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# 3

European Law Forum: Prevention • Investigation • Prosecution



Corruption

Corruption

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Guest Editorial by *Marin Mrčela*

*Francesco Clementucci and Adrianna Miekina*: The Commission Proposal for a Directive on Combating Corruption

*Lucia Zoli*: The Amendment of the PIF Directive by the New Proposal for a Directive on Combating Corruption

*Federico Luppi and Matilde Bellingeri*: Combating Corruption in EU Legislation – An Analysis of Some Aspects of the Commission Proposal for the EU Anti-corruption Directive

*Celina Nowak*: Liability for Corruption in Poland in Light of the Commission Proposal for a New Directive on Corruption

*Rafael Aguilera Gordillo*: Weaknesses in Spanish Jurisprudence on the Criminal Liability of Legal Entities

*Alina Mungiu-Pippidi*: Seven Arguments in Favour of Rethinking Corruption

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# Guest Editorial

Dear Readers,

The Group of States against Corruption (GRECO), of which I have been President since 2012, was established in 1999 as the anti-corruption monitoring body of the Council of Europe. The Council of Europe acted as a pioneer when it made fighting corruption one of its priorities for international cooperation nearly 30 years ago. Today, GRECO's 48-country membership comprises the Council of Europe member states as well as the United States of America and Kazakhstan. Being a member of GRECO is a commitment to the proactive fight against corruption and other forms of misuse of power.

Over the years, GRECO has become a multilateral reference point for anti-corruption reform and has helped hold states accountable for their anti-corruption efforts and policies. The European Court of Human Rights regularly cites the GRECO reports in its judgments related to, for example, the independence of the judiciary and the prosecution service. GRECO's evaluation and compliance reports also feature strongly in the European Commission Rule of Law Reports.

The foundation of GRECO's work is its peer review monitoring. This helps ensure ownership of GRECO's key messages and has helped us develop a substantial body of expertise within the GRECO community and even beyond. The GRECO evaluation reports are followed up with a robust compliance procedure that continues until members have reached a satisfactory level of implementation. Ad hoc procedures can also be launched if GRECO receives reliable information that an institutional reform or a legislative initiative may result in a serious violation of a Council of Europe anti-corruption standard.

States can join GRECO by invitation of the Committee of Ministers or by acceding to the Council of Europe 1999 Criminal or Civil Law Conventions on Corruption, also by invitation of the Committee of Ministers. Upon accession, GRECO is tasked with monitoring implementation by the parties to the conventions.

GRECO has followed the EU's work on the new anti-corruption package with close interest. It is very important that the action on the part of the Council of Europe, notably GRECO, and the EU is complementary in this shared core area. The 27

Member States of the European Union are all long-standing states parties to the Council of Europe Criminal Law Convention on Corruption. The EU has had observer status since 2019 and could join as a full member under the GRECO statute, a step GRECO would welcome.

Corruption is a criminal law offence and requires effective investigations, convictions, and sanctions that are proportionate, dissuasive, and, again, effective. This is clearly acknowledged in the Criminal Law Convention on Corruption. In addition, preventive action in the form of mechanisms for transparency, oversight, and accountability is very important in order to reduce impunity.

GRECO's ongoing fifth evaluation round shows that more needs to be done by states to effectively prevent corruption and to promote integrity among persons with top executive functions. In particular, states should make sure that their legislative and institutional integrity frameworks apply fully and directly to persons with top executive functions, i.e. presidents, vice presidents, prime ministers, ministers, deputy ministers, ministerial advisers, and other politically appointed persons. More efforts are also required to ensure that corrupt behaviour and integrity failings on the part of the police come to light and are acted upon.

We know that mentalities that are formed early endure, and I have continuously emphasised that states should provide education and awareness-raising about the harmful effects of corruption on people's lives and on our institutions and processes.

GRECO will continue to work with our member states to ensure that the necessary action is taken to prevent and fight corruption. The aim is clear: safeguarding our values and institutions in the future – to the benefit of everyone.



Marin Mrčela

**Marin Mrčela**  
President of GRECO

# News

Actualités / Kurzmeldungen\*



## European Union

Reported by Thomas Wahl (TW), Cornelia Riehle (CR),  
Dr. Anna Pinggen (AP)

### Foundations

#### Rule of Law

##### WJP Rule of Law Index 2023: Global Rule of Law Continues to Decline

Amid alarming global developments, the integrity of the rule of law is on a decline, affecting more than six billion individuals globally. The [2023 Rule of Law Index](#) released by the World Justice Project (WJP) on 25 October 2023 highlights the ongoing erosion in global commitment to the rule of law. It reveals that a significant number of countries are regressing, marked by unchecked governmental power, eroding human rights, and judicial systems that are increasingly unable to serve their citizens effectively.

The 2023 edition of the WJP Rule of Law Index (for the 2022 index → [eucrim 2/2022, 168](#); for the WJ project → [eucrim news of 17 June 2019](#)), which assesses rule-of-law strengths, weaknesses, progress, and setbacks across 142 countries, indicates that the rule of law had declined overall in a majority of countries for yet another

year. This continuation of authoritarian trends that began in 2016 is evident in every region, signalling a disquieting global rule-of-law recession. The decline in the functioning of justice systems – especially civil justice – spread in 2023, with more countries struggling to provide people with timely, affordable, and accessible justice.

The Index notes, however, that the decline in the rule of law was less widespread and extreme for the second year in a row. A number of countries have successfully countered trends towards authoritarianism, while yet others have effected continuous improvement in areas such as justice, the fight against corruption, and the protection of human rights.

The Index's comprehensive approach offers original, independent data organized into eight factors that comprise the concept of the rule of law:

- Constraints on government powers;
- Absence of corruption;
- Open government;
- Fundamental rights;
- Order and security;
- Regulatory enforcement;

- Civil justice;
- Criminal justice.

These factor scores reflect the perspectives and experiences of more than 149,000 households and 3400 legal experts around the world and are backed by a rigorous process of validation and analysis. (AP)

### Schengen

#### Commission Encourages Member States to Reduce Internal Border Controls

On 23 November 2023, the Commission released a [Recommendation](#) on cooperation between the Member States with regard to serious threats to internal security and public policy in the area without internal border controls. The Commission emphasised that there is a need to increase cooperation to ensure security, while phasing out long lasting border controls as stated in the 2023 Schengen Report (→ [eucrim 2/2023, 114–115](#)). It presents several alternative measures to internal border checks and includes several proposals for increased cooperation and information exchange in the event of reintroduction of such controls. The recommendation addresses eight thematic areas:

- “Structured cooperation at all levels”: Member States should establish per-

\* Unless stated otherwise, the news items in the following sections cover the period 16 October – 30 November 2023. Have a look at the eucrim website (<https://eucrim.eu>), too, where all news items have been published beforehand.

manent contact points to ensure a co-ordinated response to serious threats to public policy or internal security;

- “Reinforcing capacity for joint measures”: Member States should review and, where appropriate, adjust their bilateral frameworks to provide grounds for cross-border law enforcement cooperation. Actions should also include joint risk analyses and the provision of sufficient resources for joint patrols;

- “Law enforcement cooperation”: Member States should take the necessary measures to give effect to the 2022 Council Recommendation on operational law enforcement cooperation (→ [eucrim 2/2022, 120](#)), including the establishment or reinforcement of police and customs cooperation centres, and the increased use of available Union funding for transnational law enforcement projects and the deployment of good practices;

- “Stepping up joint actions to fight migrant smuggling”: Member States should take coordinated measures and work together with Europol, Eurojust and Frontex to step up the fight against migrant smuggling;

- “Making use of relevant tools in the area of returns”: Member States are encouraged to make full use of bilateral readmission agreements between Member States and international partners. Increased use of mutual recognition of return decisions is also key to expedite returns;

- “Measures to address unauthorised movements”: Member States confronted by unauthorised movements should, in the first place, intensify police controls in the internal border areas; any decision to reintroduce internal border controls in this regard should be accompanied by mitigating measures and be under constant review;

- “Stepping up actions to fight terrorism and cross-border organised crime”: Member States should review and increase their engagement in EMPACT (→ [eucrim 2/2021, 89–90](#)) as well as effectively implement Directive

2023/977 on the exchange of information between the law enforcement authorities (→ [eucrim 1/2023, 36–39](#));

- “Applying mitigating measures”: Member States should limit the use of systematic checks at internal borders to exceptional situations, giving preference to mobile checks in the territory and enhancing the use of modern technologies. Member States should limit the impact on the fluidity of traffic and make sure that cross-border transport connections are available.

The Recommendation is accompanied by a [report on the consultation between the Schengen Coordinator and Member States](#) which notified the reintroduction of internal border controls between May and November 2023. This concerned Denmark, Germany, France, Austria, Norway and Sweden. The report provides information on the situation at the border and the cooperation between the Member States sharing the border.

Moreover, the Commission presented [another staff working document](#) on 23 November 2023 entitled “The Dublin Roadmap in action – Enhancing the effectiveness of the Dublin III Regulation: identifying good practices in the Member States”. The Dublin III Regulation determines the Member State responsible for reviewing asylum applications. The Dublin Roadmap was agreed on in November 2022 and aims to improve the overall implementation of transfers under the Dublin III Regulation. It includes a concrete timeline for the implementation of specific measures in all Member States. Following the structure of the objectives and actions in the Roadmap, the report presents the emerging good practices identified and the findings of bilateral meetings held with Member States. It aims to help other Member States to implement in the most effective way the actions to which they have committed under the Dublin Roadmap, when addressing individual challenges. (TW)

## Reform of the European Union

### EP Proposed Amendments to EU Treaties

On 22 November 2023, the European Parliament (EP) adopted a new [proposal to amend the Treaties](#): the Treaty on European Union (TEU), the Treaty on the Functioning of the European Union (TFEU) and the Charter of Fundamental Rights of the European Union (CFR).

The [EP gave several reasons](#) why the Treaties should be amended:

- To better face challenges and crises (especially in the context of Russia’s war of aggression against Ukraine);

- To strengthen the capacity, legitimacy, and accountability of the European Union (EU);

- To better address geopolitical challenges and the complex geopolitical landscape that the EU faces;

- To adapt the institutional framework of the Union, in particular its decision-making process and especially that of the Council, to future enlargements of the EU;

- To implement the proposed changes as underlined in the conclusions of the Conference on the Future of Europe, which further underline the need for treaty changes.

With regard to institutional reforms, MEPs called for the strengthening of the Union’s capacity to act by increasing the number of areas in which action is decided by qualified majority voting (QMV) and the ordinary legislative procedure. They also called for Parliament to be given the right to propose legislation, including the introduction, amendment, and repeal of Union law, and to participate in the process of co-legislating the multiannual financial framework. The number of Commissioners should also be limited to fifteen. Citizens’ participation in the EU decision-making process should be strengthened within the framework of representative democracy instruments.

With respect to competences, the EP proposed the creation of exclusive Union competences for biodiversity, the environment, and discussions on climate change. It also proposed establishing shared competences in the fields of public health, protection and improvement of human health, civil protection, industry and education. Another aim is to further develop the Union's shared competences in the fields of energy, foreign affairs, external security and defense, external border policy in the area of freedom, security and justice, and cross-border infrastructure.

Moreover, MEPs proposed the introduction of a preventive review of norms at the Court of Justice of the European Union (“abstract review of norms”). The EP should also be empowered to bring cases of non-compliance with the Treaties before the Court of Justice of the European Union.

In the area of security and defense, the proposal calls for the creation of a defense union under the operational command of the EU, comprising military units and a permanent rapid reaction capability. MEPs also propose changes to the EU's law enforcement and prosecution mechanisms, including granting additional powers to Europol, expanding the definition of Union crimes to include gender-based violence and environmental crimes, and regulating the European Public Prosecutor's Office through the ordinary legislative procedure.

*Background:* The EP's initiative follows the proposals of the Conference on the Future of Europe, in which EU institutions and European citizens discussed ideas for a reform of the bloc (for the key proposals → [eucrim 2/2022, 84–85](#)). The EP called on the European Council to set up the Convention in accordance with [Art. 48 TEU](#) in order to proceed with the revision procedure.

The Heads of State or Government discussed the internal reforms at the [EU summit on 14/15 December 2023](#) under

the Spanish Council Presidency. They [merely committed](#) to addressing internal reforms at upcoming meetings, with a view to adopting conclusions in the summer of 2024. (AP)

## Ukraine Conflict

### Eurojust Paper: The Crime of Aggression in Domestic Laws

On 19 October 2023, Eurojust published a [paper](#) providing a comparative overview of the way in which EU Member States, Genocide Network Observer States, and Ukraine have implemented the crime of aggression into their national laws. Against the background that the International Criminal Court (ICC) cannot exercise its jurisdiction over the crime of aggression allegedly committed by Russian nationals in Ukraine (since neither Russia nor Ukraine have ratified the respective statute), the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA) was established in 2023 (→ [eucrim 2/2023, 116](#)).

The paper asks how the crime of aggression is defined in national criminal codes, whether the majority of states have adopted the definition provided by Art. 8bis of the Rome Statute, and whether they exercise universal jurisdiction over this crime. The paper does not, however, address obstacles (such as immunities, sovereignty issues, and political legitimacy) that may arise when seeking to prosecute the crime of aggression at the domestic level. The first part of the paper gives an overview of the historical evolution of the crime of aggression under international law; the second part deals with the national criminal laws of EU Member States, Genocide Network Observer States, and Ukraine. It also takes a look at the English translations of domestic provisions defining the crime of aggression, highlighting common features and main differences. (CR)

## Europol Joins JIT on International Crimes in Ukraine

On 5 October 2023, Europol [joined the Joint Investigation Team](#) (JIT) agreement on alleged core international crimes committed in Ukraine. Europol will provide analytical and forensic support, offer expertise gathered through its Analytical Project on Core International Crimes (AP CIC), and contribute analysis gathered from OSINT data (Open Source Intelligence).

The JIT was first signed on 25 March 2022 by Lithuania, Poland, and Ukraine; Estonia, Latvia, Slovakia, and Romania soon followed suit. The International Criminal Court (ICC) and the United States Department of Justice have also become participants (→ [eucrim news of 5 May 2023](#)). (CR)

## Legislation

### New Publication Mode for the EU Official Journal

Until 30 September 2023, the Official Journal of the European Union (OJ) was published daily and contained several documents that were published together on the respective day. On 1 October 2023, the OJ [switched](#) to a new act-by-act publication [mode](#): each act is now published individually as an authentic Official Journal in PDF format. Hence, each issue of the OJ now contains only one document. This aims to make the publication process quicker and more flexible with all documents published individually, making the use of additional series for urgent publications unnecessary. As a result, the L ... I and C ... I series were discontinued as of 1 October 2023, and only the main L and C series remain. The C ... A series has also been discontinued.

In the future, referencing of the OJ is based on its series, the document number (except for international agreements and corrigenda), the date of publication, and the European Leg-

isolation Identifier (ELI). The page reference has become obsolete.

*Example:* Regulation (EU) 2023/2131 of the European Parliament and of the Council of 4 October 2023 amending Regulation (EU) 2018/1727 of the European Parliament and of the Council and Council Decision 2005/671/JHA, as regards digital information exchange in terrorism cases, OJ L, 2023/2131, 11.10.2023, ELI: <http://data.europa.eu/eli/reg/2023/2131/oj>.

To further explain the new developments, the Publication Office of the EU has prepared an explanatory [video](#) that can be found on YouTube. (CR)

### DSA: Publication of the Transparency Reports for VLOPs and VLOSEs

The publishing deadline for the first transparency report by very large online platforms (VLOPs) and search engines (VLOSEs) under Arts. 15, 24, and 42 of the EU's Digital Services Act (DSA) has been met, with all 19 platforms publishing their reports. Seven platforms (Amazon, LinkedIn, TikTok, Pinterest, Snapchat, Zalando, and Bing) met this obligation ahead of the [deadline](#). The Transparency Reports and a Commission database aim to ensure accountability and transparency over content moderation online for the benefit of citizens, researchers, and regulators. This will have a significant impact on public accountability and control.

The transparency reports include information concerning content moderation on the platforms' services, with the number of notices they receive from users (and once in place, trusted flaggers), the number of pieces of content taken down on the platform's own initiative, the number of orders they receive from all relevant national judicial or administrative authorities, and the accuracy and rate of error of their automated content moderation systems. In addition, the reports provide information on content moderation teams, including their qualifications and linguistic expertise.

VLOPs and VLOSEs must publish these transparency reports every six months following their designation. Annual transparency reports will also have to be published by intermediary services and smaller platforms (those with less than 45 million users), but only from February 2024. They will also be covered by the Digital Services Act. (AP)

### First Formal Proceedings Launched by Commission under DSA: X Under Investigation

X, formerly Twitter, has been designated as a Very Large Online Platform (VLOP) under the EU's Digital Services Act (DSA → [eucrim 4/2022, 228–230](#) and [eucrim news of 8 December 2023](#)). As a VLOP, it is required to diligently identify and address systemic risks in its services, promptly notify users of content moderation decisions, avoid deceptive design or manipulation of users, maintain a repository of ads, and provide researchers with effective access to platform data. These obligations have been designed to ensure responsible and transparent practices by online platforms.

The European Commission has now opened its first [formal proceedings](#) under the DSA to assess whether X may have breached the act in areas related to risk management, content moderation, dark patterns, advertising transparency, and data access for researchers.

The Commission decided to open formal infringement proceedings against X based on the results of a preliminary investigation, including an analysis of the risk assessment report submitted by X (in September last year), X's transparency report (published on 3 November 2023), and X's responses to a formal request for information, including the dissemination of illegal content related to Hamas' terrorist attacks against Israel.

The proceedings will focus on the following areas:

- Compliance with DSA obligations

related to countering the dissemination of illegal content in the EU;

- Effectiveness of measures taken to combat information manipulation on the platform (e.g. X's so-called "Community Notes" system and related policies mitigating risks to civic discourse and electoral processes);

■ Steps taken by X to make its platform more transparent; the inquiry will look into potential inadequacies in X's advertisements repository and in providing researchers with access to X's publicly available data, as required by Art. 40 of the DSA;

- Suspected deceptive design of the user interface, particularly with regard to so-called "blue checks," which are checkmarks associated with specific subscription services.

In the event that these shortcomings are proven, they would be violations of DSA Arts. 34(1), 34(2), and 35(1), 16(5) and 16(6), 25(1), 39, and 40(12).

Regarding the opening of formal proceedings against X, the Commissioner for Internal Market, *Thierry Breton*, made clear that "the time of big online platforms behaving like they are too big to care has come to an end. We now have clear rules, ex ante obligations, strong oversight, speedy enforcement, and deterrent sanctions and we will make full use of our toolbox to protect our citizens and democracies. We will now start an in-depth investigation of X's compliance with the DSA obligations concerning countering the dissemination and amplification of illegal content and disinformation in the EU, transparency of the platforms and design of the user interface."

#### *What next?*

After the formal opening of the proceedings, the Commission will continue to gather evidence, possibly through additional requests for information, interviews, or inspections. The Commission may take further enforcement measures, including inter-

im measures and decisions in order to establish that X has failed to fulfil its obligations. If X commits to remedies, the Commission may accept them. The duration of an in-depth investigation depends on factors such as the complexity of the case and cooperation with the Commission. The opening of an in-depth investigation does not, however, forejudge the outcome and does not relieve Member State authorities of their powers to supervise and enforce certain articles of the DSA in relation to the case. (AP)

### EP Ready to Discuss Proposal to Combat Child Sexual Abuse Online

On 14 November 2023, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) adopted the [draft Parliament position](#) on new measures to protect children by preventing and stopping child sexual abuse online. Then, on 22 November 2023, the plenary of the European Parliament adopted its negotiating mandate for the new law, meaning that trilogue negotiations can start as soon as the Council has adopted its position.

The proposed regulations are designed to protect children online by requiring internet service providers (ISPs) to assess whether there is a significant risk of their services being used for online child sexual abuse and grooming and to take steps to mitigate such risks. To prevent widespread or general surveillance of the Internet, the proposed legislation would empower judicial authorities to issue time-limited orders as a last resort in order to identify and remove or disable access to child sexual abuse material (CSAM). The proposal has been the subject of much controversy (→ [eucrim 2/2022, 91–92](#), → [eucrim 3/2022, 173](#) and → [eucrim 1/2023, 13–14](#)).

MEPs stressed the importance of targeting identification orders to specific individuals or groups on the basis

of “reasonable grounds of suspicion”. They have excluded end-to-end encryption from the scope of the detection order.

Service providers would have the flexibility to choose technologies as long as they comply with the robust safeguards outlined in the legislation and are subject to an independent, public audit of those technologies. MEPs also want providers to have the autonomy to choose which mitigation measures to apply, and they want these measures to be effective, targeted, and proportionate.

Above all, to ensure that victims’ voices are heard, MEPs propose the creation of a new Victims’ Rights and Survivors’ Consultative Forum. (AP)

### Extension of Interim Regulation to Prevent and Combat Child Sexual Abuse

On 30 November 2023, the Commission [proposed](#) extending the interim regulation, allowing providers to voluntarily detect and report child sexual abuse on certain communication services. The regulation, which expires on 3 August 2024, provides a temporary legal basis until new EU rules are in place. Without an extension, there is a risk that there will be no legal basis to combat child sexual abuse, making it easier for predators to operate. The proposed extension until 4 August 2026 aims to bridge the gap until long-term legislation is adopted, and it underlines the urgency of addressing the growing gravity of child sexual abuse.

The long-term solution is sought by the controversially discussed Regulation laying down rules to prevent and combat child sexual abuse, which is currently negotiated by the European Parliament and the Council (→ [news of 12 December 2023](#) with further references). The Commission stressed that it remains committed to supporting legislative efforts to combat child sexual abuse and protect children. (AP)

## Institutions

### Commission

#### European Commission Work Programme 2024

On 17 October 2023, the European Commission adopted its [Work Programme for the year 2024](#). The Work Programme builds on the priorities announced in the [State of the Union address](#) of 13 September 2023, among them:

- A European Green deal
- A Europe fit for the digital age
- An economy that works for people
- A stronger Europe in the world
- Promoting our European way of life
- A new push for European democracy.

The European Commission’s Work Programme [sets out 18 new initiatives](#) for the year 2024 within these priorities.

Under the first two priorities, the programme calls for initiatives on a new European wind power package, the 2040 climate target, water resilience, opening up European supercomputer capacity to ethical and responsible artificial intelligence start-ups, and EU space law.

The third priority foresees new initiatives in the areas of EU biotech and biomanufacturing, social dialogue, green and digital transition, and an initiative for rules on the European Works Council.

Joint communication on a strengthened partnership with Africa and a European defence industrial strategy form the core of the fourth priority. Fighting the smuggling of migrants and initiatives for a joint European degree of, which will contribute to achieving a European Education Area, make up the fifth priority. Lastly, the main areas envisaged in the sixth priority are preparing for enlargement and child protection.

The [Annex](#) of the Work Programme presents initiatives and proposals to rationalise the burden associated with reporting requirements. The Commission's goal is to reduce such burdens by 25%, without undermining the policy objectives of the concerned initiatives. The Annex also lists proposals and initiatives for evaluations and fitness checks, and it gives an overview of all 156 pending legislative proposals in the above-mentioned policy areas.

Due to the upcoming European Parliament elections in 2024, the Commission's 2024 work programme is largely limited to fulfilling the [political guidelines from 2019](#) set by European Commission President *Ursula von der Leyen*. (CR)

## European Court of Justice (ECJ)

### Two New Judges at the General Court

Two [new judges](#) have taken up their positions at the General Court of the EU.

Mr *Saulius Lukas Kalėda* has been appointed for the period from 20 September 2023 to 31 August 2025. He succeeds Mr *Virgilijus Valančius*.

Ms *Louise Spangsberg Grønfeldt* has also been appointed for the period from 20 September 2023 to 31 August 2028. She succeeds Mr *Sten Frimodt Nielsen*.

Prior to their positions as judges at the General Court, Mr Kalėda and Ms Spangsberg Grønfeldt served as members of the Legal Service of the European Commission. (CR)

## European Public Prosecutor's Office

### Working Arrangement between EPPO and French FIU

On 26 October 2023, the EPPO and the Financial Intelligence Unit (FIU) of France (TRACFIN) [signed a working arrangement](#) (WA). The WA establishes a structured and organisational framework for the cooperation between the two bodies. In particular, the WA aims to

facilitate the exchange of information in relation to offences within EPPO's remit, such as financial transactions suspected of being related to money laundering of PIF offences. The WA also aims to streamline TRACFIN's analytical support to the EPPO. Key provisions of the WA are:

- Conditions under which the parties can exchange information;
- Modalities of the exchange of information;
- Transmission of information from TRACFIN to the European Delegated Prosecutors in France and vice versa;
- Requests related to the suspension of suspicious transactions;
- Confidentiality and use of information by the parties and with regard to third parties.

The WA entered into force on the date of signature (26 October 2023). (TW)

### EPPO's Operational Activities: October – mid-November 2023

This news item provides an overview of EPPO's main operational activities from 1 October to 15 November 2023. It continues the periodic reports of the last issues (→ [eucrim 2/2023, 124–128](#)) and is in reverse chronological order.

- 15 November 2023: Within the framework of investigations by the EPPO in Palermo (Italy), [anti-mafia investigators and the Carabinieri take action](#) against several suspects involved in the circumvention of anti-mafia prohibitory measures and the false declaration of ownership and possession of land. As a result, €916,000 in agricultural funds from the EU were illegally obtained.

- 14 November 2023: At the request of the EPPO, [authorities in the Netherlands seize](#) real estate, bank accounts and objects, including luxury cars and a boat, against a company and three individuals. The suspects allegedly set up a missing trader scheme involving the trade with consumer electronics. The exact VAT loss cannot yet be quantified, but is in the millions.

- 8 November 2023: In a major investigation by the EPPO in Zagreb (Croatia), which examines [subsidy and procurement fraud at the Faculty of Geodesy of the University of Zagreb](#), 29 persons were arrested. After a [raid in June 2023](#), the EPPO detected above all the involvement of the Dean of the Faculty of Geodesy and a professor of the same faculty in the manipulation of public procurement procedures, forgery of documents and money laundering. The estimated damage to the public budget is more than €2 million, of which over €1.7 million is attributable to the EU budget.

- 7 November 2023: Under the lead of the EPPO in Munich (Germany), [more than 200 locations are searched in Germany and the Netherlands](#). Investigators seized over €450,000 in cash, two luxury cars and more than 80 smartphones, 30 hard disks and several servers. Four suspects are remanded in custody. The action refers to investigations into a criminal Chinese group that evaded customs duties and VAT payments by having established a complex fraud scheme with numerous shell companies trading in Chinese products, such as textiles, shoes and small electronic items. The group deceived the authorities as to the actual movement of the goods in the EU and generated false documents and invoices. It is estimated that the group evaded around €200 million in tax and customs duties. The EPPO highlights the smooth international cooperation involving police, tax investigation and custom authorities in Germany, the Netherlands and Belgium.

- 7 November 2023: In investigations of fraud and money laundering involving an amount of €15 million, Romanian law enforcement authorities carry out [house searches in several locations in Romania](#). In parallel, investigative measures were taken in Cyprus, Czechia, Malta, Monaco and the United States as part of judicial cooperation. The investigations are conducted by the EPPO and OLAF targeting the unlawful obtainment of EU funds for IT projects which were

supposed to develop innovative software solutions. Project beneficiaries are suspected of having submitted false or inaccurate documents with overvalued services or services that were never provided, as well as fraudulent invoices for the purchase of goods. They also channeled the money via international financial circuits.

■ 7 November 2023: In an investigation into [large-scale VAT carousel fraud](#) conducted by the EPPO in Milan (Italy), the Guardia di Finanza arrests two persons. The defendants are suspected to be the masterminds behind a complex network which sold electronic devices via numerous shell companies managed by straw men in Italy. The VAT loss is estimated at €50 million.

■ 7 November 2023: The EPPO in Riga (Latvia), in cooperation with Latvia's Corruption Prevention and Combating Bureau (KNAB), carries out searches and detains three persons. The EPPO investigations concern [possible fraud by state officials](#) from the Municipality of Valka who presumably were involved in the illegal obtaining of more than €740 000 from the EU's European Regional Development Fund (ERDF). It is suspected that, by circumventing eligibility conditions, a certain company was preferred for the construction of a industrial building.

■ 3 November 2023: The EPPO in Palermo (Italy) indicts 56 people and two companies for [criminal association aimed at systemic agricultural funding fraud](#) and corruption. High-level public officials and industrial professionals worked together so that certain companies received agricultural funding from the EU and national budgets. On the basis of long-standing relationships, officials from the authority managing the funds systematically favoured certain applicants from the criminal group.

■ 30 October 2023: Under the lead of the EPPO in Milan (Italy), several searches in different locations in Italy and in Switzerland are carried out targeting a [large-scale VAT fraud with VoIP](#) (Voice

over Internet Protocol) technology. The scheme allegedly involves companies in Czechia, Germany, Italy, Romania, Switzerland and the UK. The estimated damage is at least €53 million.

■ 25 October 2023: An [action day](#) under the lead of the EPPO in Prague (Czechia) detects a VAT evasion scheme committed by an organised criminal group. According to the investigations, individuals operating several companies falsely declared the transfer of Chinese goods and sold the goods via an online marketplace without paying VAT. The action day results in the seizure of luxury watches and €100,000 in cash; €700,000 from bank accounts are frozen. Seven individuals and three companies are charged for tax evasion (damage: over € 50 million) and participation in an organised crime group.

■ 17 October 2023: On behalf of the EPPO in Riga, the State Police of Latvia carries out searches and arrests four suspects for agricultural fraud. The case involves [illegal public tenders](#) by companies overpricing the costs for construction works. The projects were co-funded by the EU's European Agricultural Fund for Rural Development (EAFRD) and the damage is estimated at €1 million.

■ 10 October 2023: The EPPO in Zagreb (Croatia) launches an investigation against two suspects who seemingly [committed bribes for trading in influence](#). The case concerns the maintenance of business activities of the first suspect's company with the assistance of the second suspect within the framework of tenders co-financed by the EU's Cohesion Fund.

■ 5 October 2023: The EPPO in Palermo (Italy), in cooperation with the Anti-Mafia Investigation Directorate (*Direzione Investigativa Antimafia*), has [assets of a farmer seized](#) who is suspected of agricultural funding fraud and ties to organised crime. The farmer allegedly received €245,000 from EU agricultural funds although she was not the owner of the declared land and blacklisted

for not being allowed to receive public money.

■ 4/5 October 2023: The [EPPO in Zagreb \(Croatia\) takes action against four suspects](#) who allegedly illegally received subsidies for an agricultural project co-financed by the EU's European Agricultural Fund for Rural Development (EAFRD). It is assumed that the suspects (managers of companies) deceived the Croatian paying agency as to the eligibility criteria. The inflicted damage to the EU and national budgets is estimated at over €1.5 million.

■ 2 October 2023: On behalf of the EPPO in Palermo (Italy), the Guardia di Finanza [preventively seizes assets against an agricultural company](#) located in the province of Messina/Sicily. The company is suspected of agricultural funding fraud because it faked ownership of agricultural land by presenting false lease contracts. (TW)

## Europol

### Europol Report "The Second Quantum Revolution"

**spot light** On 23 October 2023, Europol [published](#) a new [report](#) looking at the impact of quantum computing and quantum technologies on law enforcement. The report was drafted by Europol's Innovation Lab in cooperation with the European Commission's Joint Research Centre (JRC) and Europol's European Cybercrime Centre (EC3).

While classical computers use binary bits to perform calculations, quantum computers use quantum bits to make calculations and to execute certain algorithms. In this way, the number of calculations needed to solve specific problems is significantly reduced. An example of one of the immediate areas where such quantum computing may have an impact is the field of cryptography and, hence, the protection of sensitive information.

This is why this first-time report takes a detailed look at the impact of quantum computing on cryptography, pointing out a number of opportunities and threats deriving from existing and future quantum computing possibilities. They include the concept of “store now – decrypt later” that offers possibilities for both law enforcement and criminals to gain later access to encrypted evidence/information. Quantum password guessing may open new possibilities particularly for law enforcement to improve its ability to gain access to password-protected information in high-profile criminal cases. In the field of digital forensic investigation techniques, quantum devices may offer new opportunities for law enforcement to extract and analyse data. The report also looks at the impact of post-quantum cryptography, i.e. cryptographic schemes that can run on classical computers without being vulnerable to quantum computer attacks. It emphasizes, however, that being resistant to quantum computer attacks does not ensure overall security. Therefore, sensitive information and systems must be protected adequately and vulnerabilities identified.

The second part of the report looks at the overall impact of quantum technologies such as quantum machine learning, quantum communications, quantum metrology, and quantum sensors. Techniques from quantum machine learning and enhanced AI systems will offer new possibilities for data analysis, computer vision, biometrics, and many more areas of law enforcement. At the same time, AI can be considered a classical dual-use technology, with cybercriminals using these techniques equally to their advantage.

Quantum communication technologies may generate positive and negative effects, as both law enforcement and criminals may be able to make use of quantum communications to establish highly secure communication channels for information exchange. Improved accuracy, precision, and sensitivity of

measurements through quantum sensors could improve the precision of crime scene forensics, surveillance and detection capabilities, and real-time decision making in critical situations.

