



2018 / **2**

**THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM**



**Focus: The European Public Prosecutor's Office – From the Drawing Board to Implementation**  
**Dossier particulier: Le Parquet européen – de la planche à dessin à la mise en œuvre**  
**Schwerpunktthema: Die Europäische Staatsanwaltschaft – Vom Reißbrett zur Umsetzung**

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The Associations for European Criminal Law and the Protection of Financial Interests of the EU is a network of academics and practitioners. The aim of this cooperation is to develop a European criminal law which both respects civil liberties and at the same time protects European citizens and the European institutions effectively. Joint seminars, joint research projects and annual meetings of the associations' presidents are organised to achieve this aim.

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### Imprint

\* The news contain internet links referring to more detailed information. As of 2018, these links are being embedded into the news text. They can be easily accessed by clicking on the underlined text in the online version of the journal. If an external website features multiple languages, the Internet links generally refer to the English version. For other language versions, please navigate using the external website.

# Guest Editorial

Dear Readers,

Almost a year has passed since the entry into force of Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO). Activities aimed at setting up this new important European body are in full swing. The creation of a strong, efficient, and independent EPPO, which will be able to rapidly carry out its investigative functions, represents a priority for the European Commission and, in particular, for the European Anti-Fraud Office (OLAF), which I have the honour of directing since August 2018. Setting up the EPPO is a complex task, which requires the contribution of many actors. The Commission has already put a number of steps in place, and many more are being prepared. The Commission is however not alone in this process: Member States participating in the EPPO are called on to ensure that the EPPO operates smoothly and effectively in their legal and judicial systems.

The bulk of the EPPO's investigative work will be carried out by European Delegated Prosecutors – national prosecutors working for the EPPO, under the supervision and direction of the Central Office. Member States will provide both the legal and material means for these Delegated Prosecutors to be able to act effectively within their national systems, also in cooperation with other law enforcement authorities. Where appropriate, criminal procedural systems will be adapted to allow the EPPO to pursue its investigative and prosecutorial work properly. Furthermore, the European Prosecutors (one per Member State) in the EPPO's Central Office will act as a prosecutorial authority in each national system, with the power to supervise investigations in their Member State of origin and, in exceptional cases, to conduct them personally.

Member States will also play a crucial role in setting up and maintaining an efficient flow of communication between national authorities and the EPPO: the former will have to report on criminal conduct upon which the EPPO could open an investigation; the EPPO, in turn, will transmit information in order to support national authorities in protecting the EU budget from fraud.

When acting to put in place these adaptations, Member States will be guided by the principles and directly applicable provisions already contained in the EPPO Regulation. It will by no

means be an easy task: on the one hand, the legislator has chosen to embed the EPPO firmly in the legal system of each Member State, with prosecutions and subsequent criminal proceedings largely following existing criminal procedural rules. On the other, the truly innovative value of the EPPO is the possibility to shape and implement, for the first time, a European prosecution policy and increase coherence in the fight against EU fraud through criminal law instruments in the participating Member States.

Finding the right balance between these interests will be one of the key challenges. The European dimension and the profoundly innovative spirit of the EPPO must be preserved and promoted by the Member States to ensure that the EPPO will be able to play its role in the future landscape of European justice.

For the Commission, which is accompanying Member States in this process, successfully supporting the setting-up endeavour is paramount to ensuring a better protection of the EU's financial interests – the ultimate aim of the ongoing modernization of the EU's anti-fraud architecture. Within this framework, another important initiative – to which I am particularly committed as Director-General of OLAF – is the recent legislative proposal for revision of Regulation 883/2013 on the operations of OLAF itself. This proposal also includes additional, detailed provisions on cooperation between OLAF and the EPPO.

Once this proposal has been adopted by the legislator, OLAF and the EPPO will become key partners that work together efficiently to step up the EU's response to criminal activity targeting the Union's finances.



Ville Itälä

Ville Itälä,  
Director-General, European Anti-Fraud Office (OLAF)

# News

## Actualités / Kurzmeldungen



### European Union\*

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

#### Foundations

##### Fundamental Rights

###### Commission Report on the Application of CFR in 2017

On 6 June 2018, the Commission [published its annual report on the application of the EU Charter of Fundamental Rights \(CFR\)](#) in the EU in 2017. It is the 7th report of its kind after the CFR became legally binding with the entry into force of the Lisbon Treaty on 1 December 2009. For the 2016 report, see eucrim 2/2017, p. 54.

In its introductory remarks, the Commission stresses that the 2017 report shows that the structures and tools put in place – to promote a culture of fundamental rights in the EU and make the CFR a reality in people's lives – have been functioning. However, fundamental rights also faced challenges in 2017, e.g., the threat to the independence of the judiciary in some EU Member States. This led the Commission to propose to the Council to adopt a decision against Poland finding a clear risk of serious breach of EU values. This mechanism, as foreseen in Art. 7(1) TEU, was ap-

plied for the first time in the history of the EU.

The report also voices concerns about the more difficult environment for civil society organisations active in the protection of fundamental rights in 2017. Focus of the report is put on "Women's rights under attack – the topic of the annual colloquium on fundamental rights in 2017.

The report outlines the main developments in 2017 as to the application of the CFR both in/by the EU and in/by the Member States. It also summarises the most important judgments of the CJEU that give further guidance on the interpretation of the Charter's provisions.

The report concludes that the Commission will further support the common Union values in 2018. The new financial framework proposed in May 2018 will help achieve this aim. In view of the forthcoming EP elections in 2019, the focus of the 2018 fundamental rights colloquium will be on "Democracy in the EU." It will take place on 26/27 November 2018 in Brussels/Belgium and give participants the opportunity to discuss ways to foster free and open democratic participation in an era of increas-

ingly low turnout at elections, populism, digitalisation, and threats to civil society. (TW)

##### FRA Fundamental Rights Report 2018

In June 2018, FRA published its [Fundamental Rights Report 2018](#).

The report looks at the major developments in the EU between January and December 2017 in 11 chapters. FRA's opinions are given. The chapters cover the following topics:

- The first, focal chapter looks at ageing and its effects on the individual, the group, and society as a whole as well as the EU's increasing focus on the rights of the elderly.
- The second chapter analyses the EU Member States's use of the EU Charter of Fundamental Rights. According to the report, the Charter's potential was once again not fully exploited by the judiciary and in legislative processes in 2017. National courts, parliaments, and governments did not make use of the Charter's full potential.
- The third chapter deals with equality and non-discrimination in the EU and finds that unequal treatment and discrimination remain realities in European societies.
- Racism, xenophobia, and related intolerance make up the concerns of the fourth chapter. The report look at the anti-racism legislation of the EU Member States. It counts only 14 EU Member States that, by 2017, had action plans and strategies in place, which aimed at combating racism and ethnic discrimination.

\* If not stated otherwise, the news reported in the following sections cover the period 16 May 2017 – 15 September 2018.

- The fifth chapter takes stock of the progress regarding Roma integration in the EU and their fundamental rights situation.
- Asylum, visas, migration, borders, and integration and their associated risks for fundamental rights are the topics of the sixth chapter.
- Chapter seven discusses data protection and data privacy developments, big data, cybersecurity, and the EU's respective recent reforms.
- Chapter eight looks at the rights of children, especially child poverty and social exclusion. According to the report, almost 25 million children in the EU are at risk of poverty or social exclusion.
- Progress with regard to access to justice, including the rights of the crime victims, is outlined in chapter nine.
- The tenth chapter is dedicated to developments in the implementation of the Convention of the Rights of Persons with Disabilities (CRPD).
- The last chapter describes key developments during 2017 in relation to a number of core international obligations that the EU and its Member States have taken on.

All chapters, including FRA's opinions, can also be accessed individually in an [online summary](#) available on FRA's website. Furthermore, all opinions are available in a [separate document](#) available on FRA's website. (CR)

## **EU 2017 Report on Human Rights and Democracy in the World**

On 28 May 2018, the General Secretariat of the Council published the EU's annual [report on human rights and democracy in the world in 2017](#). The report draws a picture of the EU's human rights efforts in its external actions. The chapters are structured thematically and include country-specific examples. They refer, for instance, to civil society and human rights defenders, freedom of expression, torture and other ill-treatment, the death penalty, business and human rights, etc.

The report [concludes](#) that, in 2017, the EU reaffirmed its role as a leading global proponent of the promotion and protection of human rights. The EU's Action Plan on "Human Rights and Democracy" (2015–2019; see Council doc. 10897/15 of 20 July 2015) was well implemented. In this context, human rights dialogues with third countries played an increasingly important role.

One trend in 2017 was the backlash of civil society. The EU promoted an enabling environment for non-governmental organisations and human rights defenders through bilateral dialogues, financial support, and in multilateral fora.

The revision of the EU Guidelines for the Promotion and Protection of the Rights of the Child marked a milestone in 2017. The guidelines set out the EU's overarching strategy to strengthen efforts to ensure the rights of the child. They confirm that the EU will continue to stand up for the rights of all children to reach their full potential. (TW)

## **FRA Report on Eurosur Fundamental Rights Impact**

In September 2018, FRA published a [report](#) evaluating the impact of the European Border Surveillance System (Eurosur) Regulation on fundamental rights.

Eurosur has established a mechanism for information exchange and cooperation between different national authorities involved in border surveillance as well as with Frontex. Its objective is to detect, prevent, and combat irregular immigration and cross-border crime as well as to contribute to the protection and saving of lives of migrants.

For the report, FRA reviewed the implementation of Eurosур by Frontex and analysed cooperation agreements concluded by EU Member States with third countries that are integral to the exchange of information for the purposes of Eurosур.

In its conclusions, the report finds that, overall, Frontex pays attention to implementing the Eurosур Regulation in a compliant fundamental rights man-

ner, also through well-designed training. There are areas in which the recording of border surveillance incidents in Eurosур could be improved, however, e.g., by clearly marking incidents related to search and rescue. In the future, with the continued development of Eurosур, new fundamental rights risks may emerge, e.g., in relation to the processing of photographs and videos of vessels with migrants by maritime surveillance aircrafts or concerning algorithms used to track suspicious vessels.

Regarding the cooperation agreements with third countries, the report finds that none of the documents reviewed contain any wording formally contradicting fundamental rights. A number of them, however, lack express safeguards to promote a fundamental rights-compatible implementation, which could be added to future agreements. Furthermore, the report suggests conducting a more systematic and regular assessment of the situation in the third country before border surveillance information is shared. (CR)

## **Report on Freedom of Movement and Related Rights**

In August 2018, FRA published a [report](#) providing insight into how national courts approach the provisions relating to Union citizenship and freedom of movement. The report offers an EU-wide, comparative overview of the application of the Free Movement Directive (2004/38/EC) across all EU Member States, based on a review of select case law at the national level.

As identified by the report, challenges to the fulfilment of the right to move and reside freely within the territory of the EU include difficulties in identifying relevant case law in several Member States. This makes it difficult to analyse trends and progress made. Furthermore, the report sees the need for more guidance regarding the legal interpretation of Directive 2004/38/EC, e.g., in the form of a handbook on the jurisprudence of the CJEU, in order to guarantee a more

coherent and correct application of the Directive by the Member States' national courts. The report finds discrimination on the grounds of nationality a potential obstacle to free movement. Lastly, the report sees a need to promote the participation of Union citizens in European, regional, and municipal elections. (CR)

### **Commission Continues to Struggle with Poland on Rule-of-Law Compliance**

The controversy between the European Commission and Poland entered into another round in summer 2018. On 2 July 2018, the Commission decided to [launch an infringement procedure against Poland](#) regarding the Polish law on the Supreme Court.

The Commission is of the opinion that Poland's recent reforms – reducing the retirement age of Supreme Court judges and prematurely terminating the current mandate of the First President of the Supreme Court – undermine the principle of judicial independence, including the irremovability of judges. Therefore, Poland has failed to fulfil its obligations under Art. 19(1) TEU and Art. 47 of the CFR.

The Commission decided to take this step since the dialogue with Poland as part of the "Art. 7 procedure" ended in a political deadlock in June 2018. For the first time ever, the Commission provoked the "Art. 7(1) procedure" in December 2017. The procedure refers to Art. 7 TEU, which gives the Council – acting by a four-fifths majority of its members – the possibility to determine that there is a clear risk of a serious breach of the common values referred to in Art. 2 TEU by an EU Member State. The procedure may end in the suspension of rights of the accused country, including voting rights, if the breach is not eliminated.

The Commission stressed that the above-mentioned infringement proceeding does not stop the rule of law dialogue with the Polish government. The infringements proceeding started with a "Letter of Formal Notice" on 2 July

2018 setting out the Commission's legal concerns as to the Polish law on the Supreme Court. Since Poland's answer to this letter did not alleviate the concerns, the Commission send a [Reasoned Opinion to Poland on 14 August 2018](#). Poland had one month to adequately react to the Commission's legal concerns, but failed to do so.

As a result, on 24 September 2018, the Commission [referred the matter to the Court of Justice](#). It also asked the Court to order interim measures until it issues a judgment on the case and to treat the case under an expedited procedure.

The infringement procedure is the second one against Poland for potential violations of the EU value of the rule of law. On 20 December 2017, the Commission brought an infringement procedure before the CJEU regarding the Polish Law on Ordinary Courts. In this context, the Commission similarly argued that the retirement provisions and their impact on the independence of the judiciary do not comply with EU standards. This procedure is currently pending with the CJEU. (TW)

### **Area of Freedom, Security and Justice**

#### **2018 EU Justice Scoreboard: Focus on Judicial Independence**

**spot light** On 28 May 2018, the Commission published [the 2018 EU Justice Scoreboard](#). The Scoreboard provides a comparative overview of the independence, quality, and efficiency of justice systems in the EU Member States.

The EU Justice Scoreboard regularly focuses on litigious civil and commercial as well as administrative cases with a view to giving guidance to the EU Member States for an investment-, business-, and citizen-friendly environment. It also, however, provides criminal law-related information, e.g., on the average length of first-instance court cases dealing with money laundering criminal

offences or the organisation of the prosecution services.

In comparison to the previous editions, the [2018 Scoreboard](#) further develops the different indicators (for the 2017 Scoreboard, see *eucrim* 2/2017, p. 56). One focus is on judicial independence, which is an important benchmark in times of threats to the rule of law. The 2018 Scoreboard also looks in detail at the Councils for the Judiciary, at the involvement of the executive and the parliament in the appointments and dismissals of judges and court presidents, as well as at the organisation of prosecution services. For the first time, the report presents data on the length of proceedings in all court instances.

Regarding the length of judicial proceedings dealing with money laundering offences, updated data show that, in about half of the Member States, the first-instance court proceedings take up to a year on average. In several Member States facing such challenges, however, these proceedings take around two years or more.

As regards the organisation of prosecution services, the Scoreboard observes that it varies throughout the Union and that there is no uniform model. There is, however, a widespread tendency to allocate for a more independent prosecutor's office, rather than one subordinated or linked to the executive. The Scoreboard collected data on certain aspects of the organisation of the prosecution service. Particular aspects are who decides on disciplinary measures against prosecutors, who is empowered to transfer or promote prosecutors, and who has the competence to give general guidance on crime policy or instructions on prosecution services in individual cases. Other [key findings](#) of the 2018 Scoreboard are as follows:

#### *Judicial independence*

- Businesses' perception of independence has improved or remained stable in about two-thirds of Member States when compared with both the previous year and since 2010;

■ Interference or pressure from government and politicians was the most frequently stated reason for the perceived lack of independence of courts and judges;

■ The status and position of judges is the most frequently cited reason for good perception of independence.

#### *Efficiency*

■ Since 2010, efficiency has improved or remained stable in almost all Member States with very few exceptions;

■ Positive efficiency trends were particularly observed for Member States in which the EU identified economic problems.

#### *Quality in terms of accessibility*

■ Over the years, legal aid for consumers has become less accessible in some Member States, as the income threshold for legal aid remained unchanged while the poverty level increased;

■ In more than half of Member States, electronic submission of claims is not in place or is possible only to a limited extent;

■ Online access to court judgments has improved in a number of Member States compared to previous years.

#### *Quality in terms of resources*

■ General government expenditure on the judicial system remained stable in most Member States in 2016, while significant differences in allocated amounts persist;

■ Most Member States provide for continuous training of the judiciary in EU law, but efforts need to be intensified to train judges to communicate with specific groups of parties (e.g., the visually or hearing impaired), to deal with gender-sensitive practices in judicial proceedings, and on the role of interpreters.

#### *Quality in terms of assessment tools*

■ Almost all Member States monitor the number and length of court cases and have regular evaluation systems;

■ Compared to previous years, several Member States have extended monitoring to include more specific elements, and some have involved more specialised court staff to improve quality;

■ ICT case management systems still need to be implemented in many Member States.

#### *Quality in terms of setting standards*

■ Most Member States use timing standards; however, certain Member States that are facing efficiency challenges are currently not using such standards;

■ Timeframes are often set up solely by the judiciary, and the monitoring of timeframes remains the responsibility of the judiciary;

■ Most Member States have standards on backlogs, but their scope varies considerably;

■ Most Member States have standards on how to inform the parties about the progress of their case, the court timetable, or potential delays, but many differences exist as regards the methods of information used.

The EU Justice Scoreboard is not designed to rate the different legal systems of the EU Member States, but rather to provide information on the functioning of justice systems. It also helps assess the impact of justice reforms. It may be used for more specific recommendations on an individual Member State within the so-called “[European Semester](#)” – the framework for the coordination of economic policies across the EU. It allows EU countries to discuss their economic and budget plans and monitor progress at specific times throughout the year. (TW)

### **Commission Proposes New Justice, Rights and Values Fund**

As part of the Commission’s proposals for a new long-term EU budget, the Commission [proposed a new “Justice, Rights and Values fund”](#). The fund will further contribute to the development of a European area of justice by simplifying the budgetary line into one financial programme. According to the Commission’s plans, €947 million over seven years (starting from 2021) should be allocated to the budget of the new fund.

The fund is divided into the Rights and Values Programme (equipped with €642 million) and the Justice Programme (with a total budget of €305 million). The former aims at protecting and promoting rights and values as enshrined in the EU Treaties. It may include the support of civil society organisations that engage in open, democratic, and inclusive societies. The programme pursues three objectives:

- Promotion of equality and rights;
- Promotion of citizens’ engagement and participation in the democratic life of the Union;
- The fight against violence.

The Justice Programme is above all dedicated to the creation of a single European area of justice based on the rule of law, mutual recognition, and mutual trust. The specific objectives of this programme are the following:

- Facilitation and support of judicial cooperation in civil and criminal matters as well as promotion of the rule of law, for instance by supporting efforts to improve the effectiveness of national justice systems and the enforcement of decisions;
- Promotion of judicial training, with a view to fostering a common legal, judicial, and rule-of-law culture;
- Facilitation of effective access to justice and effective redress, e.g., regarding efficient civil and criminal procedures, the rights of victims of crime as well as the procedural rights of suspects and accused persons in criminal proceedings.

The new EU Justice, Rights and Value Fund must be distinguished from the Commission plans to better protect the financial interests of the EU in case of impairment of the rule of law in Member States. For the latter, see [eucrim 1/2018](#), pp. 12–13. (TW)

### **Brexit: EP Think Tank Analysis Draft Withdrawal Agreement**

In July 2018, the European Parliamentary Research Service (EPRS) released an [in-depth analysis on the draft withdrawal agreement](#) published by the

European Commission on 19 March 2018. Additional points settled in negotiations up to June 2018 were also included. The report aims at providing an overview of the main areas already settled by the negotiators as well as areas of persisting difficulty or disagreement.

The report concludes that significant progress has been made in settling several crucial issues for a draft withdrawal agreement, in particular as regards citizens' rights and financial settlement. It also welcomes the proposed transitional period that would last for 21 months from "Brexit day," namely 30 March 2019. During this period, the UK would preserve the existing EU acquis and have time to implement the withdrawal agreement. This would give business and citizens a certain amount of security while preparing for the changes arising from Brexit.

Notwithstanding, the authors of the EPRS report see two major issues that have not yet been resolved:

- The jurisdiction and powers of the CJEU as regards interpretation and application of the agreement;
- The border between Northern Ireland and Ireland after Brexit.

The report also notes that time is running out for the negotiators since the withdrawal agreement should be completed by October 2018. (TW)

## Schengen

### European Travel Information and Authorisation System (ETIAS): Legislation Adopted

In September 2018, the Council and the European Parliament formally adopted the EU legislation introducing a European Travel Information and Authorisation System (in short: ETIAS). The legal framework consisting of two regulations was published in the Official Journal of the European Union L 236 of 19 September 2018.

ETIAS will pre-screen visa-exempt travellers to the Schengen area. This

## Report

### Think Tank Considers Solutions for a Post-Brexit JHA Deal

The Institute for Government – a London-based think tank on governmental challenges – published a report entitled "Negotiating Brexit: policing and criminal justice" in September 2018. The report proposes how the United Kingdom and the EU can move towards a good agreement on their future relationship in law enforcement cooperation after Brexit. The report was authored by *Tim Durrant, Lewis Lloyd, and Maddy Thimont Jack*.

The authors analyse the current EU law enforcement cooperation and observe that cooperation on policing and criminal justice has been an important benefit of the UK's membership in the EU. They also state that the UK already has a bespoke deal with the EU in view of the UK's opt-in in justice and home affairs matters as part of the Lisbon Treaty.

According to the authors, a Brexit without a withdrawal agreement would have several disadvantages, since the UK would fall back to predicated EU cooperation:

- Extradition of criminals will be slower and more bureaucratic;
- Getting perpetrators that fled to EU countries back to the UK will become more cumbersome;
- Law enforcement authorities will find it harder to obtain crucial information for investigations because they would lose access to EU databases, e.g., the SIS;
- Collaboration between UK investigators and prosecutors with EU counterparts will become more difficult.

In conclusion, the report suggests that both the UK and the EU should be more flexible in negotiating a tailor-made agreement. Whereas the UK strives for a security agreement that maintains the current status, the EU would currently only offer the UK a cooperation that it has established with non-EU countries. The authors find that the latter is not appropriate; the EU should recognise the UK's special position in terms of its close relationship with the EU. A comprehensive security agreement would be the best way forward.

However, the UK should concede to certain issues in a future agreement, e.g., by accepting constitutional barriers existing in some EU states not to surrender own nationals or by fully implementing all EU law on procedural safeguards of suspects/alleged persons.

In addition, the UK should consider addressing the EU's legitimate concerns about the way the UK handles personal data.

Lastly, the UK should further strengthen practical efforts now that improve law enforcement cooperation – in order to show its goodwill after Brexit.

The IfG report was published at nearly the same time as another report on the future UK-EU partnership in justice and home affairs. The latter was presented by the so-called Task Force between the Centre for European Policy Studies (CEPS) and the School of Law at Queen Mary University of London (QMUL). (TW)

currently affects nationals from over 60 countries. ETIAS is designed to help the EU identify third-country nationals who pose a security, illegal immigration, or high epidemic risk.

ETIAS goes back to a Commission proposal of November 2016 (see eucrim 4/2016, pp. 155–156). The idea was first presented by *Jean-Claude Juncker* in his 2016 State of the Union speech. Agreement between the Bulgarian Council Presidency and representatives of the

European Parliament was reached on 25 April 2018.

Like systems in other countries, e.g. the USA or Canada, visa-free travellers need to apply for travel authorisation prior online to their trip. If arriving at the Schengen border, travellers will need both a valid travel document and the ETIAS authorisation. Applicants must pay an authorisation fee of €7, and the authorisation issued will be valid for three years.

## CEPS and QMUL Report Outlines UK-EU Cooperation in Criminal Justice and Police Matters after Brexit

The Task Force set up by the Centre for European Policy Studies (CEPS) – a Brussels-based think tank – and the School of Law at Queen Mary University of London (QMUL) published a [report that extensively examines the key issues, main options, and alternative models for EU-UK cooperation](#) on issues related to security and justice after Brexit.

The report – published in September 2018 – was written by *Sergio Carrera, Valsamis Mitsilegas, Marco Stefan, and Fabio Giuffrida*. It is the outcome of several discussions by the Task Force that was actively supported by *Peter Hustinx*, former EDPS, and *Michael Kennedy*, former President of Eurojust. The report is divided into three parts:

- EU constitutional framework for UK participation in the AFSJ before and after Brexit;
- UK-EU cooperation in criminal justice and police matters after Brexit;
- Key findings and the way forward.

The report addresses several topics and draws the following main conclusions:

### **EU-UK criminal justice and police cooperation after Brexit**

- An international agreement between the UK and the EU will be subject to rules on the EU's external action in the field of criminal justice and police cooperation;
- The UK government's objective to create a new model of cooperation that more or less continues the current level necessitates the UK's compliance with key EU law standards.

### **EU law benchmarks for criminal justice and police cooperation after Brexit**

- To ensure trust, the UK must continue to participate in the ECHR;
- Any post-Brexit agreement should include a "freezing mechanism," i.e., both parties may suspend cooperation if human rights violations are ascertained;
- After Brexit, the UK needs to comply with more EU standards than to date, i.e., compliance is considered necessary with the EU *acquis* on suspects' and victims' rights in criminal proceedings as well as on data protection and privacy standards.

### **Instruments of mutual recognition: status quo and alternative options:**

- Especially as regards extradition, reverting to extra-EU instruments, e.g., those agreed on within the Council of Europe or the UN, would be inefficient;
- The EU-Norway and Iceland Agreement on Surrender could serve as a model to follow, as it would keep EU-UK extradition proceedings "judicialised;"

- It must, however, be questioned whether participation in the Schengen *acquis* is a prerequisite for certain extradition conditions, such as the surrender of own nationals;
- As far as mutual legal assistance (MLA) is concerned, a post-Brexit MLA agreement should go beyond existing arrangements between the EU and third countries.

### **Data protection and the exchange of data for law enforcement and criminal justice purposes:**

- The UK would be treated like a third country after Brexit, as a result of which its data protection standard would be assessed as "essentially equivalent" to that guaranteed by EU law read in light of the Charter;
- A "guillotine clause" may govern the future partnership, i.e., data exchange between law enforcement authorities would be suspended if the CJEU withdrew or declared invalid the adequacy decision;
- Some pieces of UK legislation may become "stumbling blocks" when affirming an equivalent level of protection of personal data and privacy guaranteed by EU law.

### **Post-Brexit access to EU databases:**

- As a third country and non-Schengen country, the UK's participation in EU databases cannot be maintained after Brexit; this holds especially true for ECRIS, SIS, and EU-PNR; an exception is conceivable for the UK's participation in the Prüm framework;
- The UK's participation in the EU's interoperability legislation is likely to be impossible.
- UK participation in EU agencies after Brexit:
- The UK will need "ad hoc agreements" to continue the exchange of personal data with Europol and Eurojust;
- There is no precedent granting third country access to Europol's databases;
- A strong relationship with the European Public Prosecutor's Office will be necessary.

### **Role of the CJEU in the future EU-UK security and justice partnership:**

- The case law of the CJEU will have a relevant impact on the UK after Brexit, as the Court will remain competent to ultimately and authoritatively interpret EU law;
- The CJEU may prevent entry into force of any EU-UK agreement on criminal justice and police cooperation.

The CEPS/QMUL report was published at nearly the same time as another report on the future UK-EU partnership in justice and home affairs. The latter was presented by the Institute for Government. (TW)

A key feature of ETIAS is the possibility to cross-check data provided by the traveller against other large-scale EU systems for borders, security, and migration, such as the Schengen Information System (SIS), the Visa Information System (VIS), the Entry/Exit System (EES), and Eurodac as well as Europol and Interpol databases. Furthermore, ETIAS will feature a dedicated watchlist and specific risk indicators. In this way, ETIAS is expected to close information gaps and enhance the internal security of the EU.

Ideally, automated approval of the application will be granted within a few minutes. If, however, data matches the above-mentioned databases or the outcome of the automated process is undecided, the ETIAS Central Unit will manually handle the application process. This unit will be managed by the Border and Coast Guard Agency (Frontex). If the central unit has further doubts, the national ETIAS unit of the responsible Member States will take over the case and proceed manually.

The ETIAS legal framework contains clear rules and procedures in case of a refusal. Applicants retain the right to lodge an appeal, which must be done in the Member State that has taken the decision on the application and in accordance with the national law of that Member State. Applicants will also have the right to redress if they consider themselves to have been treated unfairly.

It is expected that travel authorisations will be issued automatically and quickly in more than 95% of the cases. It is worth mentioning, however, that the ETIAS authorisation is not a document that grants rights of entry or stay. This further decision is taken by the border guards.

ETIAS will be set up by the EU Agency for the operational management of large-scale information systems in the area of freedom, security and justice (eu-LISA). The development costs are estimated at €212.1 million. The system is expected to be ready in 2021. Frontex

will then be responsible for the continued management of ETIAS. (TW)

### **EP Sees Functioning of Schengen Area Critically**

On 30 May 2018, the European Parliament adopted a [resolution on the first annual report on the functioning of the Schengen area](#). The resolution first points out the progresses made in strengthening the Schengen area over the last several years:

- The creation of the European Border and Coast Guard;
- The introduction of mandatory, systematic checks against relevant databases at the external borders on entry and exit for third-country nationals and for EU nationals;
- The new [entry and exit registration system](#).

However, MEPs also identified a series of critical shortcomings and deficiencies. In particular, they criticize the continued reintroduction of internal border checks, as this undermines the basic principles of the Schengen area. They hold that the prolongation of internal border controls is not in line with existing rules, deeming it unnecessary and disproportional. The construction of physical barriers, including fences, between Member States is also considered incompatible with fundamental Schengen principles.

MEPs, *inter alia*, call for the following actions to be taken:

- Addressing the identified, critical shortcomings without delay in order to return to the normal functioning of Schengen without internal border controls;
- Reforming the Schengen Information System on the following issues: protection of children who are at risk or missing; the immediate, obligatory exchange of information on terrorism; and the mandatory exchange of information on return decisions;
- Allocating sufficient resources to the external borders through staffing, equipment, and expertise in order to ensure a high level of control while fully respect-

ing fundamental rights – including matters relating to international protection and non-refoulement;

- Developing a permanent, robust, and effective Union response in search and rescue operations at sea to prevent the loss of life;
- Collecting information and statistical data more efficiently by EU member state authorities on how resources are managed at the national level and on capabilities related to border control;
- Ensuring swift and effective return procedures in Member States, with full respect for fundamental rights under humane and dignified conditions;
- Ensuring adequate infrastructure, accommodation, and living conditions for all asylum seekers.
- The resolution also reiterates that Bulgaria and Romania are ready to join the Schengen area. The Council is now called on to approve their accession. (TW)

## **Institutions**

### **Council**

#### **Presidency: Priorities in the Area of Criminal Justice**

From 1 July 2018 to 31 December 2018, Austria is holding the [Presidency of the Council of the EU](#). Priorities of the Presidency in the area of criminal justice are as follows:

- To finalise the accompanying measures in preparation for the EPPO;
- To finalise the revision of Eurojust's legal framework;
- To finalise the amendment to the European Criminal Records Information System to include third-country nationals;
- To improve the fight against terrorist crime, money laundering, fraud and counterfeiting of non-cash means of payment, and the freezing and confiscation of assets.

Furthermore, the Presidency will strive to advance the proposals for a

Regulation on a European Production Order and a European Preservation Order on electronic evidence in criminal matters. It also plans to make progress on a Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings. (CR)

## **European Court of Justice (ECJ)**

### **CJEU – The Year in Review**

The Court of Justice of the EU published its [annual review](#) for the year 2017. The review summarises the Court's activity from its judicial, institutional, and administrative standpoints.

Looking at the year 2017 in figures, the budget of the institution amounted to €399 million, with a staff of 2174 persons. 75 judges and 11 advocate generals from 28 EU Member States served at the Court in 2017. In order to keep up the dialogue with legal professionals, 2300 national judges were hosted at the Court in the context of seminars, training courses, visits, and traineeships. Furthermore, approximately 20,000 people, including legal professionals, journalists, students, and citizens, visited the Court.

In 2017, important judgements were taken regarding the rights and obligations of migrants, protection of consumers and workers' rights, preservation of free competition, and the internal market, protection of intellectual property rights, and protection of personal data.

Lastly, the review underlines the institution's efforts to achieve greater gender equality among its staff and to operate in an environmental-friendly manner. (CR)

### **Names Replaced by Initials**

In order to ensure the data protection of [natural persons](#) in requests for a preliminary ruling, the Court of Justice has decided to replace the names of natural persons involved in the case with initials. Similarly, the Court will remove any additional element likely to allow

identification of the persons concerned. The new rules apply to all public documents involving requests for preliminary rulings brought after 1 July 2018. They also apply to all publications in the handling of the case, from its lodging to its closure and even to the name of the case. The Court will give anonymised cases a name according to a system outlined in the guidelines. It may, however, derogate from these rules in the event of an express request from a party or if the particular circumstances of the case justify derogation.

