2012/29/EU establishing minimum standards on the rights, support, and protection of victims of crime do not preclude national rules. According to the national rules, re-examination of a victim is held necessary if the judge's bench changes and the defence counsel of the accused persons do not consent to the court reading the written record of the oral evidence previously

given by that victim. For the opinion of AG Bot and the underlying Italian rules that triggered the reference for a preliminary ruling, see eucrim 1/2019, pp. 28–29.

The CJEU stresses that the victim's right to be protected from secondary and repeated victimization is without prejudice to the accused persons' defence rights and their right to a fair trial. It also refers to the case law of the ECtHR highlighting the importance of questioning witnesses before the deciding judge.

However, the ECtHR case law also indicates that the Member States must recognise particular circumstances that may justify a waiver of witness examination if it is not important for the conviction. Hence, re-examination of the victim is permitted if the court in the main proceedings does not identify specific protection needs that would make specific protection measures necessary pursuant to Arts. 23 and 24 of Directive 2012/29. This is up to the referring Italian court to decide. (TW)

Cooperation

Judicial Cooperation

Entry into Force of Surrender Agreement Between European Union and Norway/Iceland

On 28 June 2006, the European Union, the Republic of Iceland, and the Kingdom of Norway entered into an agreement on the surrender procedure between the Member States of the European Union and Iceland and Norway. The agreement aims at improving the surrender procedure for the purpose of prosecution or execution of a sentence between the EU Member States and Iceland and Norway. The expedited extradition procedures are largely based on the European Arrest Warrant model (cf. eucrim 1–2/2006, p. 19).

According to the final provisions, the agreement enters into force on the first

day of the third month following the day on which the Secretary-General of the Council of the European Union has found that all formal requirements (especially the deposit of the notifications and declarations) have been fulfilled. With the submission by Italy of its notifications and declarations on 29 August 2019, all EU Member States, Iceland, and Norway have now deposited their declarations and notifications. Accordingly, the formal requirements have been fulfilled and the Agreement entered into force on 1 November 2019. The library of the European Judicial Network provides [further information about the notifications and declarations](#) and other useful details. (CG)

Eurojust Guidelines: Deciding on Competing Requests for Surrender and Extradition

Eurojust published a [revised version](#) of its guidelines for deciding on competing European Arrest Warrants (EAWs) of 2004. The new guidelines enlarge the scope of the original guidelines, including scenarios for both the situation of multiple EAWs and the situation of conflicts between an EAW and a request for extradition presented by a third country (Art.s 16 (1) and (3) of Council Framework Decision 2002/584/JHA).

By means of five scenarios, the revised guidelines give advice on how to proceed in the situations when two or more EAWs against the same person were issued:

- (1) for prosecution of the same offence(s);
- (2) for prosecution of different offences. Furthermore:
- (3) when two or more EAWs against the same person, of which one (or more) EAW(s) for prosecution and one (or more) EAW(s) for the execution of a custodial sentence or a detention order in relation to different offences, were issued;
- (4) when two or more EAWs against the same person for the execution of two (or more) custodial sentences or detention

orders in relation to different offences were issued;

- (5) when one or more EAW(s) and one (or more) request(s) for extradition were issued. (CR)

European Arrest Warrant

CJEU: Executing Judicial Authority Must Make Precise Assessment of Detention Conditions

spot light On 15 October 2019, the CJEU (Grand Chamber) further clarified its case law as to the conditions under which the surrender of a person sought by a EAW can be refused because standards of detention in the issuing state infringe the prohibition of inhuman or degrading treatment (Art. 4 of the Charter of Fundamental Rights). The judgment follows the landmark judgment *Arranyosi and Căldăraru* (case C-404/15, see eucrim 1/2016, p. 16), and the judgment in case C-220/18 PPU (*Generalstaatsanwaltschaft [conditions of detention in Hungary]*), also referred to as “Aranyosi III”, see eucrim 2/2018, pp. 103–104).

► Background of the Case:

[The judgment of 15 October 2019](#) was triggered by a request for a preliminary ruling from the Higher Regional Court (*Oberlandesgericht*) of Hamburg, Germany regarding the execution of a EAW against Mr Dorobantu for the purpose of conducting criminal proceedings in Romania ([case C-128/18](#)). After having initially approved his surrender, the execution was halted by the German Federal Constitutional Court. The FCC argued that the Higher Regional Court of Hamburg had to file a preliminary ruling to Luxembourg because the legal questions at issue had not been precisely decided in the Kirchberg's courtrooms. For the case history, see eucrim 1/2018, pp. 32–33.

The Hamburg Court mainly put forward four queries:

- Extent and scope of the review by the executing judicial authority if it possess-

es information showing that there are systemic and generalized deficiencies in detention conditions in the issuing state;

- Standards for the assessment of space per detainee in a prison cell;
- Influence of existing legislative and structural measures that improve detention conditions in the issuing state on the assessment;
- Possibility to weigh a fundamental rights infringement against the efficacy of judicial cooperation in criminal matters and the principles of mutual trust/recognition.

► *The CJEU's Judgment – Parameters:*

The judges in Luxembourg essentially follow the opinion of Advocate General *Manuel Campos Sánchez-Bordona* presented in April 2019 (see eucrim 1/2019, p. 36).

If an executing judicial authority assesses a real risk of inhuman or degrading treatment within the meaning of Art. 4 of the Charter, it must take into account all the relevant physical aspects of the conditions of detention in the prison in which the person subject to surrender will be detained, e.g., the personal space available to each detainee in a cell in that prison, sanitary conditions, and the extent of the detainee's freedom of movement within the prison. One precondition remains, however, namely that the executing authority affirms systemic and generalised deficiencies in the detention conditions of an issuing Member State.

Regarding the personal space available to each detainee, the executing judicial authority must take account the minimum requirements set by the ECtHR when interpreting Art. 3 ECHR. The CJEU stresses that the detainee must (at least) have the possibility to move around normally within the cell. The Court also refers to its previous case law in which it indicated that “a strong presumption of a violation of Article 3 of the ECHR arises when the personal space available to a detainee is below 3 m² in multi-occupancy accommodation.”

Possible legal remedies and control mechanisms in the issuing state cannot rule out the existence of a real risk of inhuman or degrading treatment. In addition, the executing judicial authority cannot weigh up a found risk of the fundamental right's infringement against considerations relating to the efficacy of judicial cooperation in criminal matters and to the principles of mutual trust and recognition.

► *Put in focus:*

Beyond specific questions within the EAW framework, the *Dorobantu* case is important because it deals with general questions on the relationship between the Charter and the ECHR if minimum requirements have not been developed by the European Union.

Although the main lines of argument as regards the interpretation of the absolute right not to be treated in an inhuman or degrading way have mainly been clarified by the “*Generalstaatsanwaltschaft*” case (“*Arranyosi III*”); the *Dorobantu* case gave the CJEU the opportunity to specify its “real risk” doctrine as regards possible infringements of Art. 4 of the Charter in detention condition cases. Nonetheless, the judgment left open how to assess factors of single-occupancy cells (TW). ■

CJEU: EAWs Issued from Austrian Public Prosecutor's Office Valid

After the CJEU decided on 27 May 2019 that the German public prosecution offices lack independence to issue European Arrest Warrants (see joined cases C-508/18 (O.G.) & C-82/19 PPU (P.I.), eucrim 1/2019, pp. 31–33), the CJEU came to a different result as regards the Austrian public prosecutor's offices in a judgment of 9 October 2019. In the case at issue (*case C-489/19 PPU*), the *Kammergericht Berlin* had doubts whether – following the judgment of May – it could accept EAWs from Austria, because Austrian public prosecutors are subject to discretion or instruction from the executive, i.e., the Austrian Federal Minister of Justice.

The CJEU sees one main difference to the German situation. Under Austrian law, the public prosecutor's decision to issue a national arrest warrant and to issue an EAW must be endorsed by a court before their transmission. In the absence of endorsement, the arrest warrants do not produce legal effects and cannot be transmitted. If the following additional conditions are met, the concept of “issuing judicial authority” in Art. 6(1) of the EAW Framework Decision can be affirmed:

- The court's review of the public prosecutor's decision is ex officio, independent, and objective;
- The court has access to the entire criminal file to which any specific directions or instructions from the executive are added;
- The court is able to review the conditions of issue and the proportionality of the arrest warrants, thus adopting an autonomous decision which gives them their final form.

According to the CJEU, the Austrian law and procedure fulfil all these criteria. Nonetheless, the decision on the German public prosecution offices triggered several uncertainties. Additional references for preliminary rulings on the independence of other EU Member State's public prosecution offices in the EAW context are pending (see also eucrim 2/2019, p. 110). (TW)

Statistics on Use of EAW in 2017

On 28 August 2019, the Commission published statistical data on the use of the European Arrest Warrant in 2017. The document, officially entitled “[Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2017](#),” compiles data from the EU Member States, both as regards the issuing and the execution of EAWs. The Commission also provides an [infographic](#) that outlines the results. In addition, the Commission published a [factsheet for citizens](#) entitled “European arrest warrant – Makes Europe a safer place.”

As regards Member States as issuing States, the following figures are of interest:

- The total number of EAWs issued by Member States for the year 2017 is 17,491, whereas 16,636 EAWs were issued in 2016 and 16,144 in 2015;
- Most EAWs were issued for theft offences and criminal damage (2649), fraud and corruption offences (1538), and drug offences (1535) in 2017. All these figures indicate a slight increase in comparison to 2016. 241 EAWs were issued for terrorism offences, of which 183 were issued by France alone and 30 by Italy. In comparison, in 2016, 165 EAWs were issued for terrorism offences;
- 6317 issued EAWs resulted in the effective surrender of the person sought in 2017.

As regards Member States as executing States, the following can be said:

- The total number of persons actually arrested in 2017 was 7738, compared to 7056 persons arrested by means of an EAW in 2016 (though only 24 Member States provided information for that year, but 28 for 2017);
- The highest number of arrests in 2017 occurred in the United Kingdom (1510 arrests), Romania (853), and Spain (818);
- In the 26 Member States that provided specific figures, judicial authorities initiated 8801 surrender proceedings;
- The average duration of the extradition procedure – if the person sought did not consent to his/her surrender – decreased from 50.4 days in 2016 to 40.13 days in 2017;
- According to replies from 24 Member States, the execution of an EAW was refused in 796 cases in 2017. This figure is quite stable compared to 2016 (719 refusals for 25 Member States);
- The most common reason for non-execution in 2017 was that contained in Art. 4 No. 6 of the FD EAW: the executing state undertakes the execution of a custodial sentence against its nationals or residents. The situation in 2016 was similar;

- The grounds for mandatory non-execution (Art. 3 of the FD) are still rarely applied;

■ Seven Member States reported a total of 100 refusals because the requirements of Art. 4a of the FD EAW (in absentia situations) had not been met in 2017; this is an increase compared to 2016 (65 refusals);

- Fundamental rights issues led to refusals in seven Member States in a total of 109 reported cases.

It should be stressed that the figures must be interpreted cautiously. Not all of the Member States provided replies to every question in the standard questionnaire. Comparison to previous years is even more difficult because the response rates of Member States vary from year to year, and approaches to collecting statistical data vary. (TW)

European Investigation Order

First CJEU Judgment on European Investigation Order

On 24 October 2019, the CJEU delivered its first judgment interpreting Directive 2014/41/EU regarding the European Investigation Order in criminal matters (*Case C-324/17 – Ivan Gazanov*). The case at issue dealt with the particularity of Bulgarian law that does not provide for any legal remedy against decisions ordering the search, seizure, and hearing of witnesses through a European Investigation Order. The referring Specialised Criminal Court, in essence, wanted to know whether the Bulgarian legislation, which (directly and indirectly) precludes a challenge to the substantive grounds of a court decision issuing an EIO, is in line with Art. 14 of the Directive (for the reference and the opinion of Advocate General *Yves Bot*, see eucrim 1/2019, pp. 36–37).

The judges in Luxembourg decided to reformulate the question referred to and clarified that the referring court is actually uncertain as to how to complete Section J of the form set out in

Annex A to the Directive, which is entitled “Legal remedies.” In this context, the CJEU stated that a description of the legal remedy must be included only if a legal remedy has been sought against an EIO. It is not necessary to include an abstract description of the legal remedies, if any, that are available in the issuing Member States against the issuing of an EIO. The CJEU is of the opinion that this interpretation results from the wording of Section J of the form in the Annex of the Directive as well as from the objectives pursued by the Directive.

► Put in focus:

The CJEU’s answer can be considered disappointing in view of the protection of defence rights. The judges in Luxembourg did not follow the more far-reaching opinion of the Advocate General. He had concluded that Art. 14 of the EIO Directive not only obliges the Member State to install legal remedies, which enable concerned persons to challenge the substantive reasons for issuing the EIO, but the use of the EIO by that Member State must be frozen until the respective legislation on legal remedies is in place. The CJEU actually reduced the dispute in the main proceedings to a mere formal question. According to the CJEU, it is not necessary to interpret Art. 14 “in the present case.” Thus, it implicitly backed the Bulgarian legislation, which does not foresee any legal remedy against the issuance of the EIO – to the detriment of the accused’s rights. (TW)

Law Enforcement Cooperation

E-Evidence: Start of Negotiations on EU-US Agreement

On 26 September 2019, the European Commission [announced the start of formal negotiations with the United States Department of Justice](#) on an EU-US agreement to facilitate access to electronic evidence in criminal investigations. Both parties reaffirmed their inten-

tion to conclude an agreement as quickly as possible. The next EU-US Justice and Home Affairs Ministerial meeting in December 2019 will review progress. At its meeting on 6 June 2019, the JHA Council endorsed a mandate for the Commission to start negotiations for an international e-evidence agreement with the United States (see eucrim 2/2019, p. 113).

The USA has a negotiating mandate through the CLOUD (Clarifying Lawful Overseas Use of Data) Act of March 2018, which provides criteria for the negotiation of international agreements to facilitate the ability of other countries/partners to obtain electronic data relating to the prevention, detection, investigation, and prosecution of serious crime (for the CLOUD Act, see eucrim 2/2019, pp. 113–114 and the article by *J Daskal* in eucrim 4/2018, pp. 220–225).

On 6 November 2019, the Commission services [reported on the second negotiation round](#). The report reveals that there are still several matters of dispute. The Commission stressed that an EU–US Agreement can only be concluded following agreement on internal EU rules on e-evidence. The Commission also expressed its unhappiness with the UK-US agreement on access to electronic data for the purpose of countering serious crime signed on 3 October 2019.

Other problematic issues included:

- Different definition of data categories in European and American law;
- Types of offences for which data exchange should become possible;
- Involvement of judicial authorities in cross-border orders for e-evidence;
- Definition of service providers and types of service providers to be covered by the agreement;
- The need for strong privacy, data protection, and procedural rights safeguards.

The third negotiating round took place in Washington on 10 December 2019, the day before the EU-US JHA Ministerial meeting. (TW)

MEPs Critical of EU-US E-Evidence Negotiations

At a hearing on 7 November 2019 at the EP’s LIBE Committee, MEPs called for meeting EU data protection standards within the framework of possible future data exchanges by means of the U.S. CLOUD Act. The CLOUD Act allows U.S. law enforcement authorities to request the disclosure of data by service providers in the USA, regardless of where the data is stored (for details, see eucrim 1/2018, p. 36; 4/18 p. 207 and the article by *J Daskal* in eucrim 4/2018, pp. 220–225).

The Commission is currently negotiating an agreement by means of which law enforcement authorities in the EU Member States can also benefit from facilitated access to data held by U.S. service providers, such as Microsoft, Facebook, Apple, and Google. The European Data Protection Supervisor *Wiewiórowski* stressed that data can only be transferred for the purpose of a concrete criminal investigation, and he called on the EU Member States to provide efficient remedies against the obligation to data transfers.

MEPs pointed out the much lower data protection standards in the USA and criticised that EP’s positions have not yet been taken into account during the negotiations. In addition, MEPs referred to the existing EU-US MLA agreement. (TW)

US and UK Sign Bilateral E-Evidence Agreement

On 3 October 2019, the United States and the United Kingdom signed the first [agreement](#) allowing the other party’s law enforcement authorities, when armed with appropriate court authorisation, to go directly to tech companies based in the other country to access electronic data in order to combat serious criminal offences. Such agreements are foreseen in the U.S. CLOUD Act, which responds to the converse problem that foreign countries face with respect to their ability to access data held

by U.S. service providers (for details, see the article by *J Daskal* in eucrim 4/2018, pp. 220–225).

According to [the press release](#), “[b]oth governments agreed to terms which broadly lift restrictions for a broad class of investigations, not targeting residents of the other country, and assure providers that disclosures through the Agreement are compatible with data protection laws.” The other party’s permission is required if essential state interests are at stake; this especially concerns death penalty prosecutions by the United States and UK cases involving the freedom of speech.

The agreement was described as “landmark” and “historic” upon its signing. The agreement was signed by U.S. Attorney General *William P. Barr* and UK Home Secretary *Priti Patel* at a ceremony at the British Ambassador’s residence in Washington, D.C. The agreement is still in the legislative pipeline. It must be reviewed and approved by the U.S. and UK’s parliaments.

The major advantage of the agreement is seen in the acceleration of criminal investigations because law enforcement authorities will no longer need to go through the time-consuming, government-to-government mutual legal assistance process. (TW)

NGOs Urge U.S. Congress to Oppose US-UK CLOUD Act Agreement

On 29 October 2019, twenty privacy, civil liberties, and human rights [organizations jointly addressed U.S. Congress committee](#) chairmen to stop the US-UK CLOUD Act Executive Agreement signed on 3 October 2019. It will allow direct access by the party’s law enforcement bodies to personal data held by private service providers outside traditional mutual legal assistance procedures.

The organisations “believe that the Agreement fails to adequately protect the privacy and due process rights of U.S. and U.K. citizens.” They urge the U.S. parliament to disapprove the agreement.

The organisations observe that the US-UK executive agreement exhibits many often cited human rights concerns, e.g., diminished standards for law enforcement requests, lack of notice, vague oversight mechanisms, etc. They are particularly concerned because the agreement may become a template for future agreements, including with countries that have even less strict data protection standards. The main critical issues put forward are as follows:

- The US-UK Agreement lowers the bar for law enforcement access to both stored communications content, such as emails, and live wiretaps in the USA;
- It does not consistently foresee prior judicial authorization of an order and goes below standards of the Fourth Amendment;
- Requirements for minimization of data and targeting individual requests do not apply equally to the USA and the UK;
- The accord includes neither provisions on notice to the data subject nor any new remedies for individuals;
- The threshold for crimes covered by the agreement is low, and the protective requirement of dual criminality no longer plays a role;
- Vague external oversight;
- The agreement does away with a robust human rights review by the U.S. authorities;
- It also fails to uphold the standards against infringements to the freedom of speech as defined in the CLOUD Act;
- Sharing of gained information among the UK and American law enforcement authorities may violate U.S. law.
- In addition, the undersigning organisations question whether the UK – still a Member of the European Union – was competent to enter into a bilateral agreement. (TW)

EP Report on EU E-Evidence Legislation Advocates Strengthened Safeguards

After the EP elections, the EP Conference of Presidents decided in October 2019 that work should resume on the EU

e-evidence rules. The e-evidence package consists of two proposals tabled by the European Commission in April 2018 (see eucrim 1/2018, pp. 35–36): a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and a Directive on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings.

German MEP *Birgit Sippel* (S&D) was reappointed as rapporteur on 4 September 2019. On 11 November 2019, *Sippel* presented her [draft report](#) at the LIBE meeting. She proposes a total of 267 amendments, the main proposals of which are as follows:

- Introducing an automatic, meaningful notification of the enforcing EU Member State: the issuing authority must send each Production and Preservation Order not only to the service provider, but also simultaneously to the executing State where the service provider is established or, for service providers not established in the Member States bound by this Regulation, where its legal representative has been appointed;
- Involving the “affected state”: not only the “issuing” and “executing” states are part of the procedure, but also the “affected state,” i.e., the state of permanent residence of the person concerned. It will have the possibility to bring its doubts as regards the lawfulness of an order to the attention of the executing State;
- Introducing a new refusal mechanism: the draft report introduces several grounds for non-recognition and non-execution of a European Production or Preservation Order. They are aligned to the grounds for refusal provided for in the Directive on the European Investigation Order, thus ensuring consistency. The responsibility for applying these refusal grounds shifts from the service provider to the executing authority, which will now be entitled to refuse the orders based on a list of specific and limited grounds. If the executing authority does not react within a fixed period of

time, the service provider is obliged to preserve or produce the requested data to the issuing authority;

- Overhauling the concept of a Regulation and Directive: *Sippel* suggests directly integrating the content of the proposed Directive into the Regulation, thus clarifying that the providers’ obligation to appoint legal representatives cannot be used for other instruments and that the obligation only applies to the Member States participating at the Regulation;

- Obligations in relation to the nomination of legal representatives: the draft report also clarifies that only service providers not established in the EU or EU service providers established in an EU Member State not bound by the Regulation but offering services in the participating Member States are required to designate a legal representative in one of the participating Member States where it offers its services. Regarding service providers already established in a participating Member State, orders should be directly addressed to the main establishment of the service provider where the data controller is established;

- Implementing new review procedure in case of conflicting obligations with third-country law: the report suggests a new review procedure if questions of conflicts of law in third countries (e.g., the USA) arise. By contrast to the Commission proposal, the procedure is more pared down and involves the executing and affected states;

- Reinforcing safeguards for persons concerned: the rights of persons whose data are to be obtained by an order are strengthened and clarified. This includes fairer conditions for issuing orders and clear data categories (based on existing EU and national legislation and in line with CJEU case law). Furthermore, the rapporteur proposes more comprehensive user information, limitations to the use of data obtained, rules on admissibility of evidence and erasure of data obtained, as well as effective legal remedies.

The decision of the LIBE Committee on the draft report is necessary before the suggested amendments can be put forward to the plenary. If the plenary adopts the committee report, trilogue negotiations can start with the Council and the Commission. The Council published a consolidated version of its [general approach](#), including the desired modification to the Commission proposal, on 11 June 2019. (TW)

EDPS Opinion on E-Evidence Proposal

On 6 November 2019, the European Data Protection Supervisor (EDPS) issued his [opinion on the new EU legal framework for gathering e-evidence](#) in cross-border cases (for the Commission proposal, see eucrim 1/2018, pp. 35–36).

The EDPS endorses the objective of ensuring quick and effective access of law enforcement to electronically stored data in another state, but calls on the EU legislator to find a balanced approach respecting the Charter of Fundamental Rights of the EU and EU data protection law and implementing all necessary safeguards. The main suggestion in the opinion is to systematically involve judicial authorities of the enforcing Member State as early as possible. These authorities should then have the possibility to effectively and efficiently review compliance of the Production and Preservation Orders with the Charter and to raise grounds for refusal. This view is shared by many civil society stakeholders as well as by the European Parliament (see, e.g., eucrim 1/2019, pp. 38–40).

Furthermore, the EDPS is critical of the definition of the data categories and their overlap, which is not consistent with other EU law. He also calls for a re-balancing between the types of data for which European Production Orders could be issued and the categories of data concerned. The EDPS, in particular, believes that the proposed threshold for producing transactional and content data (three-year minimum of the maximum custodial sentence) is too low. Calling to mind the CJEU case law, which indi-

cates that these data would enable precise profiles of individuals to be established, access can be made possible for serious crime only. The EDPS further argues that the sensitivity of subscriber and access data should not be underestimated because they may include privacy-invasive electronic communications metadata.

The EDPS makes concrete recommendations on the following other issues:

- Data security;
- Rights of the data subject, including enhanced transparency, and rights to remedy;
- Immunities and privileges;
- Legal representatives;
- Time limits to produce data;
- Possibilities for service providers to object.

Ultimately, the EDPS asks for more clarity on the interaction between the EU's internal e-evidence rules and other instruments, especially a future EU-US agreement. In this context, the EDPS stresses that the EU legal framework must uphold a high level of data protection and constitute the reference for respect for fundamental rights when negotiating international agreements on cross-border access to electronic evidence.

The EDPS already issued detailed advice to the Commission regarding negotiations with the USA on an e-evidence agreement (eucrim 1/2019, p. 41). The present opinion also completes other data protection statements, e.g., those by the European Data Protection Board (see eucrim 3/2018, p. 162). (TW)



Council of Europe*

Reported by Dr. András Csúri (AC) and Christine Götz (CG)

Foundations

European Court of Human Rights

Seibert-Fohr New German Judge to ECtHR

The Council of Europe Parliamentary Assembly (PACE) elected Professor *Anja Seibert-Fohr* as [new judge to the European Court of Human Rights](#) on 27 July 2019. Her term of nine years commenced on 1 January 2020. Professor *Anja Seibert-Fohr* succeeds Professor *Angelika Nußberger* who has been serving as judge at the European Court of Human Rights for Germany since 2011. *Seibert-Fohr* was a member of the

Human Rights Committee from 2013 to 2017. Since 2016, she has held the chair of Public Law, International Law and Human Rights at the University of Heidelberg. (CG)

Specific Areas of Crime

Corruption

GRECO: Fifth Round Evaluation Report on Spain

On 13 November 2019, GRECO published its fifth round [evaluation report](#) on Spain. The focus of this evaluation round

is on preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies. The evaluation focuses particularly on such issues as conflicts of interest, the declaration of assets, and accountability mechanisms (for other reports, see, for instance, eucrim 1/2018, pp. 38–39; 2/2018, pp. 109–110; 4/2018, p. 208 and 1/2019, pp. 43–44).

Corruption is a highly debated issue in Spain and, together with unemployment, one of the most pressing concerns for Spanish society. The corruption cases in recent years revealed particularly high risks for local-level public procurement in urban planning and construction.

GRECO acknowledges partial progress made under the so-called Regeneration Plan (Plan de regeneración democrática) to promote integrity in public life and to adopt anticorruption laws. That said, GRECO has called for further steps to be taken towards a comprehensive anticorruption strategy. There is a need to analyse and mitigate risk areas involving the conflicting interests and corruption of persons with top executive functions. A more transparent approach is required in relation to areas such as recruitment, transfers, and staff appraisals in order to provide for more open and objective personnel decisions. The same can be said as to the allocation of benefits. The report recommends widening the scope of publication requirements for financial disclosures to include detailed information on assets and outside employment and considering shorter timeframes for reporting and publication. Information on spouses and dependent family members should also be included.

