

# euocrim

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**THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM**



## **Focus: The Architecture of European Law Enforcement Cooperation**

**Dossier particulier: L'architecture de la coopération européenne en matière de détection et de répression**

**Schwerpunktthema: Die Architektur der europäischen Strafverfolgungszusammenarbeit**

Guest Editorial  
Dr. *Maria Berger*

OLAF Investigations in a Multi-Level System – Legal Obstacles to Effective Enforcement  
*Michele Simonato*

Interinstitutional Relationship of European Bodies in the Fight against Crimes Affecting the EU's Financial Interests  
*Angelo Marletta*

L'échange d'informations entre autorités administratives et judiciaires  
Dr. *Valentina Covolo*

The Ventotene Manifesto and the European Area of Freedom, Security and Justice  
*Lorenzo Salazar*

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

- 122 Fundamental Rights
- 123 Area of Freedom, Security and Justice
- 123 Legislation

##### Institutions

- 124 Commission
- 124 European Parliament
- 124 OLAF
- 125 Europol
- 125 Eurojust
- 126 Frontex

##### Specific Areas of Crime / Substantive Criminal Law

- 126 Protection of Financial Interests
- 127 Tax Evasion
- 127 Money Laundering
- 128 Counterfeiting & Piracy
- 128 Cybercrime

##### Procedural Criminal Law

- 129 Data Protection
- 130 Victim Protection

##### Cooperation

- 131 Judicial Cooperation
- 131 European Arrest Warrant
- 133 Customs Cooperation

#### Council of Europe

##### Specific Areas of Crime

- 134 Corruption
- 134 Money Laundering

##### Procedural Criminal Law

### Articles

#### The Architecture of European Law Enforcement Cooperation

- 136 OLAF Investigations in a Multi-Level System. Legal Obstacles to Effective Enforcement  
*Michele Simonato*
- 141 Interinstitutional Relationship of European Bodies in the Fight against Crimes Affecting the EU's Financial Interests. Past Experience and Future Models  
*Angelo Marletta*
- 146 L'échange d'informations entre autorités administratives et judiciaires. Premiers éclaircissements tirés de l'arrêt WebMindLicences, C-419/14  
*Dr. Valentina Covolo*
- 150 The Ventotene Manifesto and the European Area of Freedom, Security and Justice  
*Lorenzo Salazar*

### Imprint

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# Guest Editorial

Dear Readers,

Cooperation on the part of national courts and executive authorities in the criminal law field is constitutive for the functioning of the area of freedom, security and justice (AFSJ). Focusing on a more or less voluntary cooperation on the part of the national authorities might initially have been an indication of the Member States' reluctance to also give up sovereignty in the field of criminal law and criminal justice. Today, however, it is clear that the AFSJ cannot be realized without such cooperation. It is therefore of programmatic significance when "cooperation" is expressly referred to in the relevant titles of primary EU law attributing competences to the EU for criminal law and criminal justice (cf. Arts. 82 and 87 TFEU) – a fact that distinguishes them from most other provisions on competences of the EU Treaty. It follows that secondary EU law must aim to strengthen, substantiate, and support cooperation, also by means of the EU's central institutions, such as Europol, Eurojust, and OLAF. Furthermore, law enforcement and judicial cooperation is – in the same manner as the harmonization of law – a prerequisite for the functioning of the principle of mutual recognition of criminal law judgments and judicial decisions – a principle that the CJEU considers of fundamental importance in EU law (Opinion 2/13, mn. 191).

A further legal basis of primary EU law concerning the duty to cooperate can be found in the general principle of sincere cooperation, as enshrined in Art. 4 para. 3 TEU. This principle also directly obliges the courts and authorities of the EU Member States to cooperate with other Member States as well as with the EU institutions. The current wording of the principle of sincere cooperation clarifies that, in turn, the EU and its institutions also have the duty to provide cooperation vis-à-vis the authorities of the Member States (as already ruled by the CJEU in 1990 in the case C-2/88, "*Zwartveld*").

Ensuring respect for fundamental rights and freedoms may, at any rate, also encourage national authorities to make extensive use of the instruments of cooperation as laid down in secondary Union law. In this context, the European Court of Justice called on the judicial authority executing a European Arrest Warrant to request all supplementary information on anticipated prison conditions from the issuing authority on the basis



Maria Berger

of Art. 15 para. 2 of the Framework Decision on the European Arrest Warrant. The issuing authority is obliged to provide this information to the executing judicial authority. This information is deemed necessary in order to ensure respect for Art. 4 of the Charter of Fundamental Rights (CJEU, Cases C-404/15 und C-659/15 (*Aranyosi und Căldăraru*), mn. 94 et seq.).

The requirements of primary EU law must be respected both in the interpretation of secondary EU law by the national courts and the CJEU as well as in the interpretation of conformity with Union law as regards national law implementing secondary EU law. The noticeable increase in criminal law cases referred to the CJEU will enable the Court to clarify more precisely the various obligations that derive from the principle of cooperation. It is more important, however, that law enforcement and judicial authorities increase their willingness to cooperate across borders in daily practice.

Dr. Maria Berger

Judge at the European Court of Justice

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## European Union\*

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

### Foundations

#### Fundamental Rights

##### MEPs Back Commission's Rule-of-Law Mechanism against Poland

In its plenary session of 14 September 2016, MEPs adopted a non-legislative resolution “on the recent developments in Poland and their impact on fundamental rights as laid down in the Charter of Fundamental Rights of the European Union.” The MEPs call on Poland to cooperate with the European Commission and to fully respect the Venice Commission’s and the European Commission’s recommendations in order to find a way out of the current constitutional crisis.

By referring in particular to the EU Charter of Fundamental Rights, the resolution stresses that the paralysis of the Polish Constitutional Tribunal and the refusal of the Polish government to publish all its judgments “endanger democracy, fundamental rights and the rule of law in Poland.” MEPs also regret that no compromise solution has been found so far and that the Venice Commission’s

recommendations of 11 March 2016 have not yet been implemented.

The Venice Commission – a body of independent experts and the Council of Europe’s advisory body on constitutional matters – issued two opinions: one on the Polish amendments to the Act on the Constitutional Tribunal and one on the amendments to the Police Act and other acts. The opinions were sought by the Polish government. They constitute the most authoritative interpretation of the obligations of Council of Europe member states concerning the rule of law and democracy.

The recommendation of the European Commission is part of the so-called “EU Rule of Law Framework.” The Framework is a kind of early warning tool. It allows the Commission to enter into a dialogue with the Member State concerned in order to prevent the escalation of systemic threats to the rule of law. Its overall purpose is to enable the Commission to find a solution together with the Member State concerned in order to prevent the emergence of a systemic threat to the rule of law that could develop into a “clear risk of a serious breach.” The latter would potentially trigger the use of

the so-called “Article 7 Procedure.” The procedure foreseen in Art. 7 TEU may lead to the sanctioning of an EU country that seriously and persistently breaches the common values of the EU, including the rule of law.

The “pre-Article 7 rule of law procedure” carried out by the European Commission for Poland started in January 2016. It relates to the ongoing debate in Poland concerning the composition of its Constitutional Tribunal, the shortening of mandates of the current President and Vice-President of the Constitutional Tribunal, and the effective functioning of the Tribunal. The recommendation follows the first stage of the rule-of-law framework, culminating in an opinion of June 2016 in which the Commission assessed the current constitutional crisis in Poland.

After the matter was not satisfactorily solved in the view of the Commission, the “Rule of Law Recommendation” of 27 July 2016 calls on Poland to solve the identified problems within three months and to inform the Commission of the steps taken to this effect. If there is no satisfactory follow-up within the time limit set, resort can be made to the “Article 7 Procedure” (third stage).

Beside the constitutional crisis, the EP also expresses its concerns over “the recent rapid legislative developments” in other areas in relation, in particular, to:

- Independence and impartiality of public service media;
- Right to freedom of expression;
- Right to privacy;

\* If not stated otherwise, the news reported in the following sections cover the period 16 July 2016–15 October 2016.

- Procedural rights as well as the fundamental right to a fair trial;
- Political impartiality of the country's administration;
- Fundamental human rights, including women's rights.

The resolution of the EP urges the Commission to also carry out an assessment of the recent Polish legislation adopted in these areas as regards its compatibility with primary and secondary EU law and with the values on which the Union is founded. (TW)

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## Area of Freedom, Security and Justice

### Progress Report on Security Union

The Commission took several steps in view of the creation of a genuine security area in the EU. The Security Union is a major part of the political guidelines of Commission President *Jean-Claude Juncker*. In two Communications of April 2015 and April 2016, the Commission outlined the main actions for an effective EU response to terrorism and other security threats in the Union in the years ahead. On 12 October 2016, the Commission presented its first progress report, including progress on operational measures in conjunction with the implementation of the European Agenda on Security and towards an effective and genuine Security Union – both matters of concern in the two Communications mentioned above.

The information in the report is based on two major pillars:

- tackling terrorism and organised crime and the means that support them;
- strengthening the EU's defences and building resilience against these threats.

The report also highlights the priority areas in which more work is needed and sets out concrete operational measures for the months to come.

The present report is the first of a series of monthly reports on the progress being made towards an operational and effective Security Union, as requested

by Commission President *Juncker* in his mission letter addressed to Security Commissioner *Julian King*. For information on the new European Commissioner for the Security Union, refer news item below under "Institutions – Commission". (TW)

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## Legislation

### Better Regulation: Commission Takes Stock

On 14 September 2016, the Commission published a Communication to report on its progress in delivering better regulation commitments. Better regulation was placed high on the agenda at the start of the *Juncker* Commission in 2014. The Commission committed to focusing its action on those issues that really matter to European citizens, especially issues where European action is necessary most, and leaving the Member States to take responsibility where national action is more appropriate.

The Communication points out that the Commission has reduced the scale of its annual Work Programmes, totalling 23 new priority initiatives and packages in 2015 and 23 again in 2016. The Commission has now focused its efforts on topics with a high EU added value, including the EU's response to the refugee crisis, strengthening borders, and combatting tax evasion and avoidance.

The report also reveals to what extent the Commission has simplified existing legislation and cut red tape. The role of the Regulatory Fitness Programme (REFIT) and the work of the REFIT Platform is highlighted in this context.

The Communication also outlines a number of key priorities for the future:

- Remaining focused on selected initiatives reflecting the 10 political priorities of President *Juncker* as well as addressing the current challenges the EU faces;
- Enhanced transparency regarding the Commission's contact with stakeholders and lobbyists;

- Considering amendments to the rules governing EU-wide authorisation procedures in certain sensitive sectors;
- Presentation of an "annual burden survey," including an assessment of the feasibility of objectives for burden reduction in key sectors;
- Stepping up efforts on the effective application, implementation, and enforcement of EU law.

Ultimately, the Communication is responsive to the cooperation on better regulation between the Commission, the European Parliament and the Council. (TW)

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### Mandatory Transparency Register Proposed

On 28 September 2016, the Commission proposed reforming the current regime of registration of independent organisations or other lobbyists seeking to influence EU legislation. By way of an inter-institutional agreement, the Commission plans to turn the current voluntary transparency register into a mandatory one. Whereas the current register only applies to the Commission and the European Parliament, the future transparency register will also cover the Council.

The proposed agreement makes it conditional that interest representatives register prior to interactions with the Council, the European Parliament, and the Commission, in particular for meetings with decision-makers in the three EU institutions. The proposal also includes a number of changes to strengthen monitoring and control of data in the register, such as enhanced human and IT resources and better controls and enforcement of the rules.

The Commission's initiative for a mandatory transparency register covering all three EU institutions that shape EU policy and legislation is part of Commission President *Juncker's* commitment to greater transparency as well as its overall aim of a better regulation (see also above news item). The proposed interinstitutional agreement was the result of intensive preparation, in-

cluding a 12-week public consultation of stakeholders which was concluded on 1 June 2016.

It is now up to the Council and the European Parliament to negotiate the mandatory Transparency Register at the EU level. At its plenary session on 6 October 2016, the EP already signaled broad support for the Commission's approach. (TW)

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## Institutions

### Commission

#### New Security Commissioner

On 19 September 2016, the Council, by common accord with the President of the Commission, *Jean-Claude Juncker*, appointed *Sir Julian King* as the new Commissioner for Security Union. The EP backed the appointment on 15 September 2016. Sir Julian King is a European Commission member of British nationality. He replaces *Jonathan Hill*, who resigned on 25 June 2016 and who was responsible for Financial Stability, Financial Services and Capital Markets Union. The appointment applies for the remainder of the current term of office of the Commission which ends on 31 October 2019.

President *Juncker* allocated the Security Union portfolio to Mr. King. The Commissioner for the Security Union supports the implementation of the European Agenda on Security that the European Commission adopted on 28 April 2015. The responsibilities of the new Commissioner include:

- Ensuring swift implementation of the steps needed to build an effective and sustainable Security Union;
- Strengthening the common fight against terrorism and organised crime;
- Reinforcing the security response to radicalisation and increasing efforts to tackle terrorist propaganda and hate speech online;
- Improving information and intelli-

gence sharing, including a stronger role for EU Agencies;

- Reinforcing the capacity to protect critical infrastructures and soft targets;
- Fighting cybercrime through enhanced cybersecurity and digital intelligence;
- Ensuring that EU-financed security research targets the needs of security practitioners and develops solutions for future security challenges.

The Security Union is a new portfolio that complements existing portfolios. The Security Commissioner will closely work with other Commissioners and other Directorate-Generals, such as Home Affairs, Mobility and Transport, Communications Networks, Content and Technology as well as Energy. (TW)

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### European Parliament

#### Anniversary: Direct Elections of the EP Made Possible 40 Years Ago

September 20th marked the date 40 years ago, in 1976, when representatives of the then nine Member States of the European Communities signed an act making it possible to elect the European Parliament by direct universal suffrage. The 1952 Paris Treaty envisaged the possibility of holding direct elections for the Assembly but, at that time, Member States preferred to designate representatives from their national parliaments. The possibility to elect the MEPs directly is considered an important milestone, which paved the EP's way from an assembly with limited powers to a genuine decision-making institution directly shaping EU policy. (TW)

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### OLAF

#### Arrangement with Ukraine

On 19 October 2016, Director-General *Giovanni Kessler*, on behalf of OLAF, signed an Administrative Cooperation Arrangement (ACA) with the National

Anti-Corruption Bureau of Ukraine. The ACA implements the comprehensive anti-fraud provisions of the 2014 EU-Ukraine Association Agreement. The agreement regulates, *inter alia*, the obligations of the competent Ukrainian authorities to cooperate in fighting and investigating fraud and corruption affecting EU funds going to Ukraine. EU support for Ukraine has an initial volume of €11 billion, which is why the protection of EU funds is considered very important.

The ACA allows OLAF and the National Anti-Corruption Bureau of Ukraine to conduct joint investigative activities and share information crucial to examining allegations of fraud or irregularities affecting the EU budget. The arrangement will also form the basis of OLAF's capacity-building, including the facilitation of training aimed at developing the expertise of the Ukrainian partner's staff members. (TW)

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#### OLAF Envisages Better Cooperation with United Arab Emirates

The free zone of the United Arab Emirates is often used for illicit trade harming the EU's financial interests. At a meeting on 12 July 2016, officials from OLAF explored ways to a more structured cooperation with the Dubai police and Dubai customs. This included not only closer cooperation on investigative cases but also the making-up of joint investigations. The possibility to provide each other with information and documents that may be admissible as evidence in legal proceedings involving EU Member States and the UAE was also discussed. (TW)

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#### OLAF and Capacity Building in Romania

As part of its capacity building mission, OLAF and the Romanian Fight against Fraud Department (DLAF) organised a roundtable in Bucharest on 21 September 2016. The roundtable not only consisted of representatives from DLAF



but also of reps from other Romanian authorities tasked with the protection of the EU budget. OLAF supports Romania's updating of its national anti-fraud strategy of 2005, at which time Romania was the second EU Member State to implement such a strategy. As part of its mission, OLAF is helping European countries improve their capabilities to identify and prevent fraud, by providing them with practical tools to recognize red flags and by supporting them in monitoring high-risk projects. (TW)

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## Europol

### Columbia Joins Europol's Focal Point1 SUSTRANS

In mid-September 2016, Europol and Columbia signed an agreement for Columbia to join Europol's Focal Point SUSTRANS, an information processing system providing support to EU Member States' cross-border investigations into the money laundering activities of transnational criminal organisations. Under the agreement, Colombia can now support all 28 members of the Focal Point through the exchange of crime-related information and via operational interactions. (CR)

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### U.S. Diplomatic Security Service Joins Europol's Focal Points Phoenix and Checkpoint

In mid-September, Europol and the U.S. Diplomatic Security Service signed an agreement for the Service to join two of Europol's Focal Points, namely FP Phoenix, which targets trafficking in human beings, and FP Checkpoint, which deals with migrant smuggling. (CR)

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### Agreement with the United Arab Emirates Signed

On 7 September 2016, Europol and the United Arab Emirates signed an agreement to enhance their cooperation in the

fight against organised crime, especially regarding financial crime, money laundering, and counterfeiting. Under the agreement, both parties may exchange non-personal strategic and technical information and participate in training. (CR)

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### Operational Cooperation Agreement with Bosnia and Herzegovina Signed

On 31 August 2016, Europol and Bosnia and Herzegovina signed an Agreement on Operational and Strategic Cooperation to combat cross-border crime, especially illegal migration, drug trafficking, and counterfeiting of goods. The agreement allows both parties to exchange information, including the personal data of suspected criminals, and jointly plan operational activities.

The agreement replaces the strategic cooperation agreement of 2007. (CR)

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### European Monitoring Team (EPMT) Report on Migration by Sea

On 12 September 2016, Europol published its EMPT infographic on migration flows to Europe by sea from 1 January to 28 August 2016.