The new guidelines do not affect legal persons. (CR)

## **OLAF**

### **OLAF's New Director-General**

On 20 June 2018, the Commission [appointed Ville Itälä from Finland as new Director-General of OLAF](#). He took office on 1 August 2018. Mr Itälä is the successor to *Giovanni Kessler* from Italy who was appointed the head of the Italian Customs and Monopoly Agency.

[Mr Itälä won against several candidates, following a long procedure characterised by confidentiality](#). He served as a member of the European Court of Auditors from 2012 to February 2018. The new Director-General also looks back on a political career: from 2004 to 2012, he was Member of the European Parliament. He was also Vice-Chair of the European People's Party and European Democrats' Group (2004–2006). From 2000 to 2003, he was Minister of the Interior of Finland. (TW)

### **Practice: Successful Cooperation Between OLAF and U.A.E.**

On 12 July 2018, OLAF reported that a joint inspection with Dubai customs led to the [seizure of a total of 82 tons of counterfeit steel pipes](#) in the port of Dubai, United Arab Emirates.

The seizure was one of the major successes of the cooperation between OLAF and the United Arab Emirates customs

authorities. The operation also involved one of the main manufacturers of steel pipes, the French company "Vallourec," which delivered information on the trade and products. The trade with counterfeit steel pipes has become an increasingly lucrative business since it is closely connected with the petroleum industry.

Smuggling of counterfeit steel pipes not only damages the EU budget, but also endangers health and security, because the counterfeit products regularly do not meet quality requirements and customers' specifications. (TW)

### **Practice: Operation Silver Axe III**

On 11 July 2018, OLAF reported on a major victory in EU law enforcement cooperation: [dismantling the smuggling of illegal and counterfeit pesticides in the EU](#).

The so-called operation Silver Axe III involved a number of police and customs authorities from 22 EU countries and five non-EU countries (Australia, Moldova, Serbia, Switzerland, and Ukraine) as well as private and public plant protection bodies. The operation was considerably supported by OLAF and Europol.

OLAF provided Europol and the participating countries with information on over 180 suspicious shipments of pesticides from third countries (mainly China) to the EU. The goods that were actually destined for the EU market were either declared as being in transit in the EU or as destined for export from the EU to a third country. As a result of the operation, 360 tons of smuggled pesticides were seized – an amount large enough to spray almost the entire United Kingdom. (TW)

## **European Public Prosecutor's Office**

### **Netherlands and Malta Join EPPO**

On 1 and 7 August 2018, the Commission gave its approval for the [Netherlands and Malta to join the European Public Prosecutor's Office \(EPPO\)](#).

As a result, 22 EU Member States are now part of the enhanced cooperation scheme establishing the EPPO and making the new supranational body operational by the end of 2020. The EPPO is designed to more effectively and swiftly investigate, prosecute, and bring to judgment serious crimes affecting the EU's financial interests, e.g., subvention fraud, corruption, money laundering, and cross-border VAT fraud.

The new office will be competent to combat fraud involving EU funds of over €10,000 and involving complex cross-border VAT fraud cases with damages over €10 million. According to the agreed on structure, the EPPO is coined mainly by a decentralised organisation with European Delegated Prosecutors, who are embedded in the national criminal justice systems of the participating EU countries and responsible for handling the fraud cases. The EPPO is to closely cooperate with the national law enforcement and judicial authorities as well as with other EU bodies, especially OLAF, Eurojust, and Europol.

Following the recent participation of the Netherlands and Malta, only Denmark, Hungary, Ireland, Poland, Sweden, and the United Kingdom do not yet support the EPPO. (TW)

#### **Updated EPPO Fact Sheet**

On 7 August 2018, the European Commission published an [updated fact sheet](#) of “Frequently Asked Questions” on the European Public Prosecutor’s Office. The fact sheet provides answers to numerous questions regarding the key features, structure, and work of the new EU body, which is slated to become operational by the end of 2020. The fact sheet is available in 19 EU languages so far. (TW)

#### **Implementation Measures for EPPO Regulation**

The Commission initiated several measures implementing the Regulation on the European Public Prosecutor’s Office. The Commission is responsible for the establishment and initial administrative

operation of the EPPO until the new office has sufficient capacity to implement its own budget. The envisaged build-up phase is three years.

The steps taken so far include, *inter alia*, the following:

- Proposal on [operating rules of the selection panel](#) provided for in Art. 14(3) of Regulation (EU) 2017/1939;
- Proposal for a Council Implementing Decision [appointing the members of the panel to select](#) the European Chief Prosecutor and the European Prosecutors in accordance with Art. 14(3) of Regulation (EU) 2017/1939;
- Development of the EPPO’s Case Management System;
- Other logistical, administrative, and financial matters.

The Commission informed the Justice Ministers of the EU Member States about the state of play of implementation of the EPPO Regulation at the [Council meeting on 4–5 June 2018](#).

Member States have already proceeded with plans to change their criminal procedure provisions, particularly in view of organising the functioning of the European Delegated Prosecutors within their national prosecution systems. (TW)

#### **COM Communication Extending EPPO Competence**



On 12 September 2018, the European Commission tabled a proposal to extend the competences of the European Public Prosecutor’s Office to include terrorist offences affecting more than one EU Member State ([COM \(2018\) 641 final](#)). The proposal was tabled in conjunction with Commission President Jean-Claude Juncker’s 2018 State of the Union speech, held on 13 September 2018 before the Members of the European Parliament. In [his speech](#), Juncker stated: “*The European Union must also be stronger in fighting terrorism. In the past three years, we have made real progress. But we still lack the means to act quickly in case of cross-border terrorist threats. [...] I also see a strong case for tasking*

*the new European Public Prosecutor with prosecuting cross-border terrorist crimes.*”

The initiative was a contribution to the meeting of the EU leaders in Salzburg on 19/20 September 2018. The plans of Commission President Juncker to extend the mandate of the EPPO even before the new body becomes operational (planned for 2020) are not new. Juncker started the debate on a possible extension of the EPPO’s mandate with a letter of intent to the EP-President and Estonian Prime Minister (then holding the Presidency of the Council) on 13 September 2017 (see [eucrim 3/2017](#), p. 104).

According to the tabled Commission Communication, the fight against terrorism is a severe, ongoing problem that needs a comprehensive and strengthened EU response. Therefore, the EPPO will overcome existing gaps in the fight against cross-border terrorist offences – gaps are seen as follows:

- Fragmentation of terrorist crime investigations;
- Untimely exchange of information on terrorist cases between the national authorities and EU agencies;
- Poor collection, sharing, and use of sensitive types of evidence;
- Disconnection between investigation and prosecuting phase;
- Inefficient parallel investigations and prosecutions.

Against this background, the Communication is supplemented by an Annex containing a concrete proposal for the European Council to unanimously extend the EPPO’s competence on the basis of Art. 86 para. 4 TFEU (i.e., unanimity required by all EU Member States, regardless of their current participation in the enhanced cooperation scheme of the EPPO). The new mandate of the EPPO would be linked to Directive (EU) 2017/541 and comprise “terrorist offences,” “offences relating to a terrorist group,” and “offences related to terrorist activities” (e.g., public provocation to commit a terrorist offence,

recruitment, providing and receiving training for terrorism, travelling for the purpose of terrorism, organising or facilitating such travelling, and terrorist financing). This includes not only the commission of these offences, but also aiding, abetting, inciting, and attempting said offences.

The Commission hopes that the European Council may finally decide to agree on the extension of EPPO's mandate at the summit of the European Council in Sibiu/Romania on 9 May 2019 – after Brexit. (TW)

## Europol

### New Executive Director Takes Up Duties

On 2 May 2018, *Catherine de Bolle* took up her duties as Executive Director of Europol (see also eucrim 1/2018, p. 9–10). Her tasks involve overseeing the administration of Europol, the management of its more than 1000 staff members, and the overall performance of the Agency. (CR)

### Working Arrangement with Israel Signed

On 17 July 2018, Europol and Israel signed a working arrangement to expand their cooperation in combatting cross-border criminal activities such as fraud, cybercrime, terrorism, and financial crime. The agreement allows for the exchange of strategic information and the joint planning of operational activities. Furthermore, Israel National Police will designate a national contact point to act as the central point of contact between Europol and the law enforcement authorities and to enable information exchange on a 24-hour basis. In addition, both parties may agree on the secondment of Liaison Officers. (CR)

### Memorandum of Understanding with Orange Signed

On 9 July 2018, Europol and Orange signed a Memorandum of Understand-

## Report

### Conference on OLAF and the EPPO and Annual Meeting of the European Criminal Law Associations

On 15 June 2018, Utrecht University, under the auspices of RENFORCE and with financial support from the HERCULE III Programme, organized the conference "OLAF and the EPPO in the new institutional setting for the protection of the financial interests of the EU." The conference welcomed participants from over twenty Member States and aimed to provide the participants with a better understanding of the administrative and criminal responses to EU fraud. It brought together academics, practitioners, and policymakers to discuss several aspects of the protection of the EU budget in light of the establishment of the EPPO, the main focus being on the relations between OLAF and the EPPO as well as their relations with other law enforcement partners.

The first part of the conference dealt with the relationship between OLAF and national authorities. This included presentations on the evaluation of the OLAF Regulation (*Irene Sacristán-Sánchez*, Head of Unit, OLAF), on OLAF's current investigative powers (*John Vervaele*, Utrecht University), and on specific needs and practical obstacles in OLAF investigations (*Cvetelina Cholakova* Head of Unit, OLAF). Additional presentations dealt with the information exchange between OLAF and other enforcement authorities (*Michiel Luchtman*, Utrecht University) and with the admissibility of OLAF reports as evidence (*Katalin Ligeti* and *Angelo Marletta*, University of Luxembourg).

The second part of the conference focused on the establishment of the EPPO and its impact on existing actors in the field. The presentations looked at the adopted text of the EPPO Regulation at the expense of a true vertical cooperation scheme (*András Csúri*, Utrecht University), how to ensure good relations between EPPO delegated prosecutors and national authorities (*Hans-Holger Herrnfeld*, Federal Ministry of Justice and Consumer Protection, Germany), and procedural safeguards and judicial control in EPPO investigations (*Juliette Lelieur*, University of Strasbourg). In addition, the presentations also addressed the mission and tasks of IBOAs (*Lothar Kuhl*, Head of Unit, DG REGIO), Eurojust's future role in the new landscape (*Natalie Bergmann*, Head of Institutional Affairs, Eurojust), and the EPPO's cooperation with third countries and non-participating EU Member States (*Nicholas Franssen*, Ministry of Justice and Security in the Netherlands).

The conference was preceded by the Annual Meeting of the Associations on European Criminal Law and the Protection of the EU's financial interests on 14 June 2018, which was also organized under the auspices of RENFORCE and co-financed by the HERCULE III Programme.

*Dr. Andras Csuri, University of Utrecht*

ing (MoU) to enhance their collaboration and share information on cyber threats and major attacks. Orange is one of the world's leading telecommunications operators and a leading provider of global IT and telecommunication services to multinational companies under the Orange Business Services brand.

The agreement defines a framework for Orange and Europol to exchange information on the status of threats to the telecommunication network and on cybercrime trends. Orange will help enhance and enrich this data through the

exchange of technical expertise and by sharing the indicators it monitors on its networks, such as spam, DDoS attacks, fraud, and cyberattacks on mobile devices and banking services. (CR)

### Memorandum of Understanding with BT Signed

On 15 May 2018, Europol and the BT (British Telecommunications) Group signed a Memorandum of Understanding to exchange threat intelligence data and information relating to cyber security trends, technical expertise, and best industry practice. (CR)

### **Memorandum of Understanding with the Centre for Climate Crime Analysts**

At the beginning of May 2018, Europol and the Centre for Climate Crime Analysis (CCCA) signed a [Memorandum of Understanding](#) (MoU) in order to reinforce their efforts to address environmental crime, especially air pollution and deforestation, including all crimes covered by the European Union Timber Regulation. Under the MoU, Europol and the CCCA pledge to exchange knowledge and cooperate in the implementation of projects of common interest.

The [CCCA](#) is a non-profit organisation made up of prosecutors and law enforcement professionals. The organisation aims to trigger and support the investigation and prosecution of climate crime by providing the relevant authorities with high-quality information and analysis. It has been operative since 2017. (CR)

### **Norway and Switzerland Join J-CAT**

In April 2018, Norway and Switzerland were unanimously accepted as [members of the Joint Cybercrime Action Task-force \(J-CAT\)](#), which is hosted as part of Europol's European Cybercrime Centre (EC3). The taskforce aims at enhancing cooperation between law enforcement authorities, at driving intelligence-led, coordinated actions against major cybercrime threats, and at facilitating cross-border investigations by its partners. It is comprised of cyber liaison officers from 13 EU Member States and non-EU partners and 15 law enforcement agencies. Due to their new membership, Norway and Switzerland will now also deploy cyber liaison officers to J-CAT. (CR)

### **Practice: Major Hit against Darknet NPS Dealers**

On 28 June 2018, Europol reported that – during a [joint operation](#) – the Spanish Guardia Civil and the Austrian Federal Police, supported by Europol, seized 100 different types of new psychoactive substances (NPS) with a market value

of €12 million. They confiscated nearly 800,000 doses of LSD, marking the biggest ever haul of this type of substance and derivative in the EU. The NPS was sold worldwide on the Darknet. Furthermore, more than 4.5 million in cryptocurrencies used to money launder the profits were seized. (CR)

### **Practice: Online Marketplace for Counterfeit Goods Taken Down**

At the beginning of May 2018, one of the largest European law enforcement operations ever resulted in the shutdown of an [illegal online marketplace](#) selling counterfeit goods and pirated content, e.g., sports articles, medicines, mobile phones, bags, jewellery, sunglasses, clothing, watches, perfumes and cosmetics, illegal Internet Protocol Television (IPTV) set-top-boxes, etc.

Operation "Aphrodite" was run by the European Union Intellectual Property Office (EUIPO) and national law enforcement authorities (from Belgium, Bulgaria, Cyprus, Greece, Ireland, Italy, Portugal, Spain, and the UK). It was supported by Europol's Intellectual Property Crime Coordinated Coalition (IPC3). As a result, more than 20,000 packages of counterfeit goods were seized and over 1000 accounts were closed. (CR)

### **Practice: Webstresser.org Taken Down**

On 24 April 2018, the world's biggest marketplace by which to hire Distributed Denial of Service (DDoS) services, [webstresser.org](#), was shut down and its infrastructure seized. This was the result of a joint operation between the Dutch Police and the UK's National Crime Agency with the support of Europol and several law enforcement agencies from around the world. Webstresser.org had over 136,000 registered users and launched 4 million orchestrated attacks targeting online services offered by banks, government institutions, and police forces.

In a DDoS attack, the attacker remotely controls connected devices to direct a large amount of traffic at a website

or an online platform. The result is that the victim website is either slowed down past the point of usability or knocked completely offline, depriving users of essential online services. By paying a nominal fee, registered users at webstresser.org could rent the use of stressers and booters. (CR)

### **Practice: Members of COSA NOSTRA Arrested**

On [5](#) and [12 May](#) 2018, Europol's "Europresearch" project, which was set up to locate and capture dangerous mafia fugitives in Europe, succeeded in the arrest of two of the most important Italian fugitives and members of the Italian Crime Syndicate COSA NOSTRA. Italian and German law enforcement authorities conducted the operations with the support of Europol. (CR)

### **Eurojust**

#### **Agreement on Eurojust Regulation**

On 19 June 2018, the Bulgarian Presidency of the Council, the European Parliament, and the European Commission [agreed](#) on the new Eurojust Regulation. The EU ambassadors confirmed the agreement on 20 June 2018.

Changes under the new Regulation concern the operational and management functions of the College of National Members. Furthermore, an executive board will be set up in order to assist the college in its management functions and to allow for streamlined decision-making on non-operational and strategic issues. The Commission will be represented in both the college and the executive board. Importantly, a mechanism of joint evaluation of Eurojust's activities by the European Parliament and national parliaments will be established to increase the agency's transparency and democratic oversight. Lastly, a new data protection regime will be installed and adapted to the recent legal framework on data protection for EU institutions. Ultimately, the revision of the Eurojust

Regulation shall also take into account the establishment of the European Public Prosecutor's Office (EPPO).

The agreement is now pending formal approval by the European Parliament and the Council of the EU. (CR)

#### **Annual 2017 Report Published**

Eurojust published its [annual report](#) for the year 2017 and infographics on [Eurojust at work](#) and [Eurojust's operations](#) in 2017. The six main chapters of the report focus on:

- Eurojust at work;
- Eurojust's casework;
- Challenges and best practices;
- Eurojust's cooperation with third states;
- Eurojust and practitioner networks;
- Staff and budget;
- Organisational developments and key challenges.

An infographic is available featuring a comparison to the previous year; the number of cases dealt with at Eurojust increased by 10.6%, from 2306 in 2016 to 2550 in 2017.

The number of coordination meetings held in 2017 increased to 302, compared to 249 in 2016. Furthermore, the number of coordination centres held in 2017 increased to 17 compared to 10 in 2016.

Eurojust supported 200 JITs, a 350% increase over 2016. 128 JITs were financially supported by Eurojust in 2017, compared to 90 in 2016.

Looking at the EAW, Eurojust's assistance was requested on 320 occasions, compared to 315 requests in 2016.

Areas of crime in which Eurojust's casework considerably increased compared to the previous year included terrorism, cybercrime, THB, fraud, and drug trafficking.

In 2016, a Memorandum of Understanding was signed with eu-LISA and a Letter of Understanding with the EEAS. Cooperation agreements with Montenegro and Ukraine entered into force. Eurojust's network of judicial contact points in third states was extended to a total of 42.

Furthermore, in 2017, Eurojust organised several strategic and tactical meetings, on terrorism, cybercrime, and illegal immigrant smuggling. The agency also produced several handbooks, reports, and analyses in these areas.

Eurojust's budget for 2017 increased to €48.689 million in comparison to €43.539 million in 2016. Budget implementation was 99.9 per cent. (CR)

#### **Liaison Prosecutor for Ukraine**

On 18 August 2018, the [first Liaison Prosecutor for the Ukraine](#), Ms Myroslava Krasnoborova, took up office at Eurojust.

Ms Krasnoborova already worked with Eurojust in her previous position as Deputy Head of Department for International Legal Cooperation and Head of Division for International Cooperation of the Prosecutor General's Office (PGO) of Ukraine, where she also served as a contact point for Eurojust. (CR)

#### **Memorandum of Understanding on JIT Funding**

On 1 July 2018, Eurojust and Europol signed a [Memorandum of Understanding](#) to ensure closer cooperation with regard to the funding of JITs. With the MoU, rules and conditions for the benefit of those requesting funding from the national authorities are established. (CR)

#### **New Joint Investigation Teams**

In May 2018, for the first time in their history, [France and Italy](#) as well as [Italy and Poland](#) signed agreements to form Joint Investigation Teams to cooperate in transnational cases. (CR)

#### **First French-Greek JIT Successful**

At the end of April 2018, the first [Joint Investigation Team](#) (JIT) ever established between France and Greece resulted in the arrest of four leaders of the Georgian mafia organisation "Vory V zakone." The organisation is suspected of having committed thousands of bur-

glaries and retail thefts in France and Greece, causing severe damage amounting to several millions of euros. (CR)

#### **Practice: Global Airport Action Days**

This year's 11th [Global Airport Action Days \(GAAD\)](#) took place from 18 to 22 June 2018, resulting in arrests of more than 140 people in 61 countries. Over 200 airports as well as 69 airlines worldwide were involved in the action, which involved investigating airline tickets bought online with fraudulent credit cards. Annual losses sustained by the airline industry from this type of fraudulent activity are estimated at over US \$1 billion.

Eurojust provided judicial cooperation assistance throughout the action week, in close cooperation with Europol's EC3, Frontex, INTERPOL and the UNODC. (CR)

#### **Cooperation in Psychoactive Substance and Precursor Cases: Report Published**

In April 2018, Eurojust published a [report analysing the current situation in judicial cooperation in new psychoactive substance \(NPS\) and precursor cases](#).

The report outlines operational experiences of the Member States in prosecuting NPS and precursor cases in addition to legislative solutions chosen by the States to criminalise NPS. It also presents some relevant judgements from the Member States. Furthermore, it briefly introduces the legislative instruments related to NPS at the EU level in 2017:

- Directive (EU) 2017/2103 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the definition of "drug" and repealing Council Decision 2005/387/JHA;
- Regulation (EU) 2017/2101 amending Regulation (EC) No. 1920/2006 as regards information exchange on, and an early warning system and risk assessment procedure for, new psychoactive substances. (CR)

## **European Judicial Network (EJN)**

### **20th Anniversary of EJN Foundation**

During its 50th Plenary on 27–29 June 2018, the EJN celebrated [its 20th anniversary](#). The plenary meeting was attended by approx. 120 participants, including local authorities from the Republic of Bulgaria; EJN Contact Points from the EU Member States; and candidate, associated, and third countries. Representatives from Eurojust, the European Commission, the General Secretariat of the Council of the EU, and EJN partners also attended. (CR)

## **Agency for Fundamental Rights (FRA)**

### **FRA Hate Crime Report**

In June 2018, FRA published [a report on hate crime recording and data collection practice across the EU](#). The report aims to assist police investigators, managers, hate crime officers, and policymakers as well as EU and intergovernmental organisations in their policymaking. The objective is to develop capacity-building activities to prevent and counter hate crime. (CR)

### **FRA Annual Activity Report**

In June 2018, FRA published its [Consolidated Annual Activity Report](#) for 2017. The report outlines the agency's achievements regarding strategic priorities and objectives, thematic areas, and its economy and efficiency in spending and non-spending activities. Furthermore, the report takes a detailed look at FRA's management and the effectiveness of its internal control systems. (CR)

### **New Scientific Committee Appointed**

At the end of May 2018, FRA's Management Board appointed 11 persons to its new [Scientific Committee](#). The Scientific Committee is tasked with guaranteeing the scientific quality of FRA's work and should therefore be involved in the early preparation stages of the majority of FRA's documents.

The 11 newly appointed members of the Committee (*Kieran Bradley, François Crépeau, Theodora Kostakopoulou, Joanna Kulesza, Julia Laffranque, Anja Mihr, Francesco Palermo, Martin Scheinin, Nico Schrijver, Anne Waldschmidt, and Siniša Zrinčak*) have academic expertise in different key disciplines such as EU law, sociology, public international law, political science, and comparative (public) law. They include present and former members of European Courts, the United Nations' Human Rights Committee, monitoring bodies of the Council of Europe, and national monitoring bodies.

The Committee's term of office started on 4 June 2018 and runs until 3 June 2023. (CR)

### **FRA Strategic Plan 2018–2022**

At the end of April 2018, FRA published its five-year [Strategic Plan](#) for the period 2018–2022. The plan identifies five priority areas that will guide the Agency's work each year during this period.

The first priority set out by the Agency is to identify trends and collect and analyse comparable data. As part of this priority, FRA will strive to:

- Contribute to better law making and implementation: provide independent advice;
- Support rights-compliant policy responses: provide real-time assistance and expertise;
- Effectively promote rights, values, and freedoms;
- Strengthen cooperation with national and local fundamental rights actors; work with communities for support.

The plan outlines further objectives under each priority and focus areas on how to achieve these objectives. (CR)

## **Frontex**

### **Annual 2017 Report of Frontex**

On 5 May 2018, the Frontex Consultative Forum published its 5th [Annual Report](#), providing an overview of its main

activities in 2017. In 2017, the Consultative Forum provided strategic advice on a child protection strategy for Frontex, its fundamental rights accountability and individual complaint mechanisms, and gender mainstreaming in Frontex activities.

The forum dealt with the revision of the Agency's Fundamental Rights Strategy, its Code of Conduct for all persons participating in Frontex activities, and the Code of Conduct for Return Operations and Return Interventions coordinated or organised by Frontex.

The Consultative Forum also looked at Frontex' operational activities, the enhancement of child protection in Frontex operations, fundamental rights in Frontex return activities, search and rescue in the context of maritime operations, and the Agency's engagement with third countries and its impact on fundamental rights.

The Consultative Forum supported Frontex with training materials and methodologies in areas related to fundamental rights.

The report also outlines the Consultative Forum's priorities for 2018: implementation of the European border and coast guard regulation; revision and further development of the Frontex Fundamental Rights Strategy and its implementing documents; fundamental rights in Frontex operations and return support activities; Frontex training activities with an impact on fundamental rights; and the external evaluation of the Frontex Consultative Forum. (CR)

### **Frontex Deploys First Liaison Officer**

On 31 August 2018, Frontex deployed its [first liaison officer](#) to Bulgaria. She is the first of eleven liaison officers to be deployed to an EU Member State, with the aim of enhancing cooperation between the agency and the national authorities responsible for border management, returns, and coast guard functions. The liaison officers shall contribute to risk analysis and monitor/report on measures taken by the respective Member States

at their border sections, including situations requiring urgent action at the external borders. Furthermore, they shall assist the Member States in preparing contingency plans for border management and report on the situation at the external borders. They will also help analyse the capacity of Member States to deal effectively with the situation on-site and with the execution of return and pre-return activities. Lastly, they will be instrumental in collecting information on irregular migration and cross-border crime and play a crucial role in vulnerability assessments conducted by Frontex. (CR)

### **Webcasts on Border Management Launched**

In June 2018, Frontex launched a [series of webcasts](#) presenting selected research findings of graduates of the European Joint Master's in Strategic Border Management. The first [webcast](#) looked the mental health protection of border guards in stressful situations.

Frontex developed the Joint Master's programme was developed together with six partner universities and more than 20 EU border guard training organisations and academies. It offers a specialised degree in border management with strategic focus. (CR)

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

### **Protection of Financial Interests**

#### **2017 PIF Report**



On 3 September 2018, the Commission published its annual [report on "The Protection of the EU's financial interests – Fight against fraud – 2017"](#). It is the 29th report that annually provides information on the main legal and practical measures taken by the Commission and the EU Member States to counter fraud and other illegal activities affecting the Union's budget.

The report is accompanied by the following [Commission working documents](#):

- [Implementation of Article 325 by the Member States in 2017](#);
- Statistical evaluation of irregularities reported for own resources, natural resources, cohesion policy and pre-accession assistance, and direct expenditure ([part 1](#) and [part 2](#));
- [Follow-up of recommendations](#) to the Commission report on the protection of the EU's financial interests – fight against fraud, 2016;
- [Early Detection and Exclusion System \(EDES\) – Panel referred to in Article 108 of the Financial Regulation](#);
- [Annual overview, with information on the results of the Hercule III Programme in 2017](#);
- [Assessment of the implementation of Art 43b of Regulation \(EC\) No. 515/97](#).

The report highlights the two major legislative achievements of 2017, which are designed to make the protection of the EU's financial interests much more effective and equi, i.e.: (1) the PIF Directive (see also eucrim 2/2017, pp. 63–64), and (2) the Regulation establishing the EPPO by enhanced cooperation (see also eucrim 3/2017, pp. 102–104).

This new legislation requires additional changes to the EU's anti-fraud setup. A first step was taken by evaluating Regulation No. 883/2013 concerning OLAF's mandate and powers (see also eucrim 1/2018, pp. 5–6).

Furthermore, the Commission took up the following legislative and policy initiatives in 2017 to improve protection against fraud:

- Continued, regular exercise of assessing developments and addressing country specific recommendations to Member States in relation to the fight against corruption within the framework of the "European Semester process";
- Making available a budget of €14.95 million via the Hercule III Programme to boost Member States' operational and administrative capacities;
- Successful negotiation of anti-fraud

provisions in the EU's international agreements;

- Launch of an evaluation of the Commission Anti-Fraud Strategy.

In the area of revenue, the report highlights the following achievements:

- Commission's legislative proposal to make the EU VAT system simpler and more fraud-proof and to close loopholes by strengthening administrative cooperation (see also eucrim 4/2017, pp. 168–169);
- Conclusion of MLA agreements with Mercosur and Azerbaijan;
- Coordination of 11 joint customs operations by OLAF;
- Success in fighting the illegal import of solar panels – the goods most affected by fraud.
- In the field of expenditure, the following measures and results are worth mentioning:
  - The proposed revision of Financial Regulation (EU, Euratom) No. 966/2012;
  - New guidelines on red flags and best practices in public procurement and irregularity reporting, prepared by COCOLAF;
  - Analysis of helpful detection methods, including risk analysis, tips from informants, whistleblowing, and information from the media; this led to further specific recommendations for national authorities to make better use of the input from these sources.
- From a statistical viewpoint, the following figures are particularly interesting:
  - 73 major measures to protect the EU's financial interests and fight fraud were reported by the Member States;
  - In 2017, a total of 15,213 fraudulent and non-fraudulent irregularities were reported to the Commission, i.e., 20,8% fewer than in 2016;
  - These irregularities involved approx. €2,58 billion.

Lastly, the report makes several recommendations to the Member States on how to improve the fight against and prevention of fraud. It also sees room

for improvement by the Member States on how to provide for the necessary data and information on anti-fraud measures. Cooperation between judicial investigations and administrative ones remains the main pillar that has to be worked on in the near future.

At the level of the EU institutions, the Commission will ensure that a strong and fully functioning OLAF complements the EPPO's criminal law approach with administrative investigations. (TW) ■

### New Rules on Administrative Cooperation to Improve Fight Against VAT Fraud

On 21 September 2018, the legislative procedure on a "Council Regulation amending Regulations (EU) No. 904/2010 and (EU) 2017/2454 as regards measures to strengthen administrative cooperation in the field of value added tax" was finalised. A general approach on the legislative text was adopted on 22 June 2018 at a meeting of the Economic and Financial Affairs Council.

The final text was published in Council doc 10472/18 of 14 September 2018.

The new EU legislation aims to prevent widespread forms of cross-border VAT fraud. The key features are the following:

- Exchanging information without prior request;
- Joint audits;
- Procedures to refund VAT to taxable persons not established in the Member State of refund;
- Strengthening Eurofisc – a network of national tax officials – with a joint risk analysis capacity and the possibility to coordinate enquiries and cooperate with OLAF and Europol in the disclosure of serious VAT fraud cases and with the EPPO (the European Public Prosecutor's Office);
- Tackling fraud involving the dual VAT regime applicable to cars by improving access to vehicle registration data;
- Fighting fraud involving customs procedures 42 and 63.

The new measures were proposed by the Commission on 30 November 2017 (COM(2017) 706 final – see eucrim 4/2017, pp. 168–169). They take up recommendations of the Council (cf. conclusions of 25 May 2016) and of the March 2016 special report by the European Court of Auditors No. 24/2015 entitled "Tackling intra-Community VAT fraud: More action needed." The European Parliament was only consulted in the legislative procedure. It delivered its opinion on 3 July 2018. The European Economic and Social Committee gave its opinion on the proposal on 23 May 2018 (published in the Official Journal C 283 of 10 August 2018, 35).

The legislation on combating VAT fraud by means of better administrative cooperation is part of a more in-depth reform of the EU's VAT system. The Commission tabled several legislative proposals – the "VAT package" – in October 2017. Guidelines had already been developed in the VAT Action Plan "Towards a single EU VAT area" presented in April 2016.

Closing gaps exploited by potential VAT fraudsters is one of the priorities of the EU. VAT is a major and growing source of revenue in the EU, raising over €1 trillion in 2015, corresponding to 7% of EU GDP. VAT revenue is one of the EU's own resources. The Commission estimates that €150–160 billion in tax revenue is lost annually due to shortcomings in the VAT system. (TW)

### ECA Criticizes Commission Plans on Loss of EU Money if Rule of Law is not Respected

In its Opinion 1/2018 of 12 July 2018, the European Court of Auditors (ECA) assessed the Commission's plans to link the future multiannual financial framework with a EU Member State's respect for the rule of law. According to the proposed Regulation, the European Union may suspend, reduce, or restrict a Member State's access to EU funding in the case of generalised deficiencies as regards the rule of law (see eucrim 1/2018, pp. 12–13).

The ECA supports the aims of the proposal and the introduction of a mechanism to protect the EU budget against the described contingencies, but strongly recommend the Commission introducing better criteria to define what constitutes "generalizes deficiencies as regards the rule of law." Furthermore, the legislative bodies should set clearer safeguards for the beneficiaries of EU programmes.

Other recommendations by the ECA include:

- Setting time limits for the Commission if measures against a Member States can be lifted;
- The Commission should assess the possible budgetary implications of a reduction in EU funding for the national budget of the Member State affected before proposing appropriate sanctioning measures;
- Clarifying the applicability of provisions relating to the European Public Prosecutor's Office.