GRECO acknowledges the positive efforts made by the Spanish authorities in recent years in adopting and amending anticorruption laws and regulations. However, a wide gap remains between

legislation and its implementation in practice, with oversight and accountability being the weakest aspects.

Law 3/2015 on the Exercise of High Office constitutes a noteworthy effort to modernise corruption prevention policy for government officials. The law covers transparency and integrity issues, the prevention of conflicts of interest, and accountability in office. Nevertheless, more needs to be done to control its practical application, especially regarding the law's advisory, supervisory, and enforcement regimes. GRECO recommends making dedicated improvements on transparency and conflict-of-interest prevention for high-ranking government officials. This should include subjecting political advisors to the same equivalent transparency and integrity requirements as those applied to persons with top executive functions. A code of conduct for persons with top executive functions should be adopted and made easily accessible to the public.

GRECO also calls for stricter rules and procedures to deal with the risks of lobbying and revolving doors (when government officials leave their functions to work in the private sector). Legislation governing such post-employment restrictions should be subject to review by an independent body.

Likewise, the system regulating the criminal responsibility of top officials should be reviewed. Currently, there is a special procedure, the so-called “aforamiento,” according to which members of government suspected of having committed corruption-related offences are tried before the Supreme Court instead of the regular courts at lower instance. GRECO recommends amending this law so that it does not hamper the criminal justice process in respect of members of government.

Law 19/2013 on Transparency, Access to Information and Good Governance and the launch of the Transparency Portal are also notable tools. There is, however, more to be done to overcome the reluctance of certain public authori-

ties (especially public companies/entities) to facilitate access to administrative information. The implementation of the law could be further advanced by facilitating information request procedures, providing for a reasonable time to answer such requests, and by raising awareness among the general public about its right to access information. Ultimately, GRECO recommends a comprehensive and effective framework for the protection of whistleblowers, which is yet to be introduced in Spain.

Regarding law enforcement agencies, GRECO recommends that the Police and the Civil Guard conduct a strategic risk assessment of corruption-prone areas and identification of trends. It also encourages the Civil Guard to adopt a Code of Conduct and make it publicly available. Both authorities should complement their respective codes with guidelines and practical measures for their implementation, e.g., regarding conflicts of interest, the use of public resources, and accessory activities.

GRECO further recommends strengthening the current vetting processes and introducing vetting at regular intervals throughout the careers of its staff members. It also encourages reviewing the career-related internal processes to improve the recording and publication of rationale in related decisions in order to achieve a more objective and transparent approach. Special attention should be paid to the integration of women at all levels in the forces. Lastly, there is a need for a full review of current whistleblower procedures within the Police and the Civil Guard in order to strengthen their protection and to better focus on the content of the information provided. (AC)

GRECO: Spain No Longer Subject to Non-Compliance Procedure

The fifth round evaluation report on Spain was published together with a [compliance report](#) on the fourth evaluation round, acknowledging Spain's progress in the implementation of GRECO's

* If not stated otherwise, the news reported in the following sections cover the period 1 August – 15 November 2019.

recommendations on corruption prevention in respect of parliamentarians, judges, and prosecutors, at the same time also calling for further progress.

The compliance report concluded that, due to steps taken by Parliament to adopt ethical standards and to several novelties aimed at infusing greater transparency and accountability into the judicial system, Spain is no longer subject to a non-compliance procedure. Nevertheless, GRECO expects more forceful action on lobbying regulation and improvements to the appointment system for the General Council of the Judiciary (CGPJ) and for top-ranking officials of the judiciary. (AC)

GRECO: Fifth Round Evaluation Report on Denmark

On 4 September 2019, GRECO published its fifth round [evaluation report](#) on Denmark. The country traditionally achieves high scores in corruption perception indices, and the risk of actual bribery taking place is considered to be very low. Trust is a central feature of the integrity system, yet regulations on preventive and control measures are lacking in certain areas. GRECO therefore recommends the adoption of more binding rules.

First, there is a need to develop an overall strategy based on an analysis of integrity-related risks involving members of the government and their special advisors. Next, a code of conduct for persons with top executive functions focusing on integrity-related matters (together with briefing and confidential counselling) needs to be adopted, coupled with supervision and enforcement mechanisms. In addition, the current system also needs to be complemented with rules governing the contacts of officials in top executive functions with lobbyists and governing their employment after termination of their service in the public sector. The current guidelines on financial declarations by members of the government should additionally be laid down in legislation that is subject

to review; exceptions to the rule of public disclosure are to be interpreted more narrowly in practice.

As for law enforcement, the police in Danish society enjoys a high degree of trust. Various reforms implemented in the last ten years deserve mention:

- The establishment of the Independent Police Complaints Authority in 2012;
- The introduction in 2015 of standard vetting of new police recruits by the Danish Security and Intelligence Service;
- The adoption of new guidelines “Good behaviour in the police and prosecution service” in 2018;
- The strengthening of police procurement procedures in 2018.

That said, GRECO recommends improvements in the training available to police officers on integrity requirements, which should also be made mandatory for managers. In addition, there is a need to develop a streamlined system for authorisation of secondary activities of police officers, coupled with effective follow-up. Finally, GRECO lauded the new whistleblowing system introduced into the Danish police, hoping that it will also lead to whistleblower regulations in other sectors of society. (AC)

GRECO: Fourth Round Evaluation Report on Germany

On 12 August 2019, the Council of Europe’s Group of States Against Corruption (GRECO) published its [fourth round evaluation report on Germany](#). A summary of the report is available [here](#). The report in German can be retrieved [here](#).

GRECO found an “overall very low level of compliance” with recommendations dating from 2015. Only three of eight recommendations were implemented satisfactorily, three were partially implemented, and two were not implemented at all.

While GRECO welcomes the fact that all ministries now publish comments from stakeholders in the private sector and civil society on legislative

initiatives, it also criticizes the lack of further progress on the part of the German federal parliament (*Bundestag*) concerning the following:

- Improvement of transparency of the parliamentary process;
- Further regulation of conflicts of interest;
- Effective supervision and enforcement of the different rules of conduct for the members of parliament.

As regards judges, GRECO in general welcomes the measures taken by the Federal Constitutional Court and another federal court to improve the transparency and monitoring of the judge’s secondary activities. Nevertheless, as the measures are limited to these courts, GRECO remarks that more progress needs to be done in the context of the transparency and cooperation of secondary activities of judges in general.

Due to its deficiencies in curbing corruption, GRECO will apply a “non-compliance-procedure” to Germany, meaning that the German delegation must provide a progress report on implementing the remaining recommendations no later than 30 June 2020. (CG)

GRECO: Kazakhstan Makes Progress on Becoming GRECO Member

On 15 October 2019, Kazakhstan [signed an Agreement](#) concerning the privileges and immunities of representatives of the Group of States against Corruption (GRECO) and members of evaluation teams. Once Kazakhstan ratifies the Agreement, it will become GRECO’s 50th Member State. (AC)

CCPE: Opinion on Role of Prosecutors in Fight Against Corruption and Related Economic and Financial Crime

At its plenary meeting in Paris on 21–22 November 2019, The Consultative Council of European Prosecutors (CCPE) adopted [Opinion No. 14](#) on the role of prosecutors in fighting corruption and related economic and financial crime. In its Opinion, the CCPE attempted to arrive at a common definition

of corruption. It also attempted to gain insight into the fact that, in a significant number of cases, corruption offences are neatly entwined with other phenomena of economic and financial crime, e.g., fraud, tax fraud, money laundering, and embezzlement.

The Opinion concludes that, when defining the term “corruption,” the best reference can be drawn from the CoE Criminal Law Convention on Corruption (ETS 173) as applied by GRECO. Said concept covers a variety of criminal offences, such as active and passive bribery in the public and private sectors and trading in influence. The Opinion lists specific challenges faced by prosecution services and individual prosecutors when fighting corruption and makes the following main recommendations:

- The particular challenges of fighting corruption make it necessary to establish a corresponding environment for the work of prosecutors specialized in the field;
- A robust constitutional and legislative framework shall allow the prosecution to act as an independent and autonomous institution free of undue political influence;
- Additionally, guarantees and safeguards shall be put in place for independent, autonomous, and transparent decision-making when it comes to the recruiting, promoting, and transferring of prosecutors and for disciplinary procedures;
- The available human, financial, and technical resources shall enable final decisions to be taken in due time and before the expiry of relevant statutory limitation periods;
- Member States shall provide for the necessary budget to recruit a sufficient number of competent prosecutors, together with properly trained support staff and the necessary modern equipment;
- Measures shall be put in place to ensure the impartiality, professionalism, and specialization of prosecutors and their regular in-service training;
- Effective access to all relevant sources

of information shall be enabled, both in public and private databases – subject, where necessary, to judicial authorisation;

- Thorough respect and protection of defence rights, respecting and applying the principles of necessity and proportionality, in particular when applying coercive measures and special investigation techniques;
- Enabling of good case management, for instance, by establishing specialized teams of prosecutors;
- Stringent rules to protect whistleblowers, namely protecting the identity and personal integrity of persons with insider knowledge when disclosing information;
- Direct contact and cooperation between prosecution services of different Member States, including information sharing with non-public actors, civil society, and NGOs in cross-border cases to enable efficient extradition and mutual legal assistance mechanisms;
- Finally, in order to facilitate a harmonized approach to fighting corruption, Member States should ratify, where applicable, the most important international instruments in this regard. (AC)

Money Laundering

MONEYVAL: Fifth Round Evaluation Report on Moldova

On 11 September 2019, MONEYVAL published its [Fifth Round Mutual Evaluation Report](#) on the Republic of Moldova. The fifth evaluation round builds on previous MONEYVAL assessments and provides a comprehensive assessment of the effectiveness of measures in place for anti-money laundering (AML) and countering the financing of terrorism (CFT). It also addresses the Member States’ compliance with the Recommendations of the Financial Action Task Force (FATF). For background information, see eucrim 1/2018, pp. 40–41; for general reference, see eucrim 2/2018, p. 111, 3/2018, pp. 208–210, and 1/2019, p. 45.

Moldova faces various money laundering (ML) threats mainly deriving from corruption, tax evasion, and smuggling as well as drug trafficking and human trafficking. A national risk assessment (NRA) was carried out in 2017. An Action Plan was consequently adopted to address the major risks identified. Though the NRA did not separately explore the risks associated with organised criminal groups, non-profit organisations, and all aspects of financing of terrorism (FT), MONEYVAL still considers the NRA to be quite comprehensive. It recommends, however, further enhancing communication of the results.

The number of investigated ML cases varied in the period under review due to the impact of two high-level cases, with an overall growing trend towards convictions. A wide spectrum of ML investigations and prosecutions, including autonomous ML and foreign predicate cases, were conducted, which, however, only led to a limited number of prosecutions.

Sanctions for ML offences have been applied proportionately. The Moldovan authorities adopted and implemented several strategic documents, which demonstrate that confiscation of the proceeds of crime is a policy objective. The authorities were able to validate various forms of confiscation, but the number and value of confiscated assets remain low and do not correspond to the scale of proceeds-generating crime in the country. The report stresses that the results are even considerably weaker when taking into consideration the value of property that was effectively recovered; the tally improves when the amounts used to compensate victims are taken into account.

The NRA classifies the FT risks as low. Correspondingly, there have been only two FT investigations leading to prosecutions. The competent law enforcement authorities have a proper understanding of FT risks and have broad powers to obtain financial intelligence and other information in FT cases. Moldova has not

Eucrim - Common abbreviations

AFSJ	Area of Freedom, Security and Justice
AG	Advocate General
AML	Anti-Money Laundering
CBRN	Chemical, Biological, Radiological, and Nuclear
CCBE	Council of Bars and Law Societies of Europe
CCJE	Consultative Council of European Judges
CDPC	European Committee on Crime Problems
CEPEJ	European Commission on the Efficiency of Justice
CEPOL	European Police College
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CoE	Council of Europe
COSI	Standing Committee on Operational Cooperation on Internal Security
COREPER	Committee of Permanent Representatives
CTF	Counter-Terrorism Financing
DG	Directorate General
EAW	European Arrest Warrant
ECA	European Court of Auditors
ECB	European Central Bank
ECBA	European Criminal Bar Association
ECHR	European Convention on Human Rights
ECRIS	European Criminal Records Information System
ECtHR	European Court of Human Rights
EDPS	European Data Protection Supervisor
EES	Entry-Exit System
EIO	European Investigation Order
EJN	European Judicial Network
ENISA	European Network and Information Security Agency
(M)EP	(Members of the) European Parliament
EPO	European Protection Order
EPPO	European Public Prosecutor's Office
EU	European Union
FCC	(German) Federal Constitutional Court
FD	Framework Decision
FT	Financing of Terrorism
GRECO	Group of States against Corruption
GRETA	Group of Experts on Action against Trafficking in Human Beings
ICTY	International Criminal Tribunal for the former Yugoslavia
JHA	Justice and Home Affairs
JIT	Joint Investigation Team
LIBE Committee	Committee on Civil Liberties, Justice and Home Affairs
MoU	Memorandum of Understanding
MONEYVAL	Committee of Experts on the Evaluation of Anti-Money Laundering Measures and the Financing of Terrorism
ML	Money Laundering
OJ	Official Journal
OLAF	Office Européen de Lutte Anti-Fraude (European Anti-Fraud Office)
PNR	Passenger Name Record
SIS	Schengen Information System
SitCen	Joint Situation Centre
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union

formally identified the types of non-profit organisations (NPOs) vulnerable to FT abuse, although a study was carried out following the assessment.

The report sees Moldova's licensing framework as robust when it comes to preventing criminals and their associates from holding, or being the beneficial owner of, a significant or controlling interest or holding management function in financial institutions. That said, microfinance and foreign exchange offices have only recently been subject to authorisation requirements. The supervisors of financial institutions have an adequate level of understanding of ML risks for the majority of the sectors, but the supervision of designated non-financial businesses and professions remains an area for improvement. The range of sanctions available in the AML/CFT law and sectorial laws is regarded as being dissuasive enough, but the report voices concern over their application, both in terms of numbers and amounts.

Moldova has a sound legal and procedural framework for exchanging information with foreign partners and actively seeks international cooperation from other states, resulting in convictions and the seizure and confiscation of proceeds of crime. (AC)

MONEYVAL: Fifth Round Evaluation Report on Malta

On 12 September 2019, MONEYVAL published its [Fifth Round Mutual Evaluation Report](#) on Malta. It calls on the Maltese authorities to strengthen the practical application of measures combatting money laundering and the financing of terrorism.

Malta is a relatively large international finance centre, and its internationally exposed banking sector is highly vulnerable to money laundering (ML). It has a significant shadow economy and cash is in widespread use.

MONEYVAL acknowledges that the country has taken steps to improve the AML/CFT framework, e.g.:

- Establishing special registers for companies, trusts, and associations incorporated or administered in Malta;
- Significant changes in the legislative instrument implementing UN and EU sanctions;
- Transposal of provisions of [EU Directive 2015/849](#).

A formal national risk assessment was conducted, and the results demonstrated that the authorities have a broad understanding of the vulnerabilities within the system. However, the importance of certain factors – notably predicate offences, financing of terrorism, legal persons – is not sufficiently understood. Several agencies, like the Financial Intelligence Analysis Unit (FIAU), have also adapted their frameworks, taking account of the vulnerabilities identified through the national risk assessment. Though the FIAU is considered to be an important source of financial intelligence for the police, the information provided by the FIAU constitutes evidence in only a limited number of ML cases and even less in FT related investigations.

ML investigations and prosecutions do not appear to be in line with the country's risk profile, due also to limited resources, both human and financial. ML is mainly investigated together with the predicate offence on which the investigation is based. The report emphasizes that Malta has not yet achieved convictions for ML concerning legal persons. Although the courts routinely order the confiscation of assets, the report stresses that there are serious shortcomings in asset-tracing policy, especially in respect of assets located abroad or those transferred to third parties in name.

The country has a sound legal framework as regards fighting FT. However

no risk assessment has been carried out, and there have been only a few investigations so far that have not resulted in any prosecutions or convictions. Some progress has still been made, as Malta recently elaborated a national counter-terrorism strategy, which however could not be provided to the assessment team.

The understanding of ML/FT risks varies across the sectors. Banks and casinos demonstrate a good understanding, but non-bank financial institutions and other non-financial businesses have a much lower understanding. In addition, the supervisory authorities also lack resources to conduct risk-based supervision.

The report stresses the lack of an in-depth analysis of how all types of legal persons and legal arrangements can be misused for ML and FT purposes. There are shortcomings in the multi-pronged approach to obtaining beneficial ownership information. The fines for failing to submit beneficial ownership information on legal persons are also not effective, dissuasive, and proportionate compared to the nature and scale of business undertaken in the country.

The report also stresses that the sanctions for non-compliance with AML/CFT requirements are not considered effective, proportionate and dissuasive. Lastly, Maltese legislation sets out a comprehensive framework for international cooperation, and the FIAU proactively interacts with its foreign counterparts in a timely and qualitative manner. (AC)

MONEYVAL: Annual Report 2018

On 25 September 2019, MONEYVAL published its [annual report for 2018](#). In 2018, MONEYVAL actively monitored

24 countries and territories through the adoption of altogether 26 mutual evaluation and follow-up reports. Additionally, MONEYVAL organized workshops to promote the exchange of experiences among experts and organized evaluator training seminars.

The report emphasizes the impact of economic crime, organised criminal groups, and terrorism in Europe and the need for states to apply robust measures to fight ML and FT. MONEYVAL stresses the need to raise the awareness and effectiveness of prosecutors and judges in repression of ML, associated offences, and TF; efforts need to be stepped up when combatting the financial flows associated with slavery, human trafficking, and forced labour.

According to the report, the ongoing “de-risking” phenomenon is among the main concerns within the international community. In recent years there has been an increase in global financial institutions terminating business relationships with foreign banks, that is entire regions or classes of customers, in order to avoid, rather than manage, ML and FT risks. This so-called “de-risking” phenomenon is not in line with FATF standards, but the number of corresponding relationships involving global banks and Eastern European banks has decreased of late. Therefore, in 2018, MONEYVAL organized roundtables on the negative consequences of de-risking and the possibilities of how to reconnect those de-risked.

The financial flows associated with slavery, human trafficking, forced labour, and child labour remain a further priority. For this purpose MONEYVAL participated in research on the risk of ML and TF for human trafficking. (AC)

Fil Rouge

The EU's action reaches beyond its borders: EU funds are spent in third countries, as part of pre-accession or neighbourhood partnerships, or as part of the EU's international cooperation strategy. Effective investigations require the possibility to collect relevant elements beyond the territory of the EU. Today OLAF can conduct administrative investigations in third countries, based on international agreements or contractual arrangements. Eurojust has developed tools to assist criminal investigations beyond the EU borders, through cooperation agreements and exchange of liaison officers with third countries. The territorial scope of investigations will be one of EPPO's future challenges. National prosecutors today use instruments for mutual legal assistance. The EPPO will have to make the best of these existing instruments, until such time as it will be able to benefit from ad-hoc tools for cooperation and develop its own network to support its operations in third countries.

The articles in this issue explore various challenges in this area. *Boštjan Škrlec* explores the evolution of Eurojust's

activity to facilitate judicial cooperation in criminal matters with non-EU countries. *Annalisa Pauciullo* and *Chervine Oftadeh* illustrate the efforts to enhance judicial cooperation between Europe and West and Central African countries. *Nicholas Franssen* and *Maria Ludwiczak Glassey* focus in their respective articles on the external dimension of the future investigations of the EPPO, its legal framework and possible practical obstacles. *Claire Scharf-Kröner* and *Jennifer Seyderhelm* focus on OLAF's investigations in non-EU countries on the expenditure side of the EU budget, analysing OLAF's competence and powers as well as possible avenues for cooperation with the EPPO in this area. Finally, *Christiana A. Makri* and *Oana Marin* expand the view on the overall architecture for the protection of the EU budget by focusing on the newly adopted Commission Antifraud Strategy.

Irene Sacristán Sánchez, Head of Unit, OLAF, Policy Development and Hercule (unit D.1)

Eurojust and External Dimension of EU Judicial Cooperation

Boštjan Škrlec*

Eurojust – the European Union Agency for Criminal Justice Cooperation – was first established by Council Decision 2002/187/JHA (Eurojust Decision). It is tasked primarily with the facilitation and coordination of criminal investigations and prosecutions of transnational crime in the countries that are members of the EU (Member States). However, effective criminal prosecution of most serious forms of trans-border crime may not depend only on judicial cooperation within the EU. Due to nature of this type of crime, third countries also have to be included if it is to be investigated and prosecuted in its entirety. This article describes how Eurojust, as an EU agency, can contribute to more effective judicial cooperation with non-Member States, what types of support it can provide, and on which legal bases the support can be provided. It describes the stage that development cooperation with third countries has reached since Eurojust became operational. This development now has to be continued under a new legal framework – the new Eurojust Regulation – bringing into play a new set of rules for Eurojust's external relations with a much stronger role of the European Commission.

I. Introduction

Eurojust – the European Union Agency for Criminal Justice Cooperation – was first established by Council Decision 2002/187/JHA (hereinafter: the Eurojust Decision).¹ Initially, it was defined as a “body of the Union” with legal personality, tasked primarily with the facilitation and coordination of criminal investigations and prosecutions of transnational crime in the countries that are members of the EU (Member States). However, it was clear from the beginning that effective criminal prosecution of the most serious forms of transnational crime may not depend only on judicial cooperation within the EU but also has to include third countries. Therefore, provisions enabling Eurojust to establish relations with such countries were included in Eurojust’s legal framework from the outset and were enhanced during its development. The final stage of this development was reached in the Eurojust Regulation 2018/1727 (hereinafter: the Regulation),² adopted on 6 November 2018, which will be applied from 12 December 2019. The Regulation has a new set of rules for Eurojust’s external relations with a much stronger role of the European Commission.

This article presents a short description of the stage of development that cooperation with third countries has reached in the years of Eurojust’s existence. This development will now have to be continued under a new legal framework, as set by the Regulation.

II. Third Countries and Partners of Eurojust

As an EU agency, Eurojust is primarily competent to exercise its powers within the territory of the Member States. To interact with third countries, additional legal arrangements are necessary to establish the legal basis for interaction and to define the scope of such interaction. In general, legal arrangements between Eurojust and third countries and partners can be divided into two main categories, based on the scope and nature of the cooperation, namely:

- Memoranda of Understanding, Letters of Understanding, and Letters of Intent;
- Cooperation Agreements.³

The main factor of differentiation between the two categories is the ability to exchange personal data or the lack thereof.

Eurojust has concluded and signed a number of Memoranda of Understanding (MoU) as well as Letters of Understanding and one Letter of Intent.⁴ Such arrangements were concluded between Eurojust and its partners (including the European Commission, Frontex, FRA, and the EJTJN), arranging institutional cooperation and the exchange of strategic and technical infor-

mation. As it is not possible to exchange any personal data under such arrangements, they may only have very limited operational impact, if any at all.

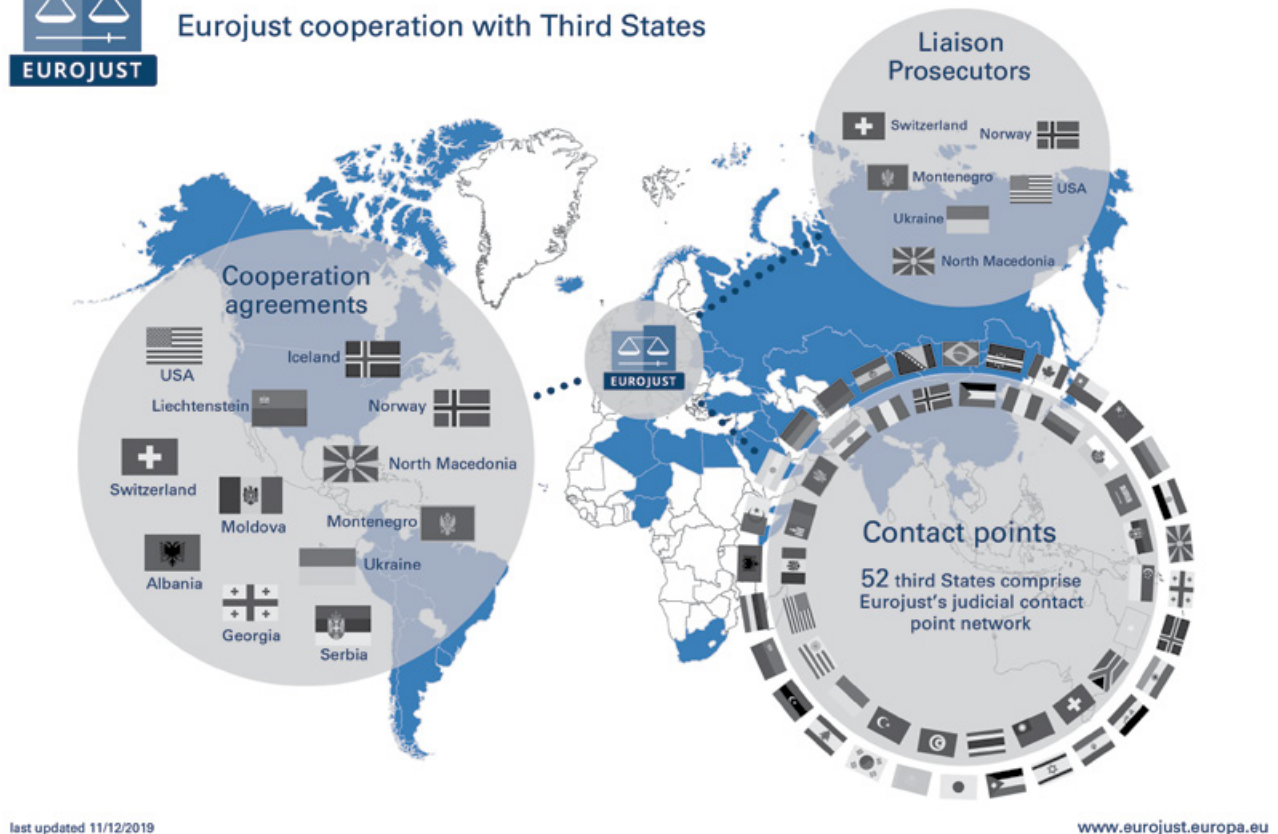
In order to achieve effective operational cooperation, a clear legal basis for the exchange of personal data needs to be put in place. Under the present legal framework, Eurojust has a mandate to conclude such agreements. In order to allow for the exchange of personal data with third countries (or EU-related institutions, bodies, and agencies), Eurojust has to conclude a **cooperation agreement** following a specific procedure that includes the participation of the Council of the EU and the Joint Supervisory Body.⁵ Once such a cooperation agreement has been concluded and after its entry into force, the country party to it is entitled to cooperate with Eurojust much like Member States are. Subject to the agreement and provided that the case includes at least one Member State and is referred to Eurojust, national authorities of third states are able to benefit from all operational activities of Eurojust described in the chapter on Eurojust’s powers below. Operational cooperation with third states can be enhanced even further by the secondment of **liaison prosecutors**⁶ of such countries to Eurojust. This advanced form of cooperation, which is specifically foreseen in the Eurojust Decision, enables those countries to have their own prosecutors permanently present at Eurojust headquarters in The Hague, thus interacting directly with national members of Eurojust and making use of all Eurojust’s operational support. The benefits of such cooperation are mutual. The same advantages of direct operational cooperation are also available to all national members of Eurojust, as well as their competent national authorities, with regard to cooperation with such a third state, represented by a liaison magistrate at Eurojust.