According to the report, the number of arrivals by sea decreased from 354,618 in 2015 to 272,070 in the given period. The Central Mediterranean route remains the primary route for migrant smuggling into the EU, with the main migratory flow passing through Italy, Switzerland, and Austria. However, new routes via air, sea, and land are increasingly being used. Regarding secondary movements, the most common *modus operandi* remains concealment in lorries and trucks. The report also reveals increased reporting of labour exploitation of irregular migrants. (CR)

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### Operation against Illegal Immigrant Smuggling

On 6 September 2016, 16 arrests and the seizure of a large amount of assets, mon-

ey, and other goods were the successful result of a major operation against an organised criminal group (OCG) involved in illegal immigrant smuggling.

Between 2014 and 2016, the OCG had allegedly transported more than 200 migrants into and within the EU.

The operation was led by Italy and supported by Eurojust. Europol and its European Migrant Smuggling Centre (EMSC) provided tailored analysis reports and deployed two specialists to the investigation. (CR)

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### Action Against Terrorist Propaganda

In September 2016, Europol's newly created Internet Referral Unit (EU IRU) joined forces with several IRUs in the Member States to target accounts used by terrorist groups to radicalise, recruit, and direct terrorist activities and glorify their atrocities. The joint action resulted in the processing of 1677 items of media content and social media accounts in six languages that contained terrorist and violent extremist propaganda for the purpose of referral. The content was being hosted by 35 social media and online service providers. (CR)

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## Eurojust

### Annual Report 2015 Published

Eurojust published its annual report for the year 2015. The five main chapters of the report focus on Eurojust's tools, casework, challenges and best practices, administration, and cooperation with practitioners' networks.

Compared to the previous year, the number of cases dealt with at Eurojust increased by 23%, from 1804 cases in 2014 to 2014 cases in 2015.

274 coordination meetings were led in 2015, an increase of 38% compared to 2014, during which 197 coordination meetings had been held. Additionally, the participation of Europol (99), OLAF (5) as well as third States (67) in coordination

meetings increased. Furthermore, 13 co-ordination centres were held in 2015.

Eurojust was involved in 120 JITs, 68 of them having been formed in 2015. 68 JITs were financially supported by Eurojust in 2015.

Looking at the EAW, Eurojust's assistance was requested on 292 occasions compared to 266 in 2014.

Areas of crime in which Eurojust's casework increased included terrorism, cybercrime, illegal immigrant smuggling, THB, fraud, corruption, and Mobile Organized Crime Groups (MOCGs).

Regarding cybercrime, Eurojust seconded a judicial cybercrime expert to the European Cybercrime Centre (EC3) and acknowledged the need to set up a network of cybercrime prosecutors and judges.

A Letter of Understanding was signed with EUNAVFOR MED (see eucrim 4/2015, p. 131) and a thematic working group on illegal immigrant smuggling formed.

Furthermore, in 2014, Eurojust organised several strategic and tactical meetings, on terrorism, THB, and cybercrime; a strategic seminar on conflicts of jurisdiction; a workshop on data retention as well as several publications.

Eurojust's budget for 2015 was EUR 33,818 million. Budget implementation was 99.86 per cent. (CR)

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### Memorandum of Understanding with the European Union Intellectual Property Office Signed

On 12 July 2016, Eurojust and the European Union Intellectual Property Office (EUIPO) signed a Memorandum of Understanding (MoU) to further expand their cooperation to support European prosecutors working on cases concerning violations of intellectual property rights (IPRs).

Under the MoU, specific cooperation projects, such as joint seminars, training, and intelligence can be developed. Furthermore, the MoU formalises the role of the European Intellectual Property

Prosecutors Network (EIPPN) and reinforces its capacities. (CR)

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## Frontex

### New Regulation Adopted

After votes in the European Parliament on 6 July 2016 and in the Council, Frontex' new legal basis, Regulation 2016/1624 on the European Border and Coast Guard, was adopted on 14 September 2016.

The regulation establishes a European Border and Coast Guard to ensure European integrated border management at the external borders of the EU. The European Border and Coast Guard consists of the European Border and Coast Guard Agency (the current Frontex Agency with extended tasks) and the national authorities of Member States that are responsible for border management, including coast guards to the extent that they carry out border control tasks.

As part of an overall improvement in coast guard functions, better cooperation between the competent agencies is foreseen. For this purpose, the mandates of the European Fisheries Control Agency and the European Maritime Safety Agency have been aligned to that of the new European Border and Coast Guard. The regulation entered into force on 6 October 2016. (CR)

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## Specific Areas of Crime / Substantive Criminal Law

### Protection of Financial Interests

#### Possible Compromise on VAT and PIF Directive in Council

The Council is still struggling to find a compromise position on whether at least some aspects of VAT fraud should be covered by the scope of the new Di-

rective on the protection of the EU's financial interests by means of criminal law ("PIF Directive", see also eucrim 2/2016, p. 72). The current Slovak Presidency tabled a proposal on 11 October 2016. VAT fraud would be introduced into the scope of the PIF Directive in only a limited way. The competence of the European Public Prosecutor's Office would be limited to the most serious cases of VAT fraud, involving, for example, cross-border VAT carousels, Missing Trader Intra-EU Fraud, VAT fraud carried out by organised criminal structures, or cases above a certain threshold. The proposal was backed by the majority of Member States at the 14 October 2016 JHA Council meeting. Negotiations with the European Parliament can only be taken up if the Council agrees on a common position on this issue. (TW)

► eucrim ID=1603020

### EPPO – Debate in Council

Negotiations on the establishment of a European Public Prosecutor's Office (EPPO) continue intensively. At its meeting on 14 October 2016, the Justice Ministers of the Member States reached a provisional agreement on the last set of articles of the regulation. They had not been discussed in previous sessions. These articles concern the rules on judicial review, the cooperation with third countries and with non-participating member states, and the relations with Eurojust. Some delegations are still critical of some of the remaining articles.

In addition, the ministers had the opportunity to discuss the entire text of the possible EU Regulation on the EPPO for the first time. The Slovak Presidency aims to get a definitive agreement at the JHA Council in December (on the EPPO, see also eucrim 2/2016, pp. 72/73; 1/2016, p. 10). (TW)

► eucrim ID=1603021

### EPPO – Resolution of EP

On 5 October 2016, the European Parliament adopted a resolution on the European Public Prosecutor's Office and



Eurojust. The EP reaffirms its longstanding support for the establishment of an efficient and independent EPPO in order to reduce the current fragmentation of national law enforcement efforts to protect the EU budget, thus strengthening the fight against fraud in the European Union. However, the EP also calls for improvements on a number of issues in the current negotiations, e.g.:

- Giving the EPPO an unambiguous, clear set of competences, including conclusion of the new PIF Directive with VAT fraud within its ambit (cf. *supra*).
- Remedying deficiencies in efficiency in view of the relationship between the EPPO and national prosecutors/national prosecution courts;
- Providing the EPPO with sufficient investigative measures;
- Improving judicial review if operational measures affect third parties;
- Ensuring independence of the EPPO and eliminating disadvantages from the “national link”;
- Protecting the procedural rights of suspected or accused persons;
- Clarifying the relationship between the EPPO and Eurojust as well as EPPO’s liaison with OLAF.

The EP may be called upon to agree on the EPPO Regulation at the beginning of 2017. (TW)

►eucrim ID=1603022

### 2015 PIF Report

On 14 July 2016, the Commission adopted its annual report on the protection of the EU’s financial interests (PIF report). The report is designed to inform the European Parliament and the Council about the approaches, procedures, and tools used by the EU Member States to fight fraud in 2015. It also sets out the initiatives and measures taken by the Commission at the EU level in 2015 to counter fraud affecting the EU budget.

All in all, the Commission found that 2015 was a good year as regards the fight against fraud in the Member States. In particular, the following achievements can be highlighted:

- Better targeted investigative actions in Member States;
- Focus on cases with high financial impact;
- Successful tracking of irregularities at all stages of the multi-annual EU spending programmes due to joint efforts on the part of Member States and the Commission;
- Good cooperation between the EU Member States, the Commission, and third countries through targeted Joint Customs Operations (JCOs);
- Concrete results delivered by JCOs combating illicit cross-border trafficking in goods;
- Success of numerous measures to improve the detection, investigation, and prosecution of fraud cases involving EU funds as well as to ensure adequate recoveries and sanctions in EU Member States.
- Adoption of national anti-fraud strategies in eight EU Member States in 2015.

Regarding figures, the Commission reports that 22,349 irregularities in relation to revenue and expenditure were reported by the Member States in 2015, totalling approximately EUR 3.21 billion in EU funds. 1461 fraudulent irregularities were reported in 2015. This is a decrease of 11% in comparison with 2014, while the amounts concerned increased by 18% to EUR 637.6 million. (TW)

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### Tax Evasion

#### 75% of Europeans Favour More EU Action against Tax Fraud

On 29 July 2016, the EP released the results of a special Eurobarometer survey on the expectations of EU citizens in 2016. Nearly 28,000 people in all 28 EU Member States were surveyed from 9-18 April 2016. As a result of this representative survey, 75% of the EU population said that the EU should do more to fight tax fraud. Tax fraud was considered the third most serious issue affecting the EU after terrorism and unemployment. However, the survey also revealed some

regional and national variations. The respondents in Portugal, Cyprus, and Spain had the highest percentage of answers (86-91%) in favour of increased EU action against tax fraud whereas lightly more than 50% replied in Austria and Poland. (TW)

►eucrim ID=1603024

### EP Inquiry Committee Investigating the Panama Papers Takes Up Work

After hearing information provided by investigative journalists who made the tax evasion scheme of Panama law firm Mossack Fonseca public, the EP inquiry committee on the Panama Papers formally started its investigations on 27 September 2016 (see also eucrim 2/2016, p. 74). The journalists, who cooperate through the Washington-based International Consortium for Investigative Journalism (ICIJ), not only explained their findings of the huge amount of leaked information but also reported on low tax systems, forms of anonymity disguising ownership of offshore firms, and the construction of intermediaries.

The chairman of the EP inquiry committee, *Werner Langen*, announced that the committee is also considering investigating the so-called “Bahama leaks.” On 21 September 2016, the ICIJ published information about offshore companies registered in the Bahamas. The information also puts former Commissioner *Neelie Kroes* under fire, who might have been engaged in an offshore firm while holding the competition portfolio at that time. (TW)

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### Money Laundering

#### Working Group on Money Laundering with Digital Currencies

Discussions to set up a working group on money laundering using digital currencies between Europol, INTERPOL, and the Basel Institute on Governance were formalised on 9 September 2016.

The aims of the newly established working group include the following:

- To gather, analyse, and exchange non-operational information regarding the use of digital currencies as a means of money laundering, and to investigate and recover proceeds of crime stored digitally;
- To organise annual workshops and meetings in order to increase the capacity of the three partners to successfully investigate crimes in which virtual currencies are involved;
- To create a network of practitioners and experts in the field of money laundering with digital currencies who can collectively establish best practices and provide assistance and recommendations inside and outside the working group. (CR)

► [eucrim ID=1603026](#)

## Counterfeiting & Piracy

### 2015 Annual Report on Counterfeit Seized Goods

On 23 September 2016, the Commission presented the results of customs actions at the EU external borders regarding the enforcement of intellectual property rights (IPR) in 2015. The annual report contains statistical information about the number of counterfeit goods seized by the customs authorities and detentions made under customs procedures. It also includes data on the categories of goods detained, their provenance, the means of transport to ship those goods, and the type of intellectual property rights involved. The information is based on data submitted to the Commission by the Member States' customs administrations. The main results of the report are as follows:

- Over 81,000 detentions, consisting of a total of 40.7 million articles were made by the customs authorities;
- Compared to 2014, the number of intercepted goods increased by 15%;
- The domestic retail value of the detained articles represents over € 642

million (in 2014: € 617 million);

- 33,191 right-holder applications requesting customs to take action because of suspicious IPR infringements were recorded – a significant increase compared to 2014 (20,929);
- Germany, Belgium, and the United Kingdom are at the top of the list of EU countries with the highest number of cases of IPR infringements. Greece, France, the Netherlands, and Romania lead the EU countries with the most articles detained;
- At 27%, cigarettes remain at the top of the category “articles detained”;
- China remains the country from where most counterfeit goods originate. However, the countries of provenance vary if looked at the specific product categories;
- Benin is the main country of provenance for foodstuff, Mexico for alcoholic beverages, Malaysia for toiletries, and Turkey for clothing;
- With regard to mobile phones, their accessories, computer equipment, CDs/DVDs, most counterfeit goods derive from Hong Kong and China. Montenegro was the biggest originator of counterfeit cigarettes and India for medicines;
- The number of products detained that pose health and safety concerns (e.g., suspected trademark infringements concerning food and beverages, body care articles, medicines, electrical household goods, and toys) decreased slightly compared to 2014 (from 28.6% to 25.8% of the total amount of detained goods);
- As in the past, postal, air, and express transport remain the most important means of transport for “number of cases detained” whereas sea transport by container is the main transport modality for “number of articles”.

The IPR enforcement report has been issued since 2000. It also forms a valuable tool for analysing IPR infringements and thus streamlining appropriate counter-measures by customs in the future. (TW)

► [eucrim ID=1603027](#)

## Cybercrime

### Public-Private Cooperation against Ransomware

The Dutch National Police and Europol stepped up the fight against the current cybercrime phenomenon of ransomware by launching a common initiative together with the private ICT companies Intel Security and Kaspersky Lab.

Ransomware is a type of malware that locks computers or encrypts the data of individuals, companies, or even public institutions, while the criminals demand ransom from the victims in order to regain control over the affected device or files. The number of users attacked by crypto-ransomware is alarming: Kaspersky Lab speaks of 718,000 victims in 2015-2016.

Ransomware is currently a top threat for EU law enforcement, with almost two thirds of EU Member States conducting investigations into this form of cybercrime, Europol said.

The initiative – called “No More Ransom” – has launched a new online portal containing public information about the dangers of ransomware, advising on how to protect oneself, and helping victims to recover their data without having to pay ransom to the cybercriminals. The project provides users with tools that may help them recover their data once it has been locked by criminals. In its initial stage, the portal contains four decryption tools for different types of malware. The portal can be accessed via the website: [www.nomoreransom.org](http://www.nomoreransom.org)

The website also allows victims of ransomware attacks to report the crime. This is considered necessary in order to get a clearer picture of the ransomware phenomenon and to be able to mitigate the threats. Victims are explicitly advised not to pay the ransom.

Since ransomware is continuously changing, the initiated cooperation between the law enforcement bodies and the private sector is open for other partners to join. (TW)

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## Procedural Criminal Law

### Data Protection

#### AG Saugmandsgaard Øe: National Data Retention Regimes Possible Under Condition

After the judgment of the CJEU in *Digital Rights Ireland and Others* (Cases C-293/12 and C-594/12), in which the Court declared the Data Retention Directive 2006/24/EC incompatible with EU law, a Swedish and a British Court referred the question to the CJEU to clarify whether national laws replicating the major contents of the Data Retention Directive are still legal. In the affirmative, the national courts further wish to know whether the national provisions are subject to the safeguards described by the CJEU in paragraphs 60-68 of its *Digital Rights Ireland* ruling.

Advocate General (AG) *Henrik Saugmandsgaard Øe* is of the opinion (published on 19 July 2016) that national provisions establishing a general data retention obligation for private enterprises are principally in line with Art. 15 (1) of Directive 2002/58/EC on privacy and electronic communications. However, the AG found that these regimes must be compatible with both the guarantees as enshrined in the Charter of Fundamental Rights and the safeguards as described and set out by the CJEU in its judgment *Digital Rights Ireland*. Following these standards, the AG then provides detailed guidance on what the national data retention regimes at issue must look like:

- The retention obligation and accompanying guarantees must be provided for in legislative or regulatory measures possessing the characteristics of accessibility, foreseeability, and adequate protection against arbitrary interference;
- The obligation must respect the essence of the right to private life and the protection of personal data laid down in Arts. 7 and 8 CFR;
- The obligation must be strictly necessary in the fight against serious crime,

which means that no other measure or combination of measures could be as effective in the fight against serious crime while at the same time interfering to a lesser extent with the rights enshrined in Directive 2002/58 and Arts. 7 and 8 of the Charter of Fundamental Rights;

- The obligation must observe the conditions set out in the said paragraphs of the judgment in *Digital Rights Ireland* as regards access to data, the period of retention, and the protection and security of the data, in order to limit the interference with fundamental rights to what is strictly necessary;

- The obligation must be proportionate, within a democratic society, to the objective of fighting serious crime.

The key point of the AG's opinion is that – under the condition that EU standards are met – Member States have still considerable discretion to enact national obligations for private telecommunication companies as to the retention of data that can be used for criminal law enforcement purposes. The cases at issue, which were dealt with together, have the references C-203/15 (*Tele2 Sverige AB*) and C-698/15 (*Watson and others*). (TW)

► eucrim ID=1603029

#### AG Mengozzi: EU-Canada PNR Deal Must Be Revised

On 8 September 2016, Advocate-General (AG) *Paolo Mengozzi* concluded that the agreement negotiated between Canada and the European Union on the transfer and processing of Passenger Name Record (PNR) data is partly incompatible with EU primary law and the EU Charter of Fundamental Rights (CFR). As a result, the AG advises that the agreement should not be entered into in its current form.

The issues of whether the EU-Canada PNR agreement, which was signed by the Council in 2014, is compatible with the EU's fundamental rights obligations (in particular Arts. 7 and 8 CFR) and is founded on an appropriate legal basis were brought before the CJEU by the

European Parliament in November 2014. The EP stated that it would not approve the agreement before the CJEU has given its opinion on the legality of its provisions. It is the first time that the Court must give a ruling on the compatibility of a draft international agreement with the CFR (referred to as Opinion 1/15).