In particular, the ECA stresses the importance of the specification of clear guidance criteria for the Commission – in the process of making assessments within the new financing mechanism – because this would lead to improved transparency, traceability, and auditability of the proposed mechanism. (TW)

### Commission Plans to Spend €181 Million on Anti-Fraud from 2021–2027

On 30 May 2018, the Commission proposed the new EU Anti-Fraud Programme. It will replace the current Hercule III Programme which expires in 2020. The new EU Programme is expected to run from 2021 until 2027, which is the next long-term EU budget cycle.

The Commission proposes making €181 million available to support Member States' efforts to fight fraud and other irregularities affecting the EU budget. Like the current Hercule III Programme, the new one pursues the similar objectives:

- Preventing and combating fraud, cor-

ruption, and any other illegal activities affecting the EU's financial interests;

- Providing tools for mutual assistance in customs matters;
- Supporting the reporting of fraud and irregularities.

Possible lines of funding include:

- Transnational cooperation;
- Knowledge exchange;
- Expert training;
- Investigative support devices;
- Sniffer dogs;
- Digital forensic tools and secure IT systems;
- Border control equipment.

The European Anti-Fraud Office, OLAF, continues to manage the Programme. The new EU Anti-Fraud Programme is a sectoral part of the general, long-term 2021–2027 EU budget proposed by the Commission on 2 May 2018 (see eucrim 1/2018, pp. 12–13). The Commission hopes that the EP and Council will agree on the new budget soon, so that a smooth transition is guaranteed. (TW)

### **Commission Registers European Citizens' Initiative "Stop fraud and abuse of EU funds"**

On 19 September 2019, the College of Commissioners [gave green light for registering](#) of a European Citizens' Initiative, entitled "STOP FRAUD and abuse of EU FUNDS – by better control of decisions, implementation and penalties."

The [Initiative calls for](#) the Commission to launch legislative proposals on enhanced PIF controls in Member States not participating in the enhanced cooperation scheme establishing the European Public Prosecutor's Office. More precisely, the initiative requests, *inter alia*:

- Ex-ante control of funding and procurement decisions in risky areas in the said Member States should be carried out;
- In-depth control should cover complete exploration of all circumstances;
- Fraudulent activities and other offences harming the financial interests of the EU should be published.

The registration entered into force on 27 September 2018. From this date, the organisers have one year to collect signatures of support. Should the initiative receive one million statements of support within one year from at least seven different Member States. Then, the Commission is required to react within three months. It can decide either to follow the request or not, and is required to explain its reasoning in either case.

This European Citizens' Initiative on the fight against fraud is one of the rare, if not the first, Initiative relating to PIF and European Criminal Law, respectively. The European Citizens' Initiatives were introduced by the Lisbon Treaty as an element of participatory democracy. EU citizens may suggest concrete legal changes in any field in which the European Commission has power to propose legislation. The rules and procedures governing the citizens' initiatives are set out in an [EU Regulation](#) of February 2011. (TW)

## **Money Laundering**

### **EU Member States Reluctant to Transpose 4th Anti-Money Laundering Directive**

On 19 July 2018, the Commission brought Greece and Romania before the EU Court of Justice for non-compliance in transposing the 4th Anti-Money Laundering Directive into their national laws. Ireland was also referred to the CJEU because it has only implemented the rules of the [4th Anti-Money Laundering Directive](#) in a very limited way.

The Commission further reported that [infringement proceedings are in progress](#) (in different stages of the procedure) against other EU Member States. In total, the Commission opened infringement proceedings against 20 Member States. The majority of them have not communicated the transposition laws to the Commission. Several MS, e.g. Austria, Belgium, France, Slovakia, and Spain, do not seem to have fully

implemented the obligations of the Directive. The Commission continues to observe correct implementation by the EU Member States. It may go ahead with infringement proceedings against certain Member States. The 4th Anti-Money Laundering Directive was to be transposed into national law by 26 June 2017. (TW)

### **5th Anti-Money Laundering Directive**

**spot light** On 19 June 2018, "[Directive \(EU\) 2018/843](#) of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing, and amending Directives 2009/138/EC and 2013/36/EU" was published in the Official Journal of the EU (L 156, 43). This legislative act is also referred to as the 5th Anti-Money Laundering (AML) Directive.

It further develops the obligations as laid down in the 4th Anti-Money Laundering Directive of 2015. The latter entails a comprehensive legal framework addressing the collection of money or property for terrorist purposes by requiring Member States to identify, understand, and mitigate the risk related to money laundering and terrorist financing.

The amendments now agreed between the EP and the Council upon a proposal of the Commission (cf. eucrim 2/2016, p. 73) were in response to the terrorist attacks in Paris and Brussels in 2015 and 2016 as well the Panama Paper leaks. [The aim of the new EU legislation](#) is to further deter money laundering and terrorist financing by means of enhanced transparency.

The main elements of Directive 2018/843 are as follows:

- Extension of the scope of the 4th AML Directive to include virtual currency exchange platforms and custodian wallet providers. Like banks, they will have to apply customer due diligence controls, including customer verification requirements;

- National Financial Intelligence Units (FIUs) will be able to obtain information allowing them to link virtual currency addresses to the identity of the owner of virtual currency;
- More harmonised treatment of high-risk third countries where the European Commission identified weaknesses in their AML/CFT regimes;
- Reduction of the threshold for identifying the holders of prepaid cards from currently €250 to €150;
- Use of anonymous prepaid cards issued outside the Union only if they comply with EU standards;
- Further enhancement of the effectiveness and efficiency of FIUs by clarifying the powers of and cooperation between them;
- FIUs will be able to obtain information from any obliged entity, even without a prior report needing to be made;
- Abolishment of further obstacles that may hinder the exchange of information between FIUs or the forwarding thereof;
- Establishment of centralised automated mechanisms, e.g. a register or data retrieval system, by means of which timely access to information on the identity of holders of bank or payment accounts and safe-deposit boxes, their proxy holders, and the beneficial owners is ensured;
- Regular monitoring of clearly specified categories of existing customers;
- Further clarification of the determination of the Member State that is responsible for the monitoring and registration of beneficial ownership information of trusts and similar legal arrangements;
- Enhanced interconnection of beneficial ownership information;
- Citizens will have the right to access information on beneficial ownerships of trusts and similar legal arrangements if this is necessary and proportional with preventing AML/CFT;
- In addition, access must be granted to any person who can demonstrate a “legitimate interest,” e.g., investigative journalists or NGOs;
- Member States will also retain the

right to provide broader access to information – in accordance with their national law;

- Establishment of the legal requirements so that competent authorities supervising obliged entities regarding compliance with the Directive can exchange confidential information and cooperate with AML/CFT supervisory authorities.

Member States are required to transpose the 5th Anti-Money Laundering Directive by 10 January 2020. For the registers and automated mechanisms, other deadlines apply. (TW)

### **Commission Proposes New Anti-Money Laundering Supervision Mechanism**

On 12 September 2018, the Commission tabled a legislative proposal to amend existing EU rules on the supervision of banks and financial institutions to better address risks of money laundering and terrorist financing ([COM\(2018\) 646 final](#)).

The amendments are considered necessary in the wake of several recent cases in which EU banks were involved in money laundering. The EU’s strong anti-money laundering rules, as established by the 4th Anti-Money-Laundering Directive in particular, do not seem to have been adequately implemented and supervised.

The core element of the tabled proposal is to give the European Banking Authority (EBA) a leading supervision and coordination role in view of anti-money laundering responsibilities in the financial sector. As a result, the EBA will become a centralised hub with expertise and resources dedicated to preventing and combating money laundering and terrorist financing. Its scope and mandate will be clarified.

The EBA will also be able to request competent authorities to investigate possible breaches of the relevant rules and oversee national procedures in this area. In this context, the EBA can also request national supervisors to consider targeted actions, e.g., sanctions. Under specific,

prescribed circumstances, it will be able to address decisions directly to individual financial sector operators with regard to money laundering matters and to engage in binding mediation between national competent authorities on such matters.

The Commission proposal also [includes the following elements:](#)

- Ensuring the quality of supervision through common standards, periodic reviews of national supervisory authorities, and risk assessment;
- Fostering the exchange of information on money laundering risks and trends between national supervisory authorities;
- Facilitating cooperation with non-EU countries on cross-border cases;
- Establishing a permanent committee that convenes national anti-money laundering supervisory authorities.

The proposal is closely connected to a pending Commission proposal of September 2017 for broader review of the European Supervisory Authorities’ Regulations. This so-called “Review Proposal” intends to strengthen the European Supervisory Authorities’ capacity to ensure convergent and effective financial supervision, but does not address the issues of combating money laundering and terrorist financing. The Commission therefore calls on the EP and the Council for swift adoption of the entire legislative package.

The currently tabled proposal also reinforces the tenor of Commission President *Jean-Claude Juncker*’s 2018 State of the Union speech. The fight against money laundering is high on his political agenda – as expressed by the message: “Europeans expect a Union that protects them.” (TW)

### **Commission Sets Out Plans for Better Supervision in Fight Against Money Laundering**

On 12 September 2018, the Commission presented a [Communication entitled: “Strengthening the Union framework for prudential and anti-money laundering](#)

supervision for financial institutions.” The Commission outlines the next legislative and non-legislative steps to further enhance the supervision of financial institutions in the Union for purposes of combating money laundering and terrorist financing.

The Communication supplements the ongoing efforts to create a Banking Union and a Capital Markets Union. Reform efforts in view of the European financial system also require reflection on how to prevent abuse of the system through illegal money laundering activities or terrorist financing.

The Communication also outlines plans to centralise expertise and resources for the supervision and effective implementation of the EU’s anti-money laundering rules in the banking sector with the European Banking Authority. The relevant legislative amendments were tabled on the same day.

The Commission concludes that there is a need to reflect on whether the current situation, which allows for differently transposed rules in Member States and reflects asymmetries in the distribution of tasks and competences, is conducive to a coherent and viable anti-money laundering supervisory system in the Union.

In the long term, it is suggested considering the transformation of the Anti-Money Laundering Directive into a Regulation, which would have the potential to establish a harmonised, directly applicable Union regulatory anti-money laundering framework. (TW)

## Tax Evasion

### CJEU: New Italian Law on Unpaid VAT Compatible with EU Rules

On 2 May 2018, the CJEU rendered a judgment in Case C-574/15 (criminal proceedings against *Mauro Scialdone*). The case concerns the interpretation of Art. 4(3) TEU and Art. 325 TFEU, Council Directive 2006/112 on the common system of value added tax (the

“VAT Directive”) and the PIF Convention of 26 July 1995.

The referring Italian court doubted that amendments to the Italian legislation on sanctioning VAT offences are compatible with EU law. In the case at issue, the Italian authorities had conducted investigations against Mr Scialdone in his capacity as sole director of a company because he did not pay the VAT resulting from the company’s annual return for the tax year 2012 within the time limit prescribed by law. The total amount of VAT due was €175,272. In May 2015, the public prosecutor brought criminal proceedings against Mr Scialdone before the referring court. In October 2015, amendments in Italian legislation entered into force that retroactively apply to the conduct ascribed to Mr Scialdone, since the provisions are more favourable to the defendant.

The referring court noticed that the amendments may lead to criminal impunity of the defendant, since the threshold for criminalisation of non-payment of VAT for a given financial year was raised from €50,000 to €250,000. In addition, the Italian legislator introduced a different threshold (€150,000) for the offence of failing to pay withholding income tax, which, according to the referring court, would afford better protection of national financial interests than of the EU’s financial interests.

The CJEU preliminarily observed that Member States enjoy procedural and institutional autonomy to counter infringements of harmonised VAT rules, but this autonomy is (above all) limited by two principles of EU law:

- Penalties must be effective and dissuasive (principle of effectiveness);
- Penalties must be analogous to those applicable to infringements of national law of a similar nature and importance that affect national financial interests (principle of equivalence).

As regards the principle of effectiveness, the CJEU stated that, indeed, the PIF Convention in its Art. 2 requires that Member States foresee penalties in-

volving deprivation of liberty at least in cases of serious fraud. Serious fraud is defined by way of the amount of fraud which cannot set by the Member States greater than €50,000 by the Member States. Given the Taricco judgment, VAT fraud also falls within this requirement.

The CJEU further noted that, in the present case, this threshold of the PIF Convention is not relevant, however, because Mr Scialdone duly complied with his obligation to declare VAT, but only failed to pay VAT. This does not constitute fraud within the meaning of Art. 325 TFEU, irrespective of whether the failure was intentional or not. Since the failure not to pay VAT does not present the same degree of seriousness as VAT fraud, the national legislator can treat both types of conduct differently.

Nonetheless, failure to pay VAT constitutes an “illegal activity” and must be subject to effective, proportionate, and dissuasive penalties. The CJEU held, however, that the Italian legislation is sufficiently effective and dissuasive because it provides for fines that can amount, in principle, to 30% of the tax due. In addition, the tax authorities require default interests to be paid.

As regards the principle of equivalence, the CJEU stated that it must determine whether a failure to pay withheld income tax may be regarded as an infringement of national law of a similar nature and importance as a failure to pay declared VAT. Although the CJEU saw some common lines of argument, both types of failure differ in their constituent elements and the difficulty involved in their detection. These differences justify a different treatment of the two types of offences by the Italian legislator.

In sum, the CJEU held that neither the VAT Directive nor the PIF Convention (read in conjunction with Art. 4(3) TEU and Art. 325 TFEU) preclude national legislation, which provides that failure to pay the VAT resulting from the annual tax return for a given financial year, within the time limit prescribed by law, constitutes a criminal offence

punishable by a custodial sentence only if the amount of unpaid VAT exceeds a criminalisation threshold of €250,000, whereas a criminalisation threshold of €150,000 is laid down for the offence of failing to pay withheld income tax. (TW)

### **Tax Fraud and Evasion: New Standard Provision for Third-Country Agreements**

On 25 May 2018, the Council adopted conclusions on the EU standard provision on good governance in tax matters for agreements with third countries. The conclusions should further advance the EU's strategy regarding external taxation as well as measures against tax treaty abuse which called for a new standard provision in line with the evolution of international standards in the tax area.

In essence, the Council agreed to include an updated standard provision in relevant agreements that are to be concluded with third countries by the Union and its Member States. The following text is considered to be appropriate in this respect:

*"The Parties recognise and commit themselves to implement the principles of good governance in the tax area, including the global standards on transparency and exchange of information, fair taxation, and the minimum standards against Base Erosion and Profit Shifting (BEPS). The Parties will promote good governance in tax matters, improve international cooperation in the tax area and facilitate the collection of tax revenues."* (TW)

### **Counterfeiting & Piracy**

#### **Lowest Level of Counterfeit Euro Banknotes since 2015**

On 27 July 2018, the European Central Bank (ECB) published its [half-yearly statistics on euro banknote counterfeiting](#). 301,000 counterfeit euro banknotes were withdrawn from circulation in the first half of 2018. This is the lowest number

of withdrawn counterfeit euro banknotes since 2015. During the first half of 2017, 363,000 counterfeit banknotes were detected; in the second half of 2017, they totaled 331,000.

The majority of counterfeit banknotes are still the €20 and €50 notes. Their denomination represent around 83% of all counterfeit notes.

Most counterfeits (88.8%) were found in countries in the euro area. Around 10.3% were found in EU Member States outside the euro area. Only a small percentage (0.9%) was detected in other parts of the world.

The ECB stressed that the number of counterfeit euro banknotes remains low in relation to the number of genuine banknotes in circulation (currently over 21 billion, with a total value of more than €1.1 trillion). The likelihood of receiving a counterfeit euro banknote is therefore very low.

Notwithstanding, the ECB directs its ongoing efforts to improving banknote security and technology.

Everyone can verify Euro banknotes simply by using the "[feel, look, and tilt](#)" method described on the ECB website.

The ECB website also provides information on [what to do if a banknote is suspected of being fake](#); it also includes special information for cash handlers. (TW)

### **Organised Crime**

#### **Home Affairs Ministers Assess 2014–2017 European Policy Cycle for Organised Crime**

At its [meeting of 4/5 June 2018](#), the Home Affairs Ministers of the EU Member States took stock of the EU Policy Cycle for organised and serious international crime for the period 2014–2017. They highlighted the multidisciplinary component of the EU Policy Cycle thus far and gave orientation as regards future developments in combating these forms of crime.

The Ministers [identified several ele-](#)

[ments that best illustrate the impact of the multidisciplinary approach](#). One key element is the multi-agency component involving numerous public bodies at different levels.

At the national level, it became apparent that awareness has been raised, and the participation of different types of law enforcement authorities – such as border guards and customs, e.g., in the field of organised property crime (including trafficking of cultural goods, firearms trafficking, and counterfeit goods) – has increased. Other public bodies were also successfully integrated in the fight against counterfeiting of goods and particularly pharmaceutical crime, e.g., labour inspectors in operations against human trafficking and labour exploitation as well as pharmaceutical regulatory authorities and food agencies. Close co-operation with judicial authorities continued to be essential, especially in the judicial follow-up phase to operations.

The multidisciplinary component is also evident at the EU level where – alongside Europol, Frontex, and Eurojust – other EU agencies are being involved in the implementation of the EU Policy Cycle, such as CEPOL, EMCDDA, and eu-LISA. Practitioners' networks also play an important role, including CARIN in the field of asset recovery; CULTNET, CARPOL, and TISPOL in organised property crime; and the EU-CPN in prevention activities.

Beyond the EU level, cooperation with third countries or international organisations like Interpol have gained in importance. The involvement of the private sector is becoming increasingly significant.

The ministers also assessed the range of activities undertaken during the EU Policy Cycle 2014–2017.

Regarding future orientation, the Ministers agreed that the following should be considered:

- Strengthening coordination at the national level;
- Increasing awareness of the EU Policy Cycle among competent authorities;

- Strengthening the external dimension of the Cycle;
- Promoting inter-agency and multidisciplinary engagement of EU agencies and bodies;
- Promoting new solutions beyond traditional law enforcement approaches in order to tackle EU crime priorities, increasing trust with and involving the private sector.

In spring 2017, the EU adopted the next four-year plan in the fight against serious and organised crime: "[EU policy cycle 2018–2021](#)." The Council adopted ten priority crime areas for EU action. They are based on the EU's serious and organised crime threat assessment ([EU SOCTA](#)), prepared by Europol (for the SOCTA 2017, see eucrim 1/2017, pp. 14–15). (TW)

### **EMSC Report**

In April 2018, Europol's European Migrant Smuggling Centre (EMSC) published its two-year [Activity Report](#) covering the period from January 2017 to January 2018.

The EMSC was established in 2016 in order to support cross-border investigations in the disruption and prosecution of organised criminal groups (OCGs), with a focus on migrant smuggling.

According to the report, 46% of the OCGs active in migrant smuggling are poly-criminal and consequently also involved in other crimes, e.g., money laundering, THB, drug trafficking, organised property crime, etc. Because there is a relatively low level of risk, migrant smuggling is highly lucrative and, hence, OCGs previously involved in other criminal activities often add migrant smuggling to their crime portfolios.

Looking at the *modus operandi* of these OCGs, the report finds that sophisticated and often life-threatening concealment methods are used to smuggle migrants across borders. Furthermore, fraudulent or fraudulently obtained travel and identity documents being increasingly used. Another method often

applied is the abuse of visa-free travel schemes that several non-EU Balkan countries offer and visa-free arrangements that many countries have with the EU.

The report finds that migrant smugglers are increasingly using diverse means of transportation such as lorries containing large groups of migrants, leisure vessels, international freight and passenger trains, and light aircraft.

One of the key enablers of migrant smuggling is document fraud. Criminals use high-quality counterfeit (entirely fabricated) documents and forged (altered/modified) documents. They also abuse genuine ID/travel documents with look-alikes. Another key issue is the use of social media to advertise smuggling services. In order to counter these methods, Europol established a Horizontal Expert Group (HEG) on Document Fraud in 2017, which offers operational support, forensic support, on-the-spot technical support, and an enhanced intelligence picture to the Member States. (CR)

### **Terrorism**

#### **Council Conclusions: Better Use of SIS Against Foreign Terrorist Fighters**

[The Council meeting of the JHA Ministers on 4/5 June 2018](#) saw the adoption of conclusions to strengthen the cooperation and use of the Schengen information system (SIS) to deal with persons involved in terrorism or terrorism-related activities, including foreign terrorist fighters. [The conclusions](#) are addressed to the Member States, the Commission, Europol, Frontex, and CEPOL. They aim to facilitate the identification and tracing of foreign terrorist fighters based on SIS hits.

Member States are called upon to ensure that relevant information is provided and that information is shared with Europol. Together with the Commission, Member States should also develop tools for "immediate reporting" in case of a hit of a person involved in terror-

ism-related activities. Europol is invited to make full use of its current rights to access SIS, VIS, and Eurodac in order to step up efforts to identify travel patterns and the connections of persons involved in terrorism and to share the outcome of these efforts with Member States' authorities. Frontex and CEPOL should increase their training efforts. (TW)

### **Terrorism Situation and Trend Report 2018**

In June 2018, Europol published its [Terrorism Situation and Trend Report](#) (TE-SAT) for 2018, outlining current trends.

According to the figures for 2017, the report counts 205 foiled, failed, and completed terrorist attacks, which nine EU Member States reported, with the UK experiencing the highest number of attacks (107). Unfortunately, 2017 saw a reversal in the downward trend observed since 2014, with a 45% increase in 2017 compared to 2016 when 142 attacks had been reported. Attacks specifically classified as ethno-nationalist and separatist accounted for the largest proportion at 67%, Jihadist attacks account for 16%, left-wing attacks for 12%, and right-wing attacks for 3%. Despite the higher number of attacks reported in 2017, the number of arrests in the EU for terrorism-related offences amounted to 975 compared to 1002 in 2016. The average age of those arrested was 30, with 45% of the suspects falling in the range of 20–30 years of age; 25% in the range of 30–40 years of age. More than 80% of the arrestees were male. The relative amount of EU citizens among the arrestees comprised 50% and lies between the percentages of previous years (58% in 2015; 43% in 2016). (CR)

### **Racism and Xenophobia**

#### **Commission Wants Binding EU Rules to Fight Terrorist Content Online**

On 12 September 2018, the European Commission presented a legislative proposal for a regulation on preventing the

dissemination of terrorist content online ([COM\(2018\) 640 final](#)). The proposal introduces a number of measures to prevent the misuse of Internet hosting services to disseminate terrorist propaganda and terrorist content online.

The European Commission is not fully satisfied with the voluntary initiatives in place so far. Although the [EU Internet Forum](#) established in 2015 has made good progress, the Commission considers binding, uniform EU rules necessary to further curb the dissemination of illegal terrorist content online. The proposal also reflects calls from the European Parliament and the European Council for legislative action in this area. It is said that terrorist content online is an urgent, real risk to European security and necessitates a rapid response from the EU legislator. In January 2018 alone, almost 700 pieces of official Da'esh propaganda were disseminated over the web and, since 2015, Europol's Internet Referral Unit flagged over 60,000 examples of terrorist content online.

Against this background, the [Commission's proposal includes](#) the following major elements:

- *One-hour rule.* Hosting service providers will be obliged to remove terrorist content online or disable access to it within one hour of receiving a removal order issued by a national authority;
- *Financial penalties.* If a hosting service provider does not comply with the removal order, Member States must put in place effective, proportionate, and dissuasive penalties. In the event of systematic failure to remove terrorist content, providers could face financial penalties of up to 4% of their global turnover for the last business year;
- *Duty-of-care obligation.* Hosting service providers must take proactive measures to prevent their platform from being abused for terrorist purposes. The measures depend on the risk and level of exposure to terrorist content, but include the deployment of automated detection tools. Providers will also have to report

on the proactive measures put in place after receipt of a removal order;

- *Increased cooperation.* Hosting service providers and Member States are required to establish points of contact reachable 24/7 in order to facilitate follow-up to the removal orders and referrals. In addition, cooperation between the hosting service providers, Member States, and Europol is to be enhanced;
- *Increased transparency and accountability.* Hosting service providers and Member States will have an obligation to annually report on their efforts; the Commission will establish a detailed programme to monitor the results and impact of the new rules;
- *Strong safeguards.* Fundamental rights, such as freedom of expression and information, are chiefly protected by the possibility of judicial redress, the possibility for hosting service providers to challenge a removal order, and a complaint mechanism by means of which users may contest the unjustifiable removal of online content.

The new rules will apply to all Internet companies that offer services in the EU, irrespective of their size or location. Companies with headquarters outside the EU will be obliged to designate a legal representative within the EU to ensure compliance with the new legislation. The scope of the new regulation therefore also includes web services that store information or function as a sharing platform, e.g. social media; video streaming services; video, imaging, and audio sharing services; file sharing or other cloud services; and websites where users can make comments or post reviews, etc.

The Commission remarked that it is concentrating on illegal terrorist content online, as defined by the Directive on Combating Terrorism (see [eucrim 2/2017](#), pp. 68–69), because of the urgency of the problem. This does not mean that the Commission will not address other types of harmful Internet content in future proposals, e.g., hate speech, child sexual abuse or counterfeit products. (TW)

### **ECA: Commission To Better Measure Effectiveness of EU Action Against Radicalisation**

On 29 May 2018, the European Court of Auditors (ECA) published [its special report No. 13/2018](#), which looked into the EU's action against radicalisation, i.e., the phenomenon of people embracing extremist ideologies and behaviour which could lead them to commit acts of terrorism. The EU supports the fight against these forms of radicalisation with numerous actions. They are characterised by being performed across many policy areas; involving many stakeholders at the local, regional, national and European levels; and by being financed via various EU funds (e.g., the Internal Security Fund, the Horizon 2020 Programme, the Justice Programme, Erasmus+, and the European Social Fund). The ECA auditors primarily looked at three aspects:

- Relevance of support from the Commission;
- Synergies between the actions financed;
- Effectiveness and value for money.

The ECA report found that the Commission essentially addressed the needs of Member States, but there were some shortfalls in coordination and evaluation. The report describes the following, *inter alia*, in detail:

- Some exceptions were identified where needs had not been sufficiently addressed;
- Support generally brought benefits to Member States acting at the European level;
- Commission coordination has resulted in synergies between its actions;
- For a long time (until 2017), however, there was no framework for coordinating all EU actions addressing radicalisation;
- The mapping of actions already started has not taken into account actions managed by Member States in their national programmes;
- A core project of the EU action, i.e., the Radicalisation Awareness Network

(RAN), is not being used to its full potential. RAN connects practitioners around Europe – psychologists; teachers; social workers; police, prison, and probation officers – who work directly with those vulnerable to radicalisation; it aims at empowering front-line practitioners when countering radicalisation;

- The Commission has assessed the effectiveness and value for money of its anti-radicalisation policy insufficiently, e.g., by not having broken down the overall policy objectives into more specific and measurable objectives or by not providing for indicators of the funds used in order to measure success;
- Achievements of specifications are often measured in terms of the amount of activity instead of effectiveness.

The auditors criticise that the Commission is at risk of not taking into account useful lessons. In general, the ECA report recommends the following to the Commission:

- Improving the framework for overall coordination of actions addressing radicalisation;
- Increasing practical support to practitioners and policymakers in the Member States;
- Improving the framework for assessing results.

The report also includes the replies from the Commission to the ECA evaluation in an annex. (TW)

context of prosecution of PIF-related offences (bribes for non-performance of customs inspections) against Bulgarian customs officers at the border between Bulgaria and Turkey. They concern the interpretation of Art. 325 TFEU and the two procedural rights Directives, i.e. Directive 2012/13/EU on the right to information in criminal proceedings and Directive 2013/48/EU on the right of access to a lawyer. For the background of the case and the opinion of Advocate General Yves Bot, see eucrim 2/2017, pp. 64–65.

The first question concerns the compatibility of provisions of the Bulgarian code of criminal procedure with Art. 325 TFEU. The Bulgarian code rather automatically requires termination of criminal proceedings if a certain time limit is exceeded – even if the delay is attributable to the defendant and irrespective of the seriousness and complexity of the case. The CJEU first recalled its established case law on the interpretation of Art. 325 TFEU, which requires Member States to have rules of criminal procedure in place that permit effective investigation and prosecution of serious fraud and other serious illegal activities affecting the EU's financial interests in customs matters. The CJEU found that the national legislation at issue is liable to impede the effectiveness of criminal prosecution and the punishment of the acts that are serious PIF offences in the present case. Therefore, the national court must immediately give full effect to EU obligations and disapply that legislation. The national court is free as to how to implement this finding, i.e. whether it disregards all requirements set out in the provisions of the Bulgarian code of criminal procedure or whether it extends the time limits imposed on the prosecutor to conclude the pre-trial stage of the proceedings. Furthermore, the national court is obliged to ensure respect for the fundamental rights of the persons accused.

The second set of questions deal with the interpretation of Art. 6(3) and

Art. 7(3) of Directive 2012/13 and, more precisely, the point of time of disclosure of detailed information on the charges as well as of access to the case material in the pre-trial phase. The CJEU was also asked to decide whether infringements of said provisions can be cured in the course of the trial stage.

The CJEU stated that the wording of said provisions of Directive 2012/13 in their various language versions does not unequivocally determine the final point in time at which the disclosure of detailed information on the charges and access to the case material must be ensured. Therefore, these provisions must be interpreted in the light of their context and their objective. In view of the adversarial principle and the equality of arms, the CJEU concluded that, as a general rule, the disclosure should take place, and the opportunity to have access to the case materials should be afforded no later than the point in time at which the hearing of arguments on the merits of the charges in fact commences before the court that has jurisdiction to give a ruling on the merits. In the event of any failure to meet this requirement, there is nothing, however, in Directive 2012/13 that precludes the national court from taking the measures necessary to correct that failure, provided that the rights of the defence and the right to a fair trial are duly protected. The CJEU further provided guidance in the event that the charge is subsequently amended or new evidence occurs.

In addition, all judicial acts must ensure respect for the defence rights and the fairness of the proceedings. This means, for instance, that the defendant and his lawyer must have sufficient time to get acquainted with the information disclosed or with the case materials, and they must have the opportunity to submit any observations or, when necessary, apply for further investigations. In addition, the defendant and his lawyer must have further opportunity to access the case materials if they were not able to attend on the day the case material could

## Procedural Criminal Law

### Procedural Safeguards

#### CJEU Ruling on Effective Prosecution of PIF Offences and Guarantee of Defence Rights

**spot light** On 5 June 2018, the Grand Chamber of the CJEU delivered its [judgment in Case C-612/15](#) – criminal proceedings against *Nikoley Kolev, Stefan Kostadinov*. The request for a preliminary ruling was presented by a Bulgarian court in the

## Report

## What Hinders EU Cooperation? Where Should the EU Take Action – Scientific Study Gives Answers

On 30 August 2018, the European Parliament Think Tank published a [scientific study entitled: "Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation."](#) Recent debates were sparked by the question of whether further approximation of the laws of criminal procedure should be undertaken at the EU level. In this context, the study aims at identifying areas in which differences between national criminal procedural laws exist and how these differences hinder cross-border cooperation, mutual recognition, and mutual trust. Ultimately, the study makes a number of recommendations – by both legislative and non-legislative actions – for EU policy makers in response to the identified challenges.

In terms of methodology, the study used a comparative criminal law approach. It representatively selected nine EU Member States to assess the differences that can lead to problems in application of the mutual recognition instruments: Finland, France, Germany, Hungary, Italy, Ireland, the Netherlands, Romania, and Spain. Research was based on a combination of desk and empirical research. National rapporteurs contributed analyses of current national case law and conducted semi-structured interviews with legal practitioners involved in cross-border cooperation in criminal matters.

The research paper identified the following nine domains of friction among the national procedural criminal laws:

- Investigative measures;
- Admissibility of evidence;
- Transnational procedures and equality of arms: the case of cross-border investigations;
- Pre-trial detention regimes and alternatives to detention;
- Procedures to assess detention conditions and surrender following the *Aranyosi and Căldăraru* judgment;
- Compensation schemes for unjustified detention;
- The right to be present at a trial and conditions for *in absentia* surrender;
- Compensation systems for victims;
- Protection measures for victims.