At present, Eurojust has signed cooperation agreements with 12 third countries, including the United States, Switzerland, and Norway. Eurojust is hosting liaison prosecutors from the United States, Switzerland, Norway, Ukraine, and North Macedonia.⁷

There is one more form of cooperation with third countries that often proves to be very useful to national authorities of Member States, although less formal in nature. This cooperation is based on **contact points**.⁸ As a result of close contacts with third countries, Eurojust has established a worldwide network of dedicated contact points, currently covering a total of 52 third countries. This network consists of persons appointed by the respective countries as contact points for Eurojust. Despite the lack of possibilities to exchange personal data,⁹ these contact points often prove to be invaluable. Through them, national members of Eurojust are able to reach out to competent authorities of third countries and expedite mutual cooperation requests (sent by their own domestic authorities), as well as



Eurojust cooperation with Third States



clarify any issues regarding the particularities of specific legal systems.¹⁰ The chart gives an overview of Eurojust's network with third countries.

III. Powers of Eurojust

According to the Regulation, Eurojust is defined as the “European Agency for Criminal Justice Cooperation”.¹¹ In order to achieve its goal, Eurojust has been given a unique composition, combined with specific powers for its national members. To better understand the potential and importance of Eurojust's external relations, the composition and powers of national members will be described in more detail below.

Eurojust is a collegial body. It is composed of national members representing their respective domestic judicial authorities. As such, they are formally part of their respective national judicial systems (the specific modalities are subject to relevant national legislation), and their salaries and emoluments are the responsibility of their respective Member States. The powers of national members, as well as Eurojust's operational tasks, are defined by the Regulation.¹² To exercise its operational powers, Eurojust acts either through one or more of its national members or through the College of Eurojust. All case-related information exchange between Eurojust and the

Member States takes place through the national members.¹³ This is important, because national members are, in turn, incorporated within their respective domestic (judicial) authorities, meaning that any information exchange between Eurojust and Member States is considered to be intra-national.

Describing Eurojust's operational tasks in detail exceeds the scope of this article. In relation to external relations, it is sufficient to say that the operational powers and functions of Eurojust are generally divided into two main clusters:¹⁴

- Facilitation;
- Coordination.

It is important to note that Eurojust can exercise its powers only in cases that are referred to Eurojust by competent national authorities.¹⁵ Criminal investigations and prosecutions are always conducted by national authorities, the competence for which is granted and defined by domestic criminal law. In addition to operational powers and functions, Eurojust also represents a centre of expertise in the field of international cooperation in criminal matters.

1. Facilitation

For any request for mutual legal assistance or mutual recognition to be executed successfully and to the fullest extent possible, a high level of mutual understanding is essential

between respective national authorities on what is requested and how it is to be provided. Due to differences in national legal systems and legal traditions, such a level of understanding is not always easy to achieve. In such situations, Eurojust is in a position to offer high-level expert support at very short notice. National members of respective countries are able to meet in person and, in direct contact with domestic authorities, to swiftly and effectively clarify any possible issues or uncertainties, be they of a legal or factual nature (level II meetings). Any language barriers, which might hinder the process and cause delays due to translation requirements, can be effectively overcome at the same time.

Within the EU, many of these issues were resolved, or at least mitigated, with the development and application of mutual recognition instruments. Nevertheless, despite the widespread use and advanced development of instruments such as the European Arrest Warrant and European Investigative Order, the need for direct contact and quick resolution of open questions occurs time and again. This is particularly so in complex cases involving the most serious cross-border crime such as terrorism, cybercrime, and migrant smuggling, when the unique means of communication of national authorities through their national members of Eurojust is invaluable¹⁶.

With respect to third countries, where no instruments of mutual recognition exist and the diversity of legal systems and legal traditions is much greater, the need for facilitation is even more pronounced. As described above, Eurojust offers the facilitation required within the limits of such arrangements, depending on the type of agreement with a particular third country. While it is evident that the highest level of support may be provided in cases in which a concluded cooperation agreement is in place with a seconded liaison magistrate of that third country at Eurojust, a significant level of facilitation can nonetheless still be achieved in cases in which (only) Eurojust's contact points are in place.

2. Coordination

Coordination is a pivotal role for Eurojust in cases of mutual cooperation in criminal matters. Given the increasing complexity of cross-border crime and given the multilateralism of such cases, the need for coordination is on the rise. Important questions need to be addressed and resolved quickly, questions like:

- Which national authority should undertake the investigation of specific criminal acts?
- Which authority is best placed to conduct special investigative measures?
- Which measures are viable against which individuals and regarding which specific criminal act?

- Which evidence collected in one country is relevant for investigations in another country?
- What is the best way to exchange such evidence?
- When is the best time to undertake certain investigative activities in order to not interfere with or jeopardize the investigations in other countries?

Solutions can only be found if they are based on the agreement of all relevant parties. Direct communication between representatives of all relevant national authorities, enabling open discussion and the effective exchange of information, is instrumental to reaching such agreement. Eurojust is perfectly suited to providing all the support necessary for reaching such agreements and putting them into practice.

Eurojust provides coordination in several different ways. One of them is level II meetings, already described above. Most coordination, however, is provided by a special form of dedicated operational tool called **coordination meetings**. These meetings are attended by the competent judicial and law enforcement authorities of the Member States that conduct investigations and prosecutions at the national level. Simultaneous translation assists in enabling direct communication between the participants on challenging legal and practical issues. Coordination meetings are organised and financed by Eurojust (including travel expenses for participants). It is important to point out that representatives from third countries may be invited to participate, and they are regularly invited in all relevant cases.¹⁷ As participants at coordination meetings, they are entitled to Eurojust's full operational support, including simultaneous translation during the meeting.

Representatives of cooperation partners, such as Europol and OLAF and international organisations like INTERPOL, may also be invited to attend coordination meetings. Europol representatives regularly participate and contribute valuably, mostly with their analytical capacities. OLAF representatives are invited to coordination meetings when their specific expertise on EU financial regulations and procedures is required. Their participation is particularly welcome if parallel administrative investigations are being conducted by OLAF. Open discussion at the expert level, involving representatives from relevant national authorities and representatives from OLAF at an early stage, is the best way to address questions relating to possible risks to respective investigations as well as questions related to the admissibility of evidence obtained.

Eurojust provides an additional form of support with **coordination centres** when real-time coordination is needed. A dedicated operational room at Eurojust ensures that participating authorities can maintain direct contact (via Eurojust) to exchange information during large-scale multilateral joint actions. Depending on the specific requirements of a case,

participants from third countries may also attend coordination centres at Eurojust. Due to the specific requirements of real-time coordination, however, representatives of countries with an established, advanced form of cooperation with Eurojust¹⁸ will primarily be able to benefit from this type of support.

Joint Investigation Teams (JITs) are another important instrument in the context of Eurojust's coordination role. JITs enable continuous and direct cooperation between the investigative authorities (both judicial and law enforcement) of participating countries. This tool is based on an agreement between competent authorities of participating countries, but Eurojust can play a vital role in the process of setting up and carrying out JITs. A model agreement has been developed with Eurojust's support to facilitate the setting-up of JITs and to help competent authorities conclude formal agreements. Together with national members facilitating the drafting process, this represents important support to national competent authorities (judges, prosecutors, and the police), which are specialized in criminal investigation and prosecution and not usually experienced in setting up international agreements. Another supporting tool for practitioners is the JITs Practical Guide¹⁹ developed by the JITs Network – in cooperation with Eurojust, Europol, and OLAF – to provide information, guidance, and advice to practitioners on the formation and operation of JITs.

Eurojust also supports the operational activities of JITs by providing financial and logistical support. The objective of such funding programmes is to promote the setting up of JITs by reducing the impact on national budgets of costs incurred due to the transnational dimension of these cases. The effectiveness of such support is sometimes wrongly judged by comparing the amount of funds awarded to competent national authorities to the amount of funds actually spent. Such comparisons are unjustified and, in principle, misleading. Due to strict EU financial regulations, rules on awarding such financial support by Eurojust require a considerable amount of anticipation and planning of investigative activities by competent domestic authorities. This is often very difficult in real-life situations of complex investigations, to say the least. As a result, fewer funds are sometimes spent as originally awarded. Regardless of such challenges, domestic authorities are usually happy to receive this type of support, and the number of JITs supported by Eurojust in this manner is growing.²⁰

The value of Eurojust's support in the form of coordination has proven invaluable in numerous cases conducted by competent national authorities of virtually every Member State.²¹ But this support is not only limited to the Member States of the EU. All the benefits of Eurojust's coordination facilities are also available to competent authorities of third countries – subject

to the cooperation arrangements described above (especially in cases of concluded cooperation agreements and, even more so, in cases of seconded liaison prosecutors).

3. Expertise

Besides performing functions of a purely operational nature, Eurojust is also the centre of expertise in the field of judicial cooperation in criminal matters. Due to its composition, Eurojust is in a unique and privileged position to obtain firsthand information on the use of such instruments horizontally across the EU. The same is also true, to a large extent, for cooperation with third countries. Through its national members, who are representatives of their respective national authorities, Eurojust receives direct input regarding the effectiveness of and challenges to the application of these instruments by practitioners in all Member States. Through interaction with liaison prosecutors and contact points from third countries, Eurojust also receives valuable feedback on the application of other instruments on judicial cooperation.

By assessing this feed-back, and by hosting regular meetings for practitioners where specific topics and challenges of judicial cooperation are discussed and experiences exchanged, Eurojust shapes the knowledge bases for practitioners and issues guidelines for the benefit of national authorities.²² With the similar objective, Eurojust is also regularly assessing how the European Court of Justice (ECJ) interprets the use of mutual cooperation instruments.²³ Although issued in relation to EU mutual recognition instruments, standards regarding fundamental human rights and liberties as set by the ECJ are most valuable for judicial cooperation with third countries.

In order to maintain a high level of expertise in relation to Eurojust's operational priorities, specialized and dedicated substructures are formed, tasked with identifying challenges and best practices from Eurojust's casework in order to support the Member States. Due to specific types of crime, some of these substructures are particularly linked to cooperation with third countries, the Counter-Terrorism Team, the Anti-Trafficking and the Cyber Team being the best examples.

IV. The Future of Eurojust's External Dimension

Everything that has been discussed so far in this article regarding Eurojust's activities with regard to third countries relates to the present legal framework defining the functioning of Eurojust and its powers – the 2002 Eurojust Decision (as amended in 2009). Under this legal act, Eurojust was granted a high level of autonomy regarding relations with third countries (as well as with EU entities and international organisations).

This legal framework foresaw the important role of the Council (and also the Joint Supervisory Body) in the process of concluding cooperation agreements, but the decision on entering into negotiations was in the hands of Eurojust and subject to its operational needs. However, the new Eurojust Regulation that applies as of 12 December 2019 entails several changes in this regard.

The Regulation not only strengthens the Eurojust's operational capabilities – strongly reaffirming it as the EU agency for criminal justice cooperation – but also changes the framework for cooperation with third countries. While existing cooperation agreements stay in force,²⁴ the new regime will apply to future forms of cooperation, particularly those entailing the exchange of operational personal data with third states. As explained above, the exchange of personal data is instrumental for advanced forms of cooperation, e.g., real time coordination and the use of liaison prosecutors. Under the Regulation, forms of cooperation entailing the exchange of such data will only be possible if an international agreement has been concluded between the EU and the third country (or international organisation), providing sufficient safeguards with respect to the protection of the privacy and fundamental rights and freedoms of individuals.²⁵ This represents an important change compared to the present system, particularly with regard to the question which entities will decide on the entry into such negotiations and which entities will actually conduct them. According to a clear provision in the Regulation,²⁶ such international agreements will have to be concluded pursuant to Art. 218 TFEU, meaning that negotiations for such agreements will be conducted by the European Commission on behalf of the Council of the EU.

Eurojust's role has changed, but it has not been excluded from the decision-making process. In consultation with the Commission, Eurojust will prepare a four-year strategy, specifying the countries (and international organisations) for which there is an operational need for cooperation.²⁷ How this new mechanism will work in practice remains to be seen. If the operational needs of Eurojust are taken in consideration fully and negotiations with third countries are conducted effectively, such a synergy of expert know-how, provided by a dedicated EU agency and the political capacity of a pivotal EU institution, could contribute to a more coherent and streamlined EU external dimension approach.

Finally, the establishment of the European Public Prosecutor's Office (EPPO) needs to be mentioned, albeit briefly. The introduction of this important new partner with its new set of exclusive competences into the EU legal landscape would merit a separate article altogether. However, as regards Eurojust, cooperation with the EPPO does not, in principle, fall within its external dimension *strictu sensu*. This could be different in relation to questions of future cooperation between the EPPO and third countries as well as non-participating Member States. Keeping in mind that the EPPO will retain the residual competence of domestic judicial authorities (double-hatted European Delegated Prosecutor and domestic courts), judicial cooperation with these countries will not be unlike the cooperation with third countries that Eurojust is supporting already today. Therefore, considering the lack of clarity in many areas and open questions regarding the modalities and the legal basis of international judicial cooperation of the EPPO, the vast experience of Eurojust, collected through its extensive case work and valuable lessons learned should not be overlooked.

* The views expressed in this article are the author's only and do not as such represent any official statement by Eurojust.

1 Council Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, *O.J.* L 63, 6.3.2002, 1., amended by Council Decision 2009/426/JHA of 16 December 2008 on the strengthening of Eurojust and amending Decision 2002/187/JHA setting up Eurojust with a view to reinforcing the fight against serious crime, *O.J.* L 138, 4.6.2009, 14.

2 Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, *O.J.* L 295, 21.11.2018, 138.

3 Under the present Eurojust Decision, Eurojust is entitled to also conclude Strategic Agreements (not entailing the exchange of personal data), but no such agreements have been concluded up to this moment.

4 Besides the arrangements already mentioned, Eurojust has also concluded Memoranda of Understanding with EJTN, IberRed, CEPOL, UNODC, Interpol, EMCDDA, EUIPO, and eu-LISA.

5 Arts 26 and 26a of the Eurojust Decision.

6 The Eurojust Decision refers to them as "liaison officers" (see Art. 26a), while in practice they are in fact prosecutors.

7 Due to very recent entry into force of cooperation agreements with

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Albania and Serbia, liaison prosecutors from these two countries are expected to be appointed in the coming months.

8 Here, I am referring to contact points for countries having no cooperation agreement with Eurojust, meaning that no personal data can be exchanged with such contact points.

9 Unless no cooperation agreement has been concluded.

10 Despite certain similarities, this form of cooperation is not to be confused with cooperation based on MoU and similar arrangements. The activities of contact points are related to existing requests for judicial

cooperation, while cooperation based on MoUs do not entail any such requests.

11 Art. 1 of the Regulation, *op. cit.* (n. 2).

12 Art. 4, 5 and 8 of the Regulation.

13 Art. 7 para. 8 of the Regulation.

14 Definitions of operational functions of Eurojust – Art. 4 of the Regulation; definitions of powers of national members – Art. 8 of the Regulation.

15 National members do have some powers regarding the ordering and execution of investigative measures in addition to certain powers in urgent matters (Art. 8 of the Regulation), and the ability of Eurojust to act on its own initiative is expanded (Art. 2 para. 3 of the Regulation), but this is less relevant for the purpose of this article.

16 Similar support could also be provided by the European Judicial Network, but it differs from Eurojust's support, which is institutionalized, structured, and therefore more feasible, particularly in cases of complex crime.

17 In 2018, representatives of third countries attended 86 coordination meetings out of a total of 359 coordination meetings organised by Eurojust that year.

18 In practice, due to data-protection requirements, representatives of countries that have concluded Cooperation Agreements with Eurojust will be best suited to participate.

19 The model agreement and the JITs Practical Guide are available in all official EU languages at: <http://www.eurojust.europa.eu/doclibrary/JITs/joint-investigation-teams/Pages/jits-framework.aspx>.

20 A total of 200 JITs in 2017 and a total of 227 JITs in 2018 were supported by Eurojust.

21 For instance, the *Pollino* case: <http://www.eurojust.europa.eu/doclibrary/corporate/Infographics/Coordinated%20crackdown%20>

[on%20Ndrangheta%20mafia%20in%20Europe,%205%20December%202018/2018-12-05_Infographic-Crackdown-on-Ndrangheta.pdf](http://www.eurojust.europa.eu/doclibrary/corporate/Infographics/Operation%20Santa%20Lucia,%202017/2017-Operation-SantaLucia.pdf) and the *Santa Lucia* case: <http://www.eurojust.europa.eu/doclibrary/corporate/Infographics/Operation%20Santa%20Lucia,%202017/2017-Operation-SantaLucia.pdf> Video: <http://www.eurojust.europa.eu/press/Pages/video.aspx>.

22 Eurojust has issued numerous reports and guidelines for practitioners regarding the use of instruments for judicial cooperation (guidelines on jurisdiction, asset recovery, European Investigation Order, to mention but a few). Some of them are particularly related to cooperation with third countries, such as the Guidelines for deciding on competing requests for surrender and extradition (http://www.eurojust.europa.eu/doclibrary/Eurojust-framework/Casework/Guidelines%20for%20deciding%20on%20competing%20requests%20for%20surrender%20and%20extradition%20%28October%202019%29/2019-10_Guidelines-competing-extradition-surrender-EAW_EN.pdf).

23 For instance, lessons learned regarding the use of EAW have been published in the 2018 edition of Eurojust's Overview on Case Law of the Court of Justice of the European Union (CJEU) on the EAW (http://www.eurojust.europa.eu/press/News/News/Pages/2018/2018-11-29_EAW-Case-Law-Report.aspx).

24 Art. 56, para. 2b of the Regulation.

25 Art. 56, para. 2c of the Regulation.

26 Art. 56, para. 2c of the Regulation.

27 See also recital 50 of the Regulation, under which the College should be able to suggest that the Council draw the attention of the Commission to the need for an adequacy decision or for a recommendation for the opening of negotiations on an international agreement pursuant to Art. 218 TFEU.

Rethinking Judicial Cooperation between Africa and Europe

The Nigerian Case

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In 1993, France appointed the first liaison magistrate in Italy to improve judicial cooperation between the two countries. Since then, various European, American, North African, and Middle Eastern countries have created liaison magistrate posts worldwide, but this tradition does not exist in Sub-Saharan Africa. Such deployments could be particularly useful, however, considering the challenges European countries face as regards judicial cooperation with West and Central African countries in the field of transnational organized crime. The United Nations Office on Drugs and Crime has tackled these challenges by supporting the deployment of two Nigerian prosecutors to Italy and Spain since 2018, in order to strengthen judicial cooperation in the field of human trafficking and smuggling of migrants. This innovative approach has contributed to shortening the channels of communication between jurisdictions; to better understanding respective legal, institutional, procedural frameworks as well as the nature and type of criminal networks; and to building trust between prosecutors and law enforcement officers from different countries. Despite the encouraging results of this cooperation, further political support, adequate funding, and collaboration from all stakeholders, as well as strengthening of regional cooperation mechanisms, will be key to achieving sustainable results in the fight against human trafficking and smuggling of migrants in West and Central Africa and Europe.

I. Introduction

The West and Central African region is facing many challenges in conjunction with transnational organized crime,¹ particu-

larly human trafficking and smuggling of migrants, the laundering of the proceeds thereof, and the corruption that enables these phenomena to thrive. While the number of trafficking victims identified in Europe is staggering, the level of success-

ful prosecutions and convictions still remains low in the countries of origin and in the countries of destination.

Judicial cooperation remains challenging, both within the region and with third countries.² In 2016, the International Organization for Migration recorded that 11,009 women and 3040 unaccompanied children from Nigeria arrived in Italy by sea, and it estimated that 80% of them were likely to be victims of trafficking for sexual exploitation.³ For the same year, Eurojust and the National Agency for the Prohibition of Trafficking in Persons of Nigeria (NAPTIP) registered “only” 104 cases and 721 cases of human trafficking, respectively. This is partly due to the fact that a significant gap remains between the policy discourse, the legal framework for international cooperation, and the attitude of judicial, prosecutorial, and law enforcement authorities. Scepticism and distrust are factors inhibiting practitioners from working together across national borders, in particular when cases require cooperation among jurisdictions from different judicial cultures and regions.

In this context, the United Nations Office on Drugs and Crime (UNODC), as the guardian of the United Nations Convention against Transnational Organized Crime (UNTOC) and the Protocols thereto, has recently begun a joint initiative with the Office of the High Commissioner for Human Rights, supporting the deployment of two Nigerian liaison prosecutors to Italy and Spain, with the aim to overcome various challenges related to judicial cooperation in the field of human trafficking and smuggling of migrants.

It has long been established that effective international cooperation mechanisms are key to responding to illicit cross-border movement of people and goods and to the increasing sophistication of criminals’ *modus operandi*.⁴ Recalling the overall objective of the UNTOC, which is to promote international cooperation,⁵ the Conference of the Parties to the UNTOC requested States Parties to “permit direct communication and transmission of requests between central authorities, and encourages them, when appropriate and feasible, to place liaison magistrates or officers in capitals of other States parties.”⁶

Indeed, the deployment of prosecutors to a foreign country to act as liaison magistrates can play a key role in removing various obstacles to judicial cooperation. With their knowledge of the hosting country’s law and procedure, the liaison magistrates can clarify specific points for both the sender and the receiver of mutual legal assistance (MLA) requests, thus fostering cooperation. Moreover, a liaison magistrate will not only be able to guide his colleagues on how to efficiently draft and submit an MLA request but, more importantly, also do the necessary follow-up on the request within the hosting state.⁷ To use the words of former liaison magistrate Mr Bernard Ra-

bate⁸ during a recent meeting organized by UNODC, “liaison magistrates are like electrical plug adaptors, their function is to transmit the legal current from one country to another.”

While the long-term objective of the UNODC Liaison Magistrate Initiative is to involve various African countries, the pilot phase has concerned Nigeria, due to the high number of victims trafficked in Italy and Spain and to the challenges encountered in judicial cooperation between European and Nigerian authorities when launching parallel investigations and prosecutions to ensure the complete dismantling of trafficking networks in both Europe and at the country of origin (II). Eighteen months after the deployment of the first magistrate to Italy, UNODC and relevant stakeholders identified the main results achieved, the lessons learned, and the remaining challenges still to overcome (III). Building on the positive developments and increasing cooperation between both Italy and Spain with Nigeria, this initiative could contribute to further bilateral and multilateral cooperation in the fight against transnational organized crime in Africa and Europe (IV).

II. Challenges in Judicial Cooperation with Nigeria on Transnational Organized Crime

1. The specificities of the Nigerian legal and judicial system

During the pre-deployment assessment missions conducted by UNODC in Italy and Spain, European prosecutors and law enforcement officers reported the lack of effective judicial cooperation between their countries and Nigeria in the field of human trafficking and smuggling of migrants. Among the main challenges identified by EU Member States, there is the struggle to identify the relevant Nigerian counterpart with whom to establish contact as well as the lack of timely response and execution of MLA requests.

Nigeria is among the few federal states in Africa and the only one in the West African region. The Constitution of 1999 established 37 States,⁹ coexisting federal and state jurisdictions as well as Sharia and Customary Courts.¹⁰ Moreover, in Nigeria, various federal law enforcement agencies have jurisdiction over human trafficking and smuggling of migrants, such as NAPTIP, the Nigeria Immigration Service, the Nigeria Police Force, and specific units of the Federal Ministry of Justice. The complexity of internal coordination between these Nigerian agencies can be challenging for European practitioners to understand and can make them shy away from seeking cooperation from their Nigerian counterparts.

The difficulties caused by the differences in legal systems are one of the main reasons for the deployment of European

prosecutors to foreign countries.¹¹ Similarly, considering the differences between the Nigerian and European systems, the deployment of Nigerian prosecutors to Europe can help foster a better understanding of Nigerian laws and procedures.

