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European Law Forum: Prevention • Investigation • Prosecution



The Protection of the Financial Interests in a Changing Context

La protection des intérêts financiers à l'ère du changement

Der Schutz der finanziellen Interessen in einem sich wandelnden Umfeld

Guest Editorial by *Lorena Bachmaier*

Iwona Jaskolska: New Instruments Protecting the 2021–2027 Cohesion Budget against Rule-of-Law Breaches

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Ute Stiegel and Korneel De Schamp: The Impact of the European Commission's Rule of Law Report in Monitoring the Prevention and Fight against Corruption

Dimitrios V. Skiadas: Trade-offs in Auditing the EU Recovery and Resilience Facility

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Dr. Benjamin Vogel and Dr. Maxime Lassalle: Developing Public-Private Information Sharing to Strengthen the Fight Against Money Laundering and Terrorism Financing

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Guest Editorial

Dear Readers,

Recital 5 of Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget serves as a reminder that the EU's legal structure is based on the fundamental premise that "each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the Union is founded, as stated in Article 2 TEU." This commitment to complying with the Treaties, including the fundamental principles of the rule of law, justifies mutual trust between the Member States. Each and every Member State shall continue to respect and promote the common values on which the Union is founded. Unfortunately, this is not the reality in every Member State.

After measures were taken in a number of Member States that acted contrary to judicial independence, the EU realized that the existing mechanisms (mainly the infringement procedure) were not sufficiently effective in countering these deviations from the shared EU principles and values. After diplomatic efforts had failed, it became clear that stronger measures needed to be adopted to correct and prevent breaches of rule-of-law principles, namely financial conditionality measures as foreseen in Art. 5 of Regulation 2020/2092: if there is a "sufficient and direct" relationship between a breach of the rule of law and a serious risk to the protection of the Union's budget, protective measures can be adopted, e.g., suspending payments until measures reinstating the judicial independence are adopted.

Abiding by rule-of-law principles is inseparably linked to the sound financial management of public funds: only if all Member States act according to the law and provide for an effective protection and judicial remedy against fraud and corruption, can the EU budget be protected. This was also stated by the European Court of Justice in its judgment of 16 February 2022 in Case C-156/21 (*Hungary v Parliament and Council*, para. 130).

The COVID-2019 pandemic not only further increased fraud risks but also saw threats to the rule of law, because governments often declared dubious state-of-emergency situations that led to the suspension of citizens' most basic rights. Hence, it is not by chance that the measures provid-

ed in the 2020 Conditionality Regulation can also be triggered if the proper management by the authorities implementing their Recovery and Resilience Plans is not ensured, as set out in Art. 8 of Regulation (EU) 2021/241.

Even if the EPPO and OLAF are efficiently fighting fraud against the EU's financial interests, the challenges are greater than ever because populism and trends towards autocratic ways of governing seem to be growing. While these risks are inherent to any democracy and can occur at any time – democracy is never to be taken for granted –, several factors indicate that the EU should reinforce oversight mechanisms in the face of massive economic, social, political, and strategic challenges as well as a war being fought in Europe.

We have witnessed how the rule-of-law principles, in particular judicial independence, have come under attack in many Member States, e.g., blocking the appointment of judges or subjecting courts to an excessive and continuous case overload that brings them to the brink of collapse. Other worrying types of attacks are attempts to acknowledge amnesty for politicians involved in the misappropriation of public funds and disregard for the sound decisions of independent and impartial courts. These actions surely undermine the very concept of the rule of law and are consequently also threatening the protection of the taxpayers' money. Ultimately, the whole project of the European Union is being put at risk.

In 1950, the 'Father of Europe' Robert Schuman rightly said: "Europe is to be built through concrete achievements which first create a de facto solidarity, and if we do not aim such solidarity, Europe's decline is not far." If the EU is to survive, decisive steps must be taken to continue building and maintaining solidarity – this must be done by protecting both the EU's budget and the common rule-of-law values that we share.

Lorena Bachmaier, Full Professor of Law at Universidad Complutense Madrid and eucrim editorial board member



Lorena Bachmaier

News

Actualités / Kurzmeldungen*



European Union

*Reported by Thomas Wahl (TW), Cornelia Riehle (CR),
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Foundations

Fundamental Rights

Threats to Key Freedoms: New EP Report on Situation of Fundamental Rights in the EU

The European Parliament's recent annual [report on the situation of fundamental rights in the EU](#) unveils an alarming landscape of threats to fundamental rights within the EU: media freedom, corruption, and individual liberties were areas under particular threat in 2022 and 2023. The report, which garnered 391 votes in favour, 130 against, and 20 abstentions in the plenary vote on 18 January 2024, raised alarm over the state of citizens' rights across the Member States, with specific recommendations for Hungary, Poland, Greece, Cyprus, and Spain in addressing these issues promptly.

A key focus of the report is the urgent need to protect journalists and to regulate the spyware industry in order to protect citizens against misuse. In this context, MEPs welcomed

the new agreement on the European media freedom act. In addition, the report looks into the disturbing trend of backsliding on women's and LGBTIQ+ rights, citing the denial of access to safe and legal abortion in Poland and the systematic discrimination against the LGBTIQ+ community in Hungary as examples. The European Parliament is pushing for the swift conclusion of negotiations on a directive to combat violence against women and domestic violence.

Corruption is another critical issue highlighted in the report. The need for a robust EU anti-corruption framework and full implementation of the Whistleblower Protection Directive are emphasized as crucial steps towards combating corruption effectively. The EP expresses deep concern over the increasing level of corruption in several EU countries and reiterates its condemnation of alleged incidents involving high-level officials and politicians, including current and former MEPs. The EP demands that zero tolerance for corruption must be the rule and it calls for the establishment of an independent ethics body.

The report also pinpoints threats to freedom of association, freedom of speech, and freedom of assembly, citing instances of police violence and mass arrests as well as the challenges posed by disinformation and restrictions on artistic and religious freedoms. The pervasive discrimination against the Romani people and widespread violations of migrants' and refugees' rights, including the illegal practice of pushbacks, have also been identified as areas requiring attention. (AP)

Commission's 2023 Report on Application of the Charter of Fundamental Rights in the EU

Since 2010, the Commission's annual reports on the EU Charter of Fundamental Rights have aimed to monitor progress, enhance transparency, and foster a fundamental rights culture within the EU. The [2023 Report](#), adhering to the thematic approach initiated in 2021, focuses on effective legal protection and access to justice, a priority outlined in the European [Commission's 2020 Strategy](#) to strengthen the application of the Charter of Fundamental Rights in the EU.

The report, which was published on 4 December 2023, gives an overview of the relevant legal EU framework in place by describing recent developments (2020–2023). It presents both

* Unless stated otherwise, the news items in this issue cover the period from the end of November 2023 to mid-January 2024. Have a look at the eucrim website (<https://eucrim.eu>), too, where all news items have been published beforehand.

achievements and challenges in the Member States by providing a snapshot of the elements identified by stakeholders. The following summarises the key findings in the four main areas explored in the 2023 Report:

➤ *EU law on effective legal protection and access to justice*

Since 2009, the EU has developed a comprehensive legal framework with judicial and non-judicial remedies in this area. The EU has also adopted several EU instruments providing for minimum standards of effective legal protection and access to justice. The scope of EU law in this area is broad, including: measures to facilitate access to justice through digitisation efforts; the establishment of safeguards for suspects and defendants in EU criminal procedure; the establishment of several instruments for judicial cooperation in criminal matters (e.g., the European Arrest Warrant); and victims' rights. Examples of key developments include:

- The digitalisation of justice is increasingly shaped by artificial intelligence (AI); AI applications can likewise support judicial decision-making, but it is important to ensure that they function properly and to mitigate the potential bias their use may entail;
- In particular the national transposition of Directive 2016/800 revealed great variation due to inherent differences between national justice systems and different standards on child-friendly justice;
- A comprehensive set of fundamental rights standards to support and protect victims of crime (e.g., the Victims' Rights Directive, the Anti-Trafficking Directive) has been established; new rules on online child sexual abuse and exploitation, including measures to report and remove abuse content, and to support victims with the removal of the material depicting their abuse are on the way;
- Other situations of vulnerability are tackled, for instance, by the Whistle-

blower Protection Directive, the proposal for a directive on strategic lawsuits against public participation (SLAPP), and Commission recommendations to Member States on measures to protect journalists and media workers;

- Several measures have been taken to ensure effective legal protection for victims of discrimination (e.g. the Pay Transparency Directive and equality directives for which the level of effective, proportionate and dissuasive penalties in cases of discrimination were assessed);
- Effective legal protection in relation to online activities is ensured, e.g. by the Digital Services Act (DSA) and the Terrorist Online Content Regulation.

➤ *Member States' measures to provide for effective legal protection*

The report gives a brief overview of the achievements and challenges faced by Member States in providing sufficient remedies to ensure effective legal protection in areas covered by EU law, as required by Art. 19(1) TEU. It highlights the efforts made by Romania, Slovakia, and Sweden in facilitating access to justice through digitalisation. The report also shows that Member States are increasingly taking specific measures to ensure legal protection in a child-friendly way, for example by setting up specialized courts or prosecutors for cases involving children and by improving children's opportunities and abilities to report crimes.

➤ *Provision of effective legal protection through courts*

The 2023 Report provides an overview of the relevant case law of the CJEU and national courts, which apply and interpret EU law and therefore play a central role in ensuring effective legal protection. The report notes that a substantial part of the CJEU's jurisprudence on the right to effective legal protection concerns interpretation of the procedural rights directives in criminal matters and clarification of the safeguards set out in the directives.

➤ *EU funding for effective legal protection*

A key component of the EU's efforts to promote effective access to justice is funding for stakeholder capacity building. Through the Justice Programme and the Citizens, Equality, Rights and Values (CERV) Programme, the European Commission is strengthening this legal protection.

The report concludes that effective legal protection and access to justice are an essential part of democratic checks and balances and instrumental in upholding the EU's founding values. Accessing justice is not only important for individuals but their cases also make a significant contribution to the interpretation of EU and national law. (AP)

Rule of Law

Enhancing the EU's Rule of Law Framework: Evaluation of the Council's Annual Dialogue Mechanism

On 12 December 2023, the Council reviewed its annual rule of law dialogue: a commitment by EU Member States to uphold and strengthen the rule of law as a foundational value of the EU. The dialogue is a structured political exercise aimed at evaluating the state of the rule of law within the Member States and the EU at large.

The background of this mechanism dates back to 16 December 2014, when the Council's annual rule of law dialogue was formally established through Council conclusions. Since its inception, the dialogue has fostered a spirit of sincere cooperation among all EU Member States, contributing to a collective effort to monitor and promote the rule of law within the bloc. Over the years, the dialogue has evolved to include:

- Horizontal discussions that address general developments concerning the rule of law in the EU;

- Country-specific discussions that provide detailed assessments of the rule of law situation in individual Member States.

These discussions are fed by the European Commission's annual rule of law reports, which serve as a critical resource for the evaluations.

The Council discussed a set of conclusions. Despite a lack of unanimous agreement on the recently proposed text, the Spanish Council Presidency issued a presidency conclusion stating that the content was either supported by or not objected to by 25 delegations. On 20 December 2023, in a meeting of EU Member States' permanent representatives (Coreper), Poland also stated its support for the Presidency conclusions of 12 December 2023 on evaluation of the annual rule of law dialogue.

The recent conclusions not only reaffirm the importance of the annual rule of law dialogue as a cornerstone of the EU's efforts to safeguard fundamental values but also signal a commitment to enhancing its efficiency and impact. By fostering a more inclusive and comprehensive process of review, the Council aims to strengthen the rule of law across the European Union, ensuring that it remains a fundamental pillar supporting the Union's stability and integrity. (AP)

Rule of Law Developments in Poland: Mid October 2023 – Mid January 2024

This news item continues the overview of the rule-of-law developments in Poland (as far they relate to European law issues) from 16 October 2023 to mid-January 2024. They follow up the overview in [eucrim 2/2023, 111–113](#).

- 24 October 2023: Applications by four Polish judges against the lowering of the retirement age for Polish judges and the related procedure are [successful before the ECtHR](#). The four female judges complained about legislative amendments that had lowered the retirement age for judges from 67 to

60 for women, and to 65 for men, and had made the continuation of a judge's duties after reaching retirement age conditional upon authorisation by the Polish Minister of Justice and by the National Council of the Judiciary ("the NCJ"). The complaints were lodged to the ECtHR in 2018 and 2019 ([applications nos. 25226/18, 25805/18, 8378/19 and 43949/19, Pajak and Others v. Poland](#)). The ECtHR found that the decisions taken in respect of each applicant by the Minister of Justice and by the NCJ had constituted arbitrary and unlawful interference, in the sphere of judicial independence and protection from removal from judicial office, on the part of the representative of executive authority and the body subordinated to that authority. It concluded that the applicants' right of access to a court (Art. 6(1) ECHR) had thereby been impaired in its very essence. In addition, the ECtHR found that the legislation complained of violated Art. 14 ECHR (prohibition of discrimination).

- 24 October 2023: In an English translation at ruleoflaw.pl, [journalist Bartosz T. Wielinski reflects on](#) the question where Poland, the fifth largest EU country, would have been today had it not been for the eight years under the PiS government.

- 7 November 2023: The still ruling PiS government tries to [push through a loyal judge](#) as candidate for the position of judge at the Court of Justice of the European Union.

- 15 November 2023: The [General Affairs Council discusses the state of play of the Article 7\(1\) TEU procedure](#) concerning Poland. The Commission that launched the procedure in 2017 informs ministers about developments since the last hearing in May 2023. Concerns with regard to the Supreme Court, the National Council for the Judiciary and the role and case law of the Polish Constitutional Tribunal remain. The Commission also points out that the reform of the disciplinary regime

applicable to Polish judges undertaken by the Polish authorities had not entered into force yet. Ministers stress the importance of addressing all the issues regarding judicial independence and rule of law in Poland. They express the hope that Poland will soon address the concerns raised. The Council will remain seized of the matter.

- 12 December 2023: An English translation of an [interview given by designated Polish Minister of Justice, Adam Bodnar](#), under the new Tusk government is published. Bodnar outlines priorities to regain trust in the Polish judiciary and his plans to undo modifications of the Polish judicial system under the previous PiS government. His most important three priorities are the unblocking of funds by the European Commission under the national recovery and resilience plan, Poland's accession to the European Public Prosecutor's Office and the reduction of the tension between the executive and the judiciary.

- 21 December 2023: The [ECJ declares](#) a request for preliminary ruling by the Extraordinary Review and Public Affairs Chamber of the Polish Supreme Court inadmissible since the chamber does not constitute a "court or tribunal" for the purpose of EU law ([Case C-781/21 L.G.](#)). Said chamber had to decide on an appeal by a Polish judge disputing a resolution of the National Council of the Judiciary ("the KRS") with regard to his retirement. The ECJ first refers to the 2021 ECtHR judgment in *Dolińska-Ficek and Ozimek v. Poland* which has already found that two adjudicating panels of the Extraordinary Review Chamber are neither established by law nor independent. Second, the ECJ refers to a decision by the Polish Supreme Administrative Court that annulled the appointment of judges in the adjudicating panel of the Extraordinary Review Chamber. Against this background, the ECJ holds that the presumption that the requirements of a "court or tribunal" within the meaning

of Article 267 TFEU are met is rebutted with regard to the referring body.

■ 9 January 2024: The ECJ declares two references for preliminary ruling inadmissible. In the [Joined Cases C-181/21 and C-269/21 \(G. and Others v M.S. and X.\)](#), Polish judges made requests to the ECJ in order to assess compliance of the composition of adjudicating panels at ordinary courts (dealing with consumer protection cases) with EU law, in particular Art. 19(1) TEU and Art. 47 CFR, because the panels had judges who were appointed by the politicized National Council of the Judiciary ("the KRS"). In both cases, the ECJ denied the "necessity" of the requests. In Case C-181/21, the ECJ holds that only the panel of three judges responsible for the main proceedings, and not one judge of that panel alone, had jurisdiction to refer the questions raised in that case to the CJEU. In its reasoning in Case C-269/21, the ECJ states that the referring court does not have jurisdiction to "recuse" a judge forming part of the panel of another court which called an order of the referring court into question.

■ 17 January 2024: In an [analysis](#), which is part of the international project [PATFox "Pioneering anti-SLAPP Training for Freedom of Expression,"](#) it is found that Polish courts increasingly and more frequently award compensations to demonstrators for political harassment by the Polish police and prosecutor's offices that happened in recent years. (TW)

Hungary: Rule-of-Law Developments May 2023 – Mid-January 2024

This news item continues the overview of concerning rule-of-law developments in Hungary, including their implications on the protection of the EU budget. It covers the period from the end of May 2023 to mid-January 2024. It follows up the overview in [eucrim 1–2023/ 5–6](#).

■ 26 May 2023: In an [open letter](#),

NGOs urge the EU Ministers to proceed with the Article 7 TEU-procedures against Hungary and Poland due to the continuous rule-of-law backsliding in these countries. With regard to Hungary, the NGOs draw attention to the latest assessment by Hungarian civil society organisations of recent reforms proposed by the Hungarian government in a bid to access EU money and to their proposed recommendations that the Council could adopt under Article 7(1) TEU. They criticise that reform attempts in Hungary take place in a "dismantled system of checks and balances and a distorted media landscape, where the Government continues to have excessive regulatory powers and where legal certainty is lacking." The letter also mentions that "there is a persistent practice of non-execution of both domestic and international court judgments and persons from various vulnerable groups face human rights violations without independent institutions being capable or willing to protect their rights."

■ 30 May 2023: The General Affairs Council holds its [sixth hearing of Hungary as part of the Article 7 procedure](#) against the country. The procedure was initiated by the European Parliament in 2018. EU Ministers receive an update of the situation in Hungary with regard to the issues raised by the EP and the Commission in its 2022 rule of law report.

■ 1 June 2023: The [judicial reform package](#) adopted by the Hungarian Parliament at the beginning of May 2023 to comply with the super milestones set out in Hungary's Recovery and Resilience Plan with a view to enhancing the independence of the judiciary ([→eucrim 1/2023, 6](#)) enters into force.

■ 1 June 2023: In a [non-legislative resolution](#), the European Parliament (EP) raises concerns over the further deterioration of the rule of law and the fundamental rights situation in Hungary despite the EP's activation

of the Article 7 mechanism and since the adoption of the EP's resolution of 15 September 2022, in which it found that serious issues remained to be solved or further issues had arisen in all the 12 areas of concern highlighted in its original reasoned proposal of 2018 on the Article 7 procedure. MEPs are particularly worried about the adoption of several pieces of legislation in a non-transparent way without the sufficient possibility for parliamentary debates and amendments and without meaningful public consultation; it is further concerned about the repeated and abusive invocation of the "state of danger", the misuse of whistleblower protections to undermine LGBTIQ+ rights and freedom of expression, and the restriction of teachers' status and the infringement of their social and labour rights, which is threatening academic freedom. MEPs raise a number of concerns about corruption and the misuse of EU funds; unblocking should only happen with legal and political certainty. Lastly, MEPs question Hungary's credibility to fulfill the required tasks as Council Presidency in the second half of 2024.

■ 20 June 2023: On the fifth anniversary of Hungary's anti-NGO laws, [16 civil society organisations call on](#) the Hungarian government to fully implement court judgments that would put an end to stigmatizing national civil society organizations (CSOs). They also stress that "[t]he unlawful administrative, criminal law, and financial measures that are still in effect render the operation of the CSOs excessively difficult and exert a chilling effect on the functioning of the entire Hungarian society". The CSOs make concrete recommendations for repealing measures that obstruct the work of CSOs in Hungary and call upon the Hungarian government to stop its smear campaigns against CSOs. In addition, the [Hungarian Helsinki Committee](#) publishes a [paper](#) with an overview of the attacks that Hungarian NGOs have

been facing during the past five years in the course of Hungary's illiberal transition.

■ 22 June 2023: The [ECJ finds](#) that Hungary had breached its obligations under the Asylum Procedures Directive. The ECJ follows the arguments put forward by the Commission, which had brought an action for failure to fulfil obligations in 2021. The reason for the infringement proceedings ([Case C-823/21](#)) was the introduction of a national asylum law regulation, according to which each applicant had to submit a declaration of intent in a Hungarian embassy outside the EU and obtain authorisation to enter Hungary, which was only granted at the discretion of the authorities. The ECJ argues that the completion of a preliminary procedure or other administrative formalities is not a requirement under EU law. The Hungarian law inadmissibly restricts the effective exercise of the right to apply for asylum in a Member State and to remain there while the application is being examined. Hungary's objection that this is justified for reasons of public health, among others, does not hold water.

■ 9 October 2023: In an [updated summary assessment](#), NGOs submit that Hungary can be deemed to have completely fulfilled only one out of four super milestones by its new legislation on the reform of the judicial independence (see above) – a precondition for the release of frozen EU funds. In conclusion, concerns are maintained with regard to the role of the National Judicial Council, the composition of the Supreme Court (Kúria), and remaining substantive obstacles for preliminary ruling references to the CJEU. The update refers to joint analyses in which the risks to the fulfillment of the judicial milestones are identified. In addition to the legal deficiencies, the effectiveness and sustainability of the adopted changes is questioned.

■ 31 October 2023: The Hungarian Helsinki Committee (HHC) reiterates

the [standpoint of civil society](#) that compliance of the Hungarian Parliament's judicial reforms (see above) do not comply with set EU milestones and explains why the remaining deficiencies must be considered as fundamental.

■ 2 November 2023: The HHC publishes a [paper](#) entitled "Hungary: No True Commitment to Restoring the Rule of Law". It summarises the main rule of law and human rights developments that have unfolded since the Council hearing of 30 May 2023 in the Article 7(1) TEU procedure against Hungary (see above). The paper proposes points of inquiry and recommendations regarding five topics that pose the major rule-of-law concerns in Hungary.

■ 15 November 2023: Following the hearing of 30 May 2023 (see above), the [General Affairs Council discusses the state of play](#) regarding respect of EU values by Hungary. Ministers echo the Commission's remaining concerns, in particular as regards the fight against corruption, media freedom, the rights of migrants and persons belonging to minorities, pressure on civil society and the extensive use of emergency powers by the Hungarian government. The Ministers urge Hungary to continue to address all the issues raised.

■ 15 November 2023: An [assessment](#) by CSOs concludes that the Hungarian government has so far not complied with most of the conditions necessary to access EU funds. The [CSOs say](#): "The government has not taken firm steps to fully address the rule of law and human rights problems that the European Union had identified. Barely anything has improved compared to the bleak situation at the end of April. The most significant deficiency relates to the compliance with the Charter of Fundamental Rights of the EU, since the government hasn't completely fulfilled any of the related four conditions." In particular, the CSOs consider

that none of the 17 anti-corruption measures have been implemented.

■ 22 November 2023: The [press reports](#) on a letter from Hungarian Prime Minister Viktor Orbán to European Council President Charles Michel, in which Orbán threatens the EU to block any further aid for Ukraine until EU leaders have a "strategic discussion" on the EU policy towards Ukraine. According to diplomats, the letter indirectly suggests that Hungary could use its veto power to block the disbursement of a planned €50 billion in aid for Ukraine if the Commission does not release €13 million of frozen EU funds to Hungary.

■ 26 November 2023: The Hungarian government [extends the "state of danger"](#) for another 180 days until the end of March 2024. This allows to rule by decree with the effect of a more facilitated restriction of fundamental rights and reduced parliamentary power. The "state of danger" was initially introduced in March 2020 and justified with the coronavirus outbreak. CSOs maintain that the entire regulatory framework of the state of danger needs to be reconsidered. They also argue that many emergency decrees have not had any connection to the real justification of the state of danger.

■ 27 November 2023: CoE Human Rights Commissioner Dunja Mijatović [issues a statement](#) against the Hungarian bill on the "protection of sovereignty" (see details below 12 December 2023). According to Mijatović, the proposal "poses a significant risk to human rights and should be abandoned". She also criticises that "[i]f this proposal is adopted, it will provide the executive with even more opportunity to silence and stigmatise independent voices and opponents."

■ 8 December 2023: [NGOs argue](#) that Hungary's last minute legislative amendments to the justice system ahead of the European Commission's decision on the fulfillment of judicial super milestones are only makeshift solutions and breach relevant laws

and bylaws as well as rule of law principles.

- 8 December 2023: In a [letter](#), *Irene Khan*, UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, and *Mary Lawlor*, UN Special Rapporteur on the situation of human rights defender, urge the Hungarian Government to refrain from adopting the legislative proposal on the Protection of Sovereignty (see below) as currently drafted and to seek international assistance and expertise from international and regional human rights mechanisms and bodies. According to the UN special rapporteurs, the draft bill "appears to be a restrictive legislative measure that could negatively impact the enjoyment of fundamental rights and civic space in Hungary."
- 12 December 2023: The ruling Fidesz and KDNP parties [pass the "Protection of National Sovereignty Act"](#). An [English translation](#) is made available. The Act entails amendments to the Hungarian constitutional law, the criminal law and other laws. According to the Hungarian government, it aims to prevent the influence of foreign interests that threaten Hungary's sovereignty or national security. It is to protect the will of Hungarian voters which may be influenced by parties that receive funding from abroad for election campaigns. The Act establishes a new authority, the "Sovereignty Protection Office" (SPO). It is officially tasked with "protecting constitutional identity". Powers include the conduct of investigations against individuals or legal entities that are suspected of serving foreign interests or threatening national sovereignty. Investigations are followed by a public report on the findings of the SPO. The SPO is entitled to receive support from the intelligence agencies, can request the disclosure of data from the investigated entity and shall notify any other state body if it detects facts or

circumstances that give rise to criminal or other administrative proceedings. In addition to the SPO, the Act amends the Hungarian criminal code by introducing the offence of "Illegal influence of the will of voters". The offence is punished with up to three years of imprisonment.

- 12/13 December 2023: Press and media as well as civil society organisations [heavily criticise](#) the Protection of National Sovereignty Act. They mainly protest against the SPO's unlimited powers and the lack of oversight and legal remedy. Moreover, they are concerned over the vagueness of the legal text and its chilling effects. According to a [statement by ten independent media outlets](#), the law makes it clear that "in Hungary today, anyone who takes part in democratic debate or even simply informs the public is suspect to those in power. Independent media outlets that obtain and report information in the public interest are repeatedly accused of serving 'foreign interests'." In an open letter, [over 100 NGOs say](#) that the law is the government's attempt "to deter its own citizens from democratic participation and to discourage the discussion of public affairs".

- 13 December 2023: The [Commission approves](#) Hungary's reforms regarding judicial independence and thus paves the way that Hungary can claim reimbursement of eligible expenditure of up to around €10.2 billion for the EU's 2021–2027 Cohesion Policy, Maritime and Fisheries, and Home Affairs programmes. However, the Commission upholds its concerns with regard to the budget conditionality mechanism. The Commission deems Hungary compliant with the horizontal enabling condition on the EU Charter of Fundamental rights, since Hungary strengthened the independence of its judiciary, e.g. by increasing the powers of the independent National Judicial Council and reforming the functioning of the Supreme Court (Kuriá) to limit

risks of political influence. However, the Commission also stress that Hungary has not fulfilled other horizontal enabling conditions and has neither adopted nor formally notified the Commission of any new remedy to address outstanding issues that apply under the general regime of conditionalities ([→eucrim 3/2020, 174–176](#)). As a result a total of €11.2 billion remains suspended.

- 23 December 2023: The controversial Protection of National Sovereignty Act (see above) enters into force.
- 17 January 2024: [MEPs debate in plenary](#) on the situation in Hungary. Many MEPs urged EU leaders not to give into Hungary's blackmail, to provide further information about the Commission's unblocking of elements of EU funding that were frozen due to rule-of-law concerns, and to respond to the Article 7 procedure that was launched by the EP in 2018. MEPs, however, also stress the need to maintain open communication with Hungary and to listen to its concerns.
- 18 January 2024: In a [resolution](#), the European Parliament (EP) expresses strong concern about the further erosion of democracy, the rule of law and fundamental rights in Hungary, in particular through the recently adopted "national sovereignty protection" package (see above) – which has been compared with Russia's infamous 'foreign agents law'. [MEPs call on the European Council](#) to take the next steps in the Article 7 TEU procedure against Hungary. They voice serious concerns over the Commission decision considering that the horizontal enabling condition of the Charter had been fulfilled in relation to judicial independence (see above, 13 December 2023), thus enabling the Hungarian authorities to submit reimbursement claims of up to €10,2 billion without adequate control mechanisms or public procurement procedures in place to guarantee sound financial management and the protection of the EU budget. It is

believed that this decision politically contradicts the decision to prolong the measures adopted under the Conditionality Regulation. Furthermore, the resolution clarifies that the measures required to release EU funding under different rules must be treated as a single package, and no payments should be made if deficiencies persist in any area. The EP will examine whether legal action should be pursued to overturn the Commission decision to partially unfreeze funds. The Commission is urged to use all available tools to address the clear risk of a serious breach by Hungary of the values on which the Union is founded, in particular, financial measures and expedited infringement procedures. (TW)

Reform of the European Union

Council: Assessment of Follow-Up to the Conference on the Future of Europe

On 7 December 2023, the General Secretariat of the Council published its [assessment](#) on the follow-up to the Conference on the Future of Europe, which concluded on 9 May 2022 ([→eucrim 2/2022, 84–85](#)). It provided an updated assessment on the follow-up, specifically the proposals and specific measures outlined in the report on the final outcome of the conference.

The update highlighted the progress made in implementing the 49 proposals and 326 related specific measures across nine key topics. It provided examples of major achievements to illustrate each key topic:

- Economic Strength, Social Justice, and Jobs: Implementation of new rules for adequate statutory minimum wages, gender balance on corporate boards, and equal pay for equal work among other initiatives;
- Education, Culture, Youth, and Sports: Approvals and recommendations to leverage sports for sustainable development, mutual recognition

in education, and to enhance youth involvement in politics;

Digital Transformation: Adoption of the Digital Markets Act and Digital Services Act to regulate the digital space, and an agreement on a European digital identity;

■ **European Democracy:** Conclusions on the safety of journalists and the promotion of fundamental rights, along with initiatives for political advertising transparency;

■ **Values, Rights, and Security:** Actions against disinformation, terrorism, and digital empowerment;

■ **Climate Change and Environment:** Emergency measures during the energy crisis, new agricultural policies, and emissions standards, etc.;

■ **Health:** Regulations on cross-border health threats and frameworks for medical countermeasures in public health emergencies;

■ **EU in the World:** Support for Ukraine, candidate status for accession to the EU for Ukraine and Moldova, and measures for strategic independence;

■ **Migration:** Extension of temporary protection for people fleeing Ukraine and ongoing discussions on the Migration and Asylum Pact.

The document noted the Council's work on specific measures that it can implement on its own, e.g., on disinformation and on media literacy. It also explores the possibility of using passerelle clauses for qualified majority voting in certain policy areas. Overall, the assessment showcased a comprehensive effort by the EU institutions to implement the Conference's proposals, emphasizing their continued commitment to responding to citizens' concerns with tangible policy actions. (AP)

Schengen

Bulgaria and Romania Join Schengen Area

On 30 December 2023, the Council reached a unanimous [decision](#) with

Bulgaria and Romania to eliminate air and maritime internal border controls as of 31 March 2024, marking their partial integration into the Schengen area. This measure means that travelers will no longer face checks when crossing internal air and sea borders between these countries and the rest of the Schengen zone, aligning this change with the International Air Transport Association's (IATA) seasonal schedule adjustment. A decision on the removal of checks at internal land borders is still pending and expected to be made by the Council in 2024.

Since their accession to the EU, Bulgaria and Romania have been progressively implementing the Schengen legal framework, with a particular focus on managing external borders, enhancing police cooperation, and utilizing the Schengen Information System (SIS). In 2011, the European [Commission deemed both countries ready](#) to join the Schengen area, based on their compliance with the necessary conditions for membership:

- Adhering to the Schengen acquis;
- Managing external borders on behalf of the Schengen zone;
- Issuing uniform Schengen visas;
- Effectively participating in law enforcement cooperation and the SIS.

National short-stay visas issued by Bulgaria and Romania before the integration date will retain their validity. These visas will allow for transit or stays in other Member States for up to 90 days within any 180-day period, as per Decision No 565/2014/EU, provided that these states have agreed to recognize such visas for these purposes.

Bulgaria's and Romania's full entry into the Schengen zone had been blocked particularly by Austria fearing an increase of illegal immigration. In early December 2023, Austria agreed to the lifting of air and maritime borders as a precursor to the opening of land borders. (AP)

Enhancing Schengen Security: Commission's Recommendation

On 17 January 2024, [Commission Recommendation \(EU\) 2024/268](#) on cooperation between the Member States with regard to serious threats to internal security and public policy in the area without internal border controls was published in the Official Journal (2024/268). The recommendation advocates for a collaborative approach at all political, administrative, and operational levels in order to combat threats effectively in the Schengen area. It builds on existing legal frameworks that facilitate operational cooperation and information exchange among police and judicial authorities. Measures in visa and return policy areas are also being developed to compensate for the absence of internal border controls.

Key aspects include:

- Encouraging Member States to establish permanent contact points to ensure a swift response to serious threats against public policy or internal security and to enhance law enforcement cooperation and information sharing;
- Recommending the continued development of capacities for joint measures, including bilateral agreements for cross-border law enforcement cooperation and joint risk analyses in order to address threats effectively;
- Highlighting the importance of giving effect to Council Recommendation (EU) 2022/915 on operational law enforcement cooperation ([→eucrim 2/2022, 120](#)), thus improving operational cooperation in combating threats, with a focus on joint patrols, hot pursuits, and the pivotal role of police and customs cooperation centres;
- Underlining the need for joint actions against migrant smuggling and irregular migration, emphasizing the significance of shared information and coordinated actions to manage migratory pressures and unauthorised movements;

- Advocating for measures to address unauthorized movements of third-country nationals, such as intensified police controls in internal border areas;
- Applying mitigating measures to limit the impact of any measures adopted to address the serious threats to public policy or internal security. Such measures include the limited use of systematic checks, preference to mobile checks in the territory of the Member States over static checks at fixed locations, and the use of modern technologies and passenger information for a risk-based data-driven approach on better targeting the checks.

The recommendation also underscores the ongoing dialogue between the Schengen Coordinator and Member States, aiming for a structured, coordinated, and common European response to shared challenges: fighting terrorism and cross-border organized crime and effectively managing migration. (AP)

ments from January 2023 to June 2023 →[eucrim 1/2023, 6–9](#); for the developments from July 2023 to September 2023 →[eucrim 2/2023, 116–117](#).

- 6 October 2023: The EU leaders gather at the informal meeting of the heads of state or government in Granada (Spain) to discuss the process of defining the Union's general political directions and priorities in the years to come, setting a strategic course of action. In the "[Granada declaration](#)", they reaffirm their unconditional support for Ukraine and confirm that the future of Ukraine lies in its accession to the EU. Hungary and Poland criticise the extent of support for Ukraine.

■ 17 October 2023: The European Parliament approves a [proposal](#) for a €50 billion facility to support Ukraine's recovery, reconstruction, and modernisation. The proposed Ukraine facility is part of the EU's revised long-term budget. MEPs demand to rebuild Ukraine with resources from the Russian Federation or other organizations or people directly involved in Russia's aggression. They also stress that funding should not be available to companies controlled by oligarchs. To enhance transparency of the facility, a web portal providing information on financial operations granted to Ukraine, its goals, and the milestones the country had to meet to receive aid will be established.

- 20 October 2023: The [Justice and Home Affairs Council](#) gives a state-of-play about measures taken to fight against impunity regarding crimes committed in connection with Russia's war of aggression against Ukraine.

■ 27 October 2023: The [European Council reiterates](#) its resolute condemnation of Russia's war of aggression against Ukraine and the continued support from the European Union in financial, economic, humanitarian, diplomatic, and especially military areas. The EU and its Member States will intensify the provision of humanitarian aid and civil protection to Ukraine

Ukraine Conflict

EU Reactions to Russian War against Ukraine: Overview October 2023 – January 2024

This news item continues the reporting on key EU reactions following the Russian invasion of Ukraine on 24 February 2022 in relation to the following aspects: the impact of the invasion on the EU's internal security policy, on criminal law, and on the protection of the EU's financial interests. The following overview covers the period from the beginning of October 2023 to the end of January 2024. For overviews of the developments from February 2022 to mid-July 2022 →[eucrim 2/2022, 74–80](#); for the developments from the end of July 2022 to the end of October 2022 →[eucrim 3/2022, 170–171](#); for the developments from November 2022 to December 2022 →[eucrim 4/2022, 226–228](#); for the develop-

and also its diplomatic outreach with Ukraine. The Council welcomes the outcome of the International Donors' Conference on humanitarian demining in Ukraine held in Zagreb on 11 and 12 October 2023, including support for the efficient governance of mine action. The European Council urges efforts to continue, including within the Core Group, in order to establish a tribunal to prosecute the crime of aggression against Ukraine with broad cross-regional support. Additionally, it supports the development of a future compensation mechanism and expresses support for the International Criminal Court, condemning Russian attempts to undermine its international mandate and functioning. The heads of state or government are unable to agree on a new financial aid package for Ukraine totalling €50 billion.

■ 8 November 2023: The Commission adopts the [2023 "Enlargement Package"](#) and recommends, *inter alia*, that the Council opens accession negotiations with Ukraine and Moldova. Before the first round of talks with Ukraine, however, the country must finalise the reforms it has begun. In particular, there are still deficits in the fight against corruption, judicial reform and minority rights. The recommendation gives Ukraine time to make progress in these areas.

■ 9 November 2023: In a new [resolution](#), the European Parliament (EP) raises concerns over existing loopholes in the EU's sanctions regime against Russia. The text highlights that the lack of proper enforcement of the sanctions undermine the goal of the sanctions. Backdoors are being created with, among other things, the EU import of Russian petroleum products through countries such as India. MEPs are alarmed that Western components reach Russia through countries like China and express deep concern about the ongoing trade in sanctioned goods between EU states and Moscow. The EP also notes the EU's significant on-

going purchases of Russian fossil fuels despite restrictions. It urges the EU and its Member States to enhance centralized oversight of sanctions, establish a mechanism to prevent and monitor circumvention, strengthen coordination to enforce sanctions on Russian oil exports, close the EU market to Russian-origin fossil fuels, and impose sanctions on major Russian oil companies, Gazprombank, and their subsidiaries and leadership.

■ 14 December 2023: In its [conclusions](#) on Ukraine, the European Council strongly condemns Russia's war of aggression against Ukraine and reaffirmed its unwavering support for Ukraine's independence, sovereignty, and territorial integrity. EU leaders emphasize that enlargement is a strategic investment in peace and prosperity. They underline the need for both aspiring members and the EU to be prepared for accession. Aspiring members must intensify reform efforts with EU assistance, especially in the rule of law. The EU commits to necessary internal reforms, strengthening its long-term ambitions and addressing key policy areas. The European Council endorses the enlargement conclusions of 12 December 2023 and decides to open accession negotiations with Ukraine and the Republic of Moldova, pending relevant steps outlined in Commission recommendations. Hungary's Prime Minister Viktor Orbán blocks the disbursement of further EU aid for Ukraine totalling €50 billion and proposes that the Ukraine aid should not be included in the EU budget. However, the other EU leaders reject this and postpone the decision on the Ukraine aid.

■ 18 December 2023: The Council adopts the [12th package of sanctions](#) against Russia (for the previous package [+eucrim 1/2023, 9](#)). It includes additional trade bans, in particular with regard to Russian high-value goods, and measures against the circumvention of EU sanctions. The most impor-

tant trade measure is a prohibition on the direct and indirect import, transfer or purchase of diamonds originating in Russia or processed/traded there. Tighter export restrictions are also introduced, among others, concerning dual use goods and technologies. There will also be stricter asset freeze obligations. The Council agreed, for instance, a new listing criterion to include persons who benefit from the forced transfer of ownership or control over Russian subsidiaries of EU companies. In future, deceased persons can be kept on the asset freeze list and Member States will have tighter obligations to proactively trace assets of listed persons. Anti-circumvention measures include the following: (1) Extending the transit prohibition to all battlefield goods; (2) banning of Russian nationals from governing bodies of legal persons, entities or bodies providing crypto-asset wallet, account or custody services to Russian persons and residents; (3) extending the existing prohibition on the provision of services to the provision of software for the management of enterprises and software for industrial design and manufacture; (4) obliging exporters to contractually insert a "No Russia Clause" that blocks the re-exportation of particularly sensitive goods and technology; (5) Introducing a new measure that will require the notification of certain transfers of funds out of the EU from EU entities directly or indirectly owned by more than 40% by Russians or entities established in Russia. In addition to economic measures, the [Council decided to add over 140 additional individuals and entities](#) on the asset freeze list. This covers primarily actors in the Russian military and defence and important economic actors as well as those who orchestrated the "elections" in the Russia-occupied Ukrainian territories, those responsible for the forced "re-education" of Ukrainian children, and those spreading disinformation/propaganda in support

of Russia's war of aggression against Ukraine.