PNR data are data collected by air carriers from passengers for the purpose of reserving flights; they include data on meal preferences, travel habits, and even payment details. Law enforcement authorities are interested in PNR data for profiling purposes, in order to guess who might be a terrorist or criminal. They are also potentially useful in detecting a committed crime. As voiced by the EP, it is often questioned whether the obligations for air carriers to store and retain the data for law enforcement purposes go beyond what is strictly necessary and whether the provisions in the bilateral PNR agreements strike the proper balance between the maintenance of public security and the protection of the person's private life and his own data.

In his opinion, AG *Mengozzi* concluded that certain provisions of the EU-Canada PNR agreement, as currently drafted, are contrary to the CFR rights on the protection of personal data and to privacy. Incompatibilities in this regard concern, *inter alia*:

- Canada's potential to process PNR data independent of the public security objective pursued by the agreement (Art. 3 (5) of the envisaged agreement), beyond what is strictly necessary;
- Canada's potential to process, use and retain PNR data containing sensitive data (Art. 8 of the envisaged agreement);
- Canada's right to make any disclosure of information without requiring any connection with the public security objective of the agreement (Art. 12 (3) of the envisaged agreement);
- Canada's retention of PNR data for up to five years without referring to the public security objective of the agreement (Art. 16 (5) of the envisaged agreement);
- Canada's subsequent transfer of PNR

data to other foreign public authorities without safeguards or an independent review mechanism (Art. 19 of the envisaged agreement).

In addition, the AG took the view that several provisions are only compatible with EU law if a number of conditions are fulfilled. They include for example:

- Clear and precise wording of the categories of PNR data;
- An exhaustive listing of offences covered by the definition of serious forms of transnational crime in the agreement;
- Clear and precise identification of the authority responsible for processing PNR data;
- Limiting the number of “targeted” persons to those who can be reasonably suspected of participating in a terrorist offence or a serious transnational crime.

The findings of the AG are generally based on the CJEU’s rulings in *Digital Rights Ireland and Others* (Cases C-293/12 and C-594/12) in which the Court declared the EU’s Data Retention Directive invalid and in *Schrems* (Case C-362/14) in which the CJEU declared the Commission’s US Safe Harbour Decision invalid. The legal assessment of the EU-Canada PNR agreement may also have an impact on other bilateral PNR deals, such as the agreements between the EU and the USA and Australia, respectively (already in place) or the agreement currently under negotiation with Mexico (put on hold pending the present CJEU assessment). Furthermore, the EU’s internal PNR scheme – the recently adopted EU PNR Directive (see eucrim 2/2016, p. 78) – may also be put under review if the CJEU follows the opinion of the AG.

►eucrim ID=1603030

### EDPS Proposes Digital Clearing House to Counter Risks of Big Data

On 23 September 2016, the European Data Protection Supervisor (EDPS), *Giovanni Buttarelli*, released an opinion entitled “Coherent enforcement of fundamental rights in the age of big data.” The opinion is part of an ongoing project

on privacy and competitiveness in the age of big data, which started in 2014. The present opinion also contains practical recommendations to EU institutions on how the rights and interests of individuals can be better protected against dominant companies in the digital markets.

The main recommendation of the EDPS is the establishment of a “Digital Clearing House.” It is designed as a voluntary network of regulatory bodies that share information about possible abuses in the digital ecosystem and the most effective way of tackling them. As a result, web-based service providers should be made more accountable for their conduct.

Further recommendations include:

- Updating the rules of the Merger Regulation in view of introducing a level of protection for the rights to privacy, data protection, and freedom of expression online;
- Exploring ways to create a common area – a space on the web – where individuals can interact without fear of being tracked and without unfair inferences made about them (in line with the Charter of Fundamental Rights).

The opinion concludes that “Big Data opportunities for boosting productivity and connectivity should be accompanied by Big Data Protection safeguards.” The EDPS announced that he will further detail his plans for a “Digital Clearing House.” (TW)

►eucrim ID=1603031

### Risks of Big Data on Agenda of MEPs

Besides the EDPS (see above news item), the EP is also looking at the opportunities and risks of using big data. At a meeting on 26 September 2016, the EP’s civil liberties committee LIBE discussed both the advantages of and challenges to the fundamental rights of privacy and data protection in the use of large quantities of collected data. Whereas it was recognised that big data represent a lucrative market, worth an expected €50 billion and promising the

creation of 3.75 million new jobs, MEPs also expressed concern about the too low protection of individuals’ personal data. Portuguese MEP *Ana Gomes* is preparing an own-initiative report on the issues. (TW)

►eucrim ID=1603032

## Victim Protection

### Guidelines on Whistleblowing Procedures by EDPS

Whistleblowing remains on the agenda of the EU institutions (for an initiative for a whistle-blower directive, see eucrim 2/2016, p. 80). On 18 July 2016, the European Data Protection Supervisor (EDPS) published “Guidelines on processing personal information within a whistleblowing procedure.” The guidelines address the EU institutions and bodies and intend that their whistleblowing procedures comply with the Data Protection Regulation 45/2001. The guidelines include, *inter alia*, recommendations, such as how EU bodies can:

- Define safe channels for staff to report fraud;
- Ensure the confidentiality of information received;
- Protect the identities of the whistleblower, the accused, and anyone else connected to the case.

The detailed recommendations of the guidelines are also designed to be a checklist for the EDPS when assessing compliance with the obligations laid down in Regulation 45/2001. (TW)

►eucrim ID=1603033

### Italy Must Revise Its Victims’ Compensation Scheme, CJEU Says

Following a judgment of 11 October 2016, the CJEU found that Italy did incorrectly implement obligations that derive from Council Directive 2004/80/EC relating to the compensation of crime victims. According to Art. 12 para. 2 of the directive, “all Member States shall ensure that their national rules provide for the existence of a scheme on com-



compensation to victims of violent intentional crimes committed in their respective territories, which guarantees fair and appropriate compensation to victims.”

Italy implemented the EU law in several special laws which, under certain conditions, grant compensation to victims of certain types of violent intentional crimes only (such as crimes linked to terrorism and organised crime).

The Commission brought an infringement procedure before the CJEU and claimed that Art. 12 of the Directive requires Member States to introduce a general compensation scheme covering all types of violent intentional crimes in cross-border situations, including, e.g., rape, homicide, serious assault, battery, etc. By contrast, Italy contended that the Directive only requires states to give Union citizens access to the compensation schemes that may be provided for under national law.

The CJEU followed the argumentation of the Commission. It concluded that the objective of Art. 12 of the Directive is to guarantee Union citizens fair and appropriate compensation for the injuries they have suffered, regardless of where in the EU the crime was committed. This is a corollary to the freedom of movement as enshrined in the TEU. This right to compensation can only be exercised if each Member State introduces a compensation scheme for victims of any type of violent intentional crime committed on its territory. (TW)

►eucrim ID=1603034

## Cooperation

### Judicial Cooperation

#### CJEU Ruling “*Petruhhin*”: Extradition of EU Citizens to Third Countries

Is it discriminatory and against the free movement of persons (Art. 18, 21 TFEU) if a national of an EU Member State does not benefit from the rule that

nationals from another EU Member State cannot be extradited to non-EU countries?

This was the essential question of a case that was referred to the CJEU by the Latvian Supreme Court (C-182/15, *Petruhhin*). In the present case, an Estonian national was arrested by Latvian authorities upon an Interpol red notice of Russia seeking his extradition for drug trafficking offences committed in Russia. Under the relevant national and international extradition laws, only own nationals (in the case at issue: Latvians) are conferred the right not to be extradited to third countries outside the EU, such as Russia. The Estonian national argued that his extradition is contrary to the essence of his Union citizenship and that he must be treated the same as Latvian nationals.

The CJEU first affirmed that the national law at issue, which only protects own nationals from non-extradition to third countries, affects the freedom of nationals of other EU Member States to move within the EU. However, such a restriction can be justified if it is based on objective considerations and is proportionate to a legitimate objective. Indeed, the CJEU considers the objective of preventing the risk of impunity of persons who have committed an offence in a foreign country a legitimate objective in EU law. However, the Court found that applying all cooperation and mutual assistance mechanisms in criminal matters under EU law, in particular the use of the European Arrest Warrant, is a manner less prejudicial to the exercise of the right to free movement. Consequently, the CJEU obliges the requested EU Member State (here: Latvia):

- To exchange information with the EU Member State of which the person is a national (here: Estonia);
- To give the other EU Member State the opportunity to exercise its jurisdiction to prosecute offences of its own nationals (e.g., via the personality principle);
- To give priority to a potential Euro-

pean Arrest Warrant of that EU Member State over the extradition request of the third country (here: Russia).

In addition, the CJEU answered the questions as to what the obligations of the requested EU Member State are in order to examine a possible violation of the Charter of Fundamental Rights, in particular Art. 19. Under Article 19 of the Charter, no one may be removed, expelled, or extradited to a State where there is a serious risk that he or she would be subjected to the death penalty, torture, or other inhuman or degrading treatment or punishment.

First, the CJEU ruled that the EU Member State which receives a request from a third state seeking the extradition of a national of another Member State must verify that the extradition will not prejudice the rights referred to in Art. 19 of the Charter.

Second, according to the CJEU, such verification cannot be limited to checking that the requesting state is party to the Convention against Torture but must instead be based on information that is objective, reliable, specific, and properly updated. By referring to its judgment *Aranyosi and Căldăraru* (C404/15 and C659/15 PPU, cf. eucrim 1/2016, p. 16), the Court confirms that the competent authorities of the requested Member State can rely on information obtained from, *inter alia*, judgments of international courts, e.g., judgments of the ECtHR, judgments of courts of the requesting third State, and also decisions, reports, and other documents produced by bodies of the Council of Europe or under the aegis of the United Nations. (TW)

►eucrim ID=1603035

### European Arrest Warrant

#### ECBA Handbook on EAW

The European Criminal Bar Association (ECBA), with the support of the law reform and human rights organisation JUSTICE, has published a Handbook on the European Arrest Warrant for De-



fence Lawyers. The handbook aims at providing practical answers for defence lawyers on how to defend a European Arrest Warrant case. It is primarily addressed to defence lawyers with little experience in EAW proceedings.

The information can be consulted online on a special website (<http://handbook.ecba-eaw.org/>). A pdf version for offline use will also be provided. The handbook provides an introduction into the legal framework of the EAW, including the rights of the individuals concerned and the role of the defence lawyer. It also provides a checklist for the EAW form or Schengen entries, for consultations with the client, and for contacts of lawyers in the issuing state.

At present, the first part of the Handbook (Understanding the EAW Framework Decision) has been released. It should be noted that the ECBA Handbook on the EAW is an ongoing project. It will be supplemented with national chapters providing information on the implementing laws and practices in each EU Member State. (TW)

►eucrim ID=1603036

### CJEU Interprets the Concept of “Detention” in the FD EAW

The CJEU had to decide anew on interpretation of provisions of the Framework Decision on the European Arrest (FD EAW) Warrant. In the present case, a Polish court referred the question to the CJEU as to what exactly is meant by the notion of “detention” in Art. 26 of the FD. According to this provision, the Member State that issued the European Arrest Warrant is required to deduct all periods of *detention* arising from the execution of a EAW from the length of the custodial sentence passed in the issuing state for the offence.

In the case at issue (Case C-294/16 – PPU, *JZ v Prokuratura Rejonowa Łódź–Śródmieście*), a Polish citizen (JZ) was sentenced in Poland of three years and two months, but absconded. Upon a EAW issued against him the UK authorities arrested JZ but did not enforce

extradition detention. Instead, JZ was released on bail and he was subjected to a nine-hour daily curfew monitored by means of an electronic tag. This curfew lasted nearly 11 months. JZ claimed before the Polish court that this restriction of his liberty must count towards the custodial sentence imposed on him in Poland.

The CJEU states that the concept of detention in the sense of Art. 26 FD EAW is an autonomous concept of EU law that must be interpreted uniformly throughout the EU. Next, the CJEU found that the concept of “detention” must be interpreted as covering not only imprisonment but also any measure or set of measures imposed on the person concerned which, on account of the type, duration, effects, and manner of implementation of the measure(s) in question deprive the person concerned of his liberty in a way that is comparable to imprisonment.

It is, in principle, up to the judicial authority of the Member State that issued a EAW to assess whether the measures taken in the executing Member State constitute “detention”. After having examined the relevant case law of the ECtHR on Art. 5 ECHR, the CJEU concludes, however, that the measures taken in the UK certainly restrict the person’s liberty of movement, but they are not, in principle, so restrictive as

to have the effect of depriving him of his liberty. Thus, they are not classified as “detention” within the meaning of Art. 26 FD D EAW. (TW)

►eucrim ID=1603037

### Federal Constitutional Court: UK Law on Use of Accused’s Silence Does Not Hinder Surrender

After the ground-breaking decision of 15 December 2015 in which the German Federal Constitutional Court (FCC) ruled that violations of the law of a Member State issuing a European Arrest Warrant (EAW) can hinder surrender if the violations are rooted in the guarantee of human dignity as enshrined in the Basic Law (cf. eucrim 1/2016, p. 17), the FCC again had the occasion to clarify this line of argumentation.

In the case at issue, the defendant, whose surrender was requested by a EAW of the United Kingdom for having shot a man in 1993, claimed that the British law allows the British courts and the jury to draw inferences from his silence to his guilt. In his opinion, surrender is not permissible because it does not comply with the basic standards of his right to remain silent under the German legal order.

The FCC reiterated the standards as set by the aforementioned order of 15 December 2015. In particular, the presumption of the principle of mutual trust

## Report

### The 2016 Oxford Conference on International Extradition and the European Arrest Warrant

University of Oxford, 29-30 August 2016

Lawyers and law school professors from around the world congregated in Oxford, England in the last week in August to brainstorm on alternative methods of extradition in light of the possible exit of the United Kingdom from the European Union. A poll of participants indicated that virtually all considered the two-day conference a “complete success,” said Dr. *Gary Botting*, a Canadian barrister and published expert on extradition law. “In extradition matters, there is always a strong need of comparative information,” said *Nicola Canestrini*, a criminal lawyer from Italy, “and networking events, such as the one held Oxford, are fundamental for an effective defense.”

The first global conference on International Extradition and the European Arrest Warrant at the Centre of Criminology at the University of Oxford attracted academic and

practising lawyers from the United States, Canada, Australia, the United Kingdom and Continental Europe. High on the agenda was an examination of the comparative merits of multilateral and bilateral extradition treaties, the European Arrest Warrant (EAW) and the Interpol Red Notice methods of extradition.

Over the course of two days, seminars focused on the theory and practice of extradition laws in a number of jurisdictions, noting that few universities, law societies and bar associations around the world focus on extradition as an area of legal practice. No university in the world offers ad hoc programmes in international extradition. "Despite the sharp increase of high-profile extradition cases in recent years, international extradition is still not taught as an independent subject in undergraduate and graduate courses in law across the world," said *Cristina Saenz Perez* of Spain, a graduate from UNICRI and one of the principal organizers of the conference. "As a result, with the exception of the UK, no established class of extradition lawyers exists in most countries." The seminar was opened by U.S. law professor *David Sonenshein* of Temple Law School in Philadelphia with a short history of extradition and the origin of the related area of interstate rendition in the United States. The initial seminar drew parallels between rendition, extradition, Canada-wide or Australia-wide warrants that have interprovincial or interstate effect, and the European arrest warrant system.

An entire session, chaired by barrister *Mark Summers QC* of Matrix Chambers, focused on the adjustments made by the United Kingdom in the process of incorporating the European Arrest Warrant (EAW) into its domestic system. "The last decade shows a fascinating and difficult tension between pro-surrender courts and a Parliament sceptical of, and determined to lessen the impact of, this European mechanism" says *Summers*, who appears on a regular basis in extradition cases, including *Assange v. Sweden* in 2012.

British solicitor *Jasvinder Nakhwal*, president of the *Extradition Lawyers Association*, reported on the difficulties of removing Interpol Red Notices once they have been put in place (often arbitrarily) – even once extradition proceedings have concluded.

Australian academic and lawyer *Ned Aughterson* highlighted the peculiarities of Australian rules of extradition and the "special relationship" with New Zealand, drawing parallels with bilateral extradition practice in the United States and Canada.

German extradition experts *Adrian Haase* and *Thomas Wahl* reported on recent developments in German case law concerning the denial of extradition contrary to public policy. In particular, they analysed the Federal Constitutional Court's judgment of 15 December 2015, in which the surrender to Italy upon a EAW was stopped since the Italian trials *in absentia* may contradict with certain core aspects of German Basic Law. "It is already a groundbreaking judgment, may shake the surrender from Germany to other EU countries considerably and possibly jeopardize the system of mutual recognition in EU criminal law altogether", *Haase* and *Wahl* said.

Another key organizer, law professor *Stefano Maffei* of the University of Parma, discussed the importance of expert witnesses in extradition hearings, especially for establishing foreign law, which almost universally is considered a question of fact rather than law. "I have served on several occasions as a foreign expert witness in extradition cases," Professor Maffei stated, "and I believe there is a real risk that foreign courts that do not instruct foreign academic experts may misunderstand or misread the rules of the State requesting extradition. This can sometimes affect the fairness of the entire process".

Finally, Dr. *Botting* focused on the importance of reaching agreement on the wording of a multilateral treaty on extradition which would supplant all the problematic alternatives to international extradition. "The identified shortcomings of 'regional' instruments of surrender for extradition such as the European Arrest Warrant and bilateral treaties show that a multilateral treaty approach to extradition would be the ideal way to secure uniformity across the globe," he said, adding that a single multilateral treaty, endorsed by the United Nations, would establish a minimum standard level of protection of the rights of those subjected to extradition procedures.