Lastly, the report makes five law enforcement recommendations with regard to developments in quantum computing and technologies. Law enforcement shall:

- Observe quantum trends and monitor relevant developments to detect emerging threats;
- Build up knowledge and start experimenting to benefit from these developments in the future;
- Foster research and development projects, engaging closely with scientific community to build a network of expertise;
- Assess the impact of quantum technologies on fundamental rights to ensure that these new technologies are used while protecting fundamental rights;
- Review its organisation's transition plans to ensure that critical systems are protected in the post-quantum era.

Europol concluded that the observatory report served as a first in-depth exploration of the impact of quantum computing and quantum technologies from the perspective of law enforcement, but there is a need for further work and research to fully comprehend and navigate the quantum era. (CR) ■

### Enhanced Security for the Olympics 2024

In view of the upcoming Olympic and Paralympic Games, which will be hosted by France in 2024, Europol and France have signed an [agreement](#) to enable Europol to support France in further strengthening security during the games. Issues covered by the agreement include:

- Increasing operational preparedness;
- Developing special channels for swift cooperation during the event;
- Enhancing strategic foresight to

anticipate and confront complex situations quickly and efficiently.

Europol will deploy a special team to assist with security arrangements during the games. In addition, Europol's Operational Centre will manage the constant flow of data between Europol and its partners on a 24/7 basis, acting as the gateway for all operational information and intelligence channelled through the agency. (CR)

### Europol Cooperates with APPF

On 7 November 2023, Europol and the Authority for European Political Parties and European Political Foundations (APPF) signed a [Memorandum of Understanding](#) (MoU). With the MoU, Europol and the APPF aim to strengthen their cooperation and reinforce the resilience of EU democracies against criminal threats such as the unlawful use of personal data (i.e., data theft, data leaks, and deepfakes) in an electoral context.

The APPF is an independent EU body established for the purpose of registering, controlling, and imposing sanctions on European Political Parties and European Political Foundations pursuant to [Regulation \(EU, Euratom\) No 1141/2014](#). Furthermore, it is tasked with imposing sanctions against European political parties and foundations that try to influence European elections by illegally abusing personal data, including by cyber-enabled means. The APPF has its seat in the European Parliament. (CR)

### Europol Successfully Collaborates with TikTok on Referral Action Day

In the context of the public-private partnership between TikTok, law enforcement agencies, and Europol, the partners conducted a [Referral Action Day](#) to target suspected terrorist and violent extremist content online. The public-private partnership aims to address terrorists' abuse of the Internet, prevent online radicalisation, and safeguard fundamental rights.

The Referral Action Day, which took place on 28 September 2023, was put in motion by Spain and the EU Internet Referral Unit of Europol's European Counter Terrorism Centre (EU IRU) in cooperation with law enforcement authorities from 10 countries. Investigators were able to assess and flag to TikTok 2145 pieces of content for voluntary review against TikTok's terms of service. Referred content included videos and memes linked to jihadism and violent right-wing extremism and terrorism. (CR)

## Eurojust

### New Possibilities for Information Exchange in Terrorism Cases

On 31 October 2023, [Regulation \(EU\) 2023/2131](#) amending Eurojust Regulation (EU) 2018/1727 as regards digital information exchange in terrorism cases entered into force. Through the amended Regulation, Eurojust may now establish a modern Case Management System (CMS) to store operational information as well as a secure digital communication channel between Member States and Eurojust. Cooperation with third countries can be enhanced by granting Liaison Prosecutors direct access to the CMS.

In addition, Member States can now transmit information on ongoing and concluded terrorism cases to the European Judicial Counter-Terrorism Register (CTR), regardless of whether there is a known link to another Member State or a third country. The register, which was launched in 2019 (→ [eucrim 3/2019, 167](#)), aims to establish links between suspects and terrorist networks and ongoing and past investigations across the EU. It is managed by Eurojust on a 24-hour basis.

With the entry into force of Regulation (EU) 2023/2131, the provisions on sharing information with Eurojust have been removed from [Council Decision 2005/671/JHA](#) and instead included

in the Regulation. Regulation (EU) 2023/2131 also sets out provisions for the initial transmission of information and for updates, acquittals, decisions not to prosecute, categories of data to be transmitted, derogations, data retention, handling codes, and follow-up actions by Eurojust. It also defines the role and tasks of the Eurojust national correspondents in terrorism matters. A summary of the digital information exchange in terrorism cases through the CTR is provided in this [leaflet](#). (CR)

### Eurojust Signs Working Arrangement with Nigeria

On 9 November 2023, Eurojust and the Nigerian judicial authorities signed a [Working Arrangement](#), with the aim of enabling structured and closer cooperation in the fight against organised crime groups. Through the agreement, Eurojust can establish a Contact Point in Nigeria. It allows Eurojust and national authorities direct and better access to the Nigerian prosecution services. This will facilitate the execution of judicial cooperation requests. The arrangement also allows for the exchange of strategic information. It entered into force on the day of signature. It is the first agreement that the EU Agency Eurojust signed with a sub-Saharan African country. (CR)

### New National Member for Portugal at Eurojust

Since 8 November 2023, Mr *José Luis Ferreira Trindade* has been a Eurojust National Member for Portugal. Mr Trindade can look back on a longstanding career with Eurojust, where he started as Assistant to the National Member in 2016 and then became Deputy National Member in 2020. Mr Trindade succeeds Mr *António Cluny*. (CR)

### New National Member for Malta

At the beginning of October 2023, Ms *Maria Baldacchino* took up her [duties as National Member for Malta at](#)

[Eurojust](#). Ms Baldacchino already gained experience working at Eurojust in her positions as Deputy National Member and Assistant to the National Member, positions that she held since 2020. She succeeds Mr *Philip Galea Farrugia*. (CR)

## Frontex

### First-Line Border Checks outside the European Union

In October 2023, Frontex officers carried out [first-line border checks](#) at a border outside the EU for the first time. As part of Frontex's Joint Operation Moldova, it was the first comprehensive operational activity in a non-EU country that included land and air borders and used the same coordination structure. This marks an important step towards international cooperation. The joint border checks conducted by Frontex officers and their Moldovan colleagues took place at the Palanca border crossing point, which is located between Moldova and Ukraine. (CR)

### Draft Resolution on Frontex Fact-Finding Investigation

On 26 October 2023, the Committee on Civil Liberties, Justice and Home Affairs of the European Parliament (LIBE) adopted a draft [resolution](#), wrapping up the fact-finding investigation by the Working Group on Frontex Scrutiny (→ [eucrim 3/2021, 148–149](#)).

In summary, the resolution calls for the agency to scale down operations in Member States where there are allegations of lack of respect for EU values; there are severe concerns over the situation in Greece, Lithuania, and Hungary. The MEPs acknowledge the steps taken by the agency to introduce managerial changes but call for further actions to ensure the transparency of and respect for EU principles. In order to finally adapt the draft resolution, it will be tabled for a discussion

and vote by the full House in a future plenary session. (CR)

## Agency for Fundamental Rights (FRA)

### FRA's Strategic Priority 2023–2028

FRA's strategic priorities for the next five years have been set out in its recently published [Strategic Plan 2023–2028](#).

In the first part, the Strategic Plan assesses a number of megatrends that seem most relevant to fundamental rights. Some of these major trends are:

- Challenges to justice and the rise of a security-based agenda;
- Threats to democratic values;
- Inequality and increased discrimination;
- Changing patterns of migration;
- Economic and social trends;
- Digital transformation and artificial intelligence;
- Climate change.

For each category, the strategy sets out three different scenarios (maintenance of status quo, growth, decline), looks at their plausibility, and describes their impact on fundamental rights in the coming years.

The second part of the agency's plan sets out its strategic priorities for the years 2023–2028. The three key priorities for this period include:

- Upholding fundamental rights standards in the development of new EU laws and policies;
- Ensuring respect, protection, and fulfilment of fundamental rights in the fields covered by existing EU laws and policies;
- Carrying out cross-cutting actions to support the realisation of the EU's fundamental rights goals and vision.

To achieve the first priority, the agency will continue to provide information, data, and analyses in order to assist policymakers and provide information on EU laws and policies. The aim is to support decision-makers

with independent advice and opinions, helping them advance policies that fully respect fundamental rights and are effective in protecting and fulfilling fundamental rights. In addition, FRA plans to carry out research and foresight studies on fundamental rights issues and future challenges in order to help EU institutions and Member States anticipate fundamental rights threats and promote fundamental rights resilience.

With regard to the second priority, the agency will support implementation of EU laws with advice, opinions, research, and real-time assistance to EU institutions, Member States, and other stakeholders. It will also contribute to the integration of the fundamental rights perspective in relevant laws and policies at the EU and national levels as well as the implementation of practical measures to address fundamental rights risks and challenges that may arise.

Looking at the third priority, cross-cutting actions to support the realisation of the EU's fundamental rights goals and vision include the following:

- Awareness raising among rights holders and duty bearers;
- Development of research methods and tools on fundamental rights, including benchmarking, assessment, due diligence tools, and fundamental rights indicators;
- Collaboration with partners, fundamental rights actors, and multipliers in strengthening regional, national, and local fundamental rights protection systems;
- Promotion of dialogue with and among key actors in order to respond to fundamental rights challenges and shape agendas with a view to enhancing collaboration and building a common vision for the future.

Lastly, FRA emphasised that it will review and possibly update its priorities halfway through the term of the strategy to react to emerging needs. (CR)

## Specific Areas of Crime

### Protection of Financial Interests

#### ECA: Increased Error Rate in EU's 2022 Spending

The EU's spending in 2022 from the budget amounted to €196 billion. This expenditure was marked by a significant increase in the level of error, and two thirds of the audited expenditure must be considered high-risk. This is one of the main findings in the European Court of Auditors' [\(ECA\) annual reports on the implementation of the EU budget](#) and on the activities of the European Development Funds (EDFs) for the 2022 financial year, which were presented at the beginning of October 2023. The reports represent the ECA's statement of assurance as to the reliability of the accounts and the legality and regularity of the transactions underlying them.

Although the auditors are satisfied with the EU's revenue accounts in 2022, they concluded that errors in the spending of the EU budget increased significantly from 3% in 2021 to 4.2% in 2022 (for the reports on the 2021 financial year → [eucrim 3/2022, 183–184](#)). The auditors issued an "adverse opinion" on the EU's spending in 2022 based on the widespread problems that exist.

Although the reports do not primarily aim to detect irregularities and fraud, the ECA's auditors identified 14 cases of suspected fraud. They reported these cases to OLAF, which has already opened two investigations. At the same time, six of these cases were reported to the European Public Prosecutor's Office (EPPO), which opened three investigations.

Expenditure under the Recovery and Resilience Facility (RRF), which is intended to alleviate the economic consequences of COVID-19 and which is the main component of the EU's €800 billion "NextGenerationEU" (NGEU) package, are still seen critically by the

ECA (→ following news item). 11 of 13 grant payments made to EU Member States under the RRF in 2022 were adversely affected by regularity issues. Six payments were affected by material error. Problems include milestones and targets that have not been satisfactorily fulfilled or eligibility criteria that have not been complied with. The ECA therefore issued a “qualified opinion” on RRF expenditure (meaning that problems have been identified, but are not pervasive).

The debts incurred in conjunction with the NGEU instruments are also seen critically. The auditors noted that the related borrowing costs increased significantly in 2022; rising interest rates combined with high inflation rates have had significant budgetary implications. In addition, the EU’s huge financial assistance to Ukraine has considerably increased the EU’s total exposure to potential future obligations. (TW)

### ECA: Commission’s Financial Management and Performance Report too Positive

When presenting EU budget achievements, the Commission was more optimistic than the European Court of Auditors (ECA). The Commission and the EU’s financial watchdog also have different opinions regarding the level of errors in the EU’s most voluminous spending areas, i.e. cohesion and the recovery fund. This is stated by the ECA in its [review of the Commission’s 2022 annual management and performance report](#) for the EU budget (AMPR). The AMPR is an important document for the discharge procedure in the European Parliament and Council. ECA’s auditors analysed how the Commission prepared the 2022 AMPR, including related checks, and how it reported on performance-related issues.

They remarked that there is still room for improvement for the Commission as regards data collection, monitoring, and performance reporting. As stated in ECA’s annual reports on the implemen-

tation of the EU budget, the auditors consider an error rate of 4.2% for the EU budget spending in 2022 (→ previous news item) whereas the Commission’s estimates amount to only 1.9%.

The biggest difference was in the area of cohesion spending, which totalled €79 billion or 40% of the EU budget; here, the auditors reported a 6.4 % error rate, while the Commission’s maximum estimate was 2.6 %. Assessments also differ as regards the payments under the Recovery and Resilience Facility (RRF). By contrast to the Commission, the auditors thought that several payments made in 2022 have not satisfactorily complied with milestones and targets.

Lastly, the ECA review criticised the AMPR for failing to mention the outstanding EU budget commitments, which the auditors say reached a record high of €453 billion. (TW)

### ECA: Overall Performance of EU’s Recovery Fund Cannot Be Measured

In its [Special Report No. 26/2023](#), published on 24 October 2023, the European Court of Auditors (ECA) [criticised](#) that the monitoring system of the Recovery and Resilience Facility (RRF) is insufficient for measuring the overall performance of the recovery fund, i.e. not allowing to answer the question as to how well an EU-funded action has met its objectives and provides value for money. Measuring overall performance should, however, be a fundamental element to ensure accountability towards citizens given that the recovery fund itself claims to be performance-based. The report sees weaknesses in the two main building blocks of the monitoring system: (1) milestones and targets for tracking member states’ progress on reforms and investments; and (2) 14 predefined common indicators for monitoring success in achieving the RRF’s objectives.

First, milestones and targets are only steps in implementation (e.g., adopting a law, selecting projects, or

signing contracts) and largely focus on what the projects finance (e.g., the number of people attending training, the number of square metres renovated, or the number of electric vehicles purchased), but they are unsuitable to measuring results (e.g. the number of people employed, savings in energy consumption, and a reduction in CO2 emissions). Second, the vast majority of common indicators do not measure results either, and they will often not provide enough information on how projects on the ground contribute to the RRF’s general objectives. Reasons for this are that some reforms and investments could not be linked to any indicator, such as major structural reforms (economic, labour market and judicial reforms) or investments in infrastructure and public transport, or common indicators do not fully cover the RRF’s objectives, e.g., lacking indicators for the rule of law, the financial sector or taxation.

Looking at data quality and reporting obligations, the auditors see remaining risks to data reliability, especially at final recipient level. The recovery and resilience scoreboard, by means of which the Commission ensures reporting on the implementation of the RRF, is user-friendly but is affected by data quality issues and lacks transparency in certain respects, according to the ECA.

The ECA recommends, *inter alia*, that the Commission ensures a comprehensive performance monitoring and evaluation framework, improves data quality, and takes care of more informative and consistent reporting. (TW)

## Corruption

### First Statements on Commission’s Anti-Corruption Proposal

European institutions started to examine the Commission’s proposal for a directive on combating corruption (→ [eucrim 2/2023, 140–141](#)).

On 21 September 2023, the competent [EP rapporteur Romana Strugariu presented a first draft report](#) on the proposal. She generally welcomes that the proposal brings EU legislation in line with the UN Convention against Corruption (UNCAC) and she acknowledges the main objective to achieve a coherent and unified framework for addressing corruption in the EU. *Strugariu* proposes the definition of further two offences, namely concealment of property gained by means of corruption and misconduct in public office, in order to curb activities by corruption rings. In addition, she pushes for introducing new rules on sanctions and procedural safeguards (aiming to eliminate any avenues of avoiding prosecution of corruption), raising some of the minimum sentences of imprisonment, and establishing the concept of grand corruption. Modifications are also proposed with regard to the protection of victims of corruption and the identification of perpetrators behind legal entities. Looking at the prevention of corruption, interfaces between the public and private sectors, potential conflicts of interest and unexplained assets of public officials are to be made more transparent. Lobbying activities as well as political party and election campaign financing should be more strictly regulated. The draft report is open to other amendments by MEPs. A vote in the LIBE Committee is scheduled for the end of January 2024.

On 25 October 2023, the [European Economic and Social Committee \(EESC\) adopted its opinion](#) on the Commission's initiative on the fight against corruption. The EESC pleads for a parallel legal framework addressing in a binding way the Union legal system since the obligations deriving from the UNCAC apply to all contracting parties in the same way and to the same extent. In this context, the powers of the EPPO should be extended to include corrupt conduct, even if without implications for the integrity

of the financial interests of the Union. Looking at prevention, the EESC calls on more stringent and precise rules regarding the obligations of the Member States relating to conflicts of interest as well as on a more effective and powerful institutional anti-corruption framework. With regard to repressive measures, the EESC welcomes the choice to intervene for the same type of crime against conduct perpetrated in both the public and private sectors, but criticises the lack of precision in some criminal definitions, such as trading in influence (Art. 10) and abuse of functions (Art. 11).

In its opinion (adopted at the end of November 2023), the [Committee of Regions \(CoR\) approves the general objective](#) of the proposed anti-corruption directive to harmonise the relevant legislation across the Member States. The CoR considers the proposal in line with the principles of subsidiarity and proportionality, but warns that the implementation of the directive into national criminal law will be a difficult and long-lasting process. The CoR emphasised that comprehensive instruments already exist at international, European and national level to combat corruption but their effectiveness continues to be hampered by implementation and enforcement gaps and obstacles in cooperation which is where more effort is needed. In particular, it calls on the promotion and follow-up of the "European Code of Conduct for all Persons Involved in Local and Regional Governance" adopted by the Congress of Local and Regional Authorities of the Council of Europe.

Next to these European institutions, the Austrian, Czech, Portuguese and Italian parliaments submitted [contributions](#) to the European Commission proposal for a directive to combat corruption. On 13 November 2023, the Legal Affairs Committee of the German Bundestag also dealt with the proposal. In a [hearing](#), legal experts were largely critical and called for consider-

able improvements in many respects. (TW)

### EP Reinforced its Anti-corruption Rules

**spot light** On 1 November 2023, [amendments to the European Parliament's Rules of Procedure](#) entered into force. The amendments strengthen integrity, transparency and accountability in the European Parliament (EP) as a response to the Qatar-gate corruption scandal. They were decided in plenary on 13 September 2023 and are based on the [EP President's 14-point reform plan](#) (→ [eucrim 1/2023, 27](#)). MEPs have adopted a stricter ban on all activities by MEPs that are constituting lobbying and tougher penalties for breaches of the code of conduct. Other changes include:

- Obligation for MEPs to submit declarations of input on ideas or suggestions received from external actors to be annexed to all reports and opinions;
- Wider rules on the publication of meetings so they apply to all MEPs and cover meetings with third country representatives;
- Stronger rules on "revolving doors", introducing a ban on MEPs from engaging with former MEPs who have left Parliament in the previous six months;
- Expanded definition of conflicts of interest;
- Extended threshold to declare additional incomes (now including all remunerated activities both regular and occasional);
- Obligation to declare assets at the beginning and end of every term of office;
- Stronger role for the competent Advisory Committee;
- Regulation and restriction of unofficial groupings' activities.

The EP also decided that declarations of interests submitted prior to these changes will remain valid until 31 December 2023. (TW) ■

## Cooperation between EU and UN in Fight against Corruption

The EU and the UN have fostered their collaboration in the fight against corruption. On 5 October 2023, the [second EU-UNODC Anti-Corruption Dialogue](#) was held in Vienna. Representatives from the EU and the United Nations Office of Drugs and Crime (UNODC) discussed progress on individual initiatives and identified new avenues for cooperation and synergy. The dialogue dealt, *inter alia*, with the following topics:

- Intersection of corruption and gender;
- Empowering youth through fostering a culture of non-tolerance towards corruption;
- Institutional accountability and linkages between corruption and organised crimes;
- UNODC's collaboration in the EU Network against Corruption (→ [eucrim news of 9 October 2023](#));
- The ongoing review of the implementation of the UN Convention against Corruption (UNCAC) in the EU (→ *infra*);
- Intersection between corruption, security and fragility;
- Cooperation in anti-corruption programmes and mutual provision of technical assistance.

Participants also reflected on the achievements and perspectives of UNCAC, which celebrates its [20th anniversary](#) in 2023.

On 13/14 November 2023, the review for the implementation of the UNCAC in the EU was continued by an [evaluation visit](#) from reviewers from Czechia and Niue which will be responsible for the review. The [Implementation Review Mechanism \(IRM\)](#) is a peer review process that assists States parties to effectively implement the Convention. In accordance with the terms of reference, each State party is reviewed by two peers – one from the same regional group – which are selected by a drawing of lots. The IRM is coordinated by the UNODC. The EU (as a regional organisation) is party to the Convention since 2008.

The reviewers met with several Commission departments and Union institutions, bodies, offices and agencies, including Europol, Eurojust, the EPPO, and OLAF. The visit mainly focused on the implementation of the UNCAC provisions on criminalisation and law enforcement as well as international cooperation.

The next steps in the EU's review under UNCAC will be an executive summary, including recommendations and a final review report, which is expected in 2024. (TW)

## Money Laundering

### MEPs Discussed Consequences from "Cyprus Confidential"

On the occasion of the recent revelations about "Cyprus Confidential", the European Parliament quizzed the Council and the Commission in a [hearing on 22 November 2023](#). It was discussed how urgently and effectively loopholes in the financial system can be closed and the ongoing negotiations with Member States on tighter anti-money laundering rules can be accelerated. Under the name [Cyprus Confidential](#), an investigation by the International Consortium of Investigative Journalists (ICIJ), published on 14 November 2023, showed how Russian oligarchs have been circumventing sanctions against Russia via letterbox companies in Cyprus after Russia's 2014 annexation of Crimea and war in Donbas, as well as since the invasion of Ukraine in February 2022.

Representatives of the Council and Commission referred to the ongoing trilogue negotiations on the money laundering package (→ [eucrim 3/2021, 153](#)) and the directive on criminal offenses for sanctions evasion (→ [eucrim 4/2022, 225](#)). Some [MEPs criticized](#) the Commission and accused it of inactivity towards countries that do not take sufficient account of existing money laundering and sanctions legislation.

[Luděk Niedermayer](#) (EPP, CZ), EP rapporteur for the 6th Anti-Money Laundering Directive, said: "Unfortunately, we have too many weak points in Europe. Dealing with the financial sanctions, this is the same exercise as anti-money laundering. We need to track the flows and understand who owns what." [Sophie in 't Veld](#) (Renew, NL), EP rapporteur for the directive on the violation of EU sanctions, said: "The complete lack of enforcement of EU laws by both the national authorities and the European Commission has turned the EU into a gangsters' paradise". (TW)

## Tax Evasion

### VAT Gap Report 2023: Progress in VAT Compliance

On 24 October 2023, the Commission released the [2023 report on the VAT gap in the EU](#). The VAT gap refers to the difference between expected value-added tax (VAT) revenue and the actual amount collected. As VAT is an important contributor to both EU and national budgets, it is important to obtain an estimate of the VAT gap. The report relates to the period 2017–2021. It was drafted by a team of experts from the Center for Social Economic Research, Warsaw.

The 2023 report shows that Member States lost around €61 billion in VAT in 2021, a decrease from the €99 billion reported in 2020 and therefore an improvement compared to previous years. This amount represents revenue losses due mainly to such factors as VAT fraud, evasion, avoidance, non-fraudulent bankruptcies, miscalculations, and financial insolvencies.

The report highlights that although some revenue losses are unavoidable, strategic policy measures, in particular those related to the digitization of tax systems, real-time transaction reporting, and electronic invoicing, have had a positive impact. In particular, Italy and Poland reduced their national VAT gap figures significantly, with Italy show-

ing a reduction of 10.7% and Poland a reduction of 7.8%. At the other end of the spectrum, the Netherlands, Finland, Spain, and Estonia reported the smallest gaps, with minimal percentages of 0.2%, 0.4%, 0.8%, and 1.4%, respectively. It is important to note that negative values, such as those observed in the Netherlands, can occur in Member States where non-compliance is already very low, possibly due to statistical and measurement inconsistencies. (AP)

### New Directive Amending EU Rules on Administrative Cooperation in Area of Taxation

spot  
light

On 17 October 2023, the Council [adopted a new directive](#) amending EU rules on administrative cooperation in the field of taxation (DAC8). The amendments primarily address the reporting and automatic exchange of information on income from crypto-asset transactions and advance tax rulings specifically for high-net-worth individuals. DAC8 ([Directive 2023/2226](#)) was published in the [Official Journal L, 2023/2122, 24 October 2023](#).

This directive follows the Council's report on tax issues of December 2021,

in which the Council indicated that it expects the European Commission to present a legislative proposal in 2022 for a further revision of Directive 2011/16/EU on administrative cooperation in the field of taxation (DAC), concerning the exchange of information on crypto-assets and tax rulings for wealthy individuals. On 8 December 2022, the Commission presented a proposal for a Council Directive amending Directive 2011/16/EU on administrative cooperation in the field of taxation.

This new directive, amending [Directive 2011/16/EU](#), aims to strengthen the existing legal framework, by extending the scope of registration and reporting obligations, and the general administrative cooperation of tax administrations. In order to address new challenges and the growing use of alternative means of payment, the amendment to the Directive will also cover crypto-assets and their users. By requiring all EU-based crypto-asset providers, regardless of their size, to report transactions from EU residents, the Directive intends to enhance Member States' ability to identify and combat tax fraud, tax evasion, and tax avoidance. In addition, the scope of the Directive has been extend-

ed to cover the reporting obligations of financial institutions in relation to electronic money and central bank digital currencies as well as the automatic exchange of information on advance cross-border rulings used by natural persons. The Directive covers a wide range of crypto-assets, using the definitions set out in the Markets in Crypto-Assets Regulation (MiCA → [eucrim 2/2023, 143](#)). It covers decentralized crypto-assets, stablecoins, including e-money tokens, and certain non-fungible tokens (NFTs).

The Directive entered into force on 13 November 2023. As a rule, Member States have time until 31 December 2025 to transpose the rules of the Directive into their national law. For certain rules of the Directive, there are longer transposition deadlines (cf. Art. 2 of Directive 2023/2226). (AP)

### Change in EU List of Non-Cooperative Jurisdictions for Tax Purposes

The EU list of non-cooperative jurisdictions for tax purposes was [updated](#) on 17 October 2023. Three jurisdictions were added to the blacklist (Antigua and Barbuda, Belize, and Seychelles), two were moved to the "grey list" (British Virgin Islands and Costa Rica), and one country (Marshall Islands) was removed from the lists.

The listing is part of the EU's external tax policy strategy and is intended to contribute to ongoing efforts to promote good tax governance worldwide (→ [eucrim 1/2020, 18](#)).

The EU's blacklist of non-cooperative jurisdictions (Annex I of the Council Conclusion) comprises countries that have either not engaged in a constructive dialogue with the EU on tax governance or not fulfilled their commitments to implement essential reforms on tax transparency, fair taxation, and compliance with international standards to prevent base erosion and profit shifting. Antigua and Barbuda, Belize, and the Seychelles were added to the list because they were found to be deficient

### Research Team Published 2024 Report on Global Tax Evasion

On 22 October 2023, the EU Tax Observatory published [a report on tax evasion](#), which deals with the effects of far-reaching initiatives to reduce international tax evasion. Prepared by the staff of the [EU Tax Observatory](#), a research laboratory dedicated to international tax issues established in 2021 (hosted at the Paris School of Economics), this report consolidates the findings of more than 100 global researchers, often in collaboration with tax administrations. The research makes use of new data on the activities of multinational enterprises (e.g. country-by-country reports) and data on offshore household assets (from the automatic exchange of bank information) stemming from policy initiatives over the past decade.

The report found that offshore tax evasion by wealthy individuals has declined. The 15% global minimum tax on multinational

corporations, which was initially expected to raise global corporate tax revenues by nearly 10% in 2021, has been significantly weakened by a growing list of loopholes. Moreover, domestic tax evasion is on the rise. Global billionaires are achieving effective tax rates of 0% to 0.5% on their wealth, largely through the widespread use of shell companies to evade income taxation.

To address the issues identified in the report, the EU Tax Observatory has made six proposals. One of the key proposals is to introduce a global minimum tax of 2% on billionaires, with an estimated annual revenue potential of nearly \$250 billion from fewer than 3000 individuals. In addition, strengthening the global minimum tax on multinational companies – without loopholes – could generate an additional \$250 billion annually. (AP)

in the exchange of tax information on request. Currently, 16 jurisdictions are listed.

The British Virgin Islands and Costa Rica were moved to the “grey list” (Annex II), as they are implementing the necessary reforms. Annex II refers to jurisdictions committed to address deficiencies. It currently includes 14 jurisdictions.

The Common EU list of third country jurisdictions for tax purposes is regularly updated twice a year (starting in 2020), with the next revision scheduled for February 2024. It is agreed by the EU Finance Ministers. A country will be removed from the list once it has addressed the issues of concern for the EU and has brought its tax system fully into line with the required good governance criteria. The Commission published a [factsheet](#) showing the evolution of the lists (Annex I and II) since December 2017. (AP)

## Counterfeiting & Piracy

### ECJ: Bulgarian Penalty for Trade Mark Infringement Disproportionate

In its judgment of 19 October 2023 in [Case C-655/21 \(G. St. T.\)](#), the ECJ interpreted the principles of legal certainty and proportionality as enshrined in Art. 49(1) and (3) CFR in the context of the incrimination of trade mark infringements under Bulgarian law.

In the case at issue, the referring District Court, Nesebar, Bulgaria, had doubts as to whether the Bulgarian provisions that implemented Union and international law on the enforcement of intellectual rights are in line with the EU Charter of Fundamental Rights (CFR).

#### ► *The principle of legality*

The first peculiarity in Bulgarian law is that the same conduct, i.e., the use in the course of trade of a trade mark without the consent of the holder of the exclusive right, is sanctioned both as an administrative and a criminal offence. Nevertheless, Bulgarian legislation does

not include any criterion to differentiate categorisation as a criminal offence and as an administrative offence. That absence of a clear and precise criterion has led to contradictory practice and unequal treatment of litigants who have committed practically the same acts. The Bulgarian court wonders whether such legislation is contrary to the principle of the legality of criminal offences and penalties within the meaning of Art. 49(1) CFR.

The ECJ [replied](#) that the legality principle means that criminal law provisions must be accessible, predictable and clear as regards the definition of the offence and the sentencing. Thus, every citizen must understand which conduct will make him or her criminally liable. However, the principle does not give rise to a requirement for the national legislation to contain criteria for the distinction between an administrative offence and a criminal offence being described in similar or identical terms.

#### ► *The principle of proportionality of custodial sentence*

However, the ECJ took issue with the level of sentence. Bulgarian criminal law penalizes the illegal use of a trade mark that has occurred repeatedly or has caused significant harmful effects with a custodial sentence ranging from five to eight years of imprisonment. The referring court stated that the lower limit of that custodial sentence is extremely long and that that sentence is, moreover, combined with a fine of an equally high amount. Furthermore, the possibilities for the court to reduce or suspend the sentence are very limited. The referring court wondered whether such legislation is precluded under Art. 49(3) CFR.

The ECJ acknowledged that, in the absence of internal EU legislation in the field of the sanctions applicable, the Member States have the power to determine the nature and level of those penalties. Nevertheless, those punitive measures must be proportionate. According to the ECJ, a custodial

sentence providing for a minimum of five years for all cases of unauthorised use of trade mark in the course of trade does not satisfy that requirement. Such legislation fails to take account of any specific aspects of the circumstances of the case. Therefore, the Bulgarian criminal provision in question is precluded in the light of Art. 49(3) CFR. (TW)

### Eurojust Raises Awareness of Advertising-Funded Digital Piracy

On 27 October 2023, Eurojust published a [flyer](#) with information on the phenomena of using advertising to fund websites and mobile apps offering pirated content. It appears that a significant amount of advertising on piracy sites and apps comes from legitimate brands and is placed by legitimate advertising companies. Although it is done unknowingly most of the time, the premium and legal advertising generates real income for criminals. According to a [study](#) on “Online advertising on IPR-Infringing Websites and Apps” commissioned by the European Union Intellectual Property Office (EUIPO), ad profiles of 5758 illegal and high-risk IPR-infringing websites and apps monitored between January and September 2021 generated €969.8 million in advertising revenue. Types of advertising range from branded advertising and sponsored content to fraudulent and malicious advertising.

Efforts to stand against this development include the 2018 [Memorandum of Understanding on Online Advertising and Intellectual Property Rights](#). The MoU is a voluntary agreement facilitated by the European Commission to limit advertising on websites and mobile applications that infringe copyrights or help disseminate counterfeit goods. To date, it has been signed by 30 actors involved in buying, selling, facilitating, and placing advertising. The [evaluation report](#) on the functioning of the MoU, published in August 2020, showed that the MoU

has already created awareness among brands that their ads may end up on IPR-infringing websites. (CR)

## Organised Crime

### New Roadmap to Fight Drug Trafficking and Organised Crime

On 18 October 2023, the Commission adopted a new EU [Roadmap to fight drug trafficking and organised crime](#). This new Roadmap is in line with the Commission's continued efforts to implement the EU Strategy on Organised Crime 2021–2025 (→ [eucrim 2/2021, 90–91](#)) and the [EU Drugs Strategy and Action Plan 2021–2025](#). The Commission considers drug trafficking operated by organised crime to be one of the most serious security threats in Europe. The roadmap sets out 17 actions in four key areas:

- *Strengthen preventive efforts*: While some Member States have robust frameworks empowering local authorities to use administrative tools against criminal infiltration, others are lagging behind in developing such approaches. It is essential to enhance the exchange of best practices and guidance among all Member States to support the establishment of national frameworks for the implementation of the administrative approach. The Commission intends to provide practical guidance in 2024, focusing in particular on the use of administrative tools and information exchange to effectively combat criminal infiltration.