The study also found several "types of hindrances" to cross-border cooperation in criminal matters, such as lengthy and complex negotiations over EU instruments as well as delays, ill-execution, and underuse of assistance requests. The authors further assessed how Member States and EU actors cope with the identified differences. They identified a number of imbalances and inconsistencies that are the "red lines" in the debate on how to properly reconcile the conflicting interests of effective EU cooperation and the protection of fundamental rights. The authors include two types of recommendations: practical measures and legislative action. As regards practical measures, the following is, *inter alia*, recommended:

- Increased training activities and awareness-raising, particularly as regards those instruments with little visibility,

e.g. the European Supervision Order or the European Protection Order;

- Development of guidelines and handbooks on both cooperation and approximation instruments;
- Development of uniform templates to address requests for additional information, e.g., in the context of the *Aranyosi and Căldăraru* case law;
- Initiation of an enhanced "trans-judicial dialogue," including the vertical dimension between the CJEU and national courts;
- Financial EU support where sufficient resources are lacking, e.g. in the domains of detention conditions, compensation for unjustified detention in cross-border cases, and compensation for victims of crime.

Recommendations for legislative measures are divided into those that should be realised in the short-term and those that should/could be realised in the mid- and long-terms. Possible *short-term solutions* are the following:

- Development of minimum EU standards in the realm of detention conditions and exclusionary rules of evidence obtained illegally or improperly;
- Initiative for a harmonised judicial review mechanism that accompanies exclusionary rules of evidence; the same could be done for overuse of pre-trial detention;
- Revision of the EU rules on compensation of victims and adoption of a new EU instrument on the compensation for unjustified detention in cross-border proceedings.

In the *mid-term*, the study recommends the following legislative measures:

- Adoption of procedural safeguards for the defence, designed specifically for transnational investigations;
- Facilitation of access to the case file by the defence counsel at early stages of the criminal procedure, expansion of legal aid mechanisms, and strengthening of existing provisions on legal remedies.

In the *long-term*, the EU should envisage the approximation of investigative measures, standards of admissibility of evidence (as opposed to exclusionary rules), and protection measures available to victims.

The study was commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee. It was carried out by the ECLAN network. The general report, including the comparative analysis, was written by *Elodie Sellier* and *Prof. Anne Weyembergh*, both Université Libre de Bruxelles. Authors of the country reports include: *Thomas Wahl*, *Alexander Oppers* (Germany); *Gerard Conway* (Ireland); *Marta Muñoz de Morales Romero* (Spain); *Perrine Simon* (France); *Silvia Allegrezza* (Italy); *Petra Bard* (Hungary); *Aart de Vries*, *Joske Graat*, *Tony Marguery* (the Netherlands); *Daniel Nitu* (Romania); and *Samuli Miettinen*, *Petri Freundlich* (Finland).

The study and the annexed country reports can be retrieved from the [website of the European Parliament Think Tank](#). (TW)

be accessed for legitimate reasons or for reasons outside their control.

The third set of questions refers to the interpretation of Art. 3(1) of Directive 2013/48, the right to access to a lawyer of the defendant's own choice and the rules on dismissing the lawyer instructed by two accused persons.

In this context, the CJEU first observed that the Directive's obligations to allow accused persons to exercise their rights of defence practically and effectively must be read in light of Art. 48(2) CFR and Art. 6(3) ECHR. The CJEU recalled the case law of the ECtHR in that this right is not absolute and may be subject to restrictions. The CJEU further noted that the Bulgarian legislation in question pursues a legitimate aim, i.e., to ensure an effective defence, and that – for the protection of the effectiveness of the rights of the defence – avoiding a lawyer's conflicts of interest is essential.

As a result, the CJEU concluded that Art. 3(1) of Directive 2013/48 must be interpreted as not precluding national legislation that requires a national court to dismiss the lawyer instructed by two accused persons, against their wishes, on the ground that there is a conflict of interest between those persons. Furthermore, Art. 3(1) does not preclude the national court from allowing those persons to instruct a new lawyer or, when necessary, itself naming two court-appointed lawyers, to replace the first lawyer.

The judgment is one of the first judgments that combines the effectiveness of the prosecution of "EU offences" and interpretation of the defence rights laid down in the EU's Directives on strengthening procedural safeguards. It may also give guidance on the future investigations of the EPPO.

The judgment is interesting from another legal viewpoint: The CJEU confers pre-effects of Directive 2013/48 to existing national criminal procedural law because the date of transposition had not yet expired when the Bulgarian court lodged the request for a preliminary ruling. (TW)

## Data Protection

### **Handbook on European Data Protection Law**

In May 2018, the EU Agency for Fundamental Rights (FRA), together with the Council of Europe (CoE), published an update of its [Handbook on European Data Protection Law](#), the first edition of which had been published in 2014.

The handbook looks at context and background, terminology, key principles, and rules of European data protection law, its independent supervision, rights of data subjects, and their enforcement. It also covers issues concerning international data transfers and flows of personal data; data protection in the context of police and criminal justice; specific types of data such as health, employment, or financial data and their relevant data protection rules. Lastly, it takes a look at modern challenges in personal data protection such as big data, algorithms, and artificial intelligence. Select case law of the European Court of Human Rights (ECtHR) and Court of Justice of the European Union (CJEU) has also been included.

Each chapter of the handbook begins with a table that identifies the legal provisions relevant to the topics dealt with in the specific chapter. The tables cover both CoE and EU law and reference select case law of the ECtHR and the CJEU. The relevant laws of the two different European orders, as they apply to the specific topics addressed, are then presented in sequence. This allows the reader to see where the two legal systems converge and where they differ. (CR)

### **Council Ready to Start Negotiations on Interoperability Legal Framework**

Despite criticism from data protection and fundamental rights organisations (cf. eucrim 1/2018, pp. 20–21; see also the [Statewatch Analysis by Tony Bunyan](#) of July 2018), the EU institutions continue to make progress in adopting legislation on the interoperability between

EU information systems in the area of justice and home affairs. On behalf of the European Council, the Permanent Representatives Committee (Coreper) approved, a [mandate for negotiations on the proposed two regulations establishing a framework for interoperability](#) on 14 June 2018,. The proposals were tabled by the European Commission on 12 December 2017 (see eucrim 4/2017, p. 174).

On the basis of this mandate, the Council Presidency can start negotiations with the European Parliament. The latter [has not yet adopted its position](#).

The systems envisaged for interoperability will cover the entry/exit system (EES), the visa information system (VIS), the European travel information and authorisation system (ETIAS), Europol, the Schengen information system (SIS), and the European criminal records information system for third-country nationals (ECRIS-TCN) as well as Europol data and certain Interpol databases on travel documents.

The Council stresses that the new regulations will not modify rights of access. A European search portal will flag where data or links exist in relation to a query, but the system will only show each authority the data to which it already has a right of access under previous legislation setting up the different databases. (TW)

## Victim Protection

### **Council Conclusions on Protection of Victims of Terrorism**

On 5 June 2018, the JHA Council adopted conclusions on victims of terrorism. They mainly call for effective cooperation between the authorities and entities responsible for the protection of victims of terrorism in order to facilitate the rapid exchange of information and assistance in the event of a terrorist attack.

Member States are called on to take the following measures:

- Effectively transpose and apply the

provisions on victim protection in Directive 2017/541/EU on combating terrorism as well as the general Victims Protection Directive 2012/29/EU;

- Nominate a national contact point responsible for providing information on available support, assistance, protection, and compensation system for victims;
- Make better use of existing EU networks on victim rights, police cooperation and crisis management;
- Exchange good practices regarding assistance and support to victims of terrorism;
- The Commission is requested to do the following:
- Support the setting up of a Coordination Centre for victims of terrorism; this centre should be designed as a hub gathering the necessary expertise on all matters related to victims of terrorism and assist Member States by providing for a guide to best practices on how to act in the event of a terrorist attack and on how to prepare for the possibility of a terrorist attack;
- Support Member States in exchanging experiences and best practices and promote specific training activities.

The conclusions do not establish new rights or create new structures, but try to give assistance to victims in order to enable them to exercise their rights more effectively. (TW)

### **EP Calls for Strict Implementation of Victims' Protection Directive**

On 30 May 2018, the plenary of the European Parliament adopted a [resolution on the implementation of Directive 2012/29/EU](#) establishing minimum standards on the rights, support, and protection of victims of crime.

The resolution was prepared by the EP Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the EP Committee on Women's Rights and Gender Equality (FEMM).

The EP, *inter alia*, criticises the European Commission for not having yet tabled an implementation report on the

Victims' Protection Directive and calls on seven EU Member States to implement the obligations of the Directive.

The Resolution includes a series of recommendations relating to the following aspects:

- Individual victim assessments;
- Victim support services;
- Training;
- Cross-border dimension;
- Procedural rights;
- Institutional perspective.

The Resolution shows that implementation of EU legislation on victims' protection is still widely neglected by EU Member States. (TW)

### **Freezing of Assets**

#### **Council and EP Shape Regulation on Freezing and Confiscation Orders**

On 20 June 2018, the Council announced that a [political agreement had been reached](#) with the European Parliament on new EU rules for the mutual recognition of freezing and confiscating orders.

The new legislation – the first one in the form of a regulation as regards the area of judicial cooperation – has yet to be approved by the plenary of the European Parliament and the JHA Ministers Council before it can be revised by lawyers linguistically and formally adopted by the two institutions.

The Council further reported that it agreed on the following main issues with EP representatives:

- The principle of mutual recognition prevails, meaning that all judicial decisions in criminal matters taken in one Member State will (principally) be directly recognised and enforced by another EU country;
- Only a limited number of grounds for non-recognition and non-execution are given. In particular, the ground for non-recognition based on fundamental rights (originally not foreseen in the Commission proposal) will be included, but it will be subject to strict conditions;

- The regulation will apply widely, including value-based confiscation and non-conviction based confiscation; certain schemes of preventive confiscation will also be included, provided that there is a link to a criminal offence;
- Standard certificates and procedures are provided for to allow for speedy and efficient freezing as well as confiscation actions;
- Deadlines for the recognition of a confiscation order have been set (usually 45 days); deadlines have also been provided for urgent cases;
- New provisions will ensure that victims' rights to compensation and restitution are respected in cross-border cases.

The new regulation on the mutual recognition of freezing and confiscation orders will replace two framework decisions of 2003 and 2006. These FDs are considered outdated and no longer in line with the latest national and EU legislative developments on freezing and confiscation of the proceeds of crime.

The new regulation dates back to a Commission proposal of 21 December 2016 ([COM\(2016\) 819 final](#) – see eucrim 4/2016, p. 165). The initiative has been controversially discussed (see also eucrim 2/2017, p. 73). It was, *inter alia*, questioned whether a regulation is the right instrument for governing cross-border judicial cooperation, whether the proposal entails enough precision and clarity, whether procedural safeguards are being sufficiently respected, and whether an *ordre-public* refusal ground can be singled out. (TW)

### **Cooperation**

#### **European Arrest Warrant**

#### **CJEU: UK's Decision to Withdraw from EU Does Not Affect the Execution of EAWs**

On 19 September 2018, the European Court of Justice (CJEU) decided on the impact of Brexit on the execution of

European Arrest Warrants (EAWS) issued by the UK ([Case C-327/18 PPU](#)). A EAW was issued by a court in Belfast/Northern Ireland for the offences of murder, arson, and rape to Mr “RO”. Within the framework of extradition proceedings in Ireland. RO argued that – given the uncertainty as to the law that will be in place in the UK after Brexit – his rights under EU law cannot be guaranteed anymore and therefore he ought not to be surrendered. The High Court of Ireland accepted this objection and referred the question to the CJEU to clarify whether the potential loss of rights, such as the right to a deduction of a period spent in custody (Art. 26 FD EAW), the speciality rule (Art. 27 FD EAW), the limits on subsequent extradition (Art. 28 FD EAW), or the respect for the fundamental rights enshrined in the CFR give rise to a “significant risk” of injustice, with the consequence that the request for surrender cannot be accepted.

The CJEU found that the mere notification by a Member State of its intention to withdraw from the EU is not an “exceptional circumstance” capable of justifying a refusal to execute a EAW. Such a consequence would circumvent EU law, since it is up to the European Council to determine a Member State’s breach of the values set out in Art. 2 TEU – only in this case may a EAW be suspended.

The CJEU further stated that the executing judicial authority must, however, examine whether there are substantial grounds for believing that, after withdrawal from the EU, the person sought would be placed at risk of being deprived of his fundamental rights and the rights delivered, in essence, from the FD EAW in the issuing Member State. This would be the case, for instance, if the issuing Member State did not guarantee the rights enshrined in the ECHR (in particular Art. 3 that corresponds to Art. 4 CFR); however, withdrawal from the EU has no effect on the obligations stemming from the ECHR. Furthermore,

the said individual’s rights as enshrined in the FD EAW are guaranteed by the UK in its national law independent from the FD EAW or in the 1957 Council of Europe Convention on Extradition (to which the UK would be bound after Brexit), so that RO would not be deprived of the opportunity to assert these rights before UK courts and tribunals after the withdrawal.

In sum, the CJEU did not see any concrete evidence at the moment that fundamental rights and essential rights of the FD EAW would not be respected by the UK after Brexit. However, this is for the referring court to determine. With its judgment, the CJEU follows the [opinion of AG Szpunar](#) delivered on 7 August 2018. (TW)

#### CJEU Clarifies Position on Non-Surrender in Case of Poor Detention Conditions ("Aranyosi III")

**spot light** On 25 July 2018, the CJEU rendered a [further landmark judgment](#) on the question as to which extent judicial authorities in the executing Member State can refuse surrender after a European Arrest Warrant if detention conditions in the issuing Member State risk violating the fundamental right against inhuman or degrading treatment (Art. 4 CFR). The decision was triggered by reference for preliminary ruling from the Higher Regional Court of Bremen, Germany, that sought clarification and further guidance from the CJEU after the judgment in the [Aranyosi and Căldăraru](#) case (see also [eucrim 1/2016](#), p. 16). The present case ([C-220/18 PPU](#)) is also referred to here as “Aranyosi III”. For the background of the case at issue, see [eucrim 1/2018](#), p. 32.

The judges in Bremen responsible for deciding on the execution of a EAW against a Hungarian national who is to serve a custodial sentence for bodily harm, damage, fraud, and burglary in Hungary, were essentially concerned about the following four issues:

- Does the existence of a legal rem-

edy – in the issuing state – enabling the sought person to challenge the detention conditions rule out the existence of a real risk of inhuman and degrading treatment?

- If the answer is negative, to which extent can the executing authority assess the conditions in the prisons, i.e. all prisons in which the sought person could potentially be detained in or only the prison in which he is likely to be detained for most of the time?
- Which information must the executing authority take into account for assessment of the prison conditions?
- What is the value of assurances given by an institution in the issuing state other than the issuing judicial authority?

By way of preliminary observations, the CJEU stressed that the principle of mutual recognition and mutual trust are of fundamental importance for the functioning of an EU area without internal borders. It further emphasised that the executing Member State may, under EU law, be required to presume the respect of fundamental rights by other EU Member States. Furthermore, the CJEU reiterated its settled case law in that refusal of a EAW is limited to the refusal grounds as set in Arts. 3, 4, and 4a FD EAW and that the Court had opened a fundamental rights exception in the *Aranyosi and Căldăraru* case only for “exceptional circumstances.” In the context of the latter judgment, the CJEU further reiterated its “two-step approach,” i.e., against the yardstick of the fundamental rights protection guaranteed by EU law, the executing authority must determine both (1) the existence of systemic and generalised deficiencies in detention conditions in the issuing state, and (2) a real risk of the individual being subjected to inhuman or degrading treatment in the issuing state after his/her surrender, i.e., taking into account precisely the circumstances of the specific case.

In the case at issue, the CJEU pointed out that the reference is limited to questions relating to the second step of said

examination, thus not ruling on the systemic or generalised deficiencies in detention conditions in Hungary, although this was disputed by the Hungarian government. Nonetheless, the CJEU calls on the court in Bremen to reconsider its premise of systemic deficiencies by taking into account properly updated information.

Regarding the first question posed, the CJEU replied that the subsequent judicial review of detention conditions in the issuing state is not sufficient to avert a real risk of inhuman treatment. The executing authority is still bound to undertake an individual assessment.

Regarding the second question, the CJEU held that the executing judicial authority is solely required to assess the detention conditions in the prison in which the person concerned is *specifically* intended to be detained, including on a temporary or transitional basis. Requests for additional information on detention conditions in prisons in which the person might be detained would run counter to the premise that the “real risk test” must be specific and precise, to the principles of acceleration and facilitation the EAW system is based on, and to the “*effet utile*” of the EAW mechanism. The compatibility with the fundamental rights of detention conditions in other prisons in which the person concerned may possibly be held at a later stage is a matter that falls exclusively within the jurisdiction of the courts of the issuing state.

As regards the third question, i.e., the criteria for assessment of the detention conditions, the CJEU reiterated the case law of the ECtHR on violations of Art. 3 ECHR. In particular, ill-treatment must attain a minimum level of severity, and the personal space for the detainee is a determining factor in whether an Article 3 violation can be presumed or not. In this context, the CJEU points out that requests for additional information must concentrate on the determining factors of the ECtHR case law. The list of 78 questions submitted by the Bremen court to

the issuing authorities, which included questions on opportunities for religious worship or laundry arrangements, went too far according to the CJEU.

Fourthly, the CJEU addressed the question as to which extent assurances given by the issuing state must be taken into account. According to the judges in Luxembourg, the FD EAW allows the request for assurances on the actual and precise detention conditions. Since the EAW system is based on mutual trust, the executing authority must, however, rely on the assurance given, at least if – as in the present case – there are no specific indications that the detention conditions in a particular prison centre are in breach of Art. 4 CFR. If the guarantee is not given by a judicial authority in the issuing state, the executing authority can evaluate it by carrying out an overall assessment of all the information available.

In conclusion, the CJEU sees no hindrances why the sought person cannot be surrendered to Hungary, since a breach of Art. 4 CFR is unlikely. The final verification, however, is up to the referring court. In essence, the CJEU follows the [opinion of AG Campos Sánchez-Bordona](#), which was presented on 4 July 2018. A main difference is, however, that the AG was of the opinion that legal remedies against detention conditions that can be brought forward in the issuing state are a decisive factor when conducting an assessment of the general situation in the issuing Member State.

The decision of the CJEU on prison conditions is another milestone in the longstanding debate as to which extent possible fundamental rights violations in a EU Member State may trigger refusal of surrender. The CJEU established rather narrow conditions and, with its judgment of 25 July 2018, clarified that the “fundamental rights card” can only be played under “exceptional circumstances.” Therefore, the premises established in the *Aranyosi and Căldăraru* case seem to be only a Pyrrhic victory for the individual. (TW)

### CJEU: Refusal of EAW in Case of Fair Trial Infringements Possible as Exception



On 25 July 2018, the CJEU delivered its judgment on the non-execution of European Arrest Warrants (EAWs) in cases of systemic deficiencies regarding the independence of the judiciary ([Case C-216/18 PPU \(“LM”\)](#)). The case was referred to the CJEU by the Irish High Court, which doubted whether surrender of a Polish national to Poland complies with the EU’s fundamental rights in view of the recent judicial reforms in Poland and the Article 7(1) procedure initiated by the European Commission (for the case, see *eurcrim* 1/2018, p. 31; for the Article 7 procedure, see news under “Fundamental Rights” in this issue as well as *Casse-se*, *eurcrim* 1/2018, p. 72). The referring court essentially wanted to know how the judicial authorities of the executing state should apply the [CJEU’s judgment in Aranyosi and Căldăraru](#) (see also *eurcrim* 1/2016, p. 16) if there is a real risk of breach of the fundamental right to a fair trial.

The CJEU concluded that the executing authority can refrain from giving effect to a EAW under these circumstances, but under very narrow conditions:

In a first step, the executing authority must assess – on the basis of objective, reliable, specific, and properly updated material – whether there is a real risk of breach of the essence of the right to a fair trial in connection with the lack of independence of the judiciary in the issuing Member State. In this context, the CJEU considers the information in the Commission documents relating to the Article 7(1) procedure to be particularly relevant for this assessment.

In a second step, the executing authority must specifically and precisely assess whether, in the particular circumstances of the case, there are substantial grounds for believing that, following surrender, the requested person runs the real risk of breach of the fundamental right to a fair trial.

The CJEU clarified that reasoned proposals of the Commission within the Article 7(1) procedure or other material showing systemic deficiencies in the light of the values referred to in Art. 2 TEU do not replace this specific assessment. Therefore, the executing authority must examine to what extent the systemic or generalised deficiencies are liable to have an impact at the level of the courts with jurisdiction over the specific case to which the requested person is subject. Even if the executing authority can affirm this impact on the courts in the concrete case, it must further assess whether there are substantial grounds for believing that the individual concerned will run a real risk of breach of his right to an independent tribunal and, therefore, of the essence of his fundamental right to a fair trial. In this context, the executing authority must pay attention to the personal situation, the nature of the alleged offence at issue, and the factual context (as presented in the EAW form).

Lastly, the CJEU calls on the executing authority to request any supplementary information from the issuing judicial authority that it considers necessary for assessing the real risk. The issuing authority may provide any objective material that rules out the existence of said risk to the individual concerned.

In sum, the CJEU transfers the testing programme it developed in the *Aranyosi and Căldăraru* case within the context of ill-treatment (Art. 4 CFR) to alleged violations of the – not absolute – right to a fair trial (Art. 47 CFR). The court maintains the necessity of a two-step assessment, i.e., the affirmation of a real risk of systemic deficiencies in the judicial system of an EU Member State must be accompanied by the affirmation of a real risk to which the individual concerned is actually exposed in the concrete case. The CJEU states more precisely the parameters that the executing judicial authority must take into consideration concerning fair trial infringements in the context of the independence

and impartiality of the judiciary. It also clarifies what information the executing authority must obtain from the issuing judicial authority in order to discount a real risk.

From a legal point of view, it is interesting that the CJEU does not follow the concept of a “flagrant denial of justice” – a concept that is common in the case law of the ECtHR and that was taken over by AG *Tranchev* in his [opinion on the case of 28 June 2018](#). It remains to be seen which consequences these different concepts will have on the future European extradition scheme.

On the one hand, the judgment can be considered a success, since the CJEU accepts a fundamental rights exception in the execution of EAWs. The CJEU explicitly bases its decision on Art. 1(3) FD EAW, i.e., the fundamental rights clause. On the other hand, considering the narrow criteria that were set by the Court, it is questionable whether such objections by the individual will be successful in concrete extradition cases. It must also be questioned whether the Court provided the courts with appropriate practical guidance in the executing state. (TW)

### CJEU Blames Hungary for Non-Execution of Croatian EAW for Corruption

On 25 July 2018, the CJEU rendered an important [judgment on the obligations of the executing authority](#) in the European Arrest Warrant (EAW) system. Furthermore, the judgment interprets the refusal grounds of Art. 3 No. 2 and Art. 4 No. 3 FD EAW.

In the case at issue ([C-268/17](#)), Hungarian authorities refused to enforce (or did not react to) several EAWs issued by Croatian authorities and courts against AY. AY, a Hungarian national, was suspected of having bribed a high-ranking Croatian politician.

Although the Hungarian Attorney General opened investigations on the case in July 2011, investigations were not conducted against AY as a suspect.

Instead, the Hungarian authorities conducted investigations only in connection with the criminal offence against an “unknown person.” In this context, AY was interviewed as a witness only. In January 2012, the Hungarian National Bureau of Investigations closed the investigation because the acts did not constitute a criminal offence. Following the accession of Croatia to the EU, the Croatian authorities issued several EAWs against AY, the first one in October 2013 and, after indictment of AY, in December 2015 and January 2017. The Hungarian authorities did not execute the EAWs. Regarding the first EAW, they argued that criminal proceedings had already been closed in Hungary in respect of the same acts as those described in the EAW. Regarding the subsequent EAWs, they justified their action by pointing out that it was not legally possible in Hungary to arrest AY or to initiate a new extradition procedure.

Against this background, the Croatian court referred, in essence, two questions to the CJEU:

- Is the judicial authority in the executing Member State required to adopt a decision on any EAW communicated to it, even when it already took a decision on a previous EAW relating to the same person and the same criminal proceedings?
- Were the Hungarian authorities entitled not to execute the Croatian EAWs if the suspect AY was only treated as a witness during the criminal proceedings that came to halt in the executing Member State (Hungary) for the same acts on which the EAW was based?

The first controversial issue in this case was whether the reference for a preliminary ruling was admissible. For the first time, it was the issuing authority that brought a case to the CJEU on interpretation of the EAW. The issuing authority ultimately sought a decision from the European Court to force the executing authority to give green light to surrender of a suspect. In its [opinion of 16 May 2018](#), AG Szpunar held the ref-

erence inadmissible because the questions referred are not necessary for the Croatian court to progress the procedure pending before it.

The CJEU objected to this statement and held the request for a preliminary ruling admissible. The CJEU explained that no situations are given in the present case that may shake the presumption of relevance, which national courts enjoy according to settled case law. The CJEU further argued that the issue of a EAW affects the individual freedom of the requested person and the observance of fundamental rights. According to the CJEU's case law, however, this issue primarily falls under the competence of the issuing Member State, so that the issuing authority must be able to initiate a preliminary ruling procedure before the Court in Luxembourg.

As to the first question, the CJEU ruled that the judicial authority in the executing Member State is required to decide on any EAW forwarded to it, even if a ruling on a previous, identical EAW has already been made and the second EAW issued on account of the indictment in the issuing state.

The CJEU went on to examine whether one of the refusal grounds would justify the position of the Hungarian authorities. The CJEU first concluded that the refusal ground of *ne bis in idem* (Art. 3 No. 2 FD EAW) is not relevant in the given case, since the proceedings against AY in Hungary cannot be considered "finally judged" if the person, who is the subject of the EAW, had only been interviewed as a witness.

Second, the CJEU observed that the wording of Art. 4 No. 3 FD EAW, second option (upon which a EAW may be refused if the executing Member State halts proceedings for the offence on which the EAW is based) may justify the decision of the Hungarian authorities. The CJEU found, however, that an interpretation of this provision according to which the execution of a EAW could be refused – if the warrant concerns the same acts without taking into account

the identity of the person against whom the criminal proceedings are brought – would be manifestly too broad. Such interpretation would also run counter to the premise that the grounds for non-execution must be interpreted strictly and in light of the need to promote the prevention of crime. Therefore, Art. 4 No. 3 FD EAW cannot apply if the decision that terminated the criminal proceedings in the executing Member State had not been taken in respect of the requested person.

In sum, the CJEU ruled that the Hungarian authorities cannot justifiably rely on a refusal ground; hence, they must execute the EAW from the Croatian authorities against AY. (TW)

### **German Court Held Extradition of Catalan Leader Puigdemont Partly Inadmissible**

In the most prominent European Arrest Warrant case in Germany in recent time, the possible surrender of former Catalan Regional President *Carles Puigdemont* to Spain, the First Senate for Criminal Matters of the Higher Regional Court of the State of Schleswig-Holstein rendered its final admissibility decision on 12 July 2018. The Higher Regional Court, in essence, reiterated the findings of its decision on extradition detention of 5 April 2018 (see eucrim 1/2018, pp. 33–34). It held that extradition for the accusation of rebellion is inadmissible, since the requirement of double criminality is not fulfilled.

The judges at the Higher Regional Court argued that the actions Puigdemont was accused of fulfilled neither the requirements of the crime of "high treason" (Sec. 81 of the German Criminal Code) nor those of the crime of "rioting" (Art. 125 of the German Criminal Code). As regards the crime of "high treason," the level of "force" required by Sec. 81, in the light of the case law of the Federal Court of Justice, was not reached taking account the disputes in Spain. As regards "ri-

oting," *Puigdemont* could not be assigned the "intellectual leader" of acts of violence.

As regards the second accusation, i.e. the embezzlement of public funds, the court held on to its previous assessment and declared extradition admissible. It noted that double criminality need not be established because this accusation falls within the list of criminal activities ("corruption") for which an examination of mutual criminal liability under German law does not take place. In addition, the Court held the "ticking" of the respective box of corruption in the EAW form in accordance with the list of Art. 2(2) FD EAW plausible, since the Spanish authorities comprehensively explained that Puigdemont may be co-responsible for incurring financial obligations at public expense. Whether this accusation can be confirmed is to be exclusively answered in the criminal proceedings in Spain.

One week after the decision of the Higher Regional Court of the State of Schleswig-Holstein, the Spanish authorities withdrew the EAW and Puigdemont returned to his exile in Brussels/Belgium. The main reason for this was that Puigdemont could have been prosecuted in Spain only for embezzlement of public funds and not for rebellion. This is due to the principle of speciality, which means that criminal prosecution in the issuing Member State is only possible to the extent to which extradition has been declared admissible. (TW)

### **Taking Account of Convictions**

#### **CJEU: Special Recognition Procedure Not in Line with EU Law**

**spot light** On 5 July 2018, the CJEU ruled that Framework Decision 2008/675/JHA precludes Hungarian procedural rules on the recognition and validity of final criminal judgments previously handed down by the court of another Member State ([Case C-390/16 – Lada](#)).

The case at issue was triggered by the Hungarian court of Szombathely to which a judgment of the Regional Court of Wiener Neustadt/Austria against the Hungarian national *Dániel Bertold Lada* had been submitted. The Austrian court convicted Mr Lada to 14 months of imprisonment for attempted theft by force of high-value goods. The court ordered him to serve 11 months of that sentence.

According to Sec. 46–48 of the Hungarian Law on international judicial assistance in criminal matters, the Hungarian courts must carry out a special procedure for recognition of the validity of a foreign judgment. This special procedure entails, *inter alia*, the following aspects:

- The Hungarian court must examine whether fundamental rights and the basic provisions of Hungarian legislation on criminal procedure were observed in the foreign proceedings;
- It must assess, and if necessary, reclassify the offence committed by the convicted person by referring to the relevant provision of the Hungarian Criminal Code in force at the material time;
- It must, if necessary, reformulate the foreign judgment in accordance with the Hungarian Criminal Code, with respect to the type and level of sentence (provided that the sentence is not more severe than that imposed in the foreign judgment).

The referring court of Szombathely doubted whether this special procedure complies with the principle of mutual recognition (Art. 82 TFEU) and Framework Decision 2008/675 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings. Since the special procedure, in fact, operates as a new procedure against the defendant for the same offences, the court also doubted whether it runs counter to the EU rules on *ne bis in idem* (Art. 50 CFR, Art. 54 CISA).

The CJEU only examined the first issue. It observed that the procedure

at issue is a preliminary procedure with the main purpose of giving effect to a foreign criminal conviction by a Hungarian court. Consequently, the decisive question was whether the special procedure for recognition of foreign judgments, such as that at issue in the main proceedings, renders FD 2008/675 ineffective.

The CJEU first noted that a national procedure that imposes an obligation to ascertain whether the court of another EU Member State observed the fundamental rights of the person concerned is liable (in the absence of exceptional circumstances) to call into question the principle of mutual trust and hence one of the objectives of FD 2008/675.

In the context of the issue of reclassifying the criminal offence or altering the sentence imposed in another Member State, the CJEU stated that the FD indeed allows a Member State to issue a decision, if necessary, in order to attach the equivalent legal effects to a previous foreign conviction. However, this possibility cannot involve, in any event, the implementation of a special national procedure for prior recognition, such as that foreseen by the Hungarian Law on international judicial assistance in criminal matters.

In conclusion, FD 2008/675, read in light of Art. 82 TFEU, precludes the taking into account in a Member State, in new criminal proceedings brought against a person, of a final judgment previously handed down by the court of another Member State convicting that person of other offences being conditional on a special procedure for prior recognition, such as that at issue in the main proceedings, by the courts of the first Member State.

It should be noted that the CJEU already substantially decided the main questions at issue in its judgments *Beshkov* (Case C-171/16, see eucrim 3/2017, pp. 119–120) and *Balogh* (Case C-25/15, see eucrim 2/2016, p. 77). The CJEU often referred to these decisions in the present case. (TW)

## Law Enforcement Cooperation

### JHA Ministers' Debate on e-Evidence Legislation

At their Council meeting of 4/5 June 2018, the JHA Ministers held a first policy debate on the Commission's proposals for a legislative EU framework on cross-border access to e-evidence. The legislative proposals were tabled on 17 April 2018 (see eucrim 1/2018, pp. 35–36). They comprise (1) a proposal for a regulation on European production and preservation orders for electronic evidence in criminal matters and (2) a proposal for a directive laying down harmonised rules on the appointment of legal representatives for the purposes of gathering evidence in criminal proceedings.

The aim is to create a legal EU framework for judicial orders that can be addressed directly to legal representatives of service providers in another member state, without the intervention of an authority there. [The Ministers concluded](#) the following:

- The scope of the new regulation should be extended to cover issues of direct access to e-evidence and real-time interception;
- The US CLOUD Act of March 2018 should closely be followed, and negotiations should start on an executive agreement between the EU and the USA as foreseen in the United States' legislation;
- In view of the plans for a second protocol of the Budapest Convention on cybercrime, coordination with the Council of Europe is needed, so that a common European approach can be developed.