The second International Extradition Conference will be held in Oxford at the end of August 2017. All those interested should email the team of organizers at [stefano.maffei@gmail.com](mailto:stefano.maffei@gmail.com)

*Prof. Stefano Maffei, Università degli Studi di Parma*

(on which the EAW is based) is shaken if there are factual indications that the requirements that are indispensable for the protection of human dignity will not be met. As a consequence, the individual cannot be extradited to another EU Member State. The FCC further confirms that the right to remain silent is rooted in human dignity, in particular because the drawing of adverse inferences from the defendant's silence may put him under impermissible psychological pressure to make a statement.

However, the FCC clarifies that only a violation of the "core content of the right not to incriminate oneself, which is an inherent part of human dignity" can be considered an obstacle to extraditions to other EU Member States. Therefore, the mere ground that the right is not guaranteed to the same extent in the requesting state's procedural law, as is the case under German criminal procedural law due to constitutional requirements, does not make the surrender impermissible.

Measured against this line of argumentation, the FCC found that the British criminal procedural law, in which silence can be treated as evidence under certain circumstances and only be used in addition to other means of evidence in the context of an overall assessment of all evidence to justify a conviction, does not affect the core content of the right not to incriminate oneself. As a result, the FCC gave green light to surrender to the UK in the present case. (TW)

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## Customs Cooperation

### Regulation 2015/1525 Now Applies – New Tools for Investigators to Detect Fraud Patterns

As of 1 September 2016, the provisions of "Regulation (EU) 2015/1525 of 9 September 2015 amending Council Regulation (EC) No 515/97 on mutual assistance between the administrative authorities of the Member States and cooperation between the latter and the

Commission to ensure the correct application of the law on customs and agricultural matters” apply.

The key feature of the amended legislation is that maritime carriers are obliged to directly transmit data on the movements and status of containers to the so-called “Container Status Messages Directory.” The CSM Directory is a central database managed by the Commission. Moreover, an Import, Export and Transit directory has also been established, containing data on goods entering, transiting, and leaving the EU.

The new system enables customs officials as well as the EU anti-fraud office

OLAF to cross-check the information from both databases to detect potential fraud patterns. It is expected that these new tools will strengthen the analytical capabilities of national customs authorities and OLAF in detecting fraudulent operations.

The amended legislation will also help speed up OLAF investigations by setting out deadlines for Member States to provide investigation-related documents. Ultimately, it facilitates the use of information obtained on the basis of mutual assistance as evidence in national judicial proceedings. (TW)

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Court. While noting the good reputation of the judges, GRECO recommends clear and precise criteria (available to the public) on recruiting judges, which should be available to the public as well. Additionally, a code of ethics offering guidance in areas such as conflicts of interest and other integrity-related matters should be elaborated by the active participation of judges of all ranks. The report also recommends introducing training of judges in respect of judicial ethics as a well-defined part of their induction training.

As regards the prosecution service, the report recommends strengthening the capacity of the individual law officers and prosecutors as well as the independence of prosecutorial functions by giving more autonomy to the prosecuting staff when conducting their duties. In addition, the prosecutorial staff should be subject to specific code of ethics, available to the public, which provides for adequate guidance on conflicts of interest and other integrity-related matters such as the acceptance of gifts, recusal, or the handling of confidential information.

Moreover, in order to prevent favoritism, the report recommends establishing criteria for the distribution of criminal cases and written justification for the reallocation of cases.

►eucrim ID=1603040



## Council of Europe\*

Reported by Dr. András Csúri

### Specific Areas of Crime

#### Corruption

##### GRECO: Fourth Round Evaluation Report on Cyprus

On 27 July 2016, GRECO published its Fourth Round Evaluation Report on Cyprus. This latest evaluation round was launched in 2012 in order to assess how states address corruption prevention in respect of MPs, judges, and prosecutors (for more recent reports, see eucrim 3/2014, p. 83; 4/2014, pp. 104-106; 1/2015, p. 11; 2/2015, pp. 43-45; 3/2015, pp. 87-88; 1/2016, pp. 20-22; 2/2016, pp. 82-83).

As regards MPs, GRECO recommended the adoption of a code of ethics covering various conflicts of interest, such as the acceptance of gifts and other

advantages, lobbyists, and post-employment activities. The report also suggested improving the existing regime of asset declarations by covering all forms of assets, widening their scope to include spouses, making the declarations public promptly, and establishing an independent and effective monitoring mechanism for such declarations. Lastly, GRECO expressed support for the current negotiations to reduce the scope of immunity of MPs whenever it goes beyond the protection of free speech, opinions, and voting in parliament.

GRECO acknowledged the high degree of independence of the judiciary provided by the Constitution. The report recommends reflection on the composition of the administrative body of the judiciary (the Supreme Council of Judicature), however, as it is composed of the same judges that make up the Supreme

#### Money Laundering

##### MONEYVAL: 2015 Annual Activity Report

On 26 September 2016, MONEYVAL presented its Fifth Annual Report. The report covers the year 2015. Of the 33 states and jurisdictions subject to evaluation by MONEYVAL at the beginning of 2015, 26 were subject to active monitoring processes through on-

\* If not stated otherwise, the news reported in the following sections cover the period 16 July 2016–15 October 2016.

site visits, adopted reports, follow-ups, and compliance procedures. The fourth cycle of MONEYVAL evaluations, which started in 2009, were completed in the process. Each fourth round evaluation provides a summary of the AML/CTF measures in place in the respective Member State and assesses compliance with the FATF 40+9 Recommendations, focusing on the initial core and key recommendations.

The report concludes that states have consistently improved their compliance with international AML/CFT standards, particularly with regard to preventive measures. Nevertheless, two key priorities need to be addressed in practice:

- Prosecutorial authorities should do more to achieve ML convictions;
- Deterrent confiscation orders should take the profit out of crime.

The first on-site visits in the fifth mutual evaluation round were also carried out. This evaluation round focuses on the effective application of the respective measures. In order to allow the plenary to focus primarily on matters of substance during the fifth cycle, a Working Group on Evaluations was established to prepare discussions and propose solutions on technical issues. In addition, two seminars were organized by MONEYVAL to train future fifth cycle evaluators.

Members of MONEYVAL also continue to act as reviewers of Mutual Evaluation Reports in other international bodies, for example the FATF or the International Monetary Fund. 2015 saw an increasing number of terrorist attacks in CoE member states, highlighting the importance of fighting terrorism even more vigorously. One example of good co-operation was MONEYVAL's participation in the FATF "terrorist financing fact-finding initiative", providing valuable assistance with regard to Moneyval members to the FATF aiming at ascertaining their preparedness to cut off terrorism-related financing.

In his opening words, *Daniel Thelesklaf*, Chairman of MONEYVAL, also referred to the leaking of the "Panama Papers" in early 2016, which once again highlighted the need for a global response to combat the abuse of companies and trusts.

►eucrim ID=1603041

## Procedural Criminal Law

### Publication of the 2016 CEPEJ Evaluation Report on European Judicial Systems

On 6 October 2016, the European Commission for the Efficiency of Justice (CEPEJ) published its latest evaluation report on European judicial systems. The report is based on data from 2014 that was provided by 45 CEPEJ Member States and by observer state Israel. Since 2004, CEPEJ has carried out a regular process for evaluating the judicial systems of the CoE member states every two years. The most recent report is limited to key issues as two other elements were also used by the CEPEJ to report on the functioning of judicial systems in 2014. These include a thematic report that deals with the use of IT in courts and a dynamic database, available to the public on the Internet and including a data processing system. This new database also allows stakeholders more space for analytical interpretation.

The 2016 evaluation highlights a sharp increase in the number of incoming criminal cases (42% compared to the 2012 CEPEJ evaluation), while the number of "other than criminal cases" has slightly decreased.

The report states that the member states are continuing their efforts to establish a more detailed understanding of the activity of their courts, including the monitoring of compliance with the fundamental principles protected by the ECHR and in terms of case-flow man-

agement and the length of proceedings. There is an overall positive trend for the capacity of European courts to cope with incoming cases in the long term, especially when considering the general increase in the number of incoming cases.

The data for the 2014 evaluation of courts' efficiency in the criminal justice sector shows that, in the vast majority of states, courts could more or less better cope satisfactorily with the incoming workload than public prosecutors. Unlike civil and commercial litigious cases, there was no change in respect of the clearance rate for criminal cases, which has remained stable at 100%.

The calculated disposition time for criminal cases in Europe has progressively improved over the last years, with a higher average for severe crimes (195 days) compared to minor offenses (133 days). The use of ADR methods (e.g., mediation, conciliation) is being promoted and incentivized in Europe, both in civil and criminal matters. The report recommends paying closer attention to the impact of this trend on the general workload of courts and on the resources that fund these procedures.

Online procedures for the processing of certain categories of claims are also increasingly being developed and applied in various member states, which will require careful monitoring in the next few years.

In general, the 2014-2016 evaluation cycle suggests that the economic recession impacted court efficiency on several levels. Among other impacts, it led to an increased volume of incoming cases and sometimes even to an extended duration of proceedings. It has also had an effect on the resources of courts and on the availability of legal aid for court users, already prompting important legislative reforms to adapt to the change. Hence, the impact of the changing economic situation should be closely followed in the future.

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# Articles

Articles / Aufsätze

The protection of the financial interests of the EU represents a shared enforcement model involving the EU Commission (OLAF) and the Member States. Its implementation requires cooperation among various EU criminal justice actors (OLAF, Europol, and Eurojust) and between OLAF and the competent national authorities. One of the complexities of PIF enforcement is the overlapping mandates of OLAF, Europol, and Eurojust to fight crimes detrimental to the EU budget because the exchange of information between these actors pertains to different legal regimes, and the coordination of their actions is impeded by their different legal natures (OLAF being supranational, whereas Eurojust and Europol are essentially intergovernmental). Another complexity of PIF enforcement lies in the cooperation between OLAF and the competent national authorities. The extent and modalities of cooperation are defined in sector-specific legislation and vary among the relevant sectors (customs, fisheries, agricultural policies, structural funds). A particularly sensitive aspect of PIF enforcement is the need to conduct transnational multi-disciplinary investigations requiring interaction on part of the administrative and judicial authorities of different Member States. This raises complex legal questions about the use and admissibility of the evidence obtained. The CJEU in its recent decision in the *WebMindLicences* case clarified (in the context of tax law) that evidence obtained in a criminal investigation can be used in subsequent administrative proceedings, provided that the obtaining of the evidence in the criminal procedure and its use in the context of the administrative procedure do not infringe the rights guaranteed by EU law. Further aspects of the use of evidence in the context of multi-disciplinary PIF proceedings are, however, still unresolved.

The contributions in this issue examine the complexities of cooperation described above and put them into the perspective of the future establishment of the European Public Prosecutor's Office (EPPO). After three years of negotiations in the Council, will the EPPO in its current design manage to bring about more coherence? How will the EPPO ensure cooperation with non-participating Member States and with third countries?

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## OLAF Investigations in a Multi-Level System

### Legal Obstacles to Effective Enforcement

Michele Simonato

#### I. Introduction

The protection of the EU budget is a shared responsibility between the EU – namely the Commission – and the Member States.<sup>1</sup> In principle, the national (administrative or judicial) authorities conduct investigations and sanction those viola-

tions of EU law that are detrimental to EU financial interests, both when they concern expenditure (e.g., structural funds) and revenue (e.g., customs duties). The readers of *eucrim* are certainly familiar with the developments in EU law that have taken place since the 1970s, which have entailed increasing EU intervention on the punitive aspects of the enforcement of



EU policies. Such intervention mainly consists of attempts to harmonise national laws,<sup>2</sup> on the one hand, and to establish an office within the Commission, the European Anti-Fraud Office (OLAF), which is independent and entrusted with investigative tasks throughout the EU territory, on the other.<sup>3</sup>

OLAF's objective is to step up the fight against fraud, corruption, and any other illegal activity affecting the EU budget.<sup>4</sup> For this purpose, it has been granted some tasks during the investigative phase: while OLAF has neither adjudicatory powers (i.e., it does not determine or apply any sanctions) nor prosecutorial tasks (i.e., it does not bring suspects before courts), it can carry out investigations both within the EU institutions, bodies, offices and agencies (internal investigations)<sup>5</sup> and in the territory of the Member States (external investigations). The nature of OLAF investigations is expressly labelled as administrative. Investigations conclude with a report that is sent to the competent authorities of the Member States concerned (or to the EU "institution, body, office or agency concerned"<sup>6</sup> in case of an internal investigation). The report may be accompanied by recommendations (which are, as such, non-binding) on the appropriate follow-up that should be taken at the national level.<sup>7</sup>

Due to the lack of sanctioning powers, at first glance, OLAF may appear to be a "toothless tiger" compared with the weight of its objectives. However, one should bear in mind that the consequences of such administrative investigations may be quite severe. OLAF's reports can be used as evidence in national administrative and judicial proceedings and, in any case, OLAF's action can be helpful for national authorities in gathering further evidence. The question of whether OLAF's powers are sufficient to step up the fight against illegal activities affecting the EU budget depends, therefore, on the understanding of the extent of such powers and of their use in such a multi-level context. In other words: what are the powers available to OLAF, and how is its cooperation with national authorities regulated?<sup>8</sup>

As a matter of fact, such an apparently plain question is actually extremely complex, especially when dealing with external investigations.<sup>9</sup> The EU legal framework does not contain an exhaustive code of OLAF's powers; instead, it is the multi-layered result of different provisions. The protection of EU financial interests ("PIF area") is of horizontal nature covering different EU policy areas (agriculture, structural funds, customs, etc.). The horizontal instruments adopted in the PIF field (namely those concerning OLAF's investigations) have not replaced the sectoral instruments previously adopted in every policy area: instead, they make some references to the existing instruments in order to specify the content of the general horizontal provisions. Furthermore, OLAF's powers are not fully determined by EU law, but often refer back to national

provisions. In this context, it has been observed that OLAF is still a "prisoner of national laws."<sup>10</sup>

For these reasons, the analysis of the powers that can effectively be exerted by OLAF has become the subject of academic interest, inasmuch as it triggers further questions concerning the architecture of the enforcement mechanisms of the EU, their consistency across different policy fields, and their impact on citizens' rights. Drawing from some research projects currently conducted at the Utrecht centre for Regulation and Enforcement in Europe, which involve experts from several Member States, this contribution aims to highlight some of the problems inherent in the current OLAF framework, as well as to indicate where some possible solutions may be found.

## II. A Look across Countries: A Challenging Interaction between EU and National Law

The establishment of OLAF has conferred a new vertical dimension to EU law enforcement: a supranational body has been entrusted with operations across national borders in order to overcome the obstacles inherent to any domestic response to transnational offences. In particular, OLAF can conduct its task in a threefold way:

- (a) OLAF can provide assistance to the Member States "in organising close and regular cooperation between their competent authorities in order to coordinate their action aimed at protecting the financial interests of the Union against fraud" (*coordination cases*);<sup>11</sup>
- (b) OLAF can join national administrative investigations that may be opened on OLAF request. In this case, OLAF acts as a seconded expert or joint investigator, vested with the same powers as the national authorities (such joint investigations are foreseen in CAP, fisheries, customs union): national law, therefore, applies (*mixed inspections*);<sup>12</sup>
- (c) OLAF can conduct proper *autonomous investigations*.

As regards external investigations, OLAF can conduct on-the-spot checks and inspections pursuant to Regulation (EC, Euratom) No. 2988/95 and Regulation (Euratom, EC) No. 2185/96.

As already mentioned, these regulations do not lay down an exhaustive EU-law-based procedure for autonomous investigations by OLAF, but rather refer to sectoral regulations<sup>13</sup> and to national law.<sup>14</sup> According to these regulations, OLAF's checks and inspections shall be prepared and conducted in close cooperation with the Member States concerned; Member States' authorities may participate in them under OLAF's authority. In this case, the national law dimension comes into play at two points in time: as regards the investigative powers as such and as regards the assistance to be provided in order to use coercive powers.<sup>15</sup>

With respect to the investigative powers available to OLAF, EU law provides that its staff shall act, “subject to the Union law applicable,” in compliance with the rules and practice of the Member State concerned and with the procedural safeguards provided in the Regulation. OLAF exercises these powers in the Member States upon the production of written authorisation specifying their identity and capacity. The Director General issues such authorisations indicating the subject matter and the purpose of the investigation, the legal basis for conducting the investigation, and the investigative powers stemming from that legal basis.<sup>16</sup> However, OLAF should be granted access to information and documents under the same conditions as the competent authorities of the Member States concerned,<sup>17</sup> and such conditions may differ in the Member States.