- 20 December 2023: The Commission launches [three new initiatives](#) boosting the EU research and innovation cooperation with Ukraine. They include a €20 million-programme for supporting the Ukrainian deep tech community (EIC4Ukraine)

- 3 January 2024: The Council adds the [Russian diamond firm PJSC Alrosa and its CEO](#) to the EU sanctions list, in line with the diamond ban introduced by the 12th package of sanctions on 18 December 2023. The EU sanctions list now apply to almost 1950 individuals and entities altogether.

- 16 January 2024: The [ECOFIN Council](#) takes note of the state of play of the economic and financial impact of Russia's aggression against Ukraine. Ministers discuss the EU's financial support to Ukraine and the ongoing work on the use of frozen and immobilised assets. Belgium stresses its commitment to continue financial support to Ukraine "for as long as necessary".

- 1 February 2024: At the [special European Council](#), the heads of state or government agree to set up the Ukraine Facility for the years 2024–2027. Viktor Orbán gives up his blockade stance (see above), but pushes through several pre-conditions for Ukraine in order to receive the funding. The EU will make available €50 billion to Ukraine as the Ukraine Reserve; €33 billion are in loans, and €17 billion are in grants. The Ukrainian government needs to prepare a recovery and reconstruction plan that sets out a reform and investment agenda. To obtain the funding, Ukraine must also uphold and respect several rule-of-law conditions and human rights guarantees. Moreover, the Commission and Ukraine must protect the EU's financial interests, particularly by countering fraud, corruption, conflicts of interest and irregularities. The Council will play a key role in the governance of the Ukraine Facility. Hence, a Council Implementing Decision will

be adopted by qualified majority for the adoption and amendments of the Ukraine Plan and for the approval and the suspension of payments. On the basis of a Commission report, the European Council will hold a debate every year on the implementation of the facility with a view to provide guidance. (AP/TW)

[General Court Judgments on Anti-War Sanctions](#)

The CJEU had to deal with several actions brought by individuals against the EU's regime imposing restrictive measures on Russian individuals and entities due to Russia's aggression against Ukraine. The following provides an overview of recent judgments delivered by the General Court (GC).

- On 8 November 2023, the [General Court confirmed](#) that the assets of Dmitry Arkadievich Mazepin, a businessperson of Russian nationality, must remain frozen ([Case T-282/22, Mazepin v Council](#)). The Council imposed sanctions on Mazepin, owner of a chemical enterprise in Russia, alleging his close association with Putin, his influential business role, and his perceived support for policies threatening Ukraine. Mazepin's challenge to the Council's decision before the GC has been rejected. The GC found that the Council provided a clear justification for its decision, and Mazepin had access to the evidence against him to defend himself. The Council presented specific and consistent evidence indicating Mazepin's role as a leading businessperson contributing substantial revenue to the Russian government. The imposed sanctions are seen as a measure to increase the costs of Russia's actions in Ukraine and pressure the Russian authorities into ceasing destabilizing policies in Ukraine.

- On 20 December 2023, the GC upheld the restrictive measures taken against Roman Arkadyevich Abramovich, who is the majority shareholder of the company Evraz, one of the leading

Russian groups in the steel and mining sector ([Case T-313/22, Abramovich v Council](#)). Mr Abramovich challenged the inclusion and retention of his name on the lists of persons and entities subject to restricted measures because of the Russian war against Ukraine. The GC deems justified the Council's decision to include and maintain Mr Abramovich's name on the list by considering his role in the Evraz group. Additionally, Mr. Abramovich's claim for compensation is dismissed, as he fails to demonstrate the unlawfulness of his inclusion on the lists. Abramovich is a Russian businessman who became famous as former owner of British Premier League soccer club Chelsea. He also holds Israeli and Portuguese citizenship. Forbes estimates his net worth at \$9.2 billion.

- Also on 20 December 2023, the GC ruled on economic trade sanctions. The [Court clarified](#) the EU regulation on restrictive measures with regard to the prohibition on the use of Russian-related aircraft in the EU territory as a consequence of Russia's actions destabilising the situation in Ukraine. In the case at issue ([Case T-233/22, Isletyeva v Council](#)), a pilot, who has dual Russian and Luxembourg citizenship, contested the EU regulation (in particular Art. 1(2) of Decision (CFSP) 2022/335, inserting Article 4e of Council Decision 2014/512/CFSP of 31 July 2014) and the decision by the Directorate for Civil Aviation of the Grand Duchy of Luxembourg refusing recognition of her right to use her private pilot license to land in, take off from or overfly the territory of the EU. The authority argued that the EU regulation also applies to pilots of Russian nationality who exercise effective and material control of an aircraft. The GC clarifies that the term "control" in said EU Decision only applies in cases of economic or financial control of an airplane, but does not extend to Russian citizens holding private pilot licenses. It stresses that the interpretation ac-

cording to which that prohibition also includes Russian citizens who hold a private pilot license would be manifestly inappropriate in the light of the objective of exerting pressure on the Russian President and his government capable of halting the violations of international law and upholding the territorial integrity of Ukraine. In conclusion, the applicant's action was dismissed inadmissible since she was not "directly concerned" by the EU measures. The GC also adds that it has no jurisdiction over the claim requesting it to recognise the applicant's right to use her private pilot licence because it cannot deliver declaratory or confirmatory judgments if it exercises its judicial review under Art. 263 TFEU. (AP/TW)

Artificial Intelligence

AI Act: Parliament and Council Reach Provisional Agreement on World's First AI Rules

spot light After intense negotiations, the Council and the European Parliament reached a [provisional agreement on the Artificial Intelligence \(AI\) Act](#). This legislation aims to ensure the safety of AI systems on the European market and respect for fundamental rights and stimulate investment and innovation in AI in Europe. The provisional agreement, which was announced on 9 December RF2023, covers the following points:

➤ Definition and scope

The definition of an AI system is aligned with the approach proposed by the Organisation for Economic Co-operation and Development (OECD): "An AI system is a machine-based system that, for explicit or implicit objectives, infers, from the input it receives, how to generate outputs such as predictions, content, recommendations, or decisions that can influence physical or virtual environments".

It is clarified that the regulation does not apply to areas outside the scope of

EU law and should not affect Member States' competences in national security. The AI act will not apply to:

- Systems used exclusively for military or defense purposes;
- Systems solely used for research and innovation;
- People using AI for non-professional reasons.

➤ Classification of AI systems as high-risk and prohibited AI practices

A horizontal layer of protection for AI systems is established, using a high-risk classification to avoid unnecessary regulation of low-risk AI. Limited-risk systems are subject to minimal transparency obligations.

A wide range of high-risk AI systems will be authorised but will have to comply with certain requirements and obligations in order to access the EU market. The co-legislators have refined these conditions to make them technically feasible and less burdensome for stakeholders, including data quality considerations and technical documentation for small and medium-sized enterprises (SMEs) to demonstrate compliance. The compromise agreement clarifies roles and responsibilities within AI value chains, in particular for providers and users. It also outlines the relationship between responsibilities in the AI Act and in existing legislation, ensuring consistency with data protection and sector-specific legislation.

The following applications of AI are recognized as posing an unacceptable risk to citizens' rights and democracy and are therefore prohibited:

- Biometric categorisation systems that use sensitive characteristics (e.g. political, religious, philosophical beliefs; sexual orientation; race);
- Untargeted scraping of facial images from the Internet or CCTV footage to create facial recognition databases;
- Emotion recognition in the workplace and educational institutions;
- Social scoring based on social behaviour or personal characteristics;

- AI systems that manipulate human behaviour to circumvent their free will;
- AI exploitation of the vulnerabilities of people (age, disability, social, or economic situation).

➤ Exceptions for law enforcement authorities

Recognising the specificities of law enforcement authorities, several changes were agreed on for the use of AI systems for law enforcement purposes. In order to preserve their operational capabilities and respect the confidentiality of sensitive data, an emergency procedure was introduced to allow the use of a high-risk AI tool in urgent situations. However, a mechanism has also been put in place to ensure the protection of fundamental rights against potential misuse of AI systems.

With regard to real-time biometric remote identification systems in public places, the provisional agreement specifies the necessary objectives for law enforcement use and introduces additional safeguards. It also limits exceptions to cases involving victims of specific crimes and supports the prevention of genuine threats, such as terrorist attacks and searches for persons suspected of the most serious crimes.

➤ Specific rules for General Purpose AI systems and foundation models

New provisions will address the use of AI systems for different purposes, in particular General Purpose AI (GPAI) technology integrated into high-risk systems. Specific rules have been outlined for foundation models where pre-market transparency obligations are required. A stricter regime is to be applied for "high impact" foundation models with advanced complexity and capabilities that may pose systemic risks along the value chain.

➤ Governance structure

A new governance architecture will be established to oversee AI models under the AI Act. This includes the cre-

ation of an AI Office within the Commission, responsible for overseeing advanced AI models, setting standards, conducting testing, and enforcing common rules across Member States. A scientific panel of independent experts will advise the AI Office on GPAI models, in this way contributing to the development of evaluation methodologies, advising on high-impact models, and monitoring safety risks.

➤ Sanctions

The AI Act provides for fines for violations, calculated as a percentage of the company's global annual turnover or a predetermined amount, whichever is higher. The fines are set at €35 million or 7% of global annual turnover for banned AI applications, €15 million or 3% for violations of obligations under the AI Act, and €7.5 million or 1.5% for providing incorrect information.

➤ What's next?

It was agreed that the AI Act should apply two years after its entry into force, with certain exceptions for specific provisions. Work on the compromise text will now be continued at the technical level before a legal-linguistic revision is made. Afterwards, the text needs to be formally adopted by the Council and the European Parliament. (AP)

- Reinforcing the EU's social and health agenda
- Protecting people and borders
- Promoting a global Europe.

In the field of Justice and Home Affairs, the Presidency has two key priorities: the reform of the migration and asylum system as well as a resilient Schengen zone. Hence, the Presidency aims to address all remaining legislative files associated with the Common European Asylum System (CEAS) and the New Pact on Migration and Asylum.

Furthermore, it will focus on intensifying the EU's efforts to combat organised crime, terrorism, and violent extremism. The fight against drug trafficking, trafficking in human beings, and preventing and combating child sexual abuse are further priorities of the Presidency. In the fight against corruption, the Belgian Presidency also wants to advance negotiations on the Commission's initiative to criminalise all forms of corruption ([→eucrim 2/2023, 139–141](#)).

As part of its priority to further support and protect victims of criminal offences, the Presidency aims to reach agreement on a general approach regarding revision of the Victims' Rights Directive and to work towards finalising the directive on combating violence against women and domestic violence.

To further enhance judicial cooperation in criminal matters, an agreement on the Regulation concerning the transfer of criminal proceedings within the EU shall be reached and special attention paid to the enforcement of sentences in the context of mutual recognition of judicial decisions in criminal matters.

At its first [informal meeting](#) with the 27 EU Ministers of Justice on 26 January 2024, Belgium's Justice Minister *Paul Van Tigchelt* also underlined the need to establish a European network of magistrates specialised in combating criminal organisations. At

this meeting, the Ministers of Justice also shared information on Belgium's approach towards small-scale detention as an alternative to prisons. Belgium plans to create around 700 small-scale detention spaces for prisoners who have received up to three years of imprisonment as a sentence. The detention houses shall provide programmes to work on prisoners' re-integration and ability to live independently, with a view to preventing prisoners from committing new offences.

The Belgian Presidency's term officially ends on 30 June 2024. However, the forthcoming European elections at the beginning of June will effectively shorten this period, as the European Parliament will not sit in plenary from May on. (CR)

Résumé of Spanish Council Presidency

On 31 December 2023, the Spanish Presidency of the Council of the EU came to an end. Four priorities were set out under its six-month programme to focus efforts on:

- Promoting the reindustrialisation of the EU and its strategic autonomy;
- Advancing the green transition;
- Achieving greater social justice and economy;
- Strengthening Europe's unity ([→eucrim 2/2023, 119](#)).

Legislative milestones achieved under the Spanish Presidency include the agreement reached on 9 December 2023 on the Legislative Artificial Intelligence Regulation and the closure of the Migration and Asylum Pact. Furthermore, at the end of December 2023, the EU Council decided to approve the Schengen extension, i.e., to remove air and maritime internal border controls with Bulgaria and Romania from March 31, 2024.

In the area of justice, agreements on the proposal for a Directive for the protection of the environment through criminal law and on the proposal for a directive on asset recovery and confis-

Institutions

Council

Belgian Presidency Starts Term

Since 1 January 2024, the [Presidency](#) of the Council of the EU has been held by Belgium. Under the theme "Protect, Strengthen, Prepare", [the programme](#) of the Belgian Presidency focuses on the following six thematic areas:

- Defending rule of law, democracy, and unity;
- Strengthening the EU's competitiveness;
- Pursuing a green and just transition;

cation could be reached. A summary of all [achievements](#) can be found on the [website](#) of the 2023 Spanish Presidency of the EU. (CR)

OLAF

[Complementary Investigation: OLAF and EPPO Successfully Cooperated](#)

On 9 November 2023, OLAF and the EPPO reported on a successful example of complementary investigations. Both bodies investigated fraud offences in Romania with regard to IT projects financed by the European Union to support innovation and foster productivity. The damage to the Union budget is estimated at € 15 million. Following OLAF's and EPPO's investigations, 38 house searches were carried out. The EPPO conducted criminal investigations while OLAF opened investigations to facilitate the adoption of precautionary administrative measures or to take administrative action. See also →news item "[EPPO's Operational Activities: October – mid-November 2023](#)", [eucrim 3/2023](#) p. 247. (TW)

[Operation BELENOS: Illicit Cash Flows Targeted](#)

On 16 November 2023, the French Customs Authority and [OLAF informed](#) of the results from the joint customs cooperation BELENOS. The Operation targeted illicit flows of cash equal to or in excess of €10,000 entering or leaving the EU, in accordance with [Regulation \(EU\) 2018/1672](#). Operation BELENOS was led by the French customs authorities in cooperation with the Spanish customs authorities and Europol as co-leaders; was carried out from 28 November to 11 December 2022 in 25 EU Member-States. OLAF and the European Commission (DG TAXUD) supported the Operation. The [main results](#) were as follows:

- €18 million of illicit cash flows uncovered;

- 400 cases of illicit accompanied and unaccompanied cash flows detected, including cases potentially linked to money laundering and to the sanctions against Russia for its aggression against Ukraine;
- 420 persons targeted;
- More than 330 administrative or judicial investigations initiated.

OLAF provided financial, analytical, technical and logistical support, including the use of a tool that enabled the secure exchange of information during the operation. (TW)

[Operation NOXIA: Successful Cooperation between Asia and Europe](#)

On 16 October 2023, OLAF informed of the [results of Operation NOXIA](#) that brought together European and Asian partners. The Operation targeted deep-sea containers in EU and Asian ports in a bid to prevent dangerous substances from being smuggled. It was part of ASEM (Asia-Europe Meeting) – an intergovernmental discussion forum that comprises 53 European and Asian states. At the 13th ASEM meeting in 2019, state representatives agreed on implementing joint customs operations in order to combat the illicit trade in dangerous substances.

Operation NOXIA was carried out in spring 2023 and focused on the illegal trade in pesticides and cigarettes headed from Asia to Europe as well as waste shipments from Europe to Asia. Operation Noxia resulted in the seizure of over 1221 tonnes of illicit waste, nearly 27,500 litres and 5 tonnes of illicit pesticides as well as over 67 million cigarettes and 10 tonnes of tobacco.

OLAF was the main coordinator of the joint customs operation. OLAF planned the Operation, analysed its results, provided a safe communication IT environment for information sharing, analysed intelligence and brought together the responsible liaison officers. Supported was also received by

Europol and the World Customs Organization (WCO). (TW)

[Operation Opson XII: 8000 Tonnes of Illicit Food and Beverages Seized](#)

On 10 October 2023, OLAF and Europol [informed of the results from the twelfth consecutive operation OPSON](#), which was carried out between December 2022 and May 2023. Operation OPSON targets counterfeit and substandard food and beverages, and food fraud in general; it is carried out every year (for operations in previous years →[eucrim 4/2022](#), [235](#); [eucrim 3/2021](#), [143](#); [eucrim 2/2020](#), [80](#) and [eucrim 2/2019](#), [90](#)).

Targeted actions coordinated by OLAF led to the seizure of 6 million litres of counterfeit, substandard or contraband alcoholic beverages, wine and beer.

According to [Europol's press release](#), 8000 tonnes of illicit products (food and beverages) were seized, 400 inspections carried out, a record of 143 arrest warrants issued during the operational activities, 119 individuals reported to judicial authorities, and six criminal networks disrupted.

Operation OPSON XII focused on the relabelling of spoiled or expired food – a trend that emerged as a consequence of the COVID-19 crises. The misuse of protected food names was also the focus of operational activities.

Europol provided several examples of food fraud in the 25 countries involved in the operation. For example, law enforcement authorities were able to disrupt a criminal organisation, led by a Lithuanian citizen, which recycled spoiled and expired food and traded the products in France, Germany, Italy, and Spain. The operation led to the seizure of more than 1.5 million packages of food. Checks in the United Kingdom identified, for instance, mislabelling and misuse of protected food names in restaurants and by individual retailers, such as feta, Parmigiano Reg-

giano and Grana Padano cheeses, and meats such as Prosciutto di Parma.

Operation OPSON XII was coordinated by Europol, OLAF, the European Commission Directorate-General for Health and Food Safety (DG SANTE), European Commission Directorate-General for Agriculture and Rural Development (DG AGRI), the European Union Intellectual Property Office (EUIPO), and Interpol. It also involved national food regulatory authorities and private entities. (TW)

European Public Prosecutor's Office

ECJ Ruling on the Exercise of Judicial Review in EPPO's Cross-Border Investigations

spot light

On 21 December 2023, the Grand Chamber of the Court of Justice of the European Union (ECJ) delivered its judgment in [Case C-281/22 \(G.K. and Others \[parquet européen\]\)](#). It is the first ECJ judgment that interprets [Regulation 2017/1939](#) implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ("the EPPO"). It relates to key provisions of the Regulation, i.e., EPPO investigations in cross-border situations for which Arts. 31 and 32 lay down the cooperation mechanism between the "handling European Delegated Prosecutor" (EDP), who conducts the principal investigation/prosecution, and the "assisting EDP" located in the Member State in which an investigative measure needs to be carried out ([→article by Csonka/Juszczak/Sason, eucrim 3/2017, 125–135](#)).

➤ Dispute in the main proceedings and question referred

Given that the provisions in question are silent, the reference for a preliminary ruling by the Higher Regional Court of Vienna (Austria) concerns the extent to which the national court in the assisting EDP's Member State can exercise judicial review ([→eucrim 2/2022, 96](#)).

In the case at issue, several persons are being prosecuted for fraud in relation to the import of American biodiesel into the European Union. The EPPO has initiated an investigation through its Delegated European Public Prosecutor (EDP) in Germany, since the import allegedly infringed customs legislation and resulted in damage to the Union budget of nearly €1.3 million. Searches of residential and business premises and the seizure of assets in Austria, where suspects are located, have been ordered in this context. The German EDP transferred the execution of these measures to the assisting Austrian EDP.

The defendants challenged these investigative measures, which had been authorised by an Austrian court, before the referring court. They argued that the judicial authorities in Austria infringed several procedural provisions and defendants' rights. They claimed that suspicion against them was insufficient, no statement of reasons for the measures was given, the searches ordered were unnecessary and disproportionate, and that the relationship of trust with their lawyer was breached.

By contrast, the Austrian assisting EDP argued that the justifications for the assigned investigative measures are governed by the law of the handling EDP and, by analogy, with the regime established by [Directive 2014/41](#) regarding the European Investigation Order. Hence, they can only be examined by the authorities of that Member State.

The referring Higher Regional Court of Vienna pointed out that, on the basis of Arts. 31(3) and 32 of Regulation 2017/1939, an interpretation is possible by which the assigned measure must be examined by a court in the assisting Member State in light of all procedural and substantive rules laid down by that Member State (full examination). However, this would entail practical challenges (e.g., transfer of the entire file, translations, etc.) and a

retrograde step compared to the European Investigation Order.

Therefore, the Higher Regional Court of Vienna sought guidance as to whether the courts in the Member State of the assisting EDP must consider all material aspects of the case or whether they are limited to examining only certain formal aspects.

➤ ECJ's findings: only limited judicial review in the assisting Member State

In its [judgment](#), the ECJ first explains the subject matter of the EPPO Regulation and the functioning of the body. Second, the ECJ clarifies that the interpretation of judicial review for the adoption and cross-border enforcement of an investigative measure pursuant to Arts. 31 and 32 of Regulation 2017/1939 must consider the wording, context and objective of the provisions in accordance with settled case law.

With regard to wording, the judges in Luxembourg conclude that it is apparent from Arts. 31(2) and 32 that both the adoption and the justification of an assigned investigative measure are to be governed by the law of the Member State of the handling EDP, whereas the enforcement of such a measure is governed by the law of the Member State of the assisting EDP.

Looking at the context, the judges in Luxembourg draw parallels between the cooperation mechanism in Arts. 31 and 32 EPPO Regulation and the scheme of judicial cooperation within the EU based on the principles of mutual trust and mutual recognition. According to the judges, these principles are of "fundamental importance" in EU law. Referring to the Framework Decision on the European Arrest Warrant and the Directive regarding the European Investigation Order in criminal matters, they state that the system of judicial cooperation in the EU is based on a division of competences between the issuing and executing judicial authorities. It is for the issuing authority to review compliance with substan-

tive conditions and such assessment cannot be reviewed by the executing judicial authority. It follows that the executing authority is, in principle, bound to execute the issued judicial decision.

Considering the objective of the legislation, the ECJ points out that, by defining the procedures laid down in Regulation 2017/1939, the EU legislator intended to establish a mechanism that ensures at least the same degree of efficiency in cross-border investigations as the scheme based on the principle of mutual recognition. An interpretation making possible a full judicial examination in the assisting Member State, however, would lead to a less efficient system in practice.

Against this background, the ECJ states that the judicial review in the Member State of the assisting EDP (if judicial authorisation is necessary for the measure in question) must be limited to questions relating to the enforcement of the cross-border investigation measures, to the exclusion of matters concerning justification and adoption.

➤ *ECJ's addendum: ensuring procedural safeguards in the Member State of the handling EDP*

The judges in Luxembourg add, however, that said sharing of responsibilities is without prejudice to the requirements relating to respect for fundamental rights in the adoption of the assigned measure. In the case at issue, the searches and seizures interfered with the persons' rights to private and family life, home, and communication (Art. 7 CFR) and with the right to property (Art. 17 CFR). The ECJ stresses:

"As regards investigation measures which seriously interfere with those fundamental rights, such as searches of private homes, conservatory measures relating to personal property and asset freezing, which are referred to in Article 30(1)(a) and (d) of Regulation 2017/1939, it is for the Member State of the handling European Delegated

Prosecutor to provide, in national law, for adequate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures."

The ECJ further points out that the EDPs involved in a case also have the responsibility to safeguard the suspects' rights, as is, *inter alia*, accentuated by Art. 31(5) lit. c) of Regulation 2017/1939.

In conclusion, adoption and justification of an investigative measure must be subject to prior judicial review in the Member State of the handling EDP in the event of serious interferences with the rights of the person concerned, as guaranteed by the Charter of Fundamental Rights of the European Union (CFR).

➤ *Put in focus*

The ECJ's Grand Chamber only partly follows the [opinion](#) of Advocate General (AG) Tamara Ćapeta in the case ([→eucrim 2/2023, 123](#)). In the case of cross-border investigations, it agrees with the AG in that the court approving a measure to be carried out in the Member State of the assisting EDP may assess only the aspects related to the execution of an investigative measure. The AG proposed that the ECJ must decide between two options: Option One: full review in the Member State of the assisting EDP – as advocated by the Austrian and German governments ([→article by Hans-Holger Herrnfeld, eucrim 2/2023, 229–236](#)). Or Option Two: division of tasks for the judicial authorisation, with only a review of the formal and procedural aspects relating to the execution of the measure in the Member State of the assisting EDP – as argued by the EPPO, the Commission, and the French, Romanian, and Netherlands governments. AG Ćapeta decided on the second option (critically, [Herrnfeld, idem](#), also making recourse to the legislative history).

The ECJ approves the AG's view, in particular by stressing that it is the ra-

tionale of Union law to avoid discrepancies with the European Investigation Order (EIO). The cross-border cooperation system within the EPPO cannot be more cumbersome as the EIO system, which similarly holds that substantive reasons for issuing an EIO can be only challenged by an action brought in the issuing State.

The judges on the Kirchberg bench, however, differ from the proponents of "option two" when they stress that there must be an opportunity for a prior judicial review of the adoption and justification of a cross-border investigative measure in the Member State of the handling EDP. This seems to be a new argument in the discussion.

It follows, however, the line of argument that the Court has been using for the instruments of judicial cooperation based on mutual trust and mutual recognition, such as the European Arrest Warrant. Correspondingly, the ECJ requests that certain procedural standards securing the rights of defendants must be in place in the issuing Member State (e.g., independence of the issuing judicial authority) as a precondition for taking part in regimes of mutual trust – the underlying principle of judicial cooperation within the bloc.

In his [post of 15 January 2024](#) at European Law Blog, [Nicholas Franssen](#) rightly put it that the Court delivered a "Solomonic verdict", reconciling the two schools of thought mentioned above. Franssen also rightly comments that this second element of the judgment could have "some unforeseen legal and practical consequences". These include, for example, the following:

- Are the legal orders of the Member States participating in the EPPO scheme in line with the newly established Court's prerequisite?
- Must these systems be revised now?
- At what stage in the procedure should the "prior" judicial review of jus-

tification and adoption be carried out and by whom?

- Has the maxim "only one single judicial authorisation", as postulated in Recital 72 of Regulation 2017/1939, become obsolete now, since it seems that the ECJ established a two-tier procedure of judicial authorisation when it comes to cross-border investigations by EDPs?
- Is the Union legislator called on to amend the EPPO Regulation?

The requirement for a prior judicial review in the ECJ's decision may also open the door for defence lawyers to contest the use of evidence that may have been collected without the necessary procedural safeguards pointed out by the judges in Luxembourg. Irrespective of whether national courts follow such an argumentation, another problem emerges for the defence: The ECJ seems to limit the requirement of prior judicial review to only serious interferences with fundamental rights. The ECJ itself cites as examples searches of private homes, conservatory measures relating to personal property, and asset freezing. The question arises as to which other investigative measures fall under the notion of "serious interferences"? Can one conclude from the ECJ's listing that searches of business offices are exempt from this categorization? If so, this would trigger a discussion on whether and why business premises are less protected than private homes under the CFR?

From the perspective of the person concerned, the ECJ judgment ultimately confirms the problem of the fragmentation of legal protection in EU cooperation. The person concerned must seek relief in two (or more) different legal orders: If he/she wishes to tackle the justification of the measure, he/she must do it in the Member State issuing an order (here: Germany as the Member State of the handling EDP). If he/she wishes to complain about the enforcement of the measure

(e.g., lack of proportionality during the execution), he/she must do so in the executing State (here: Austria as the Member State of the assisting EDP). Acting in another and foreign legal order regularly entails problems, such as the need for a double defence as well as the need to deal with an unknown legal system with different legal traditions and a foreign court language. These challenges for the individual also cannot be ignored in the present case: Even though Austria and Germany share a common language, the codes of criminal procedure in the two countries differ considerably in a number of respects. (TW)

GC: EPPO's Request for the Lifting of Parliamentary Immunity Not Open to Challenge

By [order of 16 January 2024](#), the General Court dismissed *Eva Kaili's* action for annulment against the request by the European Chief Prosecutor to lift her parliamentary immunity ([Case T-46/23](#)).

➤ Facts of the case

The EPPO is conducting investigations against Greek MEP *Eva Kaili* and her assistants for mismanagement of parliamentary allowances. By letter of 15 December 2022, sent to the President of the EP, the European Chief Prosecutor *Laura Kövesi* requested, in accordance with Art. 29(2) of Regulation (EU) 2017/1939, the lifting of the privileges and immunities of Ms Kaili, another MEP, and six accredited parliamentary assistants. At the plenary session of the EP of 18 January 2023, EP President *Roberta Metsola* disclosed that request and referred it to the Committee of Legal Affairs. Ms Kaili challenged these acts before the General Court pursuant to Art. 263 TFEU.

➤ The GC's decision

The General Court (GC) dismissed the action as inadmissible in its entirety. It pointed out that the acts in question are not open to challenge according to Art. 263 TFEU. With regard to the

European Chief Prosecutor's request for lifting immunity, the GC stressed that it is a preliminary and necessary measure to ensure the effectiveness of investigations. The request is not capable of producing binding legal effects that may affect the applicant's interests by bringing about a distinct change to her legal situation.

With regard to the decision taken by the EP President, the GC similarly argues that it does not produce binding legal effects that may affect the applicant's interests by bringing about a distinct change to her legal situation. Furthermore, the decision also constitutes a preparatory act only. An action for annulment pursuant to Art. 263 TFEU can only be brought against the Parliament's final decision.

Background: *Eva Kaili* is also one of the main figures who are involved in the Qatargate corruption scandal at the EP ([→eucrim 4/2022, 242–243](#)). She was arrested in this case in December 2022 by Belgian authorities. The EPPO investigations are distinct from that and concern [allegedly fake reimbursement requests](#) at the expenses of the Union budget. (TW)

EPPO Signs Working Arrangement with Prosecutor's Office of Bosnia and Herzegovina

On 21 November 2023, the EPPO and the Prosecutor's Office of Bosnia and Herzegovina (POBiH) [signed a working arrangement](#) (WA). The purpose of the WA is to facilitate judicial cooperation in criminal matters and exchange of operational information between the parties. It also lays down a framework for the exchange of strategic information and institutional cooperation. The latter includes the possibility for the POBiH to second a liaison officer to the EPPO's headquarter in Luxembourg and the EPPO will have a central contact point in Bosnia and Herzegovina.

Looking at the exchange of information in operational cases, the parties

agreed that they will apply the relevant multilateral instruments for judicial co-operation in criminal matters, including the 1959 European Convention on mutual assistance in criminal matters and its additional protocols, the UN Convention against transnational organised crime, and the UN Convention against corruption. The parties also agreed to set up joint investigation teams in accordance with the Second Additional Protocol to the CoE's MLA Convention. (TW)

Overview of Convictions in EPPO Cases: Fourth Quarter 2023

The following overview provides court verdicts and alternative resolutions in EPPO cases. It evaluates EPPO's news reports from October to December 2023 and continues the overview in →[eucrim 2/2023, 128–129](#). The overview is in reverse chronological order.

- 14 December 2023: In a criminal procedure led by the EPPO in Zlín (Czechia) [plea bargain agreements are reached](#) with three individuals and three companies. The case involves subsidy fraud with damage of over €1.8 million (CZK 45.8 million). The suspects falsely increased prices for machinery and provided false and incorrect documents in order to receive €1.8 million under the EU's Structural Fund. As part of the plea bargain agreements, the primary defendant agreed to pay back the total amount of damage of €1.8 million; all individuals accepted a conditional sentence of between two and five years with probation, and to pay fines ranging from €4000 to €40 000. All companies agreed to pay fines of between €12,000 and €200,000. In addition, the primary defendant and his company have been banned from applying for subsidies for a period of between 8 and 10 years.

- 31 October 2023: In an EPPO case involving the [unlawful obtainment of funds from the EU's Common Agricultural Policy \(CAP\)](#) and the EU's European Agricultural Fund for Rural De-

velopment (EAFRD) with an estimated damage of €270,000, the Court of First Instance of Athens convicted one defendant to eight months' imprisonment, suspended for three years. The court refrained from imposing sentences to seven other defendants because they fully payed back the money illegally received.

- 31 October 2023: The Court of First Instance of Athens hands down the [first verdict in an EPPO case in Greece](#).

The judgment relates to a police officer who presented false receipts, during the course of his service, for travel and accommodation expenses, which were covered by the EU's Internal Security Fund (ISF), but which were had never been incurred. He was sentenced to 18 months' imprisonment, suspended for 3 years, and a fine of 400 daily units (€10 per daily unit).

- 12 October 2023: The [District Court of Vilnius \(Lithuania\) convicts six persons and one company](#) of document forgery, fraudulent account management and high value fraud.

Investigations by the EPPO in Vilnius revealed that EU funds of €580,000 for the support of small and medium-sized enterprises were unduly received. A business owner and a supplier falsified documents and agreed on the inflation of costs for the production of COVID-19 protective material. Since the defendants plead guilty and repaid the damage before the verdict, they received suspended custodial sentences of between nine months and one year. The individuals and convicted company also have to pay fines ranging from €19,000 to €150,000.

- 9 October 2023: The Correctional Chamber of the Dutch-speaking Tribunal of First Instance in Brussels (Nederlandstalige correctionele rechtbank)

renders the [first verdict in an EPPO case investigated in Belgium](#). The defendant, an IT consultant working for the EU, was sentenced to six months' imprisonment, suspended for three years, and a fine of €8 000 for attempt-

ed fraud. The defendant intended to receive double payments for the same work when he filled out duplicate time sheets. (TW)

EPPO's Operational Activities: mid-November – December 2023

This news item provides an overview of EPPO's main operational activities from 16 November to 31 December 2023. It continues the periodic reports of the last issues (→[eucrim 3/2023, 247–248](#)) and is in reverse chronological order.

- 21 December 2023: The EPPO in Zagreb (Croatia) [indicts a farm owner and a public official](#) at the Ministry of Agriculture for subsidy fraud and abuse of office and authority, following an investigation into projects for building a winery and planting a vineyard, co-funded by the EU. The farm owner allegedly submitted false statements to meet the eligibility criteria. The public official is accused of having decided in favour of the application against his better judgement.

- 11/12 December 2023: At the request of the EPPO in Athens (Greece), [10 persons are arrested and eight luxury cars](#), several other motor vehicles, a high number of mobile phones and over €50,000 in cash are seized. The raids target a criminal organisation that established a missing trader intra-community fraud involving the trade in consumer electronics (mainly mobile phones) since the beginning of 2018. The EPPO investigation has revealed estimated losses to the EU and national budgets of €36.4 million. Furthermore, the organisation is suspected of having used its company network to siphon subsidies of nearly €10 million received as financial aid from the Greek State and the EU for the recovery of businesses from the COVID-19 pandemic.

- 11 December 2023: The [EPPO in Athens charges 23 suspects](#) for crimes in relation to the execution of contracts for restoring remote traffic

control and signalling systems on the Greek rail network, co-funded by the EU Cohesion Fund. The EPPO's investigations found that the two companies constituting the contractor consortium arbitrarily breached the contract with the subsidiary of the Greek Railway Organisation (ERGOSE). The consortium and ERGOSE also colluded in unlawfully modifying the contract which led to an increase of unwarranted costs. Officials of the Managing Authority, responsible for overseeing the use of the funds, are alleged to have approved the distribution of corresponding funds despite the fact that employees of ERGOSE submitted patently inaccurate and false documents. As a result, 14 public officials of ERGOSE are charged with subsidy fraud; 4 public officials of the Greek Managing Authority of the EU's Operational Programme for Transport Infrastructure, Environment and Sustainable Development are charged with misappropriation of funds; and 5 legal representatives and employees of the consortium contractor are charged with instigation of subsidy fraud and instigation of false certification with the purpose of obtaining an unfair advantage for another person.

■ 8 December 2023: The EPPO in Zagreb (Croatia) in Zagreb (Croatia) officially initiates an [investigation against a former minister and a former employee](#) of Croatia's Ministry of Regional Development and EU Funds (MRRFEU) for abuse of office and authority. The two persons are alleged to have had the minister's private restaurant visits and parties financed by the EU Cohesion fund.

■ 6 December 2023: Following operation "Admiral" of 29 November 2022 (→eucrim 4/2022, 237), the first indictment is filed. The [EPPO in Porto \(Portugal\) charges](#) 12 suspects and 15 companies for aggravated tax fraud, money laundering and active and passive corruption in the private sector. The defendants are suspected

of having set up and orchestrated one of the largest intra-community VAT fraud schemes ever detected in the EU. Their illegal trade in electronic devices involved over 9000 companies and 600 individuals located in different countries. Criminal activities spread throughout over 30 countries. It is estimated that losses to the national and EU budgets amount to over €2.2 billion. The damage in Portugal alone amounts to over €80 million. If found guilty, defendants face up to 25 years of imprisonment.

■ 5 December 2023: Following an investigation by the EPPO in Palermo and Rome (Italy), a house arrest against one suspect and the [seizure of €4.5 million against six companies](#) is executed. Under investigation are several aquaculture producers who are suspected of having artificially inflated the project costs for the construction and refurbishment of production sites and of having obtained illicit profits that were used for other purposes than those established in the project application. The project was co-funded by the EU's European Maritime and Fisheries Fund (EMFF) Operational Program 2014–2020.

■ 4 December 2023: The EPPO offices in Luxembourg City and Frankfurt am Main (Germany) have several searches carried out. [Police and tax authorities seize 17 bank accounts](#), cash, gold and cryptocurrencies. The measures target a criminal group that is suspected of having set up a missing trader intra-community fraud scheme involving the trade in small electronic devices (mainly AirPods). Shell companies are also based in Italy.

■ 28 November 2023: The EPPO in Cluj-Napoca (Romania) has [offices of the Municipality of Deda and other premises searched](#) in a probe into the misuse of EU funds. It is suspected that funds for inclusion and anti-discrimination projects were used for other purposes by persons involved in the project or their associates. The

funding amounted to a total of €5.5 million of which the EU co-funded over €4.6 million.

■ 23 November 2023: In an investigation into the [misuse of funds from the EU Rural Development Programme](#) 2014–2020, the EPPO in Sofia (Bulgaria) has several locations searched. It is suspected that the Boychinovtsi Municipality received funding for road construction works (€2.6 million) which were never completed.

■ 22 November 2023: Law enforcement authorities in Denmark, France, Germany, Hungary, Lithuania, the Netherlands, Sweden and Switzerland, with the support of Europol, carry out the [operation code-named "Goliath"](#). Nearly 60 companies and premises are searched and assets seized, including two luxury cars and several luxury watches. The operation under the lead of the EDP in Hamburg (Germany) targets a VAT fraud scheme involving the international trade in consumers electronics. The losses to the national and EU budgets are estimated at €85 million. Investigations found evidence that suspects established companies in Germany, other EU Member States, and non-EU countries, in order to trade the goods through a fraudulent chain of missing traders without paying VAT.

■ 21 November 2023: Investigators strike a [blow against VAT fraudsters](#). At the request of the EPPO in Madrid (Spain), 13 searches were carried out and 24 people arrested in several Spanish cities. The EPPO's investigations concern a large-scale VAT fraud with an estimated damage of more than €25 million. An organised crime group is suspected of having orchestrated a missing trader fraud scheme with IT equipment involving Spain, Belgium, Lithuania, Romania and Latin American countries.

■ 17 November 2023: The EPPO reports that, in a [joint action](#) prepared by the EPPO in Athens (Greece) and Cologne (Germany), law enforcement agents carried out 42 searches in

Greece and Germany and seized several luxury cars, goods with a value of more than €100,000, a large number of smartphones, laptops and desktop computers, and more than €250,000 in cash. Two people were arrested in Greece on the basis of EAW requests from the EPPO in Cologne. German and Greek EDPs are investigating a missing trader VAT fraud involving small electronic devices. It is estimated that the suspects evaded more than €30 million in VAT. (TW)

Eurojust

Eurojust Working Arrangement with Panama

On 12 January 2024, Eurojust and the Republic of Panama signed a Working Arrangement to step up their cooperation against organised crime. Under the agreement, both parties shall develop and encourage strategic cooperation to combat serious and organised crime and terrorism. In addition, the functions of Eurojust's contact points in Panama as well as the functions of Eurojust in facilitating judicial cooperation are regulated.