- *Dismantle high-risk criminal networks*: In order to better dismantle high-risk criminal networks, the Roadmap proposes mapping the criminal networks that pose the greatest threat to society, strengthening the exchange of information and cooperation between judicial authorities in complex cross-border organised crime investigations, and using the features of the Schengen Information System (SIS). The latter has been strengthened – by

means of a new legal framework that became operational in March 2023 (→ [eucrim 1/2023, 11–12](#)) – to help prevent criminals and terrorists from moving within or entering the EU undetected.

- *Strengthen cooperation with international partners*: priority will be given to those countries and regions whose national legal frameworks are abused by criminals to hide themselves or their assets.

- *Strengthen the resilience of logistics hubs through a European Ports Alliance*: The strategic role of logistics hubs – as key gateways for the EU's economic prosperity and the transport of goods across the EU – makes them vulnerable to drug smuggling and exploitation by high-risk criminal networks and their enablers. To counter this, the Commission proposes enhancing the resilience of ports by establishing a European Ports Alliance, by activating the customs community as the first line of defence against illicit trafficking, by promoting improved law enforcement cooperation to dismantle criminal networks involved in drug trafficking, and by establishing a public-private partnership.

The Commission will collaborate closely with Member States and its partners to accomplish the objectives outlined in this Roadmap. (AP)

## Trafficking in Human Beings

### Commission Presents Package to Prevent and Fight Migrant Smuggling

On 28 November 2023, the European [Commission presented a package to counter migrant smuggling](#). The package consists of the following:

- A proposal for a new Directive laying down minimum rules to prevent and counter the facilitation of unauthorised entry, transit and stay in the Union ([COM\(2023\) 755 final](#));

- A proposal for a Regulation to reinforce police cooperation and Europol's

role in the fight against migrant smuggling and trafficking in human beings ([COM\(2023\) 754](#));

- A [call to action](#) on a global alliance to counter migrant smuggling.

The set of measures operationalise the call of Commission President *Ursula von der Leyen* in her State of the Union speech of September 2023, in which she called for strengthening all the tools at disposal of the EU to effectively counter migrant smuggling.

- *The proposed Directive against migrant smuggling*

The [proposed Directive](#) will replace the current legal framework on facilitation of unauthorised entry, transit and residence in the EU, which stems from 2002. The main elements of the proposed Directive are the following:

- Ensuring an effective investigation, prosecution and sanctioning of organised criminal networks responsible for migrant smuggling: The proposal clarifies the smuggling offences that should be criminalised. This includes: facilitation conducted for financial or material benefit or the promise thereof; facilitation that is highly likely to cause serious harm to a person even though conducted without financial or material benefit; and public instigation of third-country nationals, for instance through digital tools or social media, to come to the EU without authorisation.

- More harmonised penalties reflecting the seriousness of the offence: The proposal introduces a definition of aggravated offences (e.g., offence committed as part of an organised criminal group, causing serious harm or endangering life or health, causing death) to which there are corresponding higher levels of criminal penalties; the maximum minimum penalties of the current framework (at least 8 years imprisonment) will be increased and scaled.

- Improving the jurisdictional reach: The proposal expands the jurisdiction of the EU Member States, including, for instance, cases of boats sunk in in-

ternational waters before reaching the territorial waters of a Member State or a third country; offences committed on board of ships or aircrafts registered in a Member State, and offences committed by legal persons doing business but not necessarily established in the EU.

- Reinforcing the Member States' resourcing capacities: Member States would be obliged to adequately resourced, sufficiently train and specialise the relevant law enforcement and judicial authorities in order to ensure effective prevention, investigation and prosecution of offenders. In addition, Member States should also work on the prevention of migrant smuggling, through information and awareness-raising campaigns, research and education programmes.

- Improving data collection and reporting: Member States will be required to collect and report statistical data on an annual basis to improve the scale, detection of cases and the response to migrant smuggling.

➤ *The proposed Regulation reinforcing law enforcement cooperation*

The [proposal for the Regulation](#) specifically pursues the following objectives:

- Strengthening the coordination at EU level: the (existing) European Centre Against Migrant Smuggling at Europol will be reinforced. In addition to Europol staff, the Centre will convene seconded national experts from the EU Member States, and liaison officers from Eurojust, Frontex and the Commission. The tasks of the Centre are further defined: it will monitor trends in migrant smuggling and trafficking in human beings, produce annual reports, strategic analyses, threat assessments and situational updates, and support investigative and operational actions. It will also support Europol's Executive Director in requesting the initiation of criminal investigations.

- Improving information sharing: The proposed regulation strengthens Member States' obligations to share informa-

tion, including biometrics, on migrant smuggling and trafficking in human beings with Europol. The redesigned European Centre Against Migrant Smuggling will be tasked to identify cases of migrant smuggling that may require cooperation with non-EU countries, including by exchanging personal data on a case-by-case basis.

- Reinforcing Member States' resources: The Commission proposed that Member States designate specialised services for combating migrant smuggling and trafficking in human beings, provide for the adequate resourcing of these services, connect these services to Europol's Secure Information Exchange Network Application (SIENA), and task the European Centre Against Migrant Smuggling to act as a network of specialised services.

- Reinforcing Europol: the proposal codifies and further develops the concept of operational task forces and sets out a new tool in the form of Europol deployments for operational support. Participation of third countries in operational task forces, and Europol deployments for operational support in third countries are also regulated. To fulfill these objectives, the Commission is also proposing to increase the financial and human resources of Europol.

Next steps: The proposed Directive and Regulation will now be discussed in and negotiated by the European Parliament and the Council.

➤ *The Call to Action for global alliance against migrant smuggling*

On 28 November 2023, the European Commission held a [high-level international conference](#) in Brussels aiming at fostering a global alliance to counter migrant smuggling. On this occasion, the Commission launched its [call for such a global alliance](#). The call states that migrant smuggling is a criminal activity under international and European law that disrespects human life and the dignity of people in the pursuit of financial or other material profit. Consequently, a strong, united, and global response

to this phenomenon is necessary from all State and non-State actors. The call sets out a series of proposals for action addressed to state governments, international organisations and online service providers. All governments should come together on prevention, response and alternatives to irregular migration, including addressing the root causes of irregular migration and facilitating legal pathways. Looking at the work that should collectively be done, the call recommends:

- Providing a strong, united and global response to migrant smuggling;
- Ensuring concerted and coordinated action to step up the operational response to migrants smuggling at the international level;
- Ensuring follow-up at technical and political level, to take forward the work on the three key strands on prevention, response, and alternatives to migrant smuggling.

For the follow-up of the call, the Commission will set up a framework in which all global stakeholder can work closely together and which acts as a contact point. As a result, the Commission will convene technical Expert Groups with representatives from EU institutions, agencies, Member States, partner countries, international organisations and other stakeholders. The first thematic Expert Group meeting on tackling the phenomenon of digital smuggling is planned to take place in early 2024. (TW/AP)

## Procedural Law

### Procedural Safeguards

#### Poland before CJEU for Failure of Transposition of Access to Lawyer Directive

On 16 November 2023, the Commission decided to [refer Poland to the CJEU for failure](#) to communicate the measures transposing into na-

tional legislation [Directive 2013/48/EU](#) on the right of access to a lawyer and to communicate upon arrest. The Commission has mainly blamed Poland for having failed to transpose specific provision in relation to minors. Since Poland was unable to dispel the Commission's concerns, the Commission decided to take the last step of the infringement procedure and to bring the case before the CJEU. The infringement procedure started in July 2021 when the Commission sent a letter of formal notice to Poland. (TW)

### ECJ Clarifies Obligation to Inform Accused Person of Reclassification of Offence

On 9 November 2023, the [ECJ decided](#) that Union law obliges a criminal court to inform the accused person of a new envisaged legal classification of the criminal act in due time ([Case C-175/22, BK](#)). As a result, Bulgarian case-law contradicts Art. 6(4) of Directive 2012/13 on the right of information in criminal proceedings. According to that national case law, Bulgarian criminal procedure law empowers the criminal court to declare a defendant guilty if the classification differs from the one initially used in the prosecutor's indictment, on the condition, first, that that new classification does not involve making substantial amendments to the factual aspect of the charges and, second, that it does not entail a more severe penalty than the offence arising from the classification initially used by the public prosecutor. A prior information of the change of legal classification is not foreseen.

In the underlying case, the Bulgarian public prosecutor classified the acts committed by the defendant as corruption while the referring court planned to use the classification of fraud or of exercise of undue influence. The referring court found itself prevented from proceeding in accordance with Bulgarian procedural criminal law in view of the EU Directive.

The ECJ emphasised that communicating the legal classification is of decisive importance to effectively exercising the rights of the defence. This already results from the fact that, according to Art. 6(4) of Directive 2012/13, the defendant must have the opportunity to put forward his arguments in relation to the elements of the new offences and he must have the opportunity to re-organise his defence.

The fact that the new classification cannot entail the application of a more severe penalty is entirely irrelevant, according to the judges in Luxembourg. Indeed, the fairness of the proceedings requires that the accused person be able fully to exercise his rights of defence. The greater or lesser degree of severity of the penalty incurred has no bearing on the question whether it has been possible to exercise those rights.

Lastly, the ECJ clarified that communicating a reclassification of the offence by the trial court does not conflict with the presumption of innocence and the right not to incriminate oneself (Arts. 3 and 7 of Directive 2016/343). A decision to reclassify an offence is not an acknowledgement of the person's guilt, the Court argued. (TW)

## Data Protection

### Council Conclusions on Digital Empowerment

On 20 October 2023, the JHA Council adopted [conclusions on digital empowerment](#) to protect and enforce fundamental rights in the digital age. They highlight the importance of ensuring that fundamental rights of citizens are preserved and protected in an increasingly digitalised world. They also reaffirm that fundamental rights apply equally online and offline and that everyone should have the opportunity and support to acquire basic digital skills. The conclusions are divided into two parts: (1) digital empowerment of individuals and key sectors, and (2)

construction of a safe digital environment where fundamental rights are protected. Several recommendations are made to the Member States and the Commission to take action in order to meet current challenges.

Regarding the digital empowerment, the Council primarily addresses Member States to take the necessary steps in order to achieve digital transformation. Policy goals include:

- Promoting adequate media and digital literacy through education, training and lifelong learning for everyone, as a right to acquire basic and advanced digital skills;
- Increasing efforts to bridge the digital divide;
- Raising awareness among the public of the importance of protecting privacy and personal data in the digital world and promoting the understanding of data processing/use, the exercise of rights and protection tools (e.g. encryption);
- Delivering capacity-building and training activities to help actors in key sectors for the defense of fundamental rights – namely justice and law enforcement.

The Council conclusions also list a number of tailored measures that Member States should adopt for the specific protection and/or digital skills of different groups of persons, such as children and young people, older persons, women and girls, socio-economically disadvantaged persons, workers, consumers, and voters.

Regarding the construction of a safe digital environment, the conclusions call on Member State, *inter alia*, to do the following:

- Promoting a favourable and just digital environment for inclusive and pluralistic public debate and enabling individuals to distinguish between reliable and unreliable sources of information, identify bias and propaganda, and develop critical thinking skills;
- Stepping up the fight against hate crimes and hate speech, including the

effective criminalisation of incitement to violence and hatred as well as the enhancement of capacity of judicial and law enforcement authorities to investigate and prosecute illegal conduct;

- Taking the necessary measures to create future-proof and technologically neutral regulatory regimes, while ensuring that AI is developed and used in a manner that is inclusive, sustainable, and human-centred.

The Council welcomes the Commission's work and initiatives to promote digital skills in the Union and to enhance the protection of fundamental rights in the digital context. The Commission is, *inter alia*, invited to do the following:

- Monitoring the implementation of the Digital Decade Policy Programme 2030 as well as the digital principles and rights set out in the European Declaration on Digital Rights and Principles for the Digital Decade;
- Countering online disinformation and illegal content by supervising and enforcing the rules of the Digital Services Act and regularly assessing other instruments in place, e.g. the Code of Conduct on countering illegal hate speech online;
- Supporting initiatives aiming to promote the development of digital awareness and skills through financial programmes. (TW)

### EDPB/EDPS Joint Opinion on Proposal for a Regulation on the Establishment of the Digital Euro

The European Commission adopted a [legislative package on the digital euro](#) on 28 June 2023. It included a proposal to establish a legal framework for a possible digital euro. More specifically, the proposal establishes the framework for the European Central Bank (ECB) to issue the digital euro, establishes the digital euro as legal tender, and sets out rules for its distribution via payment service providers (PSPs). On 17 October 2023, the European Data Protection Board (EDPB) and European Data Protection

Supervisor (EDPS) issued a [joint opinion](#) on the proposal.

The EDPB and the EDPS were generally positive about the introduction of the digital euro. They commended the fact that digital users will still be able to choose between digital and cash payments and that the digital euro will not be “programmable money”. The joint opinion also welcomed the proposal's commitment to high privacy and data protection standards for the digital euro as well as the inclusion of an “offline modality” to reduce the processing of personal data.

However, the EDPB and the EDPS expressed the following concerns about potential personal data protection issues in the proposal, which are in line with their previously articulated positions (since 2021):

- The modalities of the distribution of the digital euro;
- The necessity and proportionality of the single access point for the digital euro unique identifiers as well as how data protection by design and by default will be implemented in this context;
- The legal text on how Personal Service Providers (PSPs) are required to process personal data in order to effectively implement the holding limits;
- The pseudonymization of all transaction data vis-à-vis the ECB and the national central banks to ideally be included in the operative part of the proposal;
- The lack of foreseeability of the provisions relating to the general fraud detection and prevention mechanism (FDPM) that the ECB may establish in order to facilitate fraud detection and prevention by PSPs (e.g. tasks of the ECB, tasks to be performed by PSPs);
- The legal basis applicable to the processing operations, the allocation of responsibilities, and the types of personal data to be processed by each of the actors involved in the issuance and use of the digital euro.

The EDPB and the EDPS issued a reminder that they will both continue to monitor the implementation of the

digital euro after the laws have been adopted, each within the purview of its respective roles. (AP)

### Ne bis in idem

#### ECJ: Public Prosecutor's Order to Discontinue Proceedings due to Lack of Evidence Triggers ne bis in idem Rule

**spot light** The public prosecutor's decision in one EU Member State to close criminal proceedings against a suspect due to lack of sufficient evidence can trigger the ne bis in idem principle. This is the main finding of the ECJ in its [judgment](#) of 19 October 2023 in [Case C-147/22](#) (*Terhelt5 v Központi Nyomozó Főügyészség*).  
 ➤ *Facts of the case and question referred*

In the underlying case, the Hungarian National Public Prosecutor's Office filed an indictment (in 2019) against the accused for corruption in the context of the award of public contracts for the supply of new trains in Budapest (Hungary), allegedly committed between 2007 and 2010. However, the referring Hungarian criminal court had doubts as to the admissibility of this indictment because the accused was already subject to investigations for the same corruption case by the Central Public Prosecutor's Office for the prosecution of financial crime and corruption (“WKSTA”) in Austria. In 2014, the WKSTA discontinued the pre-trial investigation because there was no evidence that the accused had actually committed the acts of corruption.

The referring court's decision not to admit the indictment because it was in the end not in accordance with the ne bis in idem principle was set aside by the Budapest Regional Court of Appeal. The appeal court argued that Art. 50 CRF/Art. 54 CISA do not apply because it was not established that the order of discontinuance by the Austrian public prosecutor's office was based on a suf-

ficiently detailed and complete assessment of the evidence. The appeal court also proffered that evidence collected by the Hungarian prosecution service in its indictment is more comprehensive than that produced by the Austrian counterpart and the accused was not interviewed as a suspect by the Austrian authorities. The Hungarian referring court asked in essence whether, under the given circumstances, the conclusion by the appeal court was right.

➤ *The ECJ's ruling*

The case gave the ECJ the opportunity to clarify the requirements of the transnational *ne bis in idem* rule in Art. 54 CISA, especially whether the order by the Austrian public prosecutor's office can be considered as "finally disposed of" (element of "*bis*"). The judges in Luxembourg reiterate their settled case law that the element of "*bis*" is fulfilled under two conditions:

- Further prosecution must have been "definitively barred" following the adoption of the criminal decision in question;
- The decision must have been given following a "determination of the merits of the case".

➤ *Decision definitively barred?*

With regard to the requirement that further prosecution must be definitively barred, the ECJ examines two circumstances referred to by the Hungarian court. First, the ECJ points out to previous case law that Art. 54 CISA is also applicable to decisions of an authority responsible for administering criminal justice in the national legal system concerned, such as a public prosecutor's office, definitively discontinuing criminal proceedings in a Member State without the imposition of a penalty, and although such decisions are adopted without the involvement of a court and do not take the form of a judgment.

Second, the law of the first Member State (here: Austria) must confer a definitive nature to the decision in question. This is the case if the law establishes conditions under which criminal proceedings cannot merely be contin-

ued but involve the exceptional bringing of separate proceedings based on different evidence. According to the ECJ, this is the case under Austrian law since it provides the possibility to continue proceedings once closed only under strictly circumscribed procedures (i.e., if (1) "the accused person was not questioned in respect of the offence ... and no restriction was imposed on him or her in that regard," or (2) "new facts or evidence arise or appear which, alone or in combination with other results of the proceedings, appear to justify the conviction of the accused ..." – § 193 para. 2 of the Austrian Code of Criminal Procedure).

It follows that the circumstances referred to by the Hungarian court do not cast doubt on the fact that the requirement that further prosecution must have been "definitively barred" is satisfied.

➤ *Sufficient determination of the merits of the case?*

With regard to the objection that a determination of the merits of the case might not have been made by the Austrian public prosecutor, the ECJ stresses that, as a rule, an acquittal for lack of evidence is based on an assessment of the merits of the case. Making recourse to the principles of mutual trust and mutual recognition, the judges in Luxembourg clarify that it is only in exceptional cases that the second Member States can conclude that there is no detailed investigation in the first Member State. Criteria for this are the following:

- It is apparent from the terms of the criminal decision concerned that it was not preceded by any actual investigation or assessment of the criminal liability of the accused person;
- Under the applicable national law, the discontinuance decision was essentially taken for reasons which must be regarded as purely procedural; or
- The decision in question was taken for reasons of expediency, economy or judicial policy.

The circumstance that the person under investigation was not interviewed as a suspect can be an indicator for a non-detailed investigation but cannot alone justify this conclusion.

➤ *Put in focus*

Persons can benefit from the rule not being prosecuted twice in the Schengen area if basically two conditions are fulfilled, namely, first, that there must be a prior final decision (the "*bis*" condition) and, secondly, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the "*idem*" condition) – Art. 54 CISA / Art. 50 CFR. The judgment in the present case includes several important clarifications as regards the first condition of "*bis*". The judgment continues the settled case law that the conditions of the *ne bis in idem* principle are generally interpreted in a broad way in favour of the individual. It also confirms that criminal proceedings that started in a first EU Member State should also be continued there. The ECJ does not require high standards for the "*bis*" condition. The judgment contains three important findings:

- The "*bis*" condition is not only fulfilled if courts decide on a criminal case but also if any authority competent in the administration of criminal justice takes relevant decisions (such as the public prosecutor);
- The *ne bis in idem* principle is already triggered if a criminal case is "disposed of" due to the lack of sufficient evidence after pre-trial investigations;
- The definitive nature of a decision can be acknowledged if the law of the first Member State provides any hurdles for reopening criminal proceedings. Therefore, it is sufficient that any blocking effect (*Sperrwirkung*) results from the decision in question.

Another important point in the present judgment is that the ECJ clarifies the criteria under which a "determination of the merits of the case" had taken place. Interestingly, the ECJ seems here to transfer its line of argu-

ments used for the interpretation of the EU's cooperation instruments to the interpretation of the *ne bis in idem* principle. While the ECJ stresses for instance in relation to the European Arrest Warrant that the executing state must, in principle, accept the decision and conditions in the issuing state (and is only entitled to review them in exceptional circumstances), the chamber uses the same argument in its present judgment. In this context, it stressed in [para. 55 of the judgment](#):

“By contrast, that objective [of Art. 54 CISA, i.e., to ensure that a person who has been finally acquitted in one Member State may travel within the Schengen area without fear of being prosecuted in another Member State for the same acts] and those principles [mutual trust and recognition between Member States] preclude the public prosecutor's office of the second Member State, when it intends to prosecute a person who has already been prosecuted and who has been the subject, following an investigation, of a final acquittal in respect of the same acts in one Member State, from carrying out a detailed examination of that investigation in order to determine, unilaterally, whether it is sufficiently detailed in the light of the law of the first Member State.” (TW) ■

### ECJ Clarifies Assessment of “*idem*” Requirement

On 12 October 2023, the ECJ clarified that national courts must consider all relevant information on the material facts given in another EU Member State if it assesses the “*idem*” requirement of the principle *ne bis in idem* enshrined in Art. 54 CISA and Art. 50 CFR ([Case C-726/21, INTER CONSULTING](#)).

The underlying case concerned a reference for a preliminary ruling by a Croatian criminal court which has to decide whether it can continue proceedings against defendants involved in possibly illegal commercial transactions in relation to the purchase of immovable property in Croatia. The

defendants were already subject to criminal proceedings in Austria where they were prosecuted for having incited managers of an Austrian bank to receive loans on the basis of which they pursued the purchases in Croatia. The defendants were acquitted by an Austrian criminal court for this incitement and, in addition, the Austrian public prosecutor brought a preliminary investigation (which included the sale of immovable property in Croatia) to an end on the ground of insufficient evidence.

According to Croatian case law, only the enacting terms of procedural documents, such as orders to proceed with the judicial investigation, orders dismissing the proceedings, indictments and judgments, are final and can consequently only be the basis for assessing the application of the principle *ne bis in idem*. The referring Croatian court asked whether Union law precludes it from only comparing the facts cited in the enacting terms of the Croatian indictment with the key facts cited in the enacting terms of the Austrian indictment, and in the operative part of the Austrian final judgment.

The [ECJ stated](#) that such an interpretation of Art. 54 CISA/Art. 50 CFR would indeed be too narrow and not be compatible with the wording, context, and objective of the principle *ne bis in idem*. As a result, it concluded that the assessment of the “*idem*” requirement must also take account of “the facts cited in the grounds of [a foreign] judgment, including those that were the subject of the preliminary investigation, but which were not included in the indictment, and all relevant information concerning the material facts covered by previous criminal proceedings conducted in that other Member State and concluded by a final decision.”

The ECJ advised the referring court, however, to ascertain whether the conditions of “*bis*” and “*idem*” are fulfilled in the present case. (TW)

### FCC: German Legislator Was Prohibited from Introducing Ground for Reopening Criminal Proceedings

On 31 October 2023, the [German Federal Constitutional Court \(FCC\)](#) declared [a provision void that allowed the reopening of criminal proceedings](#) if new evidence comes to light with regard to very severe offences. According to the provision in question – Section 362 no. 5 of the German Criminal Procedure Code – the reopening of proceedings concluded by final judgment to the defendant's detriment is admissible if new facts or evidence are produced which, independently or in connection with evidence which was previously taken, establish cogent reasons that the acquitted defendant will be convicted of murder under aggravating circumstances (*Mord*, Section 211 of the Criminal Code) or certain crimes against international law (genocide, crime against humanity, and war crime against a person). This provision was introduced in December 2021.

In the case at issue, criminal proceedings against a defendant were reopened on the basis of this provision in February 2022, charging him for rape and killing of a girl in 1981, even though the defendant was acquitted for this offence in 1983.

The FCC found that the double jeopardy rule (enshrined in Art. 103(3) of the Basic Law (*Grundgesetz* – GG)) prohibits the legislator from enacting provisions that allow criminal proceedings to be reopened to the acquitted person's detriment on the grounds that new facts or evidence have emerged. This rule is the manifestation of a decision to prioritise legal certainty over substantive justice and it leaves no space for balancing the double jeopardy rule with other constitutional interests, according to the majority of the FCC Senate's judges.

Furthermore, insofar as Section 362 no. 5 of the Code of Criminal Procedure is applied to acquittals that were already final at the time of its entry into force, it violates the prohibition of retro-

activity (Art. 103(3) in conjunction with Art. 20(3) of the Basic Law), the FCC argued. (TW)

## Cooperation

### Police Cooperation

#### Civil Society Organisations Warn against UK's Participation in Prüm II

In a [statement of 31 October 2023](#), 15 civil rights organisations from across Europe raised concerns over the United Kingdom's participation in the EU's Prüm II scheme. Prüm II is designed to expand the types of data that can be searched and exchanged by law enforcement authorities (→ [eucrim 4/2021, 225–226](#); for criticism voiced in the EU → [eucrim 3/2022, 194](#)). The statement stressed that the necessity and proportionality of the envisaged changes to include facial images, police records and potentially driving licences into the police data exchange system have not been demonstrated.

The statement warns that UK participation in an expanded Prüm system could see unlawfully retained photos of millions of individuals who have never been charged with a crime, referred to as “custody images”, opened up to searches by police forces in EU member states. It also criticises the broad definition of “police records” that could encompass vast quantities of files, including on people who have never been charged nor convicted of an offence. “Including police records in the system would make troves of potentially incorrect, unwarranted or unverified data available for cross-border searches”, the statement says. With regard to plans to include driving license data, the statement points out that these data are not collected for policing purposes so that these data should not be made subject to routine use by law enforcement authorities. This is also true

for other UK data stored in civil systems that could be made available at the end, such as the passport database.

The statement requests a thorough parliamentary scrutiny on the UK's participation in the Prüm II network and calls for a broad public debate on the issue. (TW)

### Judicial Cooperation

#### AG: Decision Granting Refugee Status Not Binding for Extradition

**spot light** A Member State is not bound by the decision of another Member State regarding the recognition of refugee status within the meaning of the Geneva Refugee Convention. This is the view taken by Advocate General (AG) *Jean Richard de la Tour* in his Opinion of 19 October 2023 in [Case C-352/22 \(A. v Generalstaatsanwaltschaft Hamm\)](#). In the underlying case of the request for a preliminary ruling from the Higher Regional Court of Hamm (Germany), a Turkish national had been recognized as a refugee by Italian authorities in 2010. He had been in Germany since 2019, but was in custody pending extradition for criminal offenses committed. The Higher Regional Court of Hamm took the

view that asylum and extradition proceedings should be assessed independently of each other and that there was therefore no obstacle to extradition, even if the refugee status granted in Italy was still valid until 2030.

AG de la Tour confirmed this, but pointed out that in order to guarantee the principle of non-refoulement (Art. 18, 19 para. 2 CFR), the Member State conducting the extradition procedure must comprehensively examine whether the person is at genuine risk of being subjected to treatment prohibited under the Charter of Fundamental Rights in the country of destination. The decision of another Member State that has recognized refugee status must be given particular weight.

The reference was initially pushed by the [German Federal Constitutional Court which blamed](#) the Hamm Court for not having sufficiently considered whether a binding effect of the Italian decision for the German extradition procedure could be derived from Directive 2013/32/EU on common procedures for granting and withdrawing international protection, and Directive 2011/95/EU on standards for the qualification of third-country nationals or stateless persons as benefi-

### MutualRecognition2.0 –

#### Research Project on Improving Mutual Recognition Instruments Affecting Personal Liberty

The [research project “MutualRecognition2.0”](#) (MR2.0) deals with the practical problem that judicial authorities of the Member States when confronted with the need to request judicial cooperation might have more than one option to do so given that there is a wide range of instruments. For instance, when prosecution is started against a national of a different Member State, the national authorities, if the person is not present in the prosecuting Member State, can opt between issuing a European Arrest Warrant or transferring the proceedings to the other Member State. There is no guidance for making the best decision from the legal instruments themselves. The applicable legal instruments do not give a priority order.

Against this background, the MR2.0 project (co-funded by the EU) aims to promote the efficient and consistent application of judicial cooperation instruments within the European Union, specifically those that have implications for individual liberty. The research team from the Netherlands, Germany, Poland and Spain will examine cases, develop a questionnaire and draft country reports on the basis of which common solutions are proposed and, where applicable, recommendations to the EU and/or Member States made.

For more information, see the project website at: <https://mutualrecognitionnextlevel.eu/>.

ciaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted. (TW) ■

## European Arrest Warrant

### Eurojust: Updated Overview on EAW Case Law

In October 2023, Eurojust published an [update](#) of its overview of the case law of the Court of Justice of the European Union (CJEU) with regard to the application of Framework Decision 2002/584/JHA of 13 June 2002 on the European Arrest Warrant (EAW) and the surrender procedures between Member States (FD EAW). The case law overview contains summaries of the CJEU's judgments, categorised according to a set of important keywords that largely reflect the structure of the FD EAW. A table of keywords and a chronological list of judgments and pending cases are also provided at the beginning of the document. The case law overview is updated biannually by Eurojust. (CR)

## European Investigation Order

### AG: EncroChat Data Can, in Principle, Be Used in Criminal Proceedings

**spot light** On 26 October 2023, Advocate General (AG) *Tamara Čapeta* released her [opinion on the reference for a preliminary ruling with regard to the EncroChat case](#). In the case at issue, the Regional Court of Berlin, Germany, asked several questions as to the lawfulness of a European Investigation Order that was issued by the General Public Prosecution Service of Frankfurt in order to receive consent from France for the use of the infiltration of EncroChat devices by French and Dutch authorities. The AG takes the view that the transfer of evidence was, in principle, in line with the EIO Directive. The case is referred as [C-670/22](#) (*Staatsan-*

*waltschaft Berlin v M.N.*). For the reference by the Berlin court → [eucrim 3/2022, 197–198](#).

► *Facts of the case and questions referred*

EncroChat was an enterprise that provided encrypted phone networks. After suspicion that the EncroChat devices had often been used by criminals, French and Dutch law enforcement authorities conducted a joint operation and succeeded in installing a piece of Trojan software on the terminal devices via a simulated update. They were thus able to read the chat messages of thousands of users in real time, including those who used the network for criminal activities. EncroChat users in 122 countries were affected by that interception, including approximately 4600 users in Germany. In the present case, the accused is charged with drugs trafficking before the Berlin court. He argued that German law enforcement authorities unlawfully received the evidence from France and the evidence cannot be used in the criminal proceedings against him. The Regional Court of Berlin posed a number of questions on the interpretation of Directive 2014/41/EU regarding the European Investigation Order in criminal matters (the EIO Directive). The questions particularly concern:

- The German public prosecutor's competence to issue an EIO;
- The admissibility of the EIO pursuant to Art. 6(1) EIO Directive;
- Correct application and interpretation of Art. 31 EIO Directive, which regulates the surveillance of telecommunications without the technical assistance of a Member State;
- The consequences of a possible infringement of EU law for the national criminal proceedings.

► *The AG's conclusions*

AG *Čapeta* first stressed that the present reference is not about the validity of the French investigation measures, but the set of facts are to be assessed under the EIO Directive. Second, she clarified that the EIO in question

concerns the transfer of evidence that France already had in its possession and not the gathering of data in France through the interception of telecommunications. Subsequently, she reorganised the groups of questions and concluded in detail as follows:

- The requirement under Art. 6(1)(b) EIO Directive that an EIO can be issued on the condition that the investigation measure is available *under the same conditions in a similar domestic case* means – if existing evidence is sought – that the relevant conditions of the national law for the transfer of evidence gathered through the interception of communication between criminal procedures domestically must be established. Due to the close interconnection with Art. 2(c)(i) EIO Directive, it also means that the EIO need not be issued by a court if national law provides that a public prosecutor may order such a transfer in a similar domestic case.

- When an underlying measure in the executing State (here: France) was authorised by a judge (here: juge d'instruction in Lille), an EIO for the transfer of such evidence does not need to be issued by a judge as well, even if under the law of the issuing State (here: Germany) the underlying gathering of evidence would have to be ordered by a judge.

- The assessment of the necessity and proportionality of an EIO (Art. 6(1) (a) EIO Directive) requesting the transfer of the existing evidence is a matter for the issuing authority, with a possibility of review by the competent national court. Such an assessment must take into consideration that the access of the national authority to the intercepted communication data represents a serious interference with the private lives of the persons concerned. That interference must be counterbalanced by a serious public interest in the investigation and prosecution of crimes.

- Under Art. 31 EIO Directive, France should have informed the German authorities as soon as it realised that part of the intercepted data originated from

mobile phones in Germany. However, since the EIO Directive does not impose an obligation on the Member States to flag the national authority competent to receive such notifications, France (as intercepting state) could have submitted the notification to any authority that it considered appropriate in Germany (as the notified State). With regard to the purpose of Art. 31 EIO Directive, AG *Ćapeta* clarified that it protects both the individual telecommunications users and the sovereignty of the notified Member State.