Furthermore, OLAF cannot use force or coercion when conducting its investigations. The assistance of national authorities may therefore be necessary, for example if business operators are not willing to grant OLAF staff access to their premises. Regulation (EU, Euratom) No. 883/2013 specifies that Member States “shall give the necessary assistance to enable the staff of the Office to fulfil their tasks effectively.”<sup>18</sup> In this regard, it is worth mentioning that OLAF has experienced difficulties in identifying the national authority competent to provide assistance to its staff. For this reason, Regulation No. 883/2013 provides that the Member States shall “designate a service (‘the anti-fraud coordination service’) to facilitate effective cooperation and exchange of information, including information of an operational nature, with the Office” (AFCOS).<sup>19</sup>

Looking in more detail at one specific investigative measure – namely the right to enter businesses’ premises – may help to elucidate the complex interaction between the EU and national dimensions. Art. 3 of Regulation No. 883/2013 refers to Art. 9 of Regulation No. 2988/95<sup>20</sup> and to Regulation No. 2185/96. These instruments specify the targets of such investigative measures.<sup>21</sup> Nevertheless, they provide that on-the-spot checks and inspections of economic operators shall be conducted “in compliance with the rules and practices of the Member States concerned.”<sup>22</sup> In this context, the national authorities assist OLAF and ensure, “in accordance with Regulation No 2185/96, that the staff of the Office are allowed access, under the same terms and conditions as its competent authorities and in compliance with its national law, to all information and documents relating to the matter under investigations which prove necessary in order for the on-the-spot checks and inspections to be carried out effectively and efficiently.”<sup>23</sup> In addition, EU law does not provide OLAF with the power to seal premises. If necessary, “it shall be for the Member States, at the Commission’s request, to take the appropriate precautionary measures under national law, in particular in order to safeguard evidence.”<sup>24</sup>

A similar interaction between EU and national law is apparent with respect to the exchange of information. In addition to the possibility to autonomously gather information through its investigations, and in order to conduct them effectively, OLAF needs to receive the pre-existing information that is in the hands of the national authorities. In particular, OLAF needs to access this information for the following reasons:

- (i) In order to detect suspected behaviours in view of opening an investigation;
- (ii) In order to decide whether an OLAF investigation should be opened, namely whether there is a “sufficient suspicion,” whether the investigation would fall within the “policy priorities” established by OLAF, and whether it would be “proportionate;”<sup>25</sup>
- (iii) In order to share information during an ongoing investigation (following an official request or by spontaneous initiative).<sup>26</sup> However, also this obligation provided for by the EU legal framework is formulated in a way that refers back to national law.<sup>27</sup> Art. 8(2) of Regulation No. 883/2013, for example, provides that the national authorities are requested to transmit documents and information to OLAF only “in so far as their national law allows.”

Even from this cursory overview, it is evident that, in order to assess the full scope of OLAF’s investigative powers, as well as the obligation of the national enforcement authorities to exchange information with OLAF, it is necessary to examine national laws. Substantial differences are indeed expected, for example as regards the scope of procedural safeguards (such as the privilege against self-incrimination or the right to a lawyer) or as regards the approach toward multi-disciplinary cooperation (i.e., the exchange of information between different types of authorities): since OLAF is considered an administrative authority, such cooperation may encounter several obstacles.<sup>28</sup>

The most obvious risk behind the “variable geometry” of OLAF’s legal framework concerns the effectiveness of its action. The EU Commission itself pointed out a series of disadvantages of this system in 2011,<sup>29</sup> and it seems that the problems highlighted at that time were not overcome by the reform of 2013.<sup>30</sup> Furthermore, this scenario may also be alarming from the perspective of the persons subject to the investigations. The information gathered by OLAF in one Member State may later be used in another Member State and may lead to severe sanctions; different levels of safeguards provided in every Member State may therefore undermine the position and legal protection of the persons under investigation. For this reason, the transfer of investigative tasks for enforcement purposes from the national to the supranational level is not only a matter of shared sovereignty between the Member States and the EU, but also needs to be analysed from the perspective of EU citizens.<sup>31</sup>

### III. A Look across EU Policy Fields: An Internal Asymmetry?

The approach of the OLAF legal framework entails that the content of the investigative measures provided by EU law is, in the end, fully defined by national provisions. Therefore, different investigative powers can ultimately be exercised by OLAF in the Member States. In addition to this aspect, however, another question arises: are the measures available to OLAF adequate and sufficient for it to perform its tasks?

This issue is particularly relevant when regarded from the broader perspective of EU law enforcement. Although the enforcement of EU policies was originally entrusted to the national authorities, an increasing number of EU authorities has recently been given direct enforcement tasks, i.e., powers that can be exercised directly against (natural or legal) persons. These tasks may consist of monitoring markets, investigating alleged infringements, or even punishing those infringements (e.g., through administrative fines, public notices, and withdrawal of licenses). Such a “verticalisation” of tasks (the shift from the national to the EU level) can be observed in many areas. One may think, for example, of the role played by the EU Commission in the field of competition law or – to a more limited extent – in the context of food safety.<sup>32</sup> Moreover, various and, in some cases, more incisive enforcement powers have also been conferred to independent bodies such as the European Central Bank (ECB), the European Securities and Markets Authority (ESMA), and the European Aviation Safety Agency (EASA).<sup>33</sup>

Looking transversally across the different areas helps to elucidate whether there are substantial differences in how the transfer of enforcement tasks from the national to the supranational level has occurred and, most importantly, whether such differences are justified – in other words, whether there is any coherence behind this (relatively) recent trend.<sup>34</sup> Such a quest for consistency is not a mere theoretical exercise that is helpful, at most, in analysing the (political and legal) phenomenon of the “verticalisation” of powers. It can also have a normative effect on recalibrating the EU’s legal framework in order to afford adequate protection to EU citizens. Even if it consists only of investigative tasks, the action of any enforcement authority may have a deep impact on several fundamental rights, including, for example, the right to privacy, the right to a fair trial, and the right to property. The transfer of such tasks to the EU level may therefore raise concerns, both as regards the accountability of the enforcement authorities, on the one hand, and the protection against their acts, on the other.

Adopting this broader perspective, one might be quite surprised to observe the extent of the (administrative) powers ac-

corded to the Commission in competition law. First of all, not only does the Commission have the power to apply substantive fines for the violation of Art. 101 TFEU and Art. 102 TFEU, but it can also impose procedural sanctions against “undertakings” in order to ensure the possibility of conducting the investigations provided for by Regulation No. 1/2003.<sup>35</sup> In other words, although the Commission does not have direct coercive powers, it may impose fines if private companies (undertakings) do not comply with its requests. Furthermore, the powers to carry out inspections of undertakings are fully defined by EU law: the assistance of national authorities is only needed in some cases; hence, the recourse to national law is only rarely necessary.<sup>36</sup> In addition, the powers enjoyed by the Directorate-General for Competition are much broader than those accorded to OLAF. For example, in competition law, the Commission can seal business premises and books or records “for the period and to the extent necessary for the inspection.”<sup>37</sup> It can also conduct inspections of private premises – “including the homes of directors, managers and other members of staff of the undertakings and associations of undertakings concerned” – if there is a “reasonable suspicion” that documents are kept there and if those documents may be relevant to prove a “serious violation” of EU competition law.<sup>38</sup>

Looking, for example, at the ESMA legal framework, one may further observe that this authority has the possibility to directly access telephone and data traffic records.<sup>39</sup> OLAF is precluded from such powers, even after the recent recast of its regulation, thereby making the availability of this kind of information dependant on the possibility (and willingness) of the national authorities to share it with their EU counterpart. One may ask, therefore, whether such a different extent of powers is related to the objectives and actual needs of the different EU authorities; whether it is determined by legitimate concerns related to the protection of fundamental rights; or whether it is just the result of negotiations on each specific instrument, which creates an indecipherable agglomeration of EU enforcement authorities. In other words, why is the possibility – for example – to seal business premises or to conduct an inspection of non-business premises recognised by the Commission only in the field of competition law and not in the PIF area? What are the reasons for granting the power to access communication data only to ESMA and not to other EU enforcement authorities?

### IV. Conclusion

The legal framework concerning OLAF investigations is often (rightly) described as complex. This is mainly due to the interaction between the different (national and EU) levels. Even the most recently revised OLAF Regulation is far from an exhaustive code to regulate the powers to investigate ir-

regularities and fraud against the EU budget, since it contains many references to other EU regulations and to national law. In addition, when OLAF's powers are compared with those accorded to other EU enforcement authorities, they seem to be less incisive, since OLAF has fewer possibilities to directly adopt certain investigative measures without the assistance of national authorities. As a result, the effectiveness of OLAF's investigations depends on national law, on how it is applied in practice, and on the national authorities' approach to the cooperation with OLAF.

The research currently being conducted at Utrecht University aims to clarify the extent of the increasing enforcement powers bestowed upon EU actors, as well as the remedies that are available to citizens against the arbitrary exercise of such powers. Furthermore, by analysing the phenomenon of "verticalisation" in two directions, looking both at national differences and at the EU dimension, it pursues the ambitious objective of offering a more solid foundation for future policy choices, with a view to recalibrating the legal framework on direct EU enforcement powers in a more consistent way.



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1 See Arts. 310 and 325 TFEU.

2 See, among others, J.A.E. Vervaele, The European Union and harmonization of the Criminal law enforcement of Union policies: in search of a criminal law policy?, in: U. Magnus and I. Cameron (eds.), *Essays on criminalization & sanctions*, Uppsala 2014, p. 185; J.F.H. Inghelram, *Legal and Institutional Aspects of the European Anti-Fraud Office (OLAF)*, Groningen 2011, p. 7; V. Covolo, *L'émergence d'un droit pénal en réseau. Analyse critique du système européen de lutte antifraud*, Baden-Baden 2015, p. 38.

3 See Regulation (EU, Euratom) No. 883/2013 of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No. 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No. 1074/1999 (2013) O.J. L 248, 18.9.2013, 1. See also J.A.E. Vervaele, Towards an Independent European Agency to Fight Fraud and Corruption in the EU?, *European Journal of Crime, Criminal Law and Criminal Justice* Vol. 7 (1999), 331; V. Mitsilegas, *EU Criminal Law*, Oxford et. al. 2009, p. 210; M. Wade, OLAF and the Push and Pull Factors of a European Criminal Justice System, *eu crim* 3-4/2008, 128; V. Covolo, The new OLAF Regulation: a missed opportunity for substantial reforms (manuscript submitted to the *Common Market Law Review*).

4 Art. 1 of Regulation No. 883/2013.

5 Art. 1(4) of Regulation No. 883/2013.

6 Art. 11(4) of Regulation No. 883/2013.

7 Art. 11(3) of Regulation No. 883/2013.

8 The Commission, in the proposal for the Establishment of the European Public Prosecutor's Office, COM(2013) 534, p. 2, observed: "Coordination, cooperation and information exchange face numerous problems and limitations owing to a split of responsibilities between authorities belonging to diverse territorial and functional jurisdictions. Gaps in the judicial action to fight fraud occur daily at different levels and between different authorities and are a major impediment to the effective investigation and prosecution of offences affecting the Union's financial interests."

9 Art. 4 of Regulation No. 883/2013 lays down more detailed and homogeneous rules on internal investigations. See V. Covolo, *op. cit.* (n. 2), p. 291.

10 See K. Ligeti and M. Simonato, Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept, in: F. Galli and A. Weyembergh, *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, Brussels 2014, p. 82.

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

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

Art. 98 of Council Regulation No. 1224/2009 of 20 November 2009 establishing a Community control system for ensuring compliance with the rules of the common fisheries policy, O.J. L 343, 22.12.2009, 1.

13 Art. 9(2) of Council Regulation No. 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, O.J. L 312, 23.12.1995, 1.

14 Art. 8 of Regulation No. 2988/95.

15 Of course, national law comes into play again in the following phase of the admissibility and use as evidence of information gathered by OLAF. Art. 11(2) of Regulation No. 883/2013 states that OLAF's reports "shall constitute admissible evidence in administrative or judicial proceedings of the Member State in which their use proves necessary, in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors." However, in criminal proceedings, each Member State attributes a different value to information gathered during administrative investigations. See K. Ligeti and M. Simonato, *op. cit.* (n. 10), p. 91; V. Covolo, *op. cit.* (n. 2), p. 310.

16 Art. 7(2) of Regulation No. 883/2013.

17 Art. 7(1) of Council Regulation No. 2185/96 of 11 November 1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, O.J. L 292, 15.11.1996, 2.

18 Art 3(3) of Regulation No. 883/2013.

19 Art. 3(4) of Regulation No. 883/2013.

20 Art. 9(2) of Regulation No. 2988/95 refers again to other sectoral rules.

21 Art. 7 of Regulation No. 2185/96 specifies that on-the-spot checks and inspections may concern, in particular:

- professional books and documents such as invoices, lists of terms and conditions, pay slips, statements of materials used and work done, and bank statements held by economic operators,
- computer data,
- production, packaging and dispatching systems and methods,
- physical checks as to the nature and quantity of goods or completed operations,
- the taking and checking of samples,
- the progress of works and investments for which financing has been provided, and the use made of completed investments,
- budgetary and accounting documents,
- the financial and technical implementation of subsidized projects."

22 For example, Art. 14 of the Guidelines on Investigation Procedures for OLAF Staff (1 October 2013) provides that the economic operator shall be notified of the on-the-spot check only "[w]here required by national legislation."

23 Art. 3 of Regulation No. 883/2013.

24 Art. 7 of Regulation No. 2185/96.

25 Art. 5(1) of Regulation No. 883/2013.

26 Art. 8(2) and (3) of Regulation No. 883/2013.

27 See also Art. 7(2) of the Second Protocol to the Convention on the protection of the European Communities financial interests. Also, sectoral regulations often refer to national law: see, e.g., Art. 3(4) of Commission Regulation No. 1848/2006 (common agricultural policy).

28 See R. Panait, Information Sharing between OLAF and National Judicial Authorities, *eu crim* 2/2015, 64; M. Luchtman, *European cooperation between financial supervisory authorities, tax authorities and judicial authorities*, Antwerp 2008; A. Klip and J.A.E. Vervaele, *European Cooperation Between Tax, Customs and Judicial Authorities*, The Hague et al., 2002.



29 See the Communication from the EU Commission on the protection of the financial interests of the European Union by criminal law and by administrative investigations, "An integrated policy to safeguard taxpayers' money", COM(2011) 293 final.

30 The aspect to further strengthen the procedural safeguards of persons under OLAF investigation through the establishment of an external "controller of procedural guarantees" is still under negotiation (see COM(2014) 340 final).

31 The CJEU recently stressed again that the EU is "a new legal order, possessing its own institutions, for the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals" (CJEU, Opinion 2/13 on the draft agreement concerning the accession of the EU to the ECHR, ECLI:EU:C:2014, §157).

32 In the context of food safety, the EU Commission's role is to conduct audits of the official controls carried out at the national level. Nevertheless, if there is a serious failure in a national control system, the Commission can directly adopt enforcement measures ("safeguard" or "emergency" measures), such as suspension of placing on the market certain products (see Art. 56 of Regulation No. 882/2014 and Art. 53 of Regulation No. 178/2002). See B. van der Meulen and A. Freriks, Millefeuille. The emergence of a multi-layered controls system in the European food sector, *Utrecht Law Review*, Vol. 2 (2006), 156.

33 A thorough analysis of the role played by these bodies is presented in the project "Verticalisation of enforcement" coordinated by Michiel Luchtman and Mira

Scholten (for further information see: <http://renforce.rebo.uu.nl/en/bouwsteenprojecten/verticalisering-en-toezichhouders/>).

34 See L. Kuhl, Cooperation between Administrative Authorities in Transnational Multi-Agency Investigations in the EU: Still a Long Road Ahead to Mutual Recognition?, in: K. Ligeti and V. Franssen (eds.), *Challenges in the field of economic and financial crime in Europe* (Hart Publishing, forthcoming 2016).

35 See Art. 23 of Council Regulation No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts. 81 and 82 of the Treaty, O.J. L 1, 4.1.2003, 1.

36 For example, in order to obtain the assistance of the police or an equivalent enforcement authority when an undertaking opposes an inspection ordered by the Commission (see Art. 20(6), (7) of Regulation No. 1/2003).

37 This power has been accorded to the Commission to prevent the possible destruction of relevant documents overnight. Recital 25 specifies that seals "should normally not be affixed for more than 72 hours."

38 It is worth noting that, before executing this measure, the Commission needs to obtain judicial authorisation from a national judicial authority.

39 Art. 62 (1)(e) of Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories, O.J. L 201, 27.7.2012, 1; and Art. 23c of Regulation No. 513/2011 of 11 May 2011 amending Regulation (EC) No. 1060/2009 on credit rating agencies, O.J. L 145, 31.5.2011, 30. See M. Scholten and A. Ottow, Institutional Design of Enforcement in the EU: The Case of Financial Markets, *Utrecht Law Review*, Vol. 10 (2014), 80.

# Interinstitutional Relationship of European Bodies in the Fight against Crimes Affecting the EU's Financial Interests

## Past Experience and Future Models

Angelo Marletta

### I. Protecting the EU's Financial Interests: A Shared Responsibility in a Complex Enforcement Environment

The protection of the EU's financial interests (PIF) implies a shared responsibility on the part of both the Union and the Member States. In this respect, Art. 325 para. 1 TFEU recalls the multiple levels of cooperation required to counter and combat fraud and other illegal activities affecting the financial interests of the Union.

We can identify at least three levels or dimensions of cooperation in the PIF domain:

- The horizontal cooperation between the EU actors holding specific PIF responsibilities;
- The horizontal cooperation between the competent national authorities of the Member States;

- The vertical cooperation between the aforementioned EU actors and the competent national authorities of the Member States.

The intertwining of these three dimensions, coupled with the inherent cross-sectoral nature of the PIF domain<sup>1</sup> – in-between the administrative and the criminal law field – shapes a complex enforcement environment. In this environment, the realization of the ultimate objective – the effective protection of the EU's financial interests – may be constantly threatened by potential failures in the coordination of the actors at any of the three levels. Also, the efficiency of the enforcement process can be affected by unnecessary duplications of efforts.

While the vertical cooperation between the EU and national actors has been extensively analyzed (particularly, in respect



of its failures), the horizontal cooperation between EU actors has received less academic and institutional consideration. This contribution will focus on the cooperation between the main existing EU actors holding enforcement responsibilities in the PIF sector. Therefore, the relationship between OLAF and Europol as well as between OLAF and Eurojust is further explored in the following.<sup>2</sup>

The analysis of this trilateral relationship will follow three strands of reflection: cooperation and synergies in information exchange and intelligence (infra II.); cooperation and operational synergies (infra III.); and the future scenario determined by the establishment of the European Public Prosecutor's Office (infra IV.). At the outset, two preliminary remarks need to be made.