2. Nigeria, a hotspot of human trafficking and smuggling of migrants in West Africa

If West Africa is facing a multi-dimensional security crisis, the situation in Nigeria is particularly worrying, especially in the field of human trafficking and smuggling of migrants. In 2016 and 2017, Nigerians made up the highest number of smuggled migrants arriving to Italy through the Central Mediterranean Route (i.e., Libya),¹² and in July 2018, the EU estimated that close to one of three migrants in Libya was Nigerian.¹³ It is estimated that approximately 60% of these migrants come from Edo State in South Western Nigeria,¹⁴ an area known to be particularly affected by human trafficking. Between 2014 and 2017, NAPTIP detected 3842 victims of human trafficking in the country (including 3453 Nigerians), with Nigeria presenting by far the highest number of trafficked victims in the sub-region.¹⁵

The scale of the phenomenon requires an understanding of not only the legal issues related to the crime but also the influence of traditional religious contexts and institutions on the trafficking process, in particular in Edo State. For example, victims of trafficking are very often bound to their traffickers by an oath by which they swear to pay back the money that traffickers gave them to go to Europe – money hundreds of Nigerian women pay back by being forced into prostitution in European countries. It has been well documented that traffickers use very popular and respected deities, such as *Ayelala*, which makes it particularly difficult for victims to break the oath taken, because they are afraid they will be punished and/or stigmatized by their families or communities. Criminals themselves respect and fear deities.¹⁶ Without understanding the impact that these kinds of practices can have on victims of trafficking, it is difficult to assist, protect, and get a victim to cooperate with criminal justice officials in EU countries. In addition to their legal knowledge and expertise, Nigerian liaison magistrates can provide this useful contextual and socio-cultural information.

III. The Liaison Magistrates – An Innovative Approach towards Strengthening Judicial Cooperation

1. The context and objective of deployment

Considering the high number of Nigerians smuggled to Italy¹⁷ and the involvement of Nigerian criminal networks, establishing bilateral cooperation with Nigerian counterparts has been a

priority for the Prosecutor's Offices in Palermo and Catania. In response to the need expressed by the Italian authorities, a first Nigerian liaison prosecutor was deployed to Italy in February 2018 to work with prosecutors' offices in Sicily in order to facilitate the treatment of cases involving Nigerians or Nigerian criminal organizations. In June 2019, the Nigerian liaison prosecutor was transferred to Rome, to the Antimafia National Directorate (DNA), which has specific coordination functions in the investigation of transnational organized crimes nationwide. Spain is facing similar challenges;¹⁸ in March 2019, UNODC supported the deployment of another Nigerian prosecutor to Madrid, building on the Italian experience and as requested by Spanish authorities.

The deployed prosecutors act as liaison magistrates in Italy and Spain for the Central Authority of Nigeria, facilitating MLA requests between these countries. More specifically, the role of liaison magistrates is to:

- Facilitate communication between national central authorities;
- Provide relevant information on criminal networks in Nigeria;
- Transfer files on organized crime cases between countries;
- Follow up on MLA requests; and
- Provide legal and practical advice on legal and procedural requirements.

2. Successes of the liaison magistrates' scheme

Since the deployments in Italy and Spain, the Nigerian liaison magistrates have been working closely with Italian and Spanish prosecutors on cases involving Nigerian criminal networks and/or Nigerian victims. This cooperation has already shown some encouraging results in shortening the channels of communication, in improving the understanding of respective legal, institutional, procedural frameworks as well as the nature and type of criminal networks, and in building trust between prosecutors and law enforcement officers from different countries.

Thanks to their deployment, there is now a channel of communication between actors in the penal chain that was previously completely missing. Italian and Spanish prosecutors now have direct contact to identified focal points in relevant Nigerian law enforcement agencies, facilitating the exchange of information, e.g., on national legislation.

The establishment of liaison magistrates reactivated, and in some cases launched, judicial cooperation between Nigeria and Italy and Spain mostly on human trafficking cases. Currently, around 35 cases are ongoing, and concrete examples related to the translation of documents or receivable testimonies

before Nigerian courts illustrate the crucial role that liaison magistrates can play in making international judicial cooperation effective.

In one specific case, Italian authorities shared information with Nigerian counterparts in order to prosecute an alleged trafficker before Nigerian Courts. However, the original statement from the victim – requested under Nigerian law – was missing. The Nigerian liaison magistrate played a key role in transmitting the Nigerian central authority's request to the Italian counterparts and being in charge of transmitting the statement to Nigerian authorities.

IV. Strengthening South-South and South-North Judicial Cooperation

1. The increasing interest of African countries in deploying liaison magistrates

The UNODC Liaison Magistrate Initiative is particularly innovative in the sense that, for the first time, prosecutors from Sub-Sahara African countries are being deployed to European countries as liaison magistrates, building on a two-way exchange principle. Building on the results observed in the Nigerian context, Italy decided to replicate the experience in Eastern Africa, recently hosting two additional prosecutors from Eritrea and Ethiopia. These deployments, as well as the interest shown by several countries from West and Central Africa (e.g., Niger and Mali), confirm the relevance of such initiatives for smuggled migrants and victims of trafficking, both for countries of origin and for countries of destination. This is further confirmed by the Partnership Declaration signed in 2018 between several West African countries and the Italian government, which amongst other issues also refers to the deployment of prosecutors from the West African region to Italy.¹⁹ Also, in June 2019, African members of the International Association of Women Judges who gathered in Côte d'Ivoire stressed the importance of judicial cooperation in Africa and discussed the possibility of creating an African agency of liaison magistrates.²⁰

The Liaison Magistrate Initiative is an important tool by which to overcome some of the challenges to effective international judicial cooperation, through both formal and informal channels. Above and beyond the specific requests sent through the liaison magistrates, the initiative could potentially encourage the opening of new investigations and cases in origin countries, upon transmission of relevant information from the host country. In this sense, the information transmitted could become *notitia criminis* and trigger parallel investigations in the receiving state (i.e., a notice conveying that a crime is alleged to have occurred). This innovative element could open the

door to effective international cooperation in criminal matters and deserves to be further explored.

2. Integrating the Liaison Magistrate Initiative into regional cooperation mechanisms

Given the fact that transnational organized crimes often affect more than two countries, the work of the liaison magistrates should also be further supported by existing regional cooperation mechanisms, such as the West African Network of Central Authorities and Prosecutors (WACAP) or Eurojust. The WACAP network was established in 2013 to tackle challenges identified in judicial cooperation in West Africa, such as the lack of an office serving as a central authority on international cooperation in criminal matters, the lack of knowledge about other countries' legal systems and the legal requirements of other countries for MLA and extradition, the lack of knowledge on how to draft an effective MLA request, and direct cooperation.

At the interregional level, while the first two Nigerian liaison magistrates are deployed in Italy and Spain, other EU Member States have approached them on specific cases, through their magistrates and diplomatic channels in Rome and Madrid. This highlights the expansion potential of the initiative within the EU and the important role Eurojust could play, as the EU agency in charge of judicial cooperation between Member States, when more than two EU countries are affected by a crime. In fact, the role of Eurojust was already highlighted in a specific case prosecuted in Spain. As this case involves over twenty alleged traffickers in various European countries, Eurojust is playing an active role in coordinating judicial cooperation, in close collaboration with the Nigerian prosecutor deployed in Madrid.

V. Conclusions

In line with the UNTOC and the Protocols thereto, the deployment of Nigerian liaison magistrates in Italy and Spain illustrates how African and European countries can benefit from a two-way exchange in judicial cooperation. Smuggling of migrants, human trafficking, and other transnational organized crimes are complex, constantly evolving, and they impact numerous countries from both sides of the Mediterranean Sea. Cooperation between judges, prosecutors, and law enforcement officers in origin, transit, and destination countries is crucial to conducting successful investigations, bringing the perpetrators to justice, effectively supporting the victims, and confiscating the proceeds and assets generated from these criminal activities.

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* The views expressed herein are those of the author(s) and do not necessarily reflect the views of the United Nations.

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Judicial Cooperation Between the EPPO and Third Countries

Chances and Challenges

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The article deals with the European Public Prosecutor's Office's (EPPO's) specific role in the fight against EU fraud in relation to third countries, i.e., countries outside the EU. It contains an overview of the various legal avenues in the EPPO Regulation that the EPPO may explore for engaging in judicial cooperation with such third countries. It then describes the legal parameters that will mostly affect the application of these various modalities in practice. In its conclusion, the article assumes that it may well prove to be rather challenging for the EPPO to develop its external role and that it is likely to have to deal with a patchwork of forms of judicial cooperation as a result, as this will depend on factors like the nature of the case and the third country involved. Equally, once the EPPO is up and running and in a position to start defining its external policy priorities it will need to identify the third countries most relevant to its operational activities, assess the possibilities for judicial cooperation with them and, if need be, propose solutions to Member States or the Commission, as the case may be, in order to address any legal voids encountered in the process.

I. Introduction

The protection of the financial interests of the European Union (EU) encompasses a significant external dimension in the sense that money originating from the EU's financial instruments is not just spent within the territory of its Member States or perhaps their overseas territories but equally in countries outside the EU (third countries).¹ As a consequence, investigations concerning fraud, corruption, and any other illegal activity affecting the financial interests of the Union (EU fraud) should not stop at its external borders. In fact, even PIF offences committed within the EU itself may bring the need to undertake investigatory acts outside the EU. This external dimension of the fight against EU fraud will equally affect the European Public Prosecutor's Office (EPPO). This new EU body was set up by Council Regulation 2017/1939 of 12 October 2017.² The Regulation entered into force on 20 November 2017. So far, 22 Member States have chosen to participate in the project.³ The EPPO is expected to be up and running by the end of 2020.

Forms of EU fraud that have a link to third countries are plentiful. The 2018 OLAF report is a case in point.⁴ Of 84 investigations concluded in 2018, no less than 37 concerned a country outside the Union.⁵ In addition, as regards ongoing investigations at the end of 2018, divided by sector, there were 44 ongoing investigations in relation to external aid and 43 customs and trade cases out of a total of 414.⁶ Furthermore, Eurojust, the Union's Agency for Criminal Justice Cooperation, has also dealt with a number of cases of value added tax (VAT) fraud involving third countries.⁷

It goes without saying that effective cooperation with third countries will thus be essential in order for the EPPO to achieve concrete results in cases related to such countries whenever it performs its tasks under Art. 4 of the EPPO Regulation.

II. The EPPO's Extraterritorial Competence and Its Framework for Judicial Cooperation

So, has the EPPO been legally equipped to investigate and, if need be, prosecute fraud cases having a link to third countries? Art. 23 of the Regulation (Territorial and personal competence of the EPPO) offers a positive reply to this question. It defines the extent of the EPPO's extraterritorial jurisdiction, be it only in relation to its mandate regarding PIF offences as defined in Arts 22 and 25 of the Regulation. The EPPO can evidently exercise its competence if these offences were committed in the territory of one or several Member States⁸ but also with respect to offences committed:

- By a national of a Member State, provided that the Mem-

ber State has jurisdiction for such offences when committed outside its territory;⁹

- Outside the territories [of one or several of the Member States] by a person who was subject to the Staff Regulations or to the Conditions of Employment at the time of the offence, provided that a Member State has jurisdiction for such offences when committed outside its territory.¹⁰

In other words, the EPPO has competence in this situation in relation to EU nationals and EU officials. In order to be able to effectively exercise that competence in relation to third countries, the EPPO will need to resort to the use of mutual legal assistance (MLA). Some examples of international agreements on MLA (MLATs) that might prove relevant to the EPPO for this purpose are (in no particular order):

- The 1959 Council of Europe (CoE) Convention on Mutual Assistance in Criminal Matters and its second Additional Protocol of 2001;¹¹
- The United Nations (UN) Convention against Corruption of 2003 (UNCAC);¹²
- The UN Convention against Transnational Organized Crime of 2000 (UNTOC);¹³
- The 2000 EU MLA Convention¹⁴ and its Protocol of 2001,¹⁵ some provisions of which may be applied to Iceland and Norway.¹⁶

1. The road from the 2013 European Commission Proposal to Regulation 2017/1939

This section describes which provisions Regulation 2017/1939 contains on judicial cooperation between the EPPO and third countries and how they came about. When the European Commission (the Commission) published its original proposal for a Council Regulation on the establishment of the EPPO on 17 July 2013,¹⁷ that proposal contained provisions on cooperation between the EPPO and Eurojust, Europol, and third countries.¹⁸ Art. 59 of the proposal (Relations with third countries and international organisations) reads as follows:

"[...] 3. In accordance with Article 218 TFEU, the European Commission may submit to the Council proposals for the negotiation of agreements with one or more third countries regarding the cooperation between the [EPPO] and the competent authorities of these third countries with regard to [MLA/extradition] in cases falling under the competence of the [EPPO].

4. Concerning the criminal offences within its material competence, the Member States shall either recognise the [EPPO] as a competent authority for the purpose of the implementation of their international agreements on [MLA/extradition], or, where necessary, alter those international agreements to ensure that the [EPPO] can exercise its functions on the basis of such agreements when it assumes its tasks in accordance with Article 75(2)."

In hindsight, the intriguing assumption in paragraph 4 of this Article seems to have been that unilateral notifications by

Member States would always trigger a positive reaction from third states. However, looking at the most relevant rule of general international law laid down in Art. 34 of the Vienna Convention on the law of treaties of 23 May 1969,¹⁹ one might be forgiven for thinking that such a third state would actually need to agree to cooperate with the EPPO one way or the other. Against this backdrop, it is not surprising to note that Regulation 2017/1939 now contains a number of provisions on judicial cooperation between the EPPO and third countries that are fully compatible with public international law.

Chapter X of the Regulation (Provisions on the relations of the EPPO with its partners) contains a number of relevant provisions, of both a more general and a specific nature. As a starting point, Art. 99 (Common provisions) sets out the basic principle in paragraph 1 that the EPPO may establish and maintain cooperative relations with its partners, insofar as is necessary for the performance of its tasks. These main partners are the institutions, bodies, offices or agencies of the Union, non-participating Member States (NPMS), the authorities of third countries, and international organisations. Insofar as relevant to the performance of its tasks, paragraph 2 of Art. 99 states that the EPPO may, in accordance with Art. 111, directly exchange all information with the entities referred to in paragraph 1 of this Article, unless otherwise provided for in the Regulation. Lastly, for the purposes set out in paragraphs 1 and 2, paragraph 3 of the same Article allows the EPPO to conclude working arrangements with the entities referred to in paragraph 1. These working arrangements are to be of a technical and/or operational nature and must aim, in particular, at facilitating cooperation and the exchange of information between the parties thereto. The working arrangements may neither form the basis for allowing the exchange of personal data nor have legally binding effects on the Union or its Member States. The next section will explain and analyse the central provision on judicial cooperation with third countries, i.e., Art. 104 of the Regulation, in greater detail.

2. Cooperation with third countries under Article 104 of Regulation 2019/1939

Art. 104 (Relations with third countries and international organisations) starts by specifying that the working arrangements referred to in Art. 99(3) with the authorities of third countries may in particular concern the exchange of strategic information and the secondment of liaison officers to the EPPO.²⁰ The EPPO may designate, in agreement with the competent authorities concerned, contact points in third countries in order to facilitate cooperation in line with its operational needs.²¹ Before describing the three main possibilities for judicial cooperation between the EPPO and third countries – which may

be briefly summarised as conclusion of/accession to an international agreement, succession of national judicial authorities, and applying the ‘double hat’ by a European delegated prosecutor (EDP) –, it is important to note recital 109 of the Regulation, which reads as follows:

“Pending the conclusion of new international agreements by the Union or the accession by the Union to multilateral agreements already concluded by the Member States on [MLA], the Member States should facilitate the exercise by the EPPO of its functions pursuant to the principle of sincere cooperation enshrined in Article 4(3) TEU. If permitted under a relevant multilateral agreement and subject to the third country’s acceptance, the Member States should recognise and, where applicable, notify the EPPO as a competent authority for the purpose of the implementation of those multilateral agreements (...).”

From this recital, an obligation on (participating) Member States appears to follow, pending action undertaken by the Union and based on Art. 4(3) TEU, to actively promote the conditions for the EPPO to enable it to fulfil a certain role in the field of judicial cooperation. A closer look at recital 109 also reveals an order or – as some might put it – a hierarchy among the three possibilities. Moreover, the recital reflects the pragmatic notion that, if the first possibility mentioned fails to materialize, one or more alternative options will need to be explored.

The first possibility in Art. 104 is based on the **principle of conclusion of or accession to** international agreements by the Union. Art. 104(3) states that international agreements with one or more third countries concluded by the Union or to which the Union has acceded in accordance with Art. 218 TFEU in areas that fall under the EPPO’s competence, such as international agreements concerning cooperation in criminal matters between the EPPO and those third countries, shall be binding on the EPPO. In other words, there is no obligation on the Union to conclude new agreements or to accede to any existing ones. Nevertheless, the EPPO should be able to suggest that the Council draw the Commission’s attention to the need for an adequacy decision or for a recommendation on the opening of negotiations over an international agreement if the College identifies an operational need for cooperation with a third country.²² The only aforementioned conventions to which the Union is a party at the moment are UNTOC, which it approved on 21 May 2004, and UNCAC, which it approved on 12 November 2008.²³ At present, and in addition to the Agreement with Norway and Iceland mentioned above,²⁴ the EU also has two bilateral agreements on MLA of its own, one with the United States²⁵ and the other with Japan.²⁶ The EU-Japan agreement is self-standing; the agreement with the United States is complementary to bilateral agreements between the Member States and the United States.

The second possibility in Art. 104 is based on what one might refer to as the *succession principle*, according to which the

EPPO is considered the competent (judicial) authority that will replace the national judicial authorities competent for PIF crimes within the EPPO's competence. Unlike the previous principle, the focus here is on the Member States. In line with this second principle, the Regulation states the following in Art. 104(4):

"In the absence of an agreement pursuant to paragraph 3, the Member States shall, if permitted under the relevant multilateral international agreement and subject to the third country's acceptance, recognise and, where applicable, notify the EPPO as a competent authority for the purpose of the implementation of multilateral international agreements on [MLA] concluded by them, including, where necessary and possible, by way of an amendment to those agreements."

The essence of this provision is that Member States have an obligation to recognise and, if possible, notify the authorities of a third state that the EPPO is a "competent authority" for the purpose of the implementation of a multilateral MLAT concluded between them. According to recital 109, "this may entail, in certain cases, an amendment to those agreements" but it immediately acknowledges [that] "the renegotiation of such agreements should not be regarded as a mandatory step, since it may not always be possible." Indeed, this adds a touch of realism to the text. The assumption is that the actual purpose of the notification is limited to officially confirming that the EPPO has been recognised by the Member State concerned as competent for PIF crimes and competent to issue MLA requests; it does not imply something more far-reaching like allowing the new body to have direct contact with judicial authorities in third countries, unless explicitly foreseen in that agreement. In addition, Member States may also notify the EPPO as a competent authority for the purpose of the implementation of other MLATs concluded by them, in particular bilateral ones, including, by way of an amendment to those agreements.

The third and final possibility in Art. 104 is based on the so-called *double hat principle*, which is inspired by the role of the EDP described in Art. 13(1) of the Regulation. Recital 109 explains the *rationale* behind this principle as follows:

"Where the notification of the EPPO as a competent authority for the purposes of multilateral agreements already concluded by the Member States with third countries is not possible or is not accepted by the third countries and pending the Union accession to such international agreements, [EDPs] may use their status as national prosecutor toward such third countries."

The Regulation accordingly states in Art. 104(5) that:

"In the absence of an agreement pursuant to paragraph 3 or a recognition pursuant to paragraph 4 of this Article, the handling [EDP], in accordance with Article 13(1), may have recourse to the powers of a national prosecutor of his/her Member State to request [MLA] from authorities of third countries, on the basis of international agreements concluded by that Member State or applicable national law and, where required, through the competent national authori-

ties. In that case, the [EDP] shall inform and where appropriate shall endeavour to obtain consent from the authorities of third countries that the evidence collected on that basis will be used by the EPPO for the purposes of this Regulation. In any case, the third country shall be duly informed that the final recipient of the reply to the request is the EPPO."

In other words, if it were to prove impossible for the EPPO to rely on an international agreement to which the Union is a party or on an agreement to which a Member State is a party, the handling EDP is allowed to resort to whichever legal possibilities he might use in his capacity as a national prosecutor for the purpose of MLA under national or international law. However, this should be seen as an ad hoc solution that can only be applied under the strict condition that the other two possibilities are unavailable, that the EDP acts in full transparency towards both the suspect and the authorities in the third country and, last but not least, that the latter obviously agree to the use of the "double hat".

Now, what if all three possibilities described above fail? The second paragraph of Art. 104(5) of the Regulation contains a safety net in the form of relying on reciprocity or international comity,²⁷ based on the notions of courtesy and mutual recognition in international relations. It states:

"Where the EPPO cannot exercise its functions on the basis of a relevant international agreement as referred to in paragraph 3 or 4, the EPPO may also request [MLA] from authorities of third countries in a particular case and within the limits of its material competence. The EPPO shall comply with the conditions which may be set by those authorities concerning the use of the information that they provided on that basis."

This safety net may be used by the EPPO in individual cases, ad hoc, and subject to any conditions the authorities in the third country might stipulate.

Referring to recital 109 yet again, this should, however be carried out on a case-by-case basis, within the limits of the material competence of the EPPO and subject to possible conditions set by the authorities of the third countries, all of which is self-evident.

As regards the scope and content of Art. 104, two remarks are warranted. The first one concerns the possibility for the EPPO to provide information or evidence, upon request, to the competent authorities of third countries, for the purpose of investigations or use as evidence in criminal investigations. It is important to understand that this possibility only covers information or evidence in the EPPO's possession.²⁸ The implication of this limitation is that judicial authorities in third countries, who are seeking to find other evidence than the EPPO itself has, will need to contact the competent national authorities. The second remark is that Art. 104 does not cover extradition.²⁹ This matter has wisely been left to the Member States, this being a sensitive area where national authorities

tend to prefer to be in charge of the decision-making themselves, given the implications on their bilateral relations with third countries. Very often they are also legally barred from extraditing their own citizens anyway. The handling EDP may therefore request the competent authority of his/her Member State to issue an extradition request in accordance with applicable treaties and/or national law.

The following section of this article will deal with a number of legal issues concerning the modalities for judicial cooperation in Art. 104 in light of, *inter alia*, applicable public international law and its relation to European and national law and, moreover, various other factors that are likely to be crucial for their practical application.

III. Legal Issues Related to Article 104 of the EPPO Regulation

The first observation is that, whichever legal avenue the EPPO would like to embark on, the bottom line is that it will ultimately be dependent on the consent of the authorities of the third countries involved. This clearly follows from the maxim *pacta tertiis nec nocent nec prosunt* embodied in Art. 34 of the Vienna Convention mentioned in section II.1 above. The notion of acceding to or amending an existing treaty to allow for a role for the EPPO will be a daunting task, particularly in the case of a multilateral treaty. The question is which treaties would lend themselves to incorporating the EPPO with its current narrow mandate or, conversely, how to prevent it from going down the road of “mission creep” if the treaty has a much wider scope than only for PIF crimes.

A new treaty between the EU and a third country on the basis of Art. 218 TFEU may be a more attractive and feasible option, but the first issue to be solved before adopting the negotiating mandate for the Commission is what precise role for the EPPO such a new Treaty should actually allow for (competent judicial authority or even Central Authority, see below) and which forms of MLA it should cover. A second but nonetheless important procedural point is how best to take account of the fact that not all Member States of the Union are participating in the EPPO. At first glance, it would appear that, if a new treaty between the EU and a third country is concluded on the basis of Art. 218 TFEU in combination with Art. 86 TFEU, a Council decision approving the conclusion of such a treaty will have to be adopted unanimously by the participating Member States after consent by the European Parliament. Therefore, the NPMS would not need to agree to such a treaty in the Council. However, if it is a multilateral international treaty to which NPMS are also parties, they will have to agree to the amendment.

The idea of a notification to the depositary of a multilateral treaty or the other party to a bilateral agreement to the effect that the EPPO is a competent authority must obviously be possible under an existing international agreement and ideally indicate the purpose thereof. Even if this is the case, the notification may still be met with a certain scepticism in third countries and lead to counter-declarations in order to avoid the EPPO – as an EU body rather than a state – fulfilling such a role. Third states may simply refuse to cooperate. It is impossible to predict how third countries will react to such notifications. On this point, too, what use would a notification by a single EU Member State or only a handful of Member States be? It would probably lead to confusion in the outside world if this were not done in a coordinated way. If the case should ever arise, the most practical way to resolve it would seem to be that the EU and the 22 Member States announce the notification of the multilateral agreements affected *en bloc* at the Conference of States Parties. Many questions therefore remain unanswered. To end on a positive note, however, at least one third country – Switzerland – is actually preparing itself to deal with the EPPO in the future.³⁰

The second observation is that, traditionally, judicial cooperation has mostly been a matter between states, which the EPPO is not. For the purpose of judicial cooperation, most states have designated a Central Authority with the power to receive and execute MLA requests or transmit them to the competent domestic authorities for execution. The judicial authorities of the requesting state can communicate with the Central Authority directly. Sometimes, though, national law allows for direct transmission. To illustrate: Art. 4 of the Second Additional Protocol to the 1959 CoE Convention amends Art. 15 of the Convention in order to allow for direct transmission of requests in most instances.³¹

As mentioned above, the EU currently has two bilateral MLATs, one with the United States and one with Japan. These too follow the concept of a Central Authority.³² The EU is a party to UNCAC but, for obvious reasons, has not issued a notification in accordance with Art. 46(13) UNCAC designating a Central Authority it does not have.³³ The same logic applies to UNTOC.³⁴ Even if the Member States involved were to accept a role for the EPPO as a Central Authority in relation to certain criminal offences, which is anything but certain, it is not self-evident that the EU may now designate the EPPO without any boundaries after all, given the specific mandate of the EPPO versus the different scopes of UNTOC and UNCAC.³⁵ Finally, Central Authorities tend to be Ministries of Justice or offices of the Prosecutor General. This adds another complicating element in the sense that the EPPO’s strict independence on paper³⁶ will, in practice, depend on the cooperation of an external, sometimes more political actor, who may

claim a functional role in overseeing the execution of MLA requests, for instance. It would definitely be premature to conclude that the practical effect will *ipso facto* be to the detriment of the EPPO's independence, but it is safe to say that it may well have some impact on its functioning. This side note has even more relevance, if unexpectedly so, in light of recent decisions by the European Court of Justice concerning the issuing of European Arrest Warrants by public prosecutor's offices in Lithuania and Germany, which have shed light on the notion of "independence."³⁷

The third observation may not be quite as potentially problematic as the previous two but has to be mentioned all the same. For the purpose of exercising any role in relation to judicial cooperation with third countries, the EPPO will have to rely on, and in fact will be bound by, the applicable national legislation and procedures as well as the international legal framework within which the Member State concerned and the handling EDP operate. This ground rule follows from Art. 5(3) of the Regulation:

"The investigations and prosecutions on behalf of the EPPO shall be governed by this Regulation. National law shall apply to the extent that a matter is not regulated by this Regulation."