■ Looking at the questions as to whether inadmissibility of evidence results from EIOs issued contrary to the EIO Directive, the AG points out that the EIO Directive and Union law do currently not regulate admissibility of evidence. Therefore, this is a matter of national law. It can only be inferred from Art. 14(7) EIO Directive that national law must protect the rights of the defence in Arts. 47 and 48 CFR. The principles of equivalence and effectiveness do not apply in the given context of (in)admissibility of evidence.

➤ *Put in focus*

AG *Ćapeta* seems to object in some point the findings by the German Federal Court of Justice, which saw no hindrances to accept the evidence exchanged between German and French authorities (→ [eucrim 1/2022, 37–38](#)). Nonetheless, the findings of her opinion may not provide many arguments for the defence to plead, in the light of Union law, for the exclusion of the EncroChat data received from the French-Dutch interception. *Ćapeta* particularly does not see any contradiction to the ECJ's case law on data retention. Even though Advocate Generals' opinions are not binding on the ECJ, they are an important point of reference in practice.

The question of the admissibility of the use of evidence remains of crucial importance and will continue to be the subject of intense debate. Defense lawyers and academics have [voiced massive concerns](#). They criticize, *in-*

*ter alia*, that the facts of the operation have never been fully clarified and that the judicial and law enforcement authorities involved, including the Federal Criminal Police Office (BKA) and Europol, disregarded the rights of the accused. (TW) ■

## European Supervision Order/Transfer of Sentenced Persons

### ECJ: Deficiencies in Fair Trial Protection Can Block Recognition of Custodial Sentence

**spot light** Requests from courts of a Member State for mutual recognition for the enforcement of judgments imposing custodial sentences do not have to be recognized if the court in the executing state has doubts about the fairness of the proceedings. This conclusion was drawn in the ECJ's judgment of 9 November 2023 in [Case C-819/21 \(Staatsanwaltschaft Aachen v M.D.\)](#). Thus, the ECJ transferred its case law on Framework Decision 2002/584 on the European arrest warrant to [Framework Decision 2008/909](#) on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

➤ *Facts of the case and question referred*

The case presented by the Regional Court of Aachen (Germany) concerns a Polish national habitually resident in Germany; he was sentenced in Poland in his absence to six months' imprisonment for unlawful appropriation and forgery of documents. The suspended sentence was revoked and Poland applied for the sentence to be enforced in Aachen. When questioned about this, the Pole explained that, firstly, he was innocent and, secondly, he had not received a summons to the main hearing at all. The file revealed that the summons had only been sent to his Polish

address, although he already lived in Germany. The Aachen Regional Court wished to refuse to enforce the Polish custodial sentence in Germany due to the shortcomings of the Polish judicial system. However, the court doubted whether the relevant ECJ case law on the European Arrest Warrant, in particular the judgment of 25 July 2018 in Case C-216/18 ("*LM*" → [eucrim 2/2018, 104–105](#)), was transferable to the application of Framework Decision 2008/909.

The Aachen Regional Court then referred the question to the ECJ as to whether it is compatible with Union law to refuse to enforce the sentence if there are indications that the underlying criminal proceedings suffered from serious deficiencies and that these deficiencies had an impact on the conviction. Furthermore, the Regional Court asked what point in time must be taken into account for these deficiencies to be present.

➤ *The Luxembourg judges' decision*

The [ECJ affirmed the question](#) of a possible rejection due to violations of the fair trial principle. The principle of mutual recognition can be compromised in exceptional circumstances. The ECJ referred to recital 13 and Art. 3 para. 4 of Framework Decision 2008/909. Accordingly, the Framework Decision provides that it is not to have the effect of modifying the obligation to respect fundamental rights and fundamental legal principles as enshrined in Art. 6 TEU. However, the Luxembourg judges clarified that – as with the European Arrest Warrant – a two-step assessment is required: if there are systemic or generalised deficiencies, it must subsequently and additionally be examined whether these errors have had a concrete impact on the judgment at issue (here: Polish judgment imposing the custodial sentence against the Polish national). In other words, there must be substantial grounds that an abstract risk has actually materialised in the present case. In this case, the execution chamber of the Aachen Re-

gional Court could refuse to enforce the sentence due to Poland's violation of the fair trial pursuant to Art. 47 para. 2 CFR and Art. 2 TEU.

The examination should be carried out in the light of the situation prevailing in Poland on the date of the disputed conviction. The Luxembourg judges consider the development of the legal situation after the judgment was issued to be irrelevant. In their opinion, the situation in Poland at the time of the revocation of the suspended sentence is also irrelevant because the revocation is a mere enforcement measure which modifies neither the nature nor the quantum of the sentence.

It is now up to the Aachen Regional Court whether a refusal in the concrete case is justified under the conditions established by the ECJ.

#### ► Put in focus

In its judgment of 9 November 2023 in the *Staatsanwaltschaft Aachen / M.D.* case, the ECJ clarified for the first time that not only the Framework Decision on the European Arrest Warrant (FD EAW), but also the other mutual recognition instruments fostering judicial cooperation implicitly recognise a fundamental rights refusal ground. The ECJ clarified that the vague clause which was copied from Art. 1 para. 3 of FD EAW and pasted into the other framework decisions (here: Art. 3 para. 4 of FD 2008/909) established a sufficient basis for the non-recognition if other EU Member States infringe fundamental rights and values of the EU. Therefore, it did not matter that the FD on the mutual recognition of custodial sentences has no equivalent to Recital 10 FD EAW, as the ECJ stressed.

However, the Luxembourg judges fiercely defend their standpoint that a refusal on grounds of fundamental rights infringements can only be accepted in exceptional circumstances. Therefore, the executing judicial authorities need to carry out the two step test (developed in the 2015 *Aranyosi/Căldăraru* judgment → [eucrim 1/2016, 16](#)). There is

no room for a simple individual test, i.e., whether fundamental rights have been infringed solely in the concrete case, without having first approved systemic or generalised deficiencies in the issuing country. This is in line with the ECJ's recent EAW judgment in *Puig Gordi and Others* (→ [eucrim 1/2023, 41–43](#)). As indicated in para. 34 of the present judgment, the ECJ justifies this line of argument by stating that the competent authority of an executing Member State should not get the power to suspend a mutual recognition mechanism by refusing all requests from the issuing Member State on account of its deficiencies. Nonetheless, this approach does not counter criticism that the established test is too narrow in the end and hardly attainable. It does also not clearly answer the question why a moderate application of individual fundamental rights tests would undermine the principle of mutual recognition (see also the [blog post by Johan Callawaert](#) of 5 December 2023). (TW) ■

## Law Enforcement Cooperation

### Report on Impact of E-evidence Package on Switzerland

In a [report of 24 October 2023](#), the Swiss Federal Office of Justice (*Bundesamt für Justiz*) examined the impact of the EU e-evidence package (→ [eucrim 2/2023, 165–168](#)) on service providers based in Switzerland and on mutual legal assistance between Switzerland and the EU/EU Member States. The new EU e-evidence rules consist of [Regulation \(EU\) 2023/1543](#) on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings and [Directive \(EU\) 2023/1544](#) laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives

for the purpose of gathering electronic evidence in criminal proceedings.

The report also deals with the differences between the EU e-evidence package and the US CLOUD Act which both aim at facilitating access to electronic information that can be used as evidence in criminal proceedings as well as at making cross-border cooperation more effective. The report analyses the differences with regard to territoriality and transnational access to data, the protection of personal data and fundamental rights, procedural aspects, and the handling of conflicts of law.

Lastly, the report provides options for Switzerland on how the country should react to these recent legislative developments. A unilateral Swiss solution should not be pursued, rather Switzerland should seek cooperation with other countries in the area of electronic evidence, the report notes. It is recommended that Switzerland revises its national law and then seeks agreements for judicial cooperation in criminal matters. According to the Federal Office of Justice, Switzerland should not jeopardise its rule-of-law achievements while striving for a solution which enables Swiss law enforcement authorities to get access to service providers based in other countries.

For a detailed comparison of the solution adopted in the EU concerning cross-border access to electronic evidence and the Swiss law applicable in this area, and an analysis on the opportunity for Switzerland to coordinate its rules with those of European law, → the recent [eucrim article by M. Ludwiczak Glassey, Preuves électroniques: état de la situation en Suisse face à l'avancée majeure du droit européen](#). (TW)

### EU-Western Balkans Ministerial Forum on JHA

From 26 to 27 October 2023, the [annual EU-Western Balkans Ministerial Forum on Justice and Home Affairs](#) was held in Skopje (North Macedonia). The Forum was attended by the Ministers for

Home Affairs and Justice of Spain, their counterparts from the Western Balkans, the European Commissioners for Home Affairs and for Justice as well as representatives of the incoming Belgian and Hungarian Presidencies of the Council of the EU.

Discussions in the area of home affairs concentrated on current and future developments with regard to counter-terrorism and preventing/countering violent extremism. Emerging threats, such as violent right-wing extremism, spreading violent extremist content online, and possible attacks on critical infrastructures, were some of the key points of reflection that shaped the Joint Action Plan on Counter-terrorism for the Western Balkans. The Ministers recalled the agreement to prolong the Roadmap for a comprehensive small arms and light weapons control in the Western Balkans beyond 2024.

To counter the impact of drugs on their societies, the Ministers analysed joint efforts to reduce drug supply, drug demand, and drug related harm. Discussion points included the cooperation with the European Monitoring Centre for Drugs and Drug Addiction (EMCCDA), the establishment and operation of National Drug Observatories and National Early Warning Systems, and enhanced police cooperation.

Another focal point of the Forum involved measures to strengthen migration, asylum, and border management, e.g. the signing of Frontex Status Agreements, visa alignments, Readmission Agreements, and the importance of improving the registration of migrants as well as enhancing asylum and reception systems across the Western Balkans.

In the area of justice, the Forum underlined the importance of the rule of law and judicial reforms to strengthen judicial independence and accountability. Independent monitoring projects are also vital in this regard.

Lastly, the Ministers underlined their continuing support for Ukraine against Russia's war of aggression. (CR)



## Council of Europe\*\*

Reported by Dr. András Csúri

### Foundations

#### European Court of Human Rights

##### Reform of Rule on Interim Measures

On 26 June and 6 November 2023, in the context of wider procedural reforms, the ECtHR, sitting in for the Plenary Court (assembly of all ECtHR judges), adopted several [decisions clarifying and codifying its existing practice relating to interim measures](#). Under the ECHR system, [interim measures \(Rule 39 of the Rules of Court\)](#) are applied under exceptional circumstances to avoid irreversible situations that would prevent national courts and/or the ECtHR from properly examining Convention complaints and, where appropriate, securing to the applicant the practical and effective benefit of the Convention rights asserted. A failure by a respondent State to comply with interim measures undermines the effectiveness of the right of individual application guaranteed by Art. 34 ECHR and the State's formal undertaking in Art. 1 ECHR to protect the Convention rights and freedoms.

Following the aforementioned decisions of the Plenary Court, certain proposed amendments to Rule 39 were submitted to contracting parties for written comments, in accordance with Rule 116 of the Rules of Court. Similar consultations will be launched with a number of organisations with experience in representing applicants before the Court and with relevant bar associations.

An updated Practice Direction – issued by the President of the Court to provide clarification on aspects of the Court's procedure – accompanying the amended Rule 39 will be prepared and published following the consultation process. It aims to provide further details on the decision-making process when requests for interim measures are lodged.

The Plenary Court has also decided the following:

- Disclosing the identity of the judges who render the decisions on interim measure requests;
- Maintaining the practice of providing reasons for Rule 39 decisions on an *ad hoc* basis and issuing press statements when the circumstances of the cases so require;
- Issuing formal judicial decisions to be sent to the parties;
- Maintaining the established practice of adjourning the examination of requests for interim measures and requesting the parties to submit information in those circumstances where the situation is not extremely urgent and where the information that the applicants submit to the Court was not sufficient for the Court to examine the request.

At a later stage, the ECtHR will communicate how the changes to the procedure are to be implemented.

\*\* Unless stated otherwise, the news items in the following section on the Council of Europe cover the period 1 May – 15 November 2023.

## New rule on Highly Sensitive Documents

On 30 October 2023, a new version of the Rules of Court, introducing [Rule 44F on treatment of highly sensitive documents](#), entered into force. Rule 33 § 1 on public character of documents was amended accordingly. The purpose of the new rule is to establish a specific regime for the handling of highly sensitive documents, which require special treatment: either because the State party considers it necessary for reasons of national security or because an applicant does for other equally compelling reasons.

On the one hand, the new rule should alleviate concerns that might prevent a party from submitting such documents to the ECtHR; on the other, it should enable the Court to find appropriate counterbalancing measures or to draw adverse inferences if such documents cannot be disclosed to another party or the public, should the information be necessary in order to conclude a given case.

[Rule 44F sets out](#) how the Court should treat such specific requests, in particular by having them examined by a Committee of three judges who are not part of the Chamber dealing with the admissibility and/or merits of the case. The aim is to resolve the matter by cooperative means in a most pragmatic way, in order to provide the Chamber with essential information to decide on the admissibility and/or merits of a case while ensuring respect for the adversarial principle.

Rule 33 § 1, which covers the public character of documents, was amended to reflect the new Rule 44F.

## Updated Guidelines on Implementation of Advisory Opinion Procedure

On 25 September 2023, the ECtHR, sitting in for the [Plenary Court \(assembly of all ECtHR judges\)](#), approved an updated version of the [Guidelines](#) on the implementation of the advisory opinion procedure under Protocol No. 16 to the

European Convention on Human Rights (“the Convention”). The new guidelines can be found on the “Advisory Opinions” and “Official Texts” [pages of the ECtHR’s website](#). The changes, based upon the practice developed by the Court, concern, among other things, the Court’s jurisdiction in respect of requests for advisory opinions (paragraphs 6.3 and 7), the appropriate stage at which to submit a request (paragraph 10), the form and content of a request (paragraphs 12, 13, and 14), and the delivery of the Court’s opinion (paragraph 32).

*Background:* [Protocol No. 16](#) came into force on 1 August 2018 and enables the highest national courts and tribunals, as designated by the CoE member states that ratified the Protocol, to request the ECtHR to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention or the Protocols thereto (→ [eucrim 2/2018, 109](#)). Requests can be made in the context of cases pending before a national court or tribunal, with the ECtHR having the discretion to accept a request or not. The ECtHR’s reasoned advisory opinions are non-binding and are delivered by the Grand Chamber.

Currently, 22 CoE member states have signed and ratified Protocol No. 16. To date, the Court has received eight requests for an advisory opinion. It has accepted seven and refused one. The Court has so far delivered six advisory opinions, with one opinion pending.

## Specific Areas of Crime

### Corruption

#### GRECO Annual Report 2022

On 15 June 2023, GRECO published its [annual report for 2022](#). It provides insight into the most important find-

ings of the fourth and fifth evaluation rounds and gives selected good practice examples.

Although there has been progress in implementing GRECO’s recommendations to prevent corruption and promote integrity, slightly less than half of GRECO’s recommendations on central governments’ top officials and just under two thirds of those concerning the police had been (either fully or partly) implemented by the end of 2022.

States continued to make progress in implementing recommendations made in GRECO’s 4th evaluation round concerning members of parliament, judges, and prosecutors: Half of those recommendations (49.5%) had been fully implemented at the end of 2022, up from 45% the previous year. States had partly implemented a third of the outstanding recommendations, while 17% remained not implemented.

In the context of the fifth evaluation round, the report highlights the need for transparency and oversight of the executive activities of central governments. It is particularly the right to access information that ensures public transparency and, conversely, facilitates the pursuit of corrupt behavior. In exposing shortcomings, the report expresses concerns about the restrictive application of this right in some European states; there are broad margins of discretion for determining what is in the public domain and whether to exclude certain documents from free access. Government entities often appear reluctant to disclose information and prefer to apply exceptions enabling them to withhold all or parts of information requested. In addition, the application of laws on freedom of access to information is all too often inconsistent across government entities, which shows the need for training to create a common understanding and application of national freedom-of-information laws.

GRECO calls on authorities to respect international standards in this field and reiterated that, in line with the

principles of the [Committee of Ministers recommendation on access to official documents](#) and the [Council of Europe Convention on Access to Official Documents](#), any limitation of the right of access to official documents in a democratic society must be necessary and proportionate and only applied if there is no overriding interest in disclosure.

The report also notes that GRECO identified a number of shortcomings concerning access to information in the law-making process. Of particular concern here is the lack of respect for consultation timeframes, which prevents substantive contributions that could influence the legislative process.

#### GRECO: Fifth Round Evaluation Report on Hungary

On 9 June 2023, GRECO published its [5th Round Evaluation Report](#) on Hungary. The country joined GRECO in 1999 and had already been evaluated within the framework of GRECO's First (March 2003), Second (March 2006), Third (June 2010), and Fourth (March 2015) Evaluation Rounds. There is a declining track record in implementing GRECO's recommendations: 90% of them were fully implemented in the 1st round, 58% in the second round, and 53% in the third round. As far as the fourth round is concerned, the country has been the subject of a non-compliance procedure since June 2017 due to the low number of implementations. For the fourth round, GRECO also published its [4th Interim Compliance Report](#) on 9 June 2023. This round focused on corruption prevention in respect of members of parliament, judges, and prosecutors. The 4th interim compliance report assesses the implementation of the 12 outstanding recommendations and provides an overall assessment of Hungary's level of compliance with these recommendations.

The report on the 5th evaluation round highlights the following:

- Hungary has dropped from 50th (2015) to 73rd place (2021) on Trans-

parency International's Corruption Perception Index;

- Since 2010, the country has fallen from 23rd to 92nd place in the World Press Freedom Index.

According to the report, which was based on the public information available and interviews carried out onsite, legislation was used by the governing party during the last decade to centralise power and resources and to foster a clientelist system. In April 2022 – for the first time – the European Commission applied Regulation 2020/2092 on a general system of conditionality for the protection of the Union budget against Hungary (→ [eucrim 2/2022, 106](#)). The concerns were as follows:

- Public procurement;
- Functioning of the authorities implementing the EU budget;
- Audits;
- Transparency;
- Fraud prevention;
- Corruption.

The focus of the fifth evaluation round is on the effectiveness of the frameworks currently in place to prevent corruption among persons with top executive functions (PTEFs), e.g. the Prime Minister, ministers, commissioners, political state secretaries, political advisers, and the Prime Minister's agents; in addition, members of the Hungarian National Police and the National Protective Service (NPS) were evaluated.

As a common and general feature of the framework, GRECO notes that integrity tests carried out by the NPS have proven successful in curbing petty corruption, as most of them target low-level and mid-level officials working in public administration and law enforcement. The integrity framework applicable to PTEFs, however, is very weak, and the conditions for the appointment of senior managers in the police force and the NPS carry risks of politicisation. The national Anti-Corruption Strategy and Action Plan focus

on public administration and do not cover PTEFs as such. There is no applicable code of conduct for PTEFs, no awareness-raising, and no confidential counseling on integrity. The rules on lobbying do not apply to PTEFs, and dedicated rules are lacking on the acceptance of gifts and invitations, on misuse of public resources, and on post-employment restrictions.

GRECO also has misgivings about the asset declaration system. Only declarations by senior political leaders are public. As PTEFs do not have to file such declarations in electronically, the verification of declarations is clearly insufficient.

The report also stresses the lack of transparency surrounding the composition of ministerial cabinets and the function and remuneration of their members, the agendas and meetings of ministers and political advisers, the employment of the Prime Minister's agents, and the PTEFs' salary system. There are also increasing difficulties in accessing public information and establishing public participation in the legislative process. The report notes that the constitutional amendments in Hungary relating to the delegation of legislative powers to the executive in situations of emergency also require caution.

GRECO therefore makes the following recommendations:

- Publishing the names/duties of all political and personal advisers to the Prime Minister, ministers, and state secretaries on the government's and ministries' internet sites and keeping this information up to date;
- Reviewing the salary system for PTEFs in order to provide for equal treatment of all persons exercising similar functions;
- Adopting a (published) code of conduct for PTEFs, complemented by clear guidance on conflicts of interest and other integrity-related matters and coupled with a credible and effective mechanism of supervision and sanctions;

- Broadening the scope of information falling under freedom-of-information legislation, avoiding exceptions or derogations, and shortening the response time for access requests;
- Ensuring an appropriate level of consultation on government draft legislation, with only specific and limited exceptions;
- Introducing rules on how PTEFs are to engage in contacts with lobbyists and other third parties and disclosing sufficient information about the purpose of these contacts;
- Developing and applying rules on post-employment restrictions in respect of PTEFs;
- Filing asset declarations electronically and making political advisers and the Prime Minister's agents subject to the same disclosure requirements as senior political leaders.

As regards the law enforcement authorities, GRECO recommends increasing transparency by providing a formal, merit-based, competitive, and transparent procedure for the selection and appointment of the National Police Commissioner and the Director General of the NPS and by providing sufficient operational independence of the police in law and practice. To strengthen integrity, the code of ethics for Law Enforcement needs to be further elaborated and complemented by a confidential counseling mechanism. The corruption risk analyses covering the police and the NPS should be broadened to cover better also the senior and top managerial levels and remedial measures should be adopted accordingly.

Further a clear requirement for police staff to report integrity-related misconduct must be established, the disciplinary regime of the Police and the NPS needs review and the protection of whistleblowers within these institutions must be strengthened.

Lastly, GRECO recommends that measures be taken to increase the representation of women at all levels of the Police and the NPS.

### GRECO: Fifth Round Evaluation Report on Romania

On 7 September 2023, GRECO published its [5th Round Evaluation Report](#) on Romania. The country joined GRECO in 1999 and had already been evaluated within the framework of GRECO's First (October 2001), Second (February 2005), Third (November 2010) and Fourth (May 2014) Evaluation Rounds. 100% of recommendations were implemented in the First Evaluation Round, 73% in the Second Evaluation Round, and 75% in the Third Evaluation Round. In the Fourth Evaluation Round, which dealt with corruption prevention in respect of members of parliament, judges, and prosecutors, 56% of all recommendations, including those made in the follow-up to the [Ad Hoc \(Rule 34\) Report](#) had been fully implemented, 22% partly implemented, and 22% not implemented so far. The compliance procedure under the fourth round is still ongoing.

The 5th round evaluation report evaluates the effectiveness of the measures in place to prevent and combat corruption in top executive functions: the President, the Prime Minister, Deputy Prime Ministers, ministers, secretaries and undersecretaries of State, presidential advisers, state advisers, state councillors and ministerial advisers. Members of two law enforcement agencies, the police and the Gendarmerie, were also subjects of the evaluation.

GRECO calls to mind that Romania has been plagued by high-level corruption scandals throughout the past. It recognises that Romania has developed an institutional integrity framework consisting of the National Integrity Agency (ANI), the National Anti-corruption Directorate (DNA), and the General Anti-corruption Directorate (DGA) within the Ministry of Internal Affairs. A National Anti-corruption Strategy (SNA) is also in place.

The existing legal integrity framework comprises several laws regulating conflicts of interest, incompatibilities,

filing of declarations of assets and interests, and acceptance and disclosure of gifts. A new law on the protection of whistle-blowers came into effect in December 2022, with the National Integrity Agency designated as an external reporting channel. The legal framework is, however, spread out in various voluminous laws and requires greater clarity, coherence, and stability. At the same time, the phenomenon of revolving doors for PTEFs still needs to be regulated.

Regarding top executive functions in central governments, GRECO's main recommendations are the following:

- Introducing rules requiring integrity checks prior to or directly upon the appointment of members of the government, presidential councillors, and ministerial advisers in order to identify and manage any possible conflicts of interest;
- Making public and accessible the ministerial advisers' names, areas of responsibility, and any information on ancillary activities;
- Carrying out systemic analysis of corruption and integrity-related risks covering all PTEFs, including the identification of corresponding remedial measures;
- Carrying out a comprehensive analytical study of the existing legal integrity framework and, in the light of the findings, reviewing the current framework to enhance its clarity, coherence, and comprehensiveness;
- Adopting, revising, and publishing online codes of conduct for PTEFs, and another appropriate document for the President, covering all relevant integrity matters;
- Establishing an independent oversight mechanism to examine complaints against the authorities' refusal to disclose public interest information and to guarantee the effective implementation of freedom-of-information legislation;
- Regularly disclosing and updating information of public interest (by the

central government authorities) on the relevant websites in order to facilitate the public's access to information and its scrutiny of the authorities' activities;

- Conducting a study to assess the practice of legislating through emergency ordinances and the existence of adequate and effective safeguards and controls, including a revision of the regulatory framework and practice as a follow-up in light of the study's findings;

- Ensuring an adequate level of public consultations on draft emergency ordinances and that only specific, clearly regulated, and limited exceptions to this rule be made possible.

Recommendations for law enforcement agencies (police and Gendarmerie) include the following:

- Carrying out regular integrity vetting throughout the careers of law enforcement officers and establishing rules to regulate the disclosure and management of conflicts of interest in the Gendarmerie;

- As a matter of priority, taking measures to ensure the widespread appointment of law enforcement officers to managerial positions (which is predominantly left to the discretion of the direct hierarchical superior), including through "empowerment" – strictly based on merit and guided by open, standardized, and transparent competitions;

- Systematically publishing all donations and sponsorships received by the Gendarmerie on a centralised, dedicated, accessible webpage that clearly indicates the nature and value of each donation, the donor's identity, and how the assets donated were spent or used;

- Revising the Code of Ethics applicable to the police and the Gendarmerie, with the active participation of relevant stakeholders in the police force and the Gendarmerie, in order to cover relevant integrity issues in detail;

- Increasing the representation of women at all levels of the police and Gendarmerie.

GRECO calls on the Romanian authorities to report back on the implementation of its recommendations by 31 December 2024, so that GRECO can assess the country's level of compliance.

## Money Laundering

### MONEYVAL Annual Report for 2022

On 20 June 2023, Moneyval published its [annual report for 2022](#). The report assesses the compliance of the 33 member states and territories (subject to the Committee's monitoring as of 31 December 2022) with international standards and developments to combat money laundering and countering the financing of terrorism (ML/CFT) in their legal and institutional frameworks. The findings are based on the mutual evaluation reports and follow-up reports adopted under the fifth evaluation round in 2022, which assesses compliance with the 40 Recommendations of the Financial Action Task Force (FATF) and the level of effectiveness of the AML/CFT systems.

According to the report, on average, MONEYVAL member states and territories continued to demonstrate a moderate level of effectiveness in AML/CFT. The best results were achieved in risk management, international cooperation, and the use of financial intelligence. Compliance with international standards remained particularly weak in financial sector supervision, private sector compliance, transparency of legal persons, ML convictions and confiscations, and sanctions for terrorism financing and the proliferation of weapons of mass destruction. The results are excellent with regard to technical compliance with recommendations concerning legislative and institutional reforms, where members fully implemented 72% of the recommendations.

The report cautions that recovery of criminal proceeds remains insufficient compared with the estimated proceeds of crime. Therefore, there is a need not only to freeze but also to seize and confiscate criminal proceeds. This requires enhancing the powers and resources of criminal asset recovery and management offices, improving the identifying and freezing of criminal proceeds, adopting stricter sanctions, and increasing the number of convictions for serious ML offences. Digital transformation leads AML/CFT authorities and the private sector to adopt more advanced tools for monitoring transactions. In the process, Moneyval aims to guide its members in order to ensure that the technologies are compatible with relevant international and European standards. As AI increasingly takes hold, a human rights-based approach is essential in the area of data protection, data privacy, and cybersecurity.

### MONEYVAL: Typologies Report on ML and TF Risks in the World of Virtual Assets

**spot light** On 6 July 2023, MONEYVAL published a [report on money laundering \(ML\) and terrorist financing \(TF\) risks in the world of virtual assets](#) (VA) and their service providers (VASP) in MONEYVAL members states and territories.

The report found that MONEYVAL members continue to struggle with the implementation of FATF Recommendation 15, which concerns ML/TF risks in relation to the development of novel products and business practices, including new delivery mechanisms, and the use of new or developing technologies for both recent and pre-existing products. Around 80% of the assessed members are only partially or not compliant with the FATF requirements.

The report includes an overview of the measures taken to regulate and supervise VASPs and features of the identified risks for laundering the pro-

ceeds of crime via VASPs and VA (i.e., exchanges, exchange offices, aggregators, and other cryptocurrency platforms, including e-gaming, sports betting, and non-fungible tokens (NFTs)). It also explores whether law enforcement agencies have adequate powers and tools to investigate, locate, and impose interim measures in respect of VA and includes examples of the types of virtual assets platforms used to financially support criminal activity alongside examples of cases investigated by the relevant authorities. The key findings of the report are as follows:

- MONEYVAL members are at varying stages in their implementation of FATF Recommendation 15, with most of them requiring major or moderate improvements. Better results were achieved in areas in which VASPs were included as reporting entities in the national AML/CFT law;
- When assessing VA and VASP risks, different entities pose different risks, depending on various factors, including products, services, customers, geography, business models, and the strength of the entity's compliance programme. In more advanced jurisdictions, the risk analysis also includes the results of the supervisory actions;
- The collection of statistics relating to VA and VASPs would improve risk assessment, particularly in the jurisdictions that need to identify unregistered domestic VASPs or external VASPs operating in the respective jurisdiction;
- The use of technology to identify and assess risks in this sector appears to be a good practice. To better understand and mitigate the risk, some countries purchased blockchain risk evaluation tools, and supervisors trained employees in blockchain analysis;
- Licensing, registration, and regulation remain a challenge, which is directly related to the designated supervisor's capacity to fully understand the risks and the particularities of the sector;
- The difference between registering for the purpose of AML/CFT oversight

and being licensed can have a significant impact on the prevention of crime and the management of a branch of industry. Some MONEYVAL members report that registration is still not sufficient, as less reputable firms use registration as a stamp of legitimacy, and their customers rarely understand the difference between registration and license;

- MONEYVAL members report difficulties in detecting unlicensed/unregistered VASPs in practice;
- Looking at supervision of the VASP sector, most MONEYVAL members are still at the beginning of implementation. Not all supervisors are comprehensively resourced in terms of staffing and knowledge, and the risk-based approach is rarely tailored to a sector-specific risk assessment;
- Monitoring of cross-border transactions is still a problematic issue (e.g., application of the travel rule);
- Fraud and child sexual exploitation were highlighted as the prevalent predicate offences identified by VASPs;
- ML/TF investigation responsibility is most often not determined on the basis of the cases' *modus operandi* (e.g., whether VA are involved or not) but instead on the type of underlying crime. Smaller countries tend to have one central law enforcement authority responsible for all ML/TF investigations;
- Sourcing of financial intelligence is heavily dependent on the designation of VASPs as reporting entities. Members mostly reported that the legal powers to collect evidence during ML/TF investigations also cover information held by VASPs and VA;
- Difficulties exist in gathering evidence from VASPs located in foreign jurisdictions, and channels of mutual legal assistance are not efficient enough to ensure the timely seizure of VA located abroad;
- The majority of Financial Intelligence Units and law enforcement authorities is lacking appropriate technological tools and expertise to effectively ana-

lyse and investigate VA-related ML/TF cases. It is, however, evident that there is investment in training and cooperation with VASPs to build expertise;

- The ability to seize and freeze VA is dependent on the presence of a VASP intermediary and/or the possession of the private keys providing controls over the VA;
- Only a small fraction of ML/TF investigations involve proceeds of crime that are VA. This portends difficulties in detecting and investigating VA-related ML/TF cases. The value of frozen and confiscated proceeds of crime that are VA is negligible.

MONEYVAL member states and territories are invited to provide feedback on the usefulness of the findings in 2024. ■

#### **MONEYVAL: Fifth Round Evaluation Report on North Macedonia**

On 12 July 2023, MONEYVAL published the [fifth round mutual evaluation report on North Macedonia](#). It calls for improvements particularly in the investigation and prosecution of money laundering (ML) and terrorist financing (TF) as well as the financing of proliferation (FP).