European Judicial Network (EJN): New Website Launched

On 11 December 2024, the EJN launched a [new version of its website](#). Next to updates of the Atlas and Compendium, the website features a new section dedicated to its cooperation with partners, judicial networks, and non-EU countries. Users can now also find information on which network a country is a party to. Furthermore, EJN Contact Points now have the possibility to access information about the respective contact persons in non-EU countries, judicial networks, and partners cooperating with the EJN. EJN Contact Persons can upload their personal data and data visibility using a newly created "My profile information" box. (CR)

Within their respective mandates and competences, cooperation may include, in particular:

- Exchanging legal, strategic, and technical information;
- Inviting each other to awareness raising and knowledge building events;
- Facilitating communication between the competent authorities of the EU Member States and Panama;
- Ensuring mutual understanding and the exchange of best practices.

The arrangement does not constitute a legal basis for the exchange of personal data. Panama is the first Latin American country to sign a Working Arrangement with Eurojust. (CR)

Frontex

EP Resolution on Frontex Fact-Finding Investigation

spot light On 14 December 2023, the European Parliament (EP) [adopted a Resolution](#) on the fact-finding investigation of the LIBE Frontex Scrutiny Working Group (FSWG) ([→eucrim news of 27 November 2023](#)).

With 366 votes in favour, 154 against, and 15 abstaining, the need for an effective and well-functioning European Border and Coast Guard Agency became clear. The [EP resolution](#) reinforces both the increased responsibility and budget of the agency (which saw its budget increase from €114 million in 2015 to €750 million in 2022), which needs to be reflected in increased accountability and transparency as well as increased scrutiny of the agency's respect for Union law.

Looking at Frontex management, the resolution recognizes that significant managerial changes were introduced over the last two years. Nevertheless, MEPs call on the new leadership to undertake the extensive reforms needed and call on the Frontex management board to evaluate how to step up its involvement and scrutiny of the way in which the agency is run.

The MEPs expressed their disappointment that – despite the FSWG – the Commission, Frontex management, and OLAF failed to share pertinent information: During the appointment procedure of the new executive director, one of the candidates proposed for the post was "a person of interest" in the second ongoing OLAF investigation against Frontex. MEPs claim that this failure to share information constitutes a breach of the principle of mutual and sincere cooperation that governs relationships between institutions, agencies, bodies, and offices of the Union.

While efforts have been made by Frontex to implement the FSWG recommendations (36 out of 42), MEPs recommend that further specific actions be taken, such as earlier involvement of the Fundamental Rights Officer and the integration of a transparent reporting mechanism during the development of operational plans. Furthermore, formal guarantees should be established to ensure that rules and safeguards on whistleblower protection are applicable to seconded national experts, trainees, interim staff, and local agents.

With regard to the agency's transparency and scrutiny, MEPs are satisfied with the newly introduced "dashboard", a reporting tool designed to provide Parliament and the Council with an up-to-date overview of Frontex activities. However, OLAF reports on the agency should still be made public in cases of overriding public interest in disclosure, and relevant Members of Parliament should be given access to such reports in all such cases. Lastly, MEPs endorsed the recommendations of the European Ombudsman for Frontex to take a more proactive approach towards transparency, with a view to ensuring greater accountability for its operations.

In the area of fundamental rights, MEPs continue to harbour severe concerns regarding the serious and

persistent allegations made against Greek authorities in relation to pushbacks and violence against migrants and regarding the ongoing return-related operations in Hungary. In addition, MEPs request that the agency ensure full cooperation for the inquiry following the drowning of hundreds of people off the coast of Greece on 14 June 2023.

Taking note of the crucial role of the Union in preventing the deaths of migrants attempting to cross the Mediterranean Sea, Frontex needs to play a key role in search and rescue, taking a more proactive response on the part of the EU and its Member States, particularly in the Mediterranean Sea and in the fight against criminal smugglers and human traffickers.

Lastly, looking at the Russian invasion of Ukraine, MEPs welcome the role played by Frontex in the following:

- Helping EU Member States deal with the large numbers of people crossing the EU's external borders;
- Deploying approx. 500 standing corps officers along the eastern EU border from Finland to Romania;
- Offering support to Moldovan authorities;
- Signing a grant agreement worth €12 million between Frontex and the Ukrainian State Border Guard Service to support Ukrainian border officers in performing their duties. (CR) ■

2023 Saw Marked Increase in Irregular Border Crossings

With over 355,300 irregular border crossings from January to November 2023, the year 2023 witnessed a 17% increase in the number of detections of irregular border crossings, marking the highest value recorded since 2016. The largest increase was on the Western African route, the figure having doubled compared to previous years.

The Central Mediterranean route remained the busiest migratory route in 2023; it was the most perilous one

with most missing individuals reported. Overall, 2511 individuals were reported missing in the Mediterranean in the period from January to November 2023. (CR)

Agency for Fundamental Rights (FRA)

New FRA Director Appointed

On its meeting of 14 and 15 December 2023, the FRA Management Board appointed Ms Sirpa Rautio as the next FRA Director. Ms Sirpa Rautio has served many years in international and regional human rights organisations such as the UN, the Council of Europe, the OSCE and the EU working for human rights, democracy and the rule of law. Between the years 2017 and 2020, she also chaired FRA's Management Board. At the time of her appointment, she held the position of Director of the Finnish Human Rights Centre and Chair of the European Network of National Human Rights Institutions (EN-NHRI).

Ms Rautio will take up her 5-year term in the forthcoming months. She succeeds Mr Michael O'Flaherty, who was appointed in September 2015, and whose term expired on 15 December 2023. (CR)

Specific Areas of Crime

Protection of Financial Interests

European Chief Prosecutor: Slovakia May No Longer Effectively Protect EU's Financial Interests

On 18 December 2023, European Chief Prosecutor *Laura Codruța Kövesi* sent a letter to the European Commission in which she pointed to several worrying amendments in the Slovak legislation that affect the rule of law as basis for the protection of the EU's financial interests. The letter was addressed in line with Recitals 9, 16 and 17 of

Regulation (EU) 2020/2092 of 16 December 2020 on a general regime of conditionality for the protection of the budget of the European Union (Conditionality Regulation →eucrim 3/2020, 174–176). The EPPO can provide input to the Commission in order to determine whether breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way (Art. 4 of the Regulation).

Kövesi concludes that (proposed) amendments to the Slovak Criminal Procedure Code, the Criminal Code, the Act on the Public Prosecutor's Office and the Act on the Protection of Whistle-blowers constitute a serious risk of breaching the rule of law in the meaning of Art. 4(2)(c) of the Conditionality Regulation. In detail, these amendments would entail the following:

- Minimizing detection of potential fraud affecting the EU's financial interests;
- Disrupting functional reporting lines established between the EPPO and the Special Prosecution Service;
- Cutting the EPPO from the specialized investigators of the National Criminal Agency, without adequate replacement;
- Rerouting most of the EPPO cases from the Specialized Penal Court to lower courts, with little expertise in crimes under the competence of the EPPO;
- Constituting a *de facto* amnesty in a substantial number of active investigations into fraud affecting the EU's financial interests in the Slovak Republic.

In addition, Kövesi puts into question whether the Slovak government currently maintains the principles of sincere cooperation (Art. 4(3) TEU) and the effective protection of the Union budget (Art. 325 TFEU).

Update: On 18 January 2024, the European Chief Prosecutor replied to the public comment made by Maroš Žilinka, General Prosecutor of the Slovak Republic, in which he attempted to downplay voiced concerns over the recent legislative amendments proposed by the Slovak government. According to the [European Chief Prosecutor's statement](#), the reforms will also have an impact on EPPO's cooperation scheme since most investigated offences under the competence of the EPPO are transnational in nature. They will make Slovakia "a weak link" that "would put at stake the integrity of the whole EPPO zone". (TW)

Corruption

EU Commits on International Anti-Corruption Day

Each year, 9 December marks [International Anti-Corruption Day](#). The day was designated by the UN General Assembly as a way to raise awareness of corruption and of the role of the UN Convention Against Corruption (UNCAC) in combating and preventing it. The Convention was adopted in 2003 and celebrates its 20 anniversary in 2023 with meanwhile 190 parties. [The 2023 International Anti-Corruption Day highlighted](#) the crucial link between anti-corruption and peace, security, and development.

On the eve of the International Anti-Corruption Day, the European [Commission affirmed](#) the EU's commitment to fight corruption in particular also at the global level. The Commission stressed its support for the [Conference of State Parties \(CoSP\) to the UN Convention against Corruption](#), which took place from 11 to 15 December 2023 in Atlanta (United States of America). The Conference is the main policymaking body of the UNCAC and meets every two years. It supports States parties and signatories in their implementation of the UNCAC, and gives policy

guidance to UNODC to develop and implement anti-corruption activities.

The Commission also called to mind its anti-corruption package which was presented in May 2023 ([→eucrim 2/2023, 139](#)). According to the Commission, this represents a milestone in the fight against corruption, both at national and EU level, including the legislative proposal for a new anti-corruption Directive criminalising corruption offences and harmonising penalties across the EU ([→eucrim 2/2023, 140–141](#)) and the establishment of the EU Network against Corruption ([→eucrim 2/2023, 141](#)).

Lastly, the Commission pointed out a recent [Eurobarometer survey on corruption](#) which found that 4 in 10 citizens believe that corruption has risen in their country over the past three years. Also 65% of EU companies think the problem of corruption is "fairly" to "very" widespread in their country. Citizens and businesses alike are increasingly sceptical about national efforts to address corruption. (TW)

Tax Evasion

New Rules for Payment Service Providers to Fight VAT Fraud

[New transparency regulations](#) to combat VAT fraud in cross-border payments came into force on 1 January 2024. [Directive 2020/284/EU](#) amended the original VAT [Directive 2006/112/EC](#) with regard to the introduction of certain reporting requirements for payment service providers (PSPs), such as banks, e-money institutions, payment institutions and post office giro services. The aim of this new measure is to provide the tax authorities of the EU Member States with the necessary tools to detect possible VAT fraud, particularly in e-commerce – an area which is predominantly prone to VAT non-compliance. In detail, the new regulations entail the following:

- As of 1 January 2024, PSPs will be obliged to monitor the payees of cross-border payments;
- As of 1 April 2024, PSPs must also provide information on persons who receive more than 25 cross-border payments per quarter to the tax administrations of the EU Member States;
- The information will be stored centrally in a new European database developed by the EU Commission (Central Electronic System of Payment information – [CESOP](#)) and cross-checked with other data;
- All information contained in CESOP will be made available to the Member States via [Eurofisc](#), the EU's network of anti-VAT fraud specialists launched in 2010. This will facilitate data analyses and identification of online sellers who do not comply with VAT obligations, including businesses that are not located in the EU;
- Eurofisc liaison officials are empowered to take appropriate action at national level, such as proceeding with requests for information, audits, and deregistration of VAT numbers.

Germany has implemented Directive 2020/284 by inserting [§ 22g Umsatzsteuergesetz](#) (Value Added Tax Act). (TW)

Counterfeiting & Piracy

Report on EU IPR Enforcement in 2022

On 27 November 2023, The European Commission (DG TAXUD) and the European Union Intellectual Property Office (EUIPO) released their [annual report on the EU enforcement of intellectual property rights](#) (IPR). The report presents the efforts made and work carried out by all authorities in the domain of the enforcement of IPRs at the EU border and in the EU internal market in 2022.

In total, approximately 86 million fake items were detained in the EU

in 2022 (aggregated data of both the EU external border and the internal market). This is a slight decrease compared to 2021 (detention of approximately 87 million fake items). The estimated value of fake items detained in the EU amounted to over €2 billion in 2022, an increase of approximately 3 % compared to 2021. Almost 60 % of the total value of detained items was accounted for by detentions in the internal market, while the remaining resulted from detentions at the EU border, which corresponds to the percentages of previous years. Other key figures of IPR enforcement in 2022 include the following:

- The five most detained products were games, packaging material, toys, cigarettes and recorded CDs/DVDs. These items accounted for more than 72 % of the products recorded;
- The five products which represented the highest estimated value of detentions were watches, clothing, bags/wallets/purses, jewellery, and games;
- Ten Member States (Italy, France, the Netherlands, Bulgaria, Germany, Lithuania, Spain, Hungary, Greece and Portugal) accounted for over 96% of the total number of fake items detained in 2022 in the EU. Italy detained over 50% of the total number of fake items, and accounted for over 33% in terms of estimated value;
- As in previous years, China was the main country from which the majority of fake goods enter the EU, followed by Turkey (mostly fake clothing) and Hong Kong (mostly fake mobile phone accessories).

The report also shows that counterfeiters increasingly ship packaging material and the valuables separately, which indicates that fake goods are more often assembled in the EU. Having assessed the detentions and values in the internal market, another trend is that seemingly cheaper product categories are more often subject to infringements than in previous years. (TW)

Generative AI and Copyright Law

In November 2023, Eurojust published a new report analysing the impact of Generative Artificial Intelligence (AI) on intellectual property crimes. Generative AI refers to a category of artificial intelligence techniques and models that are designed to generate new and original content, including text, imagery, audio, and other data.

Recent examples of such generative AI are technologies such as ChatGPT, DALL-E, and Bard. The development of generative AI is further supported by (1) the development of so-called large-language models (LLM) that can perform language processing tasks and (2) multimodal AI that can recognise various types of data, including text, speech, videos, and images at the same time. As a result, generative AI can create different types of content, music, and images, which gives rise to numerous questions for the copyright system and the law; as it stands today, they protect works that are original, with most definitions of originality requiring a human author.

Raising the question of whether generative AI can infringe intellectual property (IP) rights and whether it can produce IP-infringing results, the report first explains the generative AI "training" process, which basically involves feeding it with massive amounts of publicly available data. If this data includes copyrighted works, the question arises as to whether their use is permissible. The report gives a short overview of the answers given by US courts, which are currently dominated by the fair use doctrine, and courts in the EU Member States, which seem to take a stricter approach under the EU's Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market.

Proceeding from there, the report addresses the question of whether AI produced material can be transformative enough not to pose a threat to the creators or compete against their

work. Such situations are expected to raise many legal issues that will need to be addressed by the courts in future. One such possible scenario: an AI machine-generated song based on the lyrics and music of existing songs composed by many different artists.

AI-generated answers, for instance by ChatGPT, are used to illustrate how these applications work. Lastly, the report analyses how generative AI can be used by criminals to advance their modi operandi. Here, the report finds and explains several new modi operandi:

- The creation of cybercriminals' own malicious generative AI;
- The employment of generative AI to advance the unlawful streaming of copyright material;
- The use of generative AI in counterfeiting, the creation of counterfeit products, and the identification of grey markets;
- The infringement of trade secrets by using generative AI to construct malware;
- Trademark registration invoice fraud, where generative AI can be used to develop false invoices, emails, and communication papers and even generate logos like actual IP registration agencies.

The report was prepared by the Intellectual Property Crime Project funded by the European Union Intellectual Property Office (EUIPO) and executed by Eurojust. (CR)

Cybercrime

New Regulation for Cybersecurity of EU Institutions

The new [Cybersecurity Regulation](#) laying down measures for a high common level of cybersecurity at the institutions, bodies, offices, and agencies of the Union entered into force on 7 January 2024. The new legal framework follows the Commission's proposal for the Cybersecurity Regulation in March

2022 ([→eucrim news of 26 April 2022](#)) and the political agreement reach by the European Parliament and Council in June 2023.

The regulation's comprehensive measures to reach a high level of cybersecurity emphasize the importance of establishing an internal cybersecurity risk management, governance, and control framework tailored to each Union entity's needs and taking into account the evolving nature of cyber threats and the interconnectedness of digital systems.

The regulation introduces the Interinstitutional Cybersecurity Board (IICB) to oversee and assist in the regulation's implementation, ensuring that Union entities work towards achieving a unified cybersecurity standard. The Computer Emergency Response Team for EU institutions (CERT-EU) is being expanded under this regulation in order to serve as a central hub for threat intelligence, information exchange, and incident response coordination – it has been renamed the Cybersecurity Service for the Union institutions while retaining the acronym "CERT-EU". (AP)

Report on Online Fraud Schemes

On 19 December 2023, Europol published a new [spotlight report](#) looking into online fraud schemes (OFSs). The report gives examples for online fraud against individuals and for the private and public sectors such as investment fraud, business email compromise (BEC), and phishing campaigns. In the area of online fraud against payment systems, the report looks at logical attacks against ATMs, skimming, shimming, and the takeover of accounts. It explains the criminal actors involved in online fraud and looks at the future of OFSs, including Europol's role in the fight against such fraud schemes.

In its key findings, the report notes that online fraud schemes represent a major threat in the EU and beyond, generating multi billions in illicit profits every year, with investment fraud

and BEC remaining the most prolific online fraud schemes. Fraudsters are highly adaptive to new developments, display sophisticated modi operandi, and use increasingly more complex social engineering techniques. Looking at the future, the report paints an even darker scenario, with OFSs set to further expand in both harm and reach. According to the report, new foci, new narratives, new products, new modi operandi, and the growth of deepfakes and crime-as-a-service systems will lure more victims than ever. In addition, the growth of (unethical) generative artificial intelligence (AI) systems and the new capabilities offered by quantum computing will add another layer of complexity to the threat. (CR)

pean Union to these eleven countries or territories continues to benefit from adequate data protection safeguards; therefore, the adequacy decisions adopted for them remain in place and data can continue to flow freely to these jurisdictions. The review further establishes that the data protection frameworks in these countries and territories have further converged with the EU's framework. As to government access to personal data, the review observed that the law of these countries or territories imposes appropriate safeguards and limitations and provides oversight and redress mechanisms in this area.

The report underscores the growing importance of adequacy decisions in the digital age, where data flows are crucial for the digital transformation of society and the global economy. Adequacy decisions ensure safe data flows that respect individual rights and promote convergence between privacy systems, thus facilitating commercial operations and international cooperation. They are particularly beneficial for small and medium enterprises in that they simplify compliance with GDPR transfer requirements.

The Commission plans to hold a high-level meeting with the relevant authorities in each of the countries and territories concerned in 2024. The objective is to enhance the dialogue between them by exchanging information and experiences. (AP)

Balancing Privacy and Scrutiny: GDPR in the Spotlight as Parliamentary Inquiries Unfold

In its judgment of 16 January 2024, the ECJ clarified to which extent a parliamentary inquiry committee that scrutinizes national security activities is subject to the obligation under the General Data Protection Regulation (GDPR) and to which extent compliance with the GDPR must be monitored by the national data protection authority ([Case C-33/22](#)).

In the case at issue, the Austrian parliament set up committee of inquiry to investigate potential political influence over a security-related authority, the Austrian Federal Office for the Protection of the Constitution and Counter-Terrorism. The inquiry raised concerns about the processing of personal data, in particular the publication of a video on the parliament's website with the full name of a witness, despite his wish to remain anonymous. This led to a complaint under the GDPR.

The Austrian Supreme Administrative Court has asked the European Court of Justice (ECJ) whether the committee of inquiry, which is a part of the legislature and carries out an inquiry as regards national security activities, is subject to the GDPR.

The ECJ clarified that a parliamentary committee of inquiry must, in principle, comply with the GDPR, even when exercising its powers of scrutiny over the executive. There is an exception, however, for activities directly related to the protection of national security, when GDPR obligations cannot apply. In this particular case, the committee's investigation did not appear to be related to national security, as it focused on political influence over the executive body responsible for security and counter-terrorism. The ECJ emphasized that any limitation of GDPR obligations justified by national security should be based on legislative measures, which the committee could not claim.

The Austrian data protection authority initially rejected the complaint, citing the separation of powers. The ECJ now ruled that, despite the principle of separation of powers, the Data Protection Authority, as the sole supervisory authority in Austria under the GDPR, is competent to monitor the committee's compliance with the GDPR.

The decision underscores the direct effect and primacy of EU law, including the GDPR, over national constitutional law. The case now awaits further

review by the referring Austrian Supreme Administrative Court to confirm whether the committee's actions were indeed related to national security and whether any legislative measures justified the disclosure of the witness's name. (AP)

ECJ: Fear of Misuse of Personal Data after Cyberattack Constitutes Non-Material Damage

On 14 December 2023, the ECJ delivered its [judgment](#) in [Case C-340/21](#) (*Natsionalna agentsia za prihodite*) in which it clarifies the conditions for compensation for non-material damage resulting from a cyberattack pursuant to the General Data Protection Regulation (GDPR).

The case concerns a cyberattack against the Bulgarian National Revenue Agency (NAP), which is attached to the Bulgarian Minister for Finance. Following the cyberattack on the NAP's IT system and the unauthorized disclosure of personal data on the Internet, several individuals, fearing potential misuse of their data. They filed legal actions against the NAP for compensation for non-material damage. The Bulgarian Supreme Administrative Court referred several questions to the ECJ seeking clarification of the conditions for awarding compensation to data subjects whose personal data, held by a public agency, were published on the internet following the attack from cybercriminals.

Key points from the judgment include:

- Assessment of protective measures: National courts cannot automatically assume that the protective measures implemented by the data controller were inadequate based solely on the unauthorized disclosure of data. The appropriateness of these measures must be evaluated on a case-by-case basis;
- Burden of proof on the controller: The data controller is responsible for demonstrating that the protective

measures implemented were appropriate;

■ Liability for third-party actions: If a third party was responsible for the unauthorized disclosure of data, the controller may be obligated to compensate affected data subjects, unless it can prove that it was not responsible for the damage;

■ Fear of misuse as non-material damage: The fear experienced by a data subject regarding the potential misuse of his/her personal data by third parties, resulting from a GDPR infringement, can itself constitute non-material damage.

It is now for the Bulgarian Supreme Administrative Court to dispose of the case in accordance with the ECJ's replies. (TW)

ECJ Clarifies GDPR Administrative Fines

In its [judgments](#) of 5 December 2023 in [Case C-683/21](#) (*Nacionalinis visuomenės sveikatos centras*) and [Case C-807/21](#) (*Deutsche Wohnen*), the ECJ clarified several aspects of the General Data Protection Regulation (GDPR) regarding administrative fines for data protection infringements. It follows that a data controller can only be fined if the infringement was committed wrongfully, meaning intentionally or negligently. This applies even if the infringement was not directly committed by the management body of a legal entity but by its representatives or anyone acting on its behalf. Additionally, the Court stated that, when calculating fines for entities that are part of a larger group, the total turnover of the entire group must be taken into account.

These replies resulted from respective inquiries from Lithuanian and German courts concerning fines imposed on the National Public Health Centre of Lithuania (contesting a fine of €12,000) and on the German real estate company Deutsche Wohnen (contesting a fine of over €14 million im-

posed as a result of its having stored the personal data of tenants for longer than necessary).

The Court also highlighted that data controllers could be fined for actions performed by processors as part of their responsibility. It also addressed the concept of joint control without the need for a formal arrangement between entities, because a common decision, or converging decisions, is sufficient to establish such control. (AP)

ECJ: Belgium Must Improve the Law on the Indirect Exercise of Data Subjects' Rights under LED

On 16 November 2023, the ECJ delivered a [judgment](#) on the interpretation of the right of indirect access to personal data as foreseen in Art. 17 of Directive 2016/680 known as the Law Enforcement (Data Protection) Directive (LED).

➤ *Background of the case*

The case concerns the implementation of this provision in Belgium. In a concrete case brought to the Belgian courts by BA it revealed that individuals, whose data protection rights to information and data access vis-à-vis the police are restricted for public interest purposes, have no judicial remedies against the decision taken by the Belgian Supervisory Body for Police Information (OCIP). Next to the question on the availability of effective judicial remedies, the referring court (the Brussels Court of Appeal) asked whether Art. 17(3) of Directive 2016/680 is actually valid having regard to Arts. 8(3) and 47 CFR in so far as it obliges the supervisory authority only to inform the data subject (i) that all necessary verifications or a review by the supervisory authority have taken place and (ii) that that person has a right to seek a judicial remedy. For further details on the case ([C-333/22 \(Ligue des droits humains ASBL, BA v Organe de contrôle de l'information policière\)](#)), the questions referred and the opinion by AG Medina →[eucrim 2/2023, 151–152.](#)

➤ *ECJ on the necessity of a judicial remedy*

The Court first finds that, in informing the data subject of the result of the verifications made, the competent supervisory authority adopts a legally binding decision. This decision must be amenable to judicial review in order for the data subject to be able to challenge the assessment made by the supervisory authority concerning the lawfulness of the data processing and the decision as to whether or not to adopt corrective measures.

➤ *ECJ on the validity of Art. 17(3) LED*

Second, the Court points out with regard to the validity of Art. 17(3) LED that this provision is a limitation on the right to an effective judicial remedy, guaranteed in Art. 47 CFR when it allows the supervising authority to submit minimum particulars only in the statement of reasons for its decision. This can be legitimate in particular where rules seek to avoid compromising the public interest purposes provided for by the LED. However, national implementing law must satisfy the other criteria of Art. 52 CFR, i.e., (i) respect the essence of the right to effective judicial protection and (ii) being based on a weighing up of the public interest purposes warranting limitation of that information and of the fundamental rights and legitimate interests of the data subject, in accordance with the principles of necessity and proportionality. Thus, it is for the Member States to provide the following rules:

- Under certain conditions, the information disclosed to the data subject may go beyond the minimum information;
- The competent authority has a degree of discretion to determine whether it may communicate to the data subject, at least in brief, the result of its verifications;
- The court which exercises judicial review of the correct application of Art. 17 LED by the supervisory author-

ity must have the possibility to examine both all the grounds and the related evidence on the basis of which that authority based the verification of the lawfulness of the processing of the data at issue as well as the conclusions which it drew from that verification.

Having regard to these considerations, the ECJ held that there is nothing calling into question the validity of Art. 17(3) of Directive 2016/680. (TW)

Cooperation

Customs Cooperation

Launch of New Expert Group to Fight Drugs Trafficking

On 24 November 2023, as part of the European ports alliance, the European Commission [launched a new strategic project group](#) to strengthen the role of EU Customs in the fight against drug trafficking. The group consisting of customs experts will meet regularly and be tasked with the following:

- Mapping the situation on the ground;
- Analysing relevant information;
- Working towards a common understanding and coordinated approach;
- Drawing up a threat and risk assessment;
- Setting out common and efficient actions;
- Sharing best practices.

The Commission plans further initiatives in order to improve the mobilisation of EU Customs in ports against drugs trafficking. These initiatives include:

- Setting up a new expert team under the [EU Customs Programme](#), which will further co-ordinate operations and more targeted controls on the ground as of mid-2024.
- Funding state-of-the-art equipment for scans of containers and other means of transport under the Customs

Control Equipment Instrument (CCEI) programme in order to increase the effectiveness of customs risk management and controls related to illicit drugs and drug precursors;

- Implementing the approach of scheduling drug precursors, and possibly reviewing the Drug Precursors regulations.

Moreover, the Commission will strive for establishing new public-private partnerships to support port authorities and private shipping companies in their role in the fight against drug trafficking and criminal infiltration. (TW)

Judicial Cooperation

New Legal Framework on Digitalisation of Judicial Cooperation

spot light

The European Union has taken a significant step forward in the digitalisation of its Member States' justice systems: On 13 December 2023, the European Parliament and Council adopted [Regulation \(EU\) 2023/2844](#) on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters. The Regulation is accompanied by [Directive \(EU\) 2023/2843](#) which amends certain legal acts with respect on the digitalisation of judicial cooperation. Both acts were published in the [Official Journal of 27 December 2023](#). They aim to streamline electronic communications for cross-border judicial cooperation in civil, commercial, and criminal matters. This step is in line with the [newly adopted e-Justice strategy](#) for 2024–2028, which pursues the objective to accelerate the digital transformation of the justice sector.

➤ Subject matter of the Regulation on the digitalisation of judicial cooperation

The Regulation establishes a uniform legal framework for the use of electronic communication between

competent authorities in judicial cooperation procedures in civil, commercial and criminal matters and for the use of electronic communication between natural or legal persons and competent authorities in judicial procedures in civil and commercial matters. In addition, it lays down rules on:

- The participation by parties and other relevant persons in oral hearings in civil, commercial and criminal proceedings by means of videoconferencing or other distance communication technologies;
- The application of electronic signatures and electronic seals;
- The legal effects of electronic documents;
- Electronic payment of fees.

The legal acts covered by the Regulation to implement the digitalisation of communications are listed in Annex I (for civil and commercial matters) and Annex II (for criminal matters) respectively. Communication between competent authorities and Union bodies and agencies, such as the European Public Prosecutor's Office or Eurojust, in cases where they are competent under the legal acts listed in Annex II, are also covered by the Regulation.

➤ The decentralised IT system and the "European electronic access point"

The Regulation provides that communications between competent national authorities or between national authorities and Union bodies/agencies, such as Eurojust, will be carried out by default through a decentralised IT system that fulfills certain conditions in relation to security, integrity and reliability. Member States will be able to use software developed by the Commission (reference implementation software) instead of a national IT system.

For the purpose of facilitating the access of natural and legal persons to the competent authorities in civil and commercial matters, the Regulation establishes the "European electronic access point" at Union level, as part of the decentralised IT system. It con-

tains information for natural and legal persons on their right to legal aid, and they are enabled to file claims, launch requests, send, request and receive procedurally relevant information, including digitalised case files, and communicate with the competent authorities, or have their representative do so on their behalf, in the instances covered by this Regulation, and be served with judicial or extra-judicial documents. The European electronic access point will be hosted on the European e-Justice Portal, which serves as a one-stop-shop for judicial information and services in the Union.

➤ The rules on videoconferencing, in particular in criminal matters

The Regulation opens the door for the optional use of videoconferencing or other distance communication technology in order to facilitate in proceedings in civil, commercial and criminal matters with cross-border implications oral hearings. It is clarified that a hearing conducted through videoconferencing or other distance communication technology should not be refused solely on account of the non-existence of national rules governing the use of distance communication technology. In such a case, the most appropriate rules applicable under national law, such as rules on the taking of evidence, should apply *mutatis mutandis*.

Specific to criminal matters: the Regulation provides that the use of videoconferencing or other distance communication technology can apply in the following procedures:

- European Arrest Warrant, in particular hearings of the requested person pending the surrender decision in the executing State;
- Enforcement of custodial sentences or measures involving deprivation of liberty under Framework Decision 2008/909, in particular if the sentenced person shall be given an opportunity to state his or her opinion pursuant to Art. 6(3) of the FD;

- Mutual recognition of probation decisions under Framework Decision 2008/947;
- Mutual recognition of supervision decisions as an alternative to provisional detention under Framework Decision 2009/829, in particular if subsequent decisions by the issuing authority are to be taken;
- European protection order (Directive 2011/99), in particular to ensure the right to be heard for the person causing danger;
- Mutual recognition of freezing orders and confiscation orders under Regulation 2018/1805, in particular if the “affected person” invokes legal remedies in the executing State against the recognition and execution of a freezing order or confiscation order.

Other requirements to use videoconferencing or other distance communication technology in these procedures include the following:

- The “requested competent authority” must allow the persons concerned (i.e., suspect or accused or convicted person and affected person (in case of Regulation 2018/1805)) to participate in the hearing provided that:
- the particular circumstances of the case justify the use of such technology; and
- the person has given consent for the use of videoconferencing or other distance communication technology for that hearing.
- The consent is lawful only if:
- The suspect/accused person has had the possibility of seeking the advice of a lawyer in accordance with Directive 2013/48/EU before giving consent;
- The competent authorities provided the person who is to be heard with information about the procedure for conducting a hearing through videoconferencing or other distance communication technology, as well as about their procedural rights, including the right to interpretation and the right of access to a lawyer before the consent is given;

- The consent is given voluntarily and unequivocally, and the requesting competent authority verified that consent prior to starting the hearing;
- Consent is not exempted because the person “poses a serious threat to public security or public health which is shown to be genuine and present or foreseeable”.
- Member States must ensure that the persons concerned have access to the necessary infrastructure to use videoconferencing or other distance communication technology and communication with the lawyer is confidential before and during the hearing through videoconferencing or other distance communication technology;
- A suspect, an accused or convicted person or an affected person shall, in the event of a breach of the requirements or guarantees provided for in the Regulation have the possibility of seeking an effective remedy, in accordance with national law and in full respect of the Charter.

➤ *The Directive as regards digitalisation of judicial cooperation*

Directive 2023/2843 ensures that the necessary amendments are implemented into the instruments covered by the Regulation, such as Framework Decision 2002/584 on the European Arrest Warrant and Framework Decision 2008/909 on the enforcement of custodial sentences, so that the digital tools foreseen in Regulation 2023/2844 can apply.

➤ *Application and further background*

The Regulation entered into force on 16 January 2024 and applies from 1 May 2025 (with the exception of the provisions on the decentralised IT system and the European electronic access point that will apply from the date of entry into force of corresponding implementing acts). The Directive will need to be transposed into national law within two years of the entry into force of the corresponding implementing act referred to in Art. 10(3)(d) of Regulation 2023/2844 .

The Regulation and Directive build on earlier EU initiatives, e.g., the e-CODEX system for the secure exchange of judicial data and legislation facilitating the electronic service of documents and the taking of evidence. The comprehensive e-Justice strategy outlines key actions for the EU and Member States to further develop digital justice over the next five years. (TW/AP)

European Arrest Warrant

ECJ: EAW Must in Principle Also Be Executed against a Mother of Young Children

spot light On 21 December 2023, the ECJ, sitting in for the Grand Chamber, ruled in [Case C-261/22 \(GN\)](#) that the surrender of a person requested by a European Arrest Warrant cannot be refused on the sole ground that she is the mother of young children. Thus, the ECJ reaffirmed its case law on the protection of fundamental rights in the context of Framework Decision 2002/584 on the European arrest warrant (FD EAW).

➤ *Facts of the case and question referred*

The case concerns a preliminary ruling request by the Italian Supreme Court of Cassation on the question as to whether Italian authorities can refuse surrender of a mother of young children to Belgium where she has to serve a sentence of five years’ imprisonment for offences of trafficking in human beings. Italian judicial authorities found that – due to a lack of replies from the part of Belgian authorities – there is no certainty that Belgian law recognised custody arrangements comparable to those in Italy, which protect a mother’s right not to be deprived of her relationship with her children and to ensure that children receive the necessary maternal and family assistance. The Court of Cassation indicated in this context that a narrow inter-

pretation of Art. 1(2) and (3) FD EAW might not be compatible with Arts. 7 and 24 CFR as well as Art. 8 ECHR (as interpreted by the ECtHR).

► *The ECJ's ruling – part I: general principles*

In the first part of its ruling, the ECJ called to mind the general principles of the EAW system as established by its previous, meanwhile settled case law. These include:

- The principles of mutual trust and mutual recognition are, in EU law, of fundamental importance;
- When implementing EU law, Member States are required to presume that fundamental rights have been observed by the other Member States;
- Save in exceptional circumstances, there is no check whether another Member State has actually observed the fundamental rights guaranteed;
- The execution of the EAW constitutes the rule, the refusal to execute is intended to be the exception.

Against this background, the Italian judicial authorities had to presume that the conditions of the mother's detention and of the care of her children in Belgium are appropriate to such a situation.

► *The ECJ's ruling – part II: the obligations for the executing judicial authority*

Looking at Art. 1(3) FD EAW, the judges in Luxembourg stress that the executing judicial authority must have regard to the standard of protection of fundamental rights as established in the Aranyosi/Căldăraru judgment ([→eucrim 1/2016. 16](#)). The lack of certainty on the part of the executing authority that detention conditions for the mother of young children in the issuing State are not comparable to those in the executing State cannot allow refusal. Rather, the executing authority must carry out the two-step examination known from the Aranyosi/Căldăraru judgment:

- First, the executing judicial authority has available to it information demon-

strating that there is a real risk of breach of the requested person's fundamental right to respect for her private and family life enshrined in Art. 7 CFR and of disregard for the best interests of children, as protected by Art. 24(2)/(3) CFR, on account of systemic or generalised deficiencies in the conditions of detention of mothers of young children and of the care of those children in the issuing Member State;

- Second, there are substantial grounds for believing that, in the light of their personal situation, the persons concerned will run that risk on account of those conditions.

The executing judicial authority can request supplementary information from the issuing judicial authority, which must observe the principle of sincere cooperation. If the latter does not respond in a satisfactory manner, the executing judicial authority must carry out an overall assessment of all the information available to it in the context of the two steps referred above.

As a result, if the criteria of the two-step examination are not met, the requested person must be surrendered.

► *Put in focus*

The ECJ's Grand Chamber judgment in GN may come as no surprise for observers. Also in constellations other than that in the landmark judgment in Aranyosi/Căldăraru, the judges in Luxembourg reiterated their standpoint on the protection of fundamental rights in EAW proceedings ([→ECJ, 31 January 2023, Case C-158/21 \(Puig Gordi and Others\) = eucrim 1/2023, 41–43](#); ECJ, 22 Februray 2022, Joined Cases C-562/21 PPU and C-563/21 PPU (Openbaar Ministerie) = [eucrim 1/2022, 33–34](#)). This approach results in the two-step assessment of – simply put – abstract and concrete danger of fundamental rights infringements vis-à-vis the requested person in the issuing state.

Nonetheless, the judgment could not discard critics in legal literature that the ECJ's approach is too narrow

and refusal of the execution of EAWs for grounds of fundamental rights violations is quasi impossible. This is corroborated by the fact that the Court slightly deviates from the opinion by Advocate General Tamara Ćapeta in the present case ([→eucrim 2/2023, 163](#)). Even though AG Ćapeta also clarified that the two-step examination must be carried out, she emphasised that the best interest of the child must guide the decision on the execution of the EAW. She then tried to reconcile the interests of the persons concerned and the state interest for avoiding impunity by proposing the application of Art. 4(6) FD EAW. This would have given the Italian authorities a backdoor to avoid surrender but to enforce the Belgian judgment in Italy. The ECJ's Grand Chamber does not touch upon Art. 4(6) FD EAW in the final ruling and seems to push the Italian authorities for surrender of the mother of young children to Belgium.

Ultimately, upon closer inspection, the judgement also includes some interesting details. First, the ECJ clarifies that the assessment of a fundamental rights breach under the first and second step of the examination is based on different criteria. Hence, the requirements as established in Aranyosi/Căldăraru (see above) must be satisfied successively and cumulatively.

Second, the ECJ emphasises that the executing authority cannot request supplementary information from the issuing authority concerning only the second step if it considers that systemic or generalised deficiencies do not exist in the issuing State.

Third, a real risk of breach of fundamental rights can be excluded by respective assurances provided by the issuing judicial authority.

The significance of the judgment in GN remains to be seen. Has Luxembourg now spoken the last word on the issue of the protection of fundamental rights in the EU's surrender law (Roma locuta causa finita)? (TW)



Council of Europe

Reported by Dr. András Csúri

Corruption

GRECO: The Link between Environmental Crimes and Corruption

On 8 December 2023, in the run-up to the annual International Anti-Corruption Day, GRECO President *Marin Mrčela* issued a [statement](#) in which he highlighted the links between environmental crimes (e.g., illegal forestry, illegal fishery, illegal wildlife trade, illegal mining, illegal dumping, and illegal transport of hazardous waste) and corrupt practices. Such practices target high-ranking public officials, politicians, and members of law enforcement. They include bribery and undue influence in order to gain financial benefits from environmental wrongdoings.

As these crimes cause irreparable damage to natural resources, every citizen's right to a healthy environment, and the rights of future generations, Mrčela called on all states to ensure transparency in the relevant decision-making and law-making processes. His concern is directed at the circumspect use of environmental resources, issuing permits and concessions, certification and enforcement, and environmental inspections. He also emphasized that GRECO's recommendations to its member states are also fully applicable to environment-related corruption, including the adequate regulation of lobbying and public procurement, the protection of whistleblower

ers, and the effective implementation of the recommendations.

Mrčela also pointed out that corruption prevention measures are an essential part of the "green transition" in view of the large amounts of money being invested in European Green Deal policy initiatives. Ensuring the transparency of the legislative process helps prevent abuse. The convention on the protection of the environment through criminal law, which is currently being prepared by the Council of Europe, will also allow states to better protect their environmental resources.