Firstly, the material competence of the three actors with regard to crimes affecting the financial interests of the Union may potentially overlap,<sup>3</sup> but their tasks and enforcement powers are still different: in this context, it must be recalled that Europol and Eurojust can intervene only when a case involves two or more Member States, while OLAF can also deal with purely internal cases.

Secondly, it cannot be overlooked that, as opposed to the two agencies in the field of Justice and Home Affairs, OLAF can conduct its own administrative investigations (both internal and external) into an alleged PIF case. Such a circumstance, to a certain extent, may have an influence and differentiate the “enforcement attitude” of the three EU actors.

## II. Information Exchange and Intelligence Synergies between OLAF, Europol, and Eurojust

An initial reflection should start with the synergies in information and intelligence exchange between the three existing enforcement actors: OLAF, Europol, and Eurojust. The combination of analytical resources and expertise between OLAF and Europol, for instance through the sharing of criminal intelligence about the structures and techniques involved in committing PIF crimes, could contribute to improving the general detection and reaction capabilities of the enforcement system as a whole.

Yet, the current state of the art presents certain limits, with regard both to the “patchwork nature” of provisions on the exchange of information between the EU actors as well as to the still fragmented data protection regimes that are applicable.<sup>4</sup> The essential framework for the information exchange between OLAF and Europol is still provided by an administrative agreement concluded in 2004.<sup>5</sup> It allows for a bidirec-

tional exchange of strategic<sup>6</sup> and technical<sup>7</sup> information but not of personal data.<sup>8</sup> A future structural bilateral exchange of personal data between the two entities will be possible after the conclusion of a new agreement;<sup>9</sup> in particular, OLAF's access to and the subsequent exchange of information stored by Europol will be possible on the basis of a “hit/no hit” system: in case of a “hit” in the Europol Information System, Europol will have to initiate the procedure to share the related information with OLAF.

Two caveats, however, will apply in this context: any sharing, indeed, will be possible “only to the extent that the data generating the hit are necessary for the performance of [...] OLAF's tasks”<sup>10</sup> and, most importantly, in accordance with the restrictions indicated by the provider of the information.<sup>11</sup> This last condition could imply that the information and data provided to Europol by the Member States might present very different degrees of availability to OLAF, for instance when the providing Member State opposed a general limitation to the exchange of the information with non-judicial or non-police authorities.

A further issue that concerns informative synergies belongs to the possibility to associate OLAF's experts to specific Europol Focal Points<sup>12</sup> (in particular those on cigarette smuggling, intellectual property, and VAT fraud), previously foreseen under Art. 14 para. 8 of the 2009 Europol Decision<sup>13</sup> and not recasted in the new Europol Regulation. It cannot be ruled out, however, that such an opportunity to enhance analytical synergies might still be regulated in the new working agreement between OLAF and Europol.

The information exchange between OLAF and Eurojust is currently based on a cooperation agreement signed by the two entities in 2008.<sup>14</sup> In contrast to the agreement with Europol, the Eurojust agreement expressly allows for the exchange of personal data.<sup>15</sup> Under this framework, OLAF and Eurojust are able to preliminarily exchange general information (“case summaries”) in order to identify cases for collaboration<sup>16</sup> and, as a second step (once the cases have been identified and cooperation has begun), to exchange “case-related information” that may include personal data. Strategic information – meaning intelligence on structures, links, *modus operandi*, and forms of financing of organizations involved in the commission of PIF offences – can be shared as well.

Beyond the formal legal framework, it cannot be ignored that the institutional relations between OLAF and Eurojust has actually been a troubled one, marked – especially at its beginning – by a latent antagonism between the two entities<sup>17</sup> and by a certain reluctance on the part of the Member States to share information on criminal investigations and prosecutions with a non-judicial entity.<sup>18</sup>

### III. Operational Synergies and General Improvements of Enforcement in the Current Scenario

Beyond the informative level, operational synergies between the three main EU actors is marked by their involvement in Joint Investigation Teams (JITs),<sup>19</sup> by the possibility of achieving a better joint coordination of the national authorities, and by increasing the chances of a national judicial follow-up of coordinated cases.

Firstly, OLAF, Europol, and Eurojust can separately or jointly promote a JIT, by recommending its establishment to the national authorities when the information they possess indicates its usefulness. As to the participation of OLAF, Europol or Eurojust in JITs, all the different cooperation agreements concluded by the three actors provide that, whenever possible, each party should inform the other about its involvement in a JIT relating to fraud, corruption, or any criminal offence affecting the Union's financial interests.<sup>20</sup> In addition, in the case of the Eurojust-OLAF agreement, each party is also required to propose inviting the other party to join the JIT to the Member States.

Secondly, with regard to the possibility of achieving a better joint coordination of the national authorities involved in a case, several provisions already allow for the consultation<sup>21</sup> and association of the other relevant EU actors in the coordination activities. It should be noted, however, that, in the current Eurojust Decision, the possibility to involve OLAF in the coordination of investigations and prosecutions for PIF crimes is still conditional upon the non-opposition of the national authorities.<sup>22</sup>

Thirdly, the judicial follow-up of OLAF's recommendations has been defined the "Achilles heel"<sup>23</sup> of the PIF enforcement system: the most recent statistics provided by OLAF on the actions taken by national judicial authorities following an OLAF recommendation present an unchanged average indictment rate of 47%.<sup>24</sup> From this perspective, a closer operational synergy between OLAF and Eurojust might potentially positively impact the attitude of the national authorities. Eurojust, through its national members, might persuade the national judicial authorities to launch a criminal proceeding following OLAF's recommendation.<sup>25</sup> It must be born in mind, however, that, in the current scenario, Eurojust intervention against the national judicial authorities can only succeed through persuasion or consensus: Art. 85 para. 1 (a) TFEU,<sup>26</sup> indeed, only refers to the possibility for Eurojust to "propose" the initiation of prosecutions to the competent national authorities, yet without involving binding powers.<sup>27</sup>

The foregoing considerations on the judicial follow up of OLAF's administrative investigations leads me to the third

part of my reflections: the future scenario and horizontal cooperation between the EU actors after the establishment of the European Public Prosecutor's Office.

### IV. Future Scenario Following the Establishment of the EPPO

The establishment of the European Public Prosecutor's Office (EPPO) will represent a radical change in the PIF enforcement environment in all of its dimensions: in particular, it will inevitably reshape the cooperative relationship between the existing EU actors. For the purpose of the following reflections, I will focus on the relations of the EPPO with Europol and with Eurojust and on the future role of OLAF. In doing so, I will refer to the latest available version of the draft text currently being negotiated in the Council.<sup>28</sup>

#### 1. The relationship with Europol

The liaison between the EPPO and Europol is foreseen by Art. 86 para. 2 of the Treaty on the Functioning of the European Union (TFEU).<sup>29</sup> According to the Treaty, the EPPO will carry its tasks (investigate, prosecute and bring to judgment perpetrators of PIF offences) "where appropriate, in liaison with Europol". At a first sight, this vague wording had also suggested the idea of Europol as a sort of *police judiciaire* of the EPPO. Yet, the express exclusion of direct and coercive powers of investigation upon Europol (Art. 88 para. 3 TFEU) puts a significant limit to the viability of such an option. In any case, Europol's informative and intelligence support might prove essential for the activities of the future EPPO: not an armed wing, but a well-connected brain. Nonetheless, the current provisions on cooperation with Europol as foreseen in the draft Regulation on the EPPO appear rather minimal. They mainly refer the modalities of collaboration to the conclusion of a future working agreement and require – in a general way – Europol to provide information and analytical support upon request of the EPPO.<sup>30</sup>

#### 2. The relationship with Eurojust

The liaison between the EPPO and Eurojust is also established by the TFEU.<sup>31</sup> The EPPO, according to a much debated provision,<sup>32</sup> should be established "from Eurojust". After the Commission's Proposal it is clear that the two entities will co-exist and shall develop a "special relationship". The exchange between these two actors will be characterized by several specific aspects and dependent on several circumstances. A first peculiarity would derive from the fact that the EPPO may be

established by way of enhanced cooperation. In this scenario, the EPPO will need to resort to Eurojust in order to ensure coordination of its activities with the authorities of the non-participating Member States. Furthermore, the need for cooperation will also depend on the scope of the competence of the EPPO with regard to the so-called “ancillary offences.”<sup>33</sup> The stricter the competence assigned to the EPPO regarding these offences, the more it will need the support and assistance of Eurojust to coordinate related national investigations and prosecutions and to avoid inconsistent – or even detrimental – outcomes.

The current Art. 57 of the draft text of the EPPO Regulation shapes the general terms of this “special” relationship: Eurojust, in particular, should be associated to the EPPO activities in order to facilitate the transmission and execution of MLA requests towards non-participating Member States and third countries and to share information on investigations, including personal data. In regard to this latter need for information and intelligence synergies, the draft text provides the EPPO with indirect access to the Eurojust Case Management System on a “hit/no hit” basis.<sup>34</sup>

### 3. The future role of OLAF

While the original Commission proposal on the EPPO foresaw a strong limitation of OLAF’s role, the new negotiating text reshapes the relations between the criminal law and the administrative actors in terms of complementarity.<sup>35</sup> Complementarity mainly implies that OLAF should not, in principle, conduct administrative investigations into the same facts being investigated by the EPPO, unless the EPPO either decides to dismiss the case or expressly requires OLAF’s support.<sup>36</sup>

To this end, Art. 57a of the draft text specifies the possible contents of such OLAF on-call support by referring to the following issues:

- the provision of information, analyses, expertise, and operational support;
- the coordination of specific actions of the competent national administrative authorities;
- the performance of administrative investigations.<sup>37</sup>

Ultimately, OLAF might potentially play a consultative role in the context of certain decisions of the EPPO, such as the exceptional exercise of its competence with regard to PIF offences causing damage under 10,000 euros, according to the current Art. 20 para. 2 of the draft text on the EPPO Regulation.<sup>38</sup>

## V. Conclusions

The current architecture of PIF enforcement at the EU level presents several complexities: this contribution tried to briefly highlight the possible synergies between the EU Actors holding responsibilities in this peculiar field. Notwithstanding certain positive elements pertaining to information exchange and operational cooperation can be already retraced in the current scenario, fragmentation yet appears as the main feature of the existing legal framework. In this perspective, the future establishment of the EPPO could in principle bring more coherence and reduce the risks deriving from the work of “too many hands” on the same issue: nonetheless, the actual success of such scenario and the persisting need and degree of involvement of different EU Actors in the enforcement process will ultimately depend by the concrete design of the EPPO, by the definition of its material competence and by the geographical scope of its jurisdiction.<sup>39</sup>

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1 See in this regard the Commission *Communication on the protection of the financial interests of the European Union by criminal law and by administrative investigations. An integrated policy to safeguard taxpayers’ money*, COM (2011) 293 final, p. 8.

2 Potentially, several relevant other actors in conjunction with the protection of the EU’s financial interests can be identified at the EU level. Just to provide some examples, a relevant role could be played by the European Court of Auditors and

the DG DEVCO of the European Commission with regard to the detection of fraud involving development aid. Furthermore, at the level of EU agencies, the role of Frontex – and of the future European Coast and Border Guard – in providing operational information and intelligence on incidents occurring at the external borders and involving smuggling of cigarettes or other goods subject to custom duties should not be underestimated; Frontex has already cooperated with OLAF and Europol in a number of Joint Custom Operations (JCO) involving neighbouring third countries, such as the 2015 JCO Romoluk II; see OLAF Report 2015, p. 19.

3 According to its establishing decision (Decision 1999/352/EC), OLAF is competent: (a) to combat fraud, corruption, and any other illegal activity adversely affecting the Community’s financial interests; (b) to investigate serious facts linked to the performance of professional activities that may constitute a breach of obligations by officials and servants of the Communities, likely to lead to disciplinary and, in appropriate cases, criminal proceedings. Europol today is expressly competent on crimes against the financial interests of the Union, according to Annex I to Regulation 2016/794/EU. The competence of Eurojust follows that of Europol: according to Art. 4 para. 1 lit. a) of the current Eurojust decision (2009/426/JHA), the material competence of the Agency is automatically and dynamically (“at all time”) adapted to Europol’s material competence.

- 4 OLAF's data protection regime is governed by Regulation 45/2001/EC. Europol's data protection regime and supervision have been strengthened by the recent reform, while Eurojust is still subject to specific data protection rules provided in its establishing decision and subsequent amendments. With regard to proposed Eurojust reform and to the proposal for the establishment of the EPPO, see the EDPS Opinion of 5 March 2014. In general, on this issue, see F. Boehm, *Information Sharing and Data Protection in the Area of Freedom, Security and Justice. Towards Harmonised Data Protection Principles for Information Exchange at EU-level*, Berlin 2012, p. 256.
- 5 The Administrative Agreement between Europol and OLAF was initially based on a previous Cooperation Agreement concluded between the European Commission and Europol in 2003. Nowadays, Art. 13 of the new Regulation 883/2013 on OLAF's investigations expressly enables the Office to conclude administrative arrangements with Europol and Eurojust in order to exchange operational, strategic, and technical information, including personal data. The new agreement with Europol is still under discussion in the context of a Joint Europol/OLAF Working Group, see the OLAF Report 2015, p. 22.
- 6 Strategic information is defined by the agreement as information on trends in criminality, on the operational structures of the organizations implicated in the relevant criminal activities, and on the links existing between them as well as information on the strategies, the *modus operandi*, and the financing of these organizations.
- 7 Technical information is defined as information on technical investigation tools, on methods in treatment and analysis of data, and on IT equipment or knowledge.
- 8 A temporary arrangement for the exchange of personal data had been provided by the (now repealed) Art. 22 para. 3 of the 2009 Europol Decision (Council Decision 2009/371/JHA).
- 9 See Art. 13 of Regulation 883/2013/EU (new OLAF Regulation) and Art. 21 of Regulation 2016/794/EU (new Europol Regulation).
- 10 See Art. 21 para. 2 Regulation 2016/794/EU.
- 11 According to Art. 19 para. 2 of Regulation 2016/794/EU Member States, Union bodies, third countries, and international organizations can determine any restriction on the access or the use of such information at the moment of providing the information to Europol.
- 12 According to the Europol *New AWF Concept – Guide for MS and Third Parties*, 2012, p. 5, a Focal Point is: "an area within an Analysis Work File (AWF) which focuses on a certain phenomenon from a commodity based, thematic or regional angle. It allows Europol to provide analysis, prioritise resources, ensure purpose limitation and maintain focus on expertise."
- 13 See A. Weyembergh, I. Armada, C. Brière, *The inter-agency cooperation and future architecture of the EU criminal justice and law enforcement area*, Study for the LIBE Committee of the European Parliament, 2014, p. 37.
- 14 Practical Agreement on arrangements of cooperation between Eurojust and OLAF, 2008. For an analysis of the contents of the agreement, see V. Covolo, *L'émergence d'un droit pénal en réseau. Analyse critique du système européen de lutte antifraude*, Baden-Baden 2015, p. 408 ff. A previous and unsuccessful Memorandum of Understanding was signed in 2003.
- 15 The agreement distinguishes between the exchange of "case summaries" (point 5 of the Agreement) and the exchange of "case-related information" (point 6 of the Agreement). While "case summaries" expressly exclude personal data, "case-related information" may also involve personal data.
- 16 Factors indicating the need for collaboration – and triggering the exchange of "case summaries" – are indicated under point 5 of the Eurojust-OLAF Agreement.
- 17 On this point, see A. Weyembergh, I. Armada, C. Brière, *op. cit.* (n. 13), p. 39, and V. Covolo, *From Europol to Eurojust – towards a European Public Prosecutor. Where does OLAF fit in?*, *eu crim* 2/2012, p. 85.
- 18 Such reluctance surfaced in the original Recital 5 of Council Decision 2002/187/JHA establishing Eurojust: "[The College] should take full account of the sensitive work carried out by Eurojust in the context of investigations and prosecutions. In this connection, OLAF should be denied access to documents, evidence, reports, notes or information, in whatever form, which are held or created in the course of these activities, whether under way or already concluded, and the transmission of such documents, evidence, reports, notes and information to OLAF should be prohibited." This recital was removed by the 2008 amendment of the Eurojust Decision.
- 19 For the Joint Investigation Teams, see Council Framework Decision 2002/465/JHA. Recital 9 of the FD expressly refers to the possibility of involving representatives from Europol, OLAF (and Eurojust) in a JIT.
- 20 See point 5 of the 2004 Administrative Arrangement between Europol and OLAF; point 9 of the 2008 Practical Agreement between Eurojust and OLAF; and, more generally, Art. 6 of the 2009 Agreement between Eurojust and Europol.
- 21 See, for instance, Art. 21 para. 5 of the new Europol Regulation (2016/794/EU).
- 22 See Art. 26 para. 4 of the consolidated Council Decision 2009/426/JHA (Council doc. 5347/3/09 REV 3). Art. 42 para 2 of the latest draft negotiating a text for the new Regulation on Eurojust (Council Doc. 6643/15) generally states that OLAF shall contribute to Eurojust's coordination work regarding the protection of the Union's financial interests.
- 23 See A. Weyembergh, I. Armada, C. Brière, *op. cit.* (n. 13), p. 32 and K. Ligeti, M. Simonato, *The European Public Prosecutor's Office: Towards a Truly European Prosecution Service?*, *New Journal of European Criminal Law*, Vol. 4 (2013), p. 8.
- 24 See OLAF Report 2015, p. 29, Figure 22. The data relate to the OLAF recommendations issued between 1 January 2008 and 31 December 2015.
- 25 See A. Weyembergh, I. Armada, C. Brière, *op. cit.* (n. 13), p. 42.
- 26 Art. 85 para 1 (a) TFEU includes, between the tasks of Eurojust, the initiation of criminal investigations and proposes the initiation of prosecutions conducted by competent national authorities, particularly those relating to offences against the financial interests of the Union.
- 27 In this regard, see A. Weyembergh, *The Development of Eurojust: Potential and Limitations of Article 85 of the TFEU*, *New Journal of European Criminal Law*, Vol. 2 (2011), pp. 75 et seq.
- 28 The most recent consolidation of the draft text is contained in the Council Doc. 11350/1/16 REV 1 of 28 July 2016.
- 29 "In a rather mysterious way," according to A. Weyembergh, I. Armada, C. Brière, *op. cit.* (n. 13), p. 56.
- 30 See Art. 58 of the consolidated draft text.
- 31 Art. 86 para. 1 TFEU states that the European Public Prosecutor's Office may be established "from Eurojust."
- 32 For the debate and the possible interpretations on establishing the EPPO "from Eurojust", see J. Monar, *Eurojust and the European Public Prosecutor Perspective: From Cooperation to Integration in EU Criminal Justice?*, in: *Perspectives on European Politics and Society*, Vol. 14 (2013), p. 350 and K. Ligeti, A. Weyembergh, *The European Public Prosecutor's Office: Certain Constitutional Issues*, in: L.H. Erkelens, A.W.H. Meij, M. Pawlik (eds.), *The European Public Prosecutor's Office: An Extended Arm or a Two-Headed Dragon*, The Hague 2015, p. 69.
- 33 The current Art. 17 para. 2 of the draft negotiating text defines ancillary offence as "any other criminal offence which is inextricably linked to a criminal conduct falling within the scope" of the ordinary material competence of the EPPO. The exercise of competence for ancillary offences, however, is an exception and is authorized only under the conditions provided by Art. 20 para. 3. On this aspect, see also C. Deboyser, *The European Public Prosecutor's Office and Eurojust: 'Love Match or Arranged Marriage?'*, in: L.H. Erkelens, A.W.H. Meij, M. Pawlik, *op. cit.* (n. 32), p. 85.
- 34 The system of indirect access on a "hit/no hit" basis replaced the original and more ambitious proposal of a "mechanism for automatic cross-checking of data" between the two case management systems; see Art. 57 para. 3 of the Commission's Proposal on the establishment of the EPPO, COM (2013) 534 final and Art. 41 para. 5 of the not yet coordinated General Approach on the Eurojust Reform Regulation, Council doc. 6643/15 of 27 February 2015.
- 35 It is worth noting that between the Commission's Proposal and the current negotiations in Council also the nature of the material competence of the EPPO on PIF crimes has been modified from exclusive to shared with the Member States.
- 36 A. Weyembergh, I. Armada, C. Brière, *op. cit.* (n. 13), p. 53, noted that the perspective of a shared competence changed the situation not just in regard to the role of Eurojust but also of OLAF.
- 37 See the Recitals 98 and 100 and Art. 33 para. 4 and Art. 57a of the draft negotiating text.
- 38 According to Art. 57a para. 5 the EPPO should also obtain indirect access on a "hit/no hit" basis to OLAF's case management system (CMS). The reciprocal indirect access of OLAF to the EPPO's CMS is not foreseen in the current draft text, but the same provision specifies that the EPPO shall inform OLAF whenever a "hit" occurs.
- 39 Art. 20 para. 2 of the current draft negotiating text, requires that, where appropriate, the EPPO shall consult the competent national authorities or Union bodies, in order to establish whether the criteria allowing for the exceptional exercise of the competence under the 10,000 Euros damage threshold are met.
- 40 For some critical considerations on the current design of the EPPO, see K. Ligeti, A. Marletta, *The European Public Prosecutors' Office: What Role for OLAF in the Future?*, in: Z. Durdević / E. Ivičević Karas (eds.), *European Criminal Procedure Law in Service of the Protection of the European Union Financial Interests: State of Play and Challenges*, Zagreb 2016, p. 53 ff.