The discussion on e-evidence remains high on the agenda and is going to be followed up at the next JHA meeting in October 2018. (TW)

### German Bar Association Highly Critical of EU's e-Evidence Initiative

On 4 September 2018, the German Bar Association (Deutscher Anwaltverein – DAV) published a statement on the two

legislative proposals of the Commission on e-evidence (see eucrim 1/2018, pp. 35–36). The statement ([SN 42/18](#)) criticises the initiative. (CR)

Regarding the proposed EU Regulation on a European Production and Preservation Orders for electronic evidence in criminal matters, the DAV lists a number of deficiencies. It objects to the “privatisation” trend in mutual legal assistance and calls upon the legislative institutions to improve the text, particularly in view of obligations of notification, legal remedies, and the use of unlawfully collected evidence.

Regarding the proposed Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings, the DAV has no fundamental objections, in principle, but sees need to establish rules on the competences of supervisory bodies in the respective Member States. It calls for detailed criteria on the location of the representative of the service provider. (TW)

#### **Practical Adviser on the Use of Channels for Information Exchange**

In July 2018, the Working Party on Information Exchange and Data Protection (DAPIX) published a [Practical Adviser](#) complementing [the Manual on Law Enforcement Information Exchange](#).

At the heart of the document is a comparative table analysing the different requirements for the exchange of information via five different channels: Interpol, Europol, SIRENE, Liaison Officers, and Police and Customs Co-operation Centres (PCCC). The table addresses officers working with these channels and other interested law enforcement authorities. It offers an overview of the purposes of these channels, their languages, participating Member States, possibilities for 24/7 monitoring, and the exchange of classified information as well as criteria for the choice of channels.

Furthermore, the adviser contains recommendations on the do’s and don’ts with regard to information exchange. (CR)

#### **Crime Information Cell Established**

On 5 July 2018, the [EUNAVFOR Med operation Sophia Task Force](#) was enforced by five specialists from Europol, Frontex, the European Border and Coast Guard Agency, and EUNAVFOR Med. Following the EU Council decision adopted on 14 May 2018, the establishment of this Crime Information Cell marks a new step towards closer operational cooperation between representatives of the Common Security and Defence Policy (CSDP) and Justice and Home Affairs (JHA) in an effort to strengthen their collective effectiveness and operational impact. (CR)

#### **Online Manual on Controlled Deliveries**

In June 2018, the Council of Europe’s drug policy network – the Pompidou Group – launched the creation of [an online handbook](#) to enhance and improve the international coordination of controlled deliveries of illicit commodities. The online manual will be designed for and restricted to law enforcement and international judiciary. It will be developed in cooperation with Eurojust, Europol, Interpol, OSCE, SELEC, and the Council of Europe’s PC-OC Committee. (CR)

#### **EU Agencies Against Trafficking in Human Beings**

On 13 June 2018, ten EU Agencies signed a [Joint Statement](#) committing themselves to working together against trafficking in human beings (THB). The 10 signing agencies are:

- The European Asylum Support Office ([EASO](#));
  - The European Police Office ([Europol](#));
  - The European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice ([eu-LISA](#));
  - The European Monitoring Centre for Drugs and Drug Addiction ([EMCDDA](#));
  - The EU Judicial Cooperation Unit ([Eurojust](#));
  - The European Institute for Gender Equality ([EIGE](#));
  - The European Border and Coast Guard Agency ([FRONTEX](#));
  - The EU Agency for Fundamental Rights ([FRA](#));
  - The EU Agency for Law Enforcement Training ([CEPOL](#));
  - The European Foundation for the Improvement of Living and Working Conditions ([Eurofound](#)).
- According to the statement, the agencies have committed to the following:
- Countering the culture of impunity for perpetrators, abusers, and exploiters;
  - Enhancing their focus on prevention, taking into account the entire trafficking chain inside and outside the EU;
  - Ensuring a gender-specific and child-sensitive approach when addressing THB;
  - Assisting Member States in improving the early identification of victims and ensuring access to and realisation of their rights;
  - Addressing the vulnerabilities of victims and ensuring accountability towards them, including in border management;
  - Enhancing the effectiveness of investigations and prosecutions, e.g., by setting up Joint Investigation Teams;
  - Promoting cross-border and internal law enforcement and judicial cooperation;
  - Strengthening training activities, sharing good practices, and capacity building within an appropriate policy context;
  - Building on synergies foreseen in relevant EU instruments in specific areas, including with respect to the EU action on drugs;
  - Improving information sharing, also via the use of technology, within the limits of data protection rules, proactive financial and intelligence-led investigations, asset recovery, and the freezing and confiscation of profits;
  - Implementing and developing large-

scale IT systems and leveraging systems interoperability;

- Supporting coherent and effective joint activities with all relevant stakeholders, including labour market intermediaries and recruitment agencies;
- Increasing regional and cross-border cooperation among public authorities and social partners in order to strengthen their commitment to a coordinated, co-

herent, and comprehensive response to THB.

Furthermore, each agency will appoint a contact point who will participate in meetings organised by the Office of the EU Anti-Trafficking Coordinator. This will ensure an overview of each agency's action in this field and its representation in the relevant fora. (CR)

mendations issued in the fourth evaluation round in 2014 (see eucrim 2/2014, p. 58); only one recommendation was implemented satisfactorily, four were partially implemented, and one had not been implemented at all. Despite the perception of the country being one of the least corrupt countries in Europe, GRECO stressed the need for concrete action in preventing and combating corruption.

As regards MPs, the report recommends establishing, effectively enforcing, and applying a code of conduct. In addition, *ad hoc* reporting of conflicts of interest should be reported as soon as they arise. Practical guidance in the form of training and counseling should be available to complement the measures.

As regards the code of ethics of the judiciary, it still needs to be accompanied by practical guidance in order to clarify the standards expected of judges, including in practical situations. A summary of the report was presented in a [press release](#) by GRECO.



## Council of Europe\*

*Reported by Dr. András Csúri*

### Foundations

#### Reform of the European Court of Human Rights

#### Entry into Force of Protocol No. 16 to the ECHR

On 1 August 2018, [Protocol No. 16 to the ECHR](#), which shall strengthen the dialogue between the European Court of Human Rights and the highest national courts, [came into force](#) after 10 Member States signed and ratified it: Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, and Ukraine. Ten more countries have signed the Protocol but have yet to ratify it: Andorra, Bosnia and Herzegovina, Greece, Italy, the Republic of Moldova, the Netherlands, Norway, Romania, Slovakia, and Turkey.

Protocol No. 16 enables the highest national courts and tribunals, as designated by the Member States concerned, to request the Court to give advisory opinions on questions of principle relat-

ing to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto. Requests can be made in the context of cases pending before a national court or tribunal, with the Court having the discretion to accept a request or not. The Courts reasoned advisory opinions are non-binding and will be delivered by the Grand Chamber.

### Specific Areas of Crime

#### Corruption

##### GRECO: Unsatisfactory Level of Preventing Corruption in Denmark

On 12 September 2018, GRECO placed Denmark in its non-compliance procedure, due to the lack of sufficient measures taken to prevent corruption in respect of MPs and the judiciary. The [report](#) classified the situation as "globally unsatisfactory". From the six recom-

##### GRECO: Fifth-Round Evaluation Report on Luxembourg

On 20 July 2018, GRECO has published its [fifth-round evaluation report on Luxembourg](#). The main focus of the recent evaluation round is on preventing corruption and promoting integrity in central governments (top executive functions) and law enforcement agencies. The evaluation focuses in particular at issues such as conflicts of interest, the declaration of assets, and the accountability mechanisms (for the fifth evaluation round, see eucrim 2/2017, p. 76; for more recent reports, see eucrim 1/2018, pp. 38–39).

GRECO observed that the country generally scores highly in perception surveys on the fight against corruption, and the risk of actual bribery is considered low (for a summary, see the [press](#)

\* If not stated otherwise, the news reported in the following sections cover the period 16 May 2017 – 15 September 2018.

[release](#)). That said, GRECO pointed out that the nature of anti-corruption measures is more reactive than proactive, and although there are some prevention measures and a committee for the prevention of corruption, there is neither a general nor sectoral strategy for preventing and combating corruption, nor any codes of ethics applicable to officials or members of the Grand Ducal Police. In a similar vein, despite existing good practices to access information held by the government, there is still no general right of access to administrative documents.

At the governmental level, there is unbroken interest in strengthening the ethical rules applicable to members of government, including the code of ethics introduced in 2014. There is, however, room for improvement, particularly regarding rules on gifts, reporting, lobbying, and the management of conflicts of interest after ministerial terms of office have expired. Additionally, GRECO recommends that the code be supported by supervision mechanisms and accompanied by sanctions for non-compliance. Lastly, the privileges enjoyed by ministers regarding prosecution and jurisdiction must be reviewed.

The report favorably acknowledges the reform of the Grand Ducal Police, which is currently under preparation. Beside territorial reorganisation and the reinforcement of the administrative police, it also involves greater independence and a stronger role for the Inspectorate General of Police. In respect of the latter, however, GRECO advocates a parallel upgrade of resources to facilitate the extension of its duties. Additionally, arrangements for recruiting and training the members of the Grand Ducal Police need to be stepped up.

GRECO generally recommends improving internal corruption-prevention efforts, especially through better assessment and management of risks and introducing checks of the good moral character and integrity of candidates when decisions on promotions are taken.

### **GRECO: Fifth-Round Evaluation Report on Latvia**

On 21 August 2018, GRECO published its [fifth-round evaluation report on Latvia](#). The country has a fluctuating position – between less favorable and more favorable – in corruption perception surveys. Many of Latvia's institutions forming the national integrity system suffered drastic budgetary cuts because of the 2009–2010 financial crisis. Parts of the population are still affected by the precarious economic environment, multiple employment has become commonplace, and a certain tolerance of corruption has developed. That said, a decrease in corruption perception has been registered since 2012.

The report assesses Latvia's integrity and corruption prevention framework, which is applicable to persons who are entrusted with top executive functions (PTEFs) and to law enforcement agencies, as being comprehensive. This includes Guidelines for the Prevention and Combatting of Corruption, the Law on Prevention of Conflicts of Interest in Activities of Public Officials, and the Criminal Code (for a summary, see the [press release](#)). There are, however, still shortcomings to address.

The report recommends strengthening the integrity of PTEFs through regular integrity risk assessments; by elaborating codes of conduct for Cabinet members, other political officials in the Offices of the Prime Minister, and unpaid advisors in central government; and by introducing an obligation to report conflicts of interest as they arise.

GRECO calls for all political officials to obtain permission when exercising ancillary activities and to stop the practice of engaging “advisory officials” in the central government, who may give orders to civil servants without proper authorisation.

As regards transparency, information on those attending meetings of the Cabinet of Ministers and State Secretaries is not fully open to the public. The legal requirements on publication of the

outcome of public participation procedures are not systematic and enforce in a timely manner.

From the perspective of accountability, GRECO recommends legislative amendments to ensure systematic and independent scrutiny of the accuracy of asset declarations and to ensure that they are publicly accessible online as provided for by law.

With regard to law enforcement agencies, the report focuses on the State Police (SP) and the State Border Guard (SBG) and praises the commitment to integrity and corruption prevention values. Both services have adopted codes of ethics and established ethics committees. However, objective and transparent criteria to assess compliance with the codes still need to be developed. The report recommends allocating more resources to both services, *inter alia* adopting and implementing whistleblowing protection mechanisms. Lastly, the report states that both services could further enhance transparency by means of specific legal provisions on public advertisement of vacant posts.

### **Money Laundering**

#### **MONEYVAL: Annual Report for 2017**

On 30 May 2018, MONEYVAL published its [General Activity Report for 2017](#). Twenty years into its establishment, MONEYVAL keeps its major focus on evaluating its members against both a set of anti-money laundering (AML) standards and Financial Action Task Force (FATF) standards for counter-terrorist financing measures (CFT).

Throughout 2017, three mutual evaluation reports were adopted, four onsite visits were conducted, and four additional members received country-specific training prior to their onsite visits in 2018. MONEYVAL also continued the follow-up process of the current and previous fourth round of mutual evaluations. It adopted altogether 21 follow-up reports.

With the recent series of terrorist attacks, MONEYVAL reaffirmed that the fight against the financing of terrorism remains one of its primary missions. To this effect, MONEYVAL continued to assist the FATF in conducting follow-up activities to the Terrorist Financing Fact-Finding Initiative (TFFFI), which are undertaken to identify jurisdictions in the global network with fundamental or significant gaps in their implementation of counter-terrorist financing legislation. With the help of an *ad hoc* follow-up procedure to the TFFFI (introduced in 2016 and finalised in 2017), fourteen MONEYVAL States and territories resolved fundamental deficiencies in their counter-terrorist financing legislation in less than two years.

In 2017, MONEYVAL organised two roundtables on correspondent-banking and de-risking. De-risking occurs when financial institutions decide to avoid, rather than manage, possible ML or financing of terrorism (FT) risks by terminating business relationships with entire regions or classes of customers. De-risking is not in line with the FATF Recommendations and is a serious concern within the international community. That said, the number of correspondent relationships by global banks with Eastern European banks has recently decreased more than in any other region in the world, which is a great concern for many MONEYVAL members.

MONEYVAL exchanged views with experts on a number of topical issues in the AML/CFT field:

- Financial flows from human trafficking and other forms of modern slavery;
- Threats and new trends of terrorist financing in light of recent terrorist attacks;
- Risks posed by convertible virtual currency businesses;
- ML/TF risks through manipulation of sports competitions;
- The sale of cultural property;
- The gender dimension of ML.

When [presenting the report](#), the Chairman of MONEYVAL, *Daniel The-*

*lesklaf*, pointed out that the risks of being exposed to ML and TF are increasing, underlined the role of the media in reporting relevant cases, and emphasized the need for more specialised training for investigators and prosecutors and for involving prosecutors at the early stages of investigations.

#### **MONEYVAL: Fifth-Round Evaluation Report on Latvia**

On 23 August 2018, MONEYVAL published its [fifth-round evaluation report on Latvia](#). This evaluation round builds on previous MONEYVAL assessments by strengthening the examination of how effectively Member States prevent and combat ML, terrorism financing (TF), and proliferation (see also eucrim 1/2016, p. 23; 2/2016, pp. 83–84; 4/2016, p. 169; 1/2017, p. 23; 3/2017 p. 123; 4/2017 p. 181; 1/2018, pp. 40–41).

MONEYVAL identified the country's key ML risk factors: large financial flows when servicing foreign customers (mainly from the Commonwealth of Independent States countries) and vulnerability to international organised crime, on the one hand, and Latvia's own level of corruption and significant shadow economy, on the other.

The report states that the overall appreciation of ML and FT risk in the financial sector is not commensurate with the factual exposure of financial institutions to the risk of misuse for ML and FT. Moreover, the general understanding of ML/FT risks is limited to those relevant for the respective businesses and professions, without amounting to an appropriate perception of risks in general.

A significant number of Latvian legal persons and foreign legal entities are very likely involved in ML/FT schemes. As a result of recent legislative amendments, the Enterprise Register (ER) will include information obtained from all legal entities on ultimate beneficial owners. This was not yet up and running at the time of the visit.

The report states that, until recently, ML was not investigated and prosecuted

in line with the country's risk profile as a regional financial center. Prosecutors still relied on the existence of a predicate offence to meet the prerequisite of proving that the accused had knowledge of the illegal origin of the laundered property. Additionally, sanctions for natural persons appear neither dissuasive nor proportionate. Lately, this appears to have changed to a certain extent, with some large-scale ML investigations currently underway and with a number of ML convictions in the last five years. Additionally, non-conviction based confiscation has also brought about initial results, allowing Latvian authorities to confiscate considerable amounts in both domestic and international cases.

Ultimately, the report praises Latvia for its international cooperation in the field, especially the country's AML/CFT system. Latvia cooperates proactively with foreign counterparts, effectively providing and seeking both mutual legal assistance and financial intelligence, and engages in joint investigations and cooperation meetings.

MONEYVAL also published a [summary of the report](#) and outlined the main findings in a [press release](#).

## **Procedural Criminal Law**

#### **CEPEJ: 2018 Report on European Judicial Systems**

On 4 October 2018, the European Commission for the Efficiency of Justice of the CoE (CEPEJ) published its [seventh evaluation report](#), based on data from 2016, on the main trends in the judicial systems of 45 European countries.

As regards budget issues, which were assessed in proportion to each country's level of wealth, there was a slight overall increase, with particularly sizeable budgets in Luxembourg and Norway. The budget cuts following the 2008 economic and financial crisis are gradually receding. In general, the budgets of court accounts make up the largest funds

allocated to the judicial system. East European countries allocate more to the public prosecution services, whereas northern European countries tend to invest more in legal aid. The salary levels of judges and prosecutors are increasingly similar.

In all evaluated countries, the introduction of legal aid systems in criminal and other cases frequently goes beyond merely providing a lawyer free of charge, extending to areas such as mediation or enforcement of judicial decisions.

There is development in providing trainings, with a tendency to make them compulsory for access to specialised posts or functions. The number of professional judges is stable, as fewer states are using non-professional judges.

Based on a number of indicators (staffing level, number of cases, roles, alternative procedures), the busiest prosecution services are in France, Austria, and Italy.

As regards parity within the judicial system, feminisation within the ranks of judges and prosecutors is a continuing trend, but there are few specific measures for promoting parity, with only Germany having developed a global policy in favour of parity. The proportion of women is increasing among judges and prosecutors, but lawyers, notaries, and enforcement agents are still predominantly male. As to their organisation, courts are becoming fewer in number, larger in size, and more specialised. The grouping together of courts goes hand in

hand with the development and use of internet-based information and communication methods. The report states that information technologies enable better information on the part of court users, but human exchange still helps them to better understand decisions and to trust in justice.

As regards the performance of the judicial systems, the productivity of Europe's courts is improving in civil and criminal cases, but the duration of procedures in criminal cases appears to be increasing in supreme courts. Asylum applications have had a significant impact on the number of incoming cases in nine countries: Germany, Austria, Belgium, Finland, France, Italy, Spain, Sweden, and Switzerland.

# Articles

## Articles / Aufsätze

### Fil Rouge

After the entry into force of Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO") on 20 November 2017, the year 2018 has been marked by intense activity on the part of the European Commission in partnership with the participating Member States. The goal is to achieve the complete setting up and functioning of the new body by the end of 2020.

The EPPO's creation marks a dramatic change in the operational context of the EU's Area of Freedom Security and Justice (AFSJ), entailing the need for attentive revision of the existing rules at the European and national levels. Relationships among the different European bodies, which are empowered with investigative prerogatives (Eurojust at the forefront, together with Olaf and Europol) in many ways need to be reconsidered, with the aim of establishing a sound and wide-ranging synergy that can improve the overall efficiency and legitimacy of the European judicial area. The entry into operation of the EPPO will require some adaptation however, in most, if not all, criminal justice systems

of the participating Member States. For some of them, in particular those that are characterised by the predominant role of the "*juge d'instruction*," the rules of the EPPO Regulation may involve radical changes and imply fundamental shifts in the existing systems of investigation and prosecution. Possible solutions are to either limit implementing provisions to the sole proceedings falling under the competence of the EPPO or to launch changes of a more general, systemic nature.

Against this background, the following articles explore several perspectives related to the practical implementation of the EPPO Regulation in some relevant Member States, i.e., in Bulgaria, Germany, France, and Spain. In addition, *Filippo Spiezia* reflects on the future relationship between the EPPO and Eurojust. Another contribution by Tom Willems looks into one particular aspect of future EPPO investigations – from the perspective of OLAF's experience: interviewing suspects.

*Lorenzo Salazar & Rosaria Sicurella*

## EPPO Institutionalization during the Bulgarian Council Presidency

### Main Steps and Challenges Ahead

Petar Rashkov

The article follows up the efforts undertaken by the EU Commission together with the Council of the European Union to set up the European Public Prosecutor's Office (EPPO). Preparing the EPPO to become operational by 2020 was a top political priority during the Bulgarian Council Presidency, given the paramount importance of the proper protection of the EU's financial interests against fraud and misuse of EU money. In the first part, information is provided on how the Presidency drove forward the initial steps to structure the EPPO and enhance its coordination with other EU partner agencies (i.e. EUROJUST, EUROPOL and OLAF). In the second part, the article gives an overview of EPPO's powers that make it a unique EU organism equipped with the neces-

sary tools to effectively investigate crimes against EU funds. This overview is followed by an analysis on the challenges that lay ahead particularly for the integration of the European Delegated Prosecutors into this new law enforcement scheme. The article concludes that the EPPO's main value is its prosecutors, and its success will depend on changing the existing mindset that dominates national criminal prosecutions.

## I. Introduction

After publication in the EU Official Journal of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (the EPPO),<sup>1</sup> it was time for initial steps to establish the Office to be taken. Institutionalizing the EPPO is a complex task involving many legal, organizational, and capacity-building measures. It also requires providing for cooperation and complementarity between the EPPO and other EU partner agencies, in particular Eurojust, OLAF, and Europol. Measures needed to get the EPPO up and running by 2020 include, *inter alia*:

- Creating a panel for selection of the European Chief Prosecutor (ECP) and European Prosecutors (EPs);
- Designing a EPPO Case Management System;
- Preparing the Member States for selection and appointment of the candidates for the positions of European Prosecutors;
- Changing the national legal rules on criminal proceedings in conformity with the requirements of the EPPO Regulation;
- Organising the functioning of the European Delegated Prosecutors (EDPs) within the national prosecution systems.

However, preparing Member States to adapt their criminal procedures to the requirements of Regulation 2017/1939 and to select the best professionals as European Prosecutors and European Delegated Prosecutors requires a keen understanding of the nature of the EPPO and its unique structure. The EPPO's design allows for the co-existence of supranational powers concentrated at its Central Office, with national prosecutions being conducted by the European Delegated Prosecutors. Nevertheless, whatever structure is in place, the human factor remains indispensable for its proper functioning. On the one hand, the core question is how to change the mentality of a national prosecutor making the abrupt career shift to European prosecutor and, on the other hand, how to facilitate his/her transition gradually by first taking the job of European Delegated Prosecutor. Despite the remaining challenges in organizing the EPPO, the time is ripe for its implementation.

Against this background, the following parts will deal with the steps undertaken to set up the EPPO during the Bulgarian Presidency of the Council of the EU (II.) and the challenges ahead regarding the conversion from national prosecutors to European Prosecutors or European Delegated Prosecutors (III.).

## II. Institutionalizing the European Public Prosecutor's Office – A Political Priority of the Bulgarian Council Presidency

The Commission introduced its legislative proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office on 17 July 2013 by the words:<sup>2</sup>

Both the Union and the Member States of the European Union have an obligation to protect the Union's financial interests against criminal offences generating significant financial damages every year. Yet, these offences are currently not always sufficiently investigated and prosecuted by the national criminal justice authorities.

The Commission's press release welcoming the political agreement on establishing the new Office continued:<sup>3</sup>

Every year, at least 50 billion euros of revenues from VAT are lost for national budgets all over Europe through cross-border fraud. Transnational organised crime is making billions in profit every year by circumventing national rules and escaping criminal prosecution. Outside the area of VAT, in 2015, the Member States detected and reported to the Commission fraudulent irregularities for an amount of around €638 million. National prosecutors' tools to fight large-scale cross-border financial crime are limited.

This statement was made after more than four years of intensive negotiations in the Council, when 20 EU Member States took the road to enhanced cooperation in setting up the European Public Prosecutor's Office. As one of the EPPO's founding Member States, Bulgaria – which also held the EU Council Presidency from 1 January to 30 June 2018 – declared the timely setting up of the EPPO to be one of its top priorities. Together with the EU Commission, this demanding task was put at the top of the Council's political agenda. As a result of the proactive policy to attract new Member States to join the enhanced cooperation, the Netherlands and Malta also decided to join the EPPO and submitted their requests to do so in the first half of 2018. Two consecutive JHA Councils in March and June 2018 and one Informal Ministerial Meeting in January 2018 were dedicated to the measures that must be undertaken to a successful establishment of the EPPO. The Commission informed the Council about the ongoing administrative and organizational steps undertaken by it in setting up the EPPO, and the ministers in turn outlined the need for an effective future cooperation of the EPPO with the other partner agencies and bodies, in particular Eurojust, Europol, and OLAF. The conclusions were drawn that other EU partner agencies and entities should cooperate and coordinate its efforts with the EPPO. This approach should complement EPPO investigations while maintaining the re-

spective partner agency's individual role in administrative enquiries (OLAF) and in criminal investigations in which the EPPO does not have competences (Eurojust). The ministers considered it an important task to make the EPPO operational swiftly, a task that requires organizational measures, political support, and regular Commission updates.

During the Bulgarian Presidency, political agreement on the Eurojust Regulation was reached. Eurojust and the EPPO will contribute to the close cooperation provided for in the new legal framework by sharing information and complementing each other according to their respective competences.<sup>4</sup> In addition, a reform of OLAF began after a new draft of the OLAF Regulation had been issued in May 2018.<sup>5</sup> Negotiations started in the Council on the new legal framework to regulate OLAF's competencies, with due regard to those of the EPPO, which is expected to facilitate cooperation and complementarity in the work of these two EU entities.

A major conference was co-organized by the Bulgarian Presidency and the Commission. It took place in Sofia at the end of March 2018. Representatives of Member States, EU institutions, and practitioners discussed the EPPO's future structure, the elections of EPPO staff, future EPPO internal rules, the EPPO's competences and necessary adaptations of national laws to the EPPO Regulation, cooperation with partner agencies and third countries, and training of EPPO staff.

The EPPO Expert Group<sup>6</sup> held its first two meetings on 14 April and 29 May 2018. The Commission gave a state of play on the setting up of the EPPO, namely on the appointment procedure for the EPPO's interim Administrative Director; the different preparatory steps for selection of the European Chief Prosecutor; the proposed budget for next year, and the study to identify the requirements for the Case Management System. The Expert Group consulted the Commission on future operational rules of the selection panel for the European Prosecutors, the vacancy notice for the position of the European Chief Prosecutor, and the design and operational characteristics of the future Case Management System. In June 2018, an Implementing Decision on the operating rules of the selection panel, provided for in Art. 14(3) of Regulation (EU) 2017/1939, was agreed upon on a working level and adopted on 13 July 2018 as an item of the Economic and Financial Affairs Council.<sup>7</sup> Furthermore, the vacancy notice for the European Chief Prosecutor was consulted provisionally with Member States.

Setting up the EPPO is an ongoing process. The next EU Presidencies and the Commission will have to continue the work in view of accomplishing the legal and organizational measures to make the EPPO operational by the end of 2020. One of the main tasks is the integration of the European Prosecutors and

European Delegated Prosecutors into the new structure. This is dealt with in the following part.

### **III. EPPO's Powers – Challenges in Becoming European Prosecutor or European Delegated Prosecutor**

Institutionalizing the EPPO is a complex but worthwhile endeavor for the benefit of all EU citizens. The EPPO is an entirely new investigative body within the EU law enforcement and justice architecture. The word "EPPO" is often used as a catchword nowadays – it is synonymous with a completely new level of professional, effective, and timely investigations by a new, single criminal investigative office throughout the entire EU territory, securing the quick return of misused EU funds and coordinating financial investigations against fraudulent crimes within the Area of Freedom, Security and Justice.

This entails, however, several questions, such as: what are EPPO's powers, and what (kind of) competences must be transferred to this new entity? And: how easy is it to quit the previous way in which standard investigative proceedings against fraud and other crimes against the EU budget were being carried out in the Member States' jurisdictions and instead immediately revert to the EPPO's own investigations? In order to answer these questions one must recall the peculiarities of the EPPO.

First, as a single EU body operating across the territory of all participating Member States. EPPO's powers to investigate, prosecute, and bring to court perpetrators who have committed offences against the Union's financial interests go beyond purely national competences. The purpose is to gain a higher level of independence in a specific field affecting the EU's budget. Therefore, the EPs and EDPs will act in the interest of the EU and will neither seek nor take instructions from EU institutions or national authorities.

Second, the EPPO structure is also unique, with a central office at the EU level and a decentralized level consisting of EDPs located in the Member States, who retain their capacities as national prosecutors ("double hat").<sup>8</sup> The central level is entrusted with supervisory powers over the investigations and prosecutions at the national level. This mixed approach is designed to ensure the effectiveness and consistency of criminal investigations in the participating Member States.

Third, the EPPO will concentrate on investigations of serious crimes affecting EU funds: those over €10,000 and cross-border VAT fraud of over €10 million. It will be equipped to act quickly across borders without the need for lengthy judicial cooperation proceedings, and it will bring actions against

criminals directly before national courts. These elements should lead to more successful prosecutions and a better recovery of the losses.

We should not be too hasty, however, to think that making the EPPO operational means to immediately abandon the “national investigations”. On the contrary, investigations at the national level coordinated by the EPPO should lay the groundwork and play an important role in the EPPO’s success story. We should recall that the EPPO’s powers are based on the investigations and prosecutions carried out by European Delegated Prosecutors in individual Member States under the authority of the European Prosecutors in the central office. On top of that, national authorities will be the ones to supply the EPPO with reports that might lead to justified conclusions for misuse of EU funds, subsequently triggering criminal prosecutions. It will be also up to the national prosecutorial authorities to consider whether a specific criminal case calls for the EPPO’s competences and involves transfer of those cases to the EPPO. Conversely, the EPPO assessing the case might arrive at the decision to transfer the proceedings back to the respective national authorities.

Therefore, considering the EPPO to be simply a supranational agency is a rather too far-reaching assumption. Attributing such a capacity to the EPPO is not the right way to perceive its nature. Rather, a more holistic approach is needed, namely viewing the EPPO as an EU single investigative agency integrating national and cross border investigations into crimes affecting the EU’s financial interests under mandatory EU rules.

European Prosecutors in turn should not be seen as modern-day mavericks who one day suddenly decide to abandon their national investigative functions in favour of the EU investigations and prosecutions. After all, supranational investigations are difficult enough (consider e.g., the International Criminal Court), especially without a national network of prosecutors and law enforcement personnel in place. In fact, any such legal action without the proper support and involvement of the national authorities would quickly fail. Here is where the European Delegated Prosecutors come into play, who will help translate decisions taken by the Permanent Chambers of the EPPO into concrete investigative measures in the territories of the participating Member States. Thus, the EPPO would practically supplement and enforce the investigations and prosecutions within its competence on the territories of the Member States participating in the enhanced cooperation, contributing to better recovery of the financial losses from the EU budget.

Further, there is much more at stake in transitioning from being a national prosecutor to becoming a EP or EDP than one might think. Changing one’s mindset from that of a prosecutor at a

national prosecution office following certain hierarchy under a national legal framework to that of a EP or EDP in the new single European office under a European legal framework is the key to successfully bridging that divide. As an EP or EDP, however, there are more tools and options at the prosecutor’s disposal to decide on the next step in the investigation if the powerful tools set up in the Regulation are used properly. The prosecutors will execute that step in their day-to-day actions, either as part of the decision-making process within the Permanent Chambers of the central office (in the case of EP) or by investigating and bringing the specific EPPO cases before the courts in the territory of a participating MS under the oversight of those Chambers (in the case of EDP). This requires – as the EDP acts in his/her own country – both a significant mindset shift and major convergent behavior.

At the same time, in the rapidly changing criminal environment harshly affecting the economy, performing the function of a prosecutor in the new single European office allows for a broadening of competences to effectively deal with criminality on a broader scale. But how is this possible while also working as a full-time national prosecutor? The “hybrid path” to the European Central Prosecution Office could be taken by initially performing the function of European Delegated Prosecutor who later on could apply for a job as European Prosecutor in the central office. In addition, being a European Delegated Prosecutor while maintaining his/her existing job allows the national prosecutor to develop the necessary skills and traits needed for the gradual transition from a national office to a possible future career in the central one.

#### **IV. Conclusion**

Having the competence to open investigations in one Member State (on its own motion), which often could have a bearing on investigations taking place in another Member State, generating EDPs’ actions in different Member States in cross-border cases (when the EPPO considers evidence sufficient to trigger such investigations), and ultimately bringing the perpetrators to justice in one or more Member States (when the EPPO decides on its own terms that there is sufficient evidence to bring the case to the court) certainly make the EPPO valuable, especially if the future Office could potentially yield concrete results.

Today, it is more important than ever to properly select the most suited persons for the job of European Chief Prosecutor, European Prosecutor, and European Delegated Prosecutor to make the EPPO operational. The success of the EPPO largely depends on the future performance of its prosecutors and their new thinking on a larger, transnational scale. National investigations are no longer sufficient; a common EU approach and

uniform criminal policy is necessary to successfully fight today's transborder crime and recover the defrauded money for benefit of the EU budget. The EPPO is the future – let us build it together!