According to the report, North Macedonia has strengthened its legal framework since the last mutual evaluation and laid the foundation for a sound regime to tackle ML and TF. Two National Risk Assessments (NRA) have been generated, and the North Macedonian authorities generally have a good understanding of them. The FIUs, law enforcement authorities (LEAs), and financial supervisors have a better understanding of the risks than the prosecutorial and judicial authorities. The conclusions of the NRAs were widely distributed to the obliged entities (OEs) by the FIU and supervisory agencies. Against this background, the report presented the following key findings:

- The authorities have access to a wide range of financial, administra-

tive, and law enforcement information. Law enforcement authorities (LEAs) and Public Prosecutor's Offices (PPOs) make limited use of financial information provided by the FIU to develop evidence and launch investigations in relation to ML/TF and underlying predicate offences, mainly due to the lack of adequate resources;

- The financial information produced by the FIU is considered useful and of good quality by LEAs and PPOs, but it is only passed on to LEAs with limited filtering and prioritization of the information. This might restrict LEAs in their ability to focus on the most material cases given the risk profile of the country. The lack of feedback from LEAs and PPOs affects the way the FIU adapts its work to the operational needs of these authorities;

- The country has established an appropriate institutional framework to investigate and prosecute ML. Parallel financial investigations are not systematically pursued; they rarely follow the money of unidentified origin to detect their potential criminal source and are mostly conducted in relation to predicate offences. The number of ML convictions is modest – one of the main reasons for this is that third-party and stand-alone ML cases usually require a conviction for a predicate offence;

- Confiscation of the proceeds of crime, instrumentalities, and property of equivalent value is a policy objective in the relevant strategic documents. Some technical deficiencies are in place, such as limitation in the application of temporary freezing measures during the pre-investigative stage of criminal proceedings, but the statistics available confirm that the amounts confiscated are considerable. The application of cross-border cash controls resulted in large amounts of restrained cash, although these actions were rarely followed by investigations into potential ML;

- Authorities have a good understanding of TF-related risks. However, recent

developments call for reconsideration of the TF risk level. There has been one case (against two individuals) so far where TF was subject to prosecution and conviction; this does not fully correspond to the country's risk profile and its threat environment;

- Targeted Financial Sanctions (TFS) listing obligations have been given immediate legal effect without delay, although broader implementation shortcomings exist. No TFS-related assets have been identified and frozen to date. Authorities have taken action to identify TF threats and the vulnerabilities of non-profit organisations (NPOs) and undertaken initiatives to provide guidance and conduct outreach since 2021. North Macedonia implements proliferation financing (PF) through the same legal framework as that for TF TFS;

- TFS obligations relating to changes to relevant UN sanctions lists were given immediate legal effect without delay. The understanding of TFS obligations is uneven across sectors. Supervisors do not generally distinguish between TF and PF TFS in their checks, and some financial supervisors have more robust approaches than others;

- The overall supervisory system applied in North Macedonia presents some positive aspects, and the financial supervisors and the FIU have undertaken efforts to adopt risk-based approaches; it is still unclear to which extent these approaches have led to positive results, considering the low number of findings from most of the supervisory actions carried out by all authorities;

- Considerable issues surround the application of market entry requirements, in particular the lack of harmonisation of the checks carried out by financial supervisors, the lack of consideration of beneficial ownership (BO) when it comes to casinos, and the lack of controls to ensure that BO information is updated;

- Despite the number of corrective and coercive actions available to supervisors, the number and amount of

pecuniary sanctions is low overall, and concerns exist about the proportionality, dissuasiveness, and effectiveness of the misdemeanour penalties provided under the AML/CFT law;

- Some efforts were taken to identify the ML/TF risks associated with legal persons, but they proved to be insufficient, due to uneven consideration of the use of strawmen, the presence of shelf companies and providers of services, and the significant number of companies being struck off the register on an annual basis. Such shortcomings need to be addressed by more in-depth analysis;

- Steps have been taken to increase the transparency of legal persons and arrangements, such as the centralisation of public registers, the implementation of a data processing tool, and the establishment of a BO Register. There are issues, however, with the quality of data populating the BO Register. No sanctions are being imposed for failures related to BO information. The presence and risks of trusts and other similar legal arrangements is almost completely disregarded by the authorities;

- Mutual legal assistance is provided across a range of requests for ML/TF and predicate offences, including those on extradition. While the feedback received from foreign partners is mostly positive, there are shortcomings related to timelines and response quality. The lack of a specific and integrated case management system for all the relevant authorities and of prioritisation mechanisms have, to some extent, had an effect on the timely execution of international cooperation;

- In relation to extradition, the authorities remain active in requesting and executing extradition requests; unsatisfactory prison conditions are the main refusal ground.

North Macedonia is expected to report back to MONEYVAL under its enhanced follow-up reporting process in May 2025.

## MONEYVAL: Fifth Round Evaluation Report on Romania

On 18 July 2023, Moneyval published its [fifth round evaluation report on Romania](#) with the following key findings. In general, the report found that Romania has taken a number of actions to strengthen its legal and institutional AML/CTF framework since the country's last evaluation in 2014; however, these efforts only show moderate levels of effectiveness in all areas but international cooperation.

The country demonstrates a good grasp of ML risks but less understanding of TF risks. The law enforcement authorities (LEAs) have access to a wide range of financial, administrative, and law enforcement information. Still, financial intelligence is accessed and used only to some extent because of a lack of technical resources and limited human resources allocated to the financial intelligence unit in the National Office for the Prevention and Control of Money Laundering (NOPCML-FIU). This hampers the quantity and quality of financial intelligence provided by the NOPCML-FIU to support the operational and strategic needs of its partners. Even so, the competent authorities use the information mainly to investigate predicate offences rather than ML offences.

The report is critical towards the lack of an overarching national AML/CFT strategy ensuring a consistent approach and methodology in AML/CFT across all areas. Insufficient communication, cooperation, and systematic coordination was demonstrated between the various prosecutors' offices. The investigation and prosecution of ML is not being pursued as an overall priority. The laundering of tax predicates and laundering of the proceeds of corruption are adequately resourced and effectively conducted. Investigations and prosecutions into human and drug trafficking focus on the predicate crimes rather than the laundering of those predicates. Specialised resources and training are nec-

essary in this field. Convictions for ML concern mainly self-laundering and a handful of third-party ML or standalone cases; the sanctions seem low and not dissuasive. Other findings of the report include the following:

Romania actively applies measures to confiscate criminal proceeds. However, effective confiscation in third party and standalone cases of proceeds located abroad are rare. Confiscation of suspicious cross-border transportation of cash is not pursued as a policy objective, the amount of falsely detected or undeclared cross-border transactions of currency are low, and the sanctions applied (fine or confiscation) are rare and not dissuasive. Additional resources to conduct financial investigations as well as practical guidance and training for prosecutors and LEAs is necessary to pursue the confiscation of criminal proceeds in more complex cases;

The National Terrorism Strategy dates from 2002, and there is no specific policy for TF. A full understanding of the specific roles that might be played by the terrorist financier was not demonstrated. The concentration of the relevant agencies – the Romanian Intelligence Service (RIS) and the Directorate for the Investigation of Organised Crime and Terrorism (DIOCT) – is mainly on the prevention and disruption of terrorism rather than on detecting, investigating, and prosecuting TF *per se*;

Banks and larger financial institutions (FIs) demonstrate a fairly good understanding of targeted financial sanctions (TFS) requirements and implementation practices, while designated non-financial businesses and professions (DNFBPs) and virtual asset service providers (VASPs) have less understanding of TFS requirements. The detection of indirect links and close associations with sanctioned entities and individuals is a concern in all sectors, and there is no risk-based regulatory and oversight framework for the non-profit sector;

In general, banks demonstrated a good grasp of ML and TF risks. The understanding of ML risks in non-bank FIs, including payment institutions (PIs), was also generally good, but the understanding of TF risks less pronounced. Customer due diligence (CDD) measures as applied by obliged entities are generally risk-based, but this is not the case for exchange offices and most DNFBPs;

The most robust AML/CFT risk-based approach is applied by the National Bank of Romania (NBR), which supervises the most material FIs. NBR engagement occurs frequently, but it operates on a rather *ad hoc* basis. ML/TF risks are taken into consideration to some extent by the Financial Services Authority and the NOPCML. The supervision of VASPs has only recently started. As a rule, remedial measures are applied; the effectiveness of sanctions has not yet been demonstrated;

Although the understanding of risk of abuse of legal persons by the authorities is greater than that in the national risk assessment (NRA), the level of risk is higher than that recognised by the authorities (medium level), at least to some extent. Important steps have been taken to prevent misuse of legal persons, including the development and use of public registries;

Although Romania has a sound legal framework for international cooperation, a significant lack of reliable data and statistics hinders the authorities' ability to demonstrate effectiveness in this area. Romania has neither a central case management system in place nor formalised guidelines for prioritisation of incoming requests. This significantly hinders the authorities' ability to monitor and follow up requests for assistance. Assistance provided to other countries is constructive and delivered on a timely basis in most cases.

Romania is expected to report back to MONEYVAL under the enhanced follow-up reporting process in May 2025.

# Articles

## Articles / Aufsätze

### Fil Rouge

Euclid regularly reports and publishes on corruption, and this issue once again dedicates its entire article section to exploring this highly relevant topic with in-depth articles.

From the mid-1990s to the start of this century, almost all major international organisations (including the EU, the Organisation of American States, the OECD, the CoE, the UN, the AU, and the Arab League) adopted binding legal instruments on corruption. These instruments vary widely, not only in terms of their material scope but also in terms of their geographical coverage and degree of bindingness. The most prominent global instrument – the United Nations Convention against Corruption (UNCAC) – applies in 190 countries and covers all aspects of corruption, i.e., incrimination, prevention, international cooperation, and technical assistance. In comparison, the OECD Anti-Bribery Convention covers “only” 45 countries and only applies to the very specific subject of active corruption in international business transactions.

What about the EU? The 1997 Convention on the fight against corruption involving EC officials or officials of Member States of the EU was recognized worldwide as one of the first and most advanced binding instruments against corruption. It stemmed from the 1996 first protocol to the 1995 Convention on the protection of the Union’s financial interests, which was limited to anti-corruption in the realm of fraud against the Union budget.

Most of these instruments are accompanied by sophisticated monitoring mechanisms, such as the Council of Europe’s GRECO (read the editorial from its President in this issue), the OECD Working Group on Bribery and the UNCAC’s Implementation Review Group. These mechanisms have the task of ensuring full and effective implementation of the instruments by all State Parties. Against this background, *Alina Mungiu-Pippidi* writes in her article that “corruption has not decreased despite unprecedented efforts” or has at least not decreased in a significant way. There are multiple reasons for this, which probably have to do with the firmly entrenched idea of corruption as an “offence without victims” (which is, of course, erroneous but possibly explains the lack of criminal investigations and prosecutions). In any case, persisting gaps in the implementation of the international anti-corruption *acquis* has triggered

in-depth reflection in the various fora on the reasons for this disparity and on how to improve the situation.

The EU is at the forefront of the new anti-corruption wave. The protection of the EU’s financial interests is once again the driving force behind this move. The 2017 “PIF Directive” already contains a broader catalogue of corruption offences than the 1997 EU Convention. The new anti-corruption package presented in May 2023 by the Commission and the High Representative of the Union for Foreign Affairs and Security Policy provides new input to the international anti-corruption scenario and may serve as a model for further initiatives in other fora. This initiative is in the focus of most articles in this issue.

In the first article, *Francesco Clementucci* and *Adrianna Miekina* introduce our readers to the initiative. *Lucia Zoli* then explains how the Commission’s proposal for a new anti-corruption directive seeks to align the PIF Directive with new and higher standards, in particular regarding sanctions for natural and legal persons, aggravating and mitigating circumstances, and limitation periods. *Zoli* highlights that the amendments also aim to implement the principle of equivalence and effective protection of the EU’s financial interests, in line with Art. 325 TFEU.

Several controversial aspects and challenges of the proposed anti-corruption directive are presented in the article by *Matilde Bellingeri* and *Federico Lippi*, e.g., respect for the principle of proportionality and the (questionable) similarity of responses to corruption in the public and private sectors. Two subsequent articles by *Celina Nowak* and *Rafael Aguilera Cordillo* focus on specific issues that are relevant for the fight against corruption. They particularly touch upon the liability of legal persons, respectively reflecting on the national situations in Poland and Spain.

In conclusion, the fight against corruption has once again become a high political priority in the EU and, after approval by the European Parliament and the Council, the new legislation is sure to have a significant impact on national legislations as well as on other international fora.

Lorenzo Salazar, Deputy Prosecutor General, Naples and Member of the euclid Editorial Board

# The Commission Proposal for a Directive on Combating Corruption

Francesco Clementucci and Adrianna Miekina\*

This article sketches the legal background and institutional history that has led the EU Commission to propose a Directive on Combating Corruption. It outlines the role the future directive shall play in the context of other EU tools, including those belonging to the 2023 anti-corruption package. The article looks at the objectives of the proposed anti-corruption directive, which are threefold: (1) consolidating the existing anti-corruption rules into one single legal act; (2) building up an effective integrity system through awareness-raising campaigns as well as research and education programmes in order to mitigate incentives for corruption; (3) facilitating the effective investigation and prosecution of corruption cases by ensuring sufficient resources as regards staff and dedicated investigative tools. Lastly, the article explains the potential future impact of the envisaged directive on the national anti-corruption frameworks, both in terms of repression and prevention.

## I. Introduction

The President of the EU Commission Ursula von der Leyen announced new actions to counter corruption in her 2022 State of the Union speech.<sup>1</sup> The anti-corruption package was later adopted by the Commission in May 2023.<sup>2</sup> The timing could not have been more appropriate, especially considering recent corruption cases that have shaken the heart of EU institutions, allegedly involving decision-makers in the European Parliament, their close advisers, and decision-influencers.<sup>3</sup> Overall, the 2023 Eurobarometer survey data indicates that the majority of Europeans think corruption is a concrete problem.<sup>4</sup> The anti-corruption package includes a Commission proposal for a directive to combat corruption by means of criminal law<sup>5</sup> and a joint Communication (by the Commission and the High Representative of the Union for foreign affairs and security policy), with a proposal to establish a regime of sanctions against serious acts of corruption committed outside the EU.<sup>6</sup> It also features the creation of the EU Network against corruption, which was then established in September 2023, whose key task will be to support EU-wide corruption risk-mapping, which will inform the future EU anti-corruption strategy.<sup>7</sup>

The anti-corruption package consolidates the existing framework composed of different EU anti-corruption legal texts, actions, and programmes. Anti-corruption is also dealt with in the Rule of Law Report<sup>8</sup> as well as in some measures of the Recovery and Resilience Facility<sup>9</sup> (which may be used to fund actions implementing recommendations stemming from the “European semester” reports).<sup>10</sup> In addition, in the context of the conditionality rules,<sup>11</sup> the Commission may ask the Council of the EU to issue budgetary measures (e.g., suspension of payments or financial

corrections) against Member States violating the Rule of Law, including its anti-corruption pillar, when it “directly affects or seriously risks affecting the sound financial management of the Union budget or of the financial interests of the Union in a sufficiently direct way”. In parallel, in June 2023, the Commission presented a proposal for establishing an EU ethics body,<sup>12</sup> with a view to creating a common set of ethics standards and types of conduct<sup>13</sup> for members of the institutions,<sup>14</sup> thereby preventing possible corruption-related malpractices.

## II. The Proposal for the Directive on Combating Corruption

The EU legal framework on combatting corruption is considered fragmented, outdated and limited in scope.<sup>15</sup> The current EU legal measures cover anti-bribery in private and public sectors.<sup>16</sup> A number of corruption-related offences, also listed in the UN Convention Against Corruption (UNCAC), have yet to be harmonised at the EU level. As a result, the possible cross-border dimension of corruption is currently not properly addressed. At the operational level, differences in criminalisation leave loopholes regarding both specific types of corruption offences and corruption enablers. As indicated in various studies,<sup>17</sup> gaps in and limited enforcement of existing legislation, together with the need for cooperation and capacities to prosecute cross-border cases, call for both the definition of common standards across the EU and more efficient law enforcement cooperation in corruption-related cases. Additionally, the lack of comparable statistics on corruption risks, cases and impact renders evidence-based policy development, both at the national and European levels, more difficult. Furthermore, the

fight against corruption at the national level remains scattered among several law enforcement agencies, triggering concerns regarding national and cross-border institutional and operational cooperation.

The legislative proposal on the fight against corruption by means of criminal law is intended to update the EU legal framework, including through the integration of internationally binding standards, such as those of the UNCAC, to which both the EU and all EU Member States are parties. The proposal seeks to ensure that all forms of corruption are criminalised in all Member States; that legal persons may also be held responsible for such offences; and that these offences incur effective, proportionate and dissuasive penalties. The legal basis for the proposal for the Directive is based on three provisions of the Treaty on the Functioning of the European Union (TFEU): a) Article 83 TFEU, which lists corruption as one of the “euro-crimes”; b) Article 83(2) TFEU as a legal basis for the proposed alignment with the so called “PIF Directive” (Directive no 1371 of 2017);<sup>18</sup> and c) Article 82(1)(d) TFEU, which constitutes a legal basis for cooperation instruments.

The focus of the proposed Directive is threefold. First, it aims to consolidate existing anti-corruption rules into one single legal act. It does so by harmonising the definition of corruption offences as per the UNCAC. This covers bribery, misappropriation, trading in influence, abuse of functions, obstruction of justice and illicit enrichment related to corruption offences. The proposal also approximates the common minimum level of criminal sanctions for both individuals and legal persons<sup>19</sup> as well as for aggravating and mitigating circumstances.<sup>20</sup>

Secondly, the proposal includes measures for the prevention of corruption, which Member States should adopt in order to build an effective system for integrity system. These measures consist in awareness-raising campaigns, research and education programmes taken to mitigate incentives for corruption. The aim is to ensure that the public sector is made accountable. As a consequence, Member States are to establish qualitative transparency through access to information of public interest, the declaration of possible conflicts of interests and their mitigating measures, asset declaration systems for public officials, and frame contacts between the private and the public sectors; they should also have specialised anti-corruption bodies that are adequately equipped (with financial, human, and technical resources), and suitably trained.<sup>21</sup>

Thirdly, the proposal is to facilitate the effective investigation and prosecution of corruption cases. Competent law-

enforcement agencies, services, as well as prosecuting and investigating entities should thus be properly resourced and able to use dedicated investigative tools.<sup>22</sup> This also covers the adoption of minimum rules on the statute of limitations, notably to prevent foreclosure in complex cases requiring lengthy investigations. Lastly, the proposal also addresses the misuse of privileges and immunity when aimed to prevent criminal investigations.<sup>23</sup>

### III. Outlook

Reducing the demand side of corruption and ensuring deterrent penalties for criminals are expected to increase the overall level of security and disrupt organised crime activities. The increased level of harmonisation in the field of anti-corruption is also expected to alleviate obstacles to cross-border cooperation in criminal matters. The question remains as to what extent the content of the proposal will be maintained in the final text of the directive that still has to be approved by the two EU co-legislators, i.e. the Council of the European Union and the European Parliament. Negotiations over the proposal are now ongoing. The ambitious expectation is to reach an agreement on the text before the end of the term of the current European Parliament’s mandate, set for June 2024. Member States’ initial reactions have been relatively cautious: beyond conventional criticism concerning the legal basis, some decision-makers underlined the text’s weak proportionality in addressing both preventive and repressive measures.<sup>24</sup> In exchange for their support on the draft directive against corruption, Member States may ask for more stringent measures to prevent, investigate, and prosecute integrity cases inside the EU institutions.<sup>25</sup> The recent bribery scandal allegedly involving EU officials,<sup>26</sup> and the fact that national authorities acted first to detect and investigate this case, may be a reason used to call for a larger competence to be allocated to the European Public Prosecutor’s Office.<sup>27</sup>

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\* The views expressed in this article are solely those of the authors and are not an expression of the views of the institution they are affiliated with.

1 State of the Union 2022 – President von der Leyen’s speech, available at: <[https://state-of-the-union.ec.europa.eu/state-union-2022\\_en](https://state-of-the-union.ec.europa.eu/state-union-2022_en)>. All hyperlinks in this article were last accessed on 8 December 2023.

2 European Commission, Press release of 3 May 2023, “Anti-corruption: Stronger rules to fight corruption in the EU and worldwide”, <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_2516](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2516)>.

3 <<https://www.euractiv.com/topics/qatargate/>>.



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4 64% of Europeans think corruption is unacceptable, with 70% of European citizens (2% higher than in 2022) and 65% of companies in the EU thinking that the problem of corruption is widespread in their country. Cf.: Directorate-General for Migration and Home Affairs, News Article of 13 July 2022, „Citizens and businesses have spoken – corruption remains a serious problem in EU countries”, <[https://home-affairs.ec.europa.eu/news/citizens-and-businesses-have-spoken-corruption-remains-serious-problem-eu-countries-2022-07-13\\_en](https://home-affairs.ec.europa.eu/news/citizens-and-businesses-have-spoken-corruption-remains-serious-problem-eu-countries-2022-07-13_en)>.

5 Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council, COM/2023/234 final, <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2023%3A234%3AFIN>>. See also T. Wahl, *eucri* 2/2023, 140–141.

6 Commission press release, *op. cit.* (n. 2).

7 On 20 September 2023, the EU network against corruption met for the first time in Brussels. This network aims to foster collaboration, identify trends, and build more effective anti-corruption policies across the EU. It brings together all stakeholders in the fight against corruption, from national authorities and experts to international organisations and relevant EU bodies. More information is available at <[https://home-affairs.ec.europa.eu/news/eu-network-against-corruption-convenes-first-time-brussels-2023-09-21\\_en](https://home-affairs.ec.europa.eu/news/eu-network-against-corruption-convenes-first-time-brussels-2023-09-21_en)>. See also T. Wahl, *eucri* 2/2023, 141.

8 The aim of the report is to identify possible problems in relation to the rule of law as early as possible, as well as best practices, so that problems can be discussed in a timely manner in individual Member States, Member States can exchange good experiences, inter-institutional cooperation is stimulated, and a rule-of-law culture can be developed across the EU. For more detail, refer to T. Wahl, “Commission’s First Rule of Law Report”, *eucri* 3/2020, 158–159, <<https://eucri.eu/news/commissions-first-rule-of-law-report/>>. NB: According to the State of the Union (SOTEU) in September 2023, the Rule of Law report will be extended beyond EU states and applied to accession countries, in order to “place them on an equal footing with Member States, and support them in their reform efforts, and it will help ensure that our future is a Union of freedom, rights and values for all” See the full SOTEU at <[https://ec.europa.eu/commission/presscorner/detail/en/speech\\_23\\_4426](https://ec.europa.eu/commission/presscorner/detail/en/speech_23_4426)>.

9 Cf. <[https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility\\_en](https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en)>.

10 Cf. <[https://commission.europa.eu/business-economy-euro/economic-and-fiscal-policy-coordination/european-semester\\_en#:~:text=The%20European%20Semester%20is%20the,of%20economic%20and%20social%20policies](https://commission.europa.eu/business-economy-euro/economic-and-fiscal-policy-coordination/european-semester_en#:~:text=The%20European%20Semester%20is%20the,of%20economic%20and%20social%20policies)>.

11 For the Rule of Law Conditionality Regulation, see <[https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation\\_en#:~:text=Under%20the%20conditionality%20regulation%2C%20the,on%20the%20proposal%20of%20measures](https://commission.europa.eu/strategy-and-policy/eu-budget/protection-eu-budget/rule-law-conditionality-regulation_en#:~:text=Under%20the%20conditionality%20regulation%2C%20the,on%20the%20proposal%20of%20measures)>.

12 European Commission, Press release of 8 June 2023, „EU Ethics Body: Commission proposes the creation of common ethics standards for all EU institutions”, <[https://ec.europa.eu/commission/presscorner/detail/en/IP\\_23\\_3106](https://ec.europa.eu/commission/presscorner/detail/en/IP_23_3106)>.

13 E.g., on acceptance of gifts, hospitality, and travel offered by third parties; conditionality and transparency and publicity measures; interests and assets to be declared; side jobs or external activities, including those carried out post-mandate.

14 Commission Press release of 8 June 2023, *op. cit.* (n. 12).

15 JOIN(2023) 12 final, Joint Communication to the European Parliament, the Council and the European Economic And Social Committee on the fight against corruption, available at <[https://commission.europa.eu/system/files/2023-05/JOIN\\_2023\\_12\\_1\\_EN.pdf](https://commission.europa.eu/system/files/2023-05/JOIN_2023_12_1_EN.pdf)>.

16 Currently applicable legal instruments are the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector and the 1997 Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

17 European Commission, Gaglio, I., Guzzon, J., Bartz, K., et al., *Strengthening the fight against corruption. Assessing the EU legislative and policy framework: final report for acceptance*, Publications Office, 2023, available at: <<https://op.europa.eu/de/publication-detail/-/publication/d7a6cfdb-8fcb-11ed-b508-01aa75ed71a1>>.

18 NB: The purpose is to ensure that the Member States have in place equivalent measures to counter both corruption affecting the Union’s and their own financial interests; the proposal contains suggestions as to aligning Directive (EU) 2017/1371 in terms of sanctions, aggravating and mitigating circumstances, and limitation periods. For the impact of the proposal on the PIF Directive, see L. Zoli, “The Amendment of the PIF Directive by the New Proposal for a Directive on Combating Corruption”, in this issue.

19 Art. 15 (Penalties and measures for natural persons). This proposal sets the minimum maximum penalty between four and six years, depending on the seriousness of the offence, which represents an increase in comparison to the above-mentioned penalties at the EU level for bribery. The Directive also sets a number of additional sanctions that the competent authorities should be able to impose upon persons convicted for a corruption offence.

In Art. 16 (Liability of legal persons), the provision follows a standard formula, one that can be found in other EU legal instruments, obliging Member States to ensure that legal persons can be held liable for criminal offences (referred to in the Directive) committed for their benefit by any person with leading positions, within the legal person, or by other persons under their control or supervision. It is not required that such liability be exclusively criminal.

20 Art. 18 (Aggravating and mitigating circumstances) provides a list of circumstances that must be regarded as aggravating circumstances in order to allow the judiciary to consider the broader societal damage, e.g., perpetrated by organised groups or persons holding positions of public responsibility. It also provides a list of

circumstances that must be regarded as mitigating circumstances, e.g., covering cases in which offenders provide information or collaborate with authorities.

21 In this sense, see the UNODC Jakarta Statement on Principles for Anti-Corruption Agencies (of 2012). In addition, as per the UNODC Colombo commentary on the Jakarta statement (of 2020), while there is no agreed formula on what constitutes “sufficient financial resources”, meeting this benchmark at the operational level requires funding to cover administrative costs (e.g., for sufficient personnel, capacity development and training, equipment and travel) as well as operational costs (e.g., for activities in relation to prevention, education, investigation, prosecution, and coordination). The resources of the anti-corruption agency should be derived from a regular budget rather than *ad hoc* contributions provided by an executive decree or donor funding. This ensures that ministries and departments cannot reduce the budget of the ACA prior to legislative approval. For more, refer to [https://www.unodc.org/documents/corruption/Publications/2020/20-00107\\_Colombo\\_Commentary\\_Ebook.pdf](https://www.unodc.org/documents/corruption/Publications/2020/20-00107_Colombo_Commentary_Ebook.pdf).

22 It is worth noting that, on 7 September 2023, the Court of Justice of the EU ruled in Case C-162/22 (*Lietuvos Respublikos generalinė prokuratūra*) that the Directive on privacy and electronic communications precludes the use, in connection with investigations into corruption in the public service, of personal

data relating to electronic communications, which were retained by providers of electronic communications services and subsequently made available to the competent authorities for the purpose of combating serious crime. See also T. Wahl, *eucri* 2/2023, 149–150.

23 Member States shall ensure that privileges and immunities can be lifted during corruption investigations in a timely manner through an effective and transparent process pre-established by law.

24 Among others, some national parties seem to oppose parts of the draft directive, e.g., Italian parties (see [https://www.ansa.it/english/news/politics/2023/07/19/centre-right-rejects-eu-anti-corruption-directive\\_de41d451-46fb-40c2-9b85-328547704680.html](https://www.ansa.it/english/news/politics/2023/07/19/centre-right-rejects-eu-anti-corruption-directive_de41d451-46fb-40c2-9b85-328547704680.html)); Czech parties (<https://www.euractiv.com/section/politics/news/czechia-opposes-new-eu-anti-corruption-directive/>).

25 NB: The proposal for the directive also covers the EU institutions. See Commission Press release of 8 June 2023, *op. cit.* (n. 12).

26 B. Moens, C. Gijs and P. Haeck, “Belgium closes in on Qatar-gate win”, *Politico.eu* <https://www.politico.eu/article/belgium-qatargate-investigation-european-parliament-corruption/>.

27 See also L. Salazar and F. Clementucci “Per una nuova anti corruzione europea: EU-rbi et orbi”, (7–8/2023) *Sistema Penale*, [https://www.sistemapenale.it/pdf\\_contenuti/1689732585\\_sp-2023-7-8-salazar-clementucci.pdf](https://www.sistemapenale.it/pdf_contenuti/1689732585_sp-2023-7-8-salazar-clementucci.pdf).

# The Amendment of the PIF Directive by the New Proposal for a Directive on Combating Corruption

Lucia Zoli\*

This article outlines the targeted amendment of the PIF Directive proposed in the Commission’s legislative initiative for a Directive on Combating Corruption, which was tabled in May 2023. The targeted amendment seeks to align the PIF Directive with the standards set out in said anti-corruption proposal. The areas of alignment are sanctions for natural and legal persons, aggravating and mitigating circumstances, and limitation periods. The amendment is designed to ensure respect for the principle of equivalence and effective protection of the EU’s financial interests, as laid down in Art. 325 of the Treaty on the Functioning of the European Union.

## I. Introduction: The “PIF Directive”

The current EU anticorruption legal framework already includes specific measures targeting acts of corruption that damage or are likely to damage the Union’s financial interests. Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law (“PIF Directive”)<sup>1</sup> sets out common definitions and standards for the criminal offences of active and passive corruption (bribery) and misappropriation by a public official (in

addition to fraud and money laundering). Indeed, bribery constitutes a particularly serious threat to the EU budget and can in many instances also be linked to fraudulent conduct, e.g. in cases of bribery of public officials in exchange for awarding EU funds or for approving inflated costs in the execution of certain projects.<sup>2</sup>

The PIF Directive was adopted on 5 July 2017 as part of the Commission’s anti-fraud strategy. It replaces the 1995 Convention on the protection of the European Communi-

ties' financial interests and its Protocols (the "PIF Convention") for the Member States bound by it.<sup>3</sup> This Directive, as implemented by national law, also defines the criminal offences that fall within the material competence of the European Public Prosecutor's Office (EPPO) pursuant to Art. 22 of Council Regulation (EU) 2017/1939 ("the EPPO Regulation").

The deadline for transposition of the PIF Directive into national law expired on 6 July 2019. As outlined in the two reports on its implementation, adopted by the Commission on 6 September 2021<sup>4</sup> and on 16 September 2022,<sup>5</sup> respectively, several outstanding conformity issues still need to be addressed. To this end, the Commission has already opened infringement proceedings against 19 Member States for incorrect transposition of the PIF Directive.<sup>6</sup>

## II. Targeted Amendment of the PIF Directive

In May 2023, the Commission adopted a comprehensive anti-corruption package, which includes a proposal for a Directive on combating corruption.<sup>7</sup> This ambitious proposal aims *inter alia* at approximating the types and levels of sanctions for individuals and legal persons as well as other sanctions-related provisions. It sets out higher penalty standards compared to those currently provided for by the PIF Directive. These higher standards were considered appropriate in view of the nature of the criminal offences to be harmonised by the proposal, the standards defined by the Member States in their national corruption legal frameworks, and the levels of sanctions established by more recent EU criminal law instruments.

This initiative required the Commission to come up with a targeted amendment of the PIF Directive, notably with a view to ensuring respect for the principle of equivalence and effective protection laid down in Art. 325 of the Treaty on the Functioning of the European Union (TFEU). The latter in fact establishes a shared responsibility between the Union and the Member States to counter fraud and any other illegal activity affecting the financial interests of the Union through effective and deterrent measures. It also sets out an obligation to ensure the same level of protection between the Union's and national financial interests.

The targeted amendment of the PIF Directive therefore proved necessary to ensure that the Member States have in place equivalent measures to counter corruption affecting the Union's and their own financial interests. To this end, Art. 28 of the proposal for a Directive on combating corruption seeks to align the PIF Directive with the higher standards set out in that proposal, in terms of sanctions

for both natural and legal persons, aggravating and mitigating circumstances, and limitation periods.

For example, with specific reference to penalties for natural persons, the minimum maximum imprisonment level set out in the PIF Directive has been raised from four to six years for bribery and from four to five years for misappropriation by a public official, when "considerable damage or advantage" is involved. In order to ensure the consistency within the PIF Directive, the penalty provisions of the other PIF offences that were already punished in the same way as corruption (fraud and money laundering) have also been raised to six years. Furthermore, the additional penalties or measures for natural persons provided for in the proposal on combating corruption (including, e.g., fines or disqualification from public office) would also be available for corruption offences affecting the EU budget. The targeted amendment of the PIF Directive further seeks to eliminate the possibility for Member States to lay down sanctions of a non-criminal nature in cases of corruption involving damage of less than €10,000 or an advantage of less than €10,000, since a comparable threshold is not foreseen in the proposal on corruption.

The same logic applies through Art. 28 of the proposal with regard to inclusion in the PIF Directive of the additional aggravating and mitigating circumstances,<sup>8</sup> the cross-reference to the provisions on penalties concerning legal persons,<sup>9</sup> and the introduction of higher limitation periods to ensure consistency with those laid down in the proposal on corruption.<sup>10</sup>

## III. Way Forward

The proposed amendment of the PIF Directive does not go so far as to extend its material scope to additional corruption offences that have been harmonised by the proposal on combating corruption but not yet included in the PIF Directive (i.e., bribery and misappropriation in the private sector, trading in influence, abuse of functions, obstruction of justice, enrichment from corruption offences). Nonetheless, as clarified in the explanatory memorandum of the proposal, the Commission will assess the extent to which these criminal offences also need to be included in the PIF Directive. This assessment will be done – in the context of the evaluation of the PIF Directive.<sup>11</sup>

The possible extension of the scope of the PIF Directive to the entire spectrum of corruption offences would further enhance the fight against crimes affecting the financial interests of the Union in the future. In addition,

such possible extension of the scope of the PIF Directive would also extend the material scope of the EPPO's competence. The latter in fact is defined by means of a dynamic reference to the PIF Directive. As a result, the

EPPO would become competent to investigate, prosecute, and bring to judgment the perpetrators of the entire spectrum of corruption offences affecting the Union's financial interests.<sup>12</sup>

\* The views expressed in this article are solely those of the author and are not an expression of the views of the institution she is affiliated with.