GRECO: Fifth Round Evaluation Report on Portugal

On 10 January 2024, GRECO presented its [5th round evaluation report on Portugal](#). GRECO acknowledges the extensive anti-corruption legal and institutional framework developed by Portugal, made possible by transparency and anti-corruption legislative packages introduced in 2019 and 2021. These include the following:

- A national anti-corruption strategy covering the period 2020–2024;
- A national anti-corruption mechanism, which is the entity responsible for the implementation and monitoring of the general regime for the prevention of corruption;
- A requirement to adopt regulatory compliance programmes in the public sector and in private entities with fifty or more employees;

- A code of conduct for members of the government and members of ministerial cabinets;
- An entity for transparency (also referred to as the transparency authority), which is entrusted with the collection and scrutiny of declarations of assets, interests, and liabilities;
- A new law protecting whistleblowers.

There have been noticeable delays, however, in the effective implementation and monitoring of the rules in many areas.

The national anti-corruption strategy lacks an action plan and proper monitoring. The national anti-corruption mechanism and the transparency authority are not yet fully operational. The government's code of conduct needs to be supplemented by proper guidance (especially as regards conflicts of interest and gifts), by awareness raising activities, and by monitoring/sanctioning mechanisms. Both the government and law enforcement authorities must comply with the requirements under the new law on whistleblower protection.

There are further deficiencies that effectively hamper the credibility of Portugal's efforts. Although there is a system in place to check the integrity of candidates prior to joining government, no such rules exist for integrity checks prior to appointment of members of ministerial cabinets. Also, the post-employment restrictions for members of government are not consistently applied in practice. Declaration systems for persons with top executive function (PTEFs) to declare their assets also have various flaws, given that there are, for instance, no operational platforms for electronic filing, no requirements to publish the declarations in full, and no regular substantive checks.

Another area of concern is public access to information, as it should be made available more readily. Websites should be updated and become more user-friendly.

Looking at law enforcement (the National Republican Guard and the Public Security Police), GRECO recommends more transparency and objectivity. Undue influence (including in the form of appointment and promotion to senior positions), donations, and external activities must be countered. The disciplinary regime also needs better oversight. Another recommendation is to further elaborate on ethical standards, in particular on conflicts of interest and gifts, in addition to implementing a confidential counseling mechanism. Lastly, GRECO recommends establishing internal whistleblower channels and increasing the representation of women at all levels.

GRECO: Fifth Round Evaluation Report on USA

On 12 December 2023, GRECO published its [5th Round Evaluation Report](#) on the United States. The country joined GRECO in 2000 and has already been assessed in four evaluation rounds. According to GRECO, the USA implemented 100% of recommendations in the First Evaluation Round (June 2002), 87% in the Second Evaluation Round (December 2005), 44% in the Third Evaluation Round (May 2011), and 75% in the Fourth Evaluation Round (May 2016).

In December 2021, the country adopted its first ever Anti-Corruption

Strategy, which predominantly focuses on the transnational dimensions of corruption. Although criminal and civil anti-bribery statutes and regulations containing rules on ethical conduct apply to nearly all persons in top executive functions (PTEFs), the President and Vice-President [of the United States] are exempt from many of the provisions, except for anti-bribery criminal statutes. In December 2022, the USA adopted the fifth US Open Government National Action Plan, which aims, *inter alia*, to improve access to government data, research and information, and to ensure accountability to the public. However, PTEF contacts with lobbyists are not subject to routine publication, which merits review.

While the Freedom of Information Act establishes the right to access public information, certain difficulties in its practical implementation still require remedy, according to the report. This has led to a backlog of requests under the Freedom of Information Act, which needs to be resolved. Another unresolved issue relates to the limited scope in prohibiting PTEF contacts with agencies and private businesses after their employment.

Against this background, GRECO recommends the following:

- Law enforcement: GRECO acknowledges that the Federal Bureau of Investigation (FBI), the primary investigative

arm of the United States government, has robust anti-corruption and integrity policies and tools that are implemented effectively. Nonetheless, the development of a dedicated FBI anti-corruption strategy would be beneficial in terms of signposting the priorities for action in this area.

- Hiring policy: The FBI has also a sound hiring policy and procedure, as vetting and re-vetting processes are strict and comprehensive, and FBI employees are subject to a wide range of ethical standards. Yet, it is no rare occurrence to move from the FBI to the private sector (with the possibility to return to the organisation at a later point in time), which is covered by an extensive set of post-employment restrictions. However, the effective application of these restrictions is almost never monitored.

- Whistleblowers: GRECO notes that more needs to be done to equip whistleblowers within the FBI with adequate procedural rights. In particular, like most federal employees under the Whistleblower Protection Act, their complaints should be subject to independent judicial review.

In conclusion, [GRECO calls on](#) the United States to continue pursuing its efforts to promote the integrity of persons entrusted with top executive functions, including the personnel of the FBI.

Articles

Articles / Aufsätze

Fil Rouge

In its news section, *eucrim* regularly updates its readers on relevant developments in the area of the protection of the EU's financial interests (PIF). The article section also regularly focuses on this topic, most recently in *eucrim* 3/2022 on institutional cooperation. This issue explores "**the protection of the financial interests in a changing context**". The changing context becomes obvious when we look at the trend towards backsliding on the rule of law in several Member States, which has put a serious strain on EU solidarity and the EU's collective aim to protect the taxpayers' money. Given that the Member States' duties under the EU Treaty – including respect for democratic values and principles and involving fundamental guarantees – are paramount, any serious and persistent breaches may negatively impact sound financial management.

The European Council concluded in July 2020 that more effective protective action is needed. It mandated that the European Commission propose measures for a legal regime of conditionality as an alternative to the Art. 7 TEU procedure designed to effectively protect the 2021–2027 EU budget and NextGenerationEU instruments. The latter mark an unprecedented financial effort for economic recovery and reconstruction after the COVID-19 crisis: an immense volume of around €700 billion. Regulation 2020/2092 on a general regime of conditionality provides for the implementation of relevant measures if a Member State seriously and continuously breaches the general principles embedded in the Union Treaties. Sanctioning decisions are also subject to qualified majority in the Council. The ECJ backed this conditionality regime in two rulings on legal actions for annulment brought by Poland and Hungary but clarified that a genuine link between the breaches identified and the protection of the financial interests is needed.

Against this background, the **first three articles** in the following section illustrate various aspects of the initiatives recently taken by EU institutions to address the **defence of values** that affect the EU's financial interests. *Jaskolska* provides an overview of the latest EU legal instruments to protect cohesion policy funding against rule-of-law conditionalities and disregard for fundamental enabling principles. This contribution is rounded off by my analysis of recent implementation practice concerning these legal instruments, under consideration of assessments undertaken and measures adopted with respect to EU cohesion programmes in Hungary and Poland. With a particular focus on anti-corruption aspects, *Stiegel* and *De Schamp* introduce

the comprehensive work carried out by the Commission in its annual rule of law reports since 2020, in which all relevant legal, administrative, and judicial developments in the EU-27 are assessed.

The **second part** of this issue (consisting of four articles) is dedicated to questions on **legislative initiatives of PIF** and related issues. *Dimitrios Skidas* deals with the centrepiece of NextGenerationEU, the Recovery and Resilience Facility, and presents a Greek case study on legislative reform of the national *ex ante* audit framework in this context. *Desterbeck* reflects on adjustments for better compensation and confiscation in cases of damage caused by PIF offences. *Androulakis*, in his article, presents a recent Council of Europe reform instrument to upgrade the existing framework for recovery of the proceeds of crime. *Varun VM*, in his turn, makes a plea for an effective asset confiscation and recovery system, both at the national level and international level, regarding offences arising from the circulation of cryptocurrencies.

The **third part** covers questions on the **implementation of the PIF's legal framework**. It first takes a look at the work of the relatively new actor bringing perpetrators of PIF offences to justice: the European Public Prosecutor's Office (EPPO). *Herrfeld* analyses and comments on the consequences of the recent ECJ's judgment of 21 December 2023 on interpretation of the EPPO Regulation, which included a new model of cross-border judicial cooperation but its provisions did not remain completely clear as to the extent of judicial protection in this scheme. He follows up on his previous *eucrim* article commenting on the Advocate General's opinion in this case. *Petr* discusses how the effectiveness of EPPO investigations in the existing data landscape can be measured. Last but not least, *Vogel* and *Lassalle* tackle another important component of the changing PIF context: the increase in public-private partnerships for the prevention of and fight against crime. They report on the results of a study that addressed the issue of how public-private information sharing and risk notifications can increase the protection of the financial system against money laundering, with due respect to the principles of the Charter of Fundamental Rights of the European Union.

Lothar Kuhl, former head of unit and senior expert, European Commission, Directorate for Audit in Cohesion and *eucrim* editorial board member

New Instruments Protecting the 2021–2027 Cohesion Budget against Rule-of-Law Breaches

Iwona Jaskolska*

This article introduces the main legal instruments at the EU level to protect the EU's financial interests with a special focus on the budget for cohesion measures. It features the Regulation on a general regime of conditionality for the protection of the Union budget (Conditionality Regulation) against breaches of the principles of the rule of law, and the cohesion policy common provisions Regulation which provides horizontal enabling conditions applicable to all its financing objectives (CPR).

I. Introduction

The rule of law is one of the founding values of the European Union. It is enshrined in Art. 2 of the Treaty on European Union (TEU), alongside human dignity, freedom, democracy, equality, and respect for human rights. According to Art. 2 TEU, these values are common to all EU Member States. While the Treaty itself does not provide a single, exhaustive definition or a list of standards constituting the rule of law, the relevant principles may be derived, *inter alia*, from the case law of the Court of Justice of the European Union (CJEU) and of the European Court of Human Rights (ECtHR) as well as from the documents prepared by the Council of Europe. These principles include legality; legal certainty; prohibition of arbitrariness of the executive powers; independent and impartial courts; effective judicial review, including respect for fundamental rights; and equality before the law.

The respect for these principles is also of paramount importance for the sound management of the Union's budget and for the legal and regular implementation of Union funding, as they can only be ensured if public authorities act in accordance with the law. This link between the rule of law and the protection of the Union's budget was accentuated in the Commission's communication of 14 February 2018 entitled "A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020,"¹ published a few months ahead of the Commission's presentation of its proposals for the Multiannual Financial Framework 2021–2027 (in May 2018). In the Communication, it reads as follows:

[A]s part of the public debate, it has been suggested that the disbursement of EU budget funds could be linked to the respect for the values set out in Article 2 of the EU Treaty and in particular to the state of the rule of law in Member States. Some have gone further, arguing that serious breaches of EU law should have consequences and should lead to the suspension of disbursements from the EU budget.

In further text, the Communication stresses the following:

[T]he Union is a community of law and its values constitute the very basis of its existence. They permeate its entire legal and institutional structure and all its policies and programmes. Respect for these values must therefore be ensured throughout all Union policies. This includes the EU budget, where respect for fundamental values is an essential precondition for sound financial management and effective EU funding.

II. Recent Legal Instruments for Protection of the Union Budget for Cohesion

On 14 March 2018, in the context of its position on the next Multiannual Financial Framework, the European Parliament called on the Commission "to propose a mechanism whereby Member States that do not respect the values enshrined in Article 2 TEU can be subject to financial consequences."² At the same time, the European Parliament insisted that such a mechanism should not ultimately punish the final beneficiaries of the Union budget, as they "can in no way be affected by breaches of rules for which they are not responsible" and that "any possible financial consequence should be borne by the Member State independently of budget implementation."

At that point in time, certain mechanisms already existed that allowed the Commission to identify and follow up on potential infringements of EU law, including an infringement procedure against a Member State based on Art. 258 TFEU and the mechanism in Art. 7 TEU (the latter allowing for suspension of certain EU membership rights provided that a unanimous European Council decision is taken determining the existence of a serious and persistent breach by a Member State of the values referred to in Art. 2 TEU – a requirement very difficult to meet). In parallel, the Member States were obliged to take all the necessary measures (legislative, regulatory, and administrative measures) to protect the Union's financial interests by virtue of Art. 59

of the Financial Regulation.³ However, there was no specific mechanism in place at that time to protect the Union's budget against generalised deficiencies related to the rule of law in a Member State.

1. The general regime of conditionality

With the entry into force of the general regime of conditionality for the protection of the EU budget ("the Conditionality Regulation") in January 2021,⁴ an additional instrument was created to protect the Union's budget in cases in which breaches of the rule-of-law principles might affect its sound financial management or protection of the financial interests of the Union in a sufficiently direct way. In Art. 2 lit. a), the Conditionality Regulation defines the "rule of law" as follows:

[It] refers to the Union value enshrined in Article 2 TEU. It includes the principles of legality implying a transparent, accountable, democratic and pluralistic law-making process; legal certainty; prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU.

The Regulation also lists a number of situations/circumstances indicative of breaches of the principles of the rule of law.⁵

This new instrument is complementary to other tools and procedures to protect the EU budget, so it can only be used in cases in which the other procedures set out in Union legislation would not protect the Union budget more effectively. According to the Conditionality Regulation, possible measures for the budget managed in shared management mode (such as, for example, cohesion policy funds)⁶ include suspension of payments, suspension of commitments, and reduction of pre-financing to a Member State. At the same time, the beneficiaries of Union funds should continue to receive their payments, made directly by the Member States concerned. Lastly, any measures proposed vis-à-vis a Member State must be proportionate. To assess whether this is the case, the Commission must take into account the nature, duration, gravity, and scope of the breaches of the rule-of-law principles. The measures should target the Union actions affected by the breaches.⁷

On 11 March 2021, Poland and Hungary brought actions for annulment of the Regulation before the CJEU, alleging, *inter alia*, that the Regulation lacks a valid legal basis and

that it constitutes an infringement of Art. 7 TEU, namely of the principles of equal treatment of Member States, of legal certainty, and of proportionality. The Court dismissed the two actions on 16 February 2022,⁸ thus confirming the validity of the Conditionality Regulation.

In its guidelines on the application of the Conditionality Regulation published on 2 March 2022, the Commission also tackles the relationship between the Conditionality Regulation and other EU budget protection instruments,⁹ underlining that, before starting the procedure under the Conditionality Regulation, it will "consider whether appropriate measures are necessary, i.e. whether other procedures set out in Union legislation for the protection of the Union budget would not allow it to protect the Union budget more effectively, as established by Article 6(1) of the Conditionality Regulation."

2. Enabling conditions applicable to funding under the Common Provisions Regulation

Cohesion policy is the Union's main investment policy to reduce disparities among regions and Member States; it is also a key component of the Union's budget. It is implemented in shared management mode, in line with the provisions of the Common Provisions Regulation (CPR).¹⁰ The CPR comprises another tool that can be used to protect the Union budget against breaches of the principles of the rule of law, specific to the funds it governs. It has to be underlined, however, that, contrary to the Conditionality Regulation, the CPR was not created with the specific intention of addressing breaches of the rule of law. It nevertheless contains a number of prerequisites (known as "horizontal enabling conditions") that a Member State has to fulfil before it receives EU funding.¹¹ One of these can be applied in the present context.

One specific enabling condition requires each Member State to establish effective mechanisms such that the implementation of its programmes complies with the Charter of Fundamental Rights of the European Union. These rights include the right to an effective remedy and to a fair trial by an independent and impartial court (Art. 47 of the Charter), which constitute key aspects of the rule of law. Member States are required to ensure that these enabling conditions remain fulfilled and respected throughout the entire programme period 2021–2027,¹² which is indispensable to receiving reimbursements of expenditure (except for expenditure related to operations contributing to the fulfilment of the relevant enabling condition).

* The information and views set out in this article are those of the author and do not necessarily reflect the official opinion of the European Commission.

1 Communication from the Commission to the European Parliament, the European Council, and the Council, "A new, modern Multiannual Financial Framework for a European Union that delivers efficiently on its priorities post-2020", COM(2018) 98 final.

2 European Parliament resolution of 14 March 2018 on the next Multiannual Financial Framework (MFF): Preparing the Parliament's position on the MFF post-2020, P8_TA(2018)0075.

3 Regulation (EU, Euratom) No 966/2012 of the European Parliament and of the Council of 25 October 2012 on the financial rules applicable to the general budget of the Union and repealing Council Regulation (EC, Euratom) No 1605/2000, OJ L 298, 26 October 2012, 1.

4 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16 December 2020 on a general regime of conditionality for the protection of the Union budget, OJ L 433I, 22.12.2020, p. 1. For a summary, see T. Wahl, "Compromise on Making EU Budget Conditional to Rule of Law Respect", (2020) *eucrim*, 174–176.

5 Idem, Art. 3.

6 Idem, Art. 5(1)(b).

7 Idem, Art. 5(3).

8 CJEU, Case C-156/21, *Hungary v European Parliament and Council of the European Union* and Case C-157/21, *Republic of Poland v European Parliament, Council of the European Union*. See also T. Wahl, "CJEU Dismisses Actions against Rule-of-Law Conditionality to Safeguard the EU Budget", (2022) *eucrim*, 21–22.

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9 Communication from the Commission, "Guidelines on the application of the Regulation (EU, EURATOM) 2020/2092 on a general regime of conditionality for the protection of the Union budget", C(2022) 1382 final, OJ C 123, 18.3.2022, 12.

10 Regulation (EU) 2021/1060 of the European Parliament and of the Council of 24 June 2021 laying down common provisions on the European Regional Development Fund, the European Social Fund Plus, the Cohesion Fund, the Just Transition Fund and the European Maritime, Fisheries and Aquaculture Fund and financial rules for those and for the Asylum, Migration and Integration Fund, the Internal Security Fund and the Instrument for Financial Support for Border Management and Visa Policy, OJ L 231, 30.6.2021, 159.

11 Idem, Art. 13 and Annex III.

12 This is in contrast to the predecessor of the enabling conditions, namely the ex-ante conditionalities introduced in the 2014–2020 programme by Regulation 1303/2013, which did not foresee such an obligation.

New Instruments in Cohesion Policy

Implementation Practice by EU Institutions

Lothar Kuhl*

This article is linked with the article by Iwona Jaskolska that introduced the new instruments protecting the cohesion budget against rule-of-law breaches (in this issue, pp. 337–339). It outlines the practical implementation of the two complementary but independent legal procedures: the Conditionality Regulation and the horizontal enabling conditions under the Common Provisions Regulation (CPR). They have been applied so far in relation to two EU Member States: Hungary and Poland. The first part of the article analyses the Commission's rule-of-law assessment of both countries and the Council's follow-up with respect to Hungary within the framework of the Conditionality Regulation mechanism. The second part looks at the important restrictions on possible requests for reimbursement under the 2021–2027 cohesion policy programmes that were imposed in parallel against Poland and Hungary in accordance with the CPR horizontal enabling conditions on the implementation of the Charter on Fundamental Human Rights.

I. Commission Rule of Law Assessment and Council Measures under the Conditionality Regime

As the Conditionality Regulation explains, respect for the common values on which the Union is founded, is a funda-

mental premise under the Treaty on European Union (Art. 2 TEU).¹ This implies and justifies mutual trust between Member States. Therefore, whenever Member States implement the Union budget, or use resources allocated on the basis of the Recovery Instrument for Next Generation Europe,² the

respect for the rule of law is an essential precondition for compliance with the principles of sound financial management as referred to in Art. 317 TFEU.

Recent legislative actions by EU institutions confirm that, for purposes of the financial implementation practice, the principles of the rule of law are recognised as general principles for the implementation of the Union budget.³ In this context, Member States and the Commission are especially called on to ensure compliance with the Charter of Fundamental Rights of the European Union (CFR), in accordance with Art. 1 of the Charter, and to respect the Union values enshrined in Art. 2 TEU, which are relevant in the implementation of the Union budget.⁴

This fundamental requirement of respect for the rule of law is based on the idea that sound financial management can only be ensured if Member States' authorities act in accordance with the law. This particularly requires that possible cases of fraud, corruption, conflicts of interest, or other breaches affecting the Union's financial interests be pursued independently by investigation and prosecution services; they are subject to effective judicial review by independent courts, acting in close cooperation with the Court of Justice of the European Union (CJEU), if necessary. More specifically, this duty derives from the obligation to respect the guarantees for an independent tribunal as set out in Art. 19 (1) second sub-paragraph TEU read in conjunction with Art. 47 CFR. When implementing the Union budget, any breaches of these guarantees systematically affect and put at serious risk the Union values.

Based on these considerations, and pursuant to Art. 6(4) of the Conditionality Regulation,⁵ the Commission sent two requests for information to Poland (on 17 November 2021) and to Hungary (on 24 November 2021) as part of the procedure to establish whether breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way.⁶

1. The rule-of-law assessment for Poland

In Poland, potential breaches of the rule of law falling within the scope of the Conditionality Regulation are illustrated by a number of respective CJEU orders and judgments on the violated independence of Polish judges and the Supreme Court of Poland.⁷ Admittedly, the underlying facts of these cases were not about Union budget implementation. But the risks affecting financial management soon became apparent. On the one hand, there was the systemic undermin-

ing of the proper functioning of the Supreme Audit Office of Poland and different measures to politically instrumentalise Poland's criminal investigation and prosecution services. On the other hand, potential breaches pertained particularly to the violation of judicial protection requirements, due to the hampering of effective judicial control by independent courts of the financial managerial action of all relevant authorities responsible for the implementation of the EU budget.⁸ The Commission must of course first carry out a thorough qualitative assessment on a case-by-case basis in an objective, impartial, and fair manner in order to identify and assess potential breaches of the rule of law under the Conditionality Regulation. Any assessment of the proportionality of measures under the Conditionality Regulation takes due account of the specific circumstances as well as budgetary and financial contexts. The Commission appraises the strict necessity of the measures in light of the actual or potential concrete impact of all possible breaches of the rule of law in conjunction with the financial management of the Union budget and the Union's financial interests.⁹

It should be noted that the CJEU interpreted the above-mentioned notions of Art. 4 of the Conditionality Regulation (setting out that breaches of the principles of the rule of law in a Member State affect or seriously risk affecting the sound financial management of the Union budget or the protection of the financial interests of the Union in a sufficiently direct way) as requiring a genuine link between the breaches of the rule of law and their effect – or the serious risk of an effect – on the sound financial management of the EU's financial interests.¹⁰

By means of these criteria, the Commission undertook a comprehensive assessment of the situation. Against this background and on the basis of the information provided by Poland, the Commission concluded in its assessment based on Art. 6 (3) Conditionality Regulation that there were not sufficient grounds to consider all the conditions for the application of the Conditionality Regulation fulfilled, and it did not initiate a procedure under this Regulation against Poland. It must be borne in mind that one of the key aims of the Conditionality Regulation is that it is to be used as a preventive tool to protect the Union budget and its financial interests. To this end, the Commission endeavours to ensure a sincere dialogue and cooperation with the Member State concerned.¹¹ A written notification under Art. 6 (1) is sent only as a last resort, should this dialogue prove unproductive and yield no other comparatively effective protective measures.

This context may also explain that, even if the Commission considers the conditions under Art. 4 for activating the

measures under the Conditionality Regulation to have been met, under the Conditionality Regulation it is not required to comprehensively document why it chose not to activate the procedure prior to sending a formal written notification under Art. 6 (1) to the Member State. The reason for this is that the Commission may consider "that other procedures set out in Union legislation would allow it to protect the Union budget more effectively." The circumstances can indeed always change. Only in the event that the Commission wants to move ahead with the procedure and considers the conditions for application of the Conditionality Regulation to be fulfilled, must it document its decision (setting out the factual elements and specific grounds on which it has based its findings) in the written notification to the Member State concerned.

2. The conditionality measures adopted concerning Hungary

By contrast to Poland, in the case of Hungary, the Commission concluded on 27 April 2022 – following various requests for information and its duly performed assessment under Art. 6(3) – that the conditions for the application of the Conditionality Regulation were fulfilled and initiated a case under this Regulation via a formal Commission notification under the Conditionality Regulation.¹² After several exchanges with Hungary, the Commission proposed on 18 September 2022 that the Council adopt budgetary measures to protect the Union budget.¹³ In December 2022, the proposal was followed by an implementing decision of the Council.¹⁴

Compared to the non-observance and monitoring of the horizontal enabling conditions set out in the CPR, the Conditionality Regulation offers the possibility to address risks linked to widespread and intertwined deficiencies and weaknesses. It offers a broad range of possible measures to protect the EU budget. In its notification to Hungary in April 2022 and in its subsequent proposal to the Council for implementing measures in September 2022, the Commission referred to several issues and their recurrence over time. These issues were indicative of a systemic inability, failure, or unwillingness on the part of the Hungarian authorities to prevent decisions that are in breach of the applicable law as regards public procurement and conflicts of interest and thus to adequately tackle the risks of corruption. The breaches of the rule-of-law principles in Hungary included systemic irregularities, deficiencies, and shortcomings in:¹⁵ (i) public procurement; (ii) detection, prevention, and correction of conflicts of interest as well as "public interest trusts"; and (iii) investigation, prosecution, and the anti-corruption framework.

On this basis, the Commission proposed the suspension of 65% of the commitments for three operational programmes under Cohesion Policy 2021–2027 (or the suspension of one or more of those programmes, in proportion to the risk to the Union's financial interests, should these programmes not yet have been adopted by the time of the Council decision). It also proposed a prohibition on entering into new legal commitments with public interest trusts and entities maintained by them for programmes implemented in direct and indirect management mode.

On 15 December 2022, the Council took the decision¹⁶ to establish measures to protect the Union budget from breaches of the principles of the rule of law in Hungary. The Council followed the Commission in its findings about deficiencies and weaknesses in the public procurement procedures in Hungary, non-application of conflict-of-interest rules to "public interest trusts", limitations to the effective investigation and prosecution of alleged criminal activity related to the exercise of public authority, and the absence of a functioning public procurement framework. The Council decided to amend the Commission proposal and reduce the percentage of commitments to be suspended from 65% to 55% for the three operational Cohesion programmes concerned. The measures include a suspension of budgetary commitments from three operational programmes under the Cohesion Policy to an amount of approximately €6.3 billion. As regards implementation of the Union budget in direct and indirect management mode, the Council also prohibited EU bodies from entering into new legal commitments with Hungarian public interest trusts and entities maintained by them.

On 13 December 2023, on the basis of its exchanges with Hungary, the Commission concluded that the situation leading to the adoption of the measures had still not been remedied and that the Union budget remained at the same level of risk.¹⁷ The Commission considers it necessary to maintain the measures under the conditionality mechanism, notably against the background of continued shortcomings in the areas concerning the mandate of the Hungarian Integrity Authority, public asset declarations, and the situation of public interest trusts. Hungary has not yet notified the Commission about any remedies taken. Therefore, the measures against Hungary adopted under the Conditionality Regulation continue to remain in place.

II. The Commission Cohesion Fund Decisions Linked to the Non-fulfilment of the Horizontal Enabling Conditions

Complementing these Conditionality Regulation-based measures, restrictions under the CPR resulting from the

non-fulfilment of the horizontal enabling condition on the Charter of Fundamental Rights¹⁸ have also been considered by the Commission. They can be put in place for reimbursement of possible payment applications to both Hungary and Poland. As a result, the possible reimbursement of funds falling under the CPR were initially nearly completely blocked.

It should be emphasised that the scope of the enabling condition on the Charter of Fundamental rights under the CPR is distinct from the scope of the Conditionality Regulation. The Charter covers rights that go beyond the principles of the rule of law. Conversely, not all the dimensions of the principles of rule of law as listed in Art. 4(2) of the Conditionality Regulation correspond to guarantees under the CFR.

1. The 2021–2027 cohesion programmes for Hungary

In the case of Hungary, the Commission had raised concerns over four aspects related to judicial independence (see below) affecting all programmes, on the one hand, and, on the other, over Hungary's child-protection law, serious risks to academic freedom, and grave risks to the right to asylum affecting select parts of the respective Cohesion 2021–2027 programmes which pursue related objectives.

In its implementing decisions of 22 December 2022 approving the Hungarian programmes,¹⁹ the Commission listed in detail the legislative changes required to address the deficiencies in judicial independence, which would trigger improvements in legislation in the field of justice and the administration of the judiciary. The Commission noted the commitments made by Hungary in its recovery and resilience plan submitted in accordance with Regulation (EU) 2021/41 to undertake reforms aiming at strengthening judicial independence in order to satisfy the conditions for impartiality of the courts and judges established by law in accordance with Art. 19 TEU. At the time, the Commission believed that these measures to remedy the deficiencies, once taken, would allow the horizontal enabling condition with respect to the CPR to be considered fulfilled. The Commission voiced its openness to further dialogue. However, it specified that the following remained necessary:

- Legislative amendments to strengthen the independent role and powers of the National Judicial Council to effectively counterbalance the powers of the President of the National Office for the Judiciary, in particular to provide a binding opinion on a number of decisions concerning the appointment of judges and to have access to all documentation concerning the administration of the (Hungarian) courts;

- Amendments to the rules on the election of the Kúria (Hungary's Supreme Court) President and on certain aspects of the functioning of the Kúria;
- Removal of the possibility for public authorities to challenge final judicial decisions before the Constitutional Court;
- Amendments of specific sections of the Hungarian Code of Criminal Procedure in order to remove the possibility for the Kúria to review the legality of a judge's decision to make a preliminary reference to the CJEU and in order to remove any obstacle for a court to make a preliminary reference in line with Art. 267 TFEU.

On 13 December 2023, the Commission acknowledged that Hungary had fulfilled the horizontal enabling condition with regard to the deficiencies in judicial independence. This conclusion was drawn after Hungary submitted several pieces of information that it fulfils the enabling conditions (on 18 July 2023 and 19 October 2023, respectively) in response to additional questions from the Commission. Accordingly, Hungary might start receiving reimbursements for a part of its Union funding.²⁰

The Commission notably acknowledged that Hungary has committed to taking the necessary measures with respect to increasing the independence of the National Judicial Council and limiting undue influence in order to ensure a more objective and transparent administration of justice. It also took note of Hungary's commitments to reform the functioning of the Hungarian Supreme Court, to limit risks of political influence, to remove the role of the Constitutional Court in reviewing final decisions by judges on request of public authorities, and to remove the possibility for the Supreme Court to review questions that judges intend to refer to the CJEU.

The Commission, however, will continue to monitor the consistent application of the measures put in place by Hungary, notably by means of audits, through engagement with stakeholders and via the monitoring committees for each of the programmes. Monitoring will particularly concern the effective implementation of legislative reform initiatives in relation to judicial independence. If the Commission at any point in time comes to the conclusion that horizontal enabling condition is no longer fulfilled, it may again decide to block funding and stop reimbursement of payment applications.²¹

As of March 2024, the Commission continues to uphold its concerns about the other areas covered by the horizontal enabling conditions on the CFR (i.e., Hungary's child protection law, academic freedom, and the right to asylum – see

above). The corresponding expenditure under the various programmes remains non-reimbursable by the Commission until these concerns are addressed by the country.

2. The 2021–2027 cohesion programmes for Poland

With respect to the Polish programmes, Poland did not inform the Commission in 2023 that the enabling conditions with respect to the CFR had been fulfilled. According to Art. 15 CPR, this did not hinder the approval of the Polish Cohesion programmes by the Commission in December 2022. But, as a consequence, the Commission did not need to carry out the assessment provided in paragraph 4 of Art. 15 to verify whether it agrees with the Member States' assessment on fulfilment of the enabling conditions.

More recently, after a new government entered office, Commission President *Ursula von der Leyen*, at her visit to Poland (on 23 February 2024) was impressed by the efforts of the new Prime Minister, *Donald Tusk*, and the Polish people to restore the rule of law. She welcomed the action plan the new Polish government presented to the EU Member States as a clear roadmap for Poland. *Von der Leyen* mentioned in particular the immediate steps taken regarding judicial independence. She announced that, based on recent measures taken by the new Polish government, the EU's financial support for Poland would no longer be blocked.²²

Under the present circumstances, however, legislative measures prepared and voted on by the Polish Parliament on appointment and disciplinary procedures for judges, on the Constitutional Court, and on the Polish Supreme Court can still run the risk of being vetoed by the Polish President of the Republic. Following its updated assessment, the Commission will come forward with two decisions on European funds for Poland. These decisions could free up about €134 billion for Poland, including €74 billion from the 2021–2027 cohesion funds as well as €60 billion from the Next Generation Europe instruments.

III. Conclusion and Outlook

The guarantees enshrined in Art. 47 CFR about the right to an independent and impartial tribunal are an essential condition for the effective implementation of the Union budget in accordance with the principle of sound financial management. Any breach thereof systematically falls within the scope of application of EU law and directly affects the financial interests of the European taxpayer. Against the background of growing risks of autocracy and anti-liberalism that trigger increasing rule-of-law backsliding in certain

Member States, the Commission and the Council have already taken concrete measures for the protection of the Union budget and the Union's financial interests. A consistent approach in defence of the values enshrined in Art. 2 TEU is necessary to deprive backsliding regimes of the EU taxpayers' money and prevent them from using EU funding instruments to finance their autocratic regimes and abusing them to consolidate their power. This approach also sends the unequivocal message to the autocratic governments that their countries stand to lose many billions of euros if they do not comply with the values and principles enshrined in the EU Treaties.²³

Recent implementation practice shows that the new instruments protecting the EU budget against rule-of-law breaches are being used with the objective of triggering the relevant institutional reforms in the Member States concerned so as to ensure adequate protection of the EU's financial interests. While their application demonstrates the commitment of the European Commission towards protecting both the EU's values and the EU budget, implementation practice so far indicates that the full engagement and cooperation of the Member States concerned is needed and further considerable effort on their part is required to carry out the necessary institutional and legislative reforms of their domestic frameworks. Both the statutory principles of the rule of law under the Conditional Regulation and the enabling conditions under Art. 15 CPR in conjunction with its Annex III need to be consistently heeded throughout the financing period and are to be periodically monitored accordingly by the Commission and programme monitoring committees. In cases of backsliding and where the Commission considers enabling conditions to be no longer fulfilled, it informs the Member State by setting out an updated assessment.

The challenges described in this article apply indiscriminately to all EU Member States and are not limited to Poland and Hungary, which have been in the focus of implementation of said instruments so far. In parallel to Commission and Council actions, the implementation of the Conditional Regulation and of the CPR continues to be closely monitored by the European Parliament²⁴ and other institutional stakeholders.²⁵

Slovakia may be a new case. Although Slovakia had stepped up its efforts to combat high-level corruption and organised crime over the past several years, the European Parliament recently called on the Commission to closely monitor the latest developments in the country with regard to the planned dissolution of key anti-corruption structures by the new populist government.²⁶ This may have implica-

tions on the country's respect for the EU's rule-of-law principles in this Member State. Here again, the Commission is called on to take "the necessary actions to safeguard

the rule of law and judicial independence, especially with respect to cases of high-level corruption, and to protect the EU financial interests."²⁷

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* The views and opinions expressed in this article are the author's own. They do not necessarily reflect the official position of the European Commission.

1 See also, in this issue, I. Jaskolksa, "New Instruments Protecting the 2021–2027 Cohesion Budget against Rule-of-Law Breaches"; L. Bachmaier, "Compliance with the Rule of Law in the EU and the Protection of the Union's Budget", (2019) *eucrim*, 120.

2 See Council Regulation (EU) 2020/2094, 14.12.2020, establishing a European Union Recovery Instrument to support the recovery in the aftermath of the COVID-19 crisis, OJ L 433 I, 22.12.2020, 23. For anti-fraud measures in the RRF Regulation in general, see C. Arwidt and C. Kreith, "Protecting the EU's Financial Interest in the New Recovery and Resilience Facility – The Role of the European Anti-Fraud Office", (2021) *eucrim*, 171–175.

3 See Art. 6 (2) of the Commission proposal for a recast of the Financial Regulation, COM(2022) 223 final 16.5. 2022.

4 The agreed final compromise text of the recast of the Financial Regulation foresees this clarification in Art. 6 Council Doc.16800/23, 15.12.2023.

5 Regulation (EU, Euratom) 2020/2092 of the European Parliament and of the Council of 16.12.2020, on a general regime of conditionalities for the protection of the Union budget, OJ L 433 I, 22.12.2020, 1.

6 Cf. Art. 6(3) in conjunction with Art. 4 of Regulation 2020/2092, *op. cit.* (n. 5).

7 See, most recently, ECJ, 5.6.2023, Case C-204/21, *Commission v Poland*, (independence and respect for private life of judges) and ECJ, 13.7.2023, Joined Cases C-615/20, YP and Others and C-671/20, M.M. (lifting of a judge's immunity and suspension from duties).

8 See the Polish country chapters in the Commission annual reports on the Rule of Law, SWD (2022) 521 and SWD (2023) 821, 5.7. 2023; for an overview of the Polish implementation of the rule of law requirements relevant under the Conditionality Regulation, see also: L. Pech, A Wójcik, P. Wachowiec, *The Case for activating the Rule of Law Conditionality Regulation in Respect of Poland*, Study mandated and edited by The Greens/EFA in the European Parliament, 2023, pp. 61ss., available at <<https://extranet.greens-efa.eu/public/media/file/10221/8557>> accessed 25 March 2024.

9 See ECJ, 16.2. 2022, Case C-157/21, *Poland v Parliament and Council*, para. 361: "[...] the proportionality of the measures to be adopted is ensured, decisively, by the criterion of the impact of breaches of the principles of the rule of law on the sound financial management of the Union budget or on the protection of the financial interests of the Union [...]".

10 ECJ, 16.2. 2022, Case C-156/21, *Hungary v Parliament and Council*, para.147, and Case C-157/21, *Poland v Parliament and Council*, para. 165.

11 Commission Guidelines on the application of the Regulation (EU, Euratom) 2020/2092 on a general regime of conditionality for the protection of the Union budget, OJ C 123, 18.3. 2022, p.12, see para. 54 ss.

12 See Commission Communication on the written notification to Hungary pursuant to Article 6 (1) of Regulation (EU, Euratom) 2020/2092, 27.4. 2022, C(2022) 2782.

13 Proposal for a Council Implementing Decision on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, COM(2022) 485 final, 18.9.2022. See also T. Wahl, "Commission Proposes Budgetary Protection Measures against Hungary – EP Remains Sceptical" (2022) *eucrim*, 183.

14 Council Implementing Decision (EU) 2022/2506 of 15.12. 2022 on measures for the protection of the Union budget against breaches of the principles of the rule of law in Hungary, OJ L 325, 20.12.2022, 94.

15 COM(2022) 485 final, *op. cit.* (n. 13), , Explanatory Memorandum points 2 and 3; these reasons are also reflected in the Council Implementing Decision (EU) 2022/2506, *op. cit.* (n. 14), Explanatory memorandum, point 2.

16 Council Implementing Decision (EU) 2022/2506, *op. cit.* (n. 14), 94.

17 Commission Decision of 13 December 2023 on the reassessment, on the Commission's initiative, of the fulfilment of the conditions under Article 4 of Regulation (EU, Euratom) 2020/2092 following Council Implementing Decision (EU) 2022/2506 of 15 December 2022 regarding Hungary, C(2023) 8999 final. See also T. Wahl, "Hungary: Rule-of-Law Developments May 2023 – Mid-January 2024", in this issue, p. 309.

18 Art. 15(1) and Annex III of Regulation (EU) 2021/1060 (CPR), OJ L 231, 30.6.2021, 159: "Effective measures are put in place to ensure compliance with the Charter of Fundamental Rights [...] which include [...] arrangements to ensure compliance of the programmes supported by the Funds and their implementation with the relevant provisions of the Charter [...]."

19 See, for example, Commission Implementing Decisions of 22.12.2022 approving the programme "Digital Renewal Operational Programme Plus" and the programme "Human Resources Development Operational Programme Plus", for support from the European Regional Development Fund and the European Social Fund Plus under the Investment for jobs and growth goal in Hungary, C(2022)10007 and C(2022) 10010 final.

20 Cf. Art. 15(3) CPR, *op. cit.* (n. 18). Hungary may start claiming reimbursements in payment applications for 2021–2027 programmes of up to around €10.2 billion. See also news section in this issue, p. 311.

21 Art. 15(6) sub-paragraph 2 CPR, *op. cit.* (n. 18).

22 European Commission, STATEMENT/24/1023, "Press statement by President von der Leyen with Belgian Prime Minister De Croo and Polish Prime Minister Tusk", Warsaw, 23 February 2024, <https://ec.europa.eu/commission/presscorner/detail/en/statement_24_1023> accessed 25 March 2024.

23 See also D. Kelemen, "Will the European Union escape its Autocracy Trap?" *Journal of European Public Policy*, 14.2.2024, DOI:10.1080/13501763.2024.2314739.