# L'échange d'informations entre autorités administratives et judiciaires

## Premiers éclaircissements tirés de l'arrêt WebMindLicences, C-419/14

Dr. Valentina Covolo

### I. Introduction

Nombreux sont les domaines règlementés par le droit de l'Union qui s'appuient sur un double système de contrôle et de sanction. Le parfait exemple est la lutte contre la fraude préjudiciable aux intérêts financiers de l'UE, qui fait l'objet aussi bien d'enquêtes administratives que de poursuites pénales.<sup>1</sup> Le développement de ce que la littérature anglophone appelle « *double track enforcement systems* » présuppose par son essence même la coordination et coopération entre autorités administratives, d'une part, et autorités policières et judiciaires, d'autre part.<sup>2</sup> La question s'avère d'autant plus complexe que l'éventail de modèles existants est vaste et varié. Au regard du droit national, certains Etats membres admettent la conduite parallèle de procédures administratives et pénales, tandis que d'autres ont opté pour une séparation stricte des deux volets, l'engagement de poursuites excluant dès lors l'intervention des autorités administratives.<sup>3</sup> Cette tentative de classification ne suffit cependant pas traduire toute la complexité de la problématique. D'une part, le modèle varie en fonction du secteur d'activité concerné. D'autre part, les dispositions nationales régissant la coopération entre autorités judiciaires et administratives sont souvent rares et éparpillées. Les mêmes incertitudes apparaissent au niveau supranational. Les instruments de coopération judiciaire en matière pénale ont été élaborés indépendamment des mécanismes sectoriels d'assistance administrative mutuelle. Le développement décousu de la réglementation s'est fait aux dépens des normes de coordination entre autorités administratives et pénales.<sup>4</sup>

L'expérience démontre cependant que la répression efficace des fraudes au budget de l'Union présuppose la coordination entre procédures administratives et pénales parallèles. Dans quelle mesure les autorités administratives et judiciaires compétentes peuvent-elles échanger des informations ? Et plus encore, quelles conditions encadrent l'utilisation « transprocédurale » des preuves collectées ?<sup>5</sup> De premiers éléments de réponse ont été apportés en décembre dernier par la Cour de justice de l'Union européenne (CJUE).<sup>6</sup> Le litige au principal opposait une société commerciale immatriculée en Hongrie sous le nom de WebMindLicences (ci-après WML) aux auto-

rités fiscales hongroises. Ces dernières ont procédé à une série de redressements fiscaux visant le paiement de la TVA en Hongrie que la société aurait éludé moyennant une opération économique fictive. Plus précisément, WML avait acquis en 2009 une société établie au Portugal et cédé à celle-ci une licence relative à l'exploitation d'un site Internet par lequel étaient fournis des services audiovisuels interactifs à caractère érotique. Les contrôles menés par le fisc hongrois ont cependant établi que l'entreprise portugaise n'avait jamais effectivement exploité le savoir-faire transféré par WML, le but de l'opération étant de contourner la législation fiscale hongroise moins avantageuse que celle en vigueur au Portugal. WML a attaqué devant les juridictions hongroises la décision des autorités fiscales sanctionnant la pratique qu'elles considéraient abusive. La société faisait notamment valoir que ladite décision s'appuyait sur des preuves obtenues à son insu au moyen d'interceptions de télécommunications et d'une saisie de courriers électroniques dans le cadre d'une procédure pénale parallèle à laquelle la société n'avait pas eu accès.<sup>7</sup> Le tribunal hongrois a ainsi saisi la CJUE d'un renvoi préjudiciel, soulevant entre autres la question de savoir si et dans quelles limites une autorité fiscale nationale peut recueillir des preuves collectées par des moyens secrets dans le cadre d'une procédure pénale parallèle et fonder sur celles-ci une décision administrative.

### II. Des limites dictées par le respect des droits garantis par la Charte

Tel que nous l'avons précédemment évoqué, rares sont les dispositions du droit de l'Union qui réglementent l'échange d'informations entre autorités administratives et judiciaires et encore plus rares – si ce n'est inexistantes – celles relatives à l'utilisation « transprocédurale » des preuves.<sup>8</sup> C'est pourquoi la Cour de justice rappelle tout d'abord que les éléments constitutifs d'une pratique abusive définie par la directive TVA doivent être établis conformément aux règles de preuve du droit national.<sup>9</sup> Si l'élaboration du régime probatoire applicable relève de l'autonomie procédurale des Etats membres, leur marge de manœuvre rencontre toutefois des limites lorsque l'application de dispositions procédurales nationales



participe à la mise en œuvre du droit de l'UE. L'arrêt *WebMindLicences* offre encore une fois à la Cour l'occasion de rappeler que la TVA figure parmi les recettes qui financent le budget de l'Union.<sup>10</sup> Comme il avait été jugé dans le célèbre arrêt *Åkerberg Fransson*,<sup>11</sup> un redressement de la TVA à la suite de la constatation d'une pratique abusive n'a pas pour seul objectif l'exacte perception de la taxe qu'il incombe aux autorités nationales d'assurer en vertu de la directive TVA.<sup>12</sup> Il constitue également la mise en œuvre de l'obligation pour les États membres de prendre des mesures effectives et dissuasives permettant de lutter contre les activités illicites portant atteinte aux intérêts financiers de l'Union, tel qu'il résulte de l'article 325 TFUE.<sup>13</sup>

Ce second constat a une double conséquence sur les règles procédurales nationales. Lu à la lumière du devoir de coopération loyale, l'obligation de l'article 325 TFUE impose au juge national d'écarter les dispositions nationales qui empêchent l'infliction de sanctions dissuasives et effectives à l'encontre des fraudes au budget de l'Union. Un exemple sont les délais de prescriptions particulièrement courts prévus par le droit italien en matière de TVA, dont la compatibilité avec le droit européen était mise en doute dans l'affaire *Taricco*.<sup>14</sup> Analysée sous l'angle de l'article 51 para. 1 de la Charte des droits fondamentaux de l'Union européenne (ci-après la «Charte»), la situation sur laquelle porte le litige au principal est régie par le droit de l'Union et, de ce fait, doit être tranchée en conformité avec les droits fondamentaux garantis par l'ordre juridique de l'UE.

C'est par conséquent à travers l'interprétation de la Charte que la CJUE esquisse les limites dans lesquelles des preuves récoltées au pénal peuvent être transmises et utilisées dans le cadre d'une procédure administrative parallèle. Il est intéressant de noter que, contrairement aux conclusions de l'avocat général,<sup>15</sup> l'arrêt n'aborde pas la question dans une unique dimension « transprocédurale ». La Cour construit au contraire son raisonnement en distinguant les différentes étapes procédurales en cause, chacune ayant un impact sur la légalité de la décision finale : l'obtention des preuves dans le cadre de la procédure pénale, le recueil et l'utilisation de ces mêmes preuves dans la procédure administrative ainsi que la portée du contrôle exercé par les juges nationaux.

### III. La collecte et l'utilisation « transprocédurale » des preuves

Dans l'affaire *WebMindLicences*, la juridiction de renvoi s'interroge sur le point de savoir si une décision administrative imposant un redressement fiscal à une société peut se fonder sur les preuves obtenues à l'insu de celle-ci dans le cadre d'une

procédure pénale parallèle. Si le droit de l'Union ne s'oppose pas, en principe, à une telle pratique, la CJUE souligne cependant que la légalité de la décision litigieuse réside dans le respect du droit à la vie privée au moment de la collecte des informations probantes lors de l'enquête pénale ainsi que dans leur utilisation subséquente par les autorités administratives.<sup>16</sup> Le contrôle opéré est dès lors double.

#### 1. L'appréciation du caractère proportionnel et nécessaire de l'atteinte à la vie privée

S'agissant de la collecte de preuves dans le cadre des poursuites pénales, la CJUE constate tout d'abord qu'aussi bien les interceptions de télécommunications que la saisie de courriers électroniques constituent des ingérences dans le droit garanti à l'article 7 de la Charte.<sup>17</sup> Les limitations au droit à la vie privée sont admises dès lors qu'elles remplissent les conditions énumérées à l'article 52 para. 1 de la Charte : toute restriction doit être prévue par la loi, respecter le principe de proportionnalité, être nécessaire et répondre à des objectifs d'intérêt général reconnus par l'Union. En examinant le caractère proportionnel de l'atteinte à la vie privée, la Cour précise que les mesures d'investigations en question « *ayant été effectuées dans le cadre d'une procédure pénale, c'est au regard de celle-ci que doivent être appréciés leur but et nécessité* ». <sup>18</sup> Les juges relèvent tout d'abord que l'emploi de mesures d'investigation pénales dans la lutte contre l'évasion à la TVA répond à l'objectif d'intérêt général de protection des intérêts financiers de l'Union.<sup>19</sup> Quant à la nécessité des interceptions et saisies, l'arrêt se réfère explicitement à la jurisprudence de la Cour européenne des droits de l'homme (CourEDH). Or, contrairement à l'interception de télécommunication, la saisie de courriers électroniques avait été opérée sans autorisation judiciaire préalable. Dans de telles circonstances, l'atteinte à la vie privée est compatible avec la Charte à condition que « *la législation et la pratique internes offrent des garanties adéquates et suffisantes contre les abus et l'arbitraire* ». <sup>20</sup> De telles garanties résident plus précisément dans la possibilité pour la personne visée par la saisie de solliciter *a posteriori* un contrôle juridictionnel tant de la légalité que de la nécessité de la mesure d'enquête au regard des conditions particulières de l'affaire en cause. En d'autres termes, il revient au juge statuant sur la décision administrative de vérifier si une telle garantie est offerte à la personne visée par la saisie dans le cadre de la procédure pénale parallèle.

Au-delà de la collecte des preuves, le respect de l'article 7 de la Charte s'impose également dans l'utilisation par l'administration fiscale des preuves collectées par des mesures intrusives de la vie privée.<sup>21</sup> Les paramètres d'appréciation ne se rattachent pas, cette fois, aux investigations pénales qui ont permis la col-

lecte d'éléments probants. Les conditions de l'article 52 para. 1 de la Charte s'analysent au regard de la procédure administrative au service de laquelle les preuves sont utilisées. D'une part, l'utilisation des preuves issues de l'enquête pénale par les autorités fiscales doit être prévue de manière suffisamment claire et précise par les dispositions de droit national, de manière à offrir « *une certaine protection contre d'éventuelles atteintes arbitraires de cette administration* ». <sup>22</sup> Reste à savoir si une loi nationale se limitant à affirmer la liberté de la preuve devant les instances administratives remplit les exigences de clarté et de précision mentionnées ou si de telles dispositions doivent pour le moins s'accompagner de règles autorisant l'échange d'informations entre autorités administratives et judiciaires. D'autre part, l'utilisation des preuves issues des interceptions et saisies doit être proportionnée au but poursuivi par les autorités fiscales. Il convient notamment de rechercher, selon la Cour, si des moyens d'investigation moins attentatoires du droit à la vie privée tels qu'un simple contrôle dans les locaux de la société ou une demande d'information aux autorités fiscales étrangères auraient permis d'obtenir toutes les informations nécessaires. <sup>23</sup> La réponse varie nécessairement en fonction des circonstances de l'affaire ainsi que des prérogatives dont jouit l'autorité administrative compétente.

## 2. La portée des droits de la défense dans la procédure administrative

L'utilisation des preuves collectées est également subordonnée au respect des droits de la défense au cours de la procédure administrative. Il importe à cet égard de souligner que la CJUE exclut l'applicabilité de l'article 48 de la Charte au litige au principal, dans la mesure où la disposition protège uniquement les droits de l'accusé. <sup>24</sup> La Cour ne s'interroge cependant pas sur la « coloration pénale » de la procédure administrative en cause, qui, au sens de l'article 6 de la CEDH, imposerait le respect des garanties procédurales au-delà des enquêtes et poursuites pénales *stricto sensu*. <sup>25</sup> Toutefois, précise la CJUE, le respect des droits de la défense s'impose dans le cadre des procédures administratives nationales qui ont pour finalité l'adoption d'un acte faisant grief sous couvert d'un principe général du droit de l'Union. <sup>26</sup> Ce faisant, la Cour laisse entendre que l'utilisation « transprocédurale » des preuves ne doit pas servir à contourner le respect des garanties profitant à la personne sanctionnée. En l'espèce, WML alléguait la violation de son droit d'être informé et entendu, puisque les éléments sur lesquelles la décision administrative litigieuse était fondée avaient été récoltés à son insu au cours d'une procédure pénale parallèle. Or, le litige porté devant la juridiction de renvoi ne concerne pas l'éventuelle sanction pénale prononcée par les juridictions nationales, mais bien la légalité de la décision administrative s'appuyant sur des interceptions et saisies.

Dès lors, l'autorité compétente pour statuer sur une telle décision doit s'assurer que WLM ait eu la possibilité de prendre connaissance des preuves et d'être entendu sur celles-ci dans le cadre de la procédure administrative afin d'en assurer le contradictoire. <sup>27</sup> Tel semble être le cas en l'espèce, puisque la société a eu accès aux transcrits des conservations téléphoniques et des courriers électroniques avant que l'autorité fiscale n'ait procédé au redressement.