1 O.J. L 198, 28.7.2017, 29–41. For background, see A. Juszczyk and E. Sason, 'The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PIF Directive). Laying down the foundation for a better protection of the Union's financial interests?', (2017) *eu crim*, 80–87. PIF stands for "protection des intérêts financiers".

2 See, for example, the typologies identified by the European Public Prosecutor's Office (EPPO) in its annual activity reports 2021 and 2022, available at: <[https://www.eppo.europa.eu/sites/default/files/2022-07/EPPO\\_Annual\\_Report\\_2021.pdf](https://www.eppo.europa.eu/sites/default/files/2022-07/EPPO_Annual_Report_2021.pdf)> and <[https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO\\_2022\\_Annual\\_Report\\_EN\\_WEB.pdf](https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO_2022_Annual_Report_EN_WEB.pdf)>. All hyperlinks in this article were last accessed on 11 December 2023.

3 The PIF Directive applies to 26 EU Member States; Denmark is not bound by it.

4 Report from the Commission to the European Parliament and the Council on the implementation of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, 6.9.2021, COM(2021) 536 final. For an overview, see W. Van Ballegooij, 'Protecting the EU's Financial Interests through Criminal Law: the Implementation of the "PIF Directive"', (2021) *eu crim*, 177-181. With specific reference to corruption, the report notes that an additional element of "breach of duties" is required in the definition of both active and passive corruption in several Member States. This additional aspect significantly narrows the scope of the Directive's definitions of corruption. On "passive corruption", the Commission found that, in a small number of Member States, the aspect concerning the refraining of public officials "from acting in accordance with [their] duty" is not covered by national legislation. On "active corruption", the report mentions that some of the aspects of the definition provided for by the Directive are missing or not transposed correctly in some Member States.

5 Second report on the implementation of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, Brussels, 16.9.2022, COM(2022) 466 final.

6 See European Commission, Press corner – infringements decision: December 2021 infringements package (<[https://ec.europa.eu/commission/presscorner/detail/en/inf\\_21\\_6201](https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201)>); February 2022 infringements package: (<[https://ec.europa.eu/commission/presscorner/detail/en/inf\\_22\\_601](https://ec.europa.eu/commission/presscorner/detail/en/inf_22_601)>); May 2022 Infringements package (<<https://ec.europa.eu/commission/presscorner/detail/>

<[https://ec.europa.eu/commission/presscorner/detail/en/inf\\_23\\_2707](https://ec.europa.eu/commission/presscorner/detail/en/inf_23_2707)>); June 2023 infringement package (<[https://ec.europa.eu/commission/presscorner/detail/en/inf\\_22\\_2548](https://ec.europa.eu/commission/presscorner/detail/en/inf_22_2548)>);

7 COM(2023) 234 final. For an overview, see F. Clementucci and A. Miekina, "The Commission Proposal for a Directive on Combating Corruption, in this issue, pp. 276–279.

8 The PIF Directive at present only provides for one aggravating circumstance, in case the criminal offences harmonised therein are committed in the framework of a criminal organisation, while the proposal on corruption includes a list of additional aggravating and mitigating circumstances. By means of the proposed amendment (Art. 28(6) of the proposal on corruption) all these circumstances would also be available in the context of the PIF Directive.

9 Compared to Art. 9 of the PIF Directive, Art. 17 of the proposal on corruption provides for additional sanctions for legal persons and, with regard to fines, relies on the calculation method based on the worldwide turnover of the legal person concerned in the business year preceding the fining decision (in line with the recent Commission proposal on the protection of the environment through criminal law and replacing Directive 2008/99/EC (COM(2021) 851 final) and the proposal on the violation of Union restrictive measures (COM(2022) 247 final), both currently under negotiation). Art. 28(7) of the proposal on corruption would also make these additional sanctions for legal persons available in the context of the PIF Directive.

10 Similarly, Art. 28(8) of the proposal on corruption aligns the rules on limitation periods between that Directive and the PIF Directive.

11 The evaluation of the PIF Directive is foreseen in its Art. 18.

12 While the EPPO is already competent to investigate and prosecute non-PIF crimes that are "inextricably linked" to the PIF crimes, under the conditions set out in Art. 25(2) of the EPPO Regulation, only a comprehensive amendment of the PIF Directive would result in an extension of its competence to the whole set of corruption offences envisaged in the proposal on corruption, provided that such offences affect the EU budget.

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# Combating Corruption in EU Legislation

## An Analysis of Some Aspects of the Commission Proposal for the EU Anti-corruption Directive

Federico Luppi and Matilde Bellingeri

The anti-corruption package presented by the European Commission in May 2023 reaffirms the priority given to combating corruption crimes in the EU. In response to the current disharmony and fragmentation of national legal systems, the proposal for a new EU Directive on combating corruption calls for greater alignment at the European level. By applying the EU's "non-exclusive" competence in criminal matters, serious corruption offenses will be countered on a shared basis, also in view of their potential cross-border dimension. The authors argue, however, that there are provisions in the proposed directive that raise serious doubts as to the adherence to the principle of proportionality, the tendency to largely equalize responses to corruption in the public and private sectors, and the preservation of basic principles of criminal law, such as legality and the degree of certainty required for offences.

### I. Premises

Corruption is highly damaging to society, to our democracies, to the economy, and to individuals. It undermines the institutions on which we depend and dilutes their credibility as well as their ability to deliver public services.<sup>1</sup> It distorts markets, erodes the quality of life, and allows organised crime and other threats to human security to flourish. Corruption is a socio-political phenomenon that occurs in all countries (large/small, rich/poor), but its effects are most destructive in developing countries. It disrupts the efficiency of public spending and exacerbates social inequalities; it costs the EU economy at least €120 billion per year.<sup>2</sup> The negative effects of corruption are felt worldwide, undercutting efforts to achieve good governance, prosperity, and the UN Sustainable Development Goals.<sup>3</sup>

There is no universal agreement on the definition of corruption: practices considered corrupt in one cultural context may not be considered so in another. Even the often-cited definition of corruption as the abuse of power for private gain may not cover all instances of collusion for gain.<sup>4</sup>

Beyond the criminal law concept of active and passive bribery,<sup>5</sup> corruption can also be conceptualized as a broader socio-economic problem, encompassing a variety of issues such as:

- Conflict of interest: a situation in which an individual is in a position to derive personal benefit from actions or decisions made in his/her official capacity;
- Clientelism: a system to exchange resources and favors based on an exploitative relationship between a "patron" and a "client";
- Various forms of favoritism, such as:
- Nepotism and cronyism: someone in an official position exploits his/her power and authority to provide a job as

a favor to a family member or friend, even though he/she may not be qualified or deserving;

- Patronage: a person is selected for a job or government benefit because of affiliations or connections, regardless of qualifications or merits.

While these practices are not necessarily criminally sanctioned, they can be very harmful to states and societies, especially when they are widespread. They occur at all levels of society and their impact can vary, depending on the decision-making power of the corrupt entity.

Following this brief introduction on the ways in which different types of corruption manifest themselves and develop, it is appropriate to examine the regulatory provisions that have gradually been enacted by the EU. The next section will examine the status quo by outlining the various provisions that the EU has adopted from 1997 until now before section III will present the 2023 Commission proposal for a new anti-corruption directive, whose main aspects will be further analysed in section IV.

### II. The Existing EU Legal Framework

The current EU's legal anti-corruption landscape is as follows:

- The 1997 Convention on fighting corruption involving officials of the European Union or officials of EU Member States;<sup>6</sup>
- The 2003 Council Framework Decision on combating corruption in the private sector, which criminalises both active and passive bribery;<sup>7</sup>
- The 2008 Council Decision on a contact-point network against corruption;<sup>8</sup>
- Directive (EU) 2017/1371 on the fight against fraud to

the Union's financial interests by means of criminal law (the "PIF Directive").<sup>9</sup>

The PIF Directive replaced the 1995 Convention on the protection of the European Communities' financial interests and its Protocols (the "PIF Convention"). Based on Art. 83(2) TFEU, the PIF Directive sets common standards for Member States' criminal laws. These common standards seek to protect the EU's financial interests by harmonising the definitions, sanctions, jurisdiction rules, and limitation periods of certain criminal offences affecting those interests.<sup>10</sup> These criminal offences (the "PIF offences") are: (i) fraud, including cross-border value added tax (VAT) fraud involving total damage of at least €10 million; (ii) corruption; (iii) money laundering; and (iv) misappropriation. This harmonisation of standards also affects the scope of investigations and prosecutions by the European Public Prosecutor's Office (EPPO) because the EPPO's powers are defined in reference to the PIF Directive as implemented by national law.<sup>11</sup>

Taken together, these instruments illustrate the strong alignment of EU Member States on certain standards in the fight against corruption. Despite these instruments and the adoption of the 2003 Council Framework Decision, however, significant discrepancies remain between Member States.

Moreover, it should be noted that European legislation has also been influenced by the United Nations Convention against Corruption (UNCAC). The UNCAC is the only legally binding universal anti-corruption instrument. Negotiated by the member states of the United Nations (UN), it was adopted by the UN General Assembly in October 2003 and entered into force on 14 December 2005. The Convention's far-reaching approach and the mandatory character of many of its provisions make it a unique tool for developing a comprehensive response to a global problem.

### III. The EU Proposal for a New EU Directive on Combating Corruption

According to the European Commission, the regulatory instruments adopted so far – in particular the Framework Decision 2003/568/JHA on Corruption in the Private Sector, the 1997 Convention on Combating Corruption against Officials of the EU or EU Member States, and the PIF Directive – have failed to achieve their intended purposes. The tools currently available in the Member State to fight corruption have not been deemed complete. In order to ensure a more coherent and effective response within the Union, the Commission has therefore formulated a Proposal for a

Directive on Combating Corruption through Criminal Law in May 2023.<sup>12</sup>

The objective of the legislative initiative is to ensure uniformity of legislation on forms of corruption, so that certain acts are considered criminal offenses in all Member States and punished with effective, proportionate, and dissuasive penalties, thus harmonising penalties across the EU. The Commission intends to step up its action by means of the following:

- Building on existing measures, thus strengthening efforts to integrate the prevention of corruption into the design of EU policies and programmes;
- Actively supporting Member States' work to put in place strong anti-corruption policies and legislation; Identifying challenges and issuing recommendations to Member States via the Commission's annual Rule of Law Report cycle.

The draft directive is supplemented by a proposal from the High Representative (supported by the Commission) to establish a dedicated Common Foreign and Security Policy (CFSP) sanctions regime<sup>13</sup> targeting serious acts of corruption worldwide. In sum, the package places a strong focus on prevention and the creation of a culture of integrity in which corruption is not tolerated, while strengthening enforcement tools.

### IV. Analysis of Some Aspects of the Proposal for an EU Directive on Corruption

When it comes to the fight against and prevention of corruption, there are indeed gaps in national enforcement and obstacles in cooperation between competent authorities in different Member States. Member State authorities face challenges related to the excessive length of judicial proceedings, short statutes of limitation, rules on immunity and privileges, limited resources, lack of training, and restricted investigative powers. The Commission's legislative initiative updates the EU legislative framework by incorporating international standards binding on the EU, such as those of the UNCAC (see II. above). For the Commission, it is indispensable that the EU ensures that all forms of corruption are criminalised throughout the EU, that legal persons can also be held liable for corruption offenses, and that corruption offenses are punished with effective, proportionate, and dissuasive penalties in a harmonised way. This is flanked by proposed measures to prevent corruption in accordance with international standards and those to facilitate cross-border cooperation. Although the proposal has its positive aspects, it also encounters several problems.

Some important issues in this regard will be analysed in the following.

### 1. Difficulty in finding a common definition

Even though corruption is a transnational phenomenon, finding a common definition in the legal frameworks is a continuous challenge.<sup>14</sup> Therefore, the Commission proposal follows the traditional approach, consisting in categorising specific manifestations of corruption in a broader sense: misappropriation of funds (Art. 9)<sup>15</sup>; trading in influence (Art. 10); abuse of functions (Art. 11); obstruction of justice (Art. 12); and enrichment through corruption offenses (Art. 13); these offences are supplemented by rules on accessory conduct (i.e., incitement, aiding and abetting, and attempt – Art. 14).

In this context, one of the main novelties of the directive is the transition of several semi-mandatory offences specified in the UNCAC (formulated there as a mere obligation to *consider* adopting a certain criminal provision) into mandatory ones. Offences that are not considered mandatory in the UNCAC are foreign passive bribery (Art. 16(2) UNCAC), trading in influence (Art. 18 UNCAC), abuse of functions (Art. 19 UNCAC), bribery and embezzlement in the private sector (Arts. 21–22 UNCAC), and illicit enrichment (Art. 20 UNCAC). In our view, the UNCAC intentionally listed these offences as non-mandatory because they are crimes where disagreements regarding the wording were more pronounced and consensus was more challenging to reach.

Furthermore, many of the terms and expressions used in the UNCAC are generic, and the definitions are very broad and vague. The draft directive reproduces these deficits.

### 2. Lack of impact assessment

The proposal may also entail problems related to the principle of proportionality in criminal law. In the Explanatory Memorandum, the Commission stated:<sup>16</sup>

...[t]his proposal is exceptionally presented without an accompanying impact assessment. Moreover, the initiative is not likely to have significant economic, environmental, or social impacts and costs, or those entailing significant spending. At the same time, it should benefit the economy and society as a whole.

This approach can be criticised in several aspects. The impact of criminal law enforcement usually involves some degree of social cost. For instance, in the Italian experience, the provision of abuse of function (Art. 323 of the Italian Criminal Code) perfectly demonstrates the impact that overly extensive and unclear criminalisation can have on the effectiveness of administration. In 2021, only 40 of

5500 criminal proceedings in Italy resulted in convictions or a plea bargain.<sup>17</sup> For public officials, especially those in elected positions, being subjected to criminal proceedings can result in severe reputational damage, regardless of the final outcome of the case, which may take months or even years to be ultimately resolved. To avoid this inconvenience, we recommend that an impact assessment is due.

### 3. Corporate criminal liability

It can indeed be acknowledged that the introduction of corporate criminal liability represents a major development in criminal justice systems in most civil law countries over the past 20 years.<sup>18</sup> However, the legal environment and rules on corporate criminal liability vary from country to country. The Commission's proposal still includes some problematic items:

- The draft directive avoids explicitly stating the “**criminal**” nature of corporate liability.<sup>19</sup> It seems that the concept of a “legal person” (Art. 2, no. 7) does not include entities without a legal personality. If they are not included, it does not sound convincing, since even members of entities without legal status may also commit crimes.
- With respect to the **structure of liability**, the proposal follows the traditional EU model based on 1) the commission of the crime by a person in a leading position in the organisation; or 2) the leading person's failure to supervise the criminal conduct of an employee. However, this model seems to be outdated.

In recent years an **alternative model** of corporate liability has gained prominence that emphasises the compliance efforts undertaken by the organization involved in the crime.<sup>20</sup> This mechanism for assigning liability to legal persons is based on the specific contribution of the entity to the commission of the crime in terms of organisational deficiencies or lack of adequate preventive systems. Countries such as Italy, Spain, the Czech Republic, Austria, Poland, and the United Kingdom have already adopted this approach.

Although the draft does not ignore the importance of effective internal control mechanisms, ethics awareness, and compliance programmes to prevent corruption in advance (before the actual crime is committed), such controls are only considered a mitigating factor at the sanctioning level. As a result, the incentive to implement pre-crime compliance programmes may be insufficient if the penalty reduction is the same as that for post-crime compliance programmes (cf. Art. 18(2)b). In fact, companies may be induced to adopt a reactive rather than a proactive approach in the rare cases in which a violation is detected and enforced. Conversely, the introduction of an independent mitigating circumstance related to vol-

untary disclosure and self-disclosure of a crime to the competent authorities, together with the implementation of corrective measures (as provided for in Art. 18(2)c)), are undoubtedly positive developments.

- Regarding the **penalties applicable to legal entities**, the method of quantifying fines based on total worldwide turnover (Art. 17(2)a) ), including related corporate entities, is surely interesting. It aligns with the methods already outlined in other EU directives and regulations, such as those on market abuse<sup>21</sup>, money laundering<sup>22</sup>, and protection of personal data<sup>23</sup>. It might be appropriate to consider different maximum fines levels, however, depending on the size of the entity.

With regard to the list of sanctions applicable to legal persons, the following is questionable: The range of sanctions is quite broad and diverse, including measures such as the permanent disqualification of the legal person from engaging in business activities, or even the judicial liquidation of the legal person, without distinguishing the cases in which the most severe sanction should be applied. Moreover, the wording proposed could be interpreted as implying that all the measures and sanctions listed are mandatory for any corporate bribery offense, which would clearly be contrary to the principle of proportionality of penalties. It would be different if the list could be understood as a mere collection of sanctions and measures from which the national legislator, responsible for implementing the directive, could choose – without being obliged to adopt a specific sanction/measure or even the entire catalogue (for any corruption offense). The latter interpretation seems more reasonable, especially considering said proportionality principle, and it should lastly be clarified in the legal text.

#### IV. Conclusion

The anti-corruption directive proposed by the European Commission in May 2023 confirms that the fight against corruption is a high political priority in the EU. If approved by the Council and the European Parliament, the new legislation will have a significant impact on national legislations. As we have seen, however, the proposed strategy not only has positive aspects but also negative ones.

The EU's intervention in the fight against corruption certainly produces an added value that cannot be achieved exclusively by the repressive policies of individual states. It is necessary to bring the criminal law of the Member States closer together, helping to create a level playing field and enable greater coordination. In addition, the decision to intervene through the instrument of a directive makes it

possible to achieve a mitigation of the major divergences between the different criminal law disciplines of the countries of the Union – binding for the Member States as to the result to be achieved – while leaving the necessary regulatory discretion on forms and methods of adaptation.

If the objective of the proposal is to determine a common “minimum” standard that would be applicable to all EU member states (Article 83(1) and (2) TFEU), it would be desirable to specify the standards more accurately, while also respecting the general principle of proportionality in European law. This is considered very important as it could ensure more uniform justice in the member states (e.g., it would prevent different limitation periods, set by each state, from encouraging the commission of corruption offenses in one state rather than another, given their potential cross-border dimension).

Failure to achieve the goal of harmonizing offenses at the European level could lead to unequal treatment and, in any case, to the inefficiency of the anti-corruption system at the European level. This comes in consideration of the difficulties encountered by Member States when implementing the semi-mandatory provisions of the UNCAC, which the European Union would now turn into (fully) binding rules. It has been argued here that a mere “copy-paste” approach to the UNCAC provisions is insufficient and inappropriate. The drafting of the proposed directive represents a significant opportunity to revitalize and streamline the fight against corruption at the European level. Let's not waste this opportunity.

1 UN Office on Drugs and Crime, “EU and UNODC meet for 2nd Anti-Corruption Dialogue”, Vienna 5 October 2023, <<https://www.unodc.org/unodc/en/frontpage/2023/October/eu-and-unodc-meet-for-2nd-anti-corruption-dialogue.html>>. All hyperlinks in this article were last accessed on 3 January 2024.

2 Report from the Commission to the Council and the European Parliament, *EU Anti-Corruption Report*, COM (2014) 38 final; European Parliament Research Service, *Stepping up the EU's efforts to tackle corruption*, Cost of Non-Europe Report, January 2023.

3 European Commission - Press release, “Anti-corruption: Stronger rules to fight corruption in the EU and worldwide”, Brussels, 3 May 2023 <[https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_2516](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_2516)>.

4 Piotr Bąkowski, *Combating corruption in the European Union*, EPRS Briefing, December 2022, <[https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739241/EPRS\\_BRI\(2022\)739241\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/739241/EPRS_BRI(2022)739241_EN.pdf)>.

5 The terms define the transactional offences: „active bribery” usually refers to the offering or paying of the bribe, while „passive bribery” refers to the receiving of the bribe (cf. Arts. 2 and 3 of the Council of Europe Criminal Law Convention on Corruption, ETS No 173).

6 Convention drawn up on the basis of Article K.3 (2) (c) of the Treaty on European Union on the fight against corruption involving



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officials of the European Communities or officials of Member States of the European Union OJ C 195, 25.6.1997, 2.

7 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192, 31.7.2003, 54.

8 Council Decision 2008/852/JHA of 24 October 2008 on a contact-point network against corruption, OJ L 301, 12.11.2008, 38.

This Decision established a network of EU Member States contact points to prevent or suppress corruption. Its purpose is to improve cooperation between the authorities combatting corruption at the EU level. The network consists of the relevant authorities and agencies in each EU Member State and performs the following tasks: 1) providing a forum for the exchange of best practices and experiences in the prevention and suppression of corruption; 2) facilitating the creation and maintenance of contacts among its members.

9 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, OJ L 198, 28.7.2017, 29.

10 A. Juszczak and E. Sason, "The Directive on the Fight against Fraud to the Union's Financial Interests by means of Criminal Law (PFI Directive)" (2017) *eu crim*, 80.

11 P. Csonka, A. Juszczak and E. Sason, "The Establishment of the European Public Prosecutor's Office", (2017) *eu crim*, 125, 128.

12 Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council, COM (2023) 234 final, 5 May 2023.

13 European Commission, Press release of 3 May 2023, *op. cit.* (n. 3); T. Wahl, "Commission and HR Set Out EU Action against Corruption", (2023) *eu crim*, 139.

14 The term "corruption" is used internationally, particularly within the framework of the UN and other international organisations and institutions (OECD, Council of Europe, World Bank, etc.), by global civil society organisations like Transparency International, and in criminological literature on the matter, in the wide sense of "abuse of entrusted power for private gain"; this definition encompasses both public and private sectors and goes beyond bribery offences in the strict sense: OECD, *Corruption. A*

*Glossary of International Criminal Standards*, Paris, 2007, p. 19; World Bank, *Helping Countries Combat Corruption: The Role of the World Bank*, 1997, p. 8; Transparency International, *The Anti-Corruption Plain Language Guide*, Berlin, 2009, p. 14: corruption is "the abuse of entrusted power for private gain. Corruption can be classified as grand, petty and political, depending on the amounts of money lost and the sector where it occurs"; definition also followed by the UN, *Global Compact, Principle Ten: Anti-Corruption*, <<https://unglobalcompact.org/what-is-gc/mission/principles/principle-10>>; UNODC-GRACE, *Knowledge tools for academics and professionals. Module Series on Anti-Corruption, Module 1: What Is Corruption and Why Should We Care?*, <[https://grace.unodc.org/grace/uploads/documents/academics/AntiCorruption\\_Module\\_1\\_What\\_Is\\_Corruption\\_and\\_Why\\_Should\\_We\\_Care.pdf](https://grace.unodc.org/grace/uploads/documents/academics/AntiCorruption_Module_1_What_Is_Corruption_and_Why_Should_We_Care.pdf)>. For legal literature references, cf: J.W. Williams and M.E. Beare, "The Business of Bribery: Globalization, Economic Liberalization, and the 'Problem' of Corruption", in M.E. Beare (ed.), *Critical Reflections on Transnational Organized Crime, Money Laundering, and Corruption*, Toronto, 2003, p. 117; in this sense, already J.J. Senturian: "corruption is the misuse of public power for private profit", cited in R. Babu, *The United Nations Convention Against Corruption: A Critical Overview*, 2006, p. 5.). Conversely, the term "bribery" refers specifically to corruption in a narrow sense: a corrupt exchange of mutual benefits or a unilateral act (offer, request) with such intent.

15 If not stated otherwise in the text, Articles refer to the Commission proposal in COM (2023) 234, *op. cit.* (n. 12)

16 Explanatory Memorandum, COM (2023) 234, *op. cit.* (n. 12), pp. 13–14.

17 Speech by Prof. Antonio Mogillo, given at the European Economic and Social Committee (EESC), Expert Hearing on the Anti-Corruption Legislative Framework, 14 July 2023.

18 See M. Pieth, and R. Ivory, (eds.), *Corporate Criminal Liability. Emergence, Convergence, and Risk*, Dordrecht, 2011, pp. 9 et seq; A. Fiorella (ed.), *Corporate Criminal Liability and Compliance Programs, vol. 1: Liability "Ex Crimine" of Legal Entities in Member States*, Napoli, 2012; vol. 2: *Towards a Common Model in the European Union*, Napoli, 2012; C. Vermeulen, W. De Bondt and C. Ryckmann, *Liability of legal persons for offences in the EU*, Antwerp, 2012; V. Mongillo, *La responsabilità penale tra individuo ed ente collettivo*, Torino, 2018, pp. 176 et seq; OECD, *The Liability of Legal Persons for Foreign Bribery: A Stocktaking Report*, 2016; Council of Europe, *Liability of Legal Persons for Corruption Offences*, 2020, pp. 19 et seq.

19 On this issue, V. Mongillo, "The Nature of Corporate Liability for Criminal Offences: Theoretical Models and European Union Member States' Laws", in: A. Fiorella(ed.), vol. II, *op. cit.* (n. 18), pp. 55–120.

20 See Allens Arthur Robinson, 'Corporate culture' as a basis for the criminal liability of corporations (report for the use of the United Nations Special Representative of the Secretary General for Business and Human Rights (UNSRSG)), February 2008, <<https://media.business-humanrights.org/media/documents/f72634fd87adfd3d31a22f5f4b93150267b8a764.pdf>>.

21 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse, OJ L 173, 12.6.2014, 1.

22 Anti-money laundering and terrorist financing Directive V – 2018/843/EU; Anti-money laundering and terrorist financing Directive IV – 2015/849/EU.

23 Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons about the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC (General Data Protection Regulation).

# Liability for Corruption in Poland in Light of the Commission Proposal for a New Directive on Corruption

## The Devil is in the Details

Celina Nowak\*

This article refers to the Polish anti-corruption law and the new European Commission proposal for a Directive on combating corruption. It aims at analysing the Polish provisions currently in force in light of the Commission proposal. Against the background of the anticipated new EU legal instruments, the author points out the most significant loopholes in Polish law hindering an effective fight against corruption. The analysis carried out in the article indicates, in particular, that there is a high need to modify the Polish legal framework as regards the liability of collective entities for offences. Compliance measures need to be adopted. In addition, the author advocates putting in place preventive measures and effectively penalizing corruption in the private sector in Poland.

### I. Introduction

On 3 May 2023, the European Commission presented a proposal for a Directive of the European Parliament and of the Council on combating corruption.<sup>1</sup> The proposal's objective is to update and develop the existing EU legal framework on corruption in the light of evolving national criminal legal frameworks and the international standards binding on the EU, in particular the 2003 United Nations Convention against Corruption (UNCAC). Although the proposal focuses to a large extent on strengthening mechanisms to repress corruption, prevention constitutes an equally important part of the initiative.

This twofold ambition is expressed in Art. 1 of the proposal, which stipulates that “the proposal establishes minimum rules concerning the definition of criminal offences and sanctions in the area of corruption, as well as measures to better prevent and fight corruption.” The structure of the proposed Directive largely reflects that of the UNCAC: the first set of provisions refers to preventive measures, whereas further articles are devoted to criminal matters.

Once adopted, the entry into force of the proposal will certainly imply modifications in the national legal systems of the EU Member States, including Poland, which has struggled with the elimination of corruptive conduct for a long time. Therefore, in the following, the provisions of the Directive will be mirrored against the relevant current provisions of Polish law, and the need for reform of the Polish law elaborated. The article will point out the most important provisions of the proposal and the most significant loopholes in Polish law that hinder an effective fight against corruption.

### II. Preventive and Institutional Measures

The Commission's proposal for a Directive provides for an obligation to prevent corruption, i.e., to detect and eliminate the causes of and conditions for corruption, through development and implementation of a system of appropriate measures and deterrence against corruption-related acts.

Most of the preventive measures mentioned in the proposal are focused on **raising awareness** of the fight against corruption, through education and research programmes and by involving civil society and non-governmental organisations. Such a preventive system requires the establishment of an adequate risk assessment process in order to identify and tackle gaps and sectors most at risk of corruption. Prevention also includes **training** for national officials on corruption offences and corruption risks.

In addition, the proposal refers to implementing “measures to ensure the highest degree of **transparency and accountability** in public administration and public decision-making with a view to prevent corruption”, as well as “effective rules regulating the interaction between the private and the public sector.”<sup>2</sup>

In these areas, Polish law (and Polish administrative practice) does not seem to be in compliance with the proposal. The main problem lies in the lack of systemic mechanisms focused on prevention, as outlined in the proposal. Although some programmes for raising awareness and education have been implemented in Poland, they have hardly been widespread. In addition, risk assessment has not been adopted in the public administration as an effective tool to prevent corruption. There is certainly also much room for improvement when it comes to transparency and anti-cor-

ruption trainings, which are not offered to all national officials on a regular basis.

The proposal for a Directive also refers to measures of an **institutional nature**. In particular, it requires Member States to set up one or several bodies or organisation units specialised in the prevention of corruption as well as in the repression of corruption. These bodies must, *inter alia*, be functionally independent from the government and have a sufficient number of qualified staff members and financial, technical, and technological resources as well as the powers and tools necessary to ensure the proper administration of their tasks, and they must be known to the public.<sup>3</sup>

Poland has several bodies specialised in the investigation and prosecution of corruption, the chief of which is the Central Anti-Corruption Bureau,<sup>4</sup> which enjoys the status of a special service. However, there are **no bodies or institutions responsible for the prevention of corruption**; this task is shared by all public administration entities, effectively leaving no one entity in charge. This is a significant downside of the Polish institutional framework, which should be amended once the proposal at hand is adopted and comes into force.

### III. Penal Provisions

The corruption offences set forth in Polish law include corruption in the public sector (Art. 228 and 229 of the Penal Code<sup>5</sup>), trading in influence (Art. 230 and 230a PC), electoral corruption (Art. 250a PC), and economic corruption (Art. 296a PC). Corruption in sport has also been criminalised (Art. 46–48 of the Act on Sport<sup>6</sup>).

#### 1. Criminalisation of corruptive behaviour

In Polish criminal law, active corruption in any sector is defined as “giving or promising to give” any benefit, whether material or personal, directly or through an intermediary, to another person. By contrast, the proposal for the new Directive and other international and EU anti-corruption legal acts define active corruption as “promise, offer or giving” such a benefit. The difference between the penalised forms of corruption refers to the act of “offering”. The Polish government has consistently maintained that offering is criminalised as an attempt to commit active corruption, and therefore all three forms of corruption mentioned in the international and EU law would be punished.<sup>7</sup> However, although attempt is indeed punishable under Art. 13 of the Polish Penal Code, it is usually punished with a lesser penalty than the actual commission of an offence.

The legal qualification also differs. For these reasons, the catalogue of forms of active corruption in Polish law should be amended in order to include “offering” as an equal form of the commission of active corruption.

#### 2. Corruption in the private sector

There is **no provision in the Polish criminal law which would criminalise corruption in the private sector per se**. Art. 296a of the Penal Code, which was introduced in 2003, criminalises active and passive corruption committed by or in relation with any person working for a business entity, irrespective of whether it is an entity operating in the private or public sector. In addition, the application of Art. 296a Penal Code has been limited to acts that are related to a distortion of competition (they constitute an act of unfair competition or an impermissible preferential act in favour of the purchaser or recipient of a good, service, or benefit) or may cause pecuniary damage to the business entity.<sup>8</sup>

As a result, Polish law implements not the EU binding provisions set forth in the Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector<sup>9</sup> but a much older, already expired Joint Action of 1998 on corruption in the private sector.<sup>10</sup> Hence, the criminalisation of corruption in the private sector in Polish law will require a thorough analysis and a radical modification.

#### 3. Other corruption offences

The Polish criminal law **does not provide for an offence of enrichment** from corruption offences, as set forth in Art. 13 of the proposal for the new Directive. Art. 13 would criminalise a public official who intentionally acquires, possesses, or uses property that that official knows is derived from the commission of any of the offences set out in the proposal, irrespective of whether that official was involved in the commission of that offence or not.

Art. 292 of the Polish Penal Code only provides for the offence of criminal fencing, which punishes a person who, on the basis of the surrounding circumstances, can reasonably believe and is able to suspect that an item has been obtained by means of a criminal offence, acquires or assists in the disposal of an item, or accepts or assists in its concealment. Such an act is punishable with a fine, limitation of liberty or deprivation of liberty for up to two years, and, in the event that the item is of a significant value (i.e., over 200,000 PLN, which is equal to approximately €45,000), with a penalty of deprivation of liberty from three months up to five years.