And not only that, the EPPO Regulation itself contains an elaborate set of provisions on the exchange of personal data with third countries.³⁸ Art. 80 stipulates that the EPPO "may transfer operational personal data to a third country [...], subject to compliance with the other provisions of this Regulation, in particular Art. 53, only where the conditions laid down in the Articles 80 to 83 are met." In other words, on top of applicable national legislation, the EPPO will also be bound by strict rules on the exchange of personal data with third countries as laid down in the Regulation.

The fourth observation is about the use of the "double hat" principle, in combination with the concept that the EPPO is somehow considered a "legal successor" to the national judicial authorities competent for PIF crimes. Here, one has to bear in mind that the EPPO no longer has exclusive competence for PIF crimes, as was envisaged in the original Commission proposal.³⁹ By contrast, the EPPO shares its competence concerning PIF crimes with national authorities. The implication of this construct is that the EPPO may only be viewed to be acting as a "legal successor" in the sense mentioned earlier, to the extent that it has actually and effectively exercised its competence for PIF crimes in a given case, thus taking priority over a competent national authority. It may not necessarily always be evident that it is competent, particularly in the early stages of an investigation. This may also turn out to be very confusing for the authorities in third countries, who are likely to encounter some difficulty in identifying who to contact in the EU in such a situation. That said, even if the third country

were to accept that an EDP may act on behalf of the EPPO in his role as national prosecutor, it will be very interesting to see the trial court's reaction to this. Will the evidence thus gathered be accepted as an integral part of the file or will it instead give rise to the court expressing doubts as to its legitimacy? Only time will tell.

The fifth and final observation worth mentioning here concerns the element of reciprocity when dealing with third countries. Arguably, any legal arrangement for judicial cooperation between the EPPO and a third state will need to be of a reciprocal nature and not just operate to the benefit of the EPPO. However, to whom will the judicial authorities in third states have to turn if they themselves need legal assistance in a PIF case? Most probably to the Central Authority in the Member State involved, unless the EPPO can be contacted directly in the future following a notification to that effect. Even so, will the EPPO automatically become a kind of "one-stop-shop" for all incoming requests for assistance from third states in PIF cases, even if it is not immediately clear whether the EPPO is competent, whether it has exercised its competence, or whether it has instead chosen to let the national authorities deal with the case? The EPPO has a limited, non-exclusive mandate, thus making it impossible to guarantee that it has all the evidence the third country is looking for. Moreover, the EPPO can only provide evidence already in its possession, as was noted in the previous section. It is, therefore, effectively impossible that the EPPO could act as an executing authority for the purpose of gathering evidence other than that which it already has. The practical question to be assessed by a third country will therefore be whether or not the EPPO is a sufficiently interesting or attractive partner to engage with and to invest effort in.

IV. Conclusion

The EPPO will not be operational before the end of 2020. Bearing in mind that the EPPO will have to deal with a rather full agenda in other areas in order to become operational and commence its core business, its external policy is not likely to be a top priority from Day One. That said, the various options for future judicial cooperation between the EPPO and third countries in Art. 104 of Regulation 2017/1939 may be complex and still untested, but, at the same time, they are definitely more in line with public international law and realistic on paper than the relevant provisions in the original Commission proposal were.

The question now is how much help the possibilities in Art. 104 will actually be to the EPPO in practice, as it will surely have to engage in cooperation with third countries in PIF cases sooner rather than later. After all, the EPPO will,

by definition, remain dependent on third states being willing to come to a form of structural or *ad hoc* judicial cooperation. The forms of judicial cooperation more likely to lend themselves to this purpose would seem to be either cooperation on the basis of the comity principle or application of the “double hat” principle by EDPs acting as national prosecutors. Resorting to the latter possibility may, however, raise legitimate questions in courts as to the acceptability of any evidence thus obtained. The avenue to designate the EPPO as a competent (judicial) authority in the context of an existing bilateral or multilateral agreement does not look like a very realistic prospect for the time being. The role foreseen for a Central Authority within the framework of such an agreement may further complicate things, particularly in the context of the possible implications of recent decisions by the European Court of Justice on the European Arrest Warrant with respect to the notion of independent judicial authorities. In the longer term, if “direct transmission” as provided for in Art. 4 of the Second Additional Protocol to the 1959 CoE Convention of 8 November 2001 were to become possible or, alternatively, if a future agreement between the Union and a third country were to allow the EPPO to act as a competent

judicial authority in direct contact with the judicial authorities of a third state, further possibilities might emerge for the EPPO accordingly.

Consequently, the EPPO will most likely have to deal with a patchwork of forms of judicial cooperation with third countries in its early days, this presumably on an *ad hoc* basis, depending on the nature of a particular investigation and the third country involved. This risks rendering the EPPO’s operability cumbersome and less effective in cases that have third country-related aspects at the initial stage of the EPPO’s existence. This would indeed be somewhat unsatisfactory from the perspective of the optimal protection of the Union’s financial interests. Once the EPPO is in a better position to define its external strategy, it will certainly need to identify the third countries most relevant to its operational activities and assess how to enable judicial cooperation with them in a more solid manner. At the same time, it should equally explore solutions to any legal voids encountered in the process. This exercise could very well include appealing to national authorities or, as the case may be, to the Commission, to undertake any appropriate measures required to fill the gaps thus identified.



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* The views expressed in this article are the author’s only and do not as such represent an official statement by the Government of The Netherlands. The article is based on an earlier publication by the same author in the *New Journal of European Criminal Law* 2019, 168 et seq.

1 For a list of 17 spending programmes under (in-)direct management open to third countries, see Council, document 5146/19 of 9 January 2019, annex 5, pp. 9–10, approved by Coreper on 23 January 2019 (see Council document 5418/19 of 18 January 2019).

2 O.J. L 283, 31 October 2017, 1.

3 At present, Denmark, Hungary, Ireland, Poland, Sweden, and the United Kingdom are not participating in the EPPO.

4 The OLAF report 2018 – Nineteenth report of the European Anti-Fraud Office 1 January to 31 December 2018, Luxembourg 2019, <https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2018_en.pdf> accessed 29 October 2019.

5 Figure 4 of the 2018 OLAF report, *op. cit.*, p. 13.

6 Figure 5 of the 2018 OLAF report, *op. cit.*, p. 13.

7 See joint Eurojust-Europol press release of 20 October 2016 “EUR 320 million VAT fraud: key targets arrested,” available at: <<http://www.eurojust.europa.eu/press/PressReleases/Pages/2016/2016-10-20.aspx>>; joint Eurojust-Europol press release of 14 July 2015 “EUR 300 million VAT fraud: key targets arrested,” available at: <<http://www.eurojust.europa.eu/press/PressReleases/Pages/2015/2015-07-14.aspx>>. See also Euro-

just’s April 2016 publication “Operation Vertigo – A closer look,” available at: <<http://eurojust.europa.eu/Practitioners/Documents/2015-Operation-Vertigo-REV.pdf>>- all accessed 29 October 2019.

8 Art. 23(a).

9 Art. 23(b).

10 Art. 23(c).

11 The Convention and its Second Protocol are available at: <<https://rm.coe.int/16800656ce>> and <<https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008155e>>. Note: Art. 27 of the 1959 Convention does not foresee a possibility for the Union to accede to it, as it states: “This Convention shall be open to signature by the members of the Council of Europe”.

12 The Convention is available at: <https://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf>.

13 The Convention is available at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtsg_no=XVIII-12&chapter=18&clang=_en>.

14 O.J., C 197, 12 July 2000, 3.

15 O.J. C 326, 21 November 2001, 2.

16 See the Agreement between the European Union and the Republic of Iceland and the Kingdom of Norway on the application of certain provisions of the Convention of 29 May 2000 on Mutual Assistance in Criminal Matters between the Member States of the European Union and the 2001 Protocol thereto, O.J. L 26, 29 January 2004, 3.

17 COM(2013) 534 final.

18 See Chapter VIII, Section 2 (Relations with partners), Art.s 57 *et seq.*

19 The Article is available at: <<https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>>, p. 341 and reads as follows: “A Treaty does not create either obligations or rights for a third State without its consent.”

20 Art. 104(1).

21 Art. 104(2).

22 Recital 109, first paragraph.

23 For a list of parties to UNTOC, see <<https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>> and to UNCAC, see <<https://www.unodc.org/unodc/en/corruption/ratification-status.htm>>.

24 *Op. cit.* n. 16.

25 Agreement on mutual legal assistance between the European Union and the United States of America of 25 June 2003, *O.J.* L 181, 19 July 2003, 34.

26 Agreement between the EU and Japan on mutual legal assistance in criminal matters of 30 November 2009, *O.J.* L 39, 12 February 2010, 20.

27 According to The Law.com Dictionary, comity is: "Courtesy; complaisance; respect; a willingness to grant a privilege, not as a matter of right, but out of deference and good will."

28 Art. 104(6).

29 Art. 104(7).

30 For more details on the Swiss proposal to allow judicial cooperation with the EPPO, see the bill amending the Federal Act on International Mutual Assistance in Criminal Matters (IMAC) <https://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2019/2019-11-06/entw-f.pdf> [accessed 6 November 2019]. See also the contribution of Maria Ludwiczak Glassey, <https://doi.org/10.30709/eucrim-2019-016>; U.I. Naves, *L'entraide pénale entre le Parquet européen et États* (Maîtrise Université de Genève, 2018, available at: <https://archive-ouverte.unige.ch/unige:114598>) [accessed 29 October 2019]), p. 33.

31 For a list of countries that have ratified the Second Additional Protocol,

see https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/182/signatures?p_auth%4LK3Qvi1C accessed 29 October 2019.

32 See Art. 3 of the EU-US MLA Agreement, *op. cit.* (n. 25) and Art. 4 and Annex 1 thereto of the EU-Japan MLA Agreement, *op. cit.* (n. 26).

33 "The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose *at the time each State Party deposits its instrument of ratification, acceptance or approval or accession to this Convention*" [emphasized by the author]; the assumption here being that the EU could still notify if it wished to do so.

34 See Art. 18(3) UNTOC.

35 See, e.g., Art. 3(1) of the UN Convention against Corruption: "This Convention shall apply, in accordance with its terms, to the prevention, investigation and prosecution of corruption and to the freezing, seizure, confiscation and return of the proceeds of offences established in accordance with this Convention".

36 Art. 6(1).

37 Judgments of 27 May 2019 in Joined Cases C-508/18 *OG* and C-82/19 *PPU PI* and in Case C-509/18 *PF*.

38 Arts 80 to 84.

39 Art. 11(4) of the original Commission proposal, *op. cit.* (n. 17).

La coopération en matière pénale entre le Parquet européen et la Suisse comme État tiers

Futur ou conditionnel ?

Dr Maria Ludwiczak Glassey

Mutual assistance in criminal matters between the European Public Prosecutor's Office (EPPO) and third States, including Switzerland, is a true challenge. The need for cooperation will exist from the very first days of the EPPO's existence, but its implementation is a problematic issue: on the one hand, the possibilities offered by the Regulation establishing the EPPO raise questions as regards their compatibility with public international law and the basic rules governing mutual legal assistance. On the other hand, Swiss mutual assistance law is not, as it stands, adapted to enable Swiss authorities to cooperate with the EPPO.

I. Introduction

Avec l'entrée en fonction prochaine du Parquet européen, un nouvel acteur entrera sur la scène pénale internationale. La mise en place de cet organe de l'UE, né d'une coopération renforcée à laquelle seuls vingt-deux États membres participent, implique incontestablement des défis multiples. L'un d'entre eux est la coopération en matière pénale avec les États tiers.¹ Au vu de l'importance de la place financière suisse et des liens étroits entretenus, la coopération avec la Suisse sera un outil précieux pour le Parquet européen. Mais sera-elle possible ? Cette contribution vise à exposer les quatre différentes options de coopération prévues par le Règlement 2017/1939 mettant en œuvre la coopération renforcée concernant la création du Parquet européen (ci-après : le Rè-

glement), puis à aborder la problématique du point de vue du droit suisse, existant et (peut-être) à venir.

II. Quatre possibilités de coopération future, selon le Règlement

La coopération entre le Parquet européen et les États tiers est régie par l'art. 104 du Règlement. La disposition traite en premier lieu d'arrangements de travail (art. 104 § 1) et de points de contacts (art. 104 § 2) qui peuvent être mis en place pour favoriser les relations entre le Parquet européen et l'État tiers. De nature technique et/ou opérationnelle, ils ne peuvent pas servir de base pour permettre l'échange de données à caractère personnel (art. 99 § 3 du Règlement). Ensuite, la disposition

prévoit (seulement) quatre voies, subsidiaires les unes par rapport aux autres, envisageables pour la coopération en matière pénale : la conclusion d'un accord entre l'UE et l'État tiers (1.), l'extension d'un accord international conclu par les États membres participants au Parquet européen (2.), l'usage de la « casquette nationale » du procureur européen délégué (3.) et la demande de coopération *ad hoc* adressée par le Parquet européen à l'État tiers (4.).

1. Accord international avec l'État tiers (art. 104 § 3)

La première possibilité a trait au fait que l'UE peut conclure avec les États tiers des accords internationaux, bilatéraux ou multilatéraux, concernant la coopération avec le Parquet européen ou adhérer à des accords internationaux conformément à l'art. 218 TFUE. Ces accords seront contraignants à l'égard du Parquet européen. En l'état, pourrait entrer dans cette catégorie l'Accord de coopération entre la Communauté européenne et ses États membres, d'une part, et la Confédération suisse, d'autre part, pour lutter contre la fraude et toute autre activité illégale portant atteinte à leurs intérêts financiers (AAF) de 2004.²

Toutefois, l'AAF n'est pas entré en vigueur parce qu'il n'a pas encore été ratifié par tous les États membres de l'UE (manque la ratification par l'Irlande, État non-participant au Parquet européen) et il est applicable au titre de traité bilatéral uniquement entre les parties qui en ont exprimé la volonté (art. 44 § 3 AAF), ce qui est bien le cas de la Suisse et de l'UE, mais pas celui de tous les vingt-deux États membres participants au Parquet européen : seuls douze d'entre eux ont fait cette déclaration.³ De plus, en matière d'entraide pénale, l'AAF vise à compléter la Convention européenne d'entraide judiciaire du Conseil de l'Europe de 1959 (CEEJ) et la Convention du Conseil de l'Europe relative au blanchiment de 1990 « entre les parties contractantes » (art. 25 § 1 AAF), ce qui n'est pas le cas de l'UE qui n'est pas partie à ces Conventions. Finalement, l'on peut se demander si le champ matériel restreint de l'AAF (art. 2) couvre celui du Règlement (art. 22).

L'UE et la Suisse sont par ailleurs parties à certaines conventions internationales sectorielles, en particulier la Convention des Nations Unies contre la criminalité transnationale organisée de 2000 et la Convention des Nations Unies contre la corruption de 2003, qui contiennent toutes deux des dispositions relatives à la coopération internationale en matière pénale. Deux bémols doivent être soulevés s'agissant de l'application de ces Conventions au Parquet européen : (a) tous les États membres de l'UE ne participent pas à la coopération renforcée mettant en place le Parquet européen et (b) le champ d'application de ces Conventions dépasse la compétence matérielle du Parquet européen.

La conclusion d'accords futurs⁴, voire l'extension de l'AAF, ne semble pas exclue et serait peut-être une voie d'entraide à privilégier entre le Parquet européen et les États tiers.⁵ À ce titre, la Commission européenne préconise de lancer les discussions avec les États membres du Conseil de l'Europe afin de permettre, à terme, au Parquet européen de faire usage de la CEEJ⁶. À ma connaissance, il n'y a pas de travaux en cours d'accord international entre l'UE et la Suisse en particulier.

2. Extension d'un accord international existant (art. 104 § 4)

Le Règlement prévoit également une seconde voie, subsidiaire à la première.⁷ Il donne la possibilité aux États membres participants, si l'accord international multilatéral le permet et sous réserve de l'acceptation de l'État tiers, de reconnaître et, le cas échéant, notifier le Parquet européen comme « autorité compétente aux fins de la mise en œuvre » de l'accord. La reconnaissance peut avoir lieu, « si nécessaire et si possible, au moyen d'une modification de ces accords ». Cette possibilité porte aussi sur les « autres accords internationaux concernant l'entraide judiciaire en matière pénale qu'ils ont conclus », donc vraisemblablement les accords bilatéraux conclus par les États membres participants. Ce faisant, l'art. 104 § 4 fait appel au principe de la coopération loyale consacré à l'art. 4 § 3 TUE.⁸

Or le Parquet européen est un organe de l'UE (art. 3 § 1 du Règlement). Désigner le Parquet européen comme autorité de mise en œuvre au sens de l'art. 104 § 4 revient à désigner l'organe d'un autre sujet du droit international public (*i. e.* l'UE) que celui qui est partie à l'accord international (*i. e.* les États membres). Une reconnaissance unilatérale, sans l'aval de l'État tiers est manifestement exclue. Une reconnaissance consentie – même par tous les États parties à l'accord international – conduit, quant à elle, à deux obstacles : (a) Comment concilier la situation avec le fait que tous les États de l'UE ne participent pas au Parquet européen ? (b) Reconnaître le Parquet européen comme autorité de mise en œuvre revient à coopérer avec le Parquet européen, ce qui revient à son tour à coopérer avec l'UE, donc étendre, *de facto*, l'accord à l'UE. Cette voie est problématique et ne sera vraisemblablement pas utilisée pour mettre en place une coopération avec la Suisse.

3. Usage de la « casquette » nationale du Procureur européen délégué (art. 104 § 5, 1^{re} hypothèse)

La troisième option, subsidiaire aux deux précédentes, vise à permettre au procureur européen délégué chargé de l'affaire de faire usage de ses pouvoirs de procureur national et solliciter l'entraide sur la base des accords conclus par son État ou du

droit national applicable, voire lorsque nécessaire, par l'intermédiaire des autorités nationales compétentes. Le Règlement prévoit que les autorités de l'État tiers doivent être informées que les preuves fournies seront utilisées par le Parquet européen, qui est le destinataire final de l'entraide, et le Procureur européen délégué « s'efforce, le cas échéant, d'obtenir leur accord à cette fin ». Cette même méthode doit être suivie aussi s'agissant de demandes d'extradition (art. 104 § 7 du Règlement).

L'usage de la « casquette » nationale du Procureur européen délégué a le mérite de faire appel à des mécanismes d'entraide régulièrement appliqués entre les États. Néanmoins, il a pour conséquence de répercuter sur le Parquet européen le traitement différencié qui existe entre les États membres de l'UE lorsqu'ils sollicitent la coopération de la Suisse. En effet, même si tous les États membres de l'UE sont parties à la CEEJ, seulement certains ont accepté l'application de l'AAF à titre bilatéral (voir *supra* 1) ; certains sont parties au Deuxième Protocole additionnel à la CEEJ (2^e PA)⁹, permettant notamment une communication directe entre autorités pénales ; certains encore ont conclu avec la Suisse des accords bilatéraux complétant la CEEJ¹⁰. Ainsi, dépendant de savoir quel procureur européen délégué sera chargé de la procédure, la coopération se fondera parfois sur la CEEJ seule (procureur européen délégué espagnol, grec ou luxembourgeois), parfois combinée avec :

- L'AAF (procureur européen délégué finlandais) ;
- L'AAF et le 2^e PA (procureur européen délégué belge, par exemple) ;
- L'AAF appliqué à titre bilatéral, le 2^e PA et un accord bilatéral complétant la CEEJ (procureur européen délégué français ou allemand) ;
- Le 2^e PA, mais non l'AAF (procureur européen délégué lituanien, par exemple) ;
- L'AAF appliqué à titre bilatéral et un accord bilatéral complétant la CEEJ, mais pas le 2^e PA (procureur européen délégué autrichien) ;
- Un accord bilatéral complétant la CEEJ, mais non l'AAF (procureur européen délégué italien).

Du point de vue du juriste suisse, affirmer que la troisième option prévue par le Règlement crée une géométrie variable relève de l'euphémisme. L'on peut même se demander dans quelle mesure la situation ne se prêterait pas à un *forum shopping*, si la « casquette » d'un État membre participant permet d'obtenir davantage et/ou plus facilement que celle d'un autre.

Par ailleurs, cette troisième option pose un problème au regard du principe de la spécialité de l'entraide. Ce principe restreint l'usage que peut faire l'État requérant des pièces qui lui sont transmises. Ainsi, les pièces obtenues de la Suisse ne peuvent être utilisées pour des procédures visant des infractions pour

lesquelles l'entraide aurait été refusée¹¹. L'utilisation par le Parquet européen des pièces transmises à l'État membre participant reviendrait, du point de vue suisse, à une (re)transmission ultérieure à un autre sujet du droit international public, *i.e.*, l'UE, et ne pourrait avoir lieu qu'avec l'accord exprès de la Suisse¹². Or en l'état actuel du droit suisse (*infra* III.), il me paraît douteux qu'un tel accord puisse être donné.

4. Demande d'entraide *ad hoc* (art. 104 § 5, 2^e hypothèse)

La dernière option, décrite par certains comme un *safety net*,¹³ consiste pour le Parquet européen à solliciter directement l'entraide auprès des autorités de l'État tiers dans une affaire particulière en l'absence de tout accord. L'art. 104 § 5 du Règlement prévoit que le Parquet européen devra alors se conformer aux conditions le cas échéant fixées par les autorités requises, s'agissant de l'utilisation qui pourra être faite des informations fournies sur cette base. Cette possibilité de coopération repose sur « la réciprocité ou la courtoisie internationale ».¹⁴

C'est précisément le principe de la réciprocité (*do ut des*) qui pose problème en rapport avec cette quatrième option de l'art. 104. D'après ce principe, la Suisse n'accorde l'entraide que si l'autorité requérante assure qu'elle l'octroiera à son tour dans un cas similaire. La réciprocité couvre non seulement le principe de l'octroi de l'entraide, mais s'étend aussi dans une certaine mesure aux divers actes qui peuvent être sollicités¹⁵. Or l'art. 104 § 5 doit être lu conjointement avec l'art. 104 § 6, qui traite de l'entraide que pourra accorder le Parquet européen aux États tiers et d'après lequel le Parquet européen pourra leur fournir, « aux fins d'enquêtes ou pour servir de preuves dans une enquête pénale, des informations ou des preuves qui sont déjà en sa possession ». Ainsi, seules les informations et preuves « déjà en [l]a possession » du Parquet européen pourront être fournies à l'État tiers, ce alors même que la Suisse pourrait se voir adresser des demandes visant à collecter des informations et pièces, bloquer des fonds, procéder à des auditions etc. S'ensuivent deux questions : (a) Au regard du principe de la bonne foi internationale, le Parquet européen pourra-t-il demander à la Suisse plus que ce que lui-même pourrait fournir ? (b) Serait-il envisageable que l'État membre participant se porte « garant » de la réciprocité lorsque l'entraide est sollicitée par le Parquet européen ? Pour autant que la Suisse adopte une vision souple de la réciprocité¹⁶, la quatrième solution prévue à l'art. 104 § 5 semble être celle, à défaut des trois autres, que le Parquet européen devra emprunter dans ses relations avec la Suisse. La Suisse et le Parquet européen pourront compter sur le soutien d'Eurojust¹⁷ auquel la Suisse participe par le biais d'un accord entré en vigueur en 2011. La transmission des demandes d'entraide pourra par exemple avoir lieu par son intermédiaire (art. 100 § 2 let. b du Règlement).

III. En droit suisse : une possibilité de coopération, au conditionnel

Lorsque le droit suisse interne trouve application (tel est le cas notamment en l'absence de traité international, cf. *supra* II.1.), si l'entraide en matière pénale est sollicitée, deux possibilités se présentent : soit la requête émane d'un État étranger, auquel cas la Loi fédérale sur l'entraide internationale en matière pénale (EIMP) s'applique, soit elle émane d'un Tribunal pénal international, la Loi fédérale relative à la coopération avec les tribunaux internationaux chargés de poursuivre les violations graves du droit international humanitaire s'appliquant alors¹⁸. Or le Parquet européen ne peut être assimilé à un Tribunal pénal international au sens de cette dernière loi, qui concerne uniquement les juridictions compétentes pour les violations graves du droit international et non des infractions dites de droit commun, dont le crime organisé. De plus, le Parquet européen, ni d'ailleurs l'UE, ne peuvent être considérés comme un État, au sens de l'EIMP¹⁹. Il en résulte que, en l'état actuel du droit, la Suisse ne peut pas accorder l'entraide au Parquet européen.

Une modification de l'EIMP est toutefois en cours²⁰. Une consultation des milieux intéressés (cantons, partis politiques, etc.) a pris fin au début de l'année 2019 et un projet devrait être soumis au parlement prochainement. La modification a un champ d'application qui n'est pas limité au Parquet européen. Elle remédiera aux carences actuelles qui ont notamment pour conséquence que l'entraide au Tribunal spécial pour le Liban a dû être refusée par le passé. Elle permettra également de dissiper les doutes quant aux possibilités de coopération avec d'autres juridictions, tel le Mécanisme international, impartial et indépendant chargé d'enquêter sur les violations commises en Syrie, qui n'entre a priori pas non plus dans le champ de l'EIMP dans sa teneur actuelle.