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1 O.J. L 283, 31.10.2017, 1.

2 COM(2013) 534 final, p. 9.

3 European Commission – Press Release of 8 June 2017, IP/17/1550.

4 Council of the European Union, Press Release of 20 June 2018, "EU agrees new rules for a more efficient and effective Eurojust", 359/18.

5 Cf. T. Wahl, "Commission Makes OLAF Fit as Partner of EPPO", (2018) *eucrim*, pp. 5–6; K. Bovend' Eerdt, "The Commission Proposal Amending the OLAF Regulation, (2018) *eucrim*, pp. 73–76.

6 Pursuant to Article 20(4) of Council Regulation (EU) 2017/1939, this expert group should assist the Commission in the establishment and initial administrative operation of the EPPO until the College of the EPPO takes

up its duties in accordance with Article 9(1) of the Regulation. In addition, the group shall assist the Commission in the preparation of the delegated act pursuant to Article 49(3) of the Regulation. This group is composed of representatives of the Member States participating in the EPPO.

7 Council of the European Union, Doc. 11122/18, PRESSE 41, PR CO 41, OUTCOME OF THE COUNCIL MEETING. 3631st Council meeting Economic and Financial Affairs, p. 14.

8 Cf. the article of H.H. Herrnfelde, "The EPPO's Hybrid Structure and Legal Framework" in this issue..

## The EPPO's Hybrid Structure and Legal Framework

### Issues of Implementation – a Perspective from Germany

**Dr. Hans-Holger Herrnfelde**

This article addresses several issues concerning additional measures required for a proper implementation of the EPPO Regulation from the point of view of a Member State with a federal structure. These issues include matters involving Member States' personnel working for the EPPO, clarification of the relevant national legal framework (in particular as regards the conduct of investigations), and the future cooperation between the EPPO and the national authorities of the (participating) Member States. The article concludes that the hybrid structure and current legal framework of the EPPO will create new challenges for the authorities of the Member States and may certainly stimulate further (academic) debate on the approach chosen by the EU legislator.

### I. Introductory Remarks

Notwithstanding its establishment as a "body" of the European Union with a legal personality of its own (Art. 3 of the Regulation 2017/1939 on the establishment of the European Public Prosecutor's Office, in the following: "EPPO Regulation")<sup>1</sup> and its independence from the Member States (Art. 6), the European Public Prosecutor's Office (EPPO) will largely rely on existing structures and human resources in the Member States, and the legal framework provided by the EPPO Regulation will be interwoven with the different national legal regimes.<sup>2</sup> In spite of the fact that the EPPO Regulation is directly applicable in those Member States participating in the establishment of the EPPO, the EPPO Regulation will require Member States to take additional

legislative and other measures. The following contribution intends to describe some of the issues that need to be addressed from the perspective of a Member State.

### II. Structure – Personnel

In terms of internal structure, the EPPO will consist of a Central Office, which will include the European Chief Prosecutor and two Deputies (Art. 11), as well as one so-called "European Prosecutor" for each of the participating Member States (Art. 16(1)),<sup>3</sup> who will jointly form the "College" of the EPPO (Art. 9) and carry out certain functions within the "Permanent Chambers" of the EPPO (Art. 10). The European Prosecutors' primary role in the day-to-day operations will be to supervise

the investigations carried out by and on behalf of the EPPO in their Member State of origin and to act as a liaison between the Permanent Chambers and “their” European Delegated Prosecutors (Art. 12(1) and (5)). In addition, the EPPO will also have a “decentralized level” (Art. 8(2)), consisting of so-called “European Delegated Prosecutors” (“EDPs”) in the Member States, who – save for certain exceptional circumstances (Art. 28(4)) – will be responsible for conducting the investigations and prosecutions (Art. 13(1)).

## 1. European Prosecutors

Even though there will be one European Prosecutor from each Member State contributing the necessary knowledge of the national language(s) and legal expertise from their Member State of origin, the European Prosecutors should definitely not be acting as “representatives” of “their” Member State when carrying out the functions of supervising the investigations in their own Member State (Art. 12(1)) or in their capacity as members of one of the Permanent Chambers (Art. 10). In spite of the fact that the European Prosecutors will also be members of the EPPO’s College, their position in and their relationship with “their” national authorities will be considerably different from those of the national members of Eurojust. Consequently, and unlike the EDPs, the European Prosecutors will be employed as temporary agents of the EPPO under Art. 2(a) of the Conditions of Employment (Art. 96(1)). Furthermore, again unlike the EDPs (cf. II.2. below), the EPPO Regulation does not provide that European Prosecutors remain active members of the public prosecution service or judiciary of the respective Member States during the time of their appointment as European Prosecutors. Member States will, however, need to ensure that whenever “their” European Prosecutor decides to conduct an investigation personally, he/she is, in fact, entitled to order or request investigative and other measures and has all the powers, responsibilities, and obligations of an EDP (cf. Art. 28(4)). Rather than awarding a “double-hat” status to their European Prosecutor, Member States could provide in their legislation for an “assimilation” of his/her status under national law with that of their EDPs and/or national prosecutors for situations in which the European Prosecutor decides to handle a case personally, thereby ensuring that he/she has all the powers, responsibilities, and obligations of an EDP under national law – without actually utilizing such status as national prosecutor.

In Germany, it should be possible to grant the European Prosecutor a special leave of absence status under applicable civil service legislation, which would allow the prosecutor to return to his/her position as prosecutor upon completion of his/her tenure at the EPPO. In view of Art. 28(4), it will be necessary

to consider amending the German Courts Constitution Act (*Gerichtsverfassungsgesetz* – the law regulating, *inter alia*, the structure and competences of the courts and prosecution offices), in order to specify that the European Prosecutor, when acting in accordance with Article 28(4), has the same powers, responsibilities, and obligations as the German EDPs even though the European Prosecutor will not be serving as national prosecutor during his/her tenure at the EPPO.

## 2. European Delegated Prosecutors

While the European Chief Prosecutor and the European Prosecutors are to be employed as “temporary agents” in accordance with the Staff Regulations of the European Union (Art. 96(1)), the EDPs will not be temporary agents of the Union. Instead, they will remain active members of the public prosecution service or the judiciary of their Member State (Art. 17(2)), thereby wearing a “double hat” as an EDP under the EPPO Regulation. Member States are obliged to provide such status under national law, independent of whether or not their EDPs also perform functions as national prosecutors, thus working only “part-time” for the EPPO (cf. Art. 13(3) – “dual-hat EDP”). Additionally, the EDPs will, however, be engaged as “Special Advisors” in accordance with Arts. 5, 123, and 123 of the Conditions of Employment<sup>4</sup> and will receive their salary from the EPPO’s budget – either fully or *pro rata* to the extent that they are carrying out functions for the EPPO.

Under German law, it should be possible to utilize existing civil service legislation allowing for a (temporary) secondment of civil servants to the EU, which could be on a full-time or a part-time basis. In accordance with Art. 13(2), the European Chief Prosecutor will need to reach an agreement with the Member State’s authorities on the number of EDPs as well as on the functional and territorial division of competences between the different EDPs of each Member State. In view of the fact that the courts and prosecution services in Germany are largely within the competence of the *Länder* (federal states), some initial internal discussions on this question have already taken place, but no decisions have been taken yet on the concept to be proposed for approval by the European Chief Prosecutor.

In terms of the EDPs’ functions and competences, the EPPO Regulation clearly provides for the EDPs’ responsibility (in the sense of “being in charge of”), not only for the prosecution phase (Art. 36) but also for the investigation (Arts. 26 to 34) of EPPO cases (cf. Art. 13(1)). While this may require some Member States to make major legislative adjustments in order to ensure that their EDPs actually have the status and powers necessary to exercise their role in leading the investigations in EPPO cases, the German system of criminal investigations

already provides for the prosecutor to have the leading role in conducting the investigations (and prosecutions); thus, German law should not require any adaptations in this respect. However, a slight amendment to the Courts Constitution Act might be indicated to clarify that, in case of investigations conducted by the EPPO in Germany, the competent EDP is “the prosecutor” as referred to in relevant provisions of the German Code of Criminal Procedure and not the “national” prosecutor who would otherwise be competent. Rather than relying on the “double-hat” construction, whereby the EDP is also an active member of the public prosecution service (cf. Art. 17(2)), such a provision would serve to “assimilate” the German EDPs with “national” prosecutors in terms of powers, competences, and obligations according to Art. 13(1).

### 3. Office Support Staff

While the operative part of the EPPO Regulation only contains a general obligation for the Member States to provide the EDPs with the necessary resources, recital number 113 specifies that the Member States should cover the costs of the necessary “secretarial support.” Such administrative staff members at the EDP’s office will not belong to the “staff of the EPPO” as referred to in Arts. 8 and 96; however, e.g., Art. 108(2)<sup>5</sup> will specifically also apply to such national staff members. Presumably, other provisions, such as Art. 46 sub-para. 4<sup>6</sup> and Art. 76<sup>7</sup>, will need to apply as well, even though these provisions do not specifically address persons “assisting” the EPPO at the national level. In this respect, Member States may need to address a number of primarily practical issues. A key question concerns situations where the administrative staff at the EDP’s office will not consist of dedicated staff members, working only for the EDP but of regular administrative staff of the national prosecution service, who will be providing administrative support to the EDP in addition to their regular duties related to “national cases.”

## III. Clarifying the Relevant National Legal Framework for the EPPO

The EPPO Regulation does not provide a “stand-alone” legal regime for conducting criminal investigations.<sup>8</sup> Many of its provisions specifically refer to national law. Such references (“in accordance with national law,” “in compliance with applicable national law,” or “in accordance with the law of his/her Member State”) are intended to refer specific (and sometimes not so specific) questions to the relevant provisions of national law, in particular national criminal procedural law. Also, Art. 5(3) provides more generally that national law applies “to the extent that a matter is not regulated by this Regu-

lation.” Typically, the applicable national law is the law of the Member State of the handling EDP (i.e., the EDP in charge of the investigation) – with certain exceptions, particularly in case of cross-border investigations (Art. 31(3), Art. 32). Such specific references to national law as well as the general provision of Art. 5(3) were needed in order to fill the gaps left by the Regulation in providing the necessary legal framework for the EPPO’s operational activities in investigating and prosecuting PIF offenses. While many of the specific references were added in the course of the negotiations, a rule similar to what is now Art. 5(3) had already been included in the Commission proposal for the EPPO Regulation.<sup>9</sup> In some cases, such references could, perhaps, have been avoided by amending the Regulation’s provisions so as to provide a clear legal framework by itself. These references to national law, however, should also serve to facilitate a smooth integration of the EPPO into the criminal justice systems of Member States. What needs to be considered in this context is that the EPPO will not have its own investigators but will rely instead on national police and customs authorities to carry out investigation measures and on national courts to issue the *ex-ante* judicial authorization of investigation measures (Art. 31). Also, it will be the responsibility of the national courts to exercise judicial review of the EPPO’s procedural acts (Art. 42) and – eventually – to adjudicate the case during the trial phase (Art. 36). While the references to “national law” are therefore primarily intended to refer to the “regular” criminal procedural law of the Member States, the wording of the relevant provisions of the EPPO Regulation does not exclude the possibility for Member States to set out specific provisions in their national criminal procedural law that will apply only to the investigations conducted by the EPPO.

Germany is currently in the process of identifying the need to amend, *inter alia*, the German Code on Criminal Procedure as well as the Courts Constitution Act<sup>10</sup> – even if only for the purpose of clarifying that certain provisions do not apply in case of EPPO investigations, as the matter is conclusively regulated in the EPPO Regulation itself (Art. 5(3)).

## IV. Cooperation Between the EPPO and National Authorities

### 1. Reporting Information to the EPPO

In many situations, the administrative authorities of the Member States will be the first to receive indications of potentially fraudulent conduct, in terms of EU revenue and expenses. In light of this, it will be important for an effective implementation of the EPPO Regulation by the Member States to ensure that the EPPO is provided with the necessary information in

accordance with Art. 24(1). The same applies where – for whatever reason – national judicial or law enforcement authorities already initiated their own investigation of a criminal offense for which the EPPO could exercise its competence (Art. 24(2)). As a result, Member States will need to determine the channel to be used to provide such information to the EPPO and whether “to set up a direct or centralized system” (cf. recital number 52) to this end. Depending on the relevant legislation and practice for initiating criminal investigations (role of the customs/police offices, role of the prosecutors’ offices), Member States may need to make necessary adjustments, taking into account that – while the EPPO Regulation provides for a concurrent/shared competence of the EPPO and national authorities – it also expects the national judicial and law enforcement authorities to “refrain from acting, unless urgent measures are required, until the EPPO has decided whether to conduct an investigation” (cf. recital number 58). There may be situations, however, where national law requires these authorities to first initiate their own criminal investigation before they can take certain urgent investigation measures and then to report to the EPPO in accordance with Art. 24(2) so that the EPPO may decide whether or not to exercise its right of evocation (Art. 27).

## 2. Conducting Investigations

Art. 28(1) stipulates that an EDP “may, in accordance with this Regulation and with national law, either undertake the investigation measures and other measures on his/her own or instruct the competent authorities in his/her Member State;” these authorities “shall, in accordance with national law, ensure that all instructions are followed and undertake the measures assigned to them.” The “procedures and modalities” for taking investigation measures “shall be governed by the applicable national law” (Art. 30(5)). As stated above, the EPPO Regulation entrusts the EDPs with the competence and responsibility for leading the investigations (cf. Art. 13(1)). However, the reference to “national law” in Art. 28(1) should allow Member States – within limits – a certain flexibility to take into account their national systems and procedures in terms of the roles and responsibilities of their different law enforcement authorities when conducting investigations. It will be up to the Member States to determine which of their national authorities are “competent” within the meaning of Art. 28(1), and they may be instructed by their EDPs to undertake investigation measures or be authorized to take urgent measures without specifically acting under instruction of the handling EDP (Art. 28(2)). With respect to both of these provisions of Art. 28, Member States will need to notify the EPPO of the designated authorities (Art. 117). While it would presumably not be compatible with the concept of the EPPO if Member States were to designate national prosecutor’s offices as competent authorities in accordance with Art. 28(1),

this could be different in terms of Art. 28(2) where there may be a need e.g. in urgent cases, to rely on a national prosecutor to order certain investigation measures or to obtain such orders from the competent courts.

## 3. Judicial Review

The competence (and responsibility) for exercising judicial review of “procedural acts of the EPPO” will primarily rest with the courts of the Member States “in accordance with the requirements and procedures laid down by national law” (Art. 42(1)). This provision is intended to give the national courts a competence that would otherwise rest with the CJEU in accordance with the Art. 263 TFEU. Already the Commission proposal had followed a similar approach by providing for a legal fiction according to which the EPPO, for the purpose of judicial review, was to be considered being a national authority – thereby excluding judicial recourse in accordance with Art. 263 TFEU.<sup>11</sup> This approach as well as the solution ultimately found in the current wording of Art. 42 raise a number of legal questions and some concerns.<sup>12</sup> One of the questions is, whether Member States may need to take legislative measures in order to properly implement the provision of Art. 42(1). While this provision – once again – refers to “national law,” it should not be interpreted as merely giving Member States the competence to allow their courts to exercise judicial review of the EPPO’s procedural acts in spite of the fact that EPPO is established as a Union body. Instead, when interpreted in light of Art. 47 of the Charter – and Art. 19(1) TEU – an appropriate implementation of Art. 42(1) by the Member States may require them to amend national legislation in order to ensure that national courts will, indeed, be empowered to exercise judicial review in all situations where natural or legal persons could seek judicial review by the CJEU under Art. 263 TFEU if Art. 42(1) were not intended to exclude such direct action in respect of procedural acts of the EPPO.

## V. Conclusion

Within the scope of the present article, it was only possible to sketch out some of the areas where the implementation of the EPPO Regulation may require Member States to take legislative measures in order to ensure compliance with the obligations set out in the EPPO Regulation and/or to complement its provisions with national law provisions necessary for an effective operation of the EPPO in their territory. Legislative measures may also be required to implement the Regulation’s provisions on investigation measures (Art. 30), on cross-border investigations (Art. 31), and on simplified prosecution procedures (Art. 40), to name a few. Member States may also

need to take a number of practical measures in order to provide the EDPs with an adequate working environment, including requisite arrangements for an effective information exchange with the EPPO's case management system on the one hand and the national authorities on the other. The hybrid nature of

the European Public Prosecutor's Office and its legal framework will not only create new challenges for the authorities of the Member States when implementing the EPPO Regulation but will most certainly also stimulate further academic debate on this approach chosen by the EU legislator.

\* The contribution solely reflects the author's personal views and not the official position of the Federal Ministry of Justice and Consumer Protection.  
1 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, *O.J. 2017, L 283/1*; all references to "Articles" refer to the EPPO Regulation, except where indicated otherwise.

2 Cf. for an overview of the EPPO Regulation, e.g.: P. Csonka, A. Juszczak, and E. Sason, "The Establishment of the European Public Prosecutor's Office", (2017) *eucrim*, 125; H. H. Herrnfeld, "The Draft Regulation on the Establishment of the European Public Prosecutor's Office – Issues of Balance Between the Prosecution and the Defence", in: C. Brière/A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law*, Oxford 2018, p. 383; A. Met-Domestici, "The Hybrid Architecture of the EPPO", (2017) *eucrim*, 143.

3 The EPPO Regulation uses the term "Member State(s)" to refer to those Member States participating in the enhanced cooperation on the establishment of the EPPO (cf. the definition in Art. 2(1)) and "Member States of the European Union" when referring to all Member States (cf., e.g., Art. 58(3) (c) and (d)).

4 Council Regulation Nos. 31 (EEC), 11 (EAEC), laying down the Staff Regulations of Officials and the Conditions of Employment of other Servants, OJ 45, 14.6.1962, p. 1385/62 with subsequent amendments.

5 According to Art. 108(2), any other person who participates or assists in carrying out the functions of the EPPO at the national level shall be bound by an obligation of confidentiality as provided for under applicable national law.

6 Referring to the necessary rules on access to the case management system.

7 Stipulating the access to operational personal data processed by the EPPO.

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8 Cf. P. Csonka, A. Juszczak, and E. Sason, (2017) *eucrim*, *op. cit.* (n. 2), 129.

9 Cf. Art.11(3) of the original Commission proposal of 17 July 2013, COM(2013) 534 final.

10 Cf. section I.1 above.

11 Art. 36 of COM(2013) 534 final.

12 W. van Ballegooij, "European Public Prosecutor's Office – A View on the State of Play and Perspectives from the European Parliament", in: W. Geelhoed/L. H. Erkelens/A.W.H. Meij (eds.), *Shifting Perspectives on the European Public Prosecutor's Office*, The Hague 2018, pp. 27, 35; Martin Böse, Die Europäische Staatsanwaltschaft "als" nationale Strafverfolgungsbehörde, *Juristenzeitung* (JZ) 2017, 82; H.H. Herrnfeld, *op. cit.* (n. 2), p. 407; V. Mitsilegas/F. Giuffrida, "The European Public Prosecutor's Office and Human Rights", in: W. Geelhoed/L. H. Erkelens/A.W.H. Meij (eds.), *Shifting Perspectives on the European Public Prosecutor's Office*, The Hague 2018, pp. 59, 78.

## La naissance d'un Parquet européen – les enjeux de sa mise en œuvre en France

Pauline Dubarry et Emmanuelle Wachenheim

Since the publication of the *Corpus Juris* – the fundamental study on the protection of the EU's financial interests, carried out under the supervision of Professor *Mireille Delmas-Mary* – the French authorities have considered the establishment of a European Public Prosecutor to be a political goal of utmost importance. The French experts actively participated in the four-year negotiation process and contributed to achieving a balanced and ambitious Regulation. A new chapter was heralded by the adoption of Regulation 2017/1939 on 12 October 2017: the 22 participating Member States must now prepare and adapt their national legal systems and legislation to the establishment of the European Public Prosecutor's Office. At this early stage of its implementation, it appears relevant to concentrate on two main aspects of the process. First, specific statutory rules for the European prosecutor and, above all, for the European delegated prosecutors must be established. Indeed, there is no precedent

in the national legal framework of a prosecutor working abroad or in a European agency that enables him/her to exercise all his/her national powers. Secondly, adjustments are necessary as regards substantive criminal law in view of the transposition of the PIF Directive, on the one hand, and procedural criminal law in view of integrating the EPPO, on the other. Aside from discussing the strictly legal and administrative implementation of the Regulation, this article argues that the national practitioners have to be prepared for this new era in the construction of an effective area of European justice.

## I. Introduction

La relecture de l'exposé des motifs du *Corpus Juris*<sup>1</sup>, critique quant à l'efficacité des mécanismes classiques d'assimilation, de coopération et d'harmonisation, pris isolément les uns des autres, permet de mesurer le chemin parcouru depuis 1997. Les 18 articles du dispositif du *Corpus Juris* portant dispositions pénales pour la protection des intérêts financiers de l'Union européenne relatifs au Ministère public européen (MPE) sont devenus les 121 considérants et 120 articles du règlement 2017/1939 du Conseil du 12 octobre 2017 mettant en œuvre une coopération renforcée concernant la création du Parquet européen. Ce texte, d'une certaine complexité en apparence, est ainsi le fruit de plus de 20 années de réflexions et de travaux, auxquels les autorités françaises ont activement participé.

Le projet de Constitution européenne prévoyait l'établissement d'un Parquet européen en son article 274. Les défenseurs de l'espace judiciaire européen sont parvenus à maintenir une disposition équivalente à l'article 86 du nouveau Traité sur le fonctionnement de l'Union européenne (TFUE). La Commission européenne a présenté la proposition de règlement le 12 juillet 2013, soit moins de trois ans après l'entrée en vigueur du Traité de Lisbonne.

Avant même la parution de la présentation de la Commission, la France, associée aux travaux préliminaires, a défendu aux côtés de l'Allemagne sa vision du Parquet européen, lequel devait, pour être efficace, reposer sur un fonctionnement collégial assurant une représentation de chaque système national. Certes, grâce à l'émergence d'une culture judiciaire partagée, dans le respect des différents systèmes et traditions juridiques des Etats membres, l'espace judiciaire européen est devenu une réalité tangible et nos autorités judiciaires respectives se comprennent mieux. Pour autant, les différences persistent et il a été estimé qu'un procureur européen, seul, ne peut pas comprendre toutes les subtilités des systèmes nationaux. Il n'aurait dès lors su déterminer, à partir d'une expérience opérationnelle forcément nationale avant tout, la politique pénale du Parquet européen. C'est pourquoi la France a défendu ce modèle collégial et la préservation d'un lien fonctionnel matérialisé par la surveillance que le procureur européen national assurera des enquêtes, aux côtés de la chambre permanente chargée de la supervision.

Tout au long des 4 années riches en rebondissements qu'ont duré les négociations, les autorités françaises ont défendu une vision à la fois ambitieuse et réaliste du Parquet européen. Elles ont constamment œuvré à la recherche de compromis, aux côtés des autres Etats membres, des présidences successives et de la Commission. Consciente que l'unanimité requise par le traité était inatteignable, elle a souhaité la mise en œuvre d'une coopération renforcée, appelant de ses vœux la participation du plus grand nombre d'Etats membres possibles et avec l'espérance que les quelques Etats réticents les rejoignent progressivement. L'annonce récente de la participation des Pays-Bas, Etat fondateur, et de Malte, portant à 22 le nombre d'Etats participant à la coopération renforcée est la preuve de la grande réussite que constitue déjà le Parquet européen. Il convient désormais de donner vie à cette réussite politique, aussi bien à Luxembourg, ville du siège du Parquet européen, que dans chaque Etat membre.

Le compte à rebours a commencé et conduit la France, comme les autres Etats membres, à mettre en œuvre les mesures d'adaptation nécessaires à la mise en place du Parquet européen, sur les plans statutaires (II) et procéduraux (III).

## II. Un statut résolument européen pour conduire des enquêtes au plan national

Les procureurs européens et procureurs européens délégués français devront bénéficier d'un statut qui soit compatible tant avec le règlement européen qu'avec leur statut de magistrat de l'ordre judiciaire français et l'organisation judiciaire.

Le règlement européen donne à cet égard des lignes directrices très claires s'agissant du statut, les ancrant dans le système de l'Union européenne : ainsi, ils relèveront du statut applicable aux fonctionnaires européens (article 96 1°), en tant qu'agents temporaires pour le procureur européen et conseillers spéciaux pour les procureurs européens délégués, ne pourront recevoir aucun ordre de leurs Etats membres ni des instances de l'Union européenne (article 6) et seront rémunérés par l'Union européenne. Sans revenir sur les détails du règlement, il peut sommairement être résumé que leur nomination et éventuelle révocation relèvent des institutions européennes pour les procureurs européens et, pour ce qui concerne leurs fonctions

europeennes, du collège du Parquet européen pour les procureurs européens délégués, sans exclure dans le cadre de la phase nationale de proposition des candidats le rôle dévolu au Conseil supérieur de la magistrature.

Mais ce ne sont finalement pas ces dispositions qui donnent son caractère inédit à la réflexion sur le statut des procureurs et procureurs européens délégués. Des magistrats français sont ainsi en permanence en situation de détachement ou de mise à disposition, ce qui les amène à travailler pour des institutions bien différentes (autorités administratives indépendantes, autres ministères, institutions européennes...).

L'originalité de la réflexion sur le statut des membres du Parquet européen ne tient finalement pas tant au rattachement indiscutable qu'ils auront avec le Parquet européen, qu'aux qualités nationales qu'ils devront conserver pour exercer leurs fonctions. Ainsi, les procureurs européens délégués doivent être « investis des mêmes pouvoirs que les procureurs nationaux dans le domaine des enquêtes, des poursuites et de la mise en état des affaires » « disposent notamment du pouvoir de présenter des arguments à l'audience, de prendre part à l'obtention des moyens de preuve et d'exercer les voies de recours existantes conformément au droit national » (article 13 du règlement 2017/1939).

Les procureurs européens, dont le rôle est de surveiller l'enquête au nom de la chambre permanente qui en assure la supervision, devront également être en mesure, dans des circonstances définies aux articles 12 et 28, de conduire l'enquête avec la chambre permanente et le procureur européen délégué.

À ces réflexions statutaires originales vont s'ajouter des préoccupations bien concrètes : combien de procureurs européens faudrait-il nommer ? Pour quelle implantation géographique et selon quelle répartition ? Comment représenter le Parquet européen en appel et en cassation ? Des réponses à ces questions découleront d'autres interrogations : quel équilibre entre indépendance et intégration aux structures existantes ? Quelle compétence pour les juridictions du siège ?

Les travaux du groupe d'experts, animé par la Commission européenne, vont s'avérer enrichissants pour nourrir la réflexion française menée par le ministère de la justice, en lien avec les autres ministères intéressés.

### **III. Une lecture comparée du règlement avec la législation pénale nationale**

L'échéance de l'automne 2020 est précédée de plus d'une année par celle du 6 juillet 2019, date à laquelle devra être trans-

posée la directive (UE) 2017/1371 du 5 juillet 2017 relative à la lutte contre la fraude portant atteinte aux intérêts financiers de l'Union au moyen du droit pénal, socle matériel du Parquet européen.

Afin de donner vie au Parquet européen en France, un double travail de vérification de compatibilité est ainsi mené :

- Une compatibilité de fond, quant aux infractions relevant du champ de compétence du Parquet européen,
- Une compatibilité de procédure, afin d'assurer une intégration efficiente de ce nouvel acteur dans notre paysage judiciaire.

A ce titre, plusieurs éléments sont expertisés.

Les prérogatives du procureur européen délégué tout d'abord, détaillées à l'article 30 du règlement, à tout le moins dans les cas où l'infraction qui fait l'objet de l'enquête est passible d'une peine maximale d'au moins quatre années d'emprisonnement et ce avec des distinctions qui doivent permettre de distinguer :

- celles devant être obligatoirement à sa disposition dans tous les cas, ce qui est prévu pour les mesures de perquisitions et mesures conservatoires (a), la production de tout objet ou document (b) et les mesures de gel des instruments ou des produits du crime (d),
- celles obligatoires mais pouvant être assorties de conditions particulières :
  - toute condition pour les mesures de production de données informatiques (c), d'interception de communications électroniques (e) et de repérage et traçage d'objet (f),
  - restrictions applicables à des catégories de personnes ou de professionnels juridiquement tenus à une obligation de confidentialité,
  - des conditions pouvant être limitées à certaines infractions graves, sous réserve d'une notification au Parquet européen, pour les mesures d'interception de communications électroniques (e) et de repérage et traçage d'objet (f).

Mais la procédure pénale ne se limitant évidemment pas aux mesures d'enquête, la mise en application du Parquet européen invite à une lecture comparée du règlement avec la législation nationale : droit des suspects et personnes poursuivies, relations avec les services enquêteurs, articulation avec les règles de procédures simplifiées ...

A titre d'exemple, un enjeu concret sera de déterminer la ou les autorités compétentes en matière d'échanges d'information avec le Parquet européen : transmission des informations sur les infractions à l'égard desquelles il pourrait exercer sa compétence, autorité saisie en cas de « conflit positif de compétence », ...

#### IV. Conclusions

Au-delà de ces préoccupations très juridiques, il peut être anticipé que la mise en œuvre du Parquet européen ne sera pas que légale : la culture européenne des acteurs, les transferts fluides de données entre applicatifs informatiques, la coopération naturelle entre autorités sont autant de clés de succès du Parquet européen. Les deux années à venir vont également permettre de s'y préparer.



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Enfin, il peut être noté que ces travaux s'inscrivent, pour ce qui concerne la France, dans la continuité de ceux menés depuis plusieurs années s'agissant de la spécialisation de certains contentieux. En particulier, s'agissant de la matière financière, la France connaît d'ores et déjà trois niveaux, distincts des parquets territorialement compétents :

- deux pôles économiques et financiers ;
- huit juridictions inter-régionales spécialisées, compétentes en matière de lutte contre la criminalité organisée et la délinquance financière dans des affaires présentant une grande complexité ;
- le procureur de la République financier, avec une compétence nationale spécialisée pour les infractions portant atteinte à la probité, aux finances publiques et au bon fonctionnement des marchés financiers.

C'est dans ce cadre que le Parquet européen trouvera sa juste place, pour mener les enquêtes et engager les poursuites relatives aux infractions portant atteinte aux intérêts financiers de l'Union les plus graves.

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1 Etude réalisée, à la demande du Parlement européen et sous la direction de Mireille Delmas-Marty, par des chercheurs des Associations des Juristes européens pour la Protection des Intérêts financiers de la Communauté sous l'égide de la Direction générale du Contrôle financier de la Commission européenne.

## The EPPO Implementation

### A Perspective from Spain

David Vilas Álvarez\*

Spain has been especially supportive of the creation of the EPPO after its mention in the Treaty of Lisbon – and even before that. Notwithstanding, Spain negotiated the implementation of the EPPO knowing that this would necessitate – partly fundamental – structural changes of its national system of criminal procedure. This system is currently characterised by giving an investigative judge the leading role in criminal investigations; prosecutors are actually one of several parties in the criminal proceedings. In contrast, the EPPO Regulation is based on the more conventional system common all around Europe, consisting in giving the said leading role to prosecutors. After outlining the main structure of the Spanish system of criminal investigation, the article deals with the major challenges that Spain has to meet in order to align its national system to the model imposed by the Regulation regarding cases in which the European Public Prosecutor will assume the investigation. Spain may opt for a total or partial renewal of the investigative structure. The article further explains which other pending issues must be solved in terms of legislation and practice in order to make the EPPO operational in Spain.

## I. Implementation Problems in View of the Spanish Structure of Criminal Procedure

### 1. Structural axioms

Spain was one of the countries that supported the establishment of the European Public Prosecutor's Office (EPPO) at an early stage, for a long time, and with great enthusiasm. Mere weeks after the Treaty of Lisbon, in January 2008, the Spanish General Prosecutor's Office hosted a seminar about the future EPPO. The will for the establishment of this new EU body was one of the clear messages constantly sent by Spain during the negotiations within the Council, particularly when unanimity for adoption of the Regulation was out of reach. In December 2016 and afterwards, during the launch of the enhanced cooperation process, France and Spain spearheaded the final rush to have this new institution.

The result constitutes a big challenge from a European perspective. Perhaps not because of the powers conferred to this new European Office, but because of the simple fact of having a European body so inextricably linked to national criminal jurisdiction.<sup>1</sup> Combining this new European body with national criminal systems could turn out difficult.

Therefore, from a national perspective, the implementation of the EPPO remains a big challenge – in particular, for those Member States that do not give full investigative competences to their prosecutors. Here, an investigative judge plays the central role at the pre-trial stage of the criminal proceedings. This includes beside Spain, Slovenia and partially also Belgium and France.