24 See, for example, the European Parliament's resolutions on the rule of law in Hungary of 12 September 2018, of 16 January 2020, of 8 July 2021, of 15 September 2022, of 24 November 2022, of 1 June 2023, and of 8 January 2024. See also the regular overviews of the rule-of-law developments in Hungary and Poland in eucrim, most

recently eucrim 4/2023, p. 308 ff.

25 European Court of Auditors, The rule of law in the EU – An improved framework to protect the EU's financial interests, but risks remain, Special report 03/2024, February 2024.

26 European Parliament, Resolution of 17 January 2024 on the planned dissolution of key anti-corruption structures in Slovakia and its implications for the rule of law, P9_TA(2024)0021.

27 Idem, para. 5.

The Impact of the European Commission's Rule of Law Report in Monitoring the Prevention and Fight against Corruption

Ute Stiegel and Korneel De Schamp*

This article discusses the European Commission's role in preventing and fighting corruption by means of its annual Rule of Law Report. The authors present the anti-corruption pillar of the Report, in which the EU Member States' frameworks in preventing and fighting corruption are regularly assessed, and which outlines the Commission's recommendations to all Member States in this area. In addition, the article describes broader synergies that exist in conjunction with other policy initiatives and tools, such as the new EU network against corruption, the Conditionality Regulation, and the Recovery and Resilience Plans.

I. Introductory Remarks: The Annual Rule of Law Report

The Rule of Law Report is one of the main initiatives put forward by European Commission President Ursula von der Leyen when she took up office in 2019. Since its first edition in 2020, it has become a major tool for safeguarding the rule of law across the EU.¹ The Rule of Law Report is a preventive tool, identifying both positive and negative trends and key developments in this area in the EU Member States. It is part of the European Rule of Law Mechanism that advances an annual dialogue on the rule of law between the Commission, the Council, the European Parliament, EU Member States (national governments, but also national parliaments), and other stakeholders such as independent institutions, associations, civil society and academia. The report has four pillars. Next to the justice system, media pluralism, and other institutional issues related to checks and balances, it covers the anti-corruption framework. Hence, the report has been particularly useful in enhancing the Commission's anti-corruption policy.

Traditionally, anti-corruption policy at the EU level has focused on criminal law. Art. 83(1) of the Treaty on the Functioning of the European Union (TFEU) designates corruption as a "euro-crime", namely a particularly serious crime with a cross-border dimension, meaning that the EU may adopt minimum rules concerning the definition of criminal offences and sanctions in this area under certain conditions. In May 2023, based *inter alia* on this article,² the European Commission presented a new proposal to combat corruption by means of criminal law. With this proposal, the Commission aims at modernising the current EU legal framework on corruption and addressing all related offences in one legal instrument against corruption at the EU level.³

Since its inception, the Rule of Law Report immediately expanded the EU's anti-corruption toolbox. It provides a comprehensive picture of the anti-corruption policies in EU Member States. A comprehensive approach to fighting corruption requires a combination of preventive and repressive measures, including a robust legal and institutional framework, sufficient administrative and judicial capacity, effec-

tive investigations and prosecutions, and a clear political will to enforce the anti-corruption framework. Reliable and effective integrity measures to minimise the space for corruption are also needed. The Rule of Law Report analyses these issues by taking an in-depth look at three main areas that are crucial for a solid anti-corruption policy: the institutional and strategic framework, the prevention of corruption, and the repression of corruption (see II.).

The monitoring of the anti-corruption framework remains crucial. Data from the 2023 Eurobarometer surveys⁴ show that corruption remains a serious concern for citizens and businesses in the EU. Seven in 10 Europeans (70%) believe that corruption is widespread in their country, and four in 10 Europeans (45%) consider the level of corruption in their country to have increased. More than half of all citizens (60%) think that their government's efforts to combat corruption are not effective. In addition, most European companies (65%) consider the problem of corruption to be widespread in their country, and half (50%) think it unlikely that corrupt people or businesses in their country would be caught or even reported to the police or prosecutors.

II. The Anti-Corruption Pillar of the Rule of Law Report

1. Legal, institutional, and strategic framework

The importance of maintaining effective and coordinated anti-corruption policies is recognised in international law. National anti-corruption strategies can ensure that countries follow a comprehensive, coherent, and integrated approach, allowing anti-corruption provisions to be mainstreamed in all relevant policy sectors. Most EU Member States currently have national anti-corruption strategies in place.

In specific terms, the Rule of Law Report looks at the content of these strategies: are they comprehensive and holistic? It also analyses whether they cover both the prevention and repression of corruption: are they targeting all relevant sectors and specific groups where needed? The existence of an action plan accompanied by adequate resources and enforceable measures is also a key indicator. The Commission also verifies whether the strategy and action plans are being adequately implemented on the ground.

An effective response to corruption depends on a robust legal and administrative anti-corruption framework and on strong and independent institutions to enforce the rules. As such, the analysis of institutional frameworks focuses on the existence of specialised bodies in relation to the preven-

tion and repression of corruption; while not mandatory under the international framework, they can play a key role in combating corruption. The report analyses whether the responsible institutions have made significant changes in the reporting period and whether they have sufficient resources (both in terms of material and personal resources). It assesses whether the national authorities are cooperating effectively with other EU countries and the European Public Prosecutor's Office (EPPO) and the European Anti-Fraud Office (OLAF) on corruption cases. These are important indicators of a properly functioning institutional framework in the fight against corruption.

As far as legislation is concerned, the report analyses possible gaps in criminal legislation or the preventative framework. It also reviews ongoing legislative changes that could impact the overall fight against corruption.

2. Prevention

Prevention helps to create a culture of integrity, in which corruption and impunity are not tolerated. It mitigates the need for criminal repression and has broader benefits, e.g., in increasing public trust in institutions. Measures that ensure transparency and integrity, such as rules on asset and interest declarations, can help detect and even prevent actual corruption. Conversely, shortcomings in integrity, including undisclosed conflicts of interest, can lead to corrupt activities if left unaddressed. In all these areas, the prevailing international and European standards, as set out by the UN Convention against Corruption (UNCAC), the OECD, and the Council of Europe, are key guidelines for the Commission's analysis in the Rule of Law Report.

Concretely, effective anti-corruption approaches build on measures to enhance transparency, ethics, and integrity as well as regulating conflicts of interest, lobbying, and "revolving doors". The Rule of Law Report analyses whether a Member State has in place a system to prevent and solve conflicts of interests, i.e., situations in which a public official has a private or professional interest that could interfere with the impartial and objective performance of his/her duties. It also monitors whether government officials and Members of Parliament are subject to specific integrity rules, such as codes of conduct and rules on preventing conflicts of interest and incompatibilities with other activities.

Lobbying activities – while a legitimate form of political participation – need to be accompanied by strong requirements for transparency and integrity in order to ensure accountability and inclusiveness in decision-making, in line with international standards. Rules on "revolving doors" or

the movement of (top-level) officials between the public and the private sectors, can help further solidify the preventative anti-corruption framework.

Asset and interest declarations by public officials foster public sector transparency and accountability and are important tools to promote integrity and prevent corruption (they are also looked at in the Report). Rules are in place in most Member States to ensure that public sector officials are subject to asset and interest disclosure obligations. There are wide variations in the scope, transparency, and accessibility of disclosed information, however, as well as in the level and effectiveness of verification and enforcement measures.

Lastly, areas at high risk of corruption are the subject of particular attention. Vulnerable sectors are, for instance, healthcare, construction and/or urban planning. Governments, in particular in course of public investments need to take account of these high-risk areas. Areas that are pressure points for organised crime groups, e.g., ports, also require constant monitoring. Other areas of risk relate for example to political party financing as well as investor citizenship and residence schemes.

3. Repression

In terms of repression of corruption, the capacity of law enforcement services, prosecution authorities, and the judiciary to enforce anti-corruption criminal law provisions is essential in order to effectively combat corruption. It is a focal point of the Rule Law Report, as is the specialisation of law enforcement or prosecution.

The report also looks at key procedural issues: are there any obstacles to effective criminal investigations and prosecutions of corruption, such as excessively cumbersome or unclear provisions on lifting immunities or statutes of limitations that are too short?

Lastly, the existence of a solid track record of investigations and prosecutions leading to dissuasive sanctions by means of final convictions, in particular for high-level corruption cases, is essential for determining whether a criminal justice system is effective in the fight against corruption.

III. The Recommendations on Corruption in the Rule of Law Report

The qualitative assessment of the Commission in the Rule of Law Report focuses on significant developments. Since

2022, the Rule of Law Reports include recommendations made to each EU Member State.⁵ These recommendations aim to support Member States in their efforts to take ongoing or planned reforms forward, encourage positive developments, and help identify where improvements or follow-ups on recent changes or reforms may be needed. As regards anti-corruption, the recommendations align with the three areas of the report described above (see I.).

In terms of the legal, institutional, and strategic framework, for example, the recommendation was made to Finland (2022) that it focuses on implementing its anti-corruption strategy, while Slovenia was urged to adopt a new anti-corruption strategy (2023).

Concerning the prevention of corruption, the Rule of Law Reports contain a wide-ranging number of recommendations. The priority issues for each Member State are represented, from establishing lobbying regulation in Latvia and Italy, to improving the asset declaration system in Belgium or Cyprus, and to establishing codes of conduct for Members of Parliament in Czechia. In some Member States, the aforementioned track record in high-level corruption cases needs to be established or seriously improved, e.g., in Bulgaria and Hungary. In others, like Malta, Croatia, and Romania, the recommended way forward is to take more action or build on initial good results.

The Commission also closely follows up and checks the implementation of its recommendations, which took place for the first time in the 2023 Rule of Law Report. Across all pillars of the Rule of Law Report, 65% of the 2022 recommendations had been fully or partially addressed. This shows that important efforts are underway in Member States to follow up on the previous year's recommendations. The recommendations are to be fine-tuned each year – some may have been fulfilled, new issues might have come to the foreground, and, upon review of the recommendations, some Member States' efforts may need to be repeated if not enough has been done.

IV. Synergies with other Measures and Instruments

The Rule of Law Report constitutes an important preventive tool in its own right; it helps to safeguard the rule of law across the EU and to improve policies in the fight against corruption. However, there are also clear links to other measures or instruments.

With the adoption of its anti-corruption package on 3 May 2023, the Commission established a new EU network

against corruption.⁶ This network aims to foster collaboration, identify trends, and maximise the impact and coherence of European efforts to prevent and fight corruption in order to create more effective anti-corruption policies. The network strongly relies on the analysis performed in the Rule of Law Report and provides avenues to discuss and resolve some of the key issues identified in the areas of prevention, repression, and legal, institutional, and strategic frameworks. It enables exchanges between the Commission, the EU Member States, and various other stakeholders, such as representatives from civil society and academia as well as key international organisations.

The proposed Directive on combating corruption (see I.) is based on multiple "lessons learned" from the Rule of Law Report and takes into account, for example, the gaps in and limited enforcement of existing legislation, the need for co-operation and capacities to prosecute cross-border cases, and the need for a stronger coordination and definition of common standards across the EU. Likewise, the Rule of Law Reports raise awareness that operational shortcomings can obstruct the investigation and prosecution of corruption cases and undermine the effectiveness of the fight against corruption. Examples include excessively cumbersome or unclear provisions on lifting immunities and short statutes of limitations, which can prevent the conclusion of complex cases, particularly in combination with other factors contributing to lengthy proceedings.

Furthermore, information captured in the context of the Rule of Law Report and, in particular, also in that of its anti-corruption pillar feeds into the Commission's analysis under the Conditionality Regulation.⁷ The Conditionality Regulation links the rule of law with the use of EU funds, allowing the EU to suspend, reduce, or restrict access to EU funding should breaches occur. Measures under the Conditionality Regulation can only be proposed if the Commission discovers that breaches of the rule-of-law principles directly affect or seriously risk affecting the sound financial management of the Union budget or of the financial interests of the Union

in a sufficiently direct way. The mechanism was triggered for the first time in April 2022 against Hungary.⁸

The Recovery and Resilience Plans (RRPs), the mechanism in each EU Member State to access funds from the Recovery and Resilience Facility, contain several milestones related to anti-corruption.⁹ These milestones can often be linked to shortcomings or deficiencies identified in the Rule of Law Report, and an important interplay exists between both tools. In particular, the RRPs were negotiated with the Member States themselves but set clear conditions for the fulfilment of milestones (and linked payments). Milestones – ranging from the introduction of lobbying legislation, to the reform of an Anti-Corruption Commission, or to the commitment of additional resources to certain institutions – help develop the anti-corruption framework via clear dialogue and cooperation with the Member States.

V. Conclusion

The European Commission's anti-corruption policy is expanding, and it is clear that the annual Rule of Law Report provides an important basis for this. The anti-corruption pillar of the report is a key monitoring instrument for the Commission in the prevention of and fight against corruption. Above all, the recommendations made may encourage the Member States to undertake crucial reforms as the efforts that are underway in Member States to follow up on its recommendations have already shown.

The report may also prove helpful for other processes, like the Recovery and Resilience Plans and the Conditionality Regulation. This has also recently been analysed by the European Court of Auditors.¹⁰

In sum, the Rule of Law Report is part of the overall efforts of the European Commission to protect the rule of law and has become an indispensable tool for the Commission to improve anti-corruption efforts across the EU.

* 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 See also the European Commission website "The rule of law mechanism", <https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/upholding-rule-of-law/rule-of-law-mechanism_en>. All hyperlinks in this article were last accessed on 19 March 2024.

2 The proposal is based on Art. 82(1) point (d) and Art. 83(1) and (2) TFEU.

3 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. See F. Clementucci and A. Miekina, "The Commission Proposal for a Directive on Combating Corruption" (2023) *eucrim*, 276; L. Zoli, "The Amendment of the PIF Directive by the New Proposal for a Directive on Combating Corruption" (2023) *eucrim*, 279.

4 Special [Eurobarometer 534](#) on Corruption (2023) and Flash [Eurobarometer 524](#) on Businesses' attitudes towards corruption in the

EU (2023). The previous data sets are the Special Eurobarometer 523 (2022) and the Flash Eurobarometer 507 (2022).

5 For a full overview of all recommendations, see COM(2023) 800 final Annex, available at: <https://commission.europa.eu/document/download/2b63674d-bdb3-47b7-bda4-e13d6a085033_en?filename=4_1_52673_comm_recomm_en.pdf>.

6 Cf. <https://home-affairs.ec.europa.eu/networks/eu-network-against-corruption_en>. See also T. Wahl, "First Meeting of EU Network against Corruption" (2023) eucrim, 141.

7 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>.

8 See the article by L. Kuhl, "New Instruments in Cohesion Policy – Implementation Practice by EU Institutions", in this issue.

9 For the Recovery and Resilience Facility, see <https://commission.europa.eu/business-economy-euro/economic-recovery/recovery-and-resilience-facility_en>.

10 ECA Review 02/2024 on the Commission's rule of law reporting, <<https://www.eca.europa.eu/en/publications/RV-2024-02>>.

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Trade-offs in Auditing the EU Recovery and Resilience Facility – Flexibility vs Compliance

A Greek Case Study

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The EU Recovery and Resilience Facility (RRF) is a very particular option for managing resources at EU level. One of its features is the involvement of national audit authorities when it comes to ensuring that financed projects are implemented in a timely and reliable fashion. In this context, the success of the RRF as a managing and auditing scheme of EU resources is assessed against certain criteria, which can be weighted differently. Using the example of the audit arrangements in Greece, this article seeks to highlight the need for a balanced approach between the two main objectives of the audit process: flexibility and compliance.

I. Introduction

In October 2023, the European Court of Auditors (ECA) published its Annual Report for the year 2022. In addition to other interesting findings and conclusions, the Union's external auditors presented the results of their audits on the management and the transactions of the EU Recovery and Resilience Facility (RRF).¹ The RRF (formally known as the Recovery and Resilience Mechanism²) is the main instrument created to manage the resources included in the Next-GenerationEU recovery instrument (also known as the EU Recovery Instrument³). The latter represents a dedicated, comprehensive framework of measures adopted to support the economic recovery of the EU and tackle the repercus-

sions of the COVID-19 pandemic. This is achieved by leveraging substantial amounts of public and private investment within a single, coherent approach at EU level in the spirit of solidarity between Member States. Creating these schemes has been seen as a constitutional-level intervention in the institutional framework of the EU, complementing the Economic and Monetary Union, as it gives the Union a federal-like budgetary power.⁴

Due to its aim and the wide range of activities included in its scope,⁵ the RRF has been equipped with a special management system, both at national and at EU level. It deviates significantly from the basic principles of the Union's budgetary functions, thus highlighting the exceptional (in the sense

of distinct and unique) character of this financial scheme. In general, the RFF follows a very particular philosophy of managing its resources, with a view to speeding up the implementation of actions. To this end, the management and monitoring procedures focus on achieving results rather than complying with rules.⁶ Thus, according to the provisions of the RRF Regulation, payments are not subject to detailed disbursement verifications; rather, they are based on the achievement of multiplier effects in relation to pre-defined milestones and indicators (target values) through the implementation of reforms and investment projects. Payment requests are simply accompanied by a management declaration on the use of resources and a summary of audits.⁷ There are several similar arrangements that distinguish the RRF's management and auditing from the usual model employed for instruments financed by the EU budget.

II. Managing the RRF at EU Level

According to Regulation (EU) 2021/241 (hereinafter the RRF Regulation), the European Commission is responsible for managing the fund, an option in line with the direct management model.⁸ However, several critical decisions, such as approving the National Recovery and Resilience Plans and the suspending of funding, are taken by the Council.⁹ This differentiation is a consequence of the exceptional nature of the whole scheme. In general, the direct management model requires a direct link between the Commission and the end beneficiaries – in the case of the RRF the national governments of the EU Member States. However, there is a strong political component to the whole framework of the RRF, in particular regarding accountability arrangements. For example, the authority to suspend financial assistance to a Member State lies with the Council, and not the Commission. This means that the national authorities are not controlled by a supranational body, such as the European Commission, but by the Council, which is an intergovernmental body, and may (and often does) adopt a more political approach. So, while – as a rule – the Commission is accountable to the European Parliament when it comes to the management of the EU budget in the context of EU budgetary governance,¹⁰ in the case of the RRF things seem to be different: the accountability lies with the Council, which has the relevant decision-making powers.

Another point of concern that has been raised is the (non) disclosure of data relating to the management of the RRF resources. More specifically, the direct management model provides for the recording and publication of all legal and natural persons who are recipients of EU funds through a special system operated by the European Commission.¹¹

As for RRF resources, the provisions of the relevant Regulation¹² initially did not provide for such a record, given that only the EU Member States themselves are considered final beneficiaries. Thus, only the amounts allocated to the Member States were recorded and made public, and no details were provided on the beneficiaries (natural and legal persons) of these funds on the ground. At national level, there was no obligation under the RRF Regulation to make such disclosures, only to provide this information to the control mechanisms of the European Union. This shortcoming was partially corrected by the amendment of Regulation 2021/241 and the addition of a provision (Art. 25a) for the creation, in each Member State, of a public portal listing and publishing the 100 final beneficiaries (natural and legal persons) of the RRF with the highest amounts of funding.¹³

It is true that the legality and regularity of expenditure under other EU programmes mainly depends on the eligibility of a beneficiary, of a project, and of the costs declared. The eligibility of such funding is often governed by conditions relating to the costs that can be incurred and declared, which may also need to be identifiable and verifiable. Eligibility conditions for this type of funding also include Union rules ensuring the effective functioning of the single market (i.e., public procurement and State aid rules), and compliance with the relevant national rules. However, in the context of the RRF, the eligibility of a beneficiary, of a project, and of the funds needed to implement investment projects is not a formal condition that the Commission needs to take into account when payments are made to Member States.¹⁴

Overall, the rationale of the initiators of the RRF is that, although operational objectives and control should be defined in detailed arrangements and procedures to avoid complications either during or after financed operations, such an arrangement may cause excessive administrative burdens, instability, and uncertainty, affecting the rate of payments and delaying the implementation of the measures financed. Moreover, shifting the focus to regulatory compliance, away from intervention and results, puts the emphasis on procedures rather than contents when selecting projects. This is the logic behind the RRF resource management provided for in the relevant Regulation: i.e., to facilitate the rapid implementation of projects and the achievement of results, albeit with a clear risk when it comes to detecting resource mismanagement. This situation, together with the national authorities' central role in managing the RRF as final beneficiaries, shows that the arrangements put in place at national level are very important to ensure sound financial management of the RRF resources.

The looser standards for ensuring the legal, regular, and sound financial management of RRF resources caused by the above-mentioned “flexible” arrangements are somewhat counter-balanced by the provisions on the protection of the EU’s financial interests contained in the RRF Regulation.¹⁵ These provisions confer upon the Member States and the European Commission the joint responsibility to act within their respective spheres of competence. This is meant to guarantee that the financial interests of the EU are protected by ensuring that projects financed by the RRF comply with applicable EU and national law, in particular as regards the prevention, detection, and correction of fraud, corruption, and conflicts of interest. Moreover, this is achieved by preventing serious breaches of the obligations arising out of the relevant financing agreements, in particular with regard to double financing.¹⁶

III. The National Authorities’ Involvement in RRF Audits – A Greek Case Study

1. General framework in the RRF

The core idea of the audit arrangements, according to the RRF Regulation, is that the Member States, as beneficiaries, are expected to take all appropriate measures to ensure that the use of the RRF resources complies with applicable EU and national law. The competent national audit authorities are required to cooperate with their EU counterparts; yet the arrangements of this cooperation have not always been considered effective. For instance, the Commission considers the national authorities solely responsible for checking that RRF financing has been used correctly, i.e., in accordance with all applicable national and Union rules (compliance audit). At the same time, the Commission reserves the right to intervene in cases of serious irregularities and non-compliance with the obligations arising from the financing agreement, in particular when it comes to the avoidance of double funding. In this regard, it focuses on the Member State systems to prevent, detect, and correct cases of fraud, corruption, conflicts of interest and double funding.¹⁷ This approach has been criticised, given the significant level of verified non-compliance with national or EU rules (e.g., on public procurement or State aid).¹⁸ Moreover, the systems audits carried out by the European Commission are not sufficient, meaning that there is no clear information on how compliance is checked.¹⁹ This situation represents a serious risk which directly affects the assurance on the legality of management, which should also be provided for the resources of the RRF under the responsibility of the European Commission, and signifies accountability shortcomings in the institutional framework of the Union.²⁰

In any case, the cooperation between national and EU authorities in the context of managing and auditing the RRF is crucial, as it allows for mutual support, advice, and sharing of experience. This creates added value when it comes to pinpointing and raising red flags, and the development of audit schemes adapted to the requirements of managing the RRF resources efficiently.

2. Greek audits for RRF

Greece is an interesting example of a national RRF resource audit system. The Greek National Recovery and Resilience Plan (NRRF-Greece) was approved very early on by the Council of the European Union,²¹ and the relevant financing agreement was signed and then ratified by Law No. 4822/2021 (Government Gazette A' 135). The details of the management and audit of the actions and projects financed by the NRRF-Greece are included in Ministerial Decision 119126 EX 2021 (Government Gazette B' 4498).

The audit arrangements (see Art. 7 of the above-mentioned Ministerial Decision) provide for a wide scope of auditing activities, aiming to verify the following:

- The proper implementation of actions and projects in accordance with the principles of sound financial management and national and Union law;
- The satisfactory achievement of the approved milestones and objectives;
- The avoidance of fraud and corruption;
- The absence of conflicts of interest;
- The absence of double financing of actions and projects.

The achievement of each milestone and objective associated with payment requests is to be verified by a specially appointed Independent Auditor, who prepares a detailed report with all positive and negative findings, even including the necessity of financial corrections (recoveries). This report is to be studied and accepted or responded to by those concerned within ten days; subsequently, the competent Managing Authority issues the appropriate decisions. This procedure is completely novel, at least in the context of the Greek system for the management of EU resources. The reduced time limits and the provision for an auditor, which is not part of the existing formal audit system, signify the will for a flexible and prompt audit procedure, in accordance with the overall concept adopted in the RRF provisions at EU level.

Furthermore, in a more typical scheme, the Audit Committee of the Greek Ministry of Finance is tasked with carrying out sample audits, regarding all five above-mentioned issues included in the scope of the RRF audit systems. These audits may be carried out on the spot and/or at the headquarters

of this Committee, on the basis of supporting documents and data held by the audited bodies in electronic or paper form, which are necessary to ensure an adequate audit trail. The results of these sample audits are presented in reports that are issued to those concerned, inviting them to comment. After ten days, the findings of the audits are finalised, and the competent officials from the Ministry will issue all necessary decisions. As noted, this audit scheme has a wider scope of action than the scheme of the Independent Auditor. Nonetheless, its nature, entailing only sample audits, has raised questions about its effectiveness and the actual assurance it provides.

It goes without saying that these audit schemes do not prevent the competent EU authorities (European Commission, European Anti-Fraud Office, European Public Prosecutor's Office, and European Court of Auditors) from verifying the correct use of the EU financial assistance granted under RRF and carrying out administrative investigations and/or on-the-spot checks of the actions of any final beneficiary, implementing agency, contractor, and subcontractor receiving Union funding.

3. Decision of the Greek Court of Audit on the applicable thresholds

However, a very interesting development can be noted that demonstrates that flexibility is put over compliance when it comes to auditing RRF financing activities. It concerns the pre-contractual audit of contracts in the framework of projects financed by the NRRF-Greece – more specifically Art. 200, which was introduced under Law 4820/2021 (Government Gazette A' 130). This law provides for the auditing activities of the Greek Court of Audit (*Elegktiko Synedrio*), which has a dual function, being both the external audit authority and the supreme financial court of Greece. Art. 200 provides for accelerated procedures, such as the appointment of a rapporteur for pre-contractual audits at a stage prior to the dispatch of the relevant file for audit or the possibility of appointing special audit teams during the procedure for the preparation of contracts financed by the RRF, etc. These provisions are supplementary to the general provisions on pre-contractual audits by the Court of Auditors contained in Art. 324 of Law No. 4700/2020 (Government Gazette A' 127). This latter Article sets a general threshold of contract value, amounting to €300,000, above which any public contract for work, supplies, or services concluded by the State, other public authorities, local authorities and their legal entities, and public enterprises, is subject to pre-contractual control. However, it was further provided that in the event of the contracts being co-financed by EU funds, the above-mentioned threshold is increased to €5 million,

allegedly for reasons of flexibility, facilitation, and acceleration of the co-financed projects under which the contracts in question are awarded.

When these provisions were applied to projects financed by the NRRF-Greece, it was found that there was no ad-hoc arrangement setting a budgetary threshold of pre-contractual control for the contracts involved in these specific projects. The case was put before the Plenary Session of the Greek Court of Audit in its judicial capacity.

It ruled by a majority²² that there are four reasons why contracts financed through RRF resources do not fall under the exception clause of an increased threshold of €5 million, but rather under the general rule of a basic threshold of €300,000. The first reason is the exceptional nature of the increased threshold, which necessitates a narrow interpretation of the relevant provision, especially when the difference between the two thresholds (basic and increased) is so significant. This approach is based on the importance of pre-contractual audits as a guarantee of legality arising from the principle of the rule of law and the historical background to the adoption of that exception, namely that it was provided for a very specific category of public contracts, which were deemed to require a special pre-contractual audit regime. The second reason is similar, namely that the RRF is an exceptional instrument for dealing with the consequences of the COVID-19 pandemic,²³ making it separate from the EU Structural and Investment Funds for which the increased threshold was established. As a consequence, contracts under these financial schemes should also be treated differently from a legal point of view. The third reason refers to the wording of the relevant provisions, which states that the exception threshold is reserved for contracts "co-financed by Union funds," whereas Art. 200 of Law 4820/2021 refers specifically to contracts "financed by the Recovery and Resilience Facility." This indicates that these are different financing mechanisms that cannot receive the same legal treatment. The fourth reason focuses on the fact that while there is a specific provision for the pre-contractual audit of RRF contracts, which entails specific procedures (see above), there is no specific reference to a threshold for these contracts. According to the majority view, this means that the aim is to expedite procedures not by reducing the guarantees of the rule of law as a result of accepting an increased pre-contractual audit threshold, but by introducing procedural arrangements and administrative procedures capable of maintaining the regular pre-contractual audit threshold.

There was also a dissenting minority opinion in the Court of Audit's judgment, which put forward some interesting

interpretative approaches.²⁴ More specifically, the minority focused on the nature and operating mechanism of the RRF, highlighting the need for timely implementation of the actions financed, i.e., within specific and strict timeframes (even by granting the possibility of receiving a pre-financing payment of 13% of the total resources – something that Greece has made use of). They are of the opinion that in light of the fact that the reference to the increased threshold is of a general nature and does not contain any exception for EU funding mechanisms, and since the need for a timely implementation of the RRF contracts is evident, the same justification for accelerating implementation should hold as for contracts co-financed by the Structural and Investment Funds of the European Union. Consequently, contracts for RRF actions should be subject to the increased threshold provisions.

It is clear from the judgment that the aim of the whole reflection was to seek a way of finding a balance between the need for flexible procedures for implementing RRF actions and the need to protect RRF resources from mismanagement through mechanisms such as pre-contractual audit. Given the above-mentioned RRF management pattern at EU level, and the importance of the competent national authorities, in particular in audit procedures, it is crucial to ensure that the resources of the RRF, which is a financial instrument of a “frontloaded” nature (i.e., funds must be paid out quickly in order to achieve the objective of economic recovery of the EU Member States as soon as possible), are managed in a sound and reliable manner. The jurisprudential position of the Court of Audit was a very useful contribution in this direction, as the application of the basic threshold for carrying out pre-contractual audits on RRF contracts, together with the procedural arrangements provided for by Art. 200 of Law No. 4820/2021, constitute a flexible but secure framework for the management of the relevant resources.

4. Subsequent legislative amendment

However, a subsequent legislative initiative changed the situation. A few weeks after the Court of Audit’s judgment, an amendment to Article 324 of Law 4700/2020 was introduced. Under this amendment, RRF contracts are now subject to the increased pre-contractual audit threshold (€5 million); furthermore, this new arrangement also retroactively applies to already concluded RRF contracts. The explanatory memorandum of this amendment pointed to a clearer wording of exceptions as the main reason for this initiative, aiming to achieve legal certainty as to the scope of this provision. This reasoning is rather unconvincing as the interpretative approach of the Court of Audit on the same issue is more substantiated and more reasonable, even when it

comes to the minority’s dissenting point of view. The €5 million threshold for a frontloaded financial instrument, such as the RRF, is risky, as the value of many contracts will be below this threshold, effectively exempting them from pre-contractual audit. Conversely, the Court of Audit’s jurisprudential approach had clarified – in a very balanced way – the framework within which the audit procedure for these contracts could operate in order to ensure that the need for adhering to the principle of the rule of law and the need for the rapid implementation of actions are both met. It has also been rightly pointed out that the Court of Audit’s pre-contractual audit is strengthened by establishing the application of principles such as the principles of economy, necessity, and efficiency, which extend the audit work beyond verifying formal legality to substantive issues. In the case of the RRF, this would strike a balance between effective action, procedures, and the timely use of resources whilst upholding transparency and adhering to the rule of law.²⁵

The above-mentioned legislative amendment, which represents a misguided way of strengthening flexibility, weakens the effectiveness of the pre-contractual legality audit as a guarantee of the rule of law in RRF projects. The very specific and quite reductive (in the sense of expediting procedures) structure of the system for managing RRF resources makes it easy to circumvent guarantees of the rule of law, especially when there is pressure from political developments. This shifts the focus of interest (see for instance the case of Poland²⁶) from the protection of the principles of the rule of law to current issues regarding the management of evolving political affairs.

IV. Conclusion

It is uncontested that the parameters and standards of RRF management constitute a completely new model for the financing and governance of public policies in the EU. This model marks a radical change from the past, as a completely new management approach has been adopted. It is mainly based on the verification of effectiveness of policies. While compliance with rules is a factor, this is not examined to the extent or with the intensity as with other funding tools and policies of the Union.

With the EU Cohesion Policy representing the basic funding model, the RRF management model has in fact been perceived as an alternative model of EU funding. These two models should theoretically complement each other,²⁷ but the coexistence of a large number of financial instruments – each with different timeframes for eligibility, implementation of actions, and governance structures²⁸ – has resulted in

a peculiar competition between them related to requirements in terms of governance, pace, priority of objectives, etc.²⁹

In this sense, the RRF constitutes a key challenge for its initiators. If this new model proves to be effective both in supporting the rapid implementation of measures and in preventing the mismanagement of large amounts of European funds, it would be worth considering extending it to other EU policies involving large amounts. At a political level, the RRF has already been identified as a first step towards the

establishment of a fully developed European fiscal union, in particular because of the innovative financing system of this instrument.³⁰ If it proves to be effective and capable of securing legal, regular, and sound financial management of EU resources through its dedicated audit schemes, then this could lead to its adoption as a model for a comprehensive overhaul of the EU's financial governance and of the resources allocated through its budget in general. In turn, this could represent the next step in the evolution of the Union's institutional framework.



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1 See European Court of Auditors, "Annual Reports for the 2022 financial year", Publications Office of the European Union, 2023, pp. 334–368.

2 See Regulation (EU) 2021/241 of the European Parliament and of the Council establishing the Recovery and Resilience Mechanism, OJ L 57, 18.2.2021, 17.

3 See Council Regulation (EU) 2094/2020 establishing a European Union Recovery Instrument to support the recovery from the COVID-19 disease crisis, OJ L 433, 22.12.2020, I/23.

4 See F. Fabbrini, "Next Generation EU: Legal Structure and Constitutional Consequences", (2022) 24 *Cambridge Yearbook of European Legal Studies*, 45, 58–63.

5 See Recital 7 of Council Regulation 2094/2020, *op.cit.* (n. 3).

6 See E. Rubio, "Balancing Urgency with Control", (2021), 262 *Jacques Delors Institute Policy Paper*, 10.

7 See Arts. 22 and 24 of Regulation (EU) 2021/241, *op. cit.* (n.2).

8 For the direct financial management model see Art. 62(1)(b).

1 subsection a' and Arts.125–153 of Regulation (EU, Euratom) 2018/1046 on the financial rules applicable to the general budget of the Union, OJ L 193, 30.7.2018, 1.

9 See, for example, Art. 20 of Regulation (EU) 2021/241, *op. cit.* (n.2), on the approval of national recovery and resilience plans and Art. 10 on the suspension of all or part of the commitments or payments from the RRF.

10 See Art. 319 TFEU.

11 See. Recital 12 of Regulation (EU, Euratom) 2018/1046, *op. cit.* (n. 8).

12 See Arts. 25 to 31 of Regulation (EU) 2021/241, *op. cit.* (n. 2).

13 See Art. 1(10) of Regulation (EU) 2023/435 amending Regulation (EU) 2021/241 as regards REPowerEU funds in recovery and resilience plans and amending Regulations (EU) No 1303/2013, (EU) 2021/1060 and (EU) 2021/1755 and Directive 2003/87/EC, OJ L 63, 28.2.2023, 1.

14 See. European Court of Auditors, "Design of the Commission's Control System for the RRF", Special Report 07/2023, Publications Office of the European Union, 2023, pp. 7–8.

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

16 For more details on the protection of the EU's financial interests in the context of the RRF, see C. Kreith and Ch. Arwidi, "Protecting the EU's Financial Interest in the New Recovery and Resilience Facility", (2021) *eucrim*, 171.

17 See European Court of Auditors, Special Report 07/2023, *op. cit.* (n. 14), p.17.

18 See European Court of Auditors, Special Report 07/2023, *op. cit.* (n. 14), p.18.

19 *Ibid.*

20 *Ibid.*

21 See Council Executive Decision 10152/21/6.7.2021 approving the assessment of Greece's recovery and resilience plan, available online at: <<https://greece20.gov.gr/to-plires-sxedio/>> accessed 1 December 2023.

22 See *Elegktiko Synedrio* (Olomeleia) (Court of Audit – Plenary), 2 February 2022, Case no 380/2022, paras 11 & 12.

23 The exceptional nature of the RRF had been formally declared by the European Council in its Conclusions after its special meeting in July 2020 (EUCO 10/20, 21 July 2020, point A4), and further stated in Recital 6 of Regulation 2020/2094.

24 See *Elegktiko Synedrio* (Olomeleia) (Court of Audit – Plenary), 2 February 2022, Case no 380/2022, para 13.

25 See. A. Mavrommatis, "The concept of efficiency in the pre-contractual audit of the Court of Auditors", (2022) 15 *Theory and Practice of Administrative Law*, 601, 605–606.

26 For an analysis of developments in the lifting of EU fiscal measures as a means of protecting the rule of law in Poland, see W. Van Gaal, "'Systemic' lack of scrutiny on EU's €723.7bn recovery fund", *EU Observer* <<https://euobserver.com/news/155125>> accessed 1 December 2023.

27 See G. J. Koopman, "Cohesion policy and the Recovery and Resilience Facility: not just two sides of the same coin", (2022) 1, *ECA Journal*, 27.

28 For a comparison between the RRF and the EU Cohesion Policy, see European Court of Auditors, Review 1/2023, *EU financing through Cohesion Policy and the Recovery and Resilience Facility: A comparative analysis*.

29 See A. Novakov, "Cohesion & NextGenerationEU: Europe's double-act for recovery?", (2022) 1, *ECA Journal*, 116.

30 The compromise reached by the European Council in its Conclusions of July 2020, as described in Art. 5 of Council Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union (OJ L 424, 15.12.2020, 1) allows the European Commission to seek the resources necessary for the RRF through borrowing funds from the capital markets till 2026. This has been a novel political initiative, which has been characterised as exceptional as it signified a deviation from the basic framework of EU own resources.

Towards More Efficient Compensation for Damage Caused by PIF Offences

Explanatory Remarks on the Rules on Compensation and Confiscation in the EPPO Regulation

Francis Desterbeck

How can the European Union be efficiently compensated for damage inflicted by criminal offences affecting its financial interests? The EU's legislative framework, in particular the EPPO Regulation, states that EU Member States must take the necessary steps to confiscate, for the benefit of the Union, the proceeds of such criminal offences and to compensate for the damage caused by them. Given the binding force of the Regulation, these are even positive legal obligations for the Member States. According to the author, a minor adjustment in supranational and Member State legislation would suffice to achieve these objectives in a more efficient manner. He proposes, *inter alia*, including the proceeds of confiscation in the traditional own resources of the Union's budget. He also examines how Belgian legislation could be adapted such that the Union is effectively compensated for the damage it suffers from criminal offences affecting its financial interests.

I. Introduction

Art. 86(1) of the Treaty on the Functioning of the European Union (TFEU) stipulates that, in order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor's Office from Eurojust. This mandate became reality by means of Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office (EPPO Regulation).¹

Operational since 1 June 2021, the European Public Prosecutor's Office (EPPO) has amply proved its usefulness with several notable activities in the short time of its existence.² As a result, the EPPO has drawn attention to the paramount importance of the fight against criminal offences affecting the Union's financial interests and, related to this, the importance of compensation for damages to the EU caused by these offences.

Art. 38 of the EPPO Regulation underlines the importance of the disposition of proceeds gained by said criminal offences affecting the Union's financial interests as well as the compensation for losses that the Union suffers due to these offences. First data in the EPPO's Annual Report for 2022 indicate that these damages are quite substantial. 1117 EPPO active investigations (as of 31 December 2022) involved estimated damages of €14.1 billion.³

However, Art. 38 of the EPPO Regulation has a rather general scope and, in my view, requires further specification both in the supranational legislation of the EU and in the national legislation of the Member States in order to ensure efficient recovery of the damage caused by the above-mentioned offences. This article aims to examine how this specification can be implemented in concrete terms.

A regulation is a binding legislative act, which must be applied in its entirety, meaning it aims to regulate a situation completely. Furthermore, a regulation is automatically part of the legislation of the Member States. This means the 22 Member States, which are members of the EPPO, have a duty to concretely apply, in practice, the principles put forward in general terms by Art. 38 of the EPPO Regulation.

This article starts with an outline of the general framework before explaining in more detail the issues surrounding the confiscation and compensation of offences detrimental to the EU's financial interests and then making recommendations for legislative improvements. In the following section (II), I will examine the scope of the EPPO Regulation and, relatedly, the powers of the EPPO. In this context, the question is addressed of whether the EPPO has the power to prosecute all offences affecting the Union's financial interests. In section III, I will explain seizure and confiscation in general and, next, in section IV, discuss how the obligation of forfeiture and compensation by Member States can be concretely improved by some legislative adjustments. The conclusions (V) put the ideas in a nutshell.