S'agissant du Parquet européen, si le projet est adopté²¹, la modification aura pour conséquence de permettre au Conseil fédéral d'étendre, par voie d'ordonnance, le champ de l'EIMP à des « institutions interétatiques ou supranationales exerçant des fonctions d'autorités pénales » pour autant, entre autres, que « la coopération contribue à la sauvegarde des intérêts de la Suisse » (nouvel art. 1 al. 3^{ter} EIMP²²). Cette dernière condition vise notamment les « objectifs de politique extérieure »²³ tels qu'énoncés à l'art. 54 al. 2 de la Constitution fédérale suisse, dont il ressort, entre autres, que la Confédération suisse « s'attache à préserver l'indépendance et la prospérité » de l'État. D'après les autorités suisses, « [e]n théorie, une coopération future avec le [P]arquet européen serait [...] imaginable dans le cadre de l'art. 1, al. 3^{ter} »²⁴.

IV. Conclusion

Du point de vue suisse, le Parquet européen est un organe judiciaire de poursuite d'une organisation supranationale dont la Suisse n'est pas membre. La coopération avec le Parquet européen relève de la coopération avec l'Union européenne elle-même, quand bien même tous les États membres de l'Union européenne n'y participent pas. Les quatre possibilités offertes par le Règlement prêtent toutes le flanc à des critiques²⁵, même si la formulation de la disposition, arrêtée à un stade avancé des négociations, est sans doute la meilleure possible²⁶. Seule la dernière option prévue par le Règlement semble envisageable, ceci pour autant que le droit suisse de l'entraide soit modifié. Au vu de l'importance des liens tissés entre l'Union européenne et la Suisse, une coopération en matière pénale efficace entre le Parquet européen et la Suisse doit être mise en place : la nécessité de la coopération se comprend ainsi au futur. En revanche, sa faisabilité se pose, en l'état actuel, au conditionnel.



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1 À ce propos en général, voir la contribution de N. Franssen, <https://doi.org/10.30709/eucrim-2019-015>.

2 Sur ces questions, voir S. Gless et T. Wahl, "Die Schweiz und das Europäische Strafrecht", in : Cassani et al., *Chronique de droit pénal suisse dans le domaine international* (2017), (2018) 28 *Swiss Review of International and European Law*, 359, 368–369.

3 L'état des ratifications et déclarations par les États membres de l'UE est consultable sur <<https://www.consilium.europa.eu/fr/documents-publications/treaties-agreements/agreement/?id=2004084>> (consulté le 31 octobre 2019).

4 Considérant 109 du Règlement.

5 Dans ce sens N. Franssen, "The future judicial cooperation between the EPP and third countries", (2019) 10 *New Journal of European Criminal Law*, 168, 180, qui estime toutefois que le travail prendrait des proportions herculéennes, sans garantie de résultat.

6 European Commission services, "Building cooperation in criminal matters with the European Public Prosecutor's Office (EPP)", Non-paper, PC-OC (2019)05 du 20 mai 2019, p. 4.

7 N. Franssen, op. cit. (n. 5), 176.

8 Voir également considérant 109 du Règlement.

9 La Suisse n'est pas partie au premier Protocole additionnel à la CEEJ.

10 C'est le cas des États limitrophes de la Suisse : l'Allemagne, l'Autriche, la France et l'Italie.

11 Voir la réserve de la Suisse concernant l'art. 2 CEEJ.

- 12 M. Ludwiczak Glassey, *Entraide judiciaire internationale en matière pénale*, Précis de droit suisse, 2018, N 711.
- 13 N. Franssen, *op. cit.* (n. 5), 178.
- 14 Considérant 109, *in fine*, du Règlement.
- 15 C. Sager, "Der Gegenrechtsgrundsatz im Rechtshilferecht – ein alter Zopf?", (2014) *Pratique juridique actuelle*, 224, 226–227 ; P. Popp, *Grundzüge der internationalen Rechtshilfe in Strafsachen*, 2001, § 15 N 428.
- 16 Dans ce sens C. Sager, *op. cit.* (n. 15), 231–234.
- 17 Voir considérant 69 du Règlement. Sur la coopération entre le Parquet européen et Eurojust, voir A. Weyembergh et C. Brière, "Relations between the EPPO and Eurojust – Still a Privileged Partnership?", in: W. Geelhoed, L. H. Erkelens et A. W. H. Meij (éds), *Shifting Perspectives on the European Public Prosecutor's Office*, 2018, pp. 171–186 ; C. Deboyser, "European Public Prosecutor's Office and Eurojust: 'Love Match or Arranged Marriage'?", in: L. H. Erkelens, A. W. H. Meij et M. Pawlik (éds), *The European Public Prosecutor's Office. An Extended Arm or a Two-Headed Dragon?*, 2015, p. 79, 90 ss.
- 18 S'agissant de la coopération avec la Cour pénale internationale, la Loi fédérale suisse sur la coopération avec la Cour pénale internationale est applicable, en complément des dispositions pertinentes du Statut de Rome.
- 19 Dans ce sens aussi U. I. Naves, *L'entraide pénale entre le Parquet européen et les États*, Mémoire de Master, Université de Genève, 2018, p. 33.
- 20 Office fédéral suisse de la justice (OFJ), Coopération avec des

- institutions pénales internationales, Communiqué du 28 septembre 2018, <<https://www.ejpd.admin.ch/ejpd/fr/home/aktuell/news/2018/2018-09-28.html>> (consulté le 31 octobre 2019).
- 21 Le texte adopté par le parlement peut être soumis au référendum populaire moyennant que 50'000 citoyens suisses ou huit cantons le demandent dans un délai de 100 jours, art. 141 al. 1 de la Constitution suisse.
- 22 Conseil fédéral suisse, Projet de modification de l'EIMP, <<https://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2019/2019-11-06/entw-f.pdf>> (consulté le 6 novembre 2019).
- 23 OFJ, Modification de l'art. 1 EIMP – combler les lacunes dans le domaine de la coopération avec les institutions pénales internationale. Rapport explicatif relatif à l'avant-projet, 27 août 2018, p. 12, <<https://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2018/2018-09-28/vn-berf.pdf>> (consulté le 31 octobre 2019).
- 24 OFJ, *op. cit.* (n. 23), p. 13. Voir aussi Conseil fédéral suisse, Message concernant la révision de l'art. 1 de la loi sur l'entraide pénale internationale, p. 13 <<https://www.ejpd.admin.ch/dam/data/bj/aktuell/news/2019/2019-11-06/bot-f.pdf>> (consulté le 6 novembre 2019).
- 25 Selon N. Franssen, *op. cit.* (n. 5), 176, le fait de prévoir de multiples options montre un certain réalisme quant à l'impossibilité de mise en œuvre de certaines d'entre elles.
- 26 À ce propos, N. Franssen, *op. cit.* (n. 5), 184.

OLAF Investigations Outside the European Union

Practical and Legal Aspects

Claire Scharf-Kröner and Jennifer Seyderhelm*

The European Anti-Fraud Office (OLAF) is an independent body that fights against illegal activities affecting the Union's financial interests. It carries out investigations of an administrative nature, both within the European Union and beyond its borders. This article outlines the legal framework within which OLAF conducts investigations in non-EU countries on the expenditure side of the EU budget. It describes OLAF's competence to act outside the EU, as defined in the EU's legislative framework and mirrored in international agreements. The discussion includes an analysis of the unique tools OLAF has to act, based on the contractual obligations of the economic operator, elements of which were clarified in two recent judgments of the European General Court. In addition, practical aspects of investigations in non-EU countries are highlighted, focussing in particular on pre-accession and European neighbourhood countries. The article concludes with an outlook on how the OLAF's particular expertise could further enhance protection of the Union's financial interests, in collaboration with the European Public Prosecutor's Office (EPPO).

I. Introduction

OLAF was set up in 1999 by Commission Decision 1999/352/EC¹ to protect the EU's financial interests. OLAF is an EU body mandated to investigate fraud to the detriment of the EU budget, corruption, and serious misconduct within the European institutions, bodies, offices, and agencies.² Moreover, OLAF is in charge of developing an anti-fraud policy for the European Commission.³

OLAF investigates allegations relating both to the entire expenditure side of the EU budget and to part of the revenue side, e.g., customs duties. OLAF also investigates serious misconduct and fraud by EU personnel, including members of institutions, which may not have financial implications but can cause serious damage to the reputation of the EU.

OLAF conducts administrative investigations and it neither has powers of law enforcement nor is it in charge of national

prosecution. OLAF summarises the results of its investigations in so-called Final Reports and, where appropriate, issues financial, judicial, disciplinary and/or administrative recommendations to the competent authorities.

At first sight, one might assume that OLAF's activities are limited to the territory of the EU. However, this would hardly allow for adequate protection of European financial interests. The EU spends substantive amounts of the EU budget outside its territory: the current multiannual financial framework (2014–2020) foresees expenditure of up to €66.3 billion⁴ in “Global Europe,” which covers all external (or foreign policy) actions carried out by the EU, including humanitarian aid and development cooperation. The Commission proposal for the upcoming multiannual financial framework (2021–2027) foresees increasing this budget up to €108 billion⁵ in the sector “Neighbourhood and the World.” In addition, the European Development Fund (EDF), which is not part of the EU budget so far,⁶ is part of the EU's financial interests. From 2014 to 2020, the financial resources of the EDF amounted to €30.5 billion.⁷ Lastly, the European Investment Bank (EIB) has large investments outside the EU.⁸ These expenditures and investments need to be protected against fraud and other illegal activities; an important part of OLAF's work is therefore to investigate related allegations outside the EU.

II. EU Legislation Provides for OLAF's Competence to Act Outside the EU

A first condition for OLAF to investigate allegations of fraud and illegal activities outside the EU is the EU's external competence to protect its financial interests. Pursuant to Art. 310(6) and Art. 325 TFEU, the competence to counter illegal activities affecting the EU's financial interests is *shared between the Member States and the Union*.

Art. 325 TFEU does not contain a specific reference to the responsibilities for external actions in relation to protection of EU financial interests. According to Art. 325(1) TFEU, the measures adopted are intended to “act as a deterrent and be such as to afford effective protection in the Member States, and in all the Union's institutions, bodies, offices and agencies.” The provision contains a clear reference to the *effet utile* of the protection to be afforded and, as confirmed by the Court of Justice of the European Union, a material EU competence may implicitly carry an external aspect.⁹

The European legislator has recognised this external competence in several legislative acts. These provide for OLAF's specific powers to carry out investigative actions in non-EU countries.

Council Regulation No 2185/96¹⁰ concerning on-the-spot checks and inspections carried out by the Commission already clarified in its Art. 1(2), that the Regulation shall apply to “*all* areas of the Communities' activity” [emphasis added]. Yet, Art. 2 seems to limit its scope only to actions within the EU, as it refers to the detection of irregularities that “may involve economic operators acting in several Member States” or to “where [...] the situation in a Member State requires on-the-spot-checks” or even to on-the-spot checks carried out “at the requests of the Member State concerned.” Nonetheless, despite this enumeration limited to situations occurring within the EU, Art. 8(5) of the Regulation clearly refers to the possibility “where on-the-spot checks or inspections are performed outside Community territory,” pointing to the conditions according to which such reports shall be prepared.

Further clarification of the external competence of the EU, and specifically for OLAF to act outside EU territory, is provided by Regulation No 883/2013.¹¹ The Regulation codifies the notion of EU financial interests, as interpreted by the CJEU,¹² in Art. 2(1): it includes *all* revenues and expenditures covered by the EU budget and other budgets administrated or monitored by institutions and bodies. In its 36th recital, the Regulation recognises the necessity for OLAF to be capable to engage in relations with competent authorities of third countries, in particular in the area of external aid.

More specifically, the Regulation clarifies in Art. 3(1) that OLAF is mandated to carry out “on-the-spot checks and inspections [...] in third countries and on the premises of international organisations.” Art. 14(1) formally introduces OLAF's right to conclude administrative arrangements with third countries and international organisations. Such arrangements may concern the exchange of operational, strategic, or technical information.

By carrying out on-the-spot checks in third countries under Art. 3(1) of Regulation No 883/2013, OLAF ultimately exercises “the Commission's powers to carry out external investigations,” as is clarified in Art. 2(1) of Commission Decision 1999/352.¹³ Pursuant to Art. 2(1b) of the Decision, OLAF shall exercise these powers “as they are defined in the provisions established in the framework of the Treaties, and subject to the limits and conditions laid down therein.”

To summarise, Art. 325 TFEU and the above-described Regulations and Decision set out the competence of the EU and task OLAF specifically with countering financial irregularities outside EU territory. However, the above-described set of rules only regulates the distribution of powers and competences *among the different EU actors*: firstly, between the Member States and the EU and, secondly, between the Commission and

OLAF. Additional legal instruments are necessary to provide OLAF with the possibility to carry out investigative activities directly in the territory of a third country.

III. OLAF Investigative Powers in Non-EU Countries

In order to effectively investigate illegal activities or fraud outside the European Union, OLAF is required to carry out investigative activities in third countries. While the EU legislator clearly mandated OLAF to also protect the EU's financial interests beyond EU borders, this as such does not provide OLAF with the power to carry out its tasks vis-à-vis the third country or vis-à-vis the economic operator¹⁴.

As will be detailed below, OLAF relies on **international agreements**, by which the country concerned consents to OLAF's powers being exercised on its territory. In the absence of such an agreement, the third country may provide its consent to OLAF's investigative activities de facto, when the competent authority agrees to OLAF's actions in a specific case.¹⁵

OLAF's cooperation with the third country's national authorities can play an important role, particularly in cases when the economic operator does not cooperate. As they act under their respective national laws, national authorities can use enforcement powers, e.g., request a search warrant, if the relevant conditions are fulfilled.

In order to allow OLAF to carry out its investigative tasks to also protect the external relations aspect of the EU budget effectively, Arts. 129(1), (2) and 220(5c) of the Financial Regulation¹⁶ foresee that any person or entity receiving Union funds must agree to include OLAF's competence to conduct investigations in any financing agreement. Pursuant to Art. 129(2) "[a]ny person or entity receiving Union funds under direct and indirect management shall agree in writing to grant the necessary rights as referred to in paragraph 1 and shall ensure that any third parties involved in the implementation of Union funds grant equivalent rights." The financing agreements concluded with the entity receiving EU funds directly refer to OLAF's competence based on Regulation No. 883/2013 and No. 2185/96 and thus provide OLAF with the possibility to rely on the **contractual obligations** of the economic operator.

1. OLAF rights of investigation as set out in international agreements

When the EU concludes international agreements with third countries, specific clauses are included to carry out technical

and financial review measures, including the collection of documents and data during an on-the-spot check. Different models exist, depending on the country or modality of financing. The EU has concluded Partnership and Cooperation Agreements (PCAs) with some countries, which provide OLAF with the powers to carry out investigative activities in that country.¹⁷ The situation for pre-accession and neighbouring countries is discussed in further detail below.

a) Pre-accession countries

There are currently seven countries (referred to as pre-accession or enlargement countries) that the EU supports, with the aim of eventual EU membership. The Commission concluded a bilateral **Stabilisation and Association Agreement** with each of them, which constitutes the framework of relations between the EU and the country concerned.

The EU supports the "enlargement countries" financially, based on Regulation No 1085/2006,¹⁸ establishing an Instrument for Pre-accession Assistance (IPA Regulation), in line with the general policy framework for accession and taking due account of the Commission's annual enlargement package.¹⁹ For the period 2007–2013 IPA I had a budget of €11.5 billion; its successor IPA II has a budget of €11.7 billion for the period 2014–2020.²⁰

According to Art. 17 of the IPA Regulation, the Commission and the beneficiary countries are to conclude **Framework Agreements** on implementation of the assistance. According to Art. 18, any agreements resulting from the IPA Regulation shall contain provisions ensuring the protection of the Community's financial interests – in particular, with respect to fraud, corruption, and any other irregularities in accordance with the applicable Regulations,²¹ thus explicitly confirming OLAF's right to access information and to conduct on-the-spot checks. In line with this legal obligation, all pre-accession countries concluded a framework agreement²² with the Commission for implementation of Union financial assistance under the IPA.

For instance, pursuant to Art. 50(5) of the Framework Agreement with Montenegro,²³ OLAF may "conduct documentary and on-the-spot checks and inspections in accordance with Regulation (EC, Euratom) No 883/2013 and Regulation (EC, Euratom) No 2185/1996." The agreement also covers subcontracts: according to Art. 50(6) "controls and audits [...] are applicable to all recipients and subcontractors who have received IPA II assistance." Identical provisions are included in the framework agreements of the other pre-accession countries.

For pre-accession countries, the IPA Framework Agreement constitutes the legal basis (in the form of an international

agreement concluded by the Commission with the beneficiary country) by which the IPA countries recognise OLAF's powers as set out in Regulation No 883/2013 and Regulation No 2185/1996. IPA II funded activities can be implemented and managed in different ways²⁴ in accordance with the Financial Regulation. The most common forms are direct management²⁵ (implementation of the budget is carried out directly by the Commission until the relevant national authorities are accredited to manage the funds²⁶) and indirect management²⁷ (budget implementation tasks are delegated to and carried out by entities entrusted by the Commission, notably the national authorities).

Specific projects and activities funded under IPA II are governed by **individual Financing Agreements**, which are concluded under provisions of the general IPA agreement and contain an "OLAF clause." Art. 50(1) of the IPA II Framework Agreement with Montenegro²⁸ specifies the following: "All Financing Agreements as well as all resulting programmes, actions and subsequent contracts shall be subject to supervision, control an audit by the Commission, including the European Anti-Fraud Office (OLAF), and audits by the European Court of Auditors."

b) Neighbourhood countries

The EU Neighbourhood Policy (ENP) extends to the EU's southern and eastern neighbours, aiming at ensuring stabilisation, security, and prosperity of the countries that are geographically close to the EU, notably Algeria, Armenia, Azerbaijan, Egypt, Georgia, Israel, Jordan, Lebanon, Moldova, Morocco, Palestine, Tunisia, Libya, Syria, Belarus, and Ukraine.²⁹

The EU has been successively signing **Association Agreements** with countries under the ENP. Since 2008, OLAF has developed anti-fraud cooperation clauses to be used in agreements like Association Agreements, Partnership and Cooperation Agreements, and other such agreements between the EU, its Member States, and third countries. The clauses have become more sophisticated over time; the more recent³⁰ Association Agreements systematically include specific provisions on OLAF competences, including powers to conduct on-the-spot checks and the possibility to exchange case-related information.

For example, the Association Agreement between the EU and Georgia³¹ codifies as follows in its Art. 398(1): "Within the framework of this Agreement, OLAF shall be authorised to carry out on-the-spot checks and inspections in order to protect the EU's financial interests in accordance with the provisions of Council Regulation (EC, Euratom) No 2185/96 of 11 November 1996 concerning on-the-spot checks and inspec-

tions carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities." When the economic operator does not agree to OLAF conducting on-the-spot checks or inspections, Art. 398(5) of the Association Agreement stipulates that "the Georgian authorities, acting in accordance with national legislation, shall give OLAF such assistance, as it needs to allow it to discharge its duty in carrying out an on-the-spot check or inspection."

Similar provisions have been included in the other, newer Association Agreements. As for the pre-accession countries, the Association Agreements in question refer to the OLAF powers set out in Regulation No 883/2013 and Regulation No 2185/1996.

2. OLAF rights of investigation on a contractual basis

Irrespective of the country in which OLAF conducts its investigative actions, any financing provided by the EU is set out in a specific financing contract that governs the relations between the authority managing EU funds and the beneficiary. According to Art. 129 of the Financial Regulation, any person or entity receiving Union funds is *obliged to cooperate* in protecting the financial interests of the EU and is also required to grant OLAF the necessary rights and accesses required, including the right to carry out investigations and to carry out on-the-spot checks and inspections.

Therefore, any such contract concluded with an entity receiving EU funds within or outside the EU includes an anti-fraud clause, which refers directly to Regulations No 883/2013 and No 2185/96. The contractual obligations to cooperate provide OLAF with an additional, important basis to act vis-à-vis the entities concerned, as will be further analysed in Section IV.4 below.

IV. Practical Aspects of Investigations in Non-EU Countries

If OLAF needs to conduct investigative activities in a third country, it contacts the national authority beforehand, in order to organise and structure the practical on-the-spot work. If possible according to the national laws of the country concerned, OLAF closely cooperates with the competent national investigation service, which may include coordinated investigation activities under the respective legal bases. This avoids unnecessary duplication of investigative steps or one body unintentionally putting at risk the results of another's investigation.

1. Cooperation with pre-accession countries

A specific service for taking up contact with the competent national authority has been established in pre-accession countries. In line with the obligation for EU Member States (Art. 3(4) of Regulation No 883/2013), pre-accession countries need to set up an Anti-Fraud Coordination Service (AFCOS). For instance, the above-mentioned Framework Agreement with Montenegro³² contains in Art. 50(2) the provision that the

“IPA II beneficiary shall designate a service (an Anti-fraud coordination service), to facilitate effective cooperation and exchange of information, including information of an operational nature, with OLAF [...]”

The aim of this provision is to have a national anti-fraud body in the country concerned to support OLAF during its operational measures in the country. Notably, it shall “support cooperation between national administrations, prosecution authorities and OLAF, share information on irregularities and suspect of fraud cases with national administrations and OLAF and ensure the fulfilment of all the obligations under Regulation (EC, Euratom) No 883/2013 of the European Parliament and of the Council, Council Regulation (Euratom, EC) No 2988/1995¹⁹ and Council Regulation (EC, Euratom) No 2185/1996²⁰.” It depends on the national administrative structure of the country as to where it places its AFCOS. It could, for example, be part of the Ministry of Finance, the Ministry of Interior, or the police service.

2. Cooperation with neighbourhood countries

There is no corresponding obligation for neighbourhood countries to set up an AFCOS service. However, where anti-fraud provisions are contained in the Association Agreement, good practice has been established, meaning that the country nominates a contact point to facilitate the cooperation. In countries that do not have a contact point, it can be more challenging and sometimes time-consuming for OLAF to identify the competent authority with whom it can cooperate in the country concerned.

Particularly in cases in which no contact point has been determined, but also more generally, OLAF can conclude Administrative Cooperation Arrangements (ACAs) with any relevant competent national authority (e.g., the police, the Ministry of Finance, or an anti-corruption body) according to Art. 14(1) of Regulation No 883/2013. Even though an ACA is not legally binding, it often helps overcome practical challenges by setting up contact persons and by providing ways of exchanging information and other important modalities of cooperation.³³ Therefore, it can be useful to conclude different ACAs with

different bodies in the same country. An overview of ACAs signed by OLAF is available on OLAF’s website.³⁴

3. Cooperation with international organisations

A significant portion of funding provided by the EU in third countries is channelled to recipients by international organisations (indirect management). The EU has concluded so-called **Framework Agreements** with some major international organisations. For example, the Framework Agreement between the EU and the World Bank Group stipulates the following in its Art. 18(2):³⁵ “In order to protect the EU’s financial interests against fraud, corruption, and any other illegal activities affecting these interests, the following principles shall apply: a) INT [Integrity Vice Presidency of the World Bank group entity] and OLAF shall support one another in operational activities, including investigations and on-the-spot checks; and b) when appropriate, and at the request of either OLAF or INT, they may agree to set up joint or parallel investigations.”

In addition, the investigative cooperation between OLAF and the respective international organisation is set out directly in the **financing contracts**, so-called **contribution agreements**. When the European Commission makes a financial contribution to an operation, programme, or project administered by an international organisation, the respective contribution agreement is complemented with a standardised annex, which refers to OLAF’s competence to investigate. According to Art. 17(2) of the Annex II – General Conditions for Contribution Agreements – “[t]he Organisation agrees that OLAF may carry out investigations, including on-the-spot checks and inspections, in accordance with the provisions laid down by EU law for the protection of the financial interests of the EU against fraud, corruption and any other illegal activity.” A very similar standard clause was contained in the predecessor template (“Pillar Assessed Grant or Delegation Agreement” – PaGoDA), which was applicable until the new Financial Regulation entered into force on 2 August 2018.

Investigations into funds channelled by international organisations may be particularly complex, in particular in cases of “multi-donor” funding, where a number of donors contribute to the same activities. In these cases, it can be challenging to establish the share of EU contribution and to which extent it is affected by the alleged fraud or irregularities. The area of budget support, which is a tool allowing the EU to finance partner countries’ development strategies, can also be challenging to investigate. Budget support involves the direct transfer of EU funds to a partner country’s budget; assessment of the use of the funds and the benchmarks by which to measure potential irregularities are both less clear. OLAF’s longstanding experi-

ence in the field of external aid as well as its established working relationships with its partners also very often enable it to resolve these complex cases.

4. Relations with the economic operator

As discussed in Section III above, OLAF has the competence – according to both Regulation No 883/2013 and Regulation No 2185/96 – to conduct on-the-spot-checks in third countries to investigate allegations of fraud and irregularities affecting the EU budget. This competence is reflected in the international agreements, concluded between the EU and the country in question, vis-à-vis the third country.

The relations between the competent authority managing EU funds (e.g., the European Commission/the EU Delegation in direct management mode or the IPA II beneficiary in indirect management mode) and the economic operator are also *directly regulated* by a specific financing agreement covering the funded programme or activity. Under its contractual obligations, the operator has the obligation to cooperate with OLAF and to provide it with all documents, including digital data.

According to current practice of the Commission, the following clause is usually part of the respective contract: “The European Anti-Fraud Office (OLAF) has the same rights as the Commission, particularly the right of access, for the purpose of checks and investigations. Under Council Regulation (Euratom, EC) No 2185/96 and Regulation (EU, Euratom) No 883/2013 OLAF may also carry out on the spot checks and inspections in accordance with the procedures laid down by Union law for the protection of the financial interests of the Union against fraud and other irregularities.” The contractual obligations of an economic operator based in a third country, and the consequence of potential non-compliance with these contractual obligations, are equivalent to those of an economic operator based within the EU.

If the economic operator refuses to cooperate, the negotiation skills of the investigators are crucial in order to move the case forward. Initial resistance, for instance against providing OLAF with the required project documentation, may be overcome if clear and thorough explanations are provided to the entity concerned about its obligations to cooperate with OLAF in addition to which consequences non-cooperation may have.