In order to determine how difficult this task of implementing the EPPO Regulation can be, a brief explanation of the Spanish legal system of criminal procedure is necessary, particularly taking into account the parties that may appear during the proceedings. In Spain, the *investigative judge* leads the investigation.<sup>2</sup> He opens the judicial proceedings and adopts all necessary investigative measures, such as the questioning of the suspect whose rights he takes care of.<sup>3</sup>

Some of the evidence obtained by the investigative judge can be used directly during the trial, in particular if it is not possible to repeat or present the evidence before the Court, i.e., the investigative judge's role allows for some pieces of information with evidentiary value to be presented during the trial phase. In addition, the investigative judge adopts personal and so-called "patrimonial precautionary measures" affecting the suspect (such as ordering pre-trial detention or seizing assets, respectively).<sup>4</sup> He/she also decides whether there is enough evidence to prosecute the case by means of the indictment pre-

sented by the accusatory parties (see below). Lastly, the investigative judge may accept or reject the demands or suggestions of all parties, including solving remedies or legal challenges, (unless another superior instance is competent for)<sup>5</sup>.

What is the role of the Spanish prosecutor? According to statutory law,<sup>6</sup> on the one hand, *prosecutors* can open pre-judicial investigations in order to obtain, if possible, enough evidence to open a judicial case. During this "preliminary investigation," they can execute or order any investigative measure that the Spanish Criminal Procedural Code allows them to, with the exception of personal and patrimonial precautionary measures or other measures affecting fundamental rights: as a result, they cannot, for instance, order pre-trial detention, searches, wiretapping, or compulsory measures to obtain communication records. During the judicial investigation, however, they are involved in the criminal proceedings by demanding the adoption of precautionary or investigative measures to be taken by the judge, always with the respective goal of ensuring the effects or determining the facts and the criminal conduct that would form the subject of the trial.

The role of the prosecutors is clarified in a decision of the Spanish Supreme Court of 11 January 2017. It called the Spanish investigative system "*heterodox*," i.e. something that is different from an acknowledged standard.<sup>7</sup> The main issue of the case was the evidentiary power of the investigative measures adopted by prosecutors before the initiation of the criminal proceedings. The Supreme Court concludes that they cannot acquire evidentiary value before the trial court, because this value legally and ordinarily relies on their jurisdictional origin in the Spanish system. However, as an exception, the investigative measures adopted by the prosecutor can become "full evidence" if they can be repeated during the trial.

Spanish criminal proceedings also know *other accusatory parties*. First, victims can lodge civil claims in criminal proceedings. This so-called and quite common "*acusación particular*" (particular accusation) is designed to do full justice to the victim. It is worth mentioning that this accusation can even be initiated by a lawyer on behalf of a public administration damaged by the alleged crime. It applies in particular in tax or funding-related crimes, and is therefore relevant in PIF cases if (also) a national administration suffered the damage. Second, yet another party to the proceedings can be any citizen or legal entity, even one not having been offended or having suffered any damage by virtue of the alleged crime, by means of the "*acusación popular*" (popular accusation).<sup>8</sup> It stems from the Spanish Constitution, whose Art. 125 recognises this right for all citizens.<sup>9</sup> This institution does not exist in similar European systems, allows participation in the proceedings from the very beginning, and is not subject to many limitations.<sup>10</sup>

## 2. Challenges for the implementation of the EPPO Regulation in Spain

This short description indicates the reasons why the implementation of the EPPO Regulation in Spain calls for a structural change of the legal system.

Art. 13 of Regulation (EU) 2017/1939 states that “the European Delegated Prosecutors … shall have the same powers as national prosecutors in respect of investigations, prosecutions and bringing cases to judgment…” Along the same lines, Art. 30(4) adds: “The European Delegated Prosecutors shall be entitled to request or to order any other measures in their Member State that are available to prosecutors under national law in similar national cases…”

Thus, the EPPO Regulation is based on the idea of prosecutors who have (full) investigative powers in an extended prosecutorial model that can be found in most countries of the EU. They should not be limited to being a subordinated party to the decisions of an investigative judge; they should be allowed to reject what the prosecutor asks for, not only with regard to the defence of rights of other parties, but also as regards how to orientate the whole investigation. Therefore, the outlined “heterodox” system in Spain does not correspond to this level of activity and responsibility.

However, the function of the Spanish Delegated Prosecutor cannot be brought to the same level as an investigative judge (acting as such). Spanish judges cannot receive instructions because of the full independence of their functions.<sup>11</sup> This does not correspond to the EPPO Regulation, which actually indicates that European (Delegated) Prosecutors may indeed receive instructions.<sup>12</sup>

As a result, the Spanish choice to support the establishment of the EPPO is delicate. During the negotiations, the Spanish government always knew that the EPPO would imply structural changes. However, it is not possible to deny that this support is closely connected to the longstanding aim of some practitioners and stakeholders interested in modifying the criminal procedural system, i.e. to bring the criminal investigation to the Spanish prosecutors – a discussion that is also portrayed in the following section.

## 3. Possible solutions ahead

There are two ways to solve the problems posed for the implementation of the EPPO in view of the structural problems mentioned above. Spain can either chose for a structural change of its procedure or for a tailor made “PIF” approach.

### a) Structural change of Spanish criminal investigation procedure

One – radical – solution would be a total change in the investigative system in Spain. This would mean providing to prosecutors, under the control of a judge, full investigative powers. This would also mean that the provision of guarantees in order to defend the rights of the suspect must be provided for. These guarantees should at least consist in previous judicial authorisations to execute investigative measures affecting fundamental rights and put all necessary remedies at the disposal of the suspects when they consider their rights to have been disrespected. If this solution were to be followed, the pending procedural issues not resolved by the Regulation<sup>13</sup> would be reduced. If the provision of the investigative role to prosecutors were to become a reality, Spain would start from a position quite similar to the majority of its European partners.

In fact, this potential, global change has been the subject of discussion for years in Spain. The current Criminal Procedural Code dates back to 1882.<sup>14</sup> Several proposals for amendments mentioned the aim to replace the investigative judge and equip the Spanish prosecutors with full investigative powers. Even the original text, in 1882, mentions in its preamble a “certain regret” for the impossibility of achieving the desired, initial and not satisfied goal of providing the investigation to prosecutors, because that would be too far reaching.

In 2011, during the late phase of the President Zapatero’s government, a proposal for a new Criminal Procedural Code presented a comprehensive text providing investigative functions to the prosecutors. In fact, this has already been the solution for criminal proceedings involving children since 2000.<sup>15</sup> Negotiations on the legislative proposal did not start, however, because the legislative term was almost finished. The publication of the text, nevertheless, maintained discussions, and a reform in this direction was an ongoing concern of future governments. Since 2012, the two consecutive Ministers of Justice in President Rajoy’s government have also expressed their will to shift the powers in the criminal investigations from the judges to the prosecutors. The new government of President Sánchez recently also advocated the same approach,<sup>16</sup> with the aim of modifying the Criminal Procedural Code before the end of his parliamentary term in 2020.

### b) Tailor-made procedure for PIF investigations

The second possible path would consist in regulating a especially devoted procedure for PIF cases as far as the competence of the EPPO is opened. Tentatively, a new Title VIII in the Second Book of Spain’s Criminal Procedural Code could

address the concerns. In theory, this set of rules would entail a tailor-made solution only for PIF crimes, maintaining the existing system for all other crimes outside PIF. Therefore, the law should generally express that a European Delegated Prosecutor may exercise all powers conferred to an investigative judge for PIF crimes, with the exception of those powers linked to the suspect's protection of fundamental rights, a judge continues to be responsible for. It could provide a solution for remedies or appeals at the same time (establishing a system similar to the current one, admitting legal challenges against any judicial decision or limiting this possibility for some decisions or some procedural steps). If this specific approach were to be set up, it would offer a good opportunity to clarify some activities on the part of the prosecutors not fully determined by the Regulation. The following section III will analyse, for example, how to address in practice the transferal of files (Art. 34 of the EPPO Regulation) or the issue of a discrepancy or conflict of competence (Art. 25(6) of the EPPO Regulation).

Aside from any modification of the Spanish Criminal Procedural Act, a tailor-made solution would necessitate amendments to the “*Ley Orgánica del Poder Judicial*” (law on judiciary power). This modification should provide to a court the competence to control the prosecutorial activity, by authorising some of the measures, in particular those affecting fundamental rights (such as house searches, e-evidence measures, etc.), and by addressing the appeals presented against such decisions. At the same time, this modification could introduce some provisions in order to accommodate the possibility of a judge becoming European (Delegated) Prosecutor.

In addition, a change on the statutory law for prosecutors should also be put in place. This change should regulate how to transition from the status of national prosecutor to the status of European Prosecutor and European Delegated Prosecutor or how to accommodate a double-hat exercise of competences (even if this opportunity is not feasible in Spain if there is no full change to its legal system).<sup>17</sup>

## II. Individual Pending Legislative Issues

Beyond the compatibility between the EPPO framework and the Spanish criminal investigative system, there are other possible interferences between the Regulation and the national systems. These issues necessitate a thorough reflection about the relationship with Spanish national law and their implementation. The issues particularly emerges from Chapter V of Regulation 2017/1939, which is devoted to rules of proceedings, investigation measures, and bringing the case before a court (Arts. 26 and following). The following can

only briefly outline some of pending issues and the possible way forward for the Spanish legislator.

### 1. Conflicts of competence

According to Art. 25(6) of the EPPO Regulation the national authorities competent to decide on the attribution of competences concerning prosecution at national level shall decide who is to be competent for the investigation of the case if there is disagreement between the EPPO and the national prosecution authorities over the question of whether the criminal conduct falls within the scope of Art. 22(2), or (3) or Art. 25(2) or (3). Therefore, Member States must specify the national authority that will decide on the attribution of competence. In Spain, the superior courts decide on any conflicts of competence between investigative judges. This may be the provincial court if the investigative judges belong to the same province or the Supreme Court if they belong to different provinces. If the EPPO shares its investigative powers with investigative judges, depending on the different crimes at issue, the mentioned rule – decision by superior court – could be applied in an analogous way. As a result, the Spanish Supreme Court would decide in such cases. Notwithstanding, specific rules for solving conflicts of competences between the EPPO and the investigative Spanish judges should be provided for by law.

### 2. Right of evocation

A close relationship between the EPPO and national authorities comes to the fore if the EPPO exercises its right of evocation (Art. 27). The Regulation provides for a certain time frame (regularly 5 days) within which the EPPO must inform the national authorities whether it assumes a case or not. Art. 27 further specifies some obligations for both the EPPO and the national authorities as to the consultation procedure, the possibility of taking urgent and provisional measures, submission of files, the continuation of the case, etc. It would be positive, from the perspective of the involved national authorities, that some rules are provided for in order to determine how to act in the context of the exercise of the right of evocation by EPPO.

### 3. Investigative measures

Art. 30 of the EPPO Regulation ensures that each European Delegated Prosecutor has at his/her disposal a set of investigative measures, “at least in cases where the offence subject to the investigation is punishable by a maximum penalty of at least 4 years of imprisonment.” Although Spanish criminal procedure law has at its disposal all of the listed investiga-

tive tools, a limitation can occur in view of “tracking and tracing an object by technical means, including controlled deliveries of goods” (Art. 30(1) lit. f)). Spanish law foresees the investigative measure of controlled deliveries of goods only for certain specific crimes, i.e. crimes that imply the delivery of goods, including smuggling. Therefore, Spanish law may not cover all PIF crimes as defined in the PIF Directive (EU) 2017/1371. As a consequence, this investigative measures is not at the European Prosecutor’s disposal for certain crimes that the Office must prosecute, e.g. forgery of documents or corruption. Nevertheless, the Spanish legal situation is in line with the Regulation since Art. 30(3) allows Member States to subject the investigation measures set out in points (c), (e) and (f) of paragraph 1 of this Article to further conditions, including limitations, provided for in the applicable national law. In particular, Member States may limit the application of points (e) and (f) of paragraph 1 of this Article to specific serious offences. Spain must notify, however, such limitation to the EPPO, if it maintains the current legal situation (Art. 30(3) in conjunction with Art. 117 of the EPPO Regulation

#### 4. Cross-border investigations.

The EPPO Regulation intended to introduce a new system of cross-border cooperation, since the new body enjoys the status of a single office with competences in all participating EU Member States. The underlying – rather complex – provision of Art. 31 of the EPPO Regulation differentiates between the “handling European Delegated Prosecutor” and the “assisting European Delegated Prosecutor”.<sup>18</sup> In the context of this section, it is sufficient to mention that, according to this article, a system should be avoided in which two judicial authorisations would be necessary to execute an investigative measure. If judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State. However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor does, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment.

In practice, it is therefore possible that a Spanish Delegated Prosecutor wishing to execute a measure and its execution abroad (according the system described) may need judicial authorisation from a Spanish judge – not from a judge where the measure will be executed. In these cases, it will be necessary to give to the Spanish judge clear jurisdiction to adopt this decision, even if it is to be executed out of the territory of Spain.

#### 5. Dismissal of a case

Art. 39 of the EPPO Regulation lists certain reasons that allow the EPPO to dismiss a case. Spanish law differs from this approach since it provides for a general clause for the dismissal of a criminal case. Arts. 637 and 641 of the Spanish Criminal Procedural Code differentiate between definitive dismissals and provisional ones. The first alternative for dismissal applies if there is no rational ground for considering the criminal facts to have been executed, if the facts do not establish a crime, or if the suspect is exempt from criminal responsibility. The second alternative for dismissal applies if it is not duly justified the execution of the criminal conduct or there are no grounds to accuse one or several persons. Against this background, amendments in Spanish law are provoked in order to align it to the European provisions, because the specific ground for closing a case according to the EPPO Regulation does not match with a system that is not based on a list of possible grounds as our current one.

#### 6. Other accusatory parties

As mentioned under I., one of the characteristics of the Spanish legal system is the admittance of public administrations as a party to the criminal proceedings since public bodies can be considered a victim of the crime, in particular in case of funding-related offences. The Spanish State structure including autonomous regions and local communities entails that various public administrations can be considered a potential accusatory party. Another peculiarity of this scheme is that the public entities have own specialised lawyers who represent them in the course of the criminal proceedings. They have manifold powers that do not essentially distinguish them from prosecutors. They are able, for instance, to ask for specific measures; disagree on the prosecutor’s position (e.g. regarding the facts, the indictment, the penalty requested, etc.); challenge the investigative judge’s decisions; disagree on any agreement with the suspect; be present at the criminal trial. Against this background, Spain has to enact standards on how the public entities and their lawyers can intervene during the investigative phase of EPPO proceedings and which position can be recognised.

### III. Organisational Issues

Beyond the mentioned general structural and legislative challenges posed by the EPPO Regulation for Spain, yet another challenge derives from an organisational point of view. The question is on how to implement the work of the European Delegated Prosecutors of Spain into our system. The Regulation sets out the main cornerstones in Art. 13(2) and (3), and 96:

- There should be a minimum of two European Delegated Prosecutors (EDPs) in each participating Member State;
- The exact number of EDPs is to be decided by the Chief Prosecutor after consultation and agreement with national authorities;
- A European Prosecutor may act exclusively as such or may combine his/her function with that of a national prosecutor, so he/she could work on the basis of a full-time or part-time contract;
- The competent national authorities shall provide the European Delegated Prosecutors with the resources and equipment necessary to exercise their functions under the Regulation; they must ensure that they are fully integrated into their national prosecution services;

These parameters imply room for organising the Office at the national level. In particular, in large Member States such as Spain, reflections must be made on the design and status of EDPs. I consider two possible solutions:

First, a decentralised solution where the EDPs are installed in different places in Spain. A similar model is currently followed with certain specialized prosecutions services, such as the Spanish anti-corruption prosecution services. This would imply that around fifteen European Delegated Prosecutors would be established in different regions of Spain. In turn, different judges of different provinces should be competent to control the activity of the EDPs, e.g. to authorise certain investigative measures.

Second, a centralised solution, in which only one central office with few EDPs is established. These EDPs – on the basis of current statistical estimates<sup>19</sup> between two and four – would handle all cases in Spain. They would be complemented by one judge controlling their investigations. and few court chambers where the trial takes place. All might be centered around the “*Audiencia Nacional*,” which already has a central competence for some complex or spread crimes in Spain. This centralised approach has several advantages. The Spanish EDPs could be appointed with a single hat and they would exercise only one function. A swifter and more specialized management of cases and cross-border cooperation can be expected. A disadvantage can be that evidentiary material must be gathered across the country and be brought to the center, e.g. Madrid, where the final trial will take place.

#### IV. Outlook

This article has shown that Spain must overcome numerous challenges in order to make the EPPO operational in its country. Accordingly, Spain’s Ministry of Justice is working on a number of different avenues to address all these concerns.

However, the political situation – a government with limited support in the parliament – does not help facilitate in-depth legislative changes.

Notwithstanding, the Ministry of Justice of Spain is currently working on the following:

- National rules for the appointment of the European Prosecutors and European Delegated Prosecutors in the attempt to provide, in a transparent way, the most highly qualified candidates to the panel of the EPPO;
- Possible amendments to the statutory law concerning prosecutors, in particular to facilitate the transition from their previous status to the new one as members of a European body and to facilitate their return;
- In-depth study on the implication of the EPPO for the Spanish criminal law system, mandating a general commission of codification as an advisory body of the Ministry of Justice;
- Preparation of a text for a new Criminal Procedure Code or, alternatively, a tailor-made solution along the lines described above.

It is envisaged that all the pending implementation issues are solved before the initiation of the EPPO’s activity foreseen in 2020.

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\* This article is based on an author’s presentation held at the conference organised by the Fondazione Basso in Rome on 27 May 2018. The presentation style was maintained. The article further develops and updates the presented issues and possible solutions that the implementation of the EPPO challenges in Spain.

1 For a comprehensive analysis of the finally adopted EPPO Regulation and the tasks to be addressed for its implementation, see L. Bachmaier Winter (ed.), *The European Public Prosecutor’s Office – The Challenges Ahead*, Springer, Cham 2018; also in Spanish, *La Fiscalía Europea*, Marcial Pons, Madrid-Barcelona 2018.

2 Art. 87 of the Spanish Organic Law on the Judiciary Power (*Ley Orgánica 6/1985, de 1 de Julio, del Poder Judicial*) and Art. 306 of the Spanish Criminal Procedural Act (*Ley de Enjuiciamiento Criminal*). For an overview of the Spanish criminal justice system, see L. Bachmaier Winter and A. del Moral García, *Criminal Law in Spain*, Wolters Kluwer, Alphen aan den Rijn, 2012.

3 The constitutional role of judges imposes their activity as defending the rights of any suspect. In this context, Art. 24(1) of Spanish Constitution states that “Every person has the right to obtain the effective protection of the Judges and the Courts in the exercise of his or her legitimate rights

and interests, and in no case may he go undefended"; Art. 117 adds the following in paragraphs 3 and 4 "the exercise of judicial authority in any kind of action, both in passing judgment and having judgments executed, lies exclusively within the competence of the Courts and Tribunals established by the law, in accordance with the rules of jurisdiction and procedure which may be established therein." Out of these functions (which do not include investigating crimes), judges, courts, and tribunals are able to exercise other functions when the law so decides, with the goal of providing guarantees of some rights: "the Courts and Tribunals shall exercise only the powers indicated in the foregoing clause and those which are expressly allocated to them by law as a guarantee of some right".

4 Precautionary measures (or provisional measures) are those measures adopted in order to ensure the final result of a proceeding. Patrimonial measures adopted by an investigative judge come from two sources: first, the final decision in Spanish criminal proceedings determines both the result from a criminal law perspective of the facts (e.g. number of years of imprisonment) and the result from a civil law perspective of the conviction. Therefore, the civil liability linked to the damages suffered by the victim of the crime is also established. In this case, the role of patrimonial measures is preventive and exactly the same as of those measures adopted during a civil proceeding. Second, patrimonial measures may also be adopted in order to ensure the availability of the suspect during the trial and avoid and replace personal measures as pre-trial detention. In any case, it is for the judge to adopt them.

5 As a general rule, every decision of an investigative judge can be remedied, either by a remedy to be solved by himself/ herself (*recurso de reforma*), or by a remedy to be solved by the superior court (*recurso de apelación*).

6 Art. 5 of the Organic Statute of the Prosecution Service (*Estatuto Orgánico del Ministerio Fiscal*). Art. 773 of the Spanish Criminal Procedural Code (*Ley de Enjuiciamiento Criminal*) also states something similar about the opening of the summary judicial proceedings, which is the most common court action in practice.

7 This description does not deny the existence of a solid basis for such a system. Suffice to say that, in any investigation, the investigative judge is provided with particular grounds of independence that a simple prosecutorial system could put at stake. For a regular case, it is probably not necessary to provide such an additional safeguard for the independence and impartiality of the investigating authority. In sensitive cases, however,

this can help to find the truth and the justice objective of a democratic society.

8 By instance, in a PIF crime in Spain, In this context, we can imagine, for instance, a PIF crime case where, beyond the public prosecutor, the lawyer of a municipality who partially funded a work affected by the crime may constitute himself as "*acusación particular*". It can even happen that a different political party to the party of one of the politician suspect of having committed the crime could be interested in appearing in the same proceeding as "*acusación popular*". The future European Delegated Prosecutor must deal with these additional accusatory parties and it is therefore necessary to provide the Spanish EDP with the adequate rules in order to exercise this new role.

9 Article 125. Citizens may engage in popular action and participate in the administration of justice through the institution of the jury, in the manner of and with respect to those criminal trials as may be determined by law, as well as in customary and traditional courts.

10 It can, however, be subject to a fee.

11 Although, a Spanish investigative judge is eligible for appointment as Spanish Delegated Prosecutor, in such a case, his career as a judge will be suspended for the time being. In contrast, an investigative judge who retains his status cannot exercise the competence of a Spanish Delegated Prosecutor: he would have sufficient powers, but his independence as a judge would be compromised.

12 Cf. Arts. 6, 10(5), 12(3), and also Art. 96(7) of Regulation 2017/1939.

13 Particularly taking into account that "national law shall apply to the extent that a matter is not regulated by [the Regulation]", cf. Art. 5(3). See further section III.

14 It was amended 67 times, 44 of the amendments after the establishment of the Constitution in 1978.

15 Organic Law 5/2000 of 12 July 2000.

16 Minister *Gallardón* and current Minister *Delgado* are prosecutors.

17 If there were no general change in their activities, it would indeed be difficult to reconcile the different ranges of powers in the same person: that of national prosecutor (with the currently existing and limited powers) and that of a European Prosecutor with a proper investigative role.

18 For further details, see P. Csonka, A. Juszczak, and E. Sason, "The Establishment of the European Public Prosecutor's Office", (2018) eucrim, 125, 129.

19 <https://www.fiscal.es/memorias/memoria2018/Inicio.html> (last accessed: 9/10/2018).

# The European Public Prosecutor's Office

## How to Implement the Relations with Eurojust?

Filippo Spiezia\*

After giving an overview of the current and envisaged role of Eurojust, this article outlines the future relationship between Eurojust and the European Public Prosecutor's Office (EPPO). Here, the author identifies three levels of possible links between the two bodies: the institutional level, the operational level, and the administrative level for the sharing of services. They have a common denominator: the need to establish an intense reciprocal cooperation scheme, despite the diversity of the functions of the two bodies. If this strong cooperation is implemented in practice, it can become the driving force around which the entire European judicial area can be redesigned, in such a way that Eurojust will still continue to play a central role as regards judicial coordination and cooperation in criminal matters. Therefore, a non-antagonistic relationship with the European Public Prosecutor should be aimed for and pursued. In this context, improving Eurojust's operational and management mechanisms, as envisaged by the new regulation, will confirm the centrality of Eurojust as a privileged hub for the collection and exchange of judicial information regarding cross-border crimes, with a renewed impulse with regard to specific crime areas where an increased exchange is particularly needed, such as international terrorism.

## I. Innovations in the EU Area of Freedom, Security and Justice: Creation of the EPPO and Changes in the Eurojust Legal Framework

On 12 October 2017, the Justice and Home Affairs Council of the European Union adopted the Council Regulation on the establishment of the European Public Prosecutor's Office (EPPO) by means of enhanced cooperation promoted by 20 Member States. On 14 May 2018, the 21st Member State, the Netherlands, formally announced its intention to participate in the EPPO. Malta followed on 14 June 2018. After more than 20 years, the project to create a supranational legal authority with the jurisdiction to investigate and prosecute financial criminal cases affecting the EU budget before national courts of the EU Member States participating in the EPPO has become a judicial reality.

The EPPO's creation marks fundamental changes in the EU's area of freedom, security and justice: specifying the new functions of the Office, and in fact, leading us into a new operational context that goes far beyond the concept of judicial cooperation, whether it is based on mutual criminal legal assistance or on the principle of mutual recognition. The phase for the "institutionalization" of the new *body* has already started.<sup>1</sup>

The creation of a new *entity* within the European area of freedom, security and justice will inevitably entail operational relations and dynamics with the pre-existing actors, in particular with Eurojust, the EU body established in 2002 to strengthen the judicial coordination and cooperation between the competent judicial authorities of the Member States in investigations of serious cross-border crime.<sup>2</sup> An analysis of the possible relations between the EPPO and Eurojust calls for a concise exposition of the operational modules used by Eurojust to improve the effectiveness of judicial cooperation procedures in the European Union and the coordination of investigations into serious cases of organized crime.

### 1. Eurojust mission

Today, Eurojust has a distinct operational dimension, which separates it, in its normative statute and in its current practice, from the previous experience of the liaison magistrates (established since 1996) and the European Judicial Network (EJN, established in 1998). The distinctiveness of its mission is reflected in its structure: indeed, Eurojust is not a network branching out to the individual national authorities, but a central body with centralized headquarters (in The Hague), representing all 28 EU Member States. The rules on the "material competence" of Eurojust set a particularly wide range of crimes, and mirror the provisions governing Europol.

The activities of the 28 national members seconded by each Member State, whose tasks extend to managerial functions through the College, are the *core business* of Eurojust. From an operational point of view, the coordination meetings are the key tools. During these meetings, national judicial and police authorities can directly exchange information, elaborate joint investigative strategies, also with the support of appropriate analyses, and discuss relevant practical and legal issues, ranging from the prevention of *ne bis in idem* situations to the pre-determination of the modalities of cross-border acquisition of evidence. The coordination efforts often support and ensure the simultaneous execution of investigative measures in several jurisdictions with different legal systems.

### 2. The reform of 2008

A reform to strengthen the new organization was launched when on 16 December 2008, the Council adopted Decision 2009/426/JHA with the aim of enhancing the body's structural and operational potential, increasing the powers of the national members<sup>3</sup> and of the College, furthering the exchange of information with national authorities, and improving the relations with the EJN and the other bodies competent in the field of cooperation. The attribution of powers conferred on the national member in his/her capacity as a national judicial authority, in accordance with his/her own national law and on the basis of the new Arts. 9 b), 9 c) and 9 d), is entirely innovative (except for the exercise of the right of derogation, where such attribution would conflict with the fundamental principles of the legal system of a Member State).<sup>4</sup>

Significant amendments were likewise made for the powers of the College in Art. 7, aimed at overcoming some functional difficulties occurring in practice.<sup>5</sup> The rules governing the information flow between the national member and the correspondent judicial authorities (Art. 13) are equally aimed at improving the functioning of supranational investigative coordination, since the availability of information on the existence of cross-border investigations or, more simply, of criminal facts involving two or more Member States (or third States), is an essential condition for Eurojust to carry out its mandate. The basic principle is that the competent judicial authorities of the Member States have to exchange with Eurojust any relevant information on cross-border crimes, as an essential requirement of the coordinating function, thus overcoming the sporadic and unstructured nature of the information flow.

The strengthening of cooperation with the contact points of the EJN and with the national correspondents, through the establishment of the Eurojust National Coordination System

(Art. 12) is a closely related objective. The purpose of this rule was to connect the operations of the various actors responsible for judicial cooperation at the national level with one another and to set up a comprehensive system, connecting them with their respective national member of Eurojust.

### 3. The way ahead – the new Eurojust Regulation

#### a) Legal basis in the Lisbon Treaty and Commission proposal

The Eurojust legal basis was included in the reshaping of the *freedom, security and justice area* launched by the Lisbon Treaty. While Art. 85 of the Treaty on the Functioning of the European Union (TFEU) confirms the centrality of the Agency in the judicial cooperation domain, enhancing its role as supranational coordinator, some important innovations can be noticed in paragraphs a) and b) of the second sub-paragraph of Art. 85 TFEU: empowering the body to commence investigations and preventing/solving jurisdictional conflicts. Both norms go beyond the mere role of Eurojust as a *mediator* established by the current legal framework, conferring binding powers vis-à-vis national authorities.

Taking a critical look at the implementation process of the Eurojust Decision of December 2008, it can easily be seen that the reform has had limited impact from a practical point of view and the results have not always been in line with the expectations, first because of some delays in the transposition at the national level, and second because of the different solutions adopted in Member States concerning the legal powers of its national members. Therefore, on 17 July 2013, the European Commission, without even waiting for the conclusions of the sixth evaluation round (dedicated to the functioning of Eurojust and the EJN), proposed a regulation for the reconfiguration of the Agency on the basis of Art. 85 TFEU.<sup>6</sup> The proposal was tabled together with the EPPO proposal.

The Commission's objectives for a further reform of Eurojust were:

- To increase its efficiency by providing it with a new governance structure encouraging the national members to become more involved in operational responsibility;
- To improve Eurojust's operational effectiveness by homogeneously defining the status and powers of national members (facilitated by the use of the regulatory instrument);
- To provide roles for the European Parliament and national parliaments in the evaluation of Eurojust's activities in line with the Lisbon Treaty;
- To bring Eurojust's legal framework in line with the common approach on the European Decentralized Agencies,<sup>7</sup> while fully respecting its special role in the coordination of on-going criminal investigations;

- To ensure that Eurojust can cooperate closely with the European Public Prosecutor's Office upon its establishment.

While several provisions of the previous Eurojust Decision remained unchanged, the proposal introduced some minor changes to the previous text, the relevance of which should not be underestimated: indeed, even merely re-proposed rules could have an impact on the overall functioning of the organization when inserted in a different legal context. In any case, the proposal remains completely silent as to the attribution of possible binding powers vis-à-vis national judicial authorities in relation to the initiation of criminal investigations and the resolution of conflicts of jurisdiction.

#### b) The negotiations in the Council

The text of the proposal was not substantially amended during the negotiations which culminated in the agreement reached within the Council in March 2015, which did not include the parts concerning the relationship with the EPPO, whose regulation was not yet finalized, and the data protection regime.

Looking at the main changes proposed, it is clear that the so-called *ancillary jurisdiction* (specified in Art. 3 of the proposal on the Eurojust regulation) already provided for in the original Decision has been reinstated. According to this reinstatement, Eurojust may also assist in investigations and prosecutions at the request of a competent authority of a Member State for other types of offences than those listed in the separate Annex to the new draft regulation.

One of the most sensitive points in the negotiations was the issue of the powers of the national members, which the proposal for a regulation deals with in Art. 2(2). The aim was to achieve greater homogeneity between Member States. Two antagonistic interests have been manifested during the negotiations: some States tended to obtain greater flexibility and, therefore, also a possible enlargement of the judicial powers of their own member at the national level; other States looked upon this attribution unfavorably. As a result, some amendments were introduced in order to reach general agreement in the Council which foresaw, on the one hand, the possibility for Member States to grant their national members judicial powers in accordance with their national legislation, even in addition to those powers indicated in the Commission proposal. On the other hand, an exception clause has been reinstated whereby if the attribution of the powers (specified in paragraphs 2 and 3) to the national member is contrary to constitutional rules or to fundamental aspects of the criminal justice system in a Member State, relating to (i) the division of powers between police, prosecutors, and judges, (ii) the functional division of tasks between prosecutors, or (iii) the federal structure of the

Member State concerned, the national member has the power to submit a proposal to the national authority responsible for implementing the measures in question.

As regards the power to perform judicial acts, in accordance with their national authorities, the final text contains useful specifications that go beyond the vagueness of the original wording and takes into account the adoption of the Directive on the European Investigation Order in criminal matters. National members will be able to issue and execute any request for mutual assistance or recognition; to order or request and carry out investigative measures in accordance with Directive 2014/41/EU; and to participate, where appropriate, in joint investigation teams and in their setting up<sup>8</sup>. This is without prejudice to the possibility that, in urgent cases, when it is impossible to identify or contact the competent national authority in a timely manner, the national members may take the above measures in accordance with national law and inform the competent national authority thereof as soon as possible.