II. The EPPO's Powers

1. Criminal offences affecting the Union's financial interests

According to Art. 4 of the EPPO Regulation, the EPPO is responsible for investigating, prosecuting, and bringing to judgment the perpetrators of, and accomplices to, serious criminal offences affecting the financial interests of the Union, as provided for in Directive (EU) 2017/1371 on the fight against fraud to the Union's financial interests by means of criminal law (PIF Directive).⁴ The offences for which the EPPO has jurisdiction are defined in Arts. 3 and 4 of the PIF Directive and concern both the Union's expenditure and revenue. As for its scope, however, the Directive includes several limitations. For instance, in respect of revenue arising from VAT own resources, the PIF Directive applies only in cases of serious offences against the common VAT system. Offences against the common VAT system are considered to be serious where the intentional acts or omissions are connected with the territory of two or more Member States of the Union and involve a total damage of at least EUR 10,000,000 (Art. 2(2) of the PIF Directive). Furthermore, it establishes that the criminal offences must have been committed intentionally (Art. 3(1)).

2. The EPPO's limited competence

The description of the scope of the PIF Directive under 1) reveals that obligations set up by Union law do not cover all offences against the Union's financial interests. However, confiscation and compensation are equally important for these offences outside the scope of Union law. This approach is also reflected in the division of responsibilities between the EPPO and national authorities. The EPPO Regulation provides for a system of shared competence between the EPPO and national authorities in combating crimes affecting the financial interests of the Union.⁵

If the terms of the EPPO Regulation are met, national authorities have a legal obligation to step down and let the EPPO do its work. The EPPO's work has enormous added value. The "helicopter view" that the EPPO takes of cases under its competence allows the office to make connections between facts that escape the attention of Member States' law enforcement powers. Some cases, however, escape even the EPPO's jurisdiction. Not all offences affecting the Union's financial interests exceed the damage threshold, at which point the EPPO becomes competent. Moreover, "only" 22 Member States are bound by the EPPO Regulation. Hungary, Poland, and Sweden, for instance,

are not parties to the Regulation but are bound by the PIF Directive. These Member States also have a duty to prosecute crimes affecting the Union's financial interests, albeit through their national jurisdictions.

As mentioned above, the settlement of damages caused by offences for which the EPPO cannot take action, either because of the limited scope of the EPPO Regulation or because the EPPO has no jurisdiction over these countries, should still benefit the Union.

III. Seizure and Confiscation

1. Legal framework of the EU in general

Criminal offences affecting the Union's financial interests for the sake of financial gain often go beyond the national sphere and are often committed by organised criminal groups. It is obvious that the losses caused by these crimes must be recovered for the taxpayer's sake. As a result, both the PIF Directive and the EPPO Regulation pay attention to seizure and confiscation as means of recovery. Recital 29 of the PIF Directive calls on Member States to take the necessary measures to ensure the prompt recovery of sums and their transfer to the Union budget, without prejudice to the relevant Union sector-specific rules on financial corrections and recovery of amounts unduly spent. In addition, Art. 10 of the PIF Directive obliges Member States to take the necessary measures to enable the freezing and confiscation of instrumentalities and proceeds from the criminal offences referred to in Arts. 3, 4, and 5. Member States bound by Directive 2014/42/EU⁶ shall do so in accordance with that Directive. The 2014 Directive's recital 1 reads as follows:

The main motive for cross-border crime, including mafia-type criminal organisation, is financial gain. As a consequence, competent authorities should be given the means to trace, freeze, manage and confiscate the proceeds of crime. However, the effective prevention of and fight against crime should be achieved by the proceeds of crime and should be extended, in certain cases, to any property deriving from activities of a criminal nature.

In addition, Art. 38 of the EPPO Regulation deals with confiscation of the proceeds of PIF offences as follows:

Where, in accordance with the requirements and procedures under national law including the national law transposing Directive 2014/42/EU of the European Parliament and of the Council, the competent national court has decided by a final ruling to confiscate any property related to, or proceeds derived from, an offence within the competence of the EPPO, such assets or proceeds shall be disposed of in accordance with applicable national law. This disposition shall not negatively affect the rights of the Union or other victims to be compensated for damage that they have incurred.

What is actually understood by the notions “seizure” and “confiscation”? Within this supranational legal framework, the notions “seizure” and “confiscation” are defined in a similar way by the EU Member States. Belgian case law and legislation is exemplary for this approach, as described in the following.

a) Seizure

The Belgian Court of Cassation defines seizure in criminal matters as a provisional coercive measure by which the competent authority, by virtue of the law and in response to a criminal offence, removes an object from the owner’s or possessor’s free right of disposal and, with a view to ascertaining the truth, confiscating it, restoring it, or securing civil interests, takes it, as a rule, into its custody.⁷

This is in line with the traditional view, which assumes that seizure in criminal matters has three functions. Initially, the *evidence function* prevailed: seizure secured goods that were the means or product of a crime. Later, seizure in criminal matters also acquired a *deprivation function*: the seizure guaranteed the execution of a possible later confiscation. More recently, the focus has been on civil interests and seizure has also acquired a *compensation function*: seizure should enable the return of property to its rightful owner and provide collateral for the compensation of victims.

b) Confiscation

Confiscation is a sanction, imposed by the court in response to a crime. Its purpose is either to deprive the asset of ownership over specific property or to oblige a person to pay a sum of money reflecting the equivalent value of such property.⁸

Art. 43 of the Belgian Criminal Code states that confiscation is applied (1) to the goods that are the object of the crime, and to those that served or were intended for the commission of the crime, when they are the property of the convicted person, (2) to the goods resulting from the crime, and (3) to the assets obtained directly from the crime, to the goods and values substituted for them, and to the income from the invested benefits.

It is mainly the third category of property that allows Belgian judges to forfeit the proceeds of crime that has harmed the Union’s financial interests. Given that confiscation is understood as a punishment under Belgian law, it is imposed by the judge at the request of the public prosecutor. Confiscation transfers ownership of the confiscated property to the Belgian State. The concrete implementation of forfeiture

falls under the remit of the Ministry of Finance (in Belgium: Federal Public Service Finance).

The Belgian legislator has also been mindful of the compensation function of forfeiture. Art. 43bis of the Belgian Criminal Code states the following:

In case the confiscated items belong to the civil party, they will be returned to it. The confiscated items will also be returned to the civil party in case the court ordered the confiscation on the grounds that they constitute goods and values substituted by the convicted party for the items belonging to the civil party or because they constitute the equivalent of such items.

The wording of the law shows that awarding confiscated property depends on the capacity of the injured party as a civil party. The injured party acquires the capacity of civil party by acknowledging himself as a civil party during the criminal investigation or during the court proceedings. Recognition as a civil party thus requires active intervention by the injured party in the criminal proceedings and recognition by the judge.

2. In concreto

a) Seizure

As mentioned above, the EPPO’s Annual Report 2022 revealed that, as of 31 December 2022, there were 1117 EPPO active investigations in the participating Member States. These investigations represented a total estimated loss of €14.1 billion. €6.7 billion of this amount is attributed to 185 VAT fraud investigations. In 2022, freezing orders were issued for €359.1 million. These figures illustrate the importance of seizure in criminal offences affecting the Union’s financial interests, even assuming that only a fraction of these estimated damages will later be confiscated by Member States’ sentencing courts.

b) Confiscation

To determine the total value of the goods to be confiscated, one should not only look at the value of the seized goods alone. Property not seized can also be confiscated. Art. 4 (1) of Directive 2014/42/EU incidentally requires Member States to establish a system of value confiscation:

Member States shall take the necessary measures to enable the confiscation, either in whole or in part, of instrumentalities and proceeds or property the value of which corresponds to such instrumentalities or proceeds, subject to a final conviction for a criminal offence, which may also result from proceedings in absentia.

In Belgium, a system of value confiscation has been in place for some time. Art. 43bis of the Belgian Criminal Code stipulates that if the assets and property that served

or were intended to serve the commission of a criminal offence cannot be found in the convicted person's assets, the court shall estimate their monetary value. The confiscation is then relative to a corresponding sum of money. The recovery of the amounts thus confiscated often involves significant difficulties and costs in practice.

IV. Suggestions for a More Efficient Supranational and Belgian Legislation

Notwithstanding the scenario of seizure and confiscation described *in abstracto* and *in concreto* above, confiscation especially in EPPO proceedings raises several issues. Indeed, Art. 38 of the EPPO Regulation (*supra* III.1) emphasises both the deprivation and the compensation function of seizure and confiscation (*supra* III.1a)). The deprivation function is emphasised by the reference to Directive 2014/42/EU, while the last sentence of the provision explicitly states that the Union must be compensated for the damage it has suffered due to the offences. For the implementation of these premises, the EPPO Regulation refers to the national legislation of the Member States. Overall, Art. 38 of the EPPO Regulation has been formulated in rather vague terms and follows a rather principled approach. Hence, the question must be raised as to whether and to what extent additional legal measures should be put in place at both the Union and Member State levels for the sake of efficiency of execution of confiscation. This question is further explored in the following, which includes recommendations for the legislature.

1. At the supranational level

According to Art. 311 TFEU, "the Union shall provide itself with the means necessary to attain its objectives and carry through its policies", i.e., the EU's policies and activities are funded by the European budget, which is established by the Council and the European Parliament. Art. 311 TFEU further stipulates that, without prejudice to other revenues, the budget is financed wholly from own resources. Own resources account for about 99% of the budget's resources. The composition of own resources is determined by Art. 2(1) of Council Decision 2020/2053.⁹ Accordingly, own resources include: "traditional own resources", i.e., customs duties and agricultural and sugar levies; own resources derived from VAT; own resources based on the weight of non-recycled plastic packaging waste; and, last but not least, own resources based on the Gross National Income (GNI) of all EU Member States.

I propose that the proceeds of confiscations, pronounced in respect of criminal offences affecting the Union's financial

interests, be placed under a separate heading of own resources in the Union budget. Such an entry would trigger a positive obligation on Member States to collect confiscated amounts and contribute them to the Union budget.

As a second option, it would also be appropriate to insert confiscated amounts under the specific heading "traditional own resources". At first glance, this might seem odd because, historically, they were the first source of revenue for the Union. However, traditional own resources are subject to their own rules of contribution, whereas uniform rates of contribution are applied to other own resources. If traditional own resources are collected, collection costs may be deducted from the amounts actually paid. These costs range from 10 to 25%, depending on when the amounts must be made available to the Union. Therefore, insertion of confiscations under traditional own resources would not only oblige Member States to pay the proceeds of all confiscations ordered for criminal offences affecting the Union's financial interests to the Union, but also allow them to take into account the costs often associated with the recovery of confiscations in practice. In particular, when recovering amounts imposed by way of value confiscation, these costs can be quite considerable.

2. At the national level – Belgian legislation

a) Seizure

Belgian law already provides the proper means to handle seizure of the proceeds of crime. It does not restrict seizure to items that are related to a committed crime and can actually be found. If there are serious and concrete indications that the suspect has obtained a pecuniary advantage, and the items representing this pecuniary advantage cannot be found as such or can no longer be found on the suspect's property located in Belgium or have been mixed up with legal goods, the public prosecutor can seize other items on the suspect's property up to the presumed amount of this pecuniary advantage (Art. 35 of the Belgian Code of Criminal Procedure). This is referred to as seizure by equivalence of property benefits. It requires a special procedure to be followed in order to safeguard the rights of the accused. As far as seizure is concerned, in my view, the Belgian legal system is thus sufficient for its authorities to properly conduct the investigation of criminal offences affecting the Union's financial interests and to secure the proceeds of these crimes until a final court decision is taken.

b) Confiscation

As mentioned above (III.1.b), under Belgian law, any injured party to a criminal offence can have confiscated property

Out-of-Court Settlement	Amount in million EUR
Payment to the public prosecution service	518
Payment to the tax authorities	407
Recovery of proceeds of crime	138
Payment to civil parties	20
Payment to social security services	0,7
Legal costs	0,4
Total	1,085

Table 1
Out-of-court settlements
between May 2011
and December 2021

appropriated by the criminal court once he/she is formally recognised as a civil party and thus becomes a party to the criminal proceedings. This also applies to the European Union because there is no provision that prohibits it from becoming a civil party. Nevertheless, the European Union becoming a civil party is a cumbersome process and implies that the Union closely monitors every criminal investigation into cases in which its financial interests are affected. In EPPO cases, this process would also create additional workload for the European Delegated Prosecutors (EDPs). As public prosecutors, the EDP must also be mindful of confiscation, which, as already mentioned above, is considered a punishment under Belgian law.

I propose a slight adaptation of the already cited Art. 43bis of the Belgian Criminal Code. The article could be supplemented with the following paragraph:

Assets, related to or proceeds obtained by means of offences against the financial interests of the European Union shall be confiscated for the benefit of the Union.

This supplement could simplify criminal proceedings because the court would be required by law to impose confiscation of the proceeds of criminal offences affecting the Union's financial interests, without having to acknowledge the European Union as a civil party. Furthermore, such a provision would offer the advantage that it would also apply to offences that damage the financial interests of the Union but are not prosecuted by the EPPO because of its limited material or territorial competence (see supra II.).

c) Simplified prosecution procedure

Belgium has a well-functioning legal system in that it has a simplified prosecution procedure. Its scope has been repeatedly extended in the recent past so that it also applies today with regard to economic and financial delinquency.

In this context, Art. 216bis of the Belgian Code of Criminal Procedure provides *inter alia*:

For the fiscal or social criminal offences by which taxes or social contributions have been evaded, a simplified prosecution procedure is possible only after the offender of the crime has paid the taxes or social contributions he owes, including interest, and the fiscal or social administration has agreed to it.

This means of concluding criminal cases is very well applicable in practice. According to Belgian press reports, over 1530 out-of-court settlements were proposed to defendants (excluding traffic offences) between May 2011 and December 2021.¹⁰ Together, these out-of-court settlements raised more than €1 billion, the break-down of which can be seen in Table 1.¹¹

I suggest that Art. 216bis of the Belgian Code of Criminal Procedure be supplemented by the following sentence:

In respect of criminal offences, affecting the Union's financial interests, a simplified prosecution procedure is possible only after the offender of the offence has compensated the prejudice to the European Union, and the Union has given its consent.

In the same way as the proposed amendment to Art. 43bis of the Belgian Criminal Code would formally establish the Union's claims for asset benefits to be confiscated, this proposed addition would strengthen the Union's claims if they are treated by a simplified prosecution procedure. As it appears from the aforementioned legal text, in Belgium, tax and/or social administrations must explicitly give their consent when a simplified prosecution procedure is proposed by the public prosecutor. This provision gives the concerned administrations a say in the matter in the form of a veto right. There can be no doubt that such a veto right would also be of interest for the Union where criminal offences affecting the Union's financial interests are concerned, and such a right should be clarified in favour of the EU in the law as proposed, when an offence against the Union's financial interests is committed.

V. Conclusion

The EPPO's annual Report 2022 confirms what all stakeholders involved in the fight against criminal offences affecting the Union's financial interests have intuitively felt for a long time: the damage caused to the Union by these crimes is, in practice, much higher than previously assumed. It is therefore correct that Union law, in particular the EPPO Regulation (and the PIF Directive), pay heed to the recovery of the damage caused by these crimes and stress the importance of seizure and confiscation of the proceeds of crime. *Stricto sensu*, the provisions of the EPPO Regulation may be regarded as sufficient in themselves to enable the recovery of these proceeds for the benefit of the European Union. Nevertheless, this re-

covery can be effected much more efficiently through a number of minor amendments to supranational and national laws, as proposed in this article.

Given that Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the Eu-

ropean Union is currently under review, a window has also been opened to effectively implement the proposed adjustments. As a consequence, the proceeds from the confiscation of proceeds and assets from criminal offences affecting the Union's financial interests can also formally be given a place in the Union's budgetary framework.



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

2 EPPO, "Annual Report 2022", available at: <https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO_2022_Annual_Report_EN_WEB.pdf> accessed 4 October 2023.

3 See Annual Report 2022, *op. cit.* (n. 2).

4 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.

5 The EPPO's competence is also characterised by the principle of

subsidiarity. The idea is that the fight against offences affecting the financial interests of the Union cannot be sufficiently achieved by the Member States on their own, given the fragmentation of national prosecutions. Therefore, the fight against these offences can be better achieved at the Union level (cf. Recitals 12 and 13 of the EPPO Regulation).

6 Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union, OJ L 127, 29.4.2014, 39.

7 Cass, 25 February 2003, AR P.02.0674.N.

8 E. Francis, "De uitvoering van de verbeurdverklaring : interne en internationale aspecten", in J. Baron, M. De Rue, E. Francis, P. Reynaert, V. Seron, Y. Van den Berge, F. Verbruggen and G. Vermeulen (eds.), *De strafuitvoering*, 2006, pp. 1–56.

9 Council Decision (EU, Euratom) 2020/2053 of 14 December 2020 on the system of own resources of the European Union and repealing Decision 2014/335/EU, Euratom, OJ L 424, 15.12.2020, 1.

10 Newspaper Knack, 14 December 2022, <<https://www.knack.be/nieuws/belgie/justitie/afkoopwet-levert-belgie-ruim-een-miljard-euro-op/>> accessed 4 October 2023. The journalist's data are partly based on statistics from the College of Public Prosecutors.

11 Ibid.

Recovery of Proceeds from Crime

Time to Upgrade the Existing European Standards?

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Asset recovery has been at the forefront of recent international initiatives in the areas of criminal law and judicial cooperation in criminal matters. In this spirit, the Conference of the Parties to the Warsaw Convention on money laundering and the financing of terrorism aims to further improve the existing framework standards of the Council of Europe. This is to be done by means of an "Asset Recovery" Protocol to the 2005 Warsaw Convention, which will seek to strike a balance between the task of depriving criminals of their illicit gains and the parallel obligation to respect the rights of the accused and of third parties, in accordance with the principles stemming from case law of the European Court of Human Rights. This article outlines the rationale behind this initiative and the main targets of reform.

I. Introduction

In 2005, at the Third Summit of the Heads of State and Government of the Council of Europe held in Warsaw, the Convention on Laundering, Search, Seizure and Confiscation of

the Proceeds from Crime and on the Financing of Terrorism, commonly known as "the Warsaw Convention" (CETS No. 198), was opened for signature. It entered into force in May 2008, having been ratified by six states.¹ With currently 39 ratifications since its adoption (and five other countries

– including the European Union as an international organization – as signatories), the Warsaw Convention embodies the commitment of at least 37 Council of Europe member states and 2 non-member states (including, since 2022, Morocco) in the fields of combatting money laundering/terrorist financing and confiscating the proceeds from crime.

To date, the Warsaw Convention remains the only comprehensive treaty covering both the prevention and repression of money laundering, as well as financing of terrorism, recovery of proceeds of crime, and international co-operation. Its unique features include being the only international treaty that grants national authorities the power to halt suspicious transactions at the earliest stage and to prevent their movement through the financial system. In addition, specialised Financial Intelligence Units (FIUs) of member states are obliged to stop such transactions at the request of a foreign counterpart FIU. The progress brought about by the Convention has been broad, swift, tangible, and is clearly reflected in the way it has further inspired revisions of the relevant Financial Action Task Force (FATF) and EU standards.

Today, 15 years after the entry into force of the Warsaw Convention, the Conference of the Parties (COP), which monitors its implementation,² aims to further improve the framework of standards set by the Convention in the specific area of asset recovery. This new initiative, which is currently underway, ensures a follow-up to the relevant decisions taken at the Fourth Summit of the Heads of State and Government of the Council of Europe (held in Reykjavik on 16 to 17 May 2023), taking into account the findings and challenges set out in the Secretary General's 2023 Report on the state of democracy, human rights, and the rule of law, entitled "An Invitation to Recommit to the Values and Standards of the Council of Europe."

In this article, I will outline the rationale behind the above initiative and, in particular, the main elements of the proposed "Asset Recovery" Protocol to the Warsaw Convention.

II. The Asset Recovery Gap

Serious and organised crime continues to pose a significant threat to the rule of law and, more generally, to the safety and security of society, both at a national and global level. Whilst there are no precise or absolutely reliable statistics, the likely value of assets generated by profit-driven, illegal activities appears to be substantial. A 2021 study by the European Commission on the profits generated by organised crime estimated that the annual revenues of the

nine main criminal markets in the EU were between €92 billion and €188 billion (mid-point of €139 billion) in 2019.³ These immense profits allow criminals to further fund their illicit activities and infiltrate the legal economy and public institutions.

In light of the above, both experience from practice and academic research tend to confirm the (somewhat mundane) statement that depriving criminals of the assets gained through their activities is an essential element in the fight against organised and financial crime. Asset recovery deters criminal activity by removing its impetus, while protecting the integrity of the financial system and the broader economy by reducing the circulation of illicit income. Indeed, the effective application of asset recovery measures has proven to be a key tool in dismantling the extensive networks of criminal organisations operating at an international level. Moreover, and no less importantly, it allows for the compensation of the victims of crime, thereby promoting social cohesion and justice.

The existing conventional framework of the Council of Europe (CETS No. 198, but also the European Convention on Mutual Assistance in Criminal Matters, and the Conventions against Corruption, Cybercrime and Trafficking in Human Beings, and their additional protocols)⁴ provides a solid operational basis for the recovery of proceeds of crime. In many aspects, the standards established therein, especially in the provisions of the Warsaw Convention, exceed the global standards as set out by the FATF and the United Nations (in the United Nations Convention against Corruption – "UNCAC"),⁵ thus providing a stronger position to pursue asset recovery for those countries that have ratified the relevant instruments.

Nevertheless, since the adoption of CETS No. 198 in 2005, the rapidly evolving criminal landscape, as well as a number of common challenges identified within the context of mutual country assessments, have revealed an urgent need to further foster international cooperation when it comes to asset recovery. Indeed, the findings of the assessment processes carried out by the main global and regional monitoring mechanisms (the FATF, the Committee of Experts on the Evaluation of AML (Anti-Money Laundering) Measures and the Financing of Terrorism-MONEYVAL, and the COP) indicate that the results achieved in this area are very modest. Although no fully accurate statistical data could be provided, it is estimated that less than 2% of criminal proceeds are routinely recovered.⁶ These results are certainly not sufficient to claim that "crime does not pay" – a phrase commonly used by lawmakers and competent authorities to describe a crucial goal in the fight against financial and organised crime.

MONEYVAL, whose 5th mutual evaluation round is due to end in 2024, has also discussed the state of play in this field in the context of a review of results achieved and the negotiation of its strategy for the years 2024 to 2027, which was adopted by the ministers responsible for Anti-Money Laundering/Counter-Terrorist Financing (AML/CFT) at their high-level meeting in Warsaw on 25 April 2023.⁷ Its 2022 Activity Report notes:⁸

Moreover, successful confiscations of ill-gotten funds as a criminal measure are rather rare in comparison with the estimates of the proceeds of crime. Countries should resort not only to freezing but also to seizure and confiscation of criminal funds. In at least ten countries (39%), enhancing the powers and resources of the countries' asset recovery and management offices will be crucial to improving their effectiveness.

The poor results achieved so far are partially attributed to the lack of a comprehensive binding international legal framework specifically aimed at the recovery of criminal proceeds, and international cooperation to this end. In response to this situation, a number of initiatives have been launched by the main stakeholders in the relevant field – more specifically:

- FATF, as a global standard-setter in AML/CFT, has recently revised its standards on asset recovery (Recommendations 4 and 38), against which states will be assessed globally in the next evaluation round;
- At the European Union level, the European Commission presented a proposal for a new European Parliament and Council Directive on asset recovery and confiscation⁹;
- Interpol has declared police cooperation on asset recovery one of its main priorities¹⁰.

This brings us to the heart of current discussions on the next steps to be taken. The Council of Europe, comprised of 46 member states and with several of its conventions open to non-member states, has historically been at the forefront of asset recovery standards. Most importantly, the Council of Europe places greater emphasis on an area which is perhaps to some extent neglected by other comparable mechanisms and organisations, namely achieving an equitable balance between the overarching task of combatting money laundering and terrorism financing and the parallel obligation to *respect the rights of the accused and of third parties*, taking into account the principles stemming from case law of the European Court of Human Rights.¹¹ It therefore constitutes a unique forum to address, in an equitable and proportionate way, the existing gaps in the framework of asset recovery and sharing, and to further enhance its comprehensiveness.

In this spirit, the COP, as the guardian of the standards enshrined in the Warsaw Convention, has been continuously discussing the need to ensure that the Convention, as the only international treaty specifically devoted to money laundering and the financing of terrorism, remains relevant and up to date, enabling Parties to respond to evolving challenges. Such discussions were initiated as early as in 2012. In 2013, the COP concluded that a more general review of the Convention's international cooperation provisions should not be undertaken until a critical mass of states had ratified the Convention and the outcome of the negotiations on the EU 4th AML Directive and the then pending Confiscation Directive (Directive 2014/42/EU on the freezing and confiscation of instrumentalities and proceeds of crime in the EU) was known.¹² Now that these steps have been taken, the time has come for the Council of Europe to take concrete steps to revise its asset recovery rules.

As a first step, this issue was put on the agenda of the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (PC-OC) as a recurring item. In close cooperation with the COP, the PC-OC carried out a comprehensive "Study on the possible added value and feasibility of preparing a new binding instrument in the CoE on international co-operation as regards the management, recovery and sharing of assets proceeding from crime"¹³ in 2019, which should be considered a key reference document for future work in the field of asset recovery. Following the findings of this study, the COP and the PC-OC held a number of consultative meetings, culminating in the organisation of a joint session in November 2022. The meeting brought together representatives of both institutions and experts from around the globe (relevant international organisations, specialised institutes, think tanks, etc.) to discuss and consider the development of an additional instrument in the field of asset recovery.

More recently, in April 2023, ministers from states and territories that are members of MONEYVAL adopted a high-level declaration and strategic priorities, which, *inter alia*, provide for closer synergies between MONEYVAL and the COP, and require MONEYVAL to support the Council of Europe in any further development of the Warsaw Convention.¹⁴ In June 2023, the issue of asset recovery was discussed at the 83rd plenary meeting of the European Committee on Crime Problems (CDPC), where it was decided to further examine the proposals and finalise the elements to be included in the draft terms of reference of an ad-hoc committee to be tasked with the preparation of a draft additional protocol supplementing the Warsaw Convention. Lastly, at its most recent, 15th plenary meeting, in November 2023, the COP took note of the planned establishment of the ad-hoc com-

mittee, which is expected to undertake its work in close cooperation with the Conference of the Parties during the period of 2024 to 2026.¹⁵

III. Areas of Reform in the Field of Asset Recovery

Three key areas have emerged from the discussions to date as the most critical in terms of the added value that the proposed Protocol can bring. These are:

- Pro-active management of seized and confiscated assets aimed at preserving and/or increasing the value of the assets concerned, and ensuring transparency, accountability, and public confidence in the effectiveness of such management;
- Providing concrete tools and mechanisms to State Parties to share confiscated assets;
- Introducing – in a manner that is mindful of the need to respect fundamental rights and freedoms – non-conviction-based (NCB) confiscation procedures, and enabling the execution of NCB forfeiture decisions rendered in foreign jurisdictions.

(1) Looking at **asset management**, it is important to note that the Warsaw Convention provides for a broad and general obligation to manage frozen and seized proceeds of crime, and property of equivalent value. Inadequate management measures have been found to thwart the entire asset recovery process. Executing foreign confiscation requests takes time, which is why preserving the value of assets is of significant importance. Consequently, a consistent asset management system needs to be applied across the State Parties to avoid asset depreciation and unduly high maintenance costs.

A number of good practices in this context have already been developed by State Parties and were thoroughly reviewed by the COP in its recent Thematic Monitoring Report on Article 6 CETS No. 198 (Management of Frozen or Seized Property). At the same time, issues related to the management of confiscated assets have recently been raised by the Parliamentary Assembly of the Council of Europe and should be considered both in the context of the effectiveness of domestic frameworks, and in the context of international cooperation. These issues include introducing, or further promoting, the possibility of social re-use of confiscated assets; establishing a centralised institution at the national level responsible for managing such assets (including both movable and immovable property), with the necessary powers and resources to administer the assets concerned and make them available for social purposes, in co-operation with local public and non-governmental bodies; giving priority to using confiscated funds to compensate direct and

indirect victims, according to a sufficiently broad definition; using part of the confiscated assets and items to enhance police and judicial capacity to identify, seize, and confiscate as many criminal assets as possible; as a state requesting the return of funds seized from a requested state, providing the latter, in adherence to the principles of transparency and accountability, with precise assurances as to the manner of disposal of the returned funds (restoration to legitimate owners, compensation of victims, social reuse, etc.); and informing the public on how returned confiscated assets will be utilised, managed, and monitored in order to maintain public confidence in the system.

(2) The **sharing and return of confiscated assets** are inextricably linked to their proper management and a key element in the asset recovery process. Many of the major financial crimes committed today have a transnational component and require the cooperation of numerous jurisdictions, through financial intelligence, law enforcement, and mutual legal assistance channels. Such cooperation often results in successful prosecutions. Nevertheless, when assets are finally confiscated, they usually stay in the jurisdiction where they were originally seized. They are rarely returned or shared with the country of origin of the proceeds or with jurisdictions that contributed to the investigation, resulting in a considerable number of victims facing difficulties in obtaining compensation for the harm caused by crimes committed against them. The World Bank estimates that only 3% of the proceeds are returned to developing countries.¹⁶ This contributes to the growing economic disparities between nations and raises questions about the fairness of international legal norms and principles.

Article 25 of the Warsaw Convention already provides that a State may, at the request of another Contracting State give special consideration, in accordance with its domestic law or administrative procedures, to the concluding agreements or arrangements with other Contracting Parties on the sharing of such property on a regular or case-by-case basis. The proposed Protocol would aim at ensuring that State Parties have an *obligation* to enter into asset sharing negotiations and agreements, including a fair partitioning of the assets. The Protocol could also seek to further streamline and regulate one of the key requirements of CETS No. 198, namely State Parties' obligation to give priority consideration to victims' compensation when acting on a foreign confiscation request. Further issues that have emerged as potential topics for discussion include ensuring transparency and accountability at every stage of the process; mandating States to consult at an early stage on who will bear the relevant costs; a formal requirement for the member state holding the asset to engage proactively and spontaneously with an-

other State Party where it is clear to the holding State Party that the confiscated assets belong to legitimate owners in that other State, or that compensation is likely to follow; and introducing an asset-sharing model similar to the relevant EU provisions, but with an “opt out” in any given case by agreement of the States involved.

(3) When it comes to the **introduction of a legal framework for NCB confiscation**, no binding rules have been set by the Council of Europe in respect thereto. This mechanism may, however, provide an advantageous solution for effectively addressing the need to secure the final confiscation of assets under particular circumstances (e.g., when the statute of limitations for the underlying crimes has run out), as long as the measures undertaken constitute a lawful and proportionate interference with the peaceful enjoyment of one's possessions. On the other hand, State Party approaches to NCB confiscation differ notably. In many cases, opposing legal principles and human rights reservations are cited as a barrier to the introduction of this measure into domestic law. Equally, whilst NCB confiscation is being increasingly adopted by States Parties, a unified approach has yet to be developed in rendering international assistance in NCB confiscation cases. The matter therefore calls for careful consideration and analysis. At a minimum, the proposed Protocol could seek to foster international cooperation among the State Parties in obtaining evidence for purposes of NCB confiscation procedures, and to encourage State Parties to endeavour to recognise and execute foreign NCB confiscation orders as best as they can.

IV. The Way forward

Whereas the global landscape of fighting organised crime has considerably changed in recent years, the scarce statistics on the confiscation of proceeds from illicit activities that do exist show that significant improvements are still needed. In this context, practical obstacles to cross-border confiscation and the confiscation of illicit assets where, for various reasons, perpetrators cannot be criminally convict-

ed, still present the key areas of concern. As noted in the Explanatory memorandum to Resolution 2218 (2018) of the Parliamentary Assembly of the Council of Europe:¹⁷

[t]he fundamental threat to the rule of law and democracy posed by the massive financial resources accruing in the hands of transnational organised criminal groups urgently requires that the overwhelming majority of States that are not (yet) under the influence of these networks fully co-operate among themselves in order to seize a sizeable chunk of these criminal assets, year after year, so that the financial power of the criminals can be contained and even rolled back.

This high-level statement forms a basis for what is considered to be a key priority area the future protocol to the Warsaw Convention (CETS No. 198) should cover. To sum things up, an additional Protocol would allow the Parties to benefit from a smooth and streamlined cooperation, enabling them to at a minimum (i) benefit from asset management in a way that preserves or even increases the value of the seized/confiscated property and that also disposes of such property for the compensation of the victim or for social purposes, in a manner that is efficient and transparent; ii) enable direct access to and enforcement without delay of asset sharing agreements and arrangements among the Parties; and (iii) provide mutual legal assistance in cases involving NCB confiscation. These elements would make the future protocol a unique legal instrument which would provide for swift and prompt cooperation among all of its Parties.

The Council of Europe, a pan-European standard-setter with vast experience in this matter, is conscious of the permanent threat posed by organised and economic crime, but also of the need to ensure that any measure taken does not have a disproportionate impact on fundamental human rights. Its knowledge and expertise are thus indispensable in steering and supervising the negotiation and finalisation of the upgraded standards in the asset recovery area. In order to live up to that ambition, close cooperation among its relevant bodies, its member states and expert community is not only necessary, but also the expected way forward in this direction.

* The views expressed in this article are those of the author and can in no way be taken to reflect the official opinion of the Council of Europe.

1 CETS No. 198, available at: <<https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty whole=198>>. All hyperlinks in this article were last accessed on 19 February 2024.

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3 European Commission, Directorate-General for Migration and Home Affairs, *Mapping the risk of serious and organised crime*

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4 CETS nos. 30, 141, 173, 174, 185 and 197.

5 Chapter V, Art. 51–59 UNCAC are devoted to asset recovery, notably: direct recovery of assets through the use of civil proceedings

(Art. 53), international cooperation for confiscation (Arts. 54 and 55), and return and disposal of assets (Art. 57).

6 See for example Europol, *Does crime still pay? Criminal asset recovery in the EU*, 1 February 2016, accessible at <<https://www.europol.europa.eu/publications-documents/does-crime-still-pay>>.

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See also Basic Objective 4.1. – MONEYVAL Strategy on anti-money

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laundering, combating the financing of terrorism and proliferation financing (2023–2027).

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16 Specific figures have been produced by the STAR Initiative on the repatriation of proceeds in foreign bribery cases, whereby only 3.3% are being returned or ordered returned to the countries whose officials were bribed or allegedly bribed; see “Left out of the Bargain – Settlements in Foreign Bribery Cases and Implications for Asset Recovery”, 2014.

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Prospects and Models of Combating Cryptocurrency Crimes

The India-EU Dialogue as a Perspective?

Varun VM

This article discusses the growing concerns regarding the convergence of virtual currencies and mainstream finance, which is leading to an increase in illicit activities such as money laundering and terrorism financing. The challenges that law enforcement faces in addressing these crimes are exacerbated by limited technological expertise and a sense of impunity among perpetrators. The article highlights successful asset recovery cases involving crypto assets in the United States and the extension of anti-money laundering laws to virtual assets in the United Kingdom and India. While advanced jurisdictions are making progress in addressing these challenges, the article emphasizes the need for policy recommendations and best practices, particularly for jurisdictions in Africa, which is experiencing rapid growth in the crypto market. It also delves into potential avenues for collaboration between the European Union (EU) and India in addressing capacity deficiencies in developing or least developed countries. The cybersecurity practices and frameworks employed by both European and Indian entities may serve as instructive models for developing and least developed countries to combat terrorism financing with virtual assets.

I. Introduction

The rapid convergence of virtual currencies and assets with the mainstream financial system has resulted in a blurred distinction between physical and virtual assets/currencies. This merging has led to a significant increase in occurrences of money laundering, transnational organized crime, and

terrorism financing facilitated by the use of illicit cryptocurrencies, thereby raising concerns about the effectiveness of regulatory measures governing the “virtual currency/asset” domain. Moreover, the limited expertise in conducting technology-based law enforcement and the growing sense of impunity further compound the challenges faced by criminal justice administration.

According to a report from the blockchain analysis company *Chainanalysis*, cited by the *Basel Institute on Governance*, illicit cryptocurrency addresses received a total of \$14 million in 2021.¹ This figure represents a significant increase of almost 80 percent compared to the previous year. In India, as of 31 January 2023, the Directorate of Enforcement, investigating several cases related to cryptocurrency fraud, has seized/attached proceeds of crime amounting to INR 9,360 million (approximately 112.91 million USD).² Recognising that the flow of illicit money through transfer of funds and crypto assets can damage the integrity, stability, and reputation of the financial sector, the European Union recently adopted a Regulation of the European Parliament and of the Council on information accompanying transfers of funds and certain crypto assets.³ The Regulation acknowledges that the traceability of transfers of funds and virtual assets can be a particularly important and valuable tool in the prevention, detection, and investigation of money laundering and terrorism financing as well as in the implementation of restrictive measures in compliance with Union regulations implementing such measures. A joint report by *Europol* and the *Basel Institute on Governance* stated that existing asset recovery laws, both conviction and non-conviction based, have enabled some jurisdictions to confiscate large amounts of illicit crypto assets.⁴ In India, the application of the 2002 Prevention of Money Laundering Act was recently extended to virtual assets/currencies and fiat currencies transactions.⁵

Although advanced jurisdictions are making progress in addressing this type of crime and related legal challenges, policymakers in Africa, one of the fastest growing crypto markets in the world, have expressed concern over cryptocurrencies being used to transfer funds illegally out of the region.⁶ This article attempts to create a compilation of best practices, including policies, legislative and administrative measures, and institutional recommendations derived from or implemented by advanced jurisdictions. These findings offer potential guidance for jurisdictions that lack effective anti-money laundering and/or counter-terrorism financing regulation (AML/CTF).

II. Challenges in Regulating the Virtual Asset Sector

According to the Financial Action Task Force (FATF), a varied approach is taken among countries to regulate the virtual asset sector. While some countries have implemented regulatory measures in recent years, others have chosen to prohibit virtual assets entirely.⁷ However, the majority of countries have not yet commenced with regulation of this sector. This global regulatory gap has created significant

loopholes that can be exploited by criminals and terrorists. Of the 98 jurisdictions that responded to FATF's survey in March 2022, only 29 jurisdictions have enacted relevant laws, and only a small subset of these jurisdictions has introduced enforcement actions.⁸ This disparity in regulatory efforts further emphasizes the urgent need for a comprehensive and coordinated international approach to address the risks associated with virtual assets, including their potential use in illicit activities such as terrorism financing.⁹

Cryptocurrencies have emerged as a novel method for criminals to finance a wide range of illicit activities, including terrorist fundraising beyond national boundaries. Evidence indicates that certain terrorist organizations are utilizing cryptocurrencies as a means to raise funds. Although the available public data regarding terrorist use of cryptocurrencies is limited, it is evident that these networks have engaged in fundraising activities through online platforms that rely on crowdsourcing and/or anonymous donations, aiming to circumvent the regulatory measures implemented within the international banking system. In August 2020, the US Department of Justice made a significant announcement regarding the largest-ever confiscation of cryptocurrency associated with terrorism. This action came in the wake of the dismantling of terrorism financing campaigns linked to the al-Qassam Brigades (the military wing of Hamas), al-Qaeda, and ISIS.¹⁰

Terrorist organizations employ cryptocurrencies to create venture capital and obtain higher funding.¹¹ The European Union's efforts to combat money laundering and terrorism financing within its regional financial system are praiseworthy, with the 5th Anti-Money Laundering Directive being a notable example of such regulations. Difficulties persist, however, due to the potential for jurisdictional arbitrage and the existence of grey areas when determining applicable law, particularly in cross-border contexts.¹² For instance, the integration of crypto assets into general property law varies across jurisdictions, with some successfully incorporating them, while others face complexities due to the requirement of physical existence for property qualification. Even when crypto assets fall within established categories, applying traditional rules to these assets can still be challenging due to their digital nature and the use of Distributed Ledger Technology (DLT), especially in cross-border contexts. A distributed ledger is "a database that is consensually shared and synchronized across networks, spread across multiple sites, institutions or geographies, allowing transactions to have [multiple private or] public 'witnesses'. The underlying technology requires the consensus of many data storage points ("nodes"), spread of different jurisdictions.¹³ The presence of DLTs with nodes across borders

may have technical advantages, however, from a regulatory perspective, it further complicates identification of the applicable jurisdiction's law for crypto asset transactions. This lack of clarity in determining the appropriate legal framework adds to the difficulties in addressing the transnational nature of crypto asset transactions and contributes to the complexities of international cooperation in combating terrorism financing effectively.¹⁴

III. Compilation of Certain Best Practices

In confronting the multifaceted challenges engendered by crypto assets, a discerning identification and prioritization of best practices emerge as imperative. The following presents some best practices that may contribute to building a more secure and trustworthy crypto ecosystem, mitigating the risks associated with crypto crimes.