Non-compliance with its duty to cooperate may lead to termination of the contract and reimbursement of the EU funds by the economic operator. Based on OLAF’s investigations, the authorising officer can also disclose information to the Early Detection and Exclusion System³⁶ (EDES). The purpose of

EDES is to protect the EU’s financial interests by excluding economic operators from participation in EU budget.³⁷ Criteria that can lead to an exclusion are listed in Art. 136(1) of the Financial Regulation and include fraud, corruption, and bankruptcy. Pursuant to Art. 136(1e)(iii), OLAF’s discovery of “significant deficiencies in complying with main obligations in the implementation of a legal commitment financed by the budget” can lead to exclusion “from participating in award procedures governed by this Regulation or from being selected for implementing Union funds” by the authorising officer. Unreliable entities can be published online on the website of the European Commission.³⁸

The obligations of economic operators vis-à-vis OLAF were recently clarified in important court decisions. In its *Sigma Orionis* judgment,³⁹ the European General Court confirmed that the operator acted in breach of its contractual obligations when it did not cooperate with OLAF; the Court also held that Regulation No 2185/96 did not provide the operator with the right to oppose OLAF’s operations;⁴⁰ hence, it could not claim that it should have been informed by OLAF of such a (non-existing) right to resist.⁴¹ In *Vialto*,⁴² the General Court held that OLAF is allowed to have access to all information and documents pertaining to the scope of its investigations during the on-the-spot-check and to make copies of all documents necessary for it to carry out the control in question⁴³ and for which has a margin of appreciation.⁴⁴ The Court also confirmed that the right to collect documents under Art. 7(1) of Regulation No 2185/96 comprises the carrying out of a forensic acquisition⁴⁵ as well as the operator, having refused to provide OLAF with the requested digital information, had correctly been excluded from the consortium for violation of its contractual duty to cooperate with OLAF.⁴⁶

Invoking the contractual obligation of the operator to cooperate with OLAF is thus, in practice, a very powerful and effective tool for OLAF’s investigations, both within the EU and beyond its borders.

5. Conclusion of OLAF investigations

OLAF summarises its investigation findings in a Final Report,⁴⁷ which can be complemented by judicial financial and administrative recommendations. OLAF forwards the report to the competent national authority of the EU Member States, in accordance with Art. 11 of Regulation No 883/2013.

For non-EU countries, there is no equivalent provision in Regulation No 883/2013. Art. 11 also cannot be used *per analogiam*, since the relations between OLAF and the Member States are governed by different principles than those between

OLAF and third countries or international organisations. Within the EU, the principle of sincere cooperation under Art. 4(3) TEU prevails, while external relations are governed by the principle of reciprocity.

In practical terms, OLAF provides non-EU countries with the results of OLAF's investigation via a so-called Information Note. For instance, if the OLAF investigation reveals evidence of a likely violation of criminal law by a national of the country concerned, OLAF will transmit an Information Note to the national prosecutor responsible. In principle, the Information Note contains all parts of the underlying Final Report pertinent for that authority or organisation.

If the OLAF investigation concerns Union expenditures managed in third countries or by international organisations, and if no administrative arrangement is in place between OLAF and the authority of the third country in question, OLAF informs the European External Action Service (EEAS) prior to sending the Information Note to the third country's authority, to allow for coordination with the EEAS if required. This practice allows OLAF to balance the necessity to cooperate with its partners in a spirit of reciprocity and ensures effective protection of the EU's financial interests in respect of the applicable EU legal framework.

V. Outlook: Future Cooperation between the EPPO and OLAF in Third Countries

The European Public Prosecutor's Office was established by Regulation No 2017/1939.⁴⁸ Its mission is to create an independent and decentralised prosecution office within the European Union with the competence to investigate, prosecute, and bring to judgment criminal offences against the financial interests of the EU (e.g., fraud, corruption, or serious cross-border VAT fraud), as defined in the Directive on the fight against fraud to the Union's financial interests by means of criminal law (so-called PIF Directive⁴⁹), cf. Arts. 4 and 22 of Regulation No 2017/1939. According to Art. 120, the EPPO shall take up its investigation and prosecution tasks at the earliest three years after entry into force of the Regulation, i.e., no earlier than end of November 2020.

The EPPO and OLAF are two different partners – each with a different structure, different tools, and different expertise. Both strive for the same goal: the protection of the financial interests of the EU. It was therefore fully intended by the EU legislator that the EPPO and OLAF work hand in hand, create synergies, and avoid overlaps. The EPPO and OLAF are to establish and maintain a *close cooperation*, aimed at ensuring the *complementarity* of their respective mandates and *avoiding duplica-*

tion. OLAF should not, in principle, open any administrative investigations parallel to an investigation being conducted into the same facts by the EPPO. This should, however, be without prejudice to the power of OLAF to start an administrative investigation on its own initiative, in close consultation with the EPPO.⁵⁰

This complementarity principle also applies to external aid cases, which raises the question of how the close cooperation between OLAF and the EPPO should be. Considering OLAF's longstanding knowledge and experience concerning how to conduct investigations and connect to cooperation partners worldwide, it would be useful if the EPPO makes maximum and effective use thereof, in line with the legal framework.

We will first assess below the areas outside of the EPPO's competence, in which OLAF continues to act based on its own mandate, unaffected by the establishment of the EPPO. Second, we will identify the areas in which we believe that collaboration of the two bodies would be of added value, providing for a most effective and efficient protection of the EU's financial interests.

1. OLAF investigations without potential overlap with the EPPO

According to Art. 23 of Regulation No 2017/1939, EPPO is competent for dealing with criminal offenses that were (a) “committed in whole or in part within the territory of one or several [participating⁵¹] Member States,” which excludes the six non-participating Member States UK,⁵² Ireland, Denmark, Hungary, Poland, and Sweden; or (b) “committed by a national of a [participating] Member State provided that the Member State has jurisdiction for such offences when committed outside its territory.” An example for case b) is, if a German citizen commits fraud at the expense of EU funds outside the EU, falling under Section 7(2) No. 1 of the German Criminal Code.⁵³ Similar rules apply for offenses committed outside the territory of participating Member State by a person subject to EU Staff Regulations (Art. 23(c) of Regulation No 2017/1939).

Based on the above, the EPPO is only competent when the criminal offense has been committed either in a participating Member State or by a national of such Member State. This, in turn, means that OLAF investigations concerning *non-participating countries and their nationals* will remain under the remit of OLAF and will be conducted independently from the EPPO. OLAF is hence expected to continue its activities, possibly even gaining further impact in this field in the future.⁵⁴

In addition to those investigations with no links to EU territory, OLAF is the only EU body competent to investigate *non-fraudulent irregularities*,⁵⁵ such as the conflict of interest of a fund manager, rendering the investment ineligible for funding. It should be noted that 90% of the irregularities detected and followed up by the Member States as reported to the Commission in 2018 were of an administrative nature, whereas only 10% were reported as having a criminal nature (fraud).⁵⁶ Regardless of the EPPO, OLAF will thus continue its work on non-fraudulent irregularities – a principle valid both within and outside the EU.

2. OLAF's added value to EPPO investigations

In areas falling under the EPPO's competence to prosecute and investigate, it can decide to cooperate with OLAF in order to achieve an optimally effective protection of the EU budget. Art. 101(3) of Regulation No 2017/1939 provides that, in the course of an investigation by the EPPO, the EPPO *can request OLAF to support or complement* its activity, notably by conducting administrative investigations. According to Art. 101(4), the EPPO may, in cases *in which the EPPO decided not to open* an investigation or to dismiss a case, *provide relevant information to OLAF* with a view towards enabling OLAF to consider appropriate administrative action.

Based on many years of OLAF's experience investigating allegations concerning EU expenditure in external relations in third countries, we would argue that a good case can be made for the EPPO to take advantage of OLAF's expertise to the benefit of an efficient protection of the EU budget.

Investigating allegations of illegal activities affecting external EU expenditure typically requires investigative activities outside the EU, often in several countries at the same time. This involves liaising with a number of international partners, including competent national authorities, international organisations, national and international donors. Especially in the field of multi-donor funding, complex financing schemes often need to be investigated. OLAF, as part of the European Commission, and having firmly established working relationships with the Directorates-General responsible for the relevant spending schemes, has developed expertise in this area. Furthermore, OLAF has established relations with the main actors in the countries concerned and with other donors and international organisations managing the funds in question. It can thus easily ensure coordination between the different actors involved.

As analysed in Section III above, OLAF's investigative activities rely on different bases. On the one hand, they can be directly anchored in international agreements concluded with

the country, such as Framework Agreements for pre-accession countries or Association Agreements for countries in the European Neighbourhood Area. As discussed in Section IV above, such investigative activities in third countries are conducted in cooperation with the competent authority of the country concerned. On the other hand, OLAF can also rely on the contractual arrangements concluded with the beneficiary, which contain the latter's obligation to provide OLAF with access to information and to allow OLAF to collect documents and other data. This means OLAF can act flexibly, depending on the facts of the case and on the country concerned, whereas the EPPO will have to rely on international instruments of mutual legal assistance to collect evidence located outside the EU.

The practicalities of cooperation between the two bodies still remain to be defined. The EPPO and OLAF are expected to conclude working agreements, as foreseen in the Proposal for Amendment of Regulation No 883/2013⁵⁷ (currently in Art. 12(g)).

V. Conclusion

OLAF relies on a large array of tools in its investigations outside the EU's borders. For pre-accession countries, the legal framework has already been harmonised to a large extent. The anti-fraud provisions in the International Framework Agreements, in combination with each country's obligation to set up an AFCOS to coordinate its anti-fraud activities, provide for a clear *modus operandi* when OLAF conducts its investigations. For neighbourhood and other third countries, the situation is more diverse, with the more recent international agreements providing for a legal situation aligned to that in pre-accession countries. OLAF's broad network of cooperation partners worldwide helps to facilitate collaboration and to protect EU funds effectively. The contractual obligations of the entity receiving Union funds to cooperate with OLAF provide for additional and very effective tools, as confirmed in the recent jurisprudence of the European General Court.

With the establishment of EPPO, a new player has emerged. We conclude that it would be in the best interests of a most effective protection of the European budget if the EPPO builds on the existing expertise of OLAF – not only for areas outside of EPPOs competence, but also where EPPO is materially competent, but can choose to rely on OLAF for complementary administrative investigations, for instance to ensure an effective financial recovery, to take precautionary measures or to ensure effective administrative sanctions. In this way, both bodies can combine their respective strengths and fight against any misuse of the EU budget – also beyond the EU's borders.

* The views expressed in this article are those of the authors and do not necessarily reflect the official opinion of the European Commission.

- 1 Commission Decision 1999/352/EC, ECSC, Euratom establishing the European Anti-fraud Office (OLAF), *O.J.* L 136, 31.05.1999, 20.
- 2 Art. 1 of the Regulation (EU, EURATOM) No 883/2013 of the European Parliament and of the Council concerning investigations conducted by the European Anti-Fraud Office (OLAF), *O.J.* L 248, 18.9.2013, 1; Art. 2 of Commission Decision 1999/352/EC, ECSC, Euratom, *op. cit.* (n. 1).
- 3 <https://ec.europa.eu/anti-fraud/policy/preventing-fraud_en> accessed 16 October 2019. See also the article by C. Makri and O. Marin, “The Commission’s New Anti-Fraud Strategy – Enhanced Action to Protect the EU Budget”, <https://doi.org/10.30709/eucrim-2019-014>.
- 4 This corresponds with 6% of the EU Budget, see EU Budget 2017 Financial Report, 11, 52.
- 5 Proposal for a Council Regulation laying down the multiannual financial framework for the years 2021 to 2027, COM/2018/322 final – 2018/0132 (APP).
- 6 See on the proposed future integration of the EDF in the EU Budget: M. Parry and M. Sapała, European Parliamentary Research Service, 2021–2027 multiannual financial framework and new own resources, July 2018, 2, 28, <http://www.epgencms.europarl.europa.eu/cmsdata/upload/db93fa39-84ce-44fe-b4fa-4c6824185e13/2021-2027_Multiannual_financial_framework_and_new_own_resources_-_Analysis_of_the_Commission%27s_proposal_.pdf> accessed 23 October 2019.
- 7 A. D’Alfonso, European Parliamentary Research Service, European Development Fund, November 2014, 5, <https://www.europarl.europa.eu/EPRS/EPRS-IDA-542140-European-Development-Fund-FINAL.pdf> accessed 28 November 2019.
- 8 In 2018, €9 billion of approved EIB lending were spent for 101 new projects outside the European Union, see here: EIB Annual Report 2018, The EIB outside the European Union, 24.09.2019, 8.
- 9 CJEU, 31 March 1971, case C-22/70, *Commission v Council*, paras. 7, 15, 17, 18, 19, 28 and CJEU, 4 September 2014, case C-114/12, *European Commission v Council of the European Union*, para. 73.
- 10 Council Regulation (EURATOM, EC) No 2185/96 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities’ financial interests against fraud and other irregularities, *O.J.* L 292, 15.11.1996, 2.
- 11 Regulation (EU, EURATOM) No 883/2013, *op. cit.* (n. 2).
- 12 CJEU, 10 July 2003, case C-11/00, *Commission v ECB*, para. 89 and CJEU, 10 July 2003, case C-15/00 *Commission v EIB*, para. 120.
- 13 Commission Decision 1999/352/EC, ECSC, Euratom, *op. cit.* (n. 1).
- 14 The term “economic operator” is clarified in Art. 5 of Regulation (EURATOM, EC) No 2185/96, *op. cit.* (n. 10), with reference to Art. 7 of Council Regulation (EC, EURATOM) No 2988/95 on the protection of the European Communities financial interests as “the natural or legal persons and the other entities on which national law confers legal capacity who have committed the irregularity and to those who are under a duty to take responsibility for the irregularity or to ensure that it is not committed”.
- 15 As explicitly recognised by the European Ombudsman in its decision of 13 March 2014, closing inquiry OF/8/2010(VIK)CK, para. 64: “nothing prevents OLAF from conducting an inspection on the basis of a de facto agreement, in this case, the consent given by the competent authorities of Country X.”, <<https://www.ombudsman.europa.eu/en/decision/en/53814>> accessed 22 October 2019.
- 16 Regulation (EU, Euratom) No 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, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, *O.J.* L 193, 30.07.2018.
- 17 See, e.g., Art. 51(7) of the Cooperation Agreement on Partnership and Development between the European Union and its Member States, on the one part, and the Islamic Republic of Afghanistan, on the other part, *O.J.* L 67, 14.03.2017, 3: “In accordance with Union legislation, and exclusively in order to protect the Union’s financial interests, the European Anti-Fraud Office shall be authorised, on request, to carry out on-the-spot checks and inspections in Afghanistan. These shall be prepared and conducted in close cooperation with the competent Afghan authorities. The Afghan

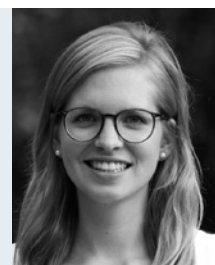
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authorities shall provide the European Anti-Fraud Office with any assistance it needs to allow it to discharge its duties.”

18 Council Regulation (EC) No 1085/2006 of 17 July 2006 establishing an Instrument for Pre-Accession Assistance (IPA), *O.J.* L 210, 31.07.2006, 82. Current beneficiaries are: Albania, Bosnia and Herzegovina, Kosovo under UN Security Council Resolution 1244/99, Montenegro, North Macedonia, Serbia, and Turkey.

19 See Art. 1 and Art. 4 of Council Regulation (EC) No 1085/2006, *op. cit.* (n. 18).

20 <https://ec.europa.eu/neighbourhood-enlargement/instruments/overview_en> accessed 28 November 2019.

21 Explicit reference is made to Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities’ financial interests, *O.J.* L 312, 23.12.1995, 1; Council Regulation (EC, Euratom) No 2185/96, *op. cit.* (n. 10) and Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF) [in the meantime replaced by Regulation (EC, Euratom) No 883/2013, *op. cit.* (n. 2)].

22 <https://ec.europa.eu/regional_policy/en/funding/ipa/framework/> last accessed 16 October 2019.

23 Framework Agreement between Montenegro represented by the Government of Montenegro and the European Commission on the Arrangements for Implementation of Union financial Assistance to Montenegro under the Instrument for Pre-accession Assistance (IPA II).

24 Pursuant to Art. 7(1) of the Regulation (EU) No 231/2014 of the European Parliament and of the Council of 11 March 2014 establishing an Instrument for Pre-accession Assistance (IPA II), *O.J.* L 77, 15.3.2014, 11: “Union assistance under this Regulation shall be implemented directly, indirectly or in shared management”.

25 Art. 62(1a) Regulation (EU, Euratom) No 2018/1046, *op. cit.* (n. 16).

26 Art. 2(2c) of the Regulation (EU) No 231/2014, *op. cit.* (n. 24): “[...] progress in Union-related institutional reform, including transition to indirect management of the assistance provided under this Regulation”.

27 Art. 62(1c) Regulation (EU, Euratom) No 2018/1046, *op. cit.* (n. 16).

28 Framework Agreement between Montenegro and the European Commission, *op. cit.* (n. 23).

29 <https://ec.europa.eu/neighbourhood-enlargement/neighbourhood/overview_en> accessed 16 October 2019.

30 In 2014, Association Agreements were concluded with Ukraine, Georgia, and the Republic of Moldova.

31 Association Agreement between the European Union and the European Atomic Energy Community and their Member States, on the one part, and Georgia, on the other part, *O.J.* L 261, 30.8.2014, 4.

32 Framework Agreement between Montenegro and the European Commission, *op. cit.* (n. 23).

- 33 For example, the Cooperation Agreement between OLAF and the Kosovo Police provides in 3.2: “When cooperating on a specific case, the Partners will provide each other with any relevant information, including personal data, in order to achieve the purpose of this Arrangement.”
- 34 List (status: January 2019) of ACAs signed by OLAF can be found at <https://ec.europa.eu/anti-fraud/investigations/cooperation-with-investigative-partners_en> accessed 16 October 2019.
- 35 Framework Agreement between the European Commission on behalf of The European Union and the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Finance Cooperation (IFC) and the Multilateral Investment Guarantee Agency (MIGA), 15.08.2014.
- 36 <https://ec.europa.eu/info/strategy/eu-budget/how-it-works/annual-lifecycle/implementation/anti-fraud-measures/edes_en> accessed 16 October 2019.
- 37 See Art. 135(1) of Regulation (EU, Euratom) No 2018/1046, *op. cit.* (n. 16): “In order to protect the financial interests of the Union, the Commission shall set up and operate an early-detection and exclusion system.”
- 38 <https://ec.europa.eu/budget/edes/index_en.cfm> last accessed 16 October 2019.
- 39 General Court, 3 May 2018, case T-48/16, *Sigma Orionis SA v Commission*.
- 40 General Court, *Sigma Orionis*, *op. cit.* (n. 39), para. 95.
- 41 General Court, *Sigma Orionis*, *op. cit.* (n. 39), para. 110.
- 42 General Court, 26 June 2019, case T-617/17 – *Vialto Consulting Kft. contre Commission européenne* [under appeal].
- 43 General Court, *Vialto*, *op. cit.* (n. 42), para. 66.
- 44 General Court, *Vialto*, *op. cit.* (n. 42), para. 68.
- 45 General Court, *Vialto*, *op. cit.* (n. 42), para. 73.
- 46 General Court, *Vialto*, *op. cit.* (n. 42), para. 93 et seq.
- 47 Art. 11 of Regulation (EU, Euratom) No 883/2013, *op. cit.* (n. 2).
- 48 Council Regulation (EU) No 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.
- 49 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.
- 50 Art. 101(1), (2) and Recital 103 of Regulation (EU) No 2017/1939, *op. cit.* (n. 48).
- 51 According to Art. 2(1) of the Regulation (EU) No 2017/1939, *op. cit.* (n. 48), Member State means, unless otherwise indicated, a Member State which participates in the establishment of the EPPO.
- 52 On 29 March 2017, the UK decided to withdraw from the Union in accordance with Article 50 of the EU Constitution.
- 53 Section 7(2) No. 1 of the German Criminal Code: “German criminal law shall apply to other offences committed abroad if the act is a criminal offence at the locality of its commission or if that locality is not subject to any criminal law jurisdiction, and if the offender [...] was German at the time of the offence or became German after the commission [...]”
- 54 See also C. Di Francesco Maesa, “Repercussions of the Establishment of the EPPO via Enhanced Cooperation”, (2017) *eu crim*, 156, 157.
- 55 Non-fraudulent irregularities do not constitute a criminal offense.
- 56 Report from the Commission to the European Parliament and the Council, 30th Annual Report on the Protection of the European Union’s financial interests – Fight against fraud – 2018, 17.
- 57 Proposal for a Regulation of the European Parliament and the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor’s Office and the effectiveness of OLAF investigations, COM(2018) 338 final.

The Commission’s New Anti-Fraud Strategy

Enhanced Action to Protect the EU Budget

Christiana A. Makri (LL.M Eur.) and Oana Marin*

This article introduces the EU Commission’s Anti-Fraud Strategy (CAFS) adopted in April 2019 and explains its background, main features, and objectives. The Commission introduced the new CAFS in order to meet the new challenges brought forward by a changing institutional and legislative anti-fraud environment and to adhere to relevant recommendations urging for a more robust anti-fraud system. The article discusses the CAFS’s main challenges and concludes that the new Strategy is designed to pave the way for the creation of a more effective anti-fraud policy for the protection of the EU’s financial interests. However, a strong commitment and continuous effort by the relevant stakeholders is necessary for an effective implementation.

I. Introduction and Overview

The European Anti-Fraud Office (OLAF) is best known as an investigative body fighting fraud, corruption and other illegal activities detrimental to the EU’s financial interests as well as serious misconduct within the European institutions.¹ The

office has, nevertheless, a dual task. OLAF is not only mandated to carry out administrative investigations but also to act as the leading Commission Service² for developing effective EU anti-fraud policies including the European Commission’s

Anti-Fraud Strategy (CAFS).³ The new CAFS reads in this context:⁴

“Fraud that affects the EU budget can cause EU funds to be siphoned off from their legitimate purposes and thereby compromise the effectiveness of EU measures. When fraudsters succeed, they call the integrity of EU action into question and undermine the public’s trust in EU policies.”⁵

In fact, combating fraud starts with management placing a realistic assessment of and adequate response to the risks of fraud high in their planning agenda. On the part of the EU Commission, threats posed by fraudsters are being taken seriously. The Commission embarked on an ambitious project in April 2019 with the adoption of its brand new Anti-Fraud Strategy that pushes for more consistency and better coordination in the fight against fraud among the various Commission departments and paves the way for more data-driven anti-fraud measures in the coming years.⁶

An evolving fraud risk environment, along with a newly shaped legal and institutional anti-fraud landscape and the advent of the Multiannual Financial Framework (MFF) for 2021–2027, triggered the need for a new, more robust anti-fraud strategy for the EU Commission. The goal is to strive towards a strong improvement of detection, sanctioning and prevention of fraud for the protection of the EU’s financial interests.

The vision behind the recently adopted Strategy is to strengthen the corporate oversight of the Commission regarding all issues related to fraud and to reinforce the anti-fraud system that is already in place through broadened and refined analysis of fraud-related data. The new Strategy’s goal is challenging and ambitious but certainly corresponds to the indispensable need to increase citizens’ trust in the EU institutions. The implementation of the Strategy’s communication and accompanying Action Plan is a challenge welcomed by the Commission as a whole, with the European Anti-Fraud Office (OLAF) having been put in the driving seat to steer the implementation and collectively achieve this goal.

II. Background

1. Legal framework

Art. 325 of the TFEU requires the EU and its Member States to combat fraud and any other illegal activities that may affect the EU’s financial interests. Under Art. 317 of the TFEU and Art. 36 of the new Financial Regulation,⁷ the EU Commission implements the EU budget, in compliance with sound financial management principles, applying effective and efficient internal control, which includes preventing, detecting, correcting and following up on fraud and irregularities. Accordingly, all

Commission Services are obliged to prevent and detect fraud as part of their daily activities involving the use of resources. Therefore, a well-functioning strategic framework is imperative, to coordinate the Commission’s anti-fraud measures and guarantee a high-calibre anti-fraud policy compliant to EU law provisions.

2. The call for a robust anti-fraud strategy

In order to prepare for the 2014–2020 Multiannual Financial Framework (MFF), the EU Commission had adopted a CAFS in 2011. The previous strategy had three priority actions:

- Introducing anti-fraud provisions in Commission proposals on spending programmes under the 2014–2020 MFF;
- Implementing anti-fraud strategies at department level;
- Revising the public procurement directives⁸, which have all been successfully implemented.

In the meantime, new developments emerged in EU law and policy that naturally contributed to the initiation of a new anti-fraud strategy. Developments included the adoption of the PIF Directive,⁹ the establishment of the European Public Prosecutor’s Office,¹⁰ the Commission proposal for the amendment of Regulation (EU, Euratom) 883/2013¹¹ (the ‘OLAF Regulation’) and the preparation for a new MFF for 2021–2027. These new realities created an urgent need for new priorities and focus to be put in place for a modern and fit-for-purpose CAFS. Importantly and in addition to the evolving anti-fraud legal and policy landscape, the European Court of Auditors published a special report in January 2019 titled “Fighting fraud in EU spending: action needed”,¹² which brought forward recommendations for the EU Commission referring to, among others, a renewed anti-fraud strategy based on enhanced risk analysis.