The scope of criminalisation differs significantly between the Penal Code and the proposal for the new Directive. In particular, the use of property is not criminalised in Polish law, although it may be considered as a type of behaviour after the actual commission of a corruption offence and, as such, be penalised together with the commission of the offence (but in such event, the offence of corruption must have been committed by the public official using the property). In addition, the Polish law refers to “items”, whereas the proposal uses the much wider notion of “property” (as defined in Art. 2 (2) of the proposal, property means “funds or assets of any kind, whether corporeal or incorporeal, movable or immovable, tangible or intangible, and legal documents or instruments in any form, including electronic or digital, evidencing title to, or an interest in, such assets”). In fact, a new offence would have to be established in Polish law in order to be able to implement the discussed provision.

#### 4. Liability of legal persons

Modern Polish criminal law has always been very firmly based on the principle of guilt. This principle implies that guilt can only be assigned to an individual. Therefore, criminal liability has been tied with natural persons only and excluded with regard to legal persons and other collective entities. Said position was to a large extent confirmed by the adoption of a new Penal Code in 1997, which expressly referred to natural persons.

The situation in this regard had to change when Poland applied for membership in international organisations, in particular the OECD and EU, once these organisations began adopting anti-corruption legal instruments providing for liability of legal persons. The necessity of implementing this anti-corruption legal framework contributed to the adoption of a new statutory act in 2002, which established the liability of collective entities for prohibited acts. Due to the theoretical considerations mentioned above, related to the notion of guilt in criminal law, this liability was neither set forth in the Penal Code, nor was it constructed as criminal, even though it was clearly very close to criminal liability.

A year after its adoption, the new Act “on Liability of Collective Entities for Acts Prohibited under a Penalty” entered into force on 28 November 2003,<sup>11</sup> but it was almost immediately referred to the Constitutional Tribunal for review. In 2004, the Tribunal found the act partially unconstitutional (based on insufficient procedural guarantees for collective entities and the repressive nature of liability), which resulted in amendments adopted in 2005 (hereinafter: “the Act”).

##### a) Notion of a collective entity

Pursuant to Art. 2 of the Act, a collective entity within the meaning of the Act is a legal person and an organisational unit without a legal personality, to which separate regulations grant legal capacity, with the exclusion of the State Treasury, local government units, and their associations. A collective entity is also a commercial company involving the participation of the State Treasury, a local government unit or an association of such units, a capital company in an organisation, an entity in liquidation, and an entrepreneur who is not a natural person as well as a foreign organisational unit. The group of entities subject to liability under the Act is therefore broader than that usually set out in international and EU legislation, which imposes an obligation on states to prosecute only legal persons, i.e., entities with a legal personality under national law.

In the proposal for the new Directive, a legal person is defined as any entity having a legal personality under the applicable national law, except for states or public bodies in the exercise of state authority and except for public international organisations. In this regard, the Polish law goes beyond the requirements of the proposal, as it covers a wider group of organisational entities.

##### b) Conditions for liability

The model of collective entity liability set out in the 2002 Act is based on **four requirements** – three substantive and one procedural. With regard to the substantive law prerequisites, it should be pointed out that, under Art. 3 of the Act, a collective entity may only be held liable for a criminal act, i.e., conduct by a natural person associated with the entity that has benefited or could have benefited the entity, albeit non-materially.

An essential substantive element for liability is the formal **relationship between the collective entity and a natural person**. Art. 3 of the Act distinguishes in detail four possible links:

- The natural person acts on behalf or in the interest of a collective entity as part of the right or obligation to represent it, make decisions on its behalf or performs internal controls (liability is also triggered if this authority is exceeded or if this obligation is not fulfilled);
- The natural person has been allowed to operate as a result of exceeding the powers or failure to fulfill obligations by the person in a managerial position;
- The natural person acts on behalf or in the interest of a collective entity, with the consent or knowledge of the person in a managerial position;

- The natural person is an entrepreneur who directly interacts with a collective entity in the implementation of a legally permissible goal.

The second substantive condition is the **establishment of a lack of due diligence** on the part of the collective entity. A collective entity is held liable if the following occurs:

- If there was at least a **lack of due diligence in the selection** of a natural person who has been allowed to operate as a result of exceeding the powers of or failure to fulfill obligations by the person in a managerial position or a natural person acting on behalf or in the interest of a collective entity, with the consent or knowledge of the person in a managerial position, or at least a **lack of due supervision of that person**, on the part of an authority or a representative of the collective entity;
- If the **organisation of the activities of the collective entity** did not ensure that the commission of the criminal act by a person acting on behalf or in the interest of a collective entity as part of the right or obligation to represent it, make decisions on its behalf, or perform internal controls or by an entrepreneur who directly interacts with a collective entity in the implementation of a legally permissible goal could have been avoided, when it could have been ensured by the due diligence required in the circumstances by the authority or the representative of the collective entity.

The third substantive element relates to an **offence committed by an individual to the benefit of a collective entity**. Under the current statutory regulation, a collective entity is not liable for every conduct of an individual that constitutes a criminal act but only for such conduct that is an offence falling into one of the categories listed in Art. 16 of the Act. Beyond other economic offences, **corruption** is listed in Art. 16(1) of the Act as conduct by an individual that triggers the liability of the collective entity.

Art. 16 of the Commission proposal for the new Directive links the liability of legal persons to acts committed to their benefit by any natural person, acting either individually or as part of an organ of the legal person and having a leading position within the legal person, based on one or more of the following:

- A power of representation of the legal person;
- The authority to take decisions on behalf of the legal person;
- The authority to exercise control within the legal person.

It can be concluded that the Polish provisions are in line with the proposal and cover all three requirements of liability.

The proposal for a new Directive does not contain any provisions referring to the procedural aspects of the liability of legal persons, aside from the provision stating that this liability of legal persons does not exclude criminal proceedings against natural persons who are perpetrators, inciters, or accessories in the criminal offences (Art. 16(3)). However, Art. 4 of the Polish Act sets out a **procedural prerequisite for the liability of collective entities**. Accordingly, a collective entity is liable if the fact that a criminal act was committed by a natural person associated with the collective entity in the manner described above has been confirmed by the following:

- A final judgment convicting that person;
- A judgment conditionally discontinuing criminal proceedings or proceedings for a fiscal offence against that person;
- A judgment granting that person permission to voluntarily submit to liability;
- A court decision discontinuing proceedings against that person due to circumstances excluding the punishment of the perpetrator.

This provision constitutes a main hinderance in the practical application of the Polish Act. Proceedings against natural persons take up to several years in Poland, and after their conclusion no one is required to hold collective entities liable. Art. 4 of the Polish Act does not contradict any provision of the Commission Proposal as such; however, since it hinders the application of liability to collective entities, it prevents them from being held liable and from being subjected to sanctions. For this reason, the provision in question in the Polish law needs to be put under revision once the Directive is adopted.

### c) Sanctions

The proposal for the new Directive generally states that legal persons held liable for criminal offences are punishable by **effective, proportionate and dissuasive sanctions**.<sup>12</sup> These sanctions include criminal or non-criminal fines, the maximum limit of which should be no less than five percent of the total worldwide turnover of the legal person, including related entities, in the business year preceding the decision imposing the fine. **Additional measures** against legal persons held liable pursuant to Art. 16 (cf. supra) can include the following:

- The exclusion of that legal person from entitlement to public benefits or aid; the temporary or permanent exclusion from public procurement procedures;
- The temporary or permanent disqualification of that legal person from the exercise of commercial activities;

- The withdrawal of permits or authorisations to pursue activities in the context of which the offence was committed;
  - The possibility for public authorities to annul or rescind a contract with them, in the context of which the offence was committed;
  - The placing of that legal person under judicial supervision; the judicial winding-up of that legal person;
  - The temporary or permanent closure of establishments which have been used for committing the offence.<sup>13</sup>
- A prohibition on applying for public procurement;
  - Publication of the judgment against the legal person.
  - The abovementioned bans/prohibitions are imposed in years, for a period from one to five years.

Interestingly, Art. 18 of the proposal provides for a list of aggravating<sup>14</sup> and mitigating circumstances applicable to offenders, both natural and legal persons. What seems particularly pertinent is that one of the mitigating circumstances applicable to legal persons refers to compliance – a novelty in an EU criminal law instrument: A mitigating circumstance shall be acknowledged if the offender is a legal person and it has implemented effective **internal controls, ethics awareness, and compliance programmes** to prevent corruption prior to or after the commission of the offence.<sup>15</sup>

In Polish law, the **main repressive measure applied against collective entities is a fine**. Pursuant to Art. 7 of the Act, this fine can range between PLN 1000 to PLN 5,000,000;<sup>16</sup> however, it may not exceed three percent of the revenue generated in the financial year in which the offence giving rise to the collective entity's liability was committed. Moreover, an obligatory forfeiture is to be ordered against the collective entity. This forfeiture can concern objects originating, at least indirectly, from the prohibited act or which were used or intended to be used to commit it; a financial benefit originating, at least indirectly, from a prohibited act; and an equivalent of objects or financial benefits originating, at least indirectly, from a prohibited act (Art. 8 of the Act).

Lastly, various **additional penalties** may also be imposed on the collective entity under Polish law. Pursuant to Art. 9 of the Act, the catalogue of these measures includes the following:

- A ban on the promotion or advertising of the conducted activity, manufactured or sold products, provided services or provided benefits;
- A ban on the use of grants, subsidies, or other forms of financial support with public funds;
- A ban on access to EU funds in cases related to employment of persons residing illegally on the territory of the Republic of Poland;
- A prohibition on using the assistance of international organisations of which the Republic of Poland is a member;

The Act mentions only one mitigating circumstance that may result in imposing a forfeiture, a prohibition, or making the judgment public instead of a fine. Such a decision may be taken in particularly justified cases, where the offence giving rise to the liability of the collective entity has not conferred a benefit on that entity. Conversely, recidivism on the part of a collective entity constitutes the only aggravating circumstance provided in the law.

Furthermore, Polish law does not mention compliance programmes in the context of the liability of legal persons, which obviously does not encourage legal persons in Poland to adopt compliance policies. I believe that the lack of legislative incentives in this regard in the current Polish legal framework is deplorable; a modification of Polish provisions in this regard is highly recommended. However, the ultimate coming-into-effect of the Commission proposal will certainly provide a strong and much needed push toward Polish companies adopting or reinforcing compliance measures.

#### d) Procedural issues and enforcement

Under Polish law, the collective entity is entitled to certain procedural rights in the course of proceedings against an individual whose act has benefited or could have benefited the collective entity. Looking at the liability proceedings against the collective entity, Art. 27 of the Act provides that these proceedings, which may take place only after a final decision on the proceedings against the individual, are initiated at the request of the public prosecutor or the wronged party. Additionally, in cases in which the collective entity's liability is based on a prohibited act recognized by law as an act of unfair competition, proceedings can moreover be initiated at the request of the President of the Office of Competition and Consumer Protection.

The provisions on the liability of collective entities for acts prohibited under a penalty started being effectively enforced in 2006. In fact, there are remarkably few rulings on the liability of collective entities in Poland. In the period from 2006 to 2020, there have been 85 rulings on the liability of a collective entity in total. None of these cases referred to corruption. Once Poland implements the provisions of the new EU directive in this matter, it is expected that these numbers will increase dramatically.

## IV. Conclusions

At first glance, the Polish law implements requirements of the EU's anti-corruption legislation currently in force as well as those enshrined in the Commission proposal of May 2023 for a new Directive on combating corruption. In reality, however, the devil is in the details. Even the brief analysis of the Polish provisions conducted within the scope of this article inevitably leads to the conclusion that significant legislative loopholes hinder the effective prevention and fight against corruption in Poland.

There are certainly glimpses of hope for improvement. One can be cautiously optimistic with regard to the liability of legal persons in particular. In 2022, a set of new provisions referring to offences against the environment was introduced into the 2002 Act on Liability of Collective Entities for Acts Prohibited under a Penalty.<sup>17</sup> These provisions provide that, in the case an offence is committed against the environment by an individual acting for the benefit of a collective entity, the collective entity is subject to liability irrespective of the verdict or judgment terminating the proceedings against the natural person. This approach radically breaks with the hitherto maintained position that the liability of the collective entity can only be dependent on the liability of the natural person.

At the same time, the principle that the amount of the fine imposed on a collective entity depends on the amount of revenue generated in the financial year in which the criminal act giving rise to the collective entity's liability was committed was changed. The new Art. 7a of the Act now stipulates as follows: if a collective entity is held liable for the act of an individual against the environment, the court shall impose a fine on the collective entity to the amount of PLN 10,000 to PLN 5,000,000<sup>18</sup>, regardless of whether and how much revenue the collective entity earned at all in the year in which the act was committed. The determination of the amount of the fine is at the discretion of the court.

Although one should recommend a thorough modification of the model of liability of collective entities in Poland, the amendments adopted in 2022 in relation to environmental crime could easily be applied to corruption offences if the Polish parliament sees fit to do so.

The implementation of other elements of the Commission proposal for the new Directive will require further amendments to Polish law and Polish administrative practice. These are the main challenges lying ahead for the new Polish parliament and the new Polish government in the coming years, provided that the Commission's proposal for a new anti-corruption Directive will be adopted in this or a similar form.

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1 Proposal for a Directive of the European Parliament and of the Council on combating corruption, replacing Council Framework Decision 2003/568/JHA and the Convention on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union and amending Directive (EU) 2017/1371 of the European Parliament and of the Council (COM(2023) 234 final). For a summary, see T. Wahl, "Commission Proposes New Anti-Corruption Directive", (2023) *eu crim*, 140–141; see also the articles by Clementucci and Miekina, "The Commission Proposal for a Directive on Combating Corruption" and L. Zoli "The Amendment of the PIF Directive by the New Proposal for a Directive on Combating Corruption", both in this issue.

2 Art. 3(2) and 3(3) of the Commission proposal.

3 Art. 4 of the Commission proposal.

4 G. Makowski, "Specialized anticorruption authorities", in: G. Makowski, C. Nowak, A. Wojciechowska-Nowak, *Implementation of Selected Provisions of the United Nations Convention Against Corruption in Poland*, Warszawa 2015, p. 41 ff. (available at: <[https://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/UNCAC\\_ang.pdf](https://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/UNCAC_ang.pdf)> accessed 4 January 2024).

5 Act of 6 June 1997, unified text published in the Official Journal of the Republic of Poland 2022, item 1138, as amended, hereinafter referred to as "PC".

6 Act of 25 June 2010, unified text published in Official Journal of the Republic of Poland 2023, item 2048.

7 OECD Phase 1 Report on Poland. Review of implementation of the Convention and 1997 Recommendation, 2001, p. 3, <<https://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2020928.pdf>> accessed 4 January 2024.

8 C. Nowak, "O potrzebie rzeczywistej kryminalizacji korupcji w sektorze prywatnym", (2021) *Przegląd Ustawodawstwa Gospodarczego*, No 3, 10–16.

9 Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, OJ L 192, 31.7.2003, 54.

10 Joint Action of 22 December 1998 adopted by the Council on the basis of Article K.3 of the Treaty on European Union, on corruption in the private sector, OJ L 358, 31.12.1998, 2.

11 The Act of 28 October 2002 on Liability of Collective Entities for Acts Prohibited under a Penalty, originally published in OJ No

197, item 1661, unified text published in Official Journal of the Republic of Poland 2023, item 659.

12 For the sanctions on legal person, cf. Art. 17 of the Commission proposal, *op. cit.* (n. 1).

13 Cf. Art. 17(2) of the Commission proposal, *op. cit.* (n. 1).

14 The aggravating circumstances are stipulated in Art. 18(1) of the proposal and are as follows: the offender is a high level official; the offender has previously been convicted of an offence referred to Arts. 7 to 14; the offender gained a substantial benefit or the offence caused substantial damage; the offender committed the offence for the benefit of a third country; the offender exercises investigation, prosecution, or adjudication functions; the offence was committed within the framework of a criminal organisation within the meaning of Framework Decision 2008/841/JHA; and the offender is an obliged entity within the meaning of Art. 2 of Directive (EU) 2015/849 of the European Parliament and of the Council, or an employee of an obliged entity, or has the power, whether individually or as part of an organ of the obliged entity, to

represent that entity or has the authority to take decisions on behalf of that entity or to exercise control within the obliged entity, and has committed the offence in the exercise of his professional activities.

15 Cf. Art. 18(2)(b) of the proposal. Pursuant to Art. 18(2)(a) and (c), other mitigating circumstances include situations where the offender provides the competent authorities with information that they would not otherwise have been able to obtain, helping them to (i) identify or bring to justice other offenders or (ii) find evidence, and where the offender is a legal person and has, once the offence has been discovered, rapidly and voluntarily disclosed the offence to the competent authorities and taken remedial measures.

16 Equivalent to approximately €250 to €1,250,000.

17 The Act of 22 July 2022 on amending certain laws to combat environmental crime, Official Journal of the Republic of Poland 2022, item 1726.

18 Equivalent to approximately €2,500 to €1,250,000.

# Weaknesses in Spanish Jurisprudence on the Criminal Liability of Legal Entities

## Non-Imputability of Certain Legal Entities and Lack of Methodology When Applying the Transfer of Criminal Liability between Corporations

Rafael Aguilera Gordillo

Systems theory has been criticized in literature on the analysis of organizations and groups of people. Its weaknesses include the lack of ontological support and the absence of evidence demonstrating the validity of its premises. Since Spain incorporated the criminal liability of legal entities into its criminal code as a means of combating corporate crime and corruption, however, the Spanish Supreme Court has been resorting to systems theory to determine when a legal person should be punished.

This article analyzes the serious practical problems that this approach entails, especially when certain complex legal-criminal issues are being dealt with. In addition to the conflicts that arise concerning the *principle of legality*, systems theory lacks a solid methodology to resolve two questions that emerge in corporate reality: 1) determination of the *non-liability* of certain legal entities, and 2) clarification of the (in)appropriateness of the criminal punishment of legal persons resulting from and arising out of mergers and acquisitions (*M&A transactions*). These aspects undoubtedly affect the necessary legal certainty that must exist in the corporate context.

### I. Introduction: The Questionable Socio-Legal Grounds Chosen by the Spanish Supreme Court to Punish Legal Entities

Many experts in organizational analysis and socio-legal theories criticize the validity of the more traditional view of systems theory as a way to explain what happens in organizations and groups of people.<sup>1</sup> These specialists consider that the hypotheses of classical systems theory lack solid

research to support them, as well as methodologies that allow us to explain, from an experimental point of view, the presumed validity of the postulates it assumes, as *Knudsen* points out.<sup>2</sup> In fact, *Adler*, *Du Gay* and *Reed*, specialists in the study of the functioning of organizations, point out that systems theory continues to be included in the list of theories on the analysis of organizations because of a period of fame it experienced in the last century and not because we have scientific evidence to demonstrate the

validity of its premises.<sup>3</sup> Indeed, this intense questioning of Luhmann's systems theory, which is found in the most specialized literature,<sup>4</sup> would have no significance in the legal-criminal field, were it not for the fact that this theory has been used by some jurists<sup>5</sup> to explain the criminal punishment of companies (within a rigid model of criminal self-responsibility of the legal person). What is more relevant for practical implications, however, is that the Spanish Supreme Court has assumed the theory of systems to be valid.<sup>6</sup> Therefore, the Court has been using it as a primary socio-legal basis to justify the existence of a *wrongful act* carried out by a legal person and to establish the notion of a *structural organizational defect*, after Spain incorporated the *criminal liability of legal entities* into its Criminal Code (CP, hereinafter) in 2010.

Likewise, we are facing an issue that goes far beyond the Spanish criminal law sphere, since the discussion on the socio-legal basis of the criminal liability of the legal person and its implications are also affecting those Latin American countries that have introduced this legal institution in recent years. However, countries with more tradition and experience in the field of the criminal liability of the legal person have not only ignored the systemic conjectures in order to establish a model of self-liability but also dismissed the idea of liability for one's own actions or strict self-liability as a basis for the punishment of the legal person. Countries such as Austria, Belgium, the USA,<sup>7</sup> France, and the UK, are not interested in the idea of strict self-liability as a basis for the punishment of the legal person. Even the country that Spain emulated in the drafting of the regulatory precepts, Italy, assumes a model of hetero-responsibility, albeit through the imposition of administrative sanctions.<sup>8</sup>

The translation of the most extreme aspects of the systemic hypotheses into the criminal law sphere entails that the legal person be considered an entity or system with an – allegedly – real and effective capacity for self-organization, with total operational independence for the individuals that compose it (these individuals are considered to be mere interchangeable parts with no capacity to influence the organization, regardless of the positions or functions they perform in it). Thus, from this systemic Luhmannian vision of the legal person, it follows that the corporate entity or company must be the recipient of criminal punishment if there is a *self-generated structural organizational defect*, an aspect that constitutes the core of the *typicity of a corporate crime*.<sup>9</sup> Therefore, once a wrongful act has been committed by one or more natural persons acting within the scope of the organization and which generates a certain benefit for the corporation, the legal entity will be punished if such a self-organizational defect is found. The self-organizational

defect is conceived as an act of its own, totally autonomous and independent of the natural persons.

The fact that the jurisprudence of the Spanish Supreme Court on the criminal liability of legal persons is resorting to such a questionable theory<sup>10</sup> in order to try to define the socio-legal basis for the allegedly independent “corporate crime” entails great *risks* in practice: these risks arise from the absence of evidence-based factual and methodological validation to meet the legal-criminal challenges posed by complex corporate reality. In fact, the shortcomings of applying systems theory to the framework of the criminal liability of legal persons when examining cases of corruption or economic crime in business contexts have already been revealed in various Spanish criminal proceedings (some of which have received a great deal of media attention). The following will explain two types of problems that have emerged in certain criminal proceedings since Spain approved the criminal liability of legal persons; they have increased and become more accentuated over the last three years (as investigations, prosecutions, and convictions of legal entities became more widespread): 1) the determination of the *non-imputability* of certain legal persons, and 2) the lack of systemic parameters to clarify the “extension of criminal liability to other legal persons” resulting from corporate transactions known as *mergers and acquisitions* (M&A).

## II. Practical Impact: Legal-Criminal Problems Generated by Adopting a Systems Theory Approach

### 1. Non-imputability of legal entities created to commit crimes

The decision of the Spanish Supreme Court, dated 22 October 2020,<sup>11</sup> is one of the court decisions that has come to represent what this Court has held since its decision of 29 February 2016:<sup>12</sup> that the regime of criminal liability of legal entities approved in Spain does not apply when we find ourselves confronted with entities or companies that have been created to commit crimes (even though these entities have a legal personality and the other requirements of the Criminal Code are met). This concept of an “unimpeachable” legal entity is based on the aforementioned systemic premise, which points to the existence of entities with an alleged self-organizing capacity; consequently, if “they themselves” do not adequately organize the prevention of risks within their corporate perimeter, they give rise to criminal reproach when any of their members engage in certain criminal conduct generating benefits for the organization. It is not possible, however,

to impose a penalty on entities or companies lacking a certain “own” organizational substratum, as the Supreme Court states in the fourth ground of law of the first judicial decision cited above “in these cases, the system of imputation will be given by the mechanism of the ‘lifting of the veil’, which directs the criminal action only towards the natural persons behind the organization”.<sup>13</sup>

Following this line of jurisprudence, the Spanish Supreme Court differentiates between three types of entities: 1) those with more licit than illicit activities (they are imputable; the criminal liability regime of the legal person applies); 2) those with more illicit than licit activities (equally imputable) and, lastly, 3) those constituted, solely, as an instrument or means for the development of illicit activities (they are considered unimputable and are therefore excluded from the criminal liability regime of the legal person).

In my opinion, this distinction causes unnecessary questions to arise *ex novo* that should not have arisen if the Criminal Code had been followed: What happens when a legal entity initially created for criminal purposes develops a small amount of lawful activity over the course of a few months or years? What should happen if said legal activity developed for criminal purposes becomes a majority after its creation? What parameters are applicable to discern between “relevant” and “irrelevant” lawful activity for these purposes? These are all questions whose solution is complex and to which the theory of systems itself does not offer technically well-armed answers; therefore, they tend to cloud a process that is already complicated.

In addition to these questions, which are relevant because of the effects that may be generated, there are others that are more closely linked to the systemic basis on which this jurisprudence is based. According to the logic of the Supreme Court, in order for the corporate criminal liability regime to be applicable, it must be possible to appreciate a certain organizational capacity of the entity itself; for this reason, when a legal person is created by individuals as an “instrument” to commit crimes, there is no such self-organizational substrate in the legal person (it cannot admit *organizational guilt*). In this regard, the Supreme Court decision of 18 March 2022<sup>14</sup> emphasizes that if the criminal actions are committed by a natural person and the legal person is constituted and shown to be an instrument, lacking the will or its own personality to act in the commercial traffic, the legal person is unimputable. I do not agree with the above, however, as I consider all criminal conduct to always be committed by individuals and that the entity lacks its own will, regardless of what has been agreed upon by the individuals within the management bodies.

Moreover, all legal persons are created *ab initio* by natural persons; hence, before their creation and during their organizational development, they are conceived as instruments to achieve certain purposes. Whether these purposes are licit or illicit should not be linked to the existence of a hypothetical self-organizational capacity of the resulting legal person, which, if its existence were accepted, would depend on yet other factors. There may well exist companies, foundations, etc. focused on illegal activities, which are made up of complex organizational charts, a large number of individuals, and copious procedures. In other words, one thing is the objective or activity being carried out by the legal entity (which may be legal, illegal, or a mixture of both) and quite another is its hypothetical capacity for self-organization, which I believe could occur in the three scenarios distinguished by the Supreme Court (a distinction that does not appear in the Spanish Criminal Code). In turn, the aforementioned court decision of 18 March 2022 seems to include cases of sole proprietorship, if they correspond to the application of the *non bis in idem* principle.

Likewise, the Court points out that the decisive factor in excluding the legal person from possible criminal liability is that the crime is manifested directly and personally by a natural person, so that the actions of the organization are blurred. However, this is what always happens in organizations: the criminal conduct is manifested by individuals. In other words, we find ourselves faced with highly interpretable notions for which no clearly defined and evidence-based criteria have been observed that would allow a neat clarification of the question in a manner congruent with the systemic postulates that must support them. The decision of the Supreme Court of 11 November 2022<sup>15</sup> is one of the recent decisions in which the conviction of the legal person was revoked and annulled, while the convictions of a legal representative and administrator of the legal person were maintained. This court decision sustains such revocation in the absence of a minimally complex structure of the legal person and, therefore, the impossibility of the entity to be the perpetrator of the “corporate crime” or source of its own injustice (structural organizational defect).

We find ourselves, therefore, with a double aspect of this jurisprudential doctrine: the un-imputability of legal persons created instrumentally to commit a crime and the un-imputability of legal persons without a minimum organizational structure. In both cases, the Luhmannian or systemic reasoning to which the Supreme Court resorts is similar: the legal person in question lacks this – hypothetical – self-organizing capacity. As on previous occasions, there is little in this decision, however, as to the process of analysis and how such an important conclusion (the un-imputability)

is reached, nor is there any further analysis of the procedures, guidelines, or protocols existing in regard to the legal person, which confirms the absence of a clear and refined systemic methodology for resolving this type of issue. In my opinion, the court decision seems to show that the declaration of the legal person's un-imputability is based on a more or less intuitive assessment that is derived from the number of individuals in the organization. This is difficult to reconcile with systemic postulates (where natural persons are interchangeable and not relevant to the analysis) and also increases the risk of arbitrariness in reaching a conclusion on something as relevant as the possibility of criminal conviction of a legal person.<sup>16</sup>

However, the jurisprudence analyzed reveals another very important obstacle: the principle of legality. It makes sense to question the compatibility of what is specifically provided for in Art. 31 bis of the Spanish CP regarding the difference in treatment based on the systemic conjectures that make the legal person subject to or excluded from the criminal liability regime on the basis of the appreciation or non-appreciation of a certain internal organizational complexity. From an exegetical point of view, the questionable systemic interpretation by the Spanish Supreme Court exposes another obstacle: according to the provisions for determining the penalties applicable to legal persons, in Rule 2 of Art. 66 bis CP, the penal aggravation must be applied when "the legal person is used instrumentally for the commission of criminal offenses". It seems obvious that the legislator is seeking to aggravate the criminal reproach against the legal person when it is used as a means to commit a crime (and not to exclude it from the approved corporate criminal liability regime). This Article also clarifies that the legal person must be considered to have been used to commit crimes when its illegal activity is more substantial than its legal one. Although the Article does not specify what should happen when all the activity is illegal, the most logical interpretation would be that this circumstance should be included in these aggravated cases. In spite of this logic, however, we have seen how the jurisprudence of the Spanish Supreme Court argues that, when the unlawful activity of the legal person is total, the provisions of Art. 66 bis CP do not apply (inferring that this type of legal person, constituted for the purpose of committing crimes, lacks the capacity for systemic self-organization).

## 2. Lack of methodology to determine the "transfer" of criminal liability between legal entities after M&A transactions

The second problem of the systemic approach emerges in those scenarios in which it is necessary to clarify the ap-

propriateness of the transfer of criminal liability between corporations, a circumstance provided for in section 2 of Art. 130 CP. Corporate criminal liability does not cease in cases where the commission of a crime was carried out by an individual acting within the perimeter or scope of a legal entity<sup>17</sup> (which we qualify as the original legal person) that is subsequently subject to some type of transformation, merger, spin-off, etc. In principle, in this type of business operation, known as mergers and acquisitions (M&A), criminal liability is transferred to the legal person resulting from the operation (which we can qualify as the resulting legal person), with the corresponding penalty "being applicable" in proportion to the part of the original legal person that remains in the resulting legal person.

Art. 130.2 CP does not provide any methodological parameters or criteria to determine when the transfer of criminal liability between legal entities is appropriate, let alone to what extent a penalty should be imposed in the case of a partial coincidence between the original legal person and the resulting legal person.<sup>18</sup> We are basically faced with a problem that may be aggravated in cases of spin-offs, where two or more resulting legal entities could maintain a certain portion of the substrate or core identity of the original legal entity.<sup>19</sup> In a systematic interpretation of Art. 130 CP, one could refer to the provisions of the second paragraph of section 2 of the Article. It states that the processes of covert or apparent dissolution of the legal person do not nullify its criminal liability. The provision further specifies that it will be considered an apparent dissolution if the economic activity and the substantial identity of clients, suppliers, and employees, or of the most relevant part of all of them, are maintained. In accordance with what has been pointed out in this second paragraph, the substantial overlap or match of employees is one of the main elements that indicate the continued existence of the corporate entity. However, this criterion could not be further from one of the presuppositions of the idea of the systemic thesis: the irrelevance of individuals in the organization within the analytical framework of an entity with a hypothetical capacity for self-organization.

The degree of overlap between the employees of the original legal person and those of the resulting legal person is an aspect that, if we are consistent with the systemic approach to self-liability, should be completely ignored when examining the appropriateness of the transfer of criminal liability between companies. This is because, according to systemic postulates, natural persons should be excluded from the analysis of the identity of the legal person (because they are irrelevant in the self-organizing dynamics of the system). The following assertions of one of the

staunchest defenders of the systemic thesis, *Gómez-Jara Díez*, are particularly representative of this view:

Membership, therefore, symbolizes the link between the norms of the organization and the norms of membership – which is none other than the link between the structures of the system and the limits of the system. Thus, despite the fact that the members of the organization are constantly changing, the organization retains its identity.<sup>20</sup>

This assumption, erroneous in my opinion, is unequivocal: the identity of the entity is detached from the individuals that make it up.

Therefore, if the Spanish Supreme Court wants to maintain a position consistent with the systemic postulates. It is incongruous and untenable for any judicial analysis of the appropriateness of transferring corporate criminal liability to focus on the human component. Otherwise, the basis on which the Spanish Supreme Court itself has resorted in order to apply the criminal liability of the legal person (see above) would be violated. I understand that it would not be coherent for the jurisprudence to engage with the systemic thesis to conceive the legal person as an entity with the capacity to facilitate its own organizational defect<sup>21</sup> and to subsequently ignore such systemic ideas when studying the relevance of the transfer of criminal liability between legal persons. If the human component has no place as a criterion in the analysis of the attribution of criminal liability to the legal person – and if it neither constitutes a factor identifying the organization from the systemic standpoint, nor is used for the examination of the subsequent transfer of corporate criminal liability –, there must be a minimum overlap in identity between the original and the resulting legal person). Otherwise, the principle of culpability (within systemic parameters) would be violated and a proscribed objective criminal liability would be applied.

The lack of criteria or methodological guidelines to clarify the transfer of corporate criminal liability from a systemic viewpoint has been confirmed in transactions such as the one involving the absorption of *Banco de Valencia* by the banking entity *Caixabank* (where it was decided that it was inappropriate to charge *Caixabank* in the framework of a criminal investigation against Banco de Valencia and some of its senior managers). Another example is the case of the prosecution of *Banco Santander* by *Banco Popular*, following the famous merger by absorption, in which the Criminal Chamber of the National High Court annulled this particular case, following the corresponding appeal against the summons of *Banco Santander* as a defendant under investigation. Although the revocation of the status of the legal person under investigation can be shared, the court orders issued do not explain the process of socio-legal analysis

or the method by which (in accordance with the systemic postulates) the inappropriateness of the transfer of criminal liability was determined. And those court orders do not contemplate it because it does not exist, since the theory of systems lacks a scientific methodology by which to resolve this type of factual question.