## IV. Le respect des droits fondamentaux dans l'échange d'informations, une question irrésolue

Bien que la Cour ait analysé successivement le respect des droits fondamentaux dans les différentes étapes des procédures en cause, une question reste ouverte. En effet, la transmission des preuves par les autorités chargées de l'enquête pénale à l'administration fiscale est abordée sous l'angle de l'article 8 de la Charte. Toutefois, la Cour fait valoir que la protection des données personnelles garantie par la disposition profite uniquement aux personnes physiques, les personnes morales telles que WML ne pouvant donc pas se prévaloir de ce droit. <sup>28</sup> Bien que la question du transfert d'information soit ainsi évacuée, deux interrogations surgissent. Premièrement, faut-il déduire de l'arrêt que l'échange de données relatives à des personnes morales entre autorités administratives, policières et judiciaires ne rencontre pas de limites particulières découlant des droits fondamentaux ? Deuxièmement, qu'en est-il de l'échange d'informations relatives à des personnes physiques ? Conformément à l'article 8 para. 2 de la Charte, toutes données personnelles doivent être traitées loyalement, à des fins déterminées et sur la base du consentement de la personne concernée ou en vertu d'un autre fondement légitime prévu par la loi. Cela présuppose avant tout l'existence d'une disposition légale en droit national prévoyant une telle possibilité. Des exemples sont les obligations de dénonciation ou d'information incombant aux autorités administratives vis-à-vis du procureur. S'agissant de leur but légitime, il est aisément identifiable dans la lutte contre l'évasion fiscale et l'exacte perception des impôts. Plus délicate pourrait s'avérer l'appréciation du caractère nécessaire et proportionné de l'atteinte à la protection des données personnelles que constitue l'échange d'informations. A cet égard, un critère d'appréciation peut être formulé par analogie au raisonnement qu'adopte la CJUE quant à l'utilisation et la collecte des preuves. Les articles 8 et 52 de la Charte s'opposeraient au transfert des preuves collectées dans le cadre d'une procédure pénale aux autorités en charge d'une procédure administrative parallèle lorsque celui-ci va au-delà de ce qui est nécessaire pour assurer l'exacte perception par les autorités fiscales de la TVA dans le cadre et à la lumière des circonstances particulières de l'affaire.

## V. L'exigence d'un contrôle juridictionnel effectif

Les conditions légales tenant à l'utilisation « transprocédurale » des preuves ne sont pas à elles-seuls suffisants. Encore faut-il que la juridiction nationale soit en mesure d'exercer un contrôle et sanctionner les éventuelles violations des droits fondamentaux ainsi constatées. Il s'agit en d'autres termes de déterminer si le juge national appelé à statuer sur la légalité de la décision litigieuse exerce un contrôle effectif au sens de l'article 47 de la Charte. La Cour a estimé que la protection juridictionnelle effective de l'assujéti exige que la juridiction compétente puisse contrôler le respect des droits fondamentaux garantis par le droit de l'Union à la fois dans l'obtention et l'utilisation des preuves.<sup>29</sup> Toutefois, il est difficilement envisageable que les compétences de contrôle d'un tribunal saisi d'un recours à l'encontre d'une décision prise par l'administration fiscale puissent s'étendre aux vices de procédure commis dans une procédure pénale parallèle. A cet égard, la CJUE n'exige pas nécessairement que le contrôle soit directement exercé par la juridiction intervenant dans le cadre de la procédure administrative. Cette dernière peut également fonder son appréciation sur le contrôle préalablement exercé par une juridiction pénale dans le cadre d'une procédure contradictoire.<sup>30</sup> Deux observations s'imposent. En premier lieu, le moment auquel le contrôle opéré par le juge pénal intervient et, par voie de conséquence, l'état d'avancement de la procédure pénale parallèle peuvent avoir un impact sur la possibilité d'utiliser les informations transmises dans le cadre de la procédure administrative. En second lieu, la procédure de contrôle doit revêtir un caractère contradictoire. Son effectivité serait ainsi subordonnée à la possibilité pour la personne visée d'accéder aux éléments probants et être entendue sur ces derniers.

S'agissant des conséquences juridiques tirées d'une violation des droits individuels, l'arrêt s'inscrit dans la lignée de la jurisprudence de la CJUE en matière de procédures administratives devant les instances européennes.<sup>31</sup> Lorsque la collecte et l'utilisation des preuves viole le droit au recours effectif ou d'autres garanties fondamentales protégées par le droit de l'Union, celles-ci « doivent être écartées et la décision attaquée qui repose sur ces preuves doit être annulée si, de ce fait, celle-ci se trouve sans fondement ».<sup>32</sup>

## VI. Conclusions

L'arrêt *WebMindLicences* est le reflet des nombreuses interrogations que soulève l'interaction entre procédures administratives et pénales. Alors que le modèle des enquêtes multidisciplinaires impliquant à la fois des autorités judiciaires, policières et administratives<sup>33</sup> se développe dans différents domaines, l'absence de dispositions légales précises encadrant

leur coopération fait du respect des droits fondamentaux dans un contexte « transprocédural » une question cruciale. Qu'il s'agisse de l'échange d'information ou de l'utilisation des preuves, la difficulté réside dans les différents niveaux de protection que les procédures administratives et pénales accordent aux particuliers. En articulant son examen autour du respect des droits fondamentaux aux différentes étapes procédurales de l'affaire, la CJUE s'efforce d'assurer que l'interaction entre procédures administratives et pénales parallèles ne contourne pas les garanties que l'individu tire du droit de l'Union et, plus particulièrement, de la Charte. La réponse apportée par la Cour consiste dès lors en une liste de conditions relatives à la légalité de la collecte et utilisation des preuves dont le contrôle doit être assurée par les juges administratif ou pénal nationaux conformément à leur compétences juridictionnelles respectives : la nécessité de l'emploi des moyens d'investigation secrets au cours de l'enquête pénale mis en œuvre sur fondement et conformément à une disposition légale, l'existence d'une base légale autorisant l'utilisation de telles preuves dans une procédure administrative et le caractère nécessaire d'une telle utilisation, le respect du droit pour le défendeur d'avoir accès aux preuves et être entendu sur celles-ci devant les instances administratives compétentes, enfin l'obligation d'écartier les preuves illégales ou dont le légalité n'est soumise à aucun contrôle juridictionnel. Au terme de cet examen, le juge national est tenu d'annuler la décision finale seulement si, une fois les éléments de preuve écartés, celle-ci se trouve sans fondement.

Un raisonnement analogue pourrait s'appliquer à l'utilisation au procès pénal de preuves recueillies par des enquêteurs administratifs. La CourEDH a en effet retenu qu'il revient au juge pénal d'examiner la recevabilité des preuves collectées au cours de l'enquête administrative à la lumière du droit au procès équitable, bien que le respect du droit de ne pas s'incriminer soi-même ne s'impose pas aux enquêteurs administratifs.<sup>34</sup> Nul ne doute que la CJUE aura à son tour l'occasion de se prononcer sur une question semblable.

1 En effet, la lutte contre la fraude préjudiciable au budget de l'UE relève à la fois des compétences des autorités administratives nationales et européennes et des autorités judiciaires des Etats membres lorsque le comportement visé constitue une infraction pénale. Sur le développement historique des compétences en matière de lutte antifraude, voy. J. Inghelram, *Legal and Institutional Aspects of the European Anti-fraud Office*, Groningen 2011, p. 7 ss.

2 V. Covolo, *L'émergence d'un droit pénal en réseau. Analyse critique du système européen de lutte antifraude*, Baden-Baden 2015, p. 328 ss.

3 K. Šugman, M. Jager, *The organisation of administrative and criminal law in national legal systems: exclusion, organized or non-organized co-existence*, in: F. Galli, A. Weyembergh (éd.), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, Bruxelles 2014, p. 156 ss.

4 K. Ligeti, M. Simonato, *Multidisciplinary investigations into offences against the financial interests of the EU: a quest for an integrated enforcement concept*, in: F. Galli, A. Weyembergh (éd.), *op. cit.*, (n. 3), p. 88–89.



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5 Le terme est employé par Vervaele pour désigner l'interaction entre procédures administratives et pénales en matière. Voy. J. Vervaele, *Compétences communautaires normatives et opérationnelles en matière d'enquête administrative et judiciaire, recueil des preuves et utilisation des preuves dans le domaine des intérêts financiers de l'Union européenne*, RCS 1999, n°3, 473–496.

6 CJUE, arrêt du 17 décembre 2015, *WebMindLicenses*, aff. C-419/14, ECLI:EU:C:2015:832.

7 *Ibidem*, point 23.

8 Pour un aperçu des instruments de coopération en matière de fiscalité indirecte, voy. M. Marty, *La répression pénale transfrontière de la fraude à la TVA dans l'Union européenne*, in: C. Herbain (dir.), *La fraude à la TVA*, Promoculture, à paraître.

9 CJUE, *WebMindLicenses*, *op. cit.* (n. 6), point 65.

10 CJUE, arrêt du 15 novembre 2011, *Commission c. Allemagne*, aff. C-539/09, ECLI:EU:C:2011:733, point 72.

11 CJUE, arrêt du 6 février 2013, *Åkerberg Fransson*, aff. C-617/10, ECLI:EU:C:2013:105, points 25 à 27.

12 Art. 250 et 273 de la Directive 2006/112/CE du Conseil du 28 novembre 2006 relative au système commun de taxe sur la valeur ajoutée, J.O. L 347 du 11.12.2006, p. 1.

13 CJUE, *WebMindLicenses*, *op. cit.* (n. 6), point 67.

14 CJUE, arrêt du 8 septembre 2015, *Taricco*, aff. C-105/14, ECLI:EU:C:2015:555.

15 Opinion de l'avocat général Wathelet, *WebMindLicenses*, aff. C-419/14, ECLI:EU:C:2015:606, points 102 ss.

16 CJUE, *WebMindLicenses*, *op. cit.* (n. 6), point 91.

17 *Ibidem*, points 71–72.

18 CJUE, *WebMindLicenses*, *op. cit.* (n. 6), point 75.

19 *Ibidem*, point 76.

20 *Ibidem*, point 77.

21 *Ibidem*, points 79 ss.

22 *Ibidem*, point 81.

23 *Ibidem*, point 82.

24 *Ibidem*, point 83.

25 Sur le champ d'application de l'article 6 de la CEDH au contentieux de nature fiscale, F.Kuty, *Justice pénale et procès équitable*, Bruxelles2006, Vol. I, p. 31 ss.

26 CJUE, *WebMindLicenses*, *op. cit.* (n. 6), point 84.

27 *Ibidem*, points 84–85.

28 *Ibidem*, point 79. Il importe cependant de souligner d'une position différente est adoptée par l'Avocat général au point 112 de ses conclusions, *op. cit.* (n. 15).

29 *Ibidem*, point 87.

30 *Ibidem*, point 88.

31 Une solution identique est retenue en matière de concurrence, aides d'Etat ou encore de marques. Voy. à titre d'exemple TPI, arrêt du 14 décembre 2005, *General Electric Company c. Commission*, aff. T-210/01, ECLI:EU:T:2005:456, point 632.

32 CJUE, *WebMindLicenses*, aff. C-419/14, point 89.

33 K. Ligeti, M. Simonato, *op. cit.* (n. 4), p. 83.

34 CourEDH, arrêt du 17 décembre 1996, *Saunders c. Royaume-Uni*, n° 19187/91, Rec. 1996-VI.

## The Ventotene Manifesto and the European Area of Freedom, Security and Justice

Lorenzo Salazar

*Altiero Spinelli* (1907–1986) was an Italian politician, political opponent of the fascist regime in Italy and, for this reason, once interned on the island of Ventotene during World War II. On the small southern Italian island in the Gulf of Gaeta, together with *Ernesto Rossi* and *Eugenio Colorni*, he wrote the “Manifesto” – entitled “*Per un'Europa libera e unita*” (For a Free and United Europe) – calling for the establishment of a European federation as a reaction to the destructive excesses of nationalism, which had led to the Second World War. The Manifesto of June 1941 ideologically underpins the idea of a united Europe, and *Spinelli* continued to strongly advocate European integration throughout his entire life and career. After the end of the war, *Spinelli* became one of the founders of the European federalist movement. He was a member of the

European Commission for six years (1970–1976) and later a member of the first elected European Parliament for ten years until his death. The main building of the European Parliament in Brussels (usually referred to with the acronym “ASP”) is named after him.

On 23 May 1986, 30 years ago already, *Spinelli* died in Rome. Only two years earlier, on 14 February 1984, the European Parliament had debated and adopted the draft “Treaty establishing the European Union,” also known as the “Spinelli Draft.” On 22 August 2016, the leaders of the Eurozone’s three largest countries met on the island of Ventotene to (re) launch the debate on the way forward following Britain’s vote to leave the European Union. The summit took place on the

30th anniversary of *Spinelli's* funeral in the small cemetery on the island where the Manifesto had been conceived and signed by him and his fellow prisoners at the Ventotene internment camp.

The word “justice” is not among the inspiring words that make up the Manifesto; nevertheless, a sincere sense of justice and equality pervades the document, which essentially addresses combating all forms of totalitarianism, dictatorship, and oligarchical privileges.

Indeed, the Manifesto includes among its post-war priorities “the impartial application of laws enacted” and mentions the terms “judicial independence.” At that time, these references – even for the law student *Spinelli* prior to his arrest and detention by the fascist regime – were “confined” to a strictly national dimension that did not leave room for the idea of a federal judiciary to come, this matter being destined for a more distant future.

Despite the absence of such a reference, the advent of freedom for entire populations, as a result of the fall of the authoritarian regimes and the consequent generalization of freedom of speech and association, may already seem the foreshadowing of a still embryonic common “Area of Freedom, Security and Justice” (AFSJ) in which (at least some of) these rights were developed and ultimately proclaimed in the 2000 Charter of Nice.

However, it is still remarkable that the “vision” of the signatories of the Manifesto did not include the perspective of creating an “area” in which all states have to face common challenges; this was not perceived, at the time of writing the document, as current or even imaginable. Times were not yet advanced enough to imagine that, in a near future, the following would be possible or necessary:

- To introduce common rules among Member States to regulate the crossing of their internal and external borders;
- To imagine that the intensification of the free movement of persons and, as a result, the rise in relationships among citizens of different Member States would lead to uniform provisions regulating the dissolution of these relationships and governing child custody and even the return of children unlawfully abducted abroad;
- To imagine that new tools of judicial and law enforcement cooperation would be established in order to prevent crime and prosecute criminals who, for their part, exploit “security deficits” as the unavoidable collateral from the full development of the freedom of circulation of persons.

All these new ideas could not yet find a political awakening within a document conceived while the roar of weapons still resounded around the tiny island of Ventotene.

Even if the times were not yet ready, *Spinelli* was a staunch defender of the individual and his inalienable right before the behemoth of the Hegelian state, whether it be Nazi fascism or Soviet communism. Precisely in this respect, he would probably not have remained disinclined to the idea of creating an “area” in which terms only apparently antithetical to one another – such as freedom, security and justice – could enjoy a non-conflicting and harmonious development. And an area in which equal treatment for all individuals would be recognized by each state party.

He would probably have been fascinated by the huge challenge posed to the European Union (although not always considered as such) by the creation of a true area of justice relying on respect for the rules and not on the law of the strongest ones. An area of justice where:

- Asylum seekers see their demands treated in a substantially uniform way regardless of the Member State examining them;
- Arrest and surrender of criminals for the purpose of surrender from one state to another occur on the basis of decisions taken by a truly independent judiciary and not through “extraordinary renditions” or disguised expulsions;
- Accused or suspected persons enjoy the same core of procedural rights in criminal trials, wherever conducted: procedural rights with a tangible added value from those already provided by the European Convention on Human Rights and proportionate to the increase in instruments of law enforcement intervention and cooperation within the same common area;
- Personal data are adequately protected, even beyond the European borders and in a transatlantic dimension;
- People can seek protection for their rights in civil, commercial, and family matters – regardless of the Member States in which they are to be enforced or defended – by preventing or resolving conflicts between national courts and by laying down precise criteria regarding jurisdiction and the enforcement of judgments.

Unknown to its authors at the time of its conception, the 1941 Manifesto already seems to provide an anticipated response to such questions, by placing the individual at the center of a Europe to come and by proposing a federalist solution to the key problems left unresolved after the massacres produced by two successive world wars. These unprecedented conflicts were largely due to the exacerbated nationalist sentiment that characterized the first part of the last century, a sentiment which now seems to be returning...

*Jacques Delors*, former president of the European Commission, once said that “one cannot fall in love with a single market.” Although it may be true that most of the European



policies are not really attractive in the eyes of the people, the creation of a true European “Citizenship” for everyone – through the full and effective implementation of the Charter of Rights – is a challenge that should, however, be appealing to everyone, including the authors of the Manifesto.

By shifting the perspective to the present day, it should become apparent that our time appears indisputably characterized by a certain “*fatigue*” towards the European project, in general, and the creation of a common area of justice, in particular. In order to revive the “spirit of Ventotene” the question could be raised as to the real cost of “non-Europe” instead of “more Europe.” This would imply raising the issue of how many losses EU citizens and residents are suffering in terms of

less welfare, less freedom, less security, and lack of integration for those who knock on our doors, due to the failure of implementing one of the fundamental objectives of the European Union since the Amsterdam Treaty entered into force in 1999, namely the creation of the AFSJ. Among the many examples that could be given (and to limit ourselves to just cooperation in criminal matters), mention should be made of the non-allocation to Eurojust of the increased powers of intervention already provided under Art. 85 TFEU. Another example is the disappointing outcome to date of negotiations on the establishment of a European Public Prosecutor’s Office (EPPO), where the balance between the European level and the national level has constantly shifted towards the latter. Both deprive Europe and Europeans of new tools that could prove very useful for an enhanced fight against organized crime and terrorism.

Although the famous phrase “*Si c’était à refaire, je commencerais par la culture*” (“If I were to do it again, I would start from the culture”), allegedly attributed to *Jean Monnet* – another great protagonist of European integration –, was probably never uttered, now that the roar of the canons has definitely come to an end within the Union, it is not irreverent to imagine that those exiled at Ventotene would start again today by dreaming of a Europe unified under the realm of the law and human rights.



**Lorenzo Salazar**  
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