The first steps taken by the Commission Services towards a comprehensive revision of the CAFS, were to carry out an evaluation of the 2011 CAFS and a fraud risk assessment, involving also the executive agencies. The evaluation conducted in 2018 against the objectives of the 2011 CAFS concluded that although it was still relevant as a policy document for the Commission, a revision was essential, to meet the challenges of an evolving situation as concerns fighting fraud and other illegal activities affecting the EU budget. The fraud risk assessment identified two main vulnerabilities: (i) an underdeveloped central analytical capacity and (ii) certain gaps in the Commission’s supervision of fraud risk management at department level. These findings paved the way towards the new Strategy’s focus areas and priorities. This fraud risk assessment was published along with the new CAFS communication and Action Plan.¹³

III. The New Commission Anti-Fraud Strategy

1. Scope

The new CAFS was adopted on 29 April 2019. The CAFS is an internal policy document binding on the Commission Services and Executive Agencies in their fight against fraud and corruption affecting the EU's financial interests. Its scope focuses on protecting the EU's financial interests from fraud, corruption and other intentional irregularities and from the risk of serious misconduct inside the EU's institutions and bodies. These areas are also central to the legislator in the fight against fraud. As a result, the 2019 CAFS covers:¹⁴

- Fraud – including VAT fraud –, corruption and misappropriation affecting the EU's financial interests, as defined in Arts. 3 and 4 of the PIF Directive;
- Other criminal offences affecting the EU's financial interests, e.g., offences linked to an abuse of procurement procedures where they affect the EU budget;
- Irregularities as defined in Art. 1(2) of Regulation (EC, Euratom) No 2988/95¹⁵ (insofar as they are intentional but not already captured by the criminal offences referred to above); and
- Serious breaches of professional obligations by Members or staff of the EU's institutions and bodies, as referred to in Art. 1(4) of the OLAF Regulation and in the second subparagraph of Art. 2(1) of Commission Decision (EC, ECSC, Euratom) No 352/1999.

2. Priorities and implementation

The 2019 Strategy essentially rests upon two pillars: strengthening cooperation between the Commission Services and generating a robust analytical capability within the Commission, through innovative analytical tools, higher connectivity of databases and improved data quality. The EU Commission envisages that more in-depth analyses based on much broader, yet tailored data collection and intense cooperation with the relevant stakeholders will provide more purposeful and substantial information in relation to specific sectors and/or EU Member States.¹⁶

The CAFS's first objective is to improve further the understanding of fraud patterns, fraudsters' profiles and systemic vulnerabilities relating to fraud affecting the EU budget. The Commission will strive to achieve this goal through the reinforcement of new and existing databases and risk scoring tools. Reliable, complete and accurate data and their analysis are at the basis of well-functioning policy-making. The EU Commission, through OLAF's policy role, already collects and analyses data on fraudulent and non-fraudulent irregularities for the purposes of the annual Report on the Protection of

the EU's Financial Interests (PIF report).¹⁷ According to the new CAFS, OLAF will work together with the Commission Services and with the Member States to identify and collect relevant fraud-related data. Based on this, it will examine Member States' anti-fraud systems and conduct analytical projects aimed at identifying, understanding and assessing further fraud risks affecting the EU budget. Subsequently, through a more efficient use of data, OLAF aims to become more effective as an investigative service and to evolve as a centre of expertise in fraud prevention and analysis. In addition, the new Strategy suggests that the increased availability of data and the continuous refinement of analysis techniques and IT tools might also lead to better-targeted investigations for the fight against fraud, corruption and any other illegal activities affecting the EU's financial interests.

The new Strategy's second objective concerns the optimisation of coordination, cooperation and workflows for the fight against fraud, in particular among the Commission Services and Executive Agencies. This objective is in line with the Commission's recent "Governance Package",¹⁸ which emphasises the need for adequate corporate oversight of policies and processes conducted by the Institution's Departments and Executive Agencies. The implementation of this objective is based upon the role of OLAF as an advisor and coordinator for steering the new CAFS implementation. At the strategic level, the Commission's Corporate Management Board (CMB) will be providing oversight and strategic orientations on the corporate aspects of the fight against fraud in the Commission Directorates-General and Services including on developments concerning the new CAFS.¹⁹ In cooperation with central services of the EU Commission in newly and thematically created working groups within the established Fraud Prevention and Detection Network, OLAF aspires to bring together ideas and join forces across the institution to optimise the fight against fraud. OLAF will share the overview of the Commission's anti-fraud activities with the CMB and propose guidance as deemed appropriate.

Further objectives of the CAFS were identified through the fraud risk assessment carried out by the Commission²⁰ or derived from the guiding principles of the Commission's fight against fraud, corruption and other illegal activities affecting the EU's budget.²¹ Those further objectives relate to the following areas:

- Integrity and compliance;
- Know-how and equipment;
- Transparency of EU funding;
- Legal framework; and
- Fighting revenue fraud.

These areas were integrated into the Action Plan,²² which is an accompanying document to the CAFS communication, designed to implement it.

Attention is given to the continuous principle of professional integrity and ethics among the Commission's staff. The Action Plan suggests, for instance, continuing training and internal communication in this respect, with special emphasis put on conflicts of interest, relations with lobbyists, duty of discretion and whistleblowing. Know-how and equipment relate to the maintenance and refinement of targeted anti-fraud training, awareness-raising and technical assistance. Moreover, on the notion of transparency, the CAFS Action Plan promotes effective information of the interested public on the use of EU funds, for example on public procurement through the Tenders Electronic Daily²³ (TED) database. Actions in connection with the legal framework refer to the continuous and effective fraud-proofing of legal instruments for the implementation of the budget, in view of the future MFF for 2021–2027. These include legislative proposals, delegated and implementing regulations as well as documents of systemic importance for a policy area, meaning, implementing decisions, model contracts and agreements, delegation agreements, guarantee agreements, calls for tenders/proposals/expressions of interest, and policy guidelines.

On fighting revenue fraud, the 2019 CAFS is now designed to strengthen the fight against customs and VAT fraud that harms the budget on the revenue side. As regards Traditional Own Resources (TOR), the new CAFS envisages to boost the Commission's and the Member States' analytical capacities in the customs area by sharing approaches and good practices and by increasing awareness and making best use of data sources. On Value Added Tax (VAT) fraud, the CAFS supports the adoption of a revamped VAT system through the effective implementation of related EU legislation combined with strengthened coordination and international co-operation.²⁴

IV. Conclusions

Yearly information on the implementation of the new Commission's Anti-Fraud Strategy will be included in the future EU Commission's "Annual Reports on the protection of the EU's financial interests," the mentioned PIF reports.²⁵

The fact that the European Commission's anti-fraud action is firmly integrated in its annual strategic planning and programming cycle already demonstrates the Institution's commitment towards an effective protection of the EU budget. Nevertheless, the Commission should bear in mind that the CAFS must remain at a central place in the Commission's agenda, in order for the Institution to demonstrate effectively its commitment and obligation to fight against fraud, corruption and other illegal activities affecting the EU budget. This is a key step into crafting a meaningful, structured and reinforced anti-fraud policy. The new CAFS implementation presents a challenge but also a great opportunity to construct a stronger anti-fraud system that will eventually have the broader impact of rebuilding citizens' trust in the EU institutions. In addition, with its reinforced role, OLAF can steer a course towards effective coordination and cooperation among the Commission Services to make the CAFS's implementation a collaborative process. The implementation of the CAFS is a shared responsibility; therefore, joint effort will lead towards best results.

Summing up, the new CAFS is an aspiring document with 63 action points in its Action Plan, which puts into place a more coherent and overall enhanced anti-fraud policy framework for the protection of the EU's financial interests. Its implementation has just begun and it is upon the Commission, benefiting from OLAF's guidance, to keep up the work towards achieving this goal.

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

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

2 Commission Services refer to EU Commission Departments and Executive Agencies.

3 European Anti-Fraud Office's website available at: https://ec.europa.eu/anti-fraud/policy/preventing-fraud_en

4 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Auditors "Commission Anti-Fraud Strategy: enhanced action to protect the EU budget," COM(2019) 196 final, 24 April 2019.

5 See COM(2019) 196 final, page 5.

6 European Commission press release "Strengthening the Commission's oversight in a modern and robust anti-fraud system" of 29 April 2019, available at: http://europa.eu/rapid/press-release_IP-19-2080_en.htm.

7 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

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- budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012, O.J. L 193, 30.7.2018, 1.
- 8 Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC, O.J. L 94, 28.3.2014, 65. Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts, O.J. L 94, 28.3.2014, 1. Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, O.J. L 94, 28.3.2014, 243.
- 9 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.
- 10 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.
- 11 Commission Proposal of 23 May 2018 for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations, COM(2018) 338.
- 12 European Court of Auditors Special Report No 01/2019 'Fighting fraud in EU spending: action needed' available at: https://www.eca.europa.eu/Lists/ECADocuments/SR19_01/SR_FRAUD_RISKS_EN.pdf; see also T. Wahl, *eu crim* 1/2019, pp. 15–16.
- 13 Action Plan accompanying the document 'Commission Anti-Fraud

- Strategy: enhanced action to protect the EU budget' SWD(2019) 170 final.
- 14 See COM(2019) 196 final, *op. cit.* (n. 4), p. 8.
- 15 Council Regulation (EC, Euratom) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, O.J. L 312, 23.12.1995, 1.
- 16 See the European Court of Auditors Journal No 2/2019: Fraud and Corruption/Ethics and Integrity, pp. 170–171.
- 17 European Commission, European Anti-Fraud Office, 'Annual Reports on the protection of the EU's financial interests ("PIF" Report)' available at: https://ec.europa.eu/anti-fraud/about-us/reports/communities-reports_en
- 18 Communication to the Commission "Governance in the European Commission" C(2018) 7703 final of 21 November 2018.
- 19 Communication to the Commission "Streamlining and strengthening corporate governance within the European Commission" C(2018)7704 final.
- 20 See "Fraud Risk Assessment", staff working document accompanying the communication "Commission Anti-Fraud Strategy: enhanced action to protect the EU budget", SWD(2019) 171 final.
- 21 See Section 4.1 of COM(2019) 196 final.
- 22 See SWD(2019) 170 final, *op. cit.* (n. 12).
- 23 The Tenders Electronic Daily database (TED) is a platform accessible to all potential bidders which serves as a source of data for improving the performance of national public procurement systems, available at: <https://ted.europa.eu/TED/main/HomePage.do>
- 24 See SWD(2019) 170 final, *op. cit.* (n. 12).
- 25 29th Annual Report from the Commission to the European Parliament and the Council, on the Protection of the European Union's financial interests – Fight against fraud – 2017, available at: https://ec.europa.eu/anti-fraud/about-us/reports/communities-reports_en.

Report

Geht der Rechtsstaat in Europa unter? – Is the Rule of Law Falling Apart in Europe?

12. EU-Strafrechtstag – 12th EU-Criminal Law Workshop, October 18–19, 2019

Under the heading "Is the rule of law falling apart in Europe?" criminal defense attorneys, mainly from Germany, met for the 12th time in Bonn/Germany to discuss current challenges in the fields of criminal law and criminal procedure in the European Union. The event was organized by the Association of defense lawyers of North-Rhine Westphalia together with defense attorney Dr. Anna Oehmichen, Knierim & Kollegen/Mainz. Numerous legal practitioners as well as judges and legal scholars working in the field of European criminal law met to analyse whether current developments involving the Europeanization of substantive criminal law and criminal procedure still allow constitutional developments. The participants discussed such issues as mutual recognition in criminal matters, improvements to the European Arrest Warrant, implementation of the European Investigation Order, the envisaged e-evidence regulation, and the current challenges of digitalization. The focus up until now seems to have been only on procedural operability and effectiveness instead of on the protection of individual rights. As in previous years, the 2019 conference set cornerstones for guaranteeing defense rights.

Der bereits zum zwölften Mal stattfindende EU-Strafrechtstag lud auch in diesem Jahr Strafverteidiger, Wissenschaftler und Praktiker aus verschiedenen europäischen Staaten ein, zu aktuellen Themen im Bereich des Europäischen Strafrecht zu diskutieren. Die traditionell im Universitätsclub in Bonn abgehaltene Veranstaltung wird von der Strafrechtsverteidigervereinigung NRW e.V. organisiert, seit zwei Jahren in Kooperation mit Rechtsanwältin Dr. Anna Oehmichen, Knierim &

Kollegen / Mainz. Im Vordergrund stand in diesem Jahr die Frage, ob der Rechtsstaat in Europa untergehe. Zu entsprechenden Befürchtungen bietet die aktuelle Entwicklung im Bereich der Europäisierung der Strafrechtspflege hinreichend Anlass, wie Dr. Anna Oehmichen in ihrer Einführungsrede am ersten Konferenztage – dem Praktikerseminar – betonte.

Prof. Dr. Matthias Bäcker (Johannes Gutenberg-Universität Mainz) ging in seinem Eröffnungsvortrag daher eindrück-

lich auf die Bedeutung der verfassungsrechtlichen Perspektive im ewig jungen Streit um die Vorratsdatenspeicherung ein. Er begann mit einer Einführung zum früheren und jetzigen rechtlichen Rahmen der Vorratsdatenspeicherung, wobei die zum früheren Recht ergangene Rechtsprechung des BVerfG und EuGH im Mittelpunkt stand. Im Folgenden schilderte Bäcker verschiedene prozessuale Möglichkeiten, die Telekommunikationsunternehmen und -nutzer haben, um die heutigen nationalen Vorgaben durch den EuGH am Unionsrecht messen zu lassen. Dabei rückte er die aktuelle Vorlagefrage des BVerwG (Beschluss v. 25.9.19, Az. 6 C 12.18 und 6 C 13.18) an den EuGH, ob die nationale Vorratsdatenspeicherung mit Unionsrecht vereinbar ist, ins Zentrum der Aufmerksamkeit. Insgesamt zeigten die Ausführungen Bäckers, dass nicht nur Vorlagefragen aus Deutschland den EuGH erreichen, sondern zugleich aus Frankreich, Belgien und Großbritannien. Bäcker vermutete, der EuGH werde seine vormals aufgestellten Vorgaben, die eindeutig „zu weit gingen“, aufgeben. Zudem wies er darauf hin, dass die Kommission eine Bedarfs- und Machbarkeitsstudie in Auftrag gegeben habe und eine Wiedereinführung der Vorratsdatenspeicherung auf EU-Ebene seit 2017 geplant sei. Im Hinblick auf die Rechtskonformität schlug Bäcker vor, die Vorratsdatenspeicherung zu beschränken: erstens auf einen klar definierten lokalen Raum, wobei die aus dem Polizeirecht bekannten „verrufenen Orte“ einen ersten Anhaltspunkt bilden können, zweitens auf eine geringe Dauer („paar Wochen“) und drittens auf nur „schwere Straftaten“.

Zu einem nicht nur rechtlich, sondern zugleich politisch brisanten Thema sprach Avvocato *Nicola Canestrini* (Revereto, Italien). Er gab einen Überblick über Fälle von Seenotrettungen vor (italienischen) Gerichten und erläuterte anschließend die gesellschaftlichen Hintergründe: Während an Seenotrettungen beteiligte Personen vor einigen Jahren noch als Helden gefeiert wurden, gelten sie heute als „Verbrecher“ bzw. „Meerestaxis“. Canestrini schilderte den – aus den Medien und der Filmbranche bekannten – Iuventa-Fall, der zwar noch in der Ermittlungsphase steckt, aber als „Mutter aller Seenotrettungsverfahren“ gilt, zumal die Staatsanwaltschaft – insofern erstmalig – vorgibt, direkte Zeugen zu haben, die aussagen, dass die Seenotretter mit „Schleppern“ zusammengearbeitet haben. Mit ebenso starker verfassungsrechtlicher Anbindung wie zuvor Bäcker erläuterte Canestrini die völkerrechtlichen und nationalen (italienischen) Grundlagen, die in Seenotrettungsverfahren Bedeutung erlangen. Zu Seenotrettungen, so Canestrini, bestehe – auch in Italien – eine (verfassungs-)rechtliche Pflicht, weshalb er weiterhin darauf hoffe, die Staatsanwaltschaft werde alle einschlägigen Verfahren einstellen.

In seinem Erfahrungsbericht im Zusammenhang mit der Rechtssache EuGH *Petruhhin/Latvijas Republikas Generalprokuratūra* (EuGH, Urt. v. 6.9.16, Az. 6 C-182/15) erläuterte anschließend Rechtsanwalt Dr. *Nikolaos Gazeas*, LL.M. (Auckland) Fragen der Rechtshilfe für Drittstaaten in der Sonderkonstellation, dass ein deutscher Staatsangehöriger in Spanien aufgrund eines US-amerikanischen Auslieferungsersuchens festgenommen wurde. In diesem Verfahren wurde versucht, aus den §§ 77 IRG, 133, 134 StPO i.V.m. Art. 18, 21

AEUV und Art. 16 Abs. 2 Satz 1 GG eine Rechtsgrundlage für eine Auslieferung der betroffenen Person nach Deutschland zu begründen, da die Voraussetzungen für einen Haftbefehl, der die Grundlage für einen Vorführungsbefehl (§§ 133, 134 StPO) bildet, nicht gegeben waren. Gazeas sprach von einer Gesetzeslücke, die der Gesetzgeber zu schließen habe. Es könne vor dem Hintergrund der EuGH-Entscheidung nicht sein, dass die „Rückholung“ deutscher Staatsangehöriger, die im Ausland straffällig geworden sind, nur unter den Voraussetzungen für den Erlass eines Haftbefehls möglich sei.

Im Anschluss rief Richter am OLG Karlsruhe *Klaus-Michael Böhm* zu einer Reform des Europäischen Haftbefehls auf. Aus praktischer Sicht und anhand kürzlich unter seiner Mitwirkung entschiedener Fälle pointierte Böhm die Schwächen der aktuellen rechtlichen Ausgestaltung des Europäischen Haftbefehls. Reformierungsbedürftig seien vor allem das Haftrecht (§ 19 IRG), der Justizaufbau, das Bewilligungsverfahren, die Verteidigung sowie der Rahmenbeschluss zum Europäischen Haftbefehl und der zu Freiheitsstrafen. Den Schwerpunkt legte Böhm auf die Einforderung von Mindeststandards für Haftanstalten, Prüfungserfordernissen für die Rechtsstaatlichkeit sowie die Notwendigkeit individueller Grundrechtsprüfung.

Das Praktikerseminar schloss ein Bericht von *Bärbel Heinkelmann* (DG JUST, EU-Kommission, Brüssel) über die Prioritäten der Kommission zur Stärkung der Verfahrensrechte in Europa ab. Heinkelmann stellte die erlassenen sechs Richtlinien zur Stärkung der Verfahrensrechte vor und hielt fest, dass drei Richtlinien bereits vollständig in nationales Recht umgesetzt wurden (2010/64/EU; 2012/13/EU; 2013/48/EU). Obwohl die Umsetzung der übrigen drei Richtlinien (2016/343/EU; 2016/800/EU; 2016/1919/EU) noch nicht in allen Mitgliedsstaaten erfolgt ist, zeigte sich Heinkelmann optimistisch, zumal in den letzten 10 Jahren auf europäischer Ebene viel für die Stärkung der Beschuldigtenrechte getan worden sei. Es müsse sicher noch – auch in weiteren EU-Strafrechtstagen – diskutiert werden, inwieweit die Richtlinien und ihre nationalstaatlichen Umsetzungen die Erfordernisse der Rechtsstaatlichkeit im Einzelnen einlösen.

Am zweiten Konferenztag – dem Samstagsplenum – stellten die Veranstalter die Rechtsstaatlichkeitsfrage in den Mittelpunkt. Dr. *Hannes Krämer* (Juristischer Dienst, EU-Kommission, Brüssel) führte aus Sicht der EU-Kommission in die Debatte ein, fragend, was die EU tun könne, um die Rechtsstaatlichkeit in den Mitgliedsstaaten zu sichern. Krämer referierte über das – bereits bestehende – politische Sanktionsverfahren des Art. 7 EUV sowie die Voraussetzungen der jeweiligen Absätze und deren Verhältnis zueinander. Als Beispielsfall nannte er das sog. „Art. 7-Verfahren“ der Kommission gegen Polen. Anschließend wies Krämer auf weitere zentrale (z.B. das Vertragsverletzungsverfahren) und dezentrale (z.B. die Anwendung von unmittelbar rechtsstaatskonkretisierenden oder -sichernden Bestimmungen des EU-Rechts) Mechanismen zur Wahrung der Rechtsstaatlichkeit in den Mitgliedsstaaten hin, um schließlich „alternative Modelle“ und die Fortentwicklung der bestehenden Sicherungsmechanismen zu diskutieren.

Vor diesem Hintergrund boten die anschließenden Länderberichte zur Rechtsstaatlichkeit in Ungarn, Rumänien und Polen von Prof. *Karoly Bard* (Central European University, Budapest/Wien), Rechtsanwältin *Roxana Staniloaie* (Bukarest), Dr. *Maciej Taborowski* (Commissioner for Human Rights, Warschau) reichlich Zündstoff. Bard erläuterte in einem historischen Rückblick die zahlreichen, durch die „neue Regierung“ in Ungarn veranlassten Verfassungsänderungen und beurteilte die Rechtsstaatlichkeit anhand des aktuellen ungarischen „Richterwahlsystems“. Staniloaie stellte ihren Ausführungen voran, dass in Rumänien die formellen Voraussetzungen für faire Verfahren an sich gegeben, jedoch in der Praxis Urteile und Beschlüsse nicht nachzuvollziehen seien. Sie prangerte die sog. „Dringlichkeitsgesetzgebung“ der Regierung an, die zur „Gewohnheit“ verkommen sei, weshalb man sich in Rumänien auf neue Rechtsvorschriften „über Nacht“ einzustellen habe. In seinem Bericht über die Rechtsstaatlichkeit in Polen legte Taborowski das Augenmerk auf aktuell ganze 14 Vorlagefragen, die dem EuGH und 7 („oder 8“) Verfahren, die dem EGMR vorliegen. Eingehend diskutierte Taborowski die Senkung der Altersgrenze für Richter und das „Richterwahlsystem“ in Polen anhand der dem EuGH vorliegenden Frage, ob die Richter des Obersten Gerichts Polens als unabhängig betrachtet werden können. Sollte der EuGH die Frage verneinen, müssten, so Taborowski sämtliche von diesen Richtern gefällte Urteile und Beschlüsse nichtig sein. Die Rechtsstaatlichkeit in Polen könne nur der EuGH sichern. Dies erfordere aber, dass auch das Verfassungsgericht ein Gericht im Sinne von Art. 267 AEUV sei.

Diese kritische Diskussion der Rechtsstaatlichkeit in der Praxis ergänzte Prof. Dr. *Liane Wörner*, LL.M. [UW-Mad.], (Universität Konstanz) um eine wissenschaftstheoretisch fundierte Grundanalyse des zentralen Europäisierungsmittels der Strafrechtspflege: der gegenseitigen Anerkennung im Strafrecht. Der bisher vorgebrachten Kritik hielt Wörner entgegen, dass die gegenseitige Anerkennung sogar entscheidender Motor der Rechtsstaatlichkeit in der EU sei. Zwar beruhe die Übertragung des zivilrechtlichen Konzepts der gegenseitigen Anerkennung in das Strafrecht auf einem entscheidenden Übertragungsfehler, der die grundlegenden Unterschiede zwischen Zivilrecht und Strafrecht insbesondere in Gestalt der Stellung des Beschuldigten nicht beachte. Allerdings habe sich dieser gerade nicht als Automatismus und Harmonisierung auf allen Wegen ausgewirkt, sondern zu einer ständigen Überprüfung geteilter Werte geführt. Allerdings, so Wörner, bedürfe es zur Sicherung der Rechtsstaatlichkeit einer Verlagerung strafrechtlicher Kompetenzen und der Schaffung eines supranationalen Strafverfahrensrechts, zumal andere Maßnahmen unzureichend seien. Dass der EuGH jener Entwicklung nicht abgeneigt sei,

zeige auch eine seiner aktuellen Entscheidungen (EuGH, Urt. v. 15.10.2019, Rs. C-128/18 – *Dorobantu*), die schwerwiegende Mängel an den Haftbedingungen als Hindernis für die Übergabe nach einer Inhaftierung aufgrund eines Europäischen Haftbefehls zum Gegenstand hatte.

Dr. *Stefan Schumann* (Assist.-Prof. an der Universität Linz und Rechtsanwalt in München) stellte Überlegungen zur Harmonisierung von Straftaten mit Bezug zu künstlicher Intelligenz an. Schumann erläuterte zunächst die technischen Grundlagen und wies darauf hin, dass das europäische Strafrecht eine Anknüpfungstatsache für künstliche Intelligenz darstelle. Er thematisierte die im aktuellen materiellen Strafrecht bestehenden Zurechnungs-, Sorgfaltsmaßstabs- und Vorhersehbarkeitsprobleme und stellte eigene Lösungsmöglichkeiten dar. Zur zentralen Frage der Verantwortungsdiffusion zog er eine Parallele zum Verbandssanktionenrecht in Österreich.

Selbstverständlich lag gerade am 19. Oktober ein Blick auf den Brexit nahe. Niemand war für dessen kritische Analyse besser geeignet als Ministerialrat Dr. *Ralf Riegel* (BMJV, Berlin). Er eruierte, welche Folgen ein möglicher Brexit für die strafrechtliche Zusammenarbeit mit dem Vereinigten Königreich insbesondere in der Strafverfahrenspraxis aus deutscher Sicht nach sich ziehen würde. Hierzu differenzierte Riegel zwischen unterschiedlichen Phasen: (1) „vor dem Brexit“, (2) die „Zwischen- bzw. Übergangsphase“ mit Austrittsumsetzungsfragen nach dem endgültigen „Brexit“-Beschluss, (3) „nach dem Brexit“ selbst, (4) einer „Zwischen- bzw. Übergangsphase“ zum Verfahrensabschluss und (5) einer zukunftsgerichteten Phase zu „weiteren Überlegungen“ (nach dem Brexit).

Mit einer Betonung auf den aktuellsten Entwicklungen in der Strafrechtspflege der EU und der kritischen Diskussion der aktuellen Rechtsprechung des EuGH einschließlich dort gerade anhängiger Verfahren schlug schließlich Jun.-Prof. Dr. *Dominik Brodowski*, LL.M. (UPenn) (Universität Saarbrücken) die Brücke zum 13. EU-Strafrechtstag, der am 23. und 24. Oktober 2020 in Bonn stattfinden wird. Spannend dürfte dann auch sein, ob sich die zwar kritischen, insgesamt aber grundsätzlich positiven Aussagen zur Rechtsstaatlichkeit halten lassen werden. Die kurz nach der Tagung ergangene Entscheidung des EuGH in der Rechtssache *Gavanozov* (Urteil v. 24.10.2018 – Az. C-324/17) lässt doch, worauf auch Brodowski vorausblickend hinwies, einigen Diskussionsbedarf aufscheinen.

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