1. Need for state-driven protective measures

The FATF recommendations require countries to identify, assess, and understand the money laundering and terrorism financing risks emerging from virtual asset activities and the activities or operations of Virtual Asset Service Providers (VASPs).¹⁵ States should adopt a risk-centric methodology to guarantee that countermeasures targeting the prevention or reduction of money laundering and terrorism financing align appropriately with the identified risks. It is imperative for countries to mandate VASPs to undertake the identification, evaluation, and implementation of efficacious measures in order to alleviate the risks associated with money laundering and terrorism financing. For example, a research briefing by the UK House of Commons Library assessing the development of a new regulatory regime for the crypto sector in the UK addressed these risk factors.¹⁶ The report highlights that cryptocurrencies pose major risks to consumers, as they lack adequate safeguards for investment protection. Cryptocurrency exchanges are susceptible to hacking incidents, thereby jeopardizing the financial assets of users. Moreover, individuals who misplaced their cryptographic keys face total forfeiture of their funds. Additionally, the realm of cryptocurrency engenders a diverse array of fraudulent schemes.

Coming to the best practice is the UK Government's commendable initiative, the Consultation on the future regulatory framework for crypto assets, undertaken from February 1, 2023, to April 30, 2023.¹⁷ It elicited responses that underscored a prominent challenge in enforcement. Respondents emphasized the regulatory difficulty in taking enforcement actions against offshore market participants,

expressing concerns over practicality and prohibitive costs. However, what is noteworthy is the best practice embedded in the Consultation, involving diverse stakeholders such as legal and consulting firms, FinTechs, crypto native firms, academia, and industry associations. This collaborative effort aimed to identify and address challenges associated with enforcement in the crypto asset domain, reflecting a proactive approach to regulatory refinement.

2. Involvement of private entities

The implementation of technology-driven inquiries and the development of the operational capabilities of law enforcement agencies play a vital role in combating contemporary forms of criminal activity. The utilization of blockchain technology serves as the foundational framework for virtual assets or currencies. It is essential that law enforcement agencies possess the necessary proficiency in harnessing blockchain technology in order to effectively identify individuals responsible for criminal acts, trace illicit gains, gather relevant evidence, and seize unlawfully obtained proceeds.

Recognising the importance of technology in the prevention of new age crimes, Interpol, in 2017, launched a project to prevent the criminal use of blockchain technology. The project involved developing efficient and effective forensic tools enabling the reasonable use of different types of data from various sources, including virtual currency ledgers.¹⁸ Similarly, in 2017, the United Nations Office on Drugs and Crime (UNODC) launched training on tackling cryptocurrency-enabled organized crime. A distinctive characteristic of the training programme is its notable collaboration with industry leaders, such as *Chainanalysis*, aimed at providing assistance to law enforcement agencies in the identification and tracking of illicit financial transactions.¹⁹ *Binance*, one of the largest crypto trading platforms, launched the Global Law Enforcement Training Program to help law enforcement detect financial crimes and cybercrimes and assist in the prosecution of bad players who exploit digital assets.²⁰

In short, specialised blockchain companies possess the ability to contribute significant insights regarding money laundering typologies related to cryptocurrencies through analysis of the extensive datasets they possess. The sharing of these findings with law enforcement agencies can serve as a catalyst for initiating investigations and formulating more focused crime prevention strategies.²¹ Furthermore, such information sharing reinforces the fact that fostering a robust cryptocurrency market is a requirement necessitating collaboration between the public and private sectors.

3. Capacity building

The process of asset confiscation and recovery holds significant importance in the realm of law enforcement, ultimately contributing to the enhancement of public trust in the justice system. However, in the context of virtual currency or assets, the challenge is caused by their "virtual", "intangible", "volatile" and, in some cases, "transnational" nature. Hence, the traditional court process and methods of confiscation and recovery may have limited application. The situation is worsened by cryptocurrency tumblers facilitating money laundering. Recognizing this limitation, the US Department of Justice formed a Virtual Asset Exploitation Unit within the Federal Bureau of Investigation (FBI), which is dedicated to blockchain analysis and virtual asset seizure. The Australian Federal Police also formed a cryptocurrency unit to prevent funnel money and money laundering.²² Thus, the enhancement of capacity within law enforcement authorities stands as an indispensable aspect in the combat against cryptocurrency crimes.

4. Enhancing transparency – the "Travel Rule"

It is of paramount importance that criminals be prevented from exploiting legal loopholes in the national frameworks for anti-money laundering and countering the financing of terrorism by utilizing judicial arbitrage as a means to evade liability. The effective adoption and implementation of the FATF guidelines, particularly the "Travel Rule", introduced in 2019, for VASPs, serve as a crucial protective measure.²³ The "Travel Rule" is a regulatory provision that imposes an obligation on originating VASPs to acquire and transmit specific information to the beneficiary VASP during the transfer of virtual assets, comparable to the requirements placed upon traditional financial institutions in wire transfers. This information typically includes personal identifiers (such as names, addresses, and account numbers) or unique identifiers such as national identity number or passport number.²⁴ The overarching objective of the Travel Rule is to bolster transparency, traceability, and accountability of virtual asset transactions, thereby increasing the threshold for illicit activities, such as money laundering and terrorism financing, to transpire without detection.

5. Improvement of mutual legal assistance

In India, challenges revolved around the issue of regulatory arbitrage and the transformation of security challenges from "hawala to crypto currency".²⁵ One potential way to address this matter could involve enhancing the mutual legal assistance treaty framework (MLAT).²⁶ The efficacy of MLAT in facilitating the confiscation of illicit proceeds

and discouraging the cross-border location or transfer of crypto assets is exemplified by a recent case in which the United States Department of Justice seized virtual currency valued at approximately \$24 million on behalf of the Brazilian government under the bilateral Treaty between the United States of America and the Federative Republic of Brazil on Mutual Legal Assistance in Criminal Matters.²⁷ Law enforcement agencies may seek assistance through other formal channels, such as the United Nations Convention on Transnational Organized Crime and the Council of Europe Convention on Cybercrime. In the event that no treaty mechanism exists, assistance can be sought through letters rogatory, foreign domestic law mechanisms, and/or comity and reciprocity.²⁸ Therefore, strengthening the international legal framework is crucial for promoting extensive information sharing, early coordination, and deconfliction efforts to ensure the accountability of offenders.

6. Awareness raising

Lastly, it is of utmost importance to raise awareness among the general public and deepen people's understanding of virtual currencies and assets, the legal framework embraced by their respective jurisdictions, the governing regulations, and the inherent risks associated. Knowledge should be shared about potential scams, types of fraud, and other forms of illicit activities. Such an increase level of consciousness is vital for the overall mitigation of digital crimes.

IV. India-EU Collaboration: The Vanguard of Security

At the 12th India-European Union Counter Terrorism Dialogue on 19 November 2020, India and the European Union strongly condemned terrorism in all its forms and manifestations including the use of terrorist proxies for cross-border terrorism. The participants of the Dialogue emphasised the need for strengthening international cooperation to combat terrorism in a comprehensive and sustained manner. They reaffirmed how crucial it is that perpetrators of violence and terrorism be brought to justice.²⁹

Building upon the strong condemnation of terrorism at the 12th India-European Union Counter Terrorism Dialogue, all stakeholders should consider intensifying their collaborative efforts to counter crypto crimes, focusing specifically on terrorism financing through virtual assets. Recognizing the evolving nature of financial crimes associated with emerging technologies, the upcoming iteration of the India-European Union Counter Terrorism Dialogue presents an opportune moment for India and the European Union to

share and implement best practices in countering illicit financial activities facilitated by cryptocurrencies. By leveraging their joint commitment to combatting terrorism and by emphasizing the importance of international cooperation, the stakeholders can establish frameworks and protocols that address the challenges posed by crypto crimes. This collaboration could involve information sharing, capacity building, and the development of legal frameworks enabling the effective investigation and prosecution of individuals involved in terrorism financing through virtual assets. By incorporating these priorities into their ongoing dialogue, India and the European Union can contribute significantly to the global efforts aimed at preventing and combating illicit financial activities associated with terrorism.

V. Conclusion

This article highlighted the main factors necessary for effectively preventing and combating crimes related to virtual currencies and assets. Effective international cooperation emerges as a key element, emphasizing the importance of information sharing, targeted technical assistance, and the establishment of uniform standards and best practices across jurisdictions. By fostering collaboration among countries, the global community can enhance its collective

ability to address the challenges posed by these emerging forms of crime. In addition, the establishment of an effective asset confiscation and recovery system both at national level and international level holds significant value, regardless of the geographical location of the illicit proceeds. Such a system acts as a deterrent, impeding the proliferation of organized crime and safeguarding the integrity of the financial market.

Additionally, capacity building for law enforcement officials assumes a vital role, necessitating the creation of specialized units equipped with the requisite skills and knowledge to investigate virtual currency-related crimes. Concurrently, raising public awareness about the risks associated with virtual currencies and assets is crucial, as it empowers individuals to make informed decisions and contributes to the overall prevention of such crimes. By incorporating these key components into their policies, policymakers and stakeholders can formulate comprehensive strategies to mitigate the threats posed by virtual currency-based crimes, ensuring the integrity, stability, and security of the global financial landscape. Indeed, the dialogue forum between India and the European Union offers a valuable platform for fostering the exchange of ideas and engaging in active capacity building activities, particularly in the realm of countering crypto crimes and addressing terrorism financing through virtual assets.

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Yes Indeed, Efficiency Prevails

A Commentary on the Remarkable Judgment of the European Court of Justice in Case C-281/22 G.K. and Others (Parquet européen)

Hans-Holger Herrnfeld

The first preliminary ruling request concerning the EPPO Regulation prompted the European Court of Justice to interpret the provisions of Article 31 regarding cross-border investigations. In its judgment of 21 December 2023, the Court largely, but not fully, followed the considerations and the proposed response offered by Advocate General Tamara Ćapeta. The judgment is remarkable in the sense that it is largely inspired by considerations concerning the objectives of the Regulation – in spite of the fact that the interpretation given by the Court is difficult to reconcile with the word-

ing of the interpreted provisions and its legislative history. Article 31 certainly has its deficiencies and could have been worded more clearly. Indeed, the Court's judgment may help to ensure efficient cross-border investigations by the EPPO. Nevertheless, the EU legislator is now called upon to review and amend the provisions of the EPPO Regulation to clarify its intentions. Furthermore, the judgment contains a remarkable statement on the obligations of the Member States to provide for mechanisms of prior judicial review of investigation measures that involve serious interference with the rights of the person concerned.

I. Introduction

Following the Opinion delivered by Advocate General Tamara Čapeta in case C-281/22, G.K. and Others (*Parquet européen*) on 22 June 2023,¹ the judgment by the Grand Chamber of the European Court of Justice (ECJ) from 21 December 2023² came as no surprise: the Court's interpretation of Art. 31 of the EPPO Regulation,³ which concerns cross-border investigations within the combined territories of the Member States participating in the establishment of the EPPO, is largely focused on the objectives of the legislation. It puts the aim of the legislator, to efficiently combat crimes against the financial interests of the Union (expressed *inter alia* in recitals 14 and 20 of the EPPO Regulation), at the forefront and concludes that, therefore, a literal interpretation of Art. 31(3), which had been advocated by the Austrian and the German governments in this case, could not be followed.⁴

Whether the interpretation now given to these provisions by the ECJ are truly reconcilable with their wording and contextual relationship is debatable (cf. IV.1 below). In substance, the decision by the Court may be welcomed to a large extent; however, the decision leaves certain questions unanswered and triggers new questions, which the ECJ may have to answer in future requests for preliminary rulings (cf. IV.2 below) – unless the Council steps in and amends the provisions of Art. 31 of the EPPO Regulation in order to better clarify its intentions and provide answers to the unresolved questions. Before providing a thorough analysis of the judgment and its implications in section IV. of this article, the following will first briefly recapitulate the questions put before the ECJ (II.) and, second, summarise the considerations of and replies given by the ECJ (III.).

II. The Questions before the Court of Justice

The author summarized the underlying facts and the relevant legal framework in a previous contribution to this journal⁵ and refers the reader to that contribution for details. The present case essentially concerns the question of whether, in case of cross-border investigations, a judicial authorisation for the ordering of an investigation measure must, where so required by national law, be obtained by the

European Delegated Prosecutor (EDP) handling the investigations in Member State A (the so-called "handling EDP"; in the present case an EDP in Germany) from a judge/court in his/her own Member State prior to "assigning" the measure to the so-called "assisting EDP" in Member State B, in which the investigation measure is to be carried out (in the present case an EDP in Austria). Or whether this authorisation is to be obtained by the assisting EDP from a judge/court in that Member State B. The first subparagraph of Art. 31(3) provides as follows:

[I]f judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State.

Therefore, the first question posed in this case by the Higher Regional Court of Vienna was whether this provision must be interpreted as meaning that the court in the assisting EDP's Member State must examine "all material aspects, such as criminal liability, suspicion of a criminal offence, necessity and proportionality." The second question by the referring court was whether the examination to be undertaken by the court in the assisting EDP's Member States should take into account whether or not the admissibility of the measure had already been examined by a court in the Member State of the handling EDP (which had not been the case in the investigation proceedings in Germany underlying the preliminary ruling request). And, as a third question, the Higher Regional Court of Vienna queried the following:

[I]n the event that the first question is answered in the negative and/or the second question in the affirmative, to what extent must a judicial review take place in the Member State of the assisting European Delegated Prosecutor.

III. The Considerations and Replies by the Court of Justice

The ECJ recalls, that "according to settled case-law, it is necessary, when interpreting a provision of EU law, to consider not only its wording but also its context and the objectives of the legislation of which it forms part" (paragraph 46). In the course of analysing the wording of Art. 31 and the related Art. 32 of the EPPO Regulation (which concerns the enforcement of the measures assigned in accordance with Art. 31), the ECJ notes that, in view of the judicial au-

thorisation to be obtained in the assisting EDP's Member State (first subparagraph of Art. 31(3)), these provisions do not "specify the extent of the review that may be carried out for the purposes of that judicial authorisation by the competent authorities of that Member State" (paragraph 53). The Court also observes that in accordance with Art. 31(1) and (2) and Art. 32

[...] the handling European Delegated Prosecutor is to decide on the adoption of an assigned investigation measure and that that adoption, as well as the justification of that measure, are to be governed by the law of the Member State of the handling European Delegated Prosecutor, whereas the enforcement of such a measure is governed by the law of the Member State of the assisting European Delegated Prosecutor [paragraph 54].

In respect of the context of Arts. 31 and 32, the Court notes that "the distinction drawn by those articles between the justification and adoption of an assigned investigation measure, on the one hand, and its enforcement, on the other, reflects the logic underlying the system of judicial co-operation in criminal matters between the Member States, which is based on the principles of mutual trust and mutual recognition" (paragraph 55). This is followed by a reflection on the principle of mutual recognition (paragraphs 57 to 63), concluding that, in accordance with that principle, "the executing authority is not supposed to review compliance by the issuing authority with the conditions for issuing the judicial decision which it must execute" (paragraph 64).

The Court then looks at the objectives of the EPPO Regulation, taking into account its recitals 12, 14, 20, and 60 and draws the conclusion that the legislator had "intended to establish a mechanism ensuring a degree of efficiency of cross-border investigations conducted by the EPPO at least as high as that resulting from the application of the procedures laid down under the system of judicial cooperation in criminal matters between the Member States which is based on the principles of mutual trust and mutual recognition" (paragraph 67). In this context, the ECJ excludes the possibility of interpreting Art. 31(3) allowing the judge/court in the assisting EDP's Member State to examine "elements relating to the justification and adoption of the assigned investigation measure concerned" as this "would, in practice, lead to a system less efficient than that established by such legal instruments and would thus undermine the objective pursued by that regulation" (paragraph 68).

Considering the distinction between the responsibilities of the handling EDP and those of the assisting EDP (paragraph 71), the Court concludes that Art. 31(2) must be interpreted as requiring that any prior judicial review of the conditions relating to justification and adoption must be obtained from a judge/court in the handling EDP's Member State when

"adopting" the measure (paragraph 73), whereas "any review of the judicial authorisation required under the law of the Member State of the assisting European Delegated Prosecutor may relate only to elements connected with that enforcement" (paragraph 72).

The "efficiency" of the cross-border investigations by the EPPO was, however, not the only concern for the ECJ. Considering the proper division of responsibilities identified by the Court, it also stipulates the following:

[I]t is for the Member State of the handling European Delegated Prosecutor to provide for a prior judicial review of the conditions relating to the justification and adoption of an assigned investigation measure, taking into account the requirements stemming from the Charter, compliance with which is binding on the Member States in the implementation of that regulation pursuant to Article 51(1) of the Charter. [paragraph 73]

Furthermore, the Court notes that this applies to "measures which, like those at issue in the main proceedings, constitute interferences with the right of every person to respect for his or her private and family life, home and communications, guaranteed by Article 7 of the Charter, and with the right to property enshrined in Article 17 of the Charter" (paragraph 74). The Court then specifically refers to measures described in Art. 30(1)(a) and (d) of the EPPO Regulation and concludes that "it is for the Member State of the handling European Delegated Prosecutor to provide, in national law, for adequate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures." (paragraph 75).

The Court recalls that "the EPPO is to ensure that its activities respect the fundamental rights" (paragraph 76). And it points out that, while "the authorities, in particular the judicial authorities, of the Member State of the assisting European Delegated Prosecutor are not empowered to examine the justification and adoption of an assigned investigation measure", Art. 31(5) provides for a mechanism under which the assisting EDP shall, if he/she deems that an alternative but less intrusive measure would achieve the same results as the assigned investigation measure at issue, consult with the handling EDP and that, in accordance with Art. 31(6), if the matter cannot be resolved within the deadline of seven working days, it is to be referred to the Permanent Chamber at the EPPO (paragraph 77).

In conclusion, the Court then replies to the three questions of the preliminary ruling as follows:

[...] Articles 31 and 32 of Regulation 2017/1939 must be interpreted as meaning that the review conducted in the Member State of the assisting European Delegated Prosecutor, where an assigned investigation measure requires judicial authorisation in accordance with the law of that Member State, may

relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure; the latter matters must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter. [paragraph 78]

IV. Analysis

1. Observations on the Court's considerations and conclusions

Art. 31 of the EPPO Regulation clearly has its deficiencies, and it is certainly one of the weaker points of the Regulation.⁶ Indeed, the Council may have failed to sufficiently clarify its intentions when finalizing the wording of its provisions. And perhaps, at that time, individual Member State delegations even had different views on what is intended by Art. 31 and how the final wording of the text is to be interpreted. However, the legislative history as well as the wording and context of Art. 31 do not give reason to assume that the interpretation now found by the ECJ is in line with what the Council intended to regulate in Art. 31 in respect of the judicial authorisation of investigation measures.

a) Why didn't the Council better clarify its intentions?

Had the EU legislator intended to stipulate in Art. 31 what the ECJ now concludes to be the correct interpretation of its provisions, one would expect the Council to have clarified this in the wording of paragraphs 2 and 3 of Art. 31, especially since one of its objectives was that "it should be clearly specified, in which Member State the authorisation should be obtained" (cf. recital 72 of the Regulation, second sentence). The legislator could easily have added a "clarification" to the second sentence of paragraph 2, namely that the "justification and adoption of the measure" shall, where required under the law of the handling EDP's Member State, also include a judicial authorisation (or "prior judicial review") by a judge/court in that Member State. And the Council could have easily worded subparagraph 1 of Art. 31(3) in such a way that it is clear from the text that the judge/court in the assisting EDP's Member State may only undertake any necessary judicial authorisation of the enforcement of the assigned measure. As a matter of fact, an earlier version of (then) Art. 26a in a Presidency document submitted to the JHA Council in March 2015,⁷ had already included a provision stipulating that judicial authorisation required under the law of the handling EDP's Member State was to be obtained by the handling EDP in that Member State. That provision, however, was subsequently deleted from the text of what is now Art. 31. This deletion was not an oversight

on the part of the Council but closely related to the final solution found in the Council Working Group for the wording of Art. 31(3).

Why does Art. 31 paragraphs 2 and 3 now read as it does? Because the Council did not have the intention to provide for a distinction of responsibilities between a court/judge in the handling EDP's Member State and another court/judge in the assisting EDP's Member State as now underlying the interpretation given by the ECJ. Instead, at least a majority of Member States strongly advocated the idea that "in any case there should be only one authorisation" (cf. recital 72 sentence 2). For the Council majority, that was the primary consideration to ensure that cross-border investigation measures requiring judicial authorisation will be more efficient than in the case of the procedures under the Directive regarding the European Investigation Order (EIO).⁸ The interpretation by the ECJ now means that, in the situations described in the first subparagraph of Art. 31(3), thus if judicial authorisation is required under the law of the assisting EDP's Member State, the EDPs will have to obtain two judicial authorisations: first from a judge/court in the handling EDP's Member State on justification of the measure and, second, from a judge/court in the assisting EDP's Member State on "matters concerning the enforcement" of the measure.

b) Adopting the investigation measure and obtaining judicial authorisation

In this context, it should be noted that the phrase "judicial authorisation" used in Art. 31(3) had already been used by the Commission in its proposal for a regulation on the establishment of the EPPO.⁹ In particular, Art. 26(4) and (5) of the Commission proposal stipulated that any judicial authorisation shall be undertaken by the competent judicial authorities of the Member State in which they are to be carried out. It is interesting to note that Art. 31(3) – introduced only in the course of negotiations as part of the new Art. 26a – now uses the same terminology ("judicial authorisation"). And it is even more interesting to note that the first subparagraph of Art. 31(3), indeed, does provide for the same rule as in Art. 26(4) and (5) of the Commission proposal: the "judicial authorisation" shall be obtained by the assisting EDP "in accordance with the law of that Member State."

In its judgment, the ECJ instead uses the term "prior judicial review", which – according to the ECJ – is to be obtained from a judge/court in the handling EDP's Member State when adopting the measure in accordance with Art. 31(2).¹⁰ While the judgment is not quite clear in this respect, pre-

sumably the terminology used by the ECJ is also intended to apply to different legal concepts used in criminal procedure law of the Member States, thus including not only procedures where a judge/court is requested to give prior approval of an investigation measure ordered by a prosecutor but also applying to procedures where the judge or court takes a decision to order an investigation measures based on a request received from the prosecutor. The wording used by the Council in Art. 31(3) was indeed chosen to cover all of these possible national procedures of obtaining judicial authorisation.¹¹

In this context, it is worth noting that Art. 31 does not use the terminology of the EIO Directive, which provides that when the authorities of one Member State issue an "order", the authorities of the other Member State are expected to "recognize" and enforce the order. By contrast, Art. 31(2) deliberately refers to the "adoption" and "assignment" of measures. In view of the "single office" concept, the Council (or at least a majority of Member State delegations) did not wish to merely set up a system of "more efficient mutual recognition" but rather something "more advanced" than mutual recognition. The "adoption" of the measure by the handling EDP was to be undertaken in accordance with the law of his/her own Member State. The handling EDP was to observe the law of his/her own country when deciding on whether or not to assign a measure to the assisting EDP. And, depending on the applicable national law for obtaining any necessary judicial authorisation (Art. 31(3)), the adoption by the handling EDP may mean that the EDP decides on a measure that needs judicial approval issued by a judge/court. Or, if national law so provides, the handling EDP may merely take the decision to request that the competent judge/court order the required measure.¹²

c) The extent of review by the judge/court in the assisting EDP's Member State

As pointed out above, the Court of Justice observes that, in view of the judicial authorisation to be obtained in the assisting EDP's Member State, the EPPO Regulation does not "specify the extent of the review that may be carried out for the purposes of that judicial authorisation by the competent authorities of that Member State".¹³ Well, the first subparagraph of Art. 31(3) does state that the assisting EDP "shall obtain that authorisation in accordance with the law of that Member State." Since the Council wanted to introduce a system that is more advanced than mutual recognition, Art. 31 does not contain any "grounds for refusal" for the assisting EDP such as those in the EIO Directive. Instead, Art. 31(5) provides that the assisting EDP may have to voice concerns and consult with the handling

EDP in order to reach consensus; and if they cannot resolve the matter, a final decision will be taken by the competent Permanent Chamber at the EPPO in accordance with Art. 31(7). This mechanism, however, applies only to concerns raised by the assisting EDP. Where judicial authorisation is required under the law of the assisting EDP's Member State, Art. 31(3) subparagraph 1 provides that the court applies its national law when deciding whether judicial authorisation is to be granted or not. And since the Council did not consider it appropriate to let the EPPO's Permanent Chamber have the final word, subparagraph 2 of Art. 31(3) simply provides that "[I]f judicial authorisation for the assigned measure is refused, the handling European Delegated Prosecutor shall withdraw the assignment". Here again, the Council wished to avoid the impression that the judge/court in the assisting EDP's Member State was expected to "recognize" the assigned measure or refuse recognition where so required in line with Art. 11 EIO Directive. Instead, the handling EDP himself/herself – once all legal remedies have been exhausted¹⁴ – is to draw the necessary conclusions based on the lack of a possibility to obtain the required judicial authorisation from a judge/court in the assisting EDP's Member State.¹⁵ In combination with the handling EDP's application of the national law of his/her own Member State when adopting the measure in accordance with Art. 31(2), this system essentially would mean that the measure needs to be in compliance with the laws of both Member States, thereby potentially ensuring that the higher level of protection prevails.¹⁶

As an alternative to the present text of Art. 31, the Council, on the basis of Presidency document 11045/15, also had looked at the possibility of specifying in what is now Art. 31(2) that prior judicial authorisation was to be obtained by the handling EDP from a judge/court of that Member State before assigning the measure and that the law of the handling EDP's Member State shall determine "the conditions and applicable procedures for ordering or requesting such cross-border measures and govern their adoption and justification".¹⁷ This alternative proposal, discussed in the Council Working Group in September 2015, also provided that, "where required under the law of his Member State", the assisting EDP "shall obtain the necessary judicial authorisation or court order"; however, "[T]he court in the Member State of the assisting European Delegated Prosecutor [...] shall not review the grounds, justifications, and substantive reasons for the ordered measure."¹⁸ In essence, that solution closely resembles what the Court of Justice has now determined to be the proper interpretation of paragraphs 2 and 3 of Art. 31. At the time of negotiations, however, the Council delegations did not approve the concept set out as "Option 2" in that Presidency document. Instead,

as a result of that discussion, Art. 31 was further developed along the lines of "Option 1" of that same document, which provided that the adoption of the measure by the handling EDP and its justification were to be governed by the law of the handling EDP (Art. 26(2) of that proposal), whereas the judicial authorisation "can only be requested in the Member State of the assisting European Delegated Prosecutor"; and if judicial authorisation is refused, the handling EDP "shall withdraw the assignment" (paragraph 4 of that proposal).

d) The efficiency considerations as arguments against a literal interpretation

In the oral hearing on 27 February 2023, the Austrian and German governments, considering also the legislative history of this provision, advocated a literal interpretation of the text of Art. 31(3), which would suggest that, if judicial authorisation is required under the law of the assisting EDP's Member State, the (only) judicial authorisation was to be obtained in that Member State and therefore the judge/court of that Member State would potentially be charged with a full review of the conditions (under the law of that Member State) for ordering the measure.

In respect of such an interpretation of the Regulation, the ECJ considers that this "would lead to a system less efficient than that established by such legal instruments and would thus undermine the objective pursued by that regulation".¹⁹ In this context, the ECJ first observes that, if the judge/court in the assisting EDP's Member State were also to examine the elements relating to the justification and adoption of the assigned measure, the judge/court "would, in particular, have to examine in detail the entire case file, which would have to be forwarded to it by the authorities of the Member State of the handling European Delegated Prosecutor and, where relevant, translated."²⁰ It may be a correct assumption that this would render the procedure less efficient than the procedures provided for in the EIO Directive.²¹ This was actually one reason why, in the course of negotiations, Austria and Germany provided a joint alternative proposal for the text of Art. 31 (Art. 26a at the time):²² it stipulated that judicial authorisation of the adoption of the measure would have to be obtained from a judge/court in the handling EDP's Member State. The proposal also foresaw that an additional judicial authorisation for the recognition of the measure may have to be obtained in the assisting EDP's Member State; the judge/court here would, however, only have recourse to a limited list of grounds for refusal. This Austrian/German proposal had been modelled on the concept of the EIO Directive – albeit with fewer grounds for refusal. But that proposal did not meet with consensus in the Council Working Group. The majority of delegations did

not favour a system requiring judicial authorisations to be obtained in both Member States. They did not want to have any requirements for formal recognition and grounds for refusal by the judicial authorities of the assisting EDP's Member State. And therefore Art. 31 was worded the way it is, which is why Austria and Germany in the oral hearing insisted on a literal interpretation of Art. 31 despite the fact that they would have preferred if the Council had indeed agreed on a model in which prior judicial authorisation would have to be obtained from a judge/court in the handling EDP's Member State.

The ECJ also notes that it would not be appropriate to expect the judge/court in the assisting EDP's Member State to give judicial authorisation to the assigned measures on the basis of the law of the handling EDP's Member State.²³ Indeed, that would prove difficult to do. But that was also not what the Council intended when formulating the text of Art. 31(3): in the situations referred to in subparagraph 1, the judge/court in the assisting EDP's Member State would rather be called upon to give judicial authorisation on the basis of the laws of and under the conditions provided for such an investigation measure in that Member State (see the text of Art. 31(3), subparagraph 1: "obtain that authorization in accordance with the law of that Member State"). Only in the situation addressed in subparagraph 3 – i.e., where judicial authorisation is required only under the law of the handling EDP's Member State – is judicial authorisation to be obtained from a judge/court of and in accordance with/under the conditions provided for in the laws of that Member State.

e) Why did the original Commission proposal for the Regulation provide for such a less efficient system of cross-border investigation?

A requirement for the EPPO to obtain a necessary prior judicial review of the grounds for ordering the measure from a judge/court in the assisting EDP's Member State would be more burdensome for the EPPO and thus make cross-border investigations less efficient than under the procedures of the EIO Directive. This was rightly observed by the ECJ, following the arguments put forward by the Commission and the EPPO in the oral hearing.²⁴

So why did the Commission provide for such a less efficient system in its initial proposal for the EPPO Regulation,²⁵ according to which judicial authorisation of investigation measures shall be undertaken "by the competent judicial authority of the Member State where they are to be carried out" (cf. Art. 26(4) and (5) of the original Commission proposal)?

When discussing the legislative history during the oral hearing, the Commission explained that the proposal for the EPPO Regulation had been drafted before the EIO Directive came into force²⁶ and that this “solution proved to function well in that mutual recognition instrument. The Commission, therefore, found it fortunate that the legislative institutions did not accept its original proposal that judicial authorisation ought to depend on the law of the Member State of the assisting EDP only, and instead have amended that proposal into what is today Article 31 of the EPPO Regulation.”²⁷ So, perhaps, the Commission had actually been a secret admirer of the alternative proposal for a new Art. 26a, presented by Austria and Germany in the course of negotiations in April 2015 (IV.1.d above), which had been based on the principles of the EIO Directive but did not find consensus in the Council Working Group.

Be that as it may, if the Council had simply approved the wording of Art. 26 as originally proposed by the Commission, the judge/court in the assisting EDP’s Member State would indeed potentially have had to examine the entire case file including, where necessary, a translation thereof. The reason why the Commission originally proposed such a system presumably lies in the fact that the proposal foresaw that the European Public Prosecutor (in the terminology of the Commission proposal this was to be the Head of the EPPO (Art. 6(2) of the proposal, now the European Chief Prosecutor) can undertake investigations directly (Art. 18(6)), which the Commission proposal considered to be a particularly efficient avenue in case of investigations involving several Member States.²⁸

The financial calculations accompanying the Commission proposal apparently assumed that almost half of all investigations would be undertaken by the European Public Prosecutor “directly” – presumably with the help of investigators and prosecutors working in the Central Office. While the Commission proposal left unclear which national law, in case the investigations are conducted by the Central Office, would apply to the investigation proceedings as such,²⁹ it is not surprising that the Commission proposal provided in Art. 26(5) that judicial authorisation of investigation measures shall be obtained from a judge/court “of the Member State where the investigation measure is to be carried out.” In such cases, there would have been no “handling EDP” to assign a cross-border measure after having first obtained the necessary judicial authorisation in his/her own Member State. Hence, the only possible solution was to have judicial authorisation obtained from a judge/court in the Member State in which the investigation measure was to be carried out.

Nevertheless, in terms of efficiency and in view of the “single office” concept (Art. 8(1)), one could have been inclined to consider the Commission proposal providing for investigations to be conducted “directly” from the EPPO’s Central Office to be the preferable option – in spite of the fact that this would have meant that any necessary judicial authorisation would have to be obtained from a judge/court in the Member State in which the measure is to be carried out.

But the EPPO Regulation now does provide that investigations are to be conducted by an EDP of a specific Member State (aside from the exceptional possibilities provided for in Art. 28(4)) and that – as a matter of principle – it is the law of that Member State that may find subsidiary application (Art. 5(3)). Against this background, it would indeed have been preferable if the Council had clearly stipulated in Art. 31(2) that the handling EDP shall obtain any necessary judicial authorisation from a judge/court in his/her own Member State.

2. Questions still open

a) Scope of judicial review by the judge or court in the assisting EDP’s Member State?

In its third question (see *supra* II.), the Higher Court of Vienna asked the Court of Justice to clarify “to what extent must a judicial review take place in the Member State of the assisting European Delegated Prosecutor.”³⁰ This question has not been fully answered by the ECJ. In its judgment, the ECJ concluded as follows:³¹

the review conducted in the Member State of the assisting European Delegated Prosecutor [...] may relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning the justification and adoption of that measure.

But what does the ECJ mean by “matters concerning the enforcement”? As outlined above, the judgment draws a parallel to the EU instruments on mutual recognition. In respect of the EIO Directive, the ECJ specifically recalled its judgment in Case C-724/19, pointing out that the EIO Directive is based

on a division of competences between the issuing judicial authority and the executing judicial authority, in the context of which it is for the issuing judicial authority to review compliance with the substantive conditions necessary for the issuing of an EIO, and that assessment cannot, in accordance with the principle of mutual recognition, subsequently be reviewed by the executing judicial authority³².

Nevertheless, the EIO Directive does provide for numerous “grounds for non-recognition” (Art. 11 EIO Directive).³³ Are these or similar grounds to be taken into account in case of the EPPO when the judge/court in the assisting EDP’s

Member States is requested to give judicial authorisation in respect of "matters concerning the enforcement"? The ECJ's judgment in case C-281/22 does not lean in this direction, not even in respect of the limited list of conditions under which the assisting EDP, in accordance with Art. 31(5), can raise concerns about the appropriateness of enforcing the assigned measure. Quite the contrary, even when it comes to the obligation on the part of the EPPO to observe fundamental rights, the ECJ (merely) refers to the internal consultation procedure set out in Art. 31(5) and the final decision to be taken by the EPPO's Permanent Chamber in accordance with Art. 31(7). The Court seems to consider this being a sufficient alternative to the "safeguards for the protection of the fundamental rights" provided for in the EU instruments on mutual recognition, which may exceptionally find application in accordance with Art. 31(6).³⁴

In her Opinion, AG Čapeta, was quite clear on this question: in her view, there is no room for (non) recognition, as "[T]he EPPO is a single body, [...] the assigned measures indeed need not be recognized, but only implemented."³⁵

But would that be a proper solution? Why did the Council not clarify this question in the text of the Regulation, in particular, since during the negotiations it had been proposed to allow the judge/court of the assisting EDP's Member State to refuse authorisation only under the conditions of Art. 31(5), i.e. where the assisting EDP would also be expected to raise concerns? As explained above, the Council did not intend to limit the scope of review by the judge/court in the assisting EDP's Member State. Instead, the first subparagraph of Art. 31(3) merely stipulates that the authorisation is to be obtained in accordance with national law. And the second subparagraph of Art. 31(3) clearly indicates that the judge/court in the assisting EDP's Member State may refuse to give the requested authorisation.

b) On what grounds could the judge or court then refuse to give authorisation?

Be that as it may, the ECJ has now determined that the first subparagraph of Art. 31(3) is to be interpreted differently. But on what grounds can the judge/court in the assisting EDP's Member State then decide to refuse authorisation in accordance with second subparagraph of Art. 31(3)? Only concerning the "mode of execution", as has been suggested by the Commission in the present case?³⁶ If one really wanted to suggest this interpretation, why then would the Council not have clarified it? And why would a provision on judicial authorisation of modalities of execution be placed in Art. 31(3); the proper place would be Art. 32 concerning the enforcement of assigned measures.

c) Under which circumstances does the first subparagraph of Art. 31(3) apply?

Considering the ECJ's interpretation of the first subparagraph of Art. 31(3), another question may be, under which circumstances this provision is to apply. If the "judicial authorisation" prescribed therein may only relate to "matters concerning the enforcement of the measure"³⁷, does that mean that this subparagraph also only applies if a judicial authorisation relating to matters concerning the enforcement is required under the law of the assisting EDP's Member State? And what kind of procedures under national law could that apply to? Or is the term "judicial authorisation" used in the first part of the sentence to be interpreted differently than in the second part of the sentence of Art. 31(3), so that judicial authorisation by a judge/court in the assisting EDP's Member State, limited to "matters of enforcement" is to be obtained whenever the criminal procedure law of that Member State, applicable in domestic cases, requires a full judicial authorisation also on the grounds and justification of the measure?

d) What could be the purpose of the third subparagraph of Art. 31(3)?

The ECJ's judgment also leaves open what the remaining purpose of the third subparagraph of Art. 31(3) could be. This subparagraph was added late in the negotiations on Art. 31 to ensure that, where the law of the assisting EDP's Member State does not require judicial authorisation but the law of the handling EDP's Member State does, the level of protection offered in this respect by the latter law is maintained.³⁸ So, what then would be the purpose of this provision if, according to the interpretation given by the ECJ, judicial authorisation as referred to in the first subparagraph of Art. 31(3) can only relate to "matters concerning the enforcement"? The suggestion, advocated during the oral hearing on 27 February 2023, according to which the authorisation given by the judge/court of the handling EDP's Member State in such situations shall extend to both the "justification and the execution of the measure",³⁹ is hardly convincing. Why should the judge/court in the handling EDP's Member State additionally give judicial authorisation to the investigation measure in accordance with the third subparagraph of Art. 31(3), in respect of which that same court had already exercised "prior judicial review" (supposedly) in accordance with Article 31(2)? And on what grounds could the judge/court express (additional) judicial authorisation of the enforcement of the measure? On the basis of the law of the handling EDP's Member State? Or the law of the assisting EDPs Member State – in spite of the fact that that law does not require judicial authorisation of the enforcement?

e) What are the consequences of the judgment regarding the question of whether an investigation to be assigned “must be subject to prior judicial review”?

The ECJ went somewhat further than merely deciding on the proper interpretation of the first subparagraph of Art. 31(3), taking into account considerations of efficiency. In paragraphs 73 to 75, the ECJ actually answered a question that the Higher Regional Court of Vienna had not asked. Presumably in order to mitigate fundamental rights concerns voiced in the course of the proceedings, the ECJ addressed in paragraph 73 not only the question of which judge/court (i.e. of which Member State) should undertake “a prior judicial review of the conditions relating to the justification and adoption of an assigned measure.” It also pointed out that it is for the Member State of the handling EDP to provide for such a judicial review, “taking into account the requirements stemming from the Charter, compliance with which is binding on the Member States in the implementation of that regulation pursuant to Article 51(1) of the Charter.”⁴⁰ The ECJ then indicated that the investigation measures in question in the present case, “constitute interferences with the right of every person to respect for his or her private and family life, home and communications, guaranteed by Article 7 of the Charter, and with the right to property enshrined in Article 17 of the Charter.”⁴¹ And while the Court, first, seems to consider a prior judicial review to be only one possible way of ensuring “adequate and sufficient safeguards [...] in order to ensure the legality and necessity of such measures,”⁴² the final conclusions by the Court of Justice offer less flexibility in this respect. Here, the ECJ clearly puts forth:⁴³

The justification and adoption of the measure must be subject to prior judicial review in the Member State of the handling European Delegated Prosecutor in the event of serious interference with the rights of the person concerned guaranteed by the Charter.