The text resulting from the negotiations also contains a more precise definition of the powers of the College, which has to focus mainly on operational issues and may intervene in administrative matters only to the extent necessary to ensure the functioning of the Agency.

#### c) The legislation after the trilogue

It is worth recalling that a general approach was reached within the Council in March 2015 already. On 20 December 2017, the European Parliament adopted its report, which contains a number of amendments concerning the original proposal of the Commission. This was the starting point of the so-called *trilogue*, which involved the three competent institutions (the Council, the Commission, and the European Parliament) in defining a collaborative text.

The main changes in the final text<sup>9</sup> of the regulation concern the following points:

- The distinction between the operational and management functions of the College of national members;
- New regime on data protection rules adapted to the recent legal framework on data protection for EU institutions;
- The setting up of an executive board to assist the College in its management functions;
- New provisions on annual and multi-annual financial programming;
- The participation of the Commission in the College and in the executive board;
- Increased transparency through a joint evaluation of Eurojust's activities by the European Parliament and national parliaments.

## II. Relations Between the EPPO and Eurojust: From Possible Structural Derivation to Necessary Relations with a View to Cooperation

### 1. Differences between the EPPO and Eurojust

Despite the distinctive traits of both bodies that are evident especially in terms of function, the final changes made to the composition of the EPPO nevertheless indicate some similarities with Eurojust, which manifested themselves particularly in the collegial composition of the EPPO's central structure. The distinctive features of Eurojust and the EPPO are apparent. The Union has pursued a different project with the creation of the EPPO. The latter is no longer a *coordinator* or *facilitator* of relations of criminal judicial cooperation, *but a real investigative body*, meant to operate on a wide territory, that almost covers the entire European judicial area. It could be argued, however, that, for crimes within the EPPO's jurisdiction, the ultimate responsibility for investigation will remain with the European Delegated Prosecutor (EDP), so that the EPPO will essentially supervise and ultimately coordinate investigations of a different operational unit working at the national level.

A further difference exists with respect to the salient points of the criminal investigation: the central structure of the EPPO will have binding powers in view of the prosecution – powers that are notoriously lacking at Eurojust with respect to the national judicial authorities.

Moreover, the requirement of the EPPO's independence, if entirely implemented, could completely emancipate the operational dynamics of the new body from those of Eurojust, whose national members are being subjected to a more or less strong relationship with their own national authorities (in some cases, this is reflected in the decisions expressed within the College).

In sum, profound differences between the two bodies can be discerned both on the organizational-structural and functional levels. Nevertheless, it is legitimate to envisage the activation and development of a number of mutual relations between the EPPO and Eurojust.

### 2. Links between the EPPO and Eurojust

In this respect, it is worth recalling that the Treaty of Lisbon referred to a European Prosecutor established "from Eurojust", without giving a clear explanation of the meaning of this phrase. The formula "from Eurojust" (Art. 86 TFEU) marked one of the most delicate points of the European legislator and for everyone who tries to construe the treaty: although the text

was ambiguous, the reference to Eurojust was symptomatic of the possible origin and development of the EPPO from Eurojust.

This structural derivation was contradicted from the very beginning of the founding proposal, which marked a clear distance of the EPPO from Eurojust. Even the consistency with the Treaty provision could cast doubt. In the final Commission proposal for the EPPO Regulation,<sup>10</sup> in fact, the issue of its relations with Eurojust was resolved not in the sense of genetic-structural derivation, but in the operational-functional sense. This is confirmed in the final EPPO Regulation 2017/1939, recital *n.* 10: “this Regulation should establish a close relationship between them based on mutual cooperation.” The concept of cooperation, with Eurojust as a service provider towards the EPPO, is repeated in recital *n.* 69 stating:

Under the principle of sincere cooperation, all national authorities and the relevant bodies of the Union, including Eurojust, Europol and OLAF, should actively support the investigations and prosecutions of the EPPO.

The relationship between the two bodies is further underlined in the field of cooperation with third countries. Recital *n.* 102 states:

The EPPO and Eurojust shall become partners and cooperate on the operational level in accordance with their respective mandates. [...] Whenever the EPPO is requesting such cooperation of Eurojust, the EPPO should liaise with the Eurojust national member of the handling European Delegated Prosecutor’s Member State. The operational cooperation may also involve third countries that have a cooperation agreement with Eurojust.

The importance of bilateral cooperation as a distinctive feature of both bodies is underlined in Art. 3 of the EPPO Regulation, which set the establishment of the new body:

The EPPO shall cooperate with Eurojust and rely on its support in accordance with Article 100.

Art. 100 finally defines the relations with Eurojust.<sup>11</sup>

### 3. Concrete situations for interaction

In any attempt to identify all the possible links between Eurojust and the EPPO, which must ultimately be enshrined in a specific operational agreement, it should be emphasized that the collaboration between the two bodies will be a marking feature of their future co-existence, because they will need to maintain a constant dialogue and assist each other, despite having different functions and mandates. The reasons for identifying a variety of potential situations for interaction among the two bodies is a consequence of the EPPO’s competences, which leaves room to maneuver for Eurojust’s mission and action.

First, this might apply to investigations of PIF offences *strictu sensu*, which fall under the EPPO’s competence and which are often transnational in their nature. Given that the territorial competence of the new EU judicial body does not fully

cover the territory of all EU countries, there is room for broad cooperation in investigations involving non-EPPO countries. Eurojust is made up of national representatives from all 28 EU Member States, plus liaison magistrates from Norway, Switzerland, the United States of America, and Montenegro, with whom Eurojust has concluded cooperation agreements and to whom it can provide support as far as investigations and prosecutions are concerned. As a result, Eurojust will be able to cooperate in transnational cases of PIF offences, which might affect the territory of States not participating in the EPPO.

Second, operational cooperation can be envisaged with respect to cases concerning offences which in principle are not covered by the competence of the EPPO, but can be committed alongside PIF offences (“any other criminal offence that is inextricably linked to criminal conduct that falls within the scope of paragraph 1 of Article 22 of EPPO Regulation”). The competence with regard to such criminal offences may only be exercised by the EPPO if the sanctions for the PIF offences are more severe than the maximum sanction for an “inextricably linked” offence.

Moreover, with regard to these cases attached to the EPPO’s ancillary jurisdiction, it should be kept in mind that the criteria for the precise identification of such cases may not be very clear-cut, due to a margin of different interpretations of Art. 22, subparagraph 3 of the Regulation. This will make it necessary to establish reliable and shared interpretative parameters on the meaning of *other offences*, which are inextricably linked to offences affecting the financial interests of the EU and which could therefore also fall within the scope of Eurojust’s competence.

Third, Eurojust may also have its own operational capacity in relation to VAT fraud cases that have caused a damage of less than €10 million and involve two or more Member States. In this context, the future working agreement of the EPPO with Eurojust must establish criteria that will make it possible to smoothly define the identification of such a threshold, e.g. whether the total damage resulting from the crime should be taken into account or only the percentage of VAT evaded that would have benefited the EU budget. It would also be useful to clarify whether presumptive criteria may be used to determine such damage.

Fourth, provided that the offences in question fall within Eurojust’s mandate, Eurojust remains competent for offences for which the EPPO does not exercise its jurisdiction under Art. 25 of the EPPO Regulation, i.e. if the European Delegated Prosecutor has not opened an investigation and the Permanent Chamber has not instructed him to do so or, vice versa, if the EPPO, though materially competent, has not exercised its right

of evocation under Art. 27 of the Regulation or has referred the case back to the national authorities for cases covered by Art. 34 of the Regulation.

#### 4. Lines of future collaboration

In the following, I will sketch some lines along which the future mutual collaboration should be shaped.

The first one will be primarily of an *inter-institutional nature*: it is expected, in fact, that the representatives of the two bodies, the President of Eurojust and the European Chief Prosecutor, will have to meet regularly to discuss and deal with matters of common interest. A starting point in this regard is the definition of the EPPO's internal rules during its initialization. In this respect, the experience gained by Eurojust in the elaboration of its internal rules will be useful.<sup>12</sup> This cooperation will then result in the European Chief Prosecutor or his/her deputies being able to participate in the meetings of the College of Eurojust when it deals with matters of common interest.

A second step in the link will be *genuinely operational*. The development of *cooperative relations between Eurojust and the EPPO* may lead to the following:

(a) *Exchange of information*. Art. 100 para. 3 of the EPPO Regulation provides that the EPPO shall have indirect access to the information contained in the Eurojust Case Management System on the basis of a hit/no hit system. When data entered into the Case Management System by the EPPO correspond to data entered by Eurojust, then Eurojust, the EPPO, and the Member State of the European Union that has supplied the data to Eurojust shall be notified. The EPPO shall take appropriate measures to ensure that Eurojust, in turn, has access to the information contained in its Case Management System on the basis of a positive or negative feedback system.

(b) Facilitation of the EPPO's requests for *judicial cooperation*. Eurojust can support the EPPO when taking the required measures, in accordance with the mandate of the national members, and ultimately help facilitate transnational investigative coordination. In fact, when the crime affecting the financial interests of the Union is transnational, and evidence has to be gathered in another country not participating in the EPPO, Eurojust may be called upon to carry out its task of supporting the cooperation procedures of interest to the EPPO. Furthermore, in the same cases, it will be possible to ask Eurojust or its national members – and in conjunction with their national authorities – to take recourse to the power to carry out specific acts of judicial cooperation, or to transmit requests for mutual legal assistance, including those based on the prin-

ple of mutual recognition. Eventually, it is conceivable that the European Delegated Prosecutor might ask the judge to issue a European Arrest Warrant (cf. Art. 33 of the EPPO Regulation) to be executed in a State where the intervention of the national member of Eurojust could facilitate or support the enforcement.<sup>13</sup>

(c) Cooperation could also take the form of *joint participation in judicial cooperation instruments*, for example when the national member(s) and the European Public Prosecutor can be members of a joint investigation team.

Third, the collaborative relations between the two bodies may concern *administrative cooperation*, which is to be understood as *common service management*: the EPPO, on the basis of a specific agreement, can also count on the support of certain technical and administrative resources from Eurojust. The determination of the Grand Duchy of Luxembourg as the EPPO's seat may make such sharing more difficult. As regards information technology, the EPPO should be part of a mechanism for the exchange of data with Eurojust, based on the hit/no hit system.

### III. Concluding Remarks

The creation of the EPPO is a major innovation in the European Area of Freedom, Security and Justice. For the first time, an entity with clear judicial connotations and jurisdiction covering almost the entire territory of the Union has been created. This is a unique opportunity for a first implementation of a *federal Europe* in the field of criminal justice. It may trigger the redesign of a comprehensive architecture of the judicial area, since the political initiative (supported by some States and the President of the European Commission, *Jean-Claude Juncker*) to immediately extend the new body's powers to other "Euro-crimes", with particular regard to the crimes of international terrorism, has already been launched.<sup>14</sup>

The normative solution undoubtedly reflects originality, namely the creation of a mosaic of "unity of multiple parts" realized by the current collegial structure. This very creative solution, however, may be the weak point of the new Office. Will the collegial structure and the functioning of the chambers succeed in ensuring the operational efficiency otherwise inherent in a hierarchical structure with a clear chain of command?

It is wise to wait and observe the EPPO in action before making judgements and, above all, before investing it with new tasks for which it may not be equipped or its structure is not suitable. Of course, the new, unifying center will certainly be the driving force behind further changes in the European legal landscape, and this scenario is very interesting from the point

of view of the analysis of legal systems and institutions. What will ultimately count will be the ability of the newly created body to provide answers to the judicial questions for which it has originally been set up – the ability to know how to protect the financial interests of the Union and its citizens.

In this sense, cooperation with Eurojust remains important, not only from an operational point of view, but also from a strategic one. It would be a mistake not to provide Eurojust with the necessary resources to ensure the efficient exercise of the functions that serve the judicial authorities of the Member States. Member States' authorities have shown that they make increasing use of Eurojust over the years.

Eurojust's more than fifteen-year existence can be considered a continuing success story. Statistical data confirms not only the steady increase in the number of cases handled but also their ever greater complexity as far as the number of Member States involved and the type of crimes for which Eurojust's support has been sought are concerned. Eurojust's operational development is attributable not only to the changing face of crime, which is increasingly cross-border and requires the intervention of *facilitators*, but also to its reputation *on the ground* and its capacity to build up trustworthy relationships with national judicial authorities.

In this respect, while the EPPO will take on the organizational dimension to reach its full operational impetus, there is still room to improve Eurojust's capabilities according to Art. 85 TFEU, especially in the field of counter-terrorism where a more comprehensive exchange of information is needed. Indeed, Eurojust can even play a major and proactive role by becoming the central hub at the EU level for gathering judicial information concerning the investigation and prosecution of terrorist crimes, in close cooperation with Europol, thus closing the current gaps in multilateral cooperation in this specific criminal area.

The most viable condition for the future of the European judicial area is therefore a strong, loyal, and wide-ranging synergy between the EPPO and Eurojust, with the knowledge that the activities of one agency will be able to increase the efficiency and legitimacy of the other, and vice versa. A competition, even if only imagined, would be detrimental to both of them and is therefore to be avoided. Strengthening Eurojust, its operational tasks, and its financial budget means ensuring the necessary conditions and the capacity of the Agency to provide appropriate answers to the growing demand for judicial services from the EU national authorities. In this way, an adequate judicial response of the EU to the increasing challenges posed by terrorism and organized crime can be guaranteed.



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1 See the article of Petar Rashkov, in this issue, p. 113–117.

2 Eurojust was created by Council Decision 2002/187/JHA (*O.J. L* 63, 6.3.2002, 1), but had already been tested by way of the creation of a provisional Unit since 2000. According to one of the founding fathers of Eurojust, former Swedish judge and later member of the General Secretariat of the Council, *Hans G. Nilsson*, the creation of Eurojust had "been written in the stars" since the establishment of Europol. Indeed, on the day following the entry into force of the Maastricht Treaty on 2 November 1993, an initiative was taken, which in some respects anticipated its creation: the Belgian Minister of Justice proposed the adoption of a joint action to establish a "Centre for Information, Discussion and Exchange in the field of Judicial Cooperation" (CIREJUD). This proposal did not

materialize, but formed the basis for the completion of an initiative for the creation of the European Network of Contact Points in 1998. The seed was sown: from that moment on, successive inter-institutional dynamics led to the establishment of the provisional formation of "Pro-Eurojust" in 2000.

3 In this regard, reference is made to the additional powers stipulated in Art. 6 (vi) and (vii), according to which, respectively, the national member may take special investigative measures or any other measure justified by the investigation or proceedings. It should also be noted that the exercise of these powers has a greater impact on the national authorities, which in any case have to provide an explanation when they refuse a request from a national member.

4 According to Art. 9 e) of the 2009 Eurojust Decision, where the attribution of such powers is contrary to constitutional rules or to fundamental aspects of a national criminal system, the national member must at least be competent to make proposals to his/her national authorities for the exercise of the powers referred to in Arts. 9(c) and 9(d).

5 In particular, in addition to its existing powers, the College may issue non-binding written opinions in cases in which two or more Member States fail to reach an agreement in the event of a conflict of jurisdiction or a joint refusal to undertake a criminal investigation. Another power is the possibility to issue decisions in cases of persistent refusal or difficulties in the execution of letters rogatory or of decisions based on the principle of mutual recognition. In this case, the activation of the College is subject to the condition that no agreement is reached between the competent national authorities or that the impasse could not be overcome through the involvement of the corresponding national members.

6 Cf. European Commission proposal of 17 July 2013 for a Regulation of the European Parliament and of the Council establishing a European Union Agency for Judicial Cooperation in Criminal Matters (Eurojust), COM(2013) 535 final.

7 It should be recalled that, following the Commission's Communica-

tion “European agencies – the way forward”, COM(2008) 135 final, the European Parliament, the Council, and the Commission agreed to launch an inter-institutional dialogue to improve the coherence, efficiency, and work of decentralized agencies, which led to the creation of an inter-institutional working group in March 2009. The group discussed a number of key issues, including the role and place of the agencies in the EU’s institutional landscape, their creation and structure and operation, as well as funding, budget, supervision, and management issues. This work led to the Joint Statement on EU Decentralised Agencies, endorsed by the European Parliament, the Council, and the Commission in July 2012, which will be taken into account on a case-by-case basis in the context of all decisions on EU Decentralised Agencies.

8 However, where the joint investigation team is financed by the Union budget, the national members of the Member States concerned shall always be invited to participate.

9 A crucial step was made on 20 June 2018: the EU ambassadors con-

firmed an agreement reached on 19 June 2018 between the Bulgarian Presidency of the Council and the European Parliament on rules amending the regulation of Eurojust. Formal adoption of the new regulation, however, is expected under the Austrian Presidency in the second half of 2018 after linguistic revision and formal adoption by the Council and the European Parliament.

10 Cf. COM(2013) 534 of 17 July 2013.

11 See also Art. 57 of the EPPO proposal, COM(2013) 534 final, and Art. 41 of the Eurojust proposal, COM (2013) 535 final.

12 See the rules of procedure for Eurojust approved by the Council on 13 June 2002.

13 In this context, it is certainly foreseeable that the European Delegated Prosecutor and the national members will be able to participate in coordination meetings and in all the operational modules that have emerged in the practice of Eurojust.

14 Cf. T. Wahl, *eucrim* 3/2017, p. 104.

# Asking the Right Questions

## Interviewing in PIF Investigations

Tom Willems

The current institutional set-up to fight EU fraud is considered unsatisfactory. With the creation of the EPPO, the definition of the offences it will investigate and prosecute, and the OLAF Regulation under revision, the EU has carved out a new institutional set-up. The objective, both from an administrative (OLAF) and criminal law perspective (EPPO), is to successfully investigate fraud and corruption affecting the EU’s financial interests. In addition to institutional and legal implementing steps, it is also important to consider what needs to be put in place in order to ensure the future quality of investigations, especially from the training perspective. This article presents some observations from the operational field with regard to what is arguably one of the major tools for enhancing the quality of PIF investigations: interviewing suspects.

### I. Investigations Conducted by the EPPO

#### 1. The EPPO’s mission to investigate

The European Public Prosecutor’s Office (EPPO) created in 2017<sup>1</sup> will be responsible for and conduct investigations regarding criminal offences affecting the financial interests of the Union.<sup>2</sup> The PIF Directive defined the offences this new EU body will investigate and prosecute.<sup>3</sup> These criminal offences concern fraud, money laundering, corruption, and misappropriation affecting the Union’s financial interests, inextricably linked criminal offences, and participation in a criminal organisation committing such criminal offences, as further defined by national law.<sup>4</sup> The responsibility for investigations, prosecutions and bringing cases to judgment lies with the European Delegated Prosecutor (EDP) of the Member States,

where the focus of the criminal activity lies or in which the bulk of the offences has been committed.<sup>5</sup>

For serious offences, the EPPO should have access to a minimum set of *investigation measures* in every participating Member State, including the search of premises and computers, access to (computer) data and bank accounts, freezing of money, telephone taps, and tracking facilities.<sup>6</sup> In addition, the EDP will also be entitled to order any *other measure* available under national law in similar national cases.<sup>7</sup>

The EPPO’s investigations should be carried out in full compliance with the fundamental rights of the suspects. The latter have the right to be presumed innocent, to a fair trial, and to enjoy all the procedural rights of defence as provided for in the EPPO Regulation and national law.<sup>8</sup>

## 2. The national investigators

The EPPO Regulation puts the centre of gravity of investigations at the Member States level, with an EDP to work hand in hand with his/her national law enforcement authorities, in particular police, customs, and financial authorities.<sup>9</sup> The EDP may instruct these authorities to undertake investigation and *other measures*, and, in accordance with national law, the latter shall ensure that all instructions are followed and carry out the measures assigned to them.<sup>10</sup> The competent national authorities shall actively assist and support the investigations of the EPPO, guided by the principle of *sincere cooperation*.<sup>11</sup>

## 3. OLAF's role

OLAF cannot open any parallel administrative investigation into facts investigated by the EPPO, but the latter can request OLAF to (*actively*<sup>12</sup>) *support or complement* an EPPO investigation as follows:<sup>13</sup>

- By providing information, analyses (including forensic analyses<sup>14</sup>), expertise, and operational support;
- By facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union;
- By conducting administrative investigations.

The Commission proposal for the amendment of Regulation 883/2013<sup>15</sup> clarifies that OLAF can *complement* an EPPO investigation by facilitating the adoption of precautionary measures or of financial, disciplinary, or administrative action.<sup>16</sup>

The PIF Directive provides that the Commission (OLAF) shall provide such technical and *operational assistance* as the competent (not restricted to administrative) national authorities need to facilitate *coordination*<sup>17</sup> of their investigations of PIF criminal offences.<sup>18</sup> Such assistance should *not*, however, *entail the participation of the Commission (OLAF) in the investigation procedures* of individual criminal cases conducted by the national authorities.<sup>19</sup> The Commission proposal confirms that OLAF may organise and facilitate cooperation, but also adds that it *may accompany competent authorities carrying out investigative activities* upon request of those authorities and may participate in Joint Investigation Teams.<sup>20</sup>

## II. Interviewing

### 1. Perceptions on interviewing

The importance of interviews in investigations, in general, and in financial investigations, in particular, is sometimes put in

question. Recurring challenges are the idea that digital and forensic evidence are all-decisive and that active lawyers prevent the interviewee from giving – if any – a statement with added evidential value. Moreover, academic research over the past years has raised doubts as to the credibility of statements.<sup>21</sup> While all legitimate, these claims beg for some nuance.

Digital and forensic evidence is definitely on the rise and crucial in many investigations, including PIF investigations (e.g., a confidential e-mail in a corruption case or a bank transfer in a fraud case). This does not, however, affect the fact that the statements of witnesses and suspects are still the most used pieces of evidence, which make these findings highly relevant and have great convincing power on the prosecutor and other decision-makers.<sup>22</sup> If forensic evidence delivers the building blocks for evidence, statements are its cement.<sup>23</sup> The suspect interview, in particular, remains a very important part of the evidence presented in the prosecution of criminal cases.<sup>24</sup>

This is particularly the case for PIF offences, where demonstrating criminal intent is crucial. Many offenders in PIF cases deny having a criminal intent rather than denying that a criminal event has occurred<sup>25</sup> and are particularly prone to presenting exonerations in regard to the seriousness of the facts or their culpability<sup>26</sup>. The intentional nature of an act or omission in relation to PIF offences may be inferred from objective, factual circumstances,<sup>27</sup> but direct evidence obtained in a professional and strategic interview is likely to be more convincing. When a “lack of conclusive evidence” is invoked in the debate on the follow-up to OLAF’s judicial recommendations,<sup>28</sup> this would seem to refer to the absence of *mens rea* in many cases and needs to be probed during interview.

The expectation that the presence of (more active<sup>29</sup>) lawyers during the interview would lead to an increase in not declaring or obstructing suspects has not been confirmed by several scientific studies.<sup>30</sup> On the contrary, they found that the presence of lawyers led to more professionalism on both sides of the table and, hence, more relevant interviews.

Interestingly, the same studies paint a scenario in complex investigations where the interview increasingly becomes part of the conclusive proceedings at the end of the investigation, which are focussed on the confirmation or presentation of evidence gathered and characterised by an increase in influencing, persuasive, and negotiation tactics from the side of the defence.<sup>31</sup>

Finally, academia has rightly identified and highlighted the dangers of suggestive and manipulative interviewing techniques, in particular when they lead to false confessions by vulnerable persons. Referring mainly to several miscarriages

of justice in murder cases involving a number of vulnerable suspects, this doctrine and jurisprudence does not immediately seem to affect PIF investigations. The EPPO's future suspects are not likely to readily make coerced false confessions.

## 2. Interview models

*Investigative interviewing* is the term used for a modern approach to interviewing, based on respect for every interviewee and the search for accurate and complete information. Key elements are establishing a “rapport” with the interviewee, gathering information by listening carefully to his/her account, and asking open questions. Its main model is PEACE,<sup>32</sup> developed in the UK in 1992 and recently put forward as a model of efficient and ethical interviewing by the UN.<sup>33</sup> In a 2016 text, the latter advocates that the participating States design a universally applicable interview model (including the interview by administrative investigative bodies<sup>34</sup>), which is “non-coercive, ethically sound, evidence-based and empirically founded.”<sup>35</sup>

Stemming from a different framework (common crime interviews for PEACE and the interrogation of detainees in the UN Protocol) and marked by strong opposition to accusing and manipulative methods,<sup>36</sup> neither the PEACE model nor the UN Protocol seem to have fully taken into account the specifics of interviewing in financial investigations (PIF offences). Whereas the PEACE model already did not contain a separate chapter (“step”) dedicated to how to obtain accurate and reliable admissions, the UN Protocol explicitly provides that

The aim of interviews must not be to elicit confessions or other information reinforcing presumptions of guilt or other assumptions held by the officers.<sup>37</sup>

Moreover, and in line with some scholars,<sup>38</sup> an approach seems to be advocated where interviewers provide early and complete disclosure of evidence at the start of the interview. They hardly – if at all – challenge his/her account<sup>39</sup> and abstain from using any influencing or persuasion tactics. Such restrictions on strategic and tactical interviewing can be seen as preventing the interviewer in PIF investigations from conducting an effective and fair investigation and making him fall short of the task of safeguarding the financial interests of the EU.

Scientific research commissioned in the aftermath of reports on interview practices in Guantanamo has identified and validated strategic and tactical interviewing techniques that are focussed on eliciting information in an intelligence setting.<sup>40</sup> Arguably more directly relevant for PIF interviews are the strong findings in the behavioural sciences on how people judge and take decisions (when uncertain). Researchers today agree that two structurally divided cognitive systems converge in regard to decision-making: an intuitive *system (1)* provides

quick and often subconsciously influenced answers, based on rules of thumb, whereas another *system (2)* is capable of abstract, sequential, more rational thinking<sup>41</sup>.

Whereas these ground-breaking insights are applied with growing success across different fields, they seem to be underused in interviews, even though their relevance cannot be denied. Interviewees are required to make a continuous series of choices and decisions (e.g., what to tell during the free account, how to react to evidence presented, etc.); these are all likely to impact on or to be affected by these dual decision processes. Understanding how intuition and ratio during the interview intervene in, for instance, how the strength of evidence is perceived, how the framing of a question can result in better responses, or how an early commitment will have continued effects, allows for an interview approach that is both effective and respectful for the freedom of statement.

## 3. Training

If the EPPO was designed to achieve a higher level of professional skills and know-how, tailored to the specific needs of transnational financial crime,<sup>42</sup> the same should hold true for the professionals conducting its investigations. Further to earlier claims regarding the crucial need to set up the training of all legal practitioners involved in criminal investigations dealing with PIF offences,<sup>43</sup> this requires PIF interviewers to receive specific training in accordance with the highest professional standards. When the investigation of white-collar crime is already complex<sup>44</sup> and requires specialist contextual knowledge (e.g., tendering procedures, cost models), the profile of its suspects calls for specific interview skills and expertise, in particular for matching counter-strategies involving influence and persuasion. Training needs are thus important and should be set up to guarantee consolidation of the trained skills, as these degrade in practice when there is no follow-up to feedback.<sup>45</sup> Such training could profit from OLAF’s expertise. In connection with on-going EU-financed research<sup>47</sup> or by inspiring targeted research, such training could also benefit from scientific, evidence-based support.

## III. Conclusion

The success of the EPPO will depend largely on the quality of the work of its investigation partners. An important factor is the quality of interviews. OLAF has knowledge and expertise that could be offered to national authorities working with the EPPO when interviewing PIF suspects. Such interviews should comply with ethical standards and procedural safeguards, respecting and protecting the physical and psycho-

logical integrity of the interviewees and aimed at gathering reliable, accurate, and complete information. This should not exclude the use of strategic and tactical interviewing techniques. Behavioural sciences offer evidence-based venues for such techniques, which are particularly relevant for PIF interviews. In any event, training is crucial to the success of the EPPO. Interview training should be inspired by OLAF's legacy and backed up by scientific research.

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\* The opinions expressed in this article do not reflect those of the European Commission and are personal opinions of the author.

1 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('EPPO-Regulation').

2 Art. 4 EPPO-Regulation.

3 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, *O.J. L* 198/29 – 28.07.2017 ('PIF-Directive').

4 Art. 22 of the EPPO-Regulation and Arts. 3(2) and 4(1, 2 and 3) of the PIF-Directive.

5 Art. 13 and 26(4) EPPO-Regulation.

6 Art. 30(1) EPPO-Regulation.

7 Art. 30(4) EPPO-Regulation and recital 71.

8 Art. 41 and recital 83 of the EPPO-Regulation, the latter referring to Arts. 47 and 48 of the CFR.

9 P. Csonka, A. Juszczak, and E. Sason, "The establishment of the European Public Prosecutor's Office. The road from vision to reality", (2017) *eucrim*, 125, 127.

10 Art. 28(1) of the EPPO-Regulation.

11 Art. 5(6) EPPO-Regulation.

12 Recital 69 of the EPPO Regulation.

13 Art. 101(3) of the EPPO-Regulation.

14 Recital 100 of the EPPO-Regulation confirms the interests in OLAF's operational analysis when it states that cooperation with (Europol and) OLAF should be of particular importance for the EPPO to draw on their analysis in specific investigations.

15 European Commission, "Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by OLAF as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations", COM(2018) 338 final ('Commission Proposal'), supported by a European Commission Staff Working Document, SWD(2017) 332 final.

16 Art. 12e, 12f(1) and (2) of the Commission Proposal.

17 See Art. 1(2) of Regulation 883/2013 for OLAF's mission to assist in organising coordination between competent authorities in the fight against fraud.

18 Art. 15 of the PIF-Directive.

19 Recital 23 of the PIF-Directive.

20 Art. 12b(1) and (4) of the Proposal.

21 See, e.g., C.A. Meissner, A.D. Redlich, S.W. Michael, J.R. Evans, C.R. Camilletti, S. Bhatt, and S. Brandon, "Accusatorial and information-gathering interrogation methods and their effects on true and false confessions: a meta-analytic review", (2014) *Journal of Experimental Criminology*, 459–486.

22 M. Bockstaele, *Handboek verhoren* 1, 2nd edition, 2018, p. 27.

23 I. Rispens, J. Hoekendijk and M. van Beek, "Het verdachtenverhoor: nieuwe dynamiek voor een vaste waarde", (2017) 79(4) *Tijdschrift voor de politie*, 31, 31.

24 See, e.g., W.J. Verhoeven and E. Duinhof, *Effectiviteit van het verdachtenverhoor*, Politie & Wetenschap, Rotterdam: Erasmus School of Law, 2017, p. 19.

25 M.L. Benson, "Denying the guilty mind: accounting for involvement in white-collar crime", (1985) 23, *Criminology*, 583–607.

26 G. Sykes and D. Matza, "Techniques of neutralization: a theory of delinquency", (1957) *American Sociological Review*, 664–670.

27 Recital 11 of the PIF-Directive.

28 See, e.g., OLAF report 2017, p. 42.

29 Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings and in European Arrest Warrant proceedings adopted on 22 October 2013 by the European Parliament and the Council (*O.J. L* 294, 6.11.2013, p. 1).

30 M. Vanderhallen, A. de Jong, H. Nelen, and T. Spronken, *Rechtsbijstand en de waarde van het verhoor. Een studie naar de te verwachten gevolsen op de verklaringsbereidheid en de opsporing en bewijsvoering in strafzaken van het verlenen van rechtsbijstand voorafgaand en tijdens het verhoor*, 2014; J. Blackstock, E. Cape, J. Hodgson, A. Ogorodova, and T. Spronken, *Inside police custody. An empirical account of suspects' rights in four jurisdictions*, Antwerp: Intersentia, 2014; W.J. Verhoeven and E. Duinhof, *op. cit.* (n. 24), p. 150.

31 See Vanderhallen et al., *op. cit.* (n. 30), pp. 153.

32 See: <https://www.app.college.police.uk/app-content/investigations/investigative-interviewing>

33 See J.E. Méndez, Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, submitted to the General Assembly of the UN on 05.08.2016 in accordance with Assembly resolution 70/146, 2016, A/71/298, available at <https://www.apt.ch/en/resources/a-universal-protocol-for-investigative-interviewing-and-procedural-safeguards/> See point 47 for the PEACE recommendation.

34 Interim report, *op. cit.* (n. 33), points 28 and 31.

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36 Mainly the REID model used in the USA (see F.E. Inbau, J.E. Reid, J.P. Buckley, and B.C. Jayne, *Criminal interrogation and confessions*, Burlington, Jones & Bartlett Learning, 2013).

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46 See, e.g., <http://www.law-train.eu/> and <http://valcri.org/>.

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