In my opinion, the deficits outlined above have a significant impact on the legal certainty that must exist in the criminal sphere. It is necessary to move away from the hypotheses of systems theory and adopt an approach towards the criminal liability of legal persons that is based on evidence-based contemporary studies that explain how the dynamics of decision-making processes work in these organizational frameworks: what influences – criminal or not – are at play in such interaction contexts, what are the strategic factors, and what are the dominant or strategically advantageous positions, etc. In short, I believe that such extremes should not be ignored and that the human component is crucial in any exhaustive analysis of the attribution and transfer of criminal liability to legal persons.

### III. Concluding Remarks

Systems theory is one of the most questioned theories of organizational analysis in the specialized literature. Despite strong criticism of the system theory, the Spanish Supreme Court uses it to justify when it is appropriate to convict a legal person. In my opinion, the lack of ontological validity of systems theory generates problems when there are criminal-legal issues of practical importance. This is what has happened (and will continue to happen if the Supreme Court does not reorient its jurisprudence) so far with two issues analyzed above (II): the determination of the “non-imputability” of certain legal persons and the clarification of the “transfer” of criminal liability between corporate entities. The lack of evidence-based solutions and methodological rigor of systems theory as applied to the criminal law of the legal person is evident here.

The jurisprudence of the Spanish Supreme Court regarding the “un-imputability” of certain legal entities has two aspects: the un-imputability of corporate entities created to commit crimes and the un-imputability of entities without a minimum organizational structure. In both cases, the basis for the entities’ unaccountability is the same, namely the absence of an alleged capacity for self-organization and, therefore, for the occurrence of an organizational defect. It was argued here first that the determination of un-imputability in these cases clashes with the most logical interpretation of what is provided for in the Spanish Criminal Code.

Second, in addition to the collision of systemic theorizing with actual reality represented by the organizations, there consequently is a serious problem of compatibility with the principle of legality.

In regard to legal persons being excluded from the criminal liability regime of entities created to commit crimes on the grounds that they lack self-organizing capacity, it should be noted that all legal persons are created to achieve certain ends, i.e. they are instruments to achieve certain purposes. Whether these purposes are lawful or unlawful does not mean that there is – or is not – a certain self-organizing capacity of the entity. We believe that the correlation between an entity's self-organizational capacity and the lawfulness of its ends, assumed by the Supreme Court, is inaccurate. A large number of individuals and a complex hierarchy do not necessarily equate to lawful activities, as such an entity could still be totally or partially involved in unlawful activities.

On the other hand, with regard to the jurisprudence that indicates the non-imputability of legal persons that do not have a minimum substrate or self-organizing capacity (despite the fact that the Spanish Criminal Code does not indicate that these legal persons are unimputable), we must emphasize that the determination of such an assessment in the judicial decisions issued to date suffers from a lack of fine-tuned criteria. The court decisions that have been handed down in Spain so far do not set out a serious socio-legal methodology to explain when we are dealing with an im-

putable legal person or an imputable legal person. In my opinion, the judicial declarations on the non-imputability of legal persons issued so far are based on very simple assessments of the judges, more or less intuitive. They are assessments that judges deduce from the number of individuals that make up the organization (usually applied to legal persons composed of a very limited number of individuals) and not on minimally sound socio-legal criteria or evidence-based methodology.

The clarification of the “transfer” of criminal liability between legal entities after M&A transactions is the second case where case law shows us that systems theory lacks components that respond to and align with the complexity of what really happens in organizations. It is evident that there are no clear and coherent parameters that make it possible to discern when the “identity” of a legal person remains or persists in another legal person. If we are consistent with Luhmann's systems theory, in order to punish the legal person for its own structural organizational defect, the overlap of the human component between the original legal person (the one under whose scope the crime was committed) and the resulting legal person should not play a role, even if there is a very high percentage of overlap between managers and employees in both organizations. In summary, the conjectures of the criticized systems theory should not be relied upon as a valid basis for determining the applicability of the criminal liability regime to legal persons, and therefore when they can be criminally charged and punished.



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1 As a paradigm of the criticisms of systems theory, see D. Seidl and H. Mormann, “Niklas Luhmann as Organization Theorist”, in: P. Adler; P. Du Gay; G. Morgan and M. Reed (eds.), *The Oxford Handbook of Sociology, Social Theory, and Organization Studies*, 2014, p. 26: “Luhmann quickly abandoned his own empirical research in order to concentrate on the theoretical-conceptual side of his work, which in turn tends to attract researchers working conceptually rather than empirically. Moreover, Luhmann's later work in particular has been criticized for not lending itself to empirical investigation, because the assumption that social systems are operatively closed tends to undermine the researcher's position. So far, the little em-

pirical research that incorporates Luhmann's work largely ignored, rather than tackled, these problems”.

2 M. Knudsen, “Displacing the Paradox of Decision Making: The Management of Contingency in the Modernization of a Danish County”, in: D. Seidl; K.H. Becker (eds.): *Niklas Luhmann and Organization Studies*, 2005, pp. 107–126.

3 P. Adler, P. du Gay, G. Morgan and M. Reed, *The Oxford Handbook of Sociology, Social Theory, and Organization Studies: Contemporary Currents*, 2014, p. 6.

4 Together with those mentioned above, we can cite many others that share this deeply critical position on system theory, e.g.: J. Minguers, “Can Social Systems Be Autopoietic? Assessing Luhmann's Social Theory”, (2002) 50(2) *Sociological Review*, pp. 278–299; C. Fuchs and W. Hofkirchner, “Autopoiesis and Critical Social Systems Theory”, in: R. Magalhães and R. Sanchez (eds.), *Autopoiesis in Organization Theory and Practice*, 2009, pp. 111–129.

5 This is not only a position that is confined to a sector of Spanish doctrine, as it is also being adopted by the doctrine and jurisprudence of certain Latin American countries. Gómez-Jara Díez could be considered the most representative of those who promote the incorporation of systemic hypotheses into the corporate criminal field: C. Gómez-Jara Díez, “Teoría de sistemas y derecho penal: cul-

pabilidad y penal en una teoría constructivista del derecho penal”, in: C. Gómez-Jara-Díez (ed.), *Teoría de Sistemas y Derecho Penal: fundamentos y posibilidades de aplicación*, 2005, pp. 417–467; C. Gómez-Jara Díez, “Capítulo. VI. El injusto típico de la persona jurídica”, in: M. Bajo Hernández, B. Feijoo Sánchez and C. Gómez-Jara Díez (eds.), *Tratado de responsabilidad penal de las personas jurídicas*, 2016, pp. 121–220.

6 Organic Law 5/2010, of 22 June 2010, which amends Organic Law 10/1995 of 23 November 1995 of the Penal Code. This article consolidates a part of the work in which the weaknesses of the systemic thesis are more widely exposed and the outlines of a possible alternative model of criminal liability of the legal person are explained, which, in my opinion, has a more solid scientific basis: Cf. R. Aguilera Gordillo, “Déficits del enfoque sistémico de responsabilidad penal de la persona jurídica: inimputabilidad y contagio penal en operaciones de M&A. Procedencia del modelo antrópico y behavioral game theory”, (2023) *Revista Electrónica de Ciencia Penal y Criminología*, pp. 1–54.

7 Respecto al Derecho estadounidense, M.A. Villegas and M.A. Encinar, *La lucha contra la corrupción, compliance e investigaciones internas. La influencia del Derecho estadounidense*, 2020, pp. 93–137. The authors underline that, within the scope of the *Foreign Corrupt Practices Act* (FCPA), the model of corporate criminal liability adopted is vicarious liability, following the Anglo-Saxon tradition. This model establishes liability by virtue of the transfer that operates by virtue of the criminal conduct of the individual. Under the doctrine known as *respondeat superior*, the legal person is criminally reproached for the crime committed by directors or employees, as long as they had the purpose of benefiting the corporation and it developed within the scope of their functions. However, despite the predominance of the vicarious model, E. Gorriz Arroyo indicates that notions have emerged in recent decades in the context of the jurisprudential constructions of some states of the union, notions that could sustain a conception of the corporation’s own fact. See E. Gorriz Arroyo, “Criminal compliance ambiental y responsabilidad de las personas jurídicas a la luz de la LO 1/2015, de 30 de marzo”, (2019) 4, *Revista para el análisis del Derecho InDret*, pp. 32–34.

8 A comprehensive exposition of the models of criminal liability of legal persons, Council of Europe report (Economic Crime and Cooperation Division Action against Crime Department), *Liability of Legal Persons for Corruption Offences*, <<https://rm.coe.int/liability-of-legal-persons/16809ef7a0>>, accessed 1 December 2023.

9 The first significant court ruling and one that marked the beginning of the jurisprudential doctrine on this matter by the Spanish Supreme Court was the ruling dated 29 February 2016 (a ruling that saw almost half of the judges in a dissenting position).

10 Not only has it been questioned in the scientific field of organizational analysis itself (and by some of the judges of the court), but the majority of representatives of Spanish criminal doctrine has also criticized the systemic vision adopted by the Supreme Court and denounced its shortcomings. Among the critics of the systemic approach (regardless of whether they defend positions or models of self-liability or hetero-liability of the legal person). The Spanish State Attorney General’s Office itself is in total disagreement with the systemic approach of the Supreme Court (a position that is clearly stated in Circular 1/2016 of the State Attorney General’s Office). The Prosecutor’s Office defends the fact that the Spanish Criminal Code adopts a vicarious model of criminal liability as regards the legal person and, consequently, the attribution of criminal liability to the legal person proceeds like the criminal action of a natural person acting within the scope of the organization (not the legal person itself) <<https://www.boe.es/buscar/doc.php?id=FIS-C-2016-00001>> accessed 1 December 2023.

11 Judicial decision of the Spanish Supreme Court dated 22 October 2020 [sentencia del Tribunal Supremo español de fecha 22 de octubre 2020] <<https://www.poderjudicial.es/search/AN/openC/Document/cac2ec927df2ac2410b129baa45c19bfd6ae01958accac29>> accessed 1 December 2023.

12 Judicial decision of the Spanish Supreme Court dated 29 February 2016 [sentencia del Tribunal Supremo español de fecha 29 de febrero de 2016] <<https://www.poderjudicial.es/search/AN/open/Document/46ebea8f10494412/20160302>> accessed 1 December 2023.

13 Fourth Ground of Law [Fundamento de Derecho Cuarto] contained in the aforementioned judicial decision dated 22 October 2020.

14 Judicial decision of the Spanish Supreme Court dated 18 March 2022 [sentencia del Tribunal Supremo español de fecha 18 de marzo de 2022] <<https://www.poderjudicial.es/search/openDocument/e09e50f73ca340b6>> accessed 1 December 2023.

15 Judicial decision of the Spanish Supreme Court dated November 11, 2022 [sentencia del Tribunal Supremo de fecha 11 de noviembre 2022] <<https://www.poderjudicial.es/search/AN/openDocument/16aa9cd321ffac14a0a8778d75e36f0d/20221125>> accessed 1 December 2023.

16 At the same time, it may encourage a pernicious strategy in small legal entities with few individuals in which there is a pre-existing level of acquiescence towards improper conduct, on the one hand, or, on the other hand, a certain fear of the effects of such conduct despite certain precautions, namely that the application of policies and procedures of regulated self-regulation, such as the adoption of compliance systems is not promoted, because it is understood that this may have a very negative impact on a possible criminal proceeding. The existence of such elements of an organizational nature could encourage the judge to appreciate the hypothetical self-organizational capacity of the entity and, consequently, the application of the criminal liability regime of the legal person.

17 It is understood that all requirements of the titles of imputation in letter a) or letter b) of Art. 31 bis 1 CP are met and that this unlawful conduct can be subsumed in one of the types of crime for which the criminal liability of legal persons is foreseen.

18 I consider that the power of the judge to moderate the penalty or not, according to the degree of subsistence of identity of the original legal person in the resulting legal person [since Art. 120.2 CP states: “may moderate” (“podrá moderar”)], should have an imperative nature in order to ensure some respect for the principle of personality for penalties adapted to the complex and very different corporate reality [“may” should be replaced by “should” (“deberá”)].

19 In this sense, special precautions should be taken to ensure that, in any punitive process, whether criminal or administrative, the *non bis in idem* principle is not violated due to the identity of the subject (now split up, meaning the permanence and degree of the resulting legal entities must be clarified), same fact and same basis (or grounds for punishment), except for jurisprudentially exceptional cases (Spanish Constitutional Court decisions: STC 152/2001 of 2 July 2001 and STC 2/2003 of 16 January 16 2003).

20 Translation of: “la condición de miembro, por tanto, va a simular la vinculación entre normas de la organización y normas de pertenencia –que no es otra que la vinculación entre las estructuras del sistema y los límites del sistema–. Así, pese a que continuamente los miembros de la organización vayan cambiando, la organización conserva su identidad”, in: C. Gómez-Jara Díez, “Autoorganización empresarial y autorresponsabilidad empresarial: Hacia una verdadera responsabilidad penal de las personas jurídicas”, (2006) *Revista Electrónica de Ciencia Penal y Criminología*, núm. 08-06, p. 05:7.

21 From my point of view, this position was established with the purpose of trying to avoid the existing problems regarding the principle of culpability in the criminal law of the legal person.

# Seven Arguments in Favour of Rethinking Corruption

Alina Mungiu-Pippidi

The act of “rethinking” corruption is necessary due to a global stagnation after more than two decades of international anticorruption efforts. The issue of corruption is being reframed as a security issue, rather than a developmental one, but the role international agency play in changing a country is still seen as prominent. This article sums up the lessons learned from theoretical and practical advances outlined in the author’s book on “Rethinking Corruption.” It makes a clear argument in favour of rethinking corruption outside the traditional framework and offers a forecasting method, alongside state-of-the-art analytical, fact-based tools to map, assess, and predict corruption risks.

The author argues that corruption is a policy issue frequently overriding individual choice, and can only be tackled by strong policy interventions, not by “nudging” every individual into honesty. She explains the limits of international intervention and demonstrates how much unfinished business was left behind by the developmental approach to anticorruption – business that can only be tackled domestically by pro-change coalitions. Evidence is shown that corruption has not decreased despite unprecedented efforts. This is the case because the international context presently creates far more opportunities for corruption than it poses constraints. Few countries and international organisations have proven able to solve the social dilemma of corruption. The instruments to collect evidence for action have been as poor as conceptualisation, but progress has been made and can be used by domestic coalitions seeking to challenge a corrupt status quo.

The article outlines that “Rethinking Corruption” is a non-orthodox, yet state-of-the-art guidebook (covering corruption and democracy, corruption and market failure, corruption and government failure, etc.) for policy makers, administrators, and practitioners looking to identify an effective way of approaching corruption, engaging in corruption issue policy analysis, designing actionable measurement, and building successful coalitions against systemic corruption.

## I. Introduction

The UK-based academic publisher Edward Elgar publishing hosts a book series dedicated to the “rethinking” of various science and social science concepts. 2021 saw corruption on the agenda in a very timely manner: having spent the previous 30 years on the margins of social science, corruption has become one of the most prominent cross-disciplinary topic infusing both academic and policy debates. The choice of author appeared less obvious, as I – an expert who had already published extensively on this topic from many different angles – was picked to provide a fresh take. Corruption had featured in several of my books/works up until this point, including a textbook<sup>1</sup>, an impact evaluation of EU anticorruption policies throughout the years and across the globe<sup>2</sup>, a warning that corruption is “omnipresent” due to its subversion of innovation<sup>3</sup>, as well as a new, model-based non-perception corruption index<sup>4</sup>. Drawing on this work, my team created an interactive website for practitioners at [www.corruptionrisk.org](http://www.corruptionrisk.org) using objective (not perception-based) and actionable indicators for over one hundred countries, from causes of corruption to a forecast.

So, what more could I say to avoid repeating myself? I decided to follow the structure of the over 20 classes I had taught on corruption as a policy phenomenon – or, captur-

ing it even better, anticorruption as a comprehensive policy meant to disable corruption – in Berlin from 2013 to 2023. Even in the developed European Union, over half the countries have serious domestic issues. The course taught developed its own analytical instruments for diagnosis, context analysis, stakeholder analysis, and cost effectiveness of corruption problems, culminating in the fundamental question: how to address corruption as a social dilemma?

This gave rise to my new book “Rethinking Corruption,” published in 2023, as part of the already mentioned Elgar series “Rethinking Political Science and International Studies.” In the final chapter, I wrote that the historical career of corruption as an international topic has been one of a permanent shifting of meanings and paradigms. Thus, the act of “rethinking” corruption has already taken place more than once, contributing more to a post-truth about corruption than to anything else, despite extraordinary insights from people like *Elinor Ostrom*, *Douglass North*, and *Michael Johnston*. That said, such moments of wisdom passed very quickly without generating practical knowledge. This is where we need to bridge the gap and “rethink” out of the “inefficient anticorruption” box. To realize the goal of the book “Rethinking Corruption”, that is to bridge the gap and “rethink” outside the box of “inefficient anti-corruption”, it is

necessary to analyze the seven main rethinking approaches in the book, each carrying a solid truth, which are summarized below.

## II. The Rethinking Approaches

### 1. A policy problem should not be conceptualized at the individual level.

There is evidence that, despite a widespread discourse in favour of “contextual” explanations, corruption and anticorruption are still conceptualized at an individual level. And this is wrong. Corruption control, or the capacity of a state to operate autonomously from private interests and for the greatest possible social welfare, is a social context. Corruption is a policy problem because individuals tend to follow the rules of the game of their respective societies (and organisations). The recent behaviouralist approach to corruption as an individual choice – without being necessarily wrong – applies only to a handful of situations (where corruption is an exception), and nowhere else. If we accept the evidence that individual choice is largely dependent on the social context, we in fact agree that little individual choice exists, and policies are needed far more than prosecutions. We need to change collective incentives, not individual ones, and so we need to stop asking how to nudge individuals into honesty as if the context surrounding them were one of integrity.

### 2. Corruption results from a balance between opportunities and constraints.

The second “rethinking” is needed to acknowledge that the literature on causes of corruption<sup>5</sup> allows, at national level, to extend the individual level formula of *Gary Becker*<sup>6</sup>

on crime and treat corruption, for all practical and theoretical purposes, as a balance between opportunities (enablers) and constraints (disablers) in every social context. The classic model of the individual decision to engage in a criminal (corruption) act after a rational calculation of the probability of detection versus the opportunity of a crime is largely dependent on how this balance between opportunities and constraints plays out in the broader social context. Corruption control can thus be conceived as a balance (see *Figure 1*) between opportunities (power asymmetry and potential material spoils) and constraints that an autonomous society is able to force on the ruling elites through an independent judiciary, free media, and a mass of enlightened citizens who put up a strong demand for good governance.<sup>7</sup>

When a program like UN Oil for Food is designed without any constraints and multiple opportunities, we can expect systematic corruption, regardless of the nationality and culture of those involved in it. If we continue to aim anticorruption approaches at individuals, ignoring the broader balance (in a sector, activity, or a country), the overall prevalence of corruption will stay the same, although some individuals or groups of profiteers may be replaced by others when exposed.

### 3. A good corruption theory is actionable.

Using a model of opportunities versus constraints allows a better understanding and monitoring of corruption over time, as well as an assessment of the impact of anticorruption measures. Designing actionable instruments based on such a model enables us to see where countries fall short and identify what is missing to redress the balance, especially by comparing them with their regional or income peers. The European Research Centre for Anticorruption and State-Building (ERCAS) has developed instruments,

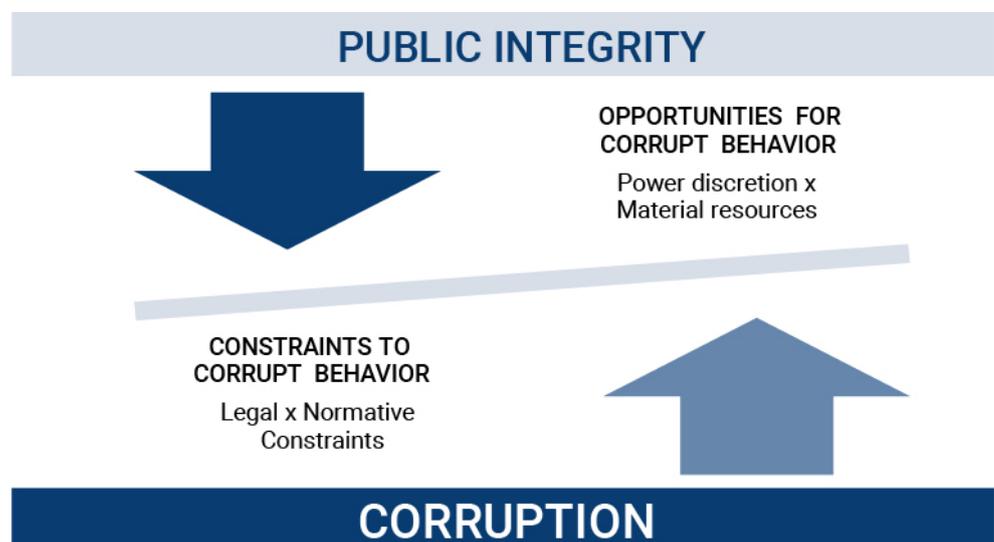


Figure 1.  
Control of corruption as a balance

like the Transparency Index (T-Index), and analytical tools, like the Index of Public Integrity (IPI), which provide an assessment able to capture any significant policy intervention which has an impact. In particular, the IPI allows us to measure the different elements of context which interact to create a society's capability (or lack thereof) to control corruption. It identifies proximate measures for factors identified in research as impacting corruption risk, and provides mostly objective and actionable data to measure corruption control.<sup>8</sup>

#### 4. Corruption is subversive for any political system.

Corruption subverts any political system, autocracies and democracies alike. Consequently, it should not be seen as a prime factor for democratic backsliding, but rather as a vulnerability, jointly with concentrated economic rents, (such as mineral resources or drugs). Democracies that manage to solve the problem of corruption are the most resilient political systems in the world, but both overcoming corruption issues and sustaining the equilibrium do not come easily. This needs a high degree of cooperation in a society to solve collective action problems in order to uphold general welfare versus specific groups one (as we see in the successful lobby of many industries, like pharma, oil, etc). A repressive anticorruption approach – top-level prosecutions, special power investigators, special courts – has proven more of a danger for opposition politicians (as they offer authoritarian incentives for those who control them) than a tool to help democracies progress. Few countries have sufficient rule of law to clear individuals wrongfully accused of corruption and demand that the officials who fabricated evidence be prosecuted instead.<sup>9</sup>

#### 5. The balance in international affairs has long been bending towards corruption.

A fifth point when rethinking corruption is that international factors, such as globalisation, the international anticorruption regulation such as the United Nations Convention against Corruption (UNCAC), and external anticorruption interventions in various countries (e.g., Kosovo, Iraq, Guatemala, Afghanistan), have not succeeded in bringing corruption under control. The main reason for this is that opportunities for corruption in the global world by far exceed constraints when clear jurisdictions and normative constraints are lacking. Free trade alone is no match for the sovereignty of corrupt governments and the need to do business with them. With a new realism paradigm taking hold worldwide, we should at least acknowledge that the previous phase of norm socialisation only succeeded at a *de jure*, and not a *de facto* level. The UNCAC has not

changed any country struggling with corruption (just as the UN has not been able to promote universal human rights practices). That is not to say that the creation of a universal set of integrity norms has been in vain, especially since citizens of most countries identify with values of ethical universalism. It only means that citizens (and their associations<sup>10</sup>) – and they alone – can help advance the transition from legal ethical universalism to its practice.

#### 6. Solving corruption often means solving collective action problems.

The sixth reconsideration refers to the issue that a collective action problem exists whenever corruption is systemic, at national and other levels (e.g., FIFA or the oil industry). In general, a collective action problem is the result of clashing individual and collective best interests. As far back as in 1965, *Mancur Olson* described the underlying reasons for the observed lack of collective action for common interests in certain contexts. He argued that when individuals believe they can receive the benefits of cooperation without having to contribute to the cost, they are more likely to opt to free ride on the efforts of others.<sup>11</sup> This is the central problem of collective action. According to *Olson*, a society will never be able to overcome it unless deliberate measures are put in place that incentivise groups to engage in collective action for the common interest, and not just pursue self or group interests. In corrupt contexts, principal agent tools fail due to the classic problem of absent political will – the principal is corrupt himself and the agent is not defecting: they both collude (i.e., politician and his political appointee, the civil servant into extracting private profit from public resources). The citizens are ineffective principals in their turn because they do not cooperate into forming an anticorruption party, but prefer to cut individual deals in their own selfish interest, therefore perpetuating a corrupt system. In this sense, human anticorruption agency has to be conceived of in broader terms, as only coalitions of interested parties, of which some are altruistic enough to make an initial investment (i.e., volunteer funds or work to enable others getting together), might be able to trigger substantial change if they manage to outnumber those who profit from the status quo. Outsiders (in the form of foreign donors or UNCAC peer review missions) may find a role for themselves in providing this initial investment on behalf of anticorruption domestic actors. However, success stories on changing systemic corruption are mostly rooted in domestic agency. Consequently, international intervention (where this is possible without unintended consequences, as otherwise it is ill advised to intervene to clean other people's countries altogether) – would be well advised to support broad national anticorruption coalitions rather than just governments, as the ownership of anticorruption should lie with citizens, and not kleptocrats.

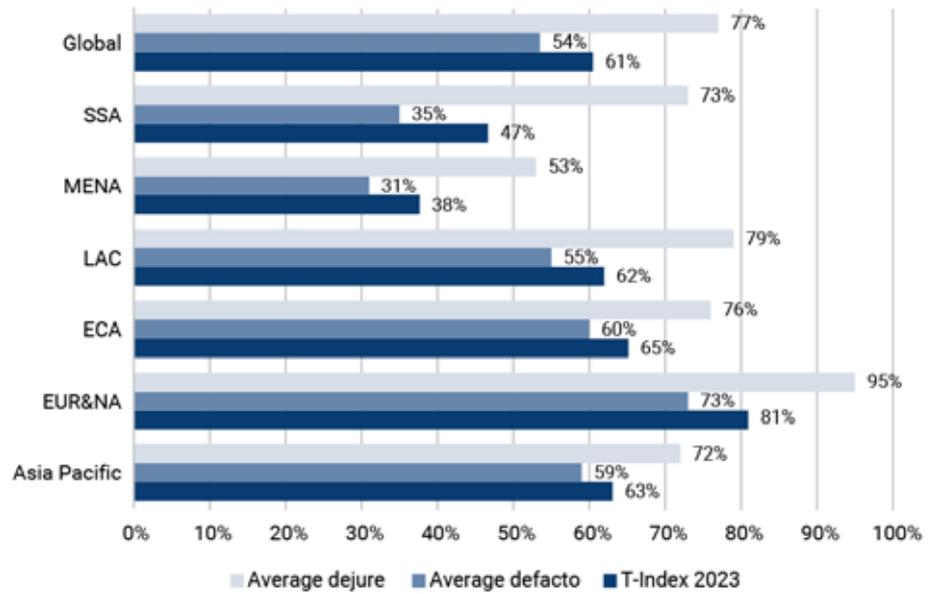


Figure 2.  
State of transparency:  
legal, real, and  
implementation gap

### 7. Let's not abandon anticorruption for development in favor of anticorruption for security.

My seventh and last issue of rethinking anticorruption strategies relates to the emergence of corruption as a security threat that replaced the more benevolent (though patronizing) view of corruption as a threat to development. In the 1980s anticorruption (as chaired by the World Bank) was an effort of reforming countries. After 9/11, many discovered that foreign individuals could detonate bombs in Western cities, rather than just acquiring soccer clubs or laundering their ill-gotten gains, as they had done before. Yet, after Russia's invasion of Ukraine, we witnessed Russian oligarchs treated as terrorists had once been and the new instruments of global anticorruption became the sanctions.

But moving into an old paradigm while our earlier work is to a large extent unfinished is not productive. The earlier anti-terrorism measures have led to some progress in making international finance more transparent, narrowing down the grey and black areas (for instance in banking). At country level, however, reforms were limited and transparency remains an unfinished job. The world has not yet exhausted transparency as a tool to prevent corruption, as the ERCAS T-Index shows (Figure 2).<sup>12</sup>

The ERCAS' T-index (that covers 140 countries) shows an important gap between the legal commitments made by governments (transparency *de jure*) and their actual implementation (transparency *de facto*). The survey confirmed that putting democratic transparency into practice may demand more than the simple ratification of treaties and adoption of laws. The way forward for any country is not more formal adoption of tools,

but the implementation of these tools and granting citizens, the media, and civil societies the freedom to use them. Should this not be the main job, changing the rules of the game, rather than the attention-grabbing chasing after kleptocrats – some of which pose no danger to the global world order and stability, and they are often not indicted or cleared by the Courts, including European Courts, as in the case of assets freezing of former Ukrainian president Viktor Yanukovich.

### III. Conclusion

Finally, my team's research offers several instruments to analyse corruption both as a market and as a government failure. Ultimately, these instruments are brought together in an analytical forecast designed to overcome the lack of sensitivity and concreteness of corruption indicators: the Corruption Risk Forecast. Once we have established a model of the main factors causing corruption as shown in Figure 1 (enablers and disablers), the trends can be followed over time to understand why a country changes (or not).<sup>13</sup> To trace the evolution of corruption control, the Corruption Risk Forecast uses the disaggregated components of the Index for Public Integrity and observes the changes recorded since 2008. The Corruption Risk Forecast rates change as consistent when a country has progressed (or regressed) regarding three indicators (two of them, e-services offered by the state and e-citizens, individuals with a broadband Internet connection are bound to grow naturally) and has not regressed (or progressed) in any of the other three indicators. Subsequently, the Corruption Risk Forecast checks for inconsistencies regarding political change and societal demand. This trend analysis and weighting produces three categories of coun-



**Figure 3.**  
Corruption forecast for Albania

Source: <https://www.corruptionrisk.org/country/?country=ALB#forecast>

tries: stationary cases, improvers, and backsliders. **Figure 3** illustrates this assessment with the case of Albania. The figure shows Albania progressing in three indicators (Judicial Independence, E-Citizenship, and Online Services), regressing in one (Press Freedom) and stagnating in one (Budget Transparency). Thus, following our assessment, Albania's change is rated as not consistent, and categorized as stationary.<sup>14</sup>

The forecast can serve as an evaluation tool for a country's anticorruption strategists, as well as for a longer-term diagnosis complementing the Index for Public Integrity, which offers only a snapshot at any moment in time. It is important to understand a country's trend to confirm or adjust the anticorruption strategists' theory of change and strategy accordingly. Our complete datasets can be found on <https://corruptionrisk.org/datasets/>.



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- 1 A. Mungiu-Pippidi, *The Quest for Good Governance*, Cambridge University Press, 2015.
- 2 A. Mungiu-Pippidi, *Europe's Burden: Promoting Good Governance across Borders*, Cambridge University Press, 2019.
- 3 A. Mungiu-Pippidi, "Corruption: Good governance powers innovation", *Nature* 518, 295–297(2015).
- 4 A. Mungiu-Pippidi, "The time has come for evidence-based anticorruption", (2017) 1 *Nature Human Behaviour*, Article number 0011.
- 5 D. Treisman, "What have we learned about the causes of corruption from ten years of cross-national empirical research?" (2007) 10 *Annu. Rev. Polit. Sci.*, 211–244.
- 6 G.S. Becker, "Nobel lecture: The economic way of looking at behavior", (1993) 101 (3) *Journal of political economy*, 385–409.
- 7 See also G. Becker, "Crime and Punishment: An Economic Approach", (1968) 76 *Journal of Political Economy*, 169–217; J. Huther and A. Shah. *Anticorruption Policies and Programs: A Framework for Evaluation*, Policy Research Working Paper 2501, The World Bank, 2000.

- 8 For a full explanation of the IPI methodology, see <https://corruptionrisk.org/ipi-methodology/> accessed 23 January 2024.
- 9 An example is Botswana, cf. <https://freedomhouse.org/country/botswana/freedom-world/2022> accessed 23 January 2024.
- 10 NGOs, anticorruption networks, political parties against corruption, etc.
- 11 M. Olson Jr., *The Logic of Collective Action*, Harvard Economic Studies 124, 1965.
- 12 In 2021, ERCAS measured the state of transparency regarding accountability in the new T-Index (computer mediated government transparency) for 129 countries for the first time by direct observation. The methodology and the first results appeared in *Regulation and Governance* in 2022, and a new webpage created a fully transparent index, where every item could be traced back to the original webpage with one click, and readers could use a feedback button to report errors. The T-Index benefits from the digitalisation of transparency and does two innovative things: First, it measures the type of transparency most relevant for anticorruption and rule of law. Second, to this end, it distinguishes between *de jure* (legal commitments) and *de facto* (already implemented transparency) and observes the latter directly, as digital transparency.
- 13 We use the disaggregated components of IPI, without normalisation (just recording their original scales to 1–10, with 10 being best control of corruption), and we observe changes since 2008, considering them significant if they are above the average global standard deviation of average change. See [www.corruptionrisk.org/forecast](http://www.corruptionrisk.org/forecast) for full methodology and results.
- 14 See additionally <https://www.corruptionrisk.org/forecast-methodology/>.

# Imprint

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