This statement may have – yet unknown – further consequences for the respective legislation of the Member States. The original Commission proposal⁴⁴ had included an extensive list of measures where a “judicial authorisation” was to be required.⁴⁵ Unfortunately, a majority of Member States’ delegations did not agree to the attempt to harmonise such requirements for prior judicial review and hence Art. 30 of the EPPO Regulation now does not provide for that. The question arises here as to whether it would be appropriate for the EU legislator now – in light of the conclusions drawn by the ECJ in this case – to leave things as they are and leave it up to national legislation, thus triggering possible additional preliminary ruling requests to the ECJ asking which other types of investigation measures, aside from those specifically referred to by the ECJ,⁴⁶ require prior judicial authorisation. In particular, this may be

come an issue in respect of cross-border investigations by the EPPO if judicial authorisation of the assigned measure by a judge/court in the assisting EDP’s Member State is not to address issues concerning the adoption and justification of the measure even in situations where the law of the handling EDP’s Member State does not require any “prior judicial authorisation”. It may also become a matter of concern if the judge/court in the assisting EDP’s Member State should not be allowed to refuse authorisation on grounds other than those concerning “the mode of execution” as was proposed by the Commission in the present case (see IV.2. b) above).⁴⁷

Presumably said statement of the Court not only applies to the prior judicial review to be exercised in cross-border investigations in accordance with Art. 31(2) but would also apply to pure domestic investigation measures, in respect of which Art. 30 does not contain any specific rules on the application of national law regarding the question of whether a prior judicial review is required or not.

In either case, the “prior judicial review”, which the ECJ requires in its concluding statement in paragraph 78 would have to be exercised by a judge or court of the handling EDP’s Member State and not merely by the EPPO itself – irrespective of the fact that a prosecution office may be considered being a judicial authority for the purpose of applying certain instruments on mutual recognition.⁴⁸ A different question may arise as to whether the requirements of prior judicial review would also be satisfied if, in accordance with national law, for example, a house search may be ordered in urgent cases by a prosecutor, who would then be obliged to obtain subsequent judicial approval from a judge/court.

Member States will presumably now have to review and possibly amend their legislation in order to ensure that it meets the requirements expressed by the ECJ in respect of a prior judicial review in case of investigations measures ordered by the EPPO.⁴⁹ Moreover, additional questions may arise as to any conclusions to be drawn from this ECJ judgment, also in respect of the application of the EIO Directive in national criminal investigations.

V. Conclusion

The truly remarkable judgment of the ECJ may be welcomed to a large extent – leaving aside the fact that it is in part difficult to reconcile with text of Art. 31 of the EPPO Regulation and its legislative history. Presumably, it will indeed help to ensure that the EPPO can undertake cross-border investigations in a more efficient way than if judicial

authorisation in respect of the grounds and justification of the measure would have to be obtained from a judge/court in the assisting EDP's Member State. Nevertheless, several questions remain open and could give rise to additional requests for a preliminary ruling. In the meantime, the difficulties that occurred in the interpretation of the provisions of Art. 31 may continue to be a source of uncertainty and confusion.

Member States may now need to amend their legislation to bring it in line with the interpretation of Art. 31 developed by the Court of Justice. But that may prove to be difficult to do in some respects. Should the national legislator specifically provide in its legislation on the implementation of the EPPO

Regulation that judicial authorisation by the judge or court, when called upon by the assisting EDP, "may relate only to elements connected with that enforcement"? And would that help the judge/court to know what it may or may not examine before deciding on whether to pronounce judicial authorisation?

It would therefore be appropriate for the EU legislator to urgently reconsider the wording of Art. 31 and to clarify what Art. 31 really is intended to regulate,⁵⁰ taking into account not only concerns for the efficiency of investigations but also the milestones set by the Court of Justice in respect of the need to ensure proper prior judicial review by the competent judge or court.

1 Opinion of Advocate General Tamara Ćapeta, 22 June 2023, Case C-281/22, G.K. and Others (*Parquet européen*), ECLI EU:C:2023:510); for a detailed analysis of the Opinion, see: [H-H Herrnfeld, "Efficiency contra legem?", \(2023\) eucrim, 229–236](#).

2 ECJ (Grand Chamber), 21 December 2023, Case C-281/22, G.K. and Others (*Parquet européen*), ECLI EU:C:2023:1018.

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

4 See, in particular, paragraphs 65 to 71 of the judgment, *op. cit.* (n. 2).

5 See n. (1); see also: A. Venegoni, "The EPPO Faces its First Important Test: A Brief Analysis of the Request for a Preliminary Ruling in G. K. and Others", (2022) *eucrim*, 282–285.

6 See further on this: H-H. Herrnfeld, "The Draft Regulation on the EPPO", in: C. Brière/A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law*, 2018, pp. 383, 402 et. seq.

7 Council Document 6318/1/15 of 2 March 2015, informing the JHA Council on the "state of play", in which the Presidency had attempted to "reconcile as many as possible views expressed by delegations."

8 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, OJ L 130, 1.5.2014, 1; See on this question also: L. Bachmaier Winter, "Cross-Border Investigations Under the EPPO Proceedings and the Quest for Balance", in L. Bachmaier Winter (ed.), *The European Public Prosecutor's Office – The challenges ahead*, 2018, p. 117, 122.

9 COM (2013) 534 final, 17.7.2013.

10 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 73.

11 This also follows from recital 72, where the Council deems that the handling EDP should "withdraw the request or the order"; cf. further on this question: H.-H. Herrnfeld, in H.-H. Herrnfeld/D. Brodowski/C. Burchard, *European Public Prosecutor's Office, Article-by-Article Commentary*, 2021, Art. 31 mn. 15.

12 Herrnfeld, in Herrnfeld/Brodowski/Burchard, *op. cit.* (n. 11), Art. 31 mn. 4 et seq., 14 et. seq., and 38 et. seq.

13 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 53.

14 See recital 72, sentence 2 of the EPPO Regulation.

15 Herrnfeld, in Herrnfeld/Brodowski/Burchard, *op. cit.* (n. 11), Art. 31 mn. 8 and 23.

16 Herrnfeld in Brière/Weyembergh, *op. cit.* (n. 6), p. 406.

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17 See the text of Art. 26(2) of the "Option 2" set out in the (public) Council Document 11045/15 of 31 July 2015, available at <https://db.eurocrim.org/db/en/doc/2363.pdf> accessed 18 March 2023.

18 See Art. 26(5) of the "Option 2" set out in Council Document 11045/15 (n.17).

19 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 68.

20 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 69.

21 Herrnfeld, in Herrnfeld/Brodowski/Burchard, *op. cit.* (n. 11), Art. 31 mn. 40.

22 Council document DS 1237/15, 21 April 2015.

23 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 70.

24 See a reflection of the Commission's views in the Opinion delivered by AG Ćapeta, *op. cit.* (n. 1), para. 58.

25 COM(2013) 534 final, 17.7.2013 – see on this also section IV.1.b above.

26 The transposition deadline for Directive 2014/41/EU, *op. cit.* (n. 8), ended on 22 May 2017.

27 Cited from the Opinion delivered by AG Ćapeta, *op. cit.* (n. 1), para 62.

28 See recital 9 of the Commission proposal.

29 Art. 11(3) of the Commission proposal prescribed that "[T]he applicable national law shall be the law of the Member State where the investigation or prosecution is conducted." If the term "investigation" here was to refer to the investigation proceedings as such – and not only to individual investigation measures – what would have been considered the applicable national law if the investigation was conducted by the Central Office directly? The same question would essentially arise if the investigation were conducted by an EDP in accordance with Art. 18(1) of the Commission's proposal, requiring, however, investigation measures to be undertaken in one or several other Member States.

- 30 See Section 2 above and ECJ, Case C-281/22, *op. cit.* (n. 2), para. 37.
- 31 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 78.
- 32 ECJ, Case C-724/19, judgment of 16 December 2021, Spetsializirana prokuratura (Traffic and location data), EU:C:2021:1020, para. 53.
- 33 As also rightly observed by A. Hernandez Weiss, "Judicial review of investigative measures under the EPPO Regulation. More to it than it seems? A recap of the Oral Hearing in G.K. & other", *European Law Blog* 19/2023, 26 April 2023.
- 34 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 76 and 77; on issues of concern for the defence in view of the "single-office principle" see V. Costa Ramos, "The EPPO and the equality of arms between the prosecutor and the defence", (2023) 14(1) *New Journal of European Criminal Law*, 43 et seq.
- 35 Opinion of AG Čapeta, *op. cit.* (n. 1) para. 101.
- 36 See a reflection of the Commission's views in the Opinion of AG Čapeta, *op. cit.* (n. 1), para. 53.
- 37 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 78.
- 38 Along the same lines: Bachmaier Winter, *op. cit.* (n. 8), p. 128.
- 39 See the views reflected in the Opinion of AG Čapeta, *op. cit.* (n. 1), para 45.
- 40 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 73.
- 41 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 74.
- 42 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 75.
- 43 ECJ, Case C-281/22, *op. cit.* (n. 2), para. 78.
- 44 COM (2013) 534 final, 17.7.2013.
- 45 Art. 26(4) of the Commission proposal referring to parts of the list set out in its paragraph 1.
- 46 In paragraph 75 of the judgment, the ECJ specifically refers to "searches of private homes, conservatory measures relating to personal property and asset freezing, which are referred to in Article 30(1)(a) and (d)".
- 47 Cf. on this, also with further questions: Nicholas Franssen, "The judgment in G.K. e.a. (parquet européen) brought the EPPO a pre-Christmas tiding of comfort and joy but will that feeling last?", *European Law Blog* 1/2024, 15. January 2024, p. 4.
- 48 Cf. for considerations to the contrary: Franssen, *op. cit.* (n. 47), p. 5 et. seq.
- 49 Cf. also T. Wahl, "ECJ Ruling on the Exercise of Judicial Review in EPPO's Cross-Border Investigations", [eucrim news of 27 February 2024](#).
- 50 In the same vein: Franssen, *op. cit.* (n. 47).

EPPO Cases in Data

Examples from Czechia on the (Problematic) Measurement of the Effectiveness of EPPO Investigations

Jan Petr

In June 2023, the European Chief Prosecutor described the level of effectiveness of criminal investigations falling within the scope of the European Public Prosecutor's Office (EPPO) in the Czech Republic as low. This article aims to determine whether any data can verify or refute this statement. Incorporating relevant data from the EPPO's annual reports and statistics from national law enforcement authorities, the author shows that the effectiveness of the investigations does not differ dramatically from that of other economic crimes in the Czech Republic. On the contrary, the majority of cases investigated by the EPPO generally record a higher clearance rate than the national average. The clearance rate of EPPO cases even further improved in 2023 as statistical data submit.

I. Introduction

During her visit to the Czech Republic in June 2023, European Chief Prosecutor Laura Codruța Kövesi declared:¹

We are interested in the level of crime detection, the level of reporting to the EPPO and also in having the police officers specialised in our cases. The level of detection in the Czech Republic is, in my opinion, low, particularly in cases of the value added tax (VAT) fraud. During our investigations we have seen many links with the Czech Republic. These mainly involved the so-called missing trader companies, i.e. fake companies that are set up to commit the VAT fraud.

Indeed, Czech law enforcement authorities, which are now under the supervision of the European Delegated Prosecutors, also consider such criminal activity a significant threat. According to the Report on the Situation in the Area of Public Order and Internal Security in the Czech Republic in 2022:²

[I]nfluencing public procurement is linked to subsidy fraud and damage to the financial interests of the EU, as public procurement is often paid for by subsidies, both national and EU. [...] Public procurement is thus a constant source of unjust enrichment at the expense of public budgets.

Ms Kövesi's criticism towards Czech national law enforcement authorities seems harsh and also to assume that the Czech Republic does not fully comply with the requirement enshrined in primary Union law to effectively protect the financial interests of the European Union (Art. 325(2) TFEU). The question arises as to whether these conclusions can also be verified empirically? The following seeks to answer this question by first examining the legal framework of EPPO investigations in the Czech Republic and second by assessing statistical data in respect of the type of EPPO cases and the national clearance crime rate.

II. Legal Framework of the EPPO's Investigations in the Czech Republic

1. Criminal Procedure

It is important to note that the Czech Republic follows a rather formalised approach to criminal procedure in comparison with other European legal systems. The following section explains typical criminal proceedings in an EPPO case. For the sake of brevity and context, this explanation has been simplified, as it would exceed the scope of this article to go into details of the complete procedure with all its variants.

The initial stage of criminal proceedings is the pre-trial stage (*přípravné řízení*), which is typically divided into two phases: the examination phase (*prověrování*) and the investigation phase (*vyšetřování*). In this context, it should be noted that the wording of the Czech version of the EPPO Regulation³ is (counterintuitively) rather confusing for a Czech practitioner, as it uses the term for the investigation phase (*vyšetřování*) to refer to what is, in fact, the entire pre-trial proceeding.

The legality of the entire pre-trial stage is supervised by the public prosecutor (in EPPO cases: the European Delegated Prosecutor – EDP), who is the *dominus litis* of this stage of the proceeding and is therefore vested with a number of powers by the Criminal Procedure Code.⁴ For example, the public prosecutor can give direct instructions to the police authority, replace the investigator, and even conduct the entire pre-trial proceeding by him-/herself.

The police authority involved in EPPO investigations is typically the Criminal Police and Investigation Service of the Police of the Czech Republic (*Služba kriminální policie a vyšetřování Policie České republiky*) or its specialised branch, the National Centre against Organised Crime (NCOZ). In cases concerning VAT, the Customs Administra-

tion of the Czech Republic may also assume the role of the police authority.

In the examination phase, the police authority is responsible for conducting all necessary steps to establish the circumstances indicating that a criminal offence has been committed by a certain offender. This must be done within a period of two to six months, which can be extended several times upon approval by the public prosecutor.

If the police authority cannot establish the concrete criminal offence and/or the offender, it dismisses the case. Such a decision may be overturned, however, by the public prosecutor. Conversely, the police authority should issue a formal decision without delay on the commencement of criminal prosecution against the concrete offender. This decision has procedural implications. It moves the proceedings from the examination phase to the investigation phase and confers procedural rights on the accused person. Therefore, a prosecution may not be initiated only to establish a case, i.e., against an unknown offender.⁵

Upon completion of the investigation, the police authority submits the file to the public prosecutor with a recommendation to draft an indictment or to take a different decision (e.g., to transfer the case or to dismiss the prosecution). It is then up to the public prosecutor to take the decision. He/ She may, for instance, start negotiations on an agreement on guilt and punishment (i.e., an out-of-court settlement) or decide on different, alternative resolutions of the case. If an indictment is filed, the public prosecutor represents the public prosecution in a trial. An indictment may only be brought for an offence for which a criminal prosecution was initiated, and the court may only try the offence specified in the indictment.

2. Material Competence of the EPPO

With regard to substantive criminal law, the Czech Republic notified the EPPO (in accordance with Art. 117 of the EPPO Regulation) a list of nineteen crimes that constitute the offences defined in the PIF Directive,⁶ for which the EPPO exercises its competence. These criminal offences are specified in the Special Part of Act No. 40/2009 Coll., Criminal Code (CC), mainly as property or economic crimes.

III. Analysis of Cases Investigated by the EPPO

The following section assesses available statistical data in respect of the type of EPPO cases and its national clearance crime rate in the Czech Republic.

The lack of publicly available data likely poses the biggest challenge when it comes to a proper assessment of the types of cases investigated by the EPPO in the Czech Republic, including data on the effectiveness of law enforcement authorities regarding their prosecution. At the Union level, recourse can be made only to data in the EPPO's annual reports (issued pursuant to Art. 7(1) of the EPPO Regulation). Given that the EPPO's annual report for 2021 only covers the second half of the year, only the data contained in the annual reports for 2022 and 2023 present a full picture of its activities.

Another problem is that the EPPO's annual reports (including the newly released EPPO Annual Report 2023⁷) do not provide any information on the methodology used to obtain their statistical data. Therefore, any relevant conclusions in the national context can only be drawn by consulting national data. For the Czech Republic, the data provided by the EPPO can be evaluated against the data presented in the "Annual Report on the Activities of the Public Prosecutor's Office"⁸ and the criminal statistics of the Police of the Czech Republic⁹.

1. Data Assessment

According to data from the Report on the Activities of the Public Prosecutor's Office for 2022,¹⁰ the Czech EDPs have already supervised 80 files in total. Of these, 39 offences (49%) were classified as a criminal offence of damage to the financial interests of the European Union under Section 260 CC, and 29 offences were classified as subsidy fraud under Section 212 CC (36%). The third and fourth most frequent offences were evasion of taxes, fees, and similar compulsory payments pursuant to Section 240 CC and the offence of obtaining an advantage in the awarding of a public contract, in a public tender, or in a public auction pursuant to Section 256 CC.

As of 1 June 2021, when the EPPO started its operational activities, it had taken over the supervision of 25 ongoing criminal proceedings in the Czech Republic.¹¹ In 2022, it supervised 54 proceedings involving a total estimated damage of €275 million. It is interesting to note that only four cases were investigated as VAT fraud, but the total estimated damage made up almost 76% (€207.7 million) of the total estimated damage in all ongoing proceedings supervised by the total of ten Czech EDPs.¹² In 2023, the total estimated damage reached €318.7 million in all 77 supervised cases. VAT fraud cases had risen to seven cases in total,¹³ while the share of the VAT fraud damages compared to the damage of all supervised cases remained almost unchanged at 75.9% (€ 241.9 million).

One possible explanation for the flagrant disparity between the amount of VAT fraud and other types of crime might be the restriction of the EPPO's material competence to VAT fraud cases with a total damage of at least €10 million (Art. 22(1) of the EPPO Regulation). Moreover, higher damages usually result from the complexity of the cases and the higher degree of organisation involved in this type of criminal activity, especially in cases of so-called carousel fraud.

2. Level of Reporting in Czechia

It should first be noted that the level of reporting should be distinguished from the level of detection of crimes. Currently, no official data exist with regard to the level of crime detection (i.e., latent criminality or dark figure of crime) or the pursued crime types in the Czech Republic. Indeed, for any criminality it is challenging to criminologists to objectively measure the level of crime detection. While law enforcement authorities might rely on official data only, a direct proportion between the level of detection and the level of reporting should logically exist. In my view, the hypothetic low level of crime detection of EPPO-relevant crimes by the national authorities would lead to the higher level of reporting from other entities, i.e. private parties and European Union authorities.

In terms of the level of reporting, the Czech EDPs received a total of 48 reports for 2022. Of these reports, 47 came from national authorities, and only one was from a European Union authority.¹⁴ In 2023, the number of reports reached 63, consisting of 55 reports from national authorities, five from European Union authorities, and three from private individuals.¹⁵

3. Clearance Rate

The success of national law enforcement authorities in their criminal investigations can be measured by the clearance rate, presented in the criminal statistics of the Police of the Czech Republic.

In 2022, the Police registered a total of 53 acts that qualified as a criminal offence of damage to the financial interests of the European Union under Section 260 CC, with an overall clearance rate of 49%. 137 acts qualified as subsidy fraud under Section 212 CC, with an overall clearance rate of 60%. In addition, the Police registered 747 cases of tax evasion under Section 240 CC, for which the overall clearance rate was 41%. In comparison, the overall clearance rate for all types of economic crimes (registered by the Police of the Czech Republic in 2022) was 58%.¹⁶

In 2023, the Police registered a total of 43 acts of damage to the financial interests of the European Union (Section 260 CC), with an overall clearance rate of 84%. In addition, 130 acts qualified as subsidy fraud (Section 212 CC), with an overall clearance rate of 78%. The offence of tax evasion (Section 240 CC) was registered 916 times and cleared in 49% of cases. In comparison, the overall clearance rate for economic crimes in 2023 was 59%.¹⁷

Regarding the methodology used, it is important to stress that, in cases of multiple criminal offences, the statistics only cover the most serious offence in the sense of the most severely punishable offence. Furthermore, it is necessary to define the term "clearance rate" in order to correctly classify the data. In the context of Czech police statistics, this term represents the so-called relative clearance rate, i.e., the proportion of registered crimes with a known perpetrator in the total number of registered crimes. As a result, only these cases are considered "solved," namely that a formal decision on prosecution (mentioned above in Section II.1) has been taken.

As the material competence of the EPPO is exercised in all offences of damage to the financial interests of the European Union (Section 260 CC) and of subsidy fraud (Section 212 CC), these data are the most representative of the EPPO's activities. In contrast, VAT fraud cases falling within the scope of the EPPO represent only a small fraction of the total number of registered tax evasion offences in the Czech Republic. Nonetheless, given the absence of more specific data, this information gives us an idea of the average clearance rate for this type of criminal activity in the country.

IV. Conclusion

As outlined in the introduction, European Chief Prosecutor Kövesi voiced criticism against the national law enforcement authorities in the Czech Republic, implying low effectiveness of investigation of the cases falling under the competence of the EPPO, in particular those concerning VAT fraud.

It was argued here that, whereas it seems impossible to objectively measure the level of crime detection, there must be a correlation between the level of detection and the level of reporting. Looking at the level of reporting, the EPPO's annual reports are the only source of publicly available data. From them, we can conclude that the absolute majority of crime reports stem from the national authorities, while only a fraction of reports come from EU authorities and private

parties. In my view, such data indicate the active approach of the national authorities to the detection of this kind of criminal activity.

Looking at the national clearance rate, we can conclude from the available data that the majority of criminal cases handled by Czech EDPs, i.e., cases of offences damaging the EU's financial interests and subsidy fraud (Sections 260 and 212 CC), had a higher clearance rate than the national average for economic offences: Concretely, 49% and 60% respectively in 2022 as well as 84% and 78% in 2023, while the overall national clearance rate for economic crimes remained below 60%. This improvement could theoretically be due to the EPPO's supervision of the cases; however, due to lack of long-term comparable data no firm statement can be made in respect of effectiveness.

With regard to tax evasion crimes, including VAT fraud, the overall clearance rate is slightly lower than the average for all economic crimes in the Czech Republic. Again, more precise conclusions cannot be made here, particularly since the EPPO's annual reports do not contain more specific data on its VAT fraud cases.

On the basis of the above data analyses, there is no indication that the approach taken by Czech law enforcement authorities to counter fraud affecting the financial interests of the EU is any different from their approach to countering fraud affecting the national budget.

In my view, one problem is that the EPPO's annual reports do not contain enough information to draw more accurate conclusions. They lack sufficient information regarding the methodology used, making any relevant international comparison impossible. In our case at issue, for instance, the section in the EPPO's annual report on "Typologies identified in active EPPO cases" (on the profile of each Member State's operational activity)¹⁸ could include references to the concrete crime as per the Criminal Code.

As a result, the current division in the EPPO's report is incomparable with the national statistics and does not entail an added value for the national authorities. In my opinion, the EPPO missed an opportunity to use its capacity to compare (and publicly disclose) more detailed information regarding its investigations. This would be a valuable asset in the European context. We should keep in mind that effective measures for the protection of the EU's financial interests at the Union level cannot be taken without data-based knowledge on the concrete situation in the Member States, particularly in cases involving such complex criminal activity as VAT fraud.



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- 1 M. Shabu, "Šéfka eurožalobců tepe Česko: špatně odkrýváte podvody s DPH, naše vyšetřování často vede na vaše území", *Lidové noviny* <https://www.lidovky.cz/domov/kovesiova-eurozalobce-dph-podvody-danova-kriminalita.A230612_125937_In_domov_lsva> accessed 4 March 2024. Author's translation.
- 2 Ministry of the Interior of the Czech Republic, *Report on the Situation in the Area of Public Order and Internal Security in the Czech Republic in 2022, 2023*, p. 70. Author's translation.
- 3 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'), OJ L 283, 31.10.2017, 1.
- 4 Act No. 141/1961 Coll., Criminal Procedure Code.
- 5 Institute of Criminology and Social Prevention, *Criminal Justice System in the Czech Republic*, 3rd ed., 2017, p. 74.
- 6 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.

- 7 European Public Prosecutor's Office, *EPPO Annual Report 2023*, Luxembourg 2024, <https://www.eppo.europa.eu/sites/default/files/2024-03/EPPO_Annual_Report_2023.pdf> accessed 9 April 2024.
- 8 Prosecutor General's Office, Zprávy o činnosti státního zastupitelství <<https://verejnazaloba.cz/nsz/cinnost-nejvyssiho-statniho-zastupitelstvi/zpravy-o-cinnosti>> accessed 9 April 2024.
- 9 Police of the Czech Republic, Statistické přehledy kriminality <<https://www.policie.cz/statistiky-kriminalita.aspx>> accessed 9 April 2024.
- 10 Prosecutor General's Office, Zpráva o činnosti státního zastupitelství za rok 2022, 2023, Charts II. Note: The report for 2023 had not yet been released at the time of writing.
- 11 Ibid.
- 12 European Public Prosecutor's Office, *EPPO Annual Report 2022*, Luxembourg 2023, p. 24, available at: <https://www.eppo.europa.eu/sites/default/files/2023-02/EPPO_2022_Annual_Report_EN_WEB.pdf> accessed 9 April 2024.
- 13 EPPO Annual Report 2023, op. cit. (n. 7), p. 24.
- 14 EPPO Annual Report 2022, op. cit. (n. 12), p. 24.
- 15 EPPO Annual Report 2023, op. cit. (n. 7), p. 24.
- 16 Police of the Czech Republic, Statistické přehledy kriminality za rok 2022 <<https://www.policie.cz/clanek/statisticke-prehledy-kriminality-za-rok-2022.aspx>> accessed 9 April 2024.
- 17 Police of the Czech Republic, Statistické přehledy kriminality za rok 2023 <<https://www.policie.cz/clanek/statisticke-prehledy-kriminality-za-rok-2023.aspx>> accessed 9 April 2024.
- 18 EPPO Annual Report 2023, op. cit. (n. 7), p. 25.

Developing Public-Private Information Sharing to Strengthen the Fight against Money Laundering and Terrorism Financing

Recommendations of the ISF-Police-funded Research Project "Public-Private Partnerships on Terrorism Financing" (ParTFin)

Benjamin Vogel and Maxime Lassalle

The European Union's upcoming new Framework on Anti-Money Laundering and Countering the Financing of Terrorism is set to introduce "partnerships for information sharing" as a new key tool for efforts addressing financial crime. Such partnerships are meant to enable the sharing of information between obliged entities in particular, for which the draft AML regulation will contain a detailed legal basis. At the same, the draft regulation also envisages that competent authorities may participate in the partnerships in view of facilitating information sharing between them and obliged entities for the purposes of preventing and combating money laundering, its predicate offences, and terrorist financing. Against this backdrop, this article summarizes the findings of the EU-funded ParTFin project. The full report has been published online on the eucrim webpage and can be downloaded from <https://doi.org/10.30709/eucrim-2023-030>. It aims to provide guidance for policy-makers, competent authorities, and obliged entities on how to ensure that public-private information-sharing mechanisms in the field of financial crime can operate effectively and at the same time align with the Charter of Fundamental Rights of the European Union.

I. Background

Recent years have seen an increase in public-private partnerships in the fight against financial crime. At the international level, such partnerships have been welcomed by the United Nations Security Council¹ and by the FATF.² At the EU level, partnerships are not only supported by a Commission Staff Working Document but have also been welcomed by the European Parliament and the Council during the ongoing negotiations on the anti-money laundering (AML) legislative package.³ Meanwhile, a number of countries in and outside the EU have been developing partnerships of various design.⁴ While most partnerships provide for an exchange of strategic information, some initiatives have already gone further and allow for the sharing of tactical information – that is, information that targets specific suspects and other specific persons of interest. The sharing of personal data is widely considered more problematic, however, as it affects fundamental rights more directly and is usually not provided for in national legal frameworks. These concerns were amplified in a letter by the European Data Protection Board.⁵

II. Purpose of the Recommendations and Methodology

The present Recommendations aim at situating public-private partnerships in the EU legal order and providing guidance for policymakers, authorities, and obliged entities on how to ensure that cooperation aligns with the imperatives of the Charter of Fundamental Rights of the European Union (CFR).

As a starting point, it should be stressed that public-private partnerships in anti-money laundering and countering the financing of terrorism (AML/CFT) can take many different forms. However, they typically involve the processing of customer data by obliged entities and, in order to induce or facilitate this processing, the provision of information to the obliged entities by authorities. Similarly, cooperation can emphasise different objectives – notably, the objective of improving the quality of obliged entities' customer due diligence (CDD) or the objective of advancing ongoing criminal investigations ([ParTFin report, p. 3–7](#)). Developing legal frameworks for public-private partnerships thus, in essence, means regulating the aforementioned forms of cooperation. In the process, the focus lies on those forms of cooperation that are most problematic from a fundamental-rights point of view, namely on practices that, in one way or another, target specific individuals, specific entities, or specific transactions.

In addition, discussions surrounding the topic of closer public-private cooperation in AML/CFT have so far been conducted chiefly under the umbrella of the term “partnership”, denoting forms of cooperation that are voluntary. Yet it may sometimes, for practical or legal reasons, be desirable to create mechanisms for mandatory enhanced public-private cooperation. The present Recommendations therefore address new forms of cooperation more broadly, whether they are voluntary or not.

On a last note on the objectives pursued by the Recommendations, it is worth underlining that the Recommendations are marked by the desire to find an appropriate balance between the conflicting interests at stake: strengthening the fight against financial crime while at the same time upholding a high standard of fundamental-rights protection. Each side, and each Member State, can of course argue for placing more or less emphasis on a particular aspect – more or fewer powers, more or fewer safeguards, etc. What is ultimately appropriate is not least a question for national constitutional law and for the – hitherto often not clearly delimited – guarantees offered by the CFR. In any case, the EU-level debate should strive for balance, because the enhanced public-private cooperation proposed here does indeed pose major legal challenges.

III. Key Challenges

Data protection and the lack of a clear legal basis

Attempts to implement mechanisms for enhanced public-private cooperation are frequently thwarted by the lack of a clear legal basis. In fact, the law of many countries so far does not set forth rules for *voluntary* cooperation between the competent authorities and the private sector when they work together to prevent, detect, or investigate crime. So far, the law is primarily, and in some countries even exclusively, concerned with coercive measures (such as subpoenas and the seizure of documents), especially when performed as part of criminal investigations ([ParTFin report, p. 15–17](#)). Yet a one-sided focus on traditional, coercive instruments does not provide sufficient protection for the rights of customers whose data may be processed by obliged entities on behalf or at the instigation of the authorities. Without a clear legal basis to regulate public-private cooperation, neither the powers of the authorities nor those of obliged entities are clear. More specifically, the law of many countries so far lacks guidance on the lawfulness of a transfer of information to obliged entities by authorities and the extent to which authorities may be allowed to ask obliged entities to

process customer data beyond what is required under the latter's CDD obligations. Similarly, as regards the powers of obliged entities, legal frameworks frequently lack clarity as to the extent to which obliged entities may process data when they do so largely or exclusively at the initiative of or on behalf of the authorities. Though public-private partnerships frequently seem to rely on the idea that existing CDD powers under the AML/CFT regulatory framework provide a sufficient legal basis, it can be unclear whether these powers do indeed suffice. In fact, CDD under the AML/CFT regulatory framework was originally conceived exclusively as a tool for obliged entities, not as a tool for the authorities. The nature of obliged entities' processing of their customer data can change significantly, however, and thereby lose the hallmarks of CDD in the conventional sense, if authorities become more and more involved in this processing. In any case, when seeking an appropriate legal basis under the General Data Protection Regulation (GDPR) for the voluntary processing of personal data at the initiative of or on behalf of the authorities (as would be necessary to enable various forms of enhanced public-private cooperation on AML/CFT), obliged entities will find – barring a special legal basis for voluntary public-private cooperation – only very limited possibilities. ([ParTFin report, p. 22–27](#))

The potentially high degree of intrusiveness of public-private data processing

Over the last several years, the European Court of Justice has established demanding requirements concerning data collection and transfer from private entities to public authorities. Further legal limits result from the case-law of the European Court of Human Rights. It is still unclear exactly how these requirements apply to the relationship between obliged entities and public authorities when they collaborate in the processing of customer data, and exactly what substantive and procedural safeguards for public-private cooperation in AML/CFT are required by EU data protection law.

Existing case-law provides criteria, however, to identify a few types of cooperation that regularly require particular legal guardrails. Insofar as a public-private cooperation measure aims at monitoring the activities of specific individuals, this can effectively amount to targeted, covert surveillance conducted by the authorities through the obliged entities. Depending on the nature and scope of the information sought, strong safeguards may be required, for example if the monitoring process in question provides insights into core areas of individuals' private life or if it enables the real-time geo-localisation of individuals. Similar considerations may apply if authorities ask obliged entities to conduct an

in-depth analysis of an individual's past financial activities, especially if the authorities thereby try to obtain in-depth information about the targeted individual's private life. Lastly, case-law indicates the need for special safeguards if public-private cooperation aims at searching for individuals of interest by automatically and continuously screening vast numbers of unsuspicious customers and their transactions on behalf of the authorities. ([ParTFin report, p. 27–37](#))

De-risking and stigmatisation

The practice of de-risking and of adopting other measures to the detriment of customers (such as raising fees in response to a perceived higher risk) is already considered a major challenge for the AML/CFT framework. The problem is aggravated, however, by public-to-private information sharing. Up to now, de-risking was merely a problem arising in the (contractual) relationship between obliged entities and their customers. Yet when obliged entities' CDD is increasingly based (in part) on information that the authorities provide to the obliged entities, de-risking and other measures detrimental to customers will often be effectively attributable to the authorities and thereby impact the legality of the authorities' interaction with the obliged entities. As a consequence, public-to-private information sharing will need to be combined with stronger legal scrutiny of resultant adverse measures adopted by the obliged entity to the detriment of a customer.

At the same time, legislators' ability to effectively regulate obliged entities' risk management necessarily remains limited. After all, obliged entities necessarily enjoy contractual freedom. This means that the law may be unable to fully control the risks that public-to-private information sharing is bound to create for customers. This shortcoming constitutes a significant factor militating in favour of a cautious approach to public-to-private sharing, especially if the authorities share with obliged entities information that targets customers about whom only a suspicion – and not yet proof – of involvement in criminal activity exists. The more that such information may cause harm to the reputation of a customer, the more urgent the need for obliged entities to ensure that the information is not used for purposes other than those narrowly defined. ([ParTFin report, p. 37–40](#))

IV. Recommendations

The Recommendations are the result of a three-step analysis: understanding and categorising the various ways in which authorities and financial institutions are cooperating

in the fight against money laundering and terrorism financing; subsequently identifying the relevant legal parameters under EU law; lastly, developing a legal framework for each of these different categories.

As for the need to categorise the various forms of public-private cooperation: Currently public-private cooperation is usually discussed using very vague and unspecific terminology – “partnership” being the most prominent example of such wording. To develop a legal framework, one needs to be more specific. Therefore, agreeing on a common terminology for different forms of cooperation is a key precondition for developing legislative Recommendations.

To this end, ParTFin analysed various forms of cooperation observed in existing partnerships, identified the various purposes pursued, and pinpointed the various methods of information sharing applied by the cooperating stakeholders. Five different categories of cooperation were able to be identified, three of them having the aim of supporting the crime-detection abilities of obliged entities, and two of them having the aim of supporting authorities. Oftentimes there is overlap between them, but it is still crucial to keep these separate categories in mind. ([ParTFin report, p. 59–62](#) and [99–102](#))

The five categories of cooperation revealed by ParTFin are:

- Threat warnings
- Risk notifications
- Risk indicators
- Financial analysis requests
- Financial monitoring requests

As for the development of a legal framework for each of these five categories, it was necessary to design them from scratch, because national legal orders have so far hardly addressed proactive public-private cooperation for AML/CFT purposes. As a consequence, the Recommendations will sound unfamiliar to many observers, not least to many lawyers. Discussing them requires patience and, above all, an understanding that the current state of affairs in AML/CFT cannot be considered satisfactory – neither from a law-enforcement nor from a fundamental-rights perspective.

1. Threat warnings

Meaning and purpose

By means of a threat warning, an investigative authority or another competent authority informs an obliged entity (or several obliged entities) about a specific criminal threat and

names the specific individual or entity from whom the threat originates. A threat warning may, for example, serve to inform an obliged entity that specific individuals, who may be concealed behind shell companies, are linked to a criminal organisation and may currently be trying to abuse the entity. The warning is meant to enable the obliged entity to protect itself from the threat. If the individual or entity responsible for the threat is already known to the obliged entity, it will usually suffice to terminate the relevant relationship. If the obliged entity is not yet, at least not knowingly, in a relationship with the individual or entity in question, it can include the name of this individual or entity in the screening of customers and transactions, and thereby try to avoid exposure to the threat.

The purpose of threat warnings is to operationalise relevant information in the possession of authorities in order to protect obliged entities from criminal abuse. This corresponds to the observation that law enforcement authorities frequently come by information which, if shared with an obliged entity, would enable that entity to disrupt hidden financial crime plots. Often, however, such information is not brought to the attention of obliged entities, and it may sometimes not even be used for preventive purposes by the authorities themselves. In fact, authorities will in many cases be aware of an ongoing threat but nevertheless unable or unwilling, for various legal and practical reasons, to take direct action against the individual or entity at the origin of the threat. The resulting gap facilitates crime that could have been easily disrupted. ([ParTFin report, p. 62](#))

Field of application

Threat warnings could be issued by the police and judicial authorities during a criminal investigation. Warnings could, in particular, serve as a gateway for investigative authorities to provide feedback to an obliged entity following the filing of a SAR. However, threat warnings should not be limited to cases in which a SAR became relevant for an investigation; instead, legislators could consider introducing warnings as a standard measure available to investigative authorities.

In contrast, warnings should not be issued by FIUs, as FIUs will normally lack the complete picture of an investigation needed to be able to assess the threat potential of a particular criminal endeavour. In addition, powers to issue warnings should be provided when investigative authorities or administrative authorities (such as government ministries) learn about a threat outside a criminal investigation, for example based on information they received from non-EU authorities. ([ParTFin report, p. 68–69](#))

Concerns

The primary concern regarding threat warnings is that they can be erroneous. Given the prognostic nature of the assessment, there will often be no absolute certainty about whether a threat is actually present or not. Available information is always backward-looking, but anticipating a threat typically means looking into the future. Naturally, issuing authorities can fall victim to miscalculation, for instance overestimating the danger posed by a particular individual. In addition, there can be cases where the available information subsequently turns out to be unreliable or incomplete. Given this uncertainty, it is important to note that threat warnings can heavily affect fundamental rights. Targeted individuals and entities may have their accounts closed and may be excluded from financial services and possibly even from entire markets due to an unsubstantiated suspicion.

Secondly, threat warnings can be problematic because obliged entities could use them in ways that do not correspond to their actual purpose, or could use them in an excessive manner. Out of a desire to avoid potential risks, an obliged entity might, for example, discontinue business relationships with individuals who share some characteristics with a person mentioned in a warning (for example individuals with similar spending habits or similar business activities), even if there is no reason to suspect that these individuals are involved in crime. How a warning is used by the obliged entity and whether the latter complies with any conditions set by the authorities can be difficult to verify.

As a third major vulnerability of threat warnings, the sharing of operational information with private entities can lead to a tipping-off of suspects and endanger investigations. Sensitive information can fall into the wrong hands, enabling criminals to cover up their tracks or providing them with new opportunities for crime. The unauthorised dissemination of warnings can also cause undue prejudice to the individuals and companies mentioned in those warnings, exposing them to widespread and lasting stigmatisation that may turn out to be unfounded or disproportionate. ([ParTFin report, p. 63–68](#))

Safeguards

Threat warnings label targeted individuals and entities as constituting an unacceptable financial crime risk, and thus essentially ask the addressed obliged entities to exclude these targets from financial services. It follows that the warnings can be highly intrusive, and that they therefore require the creation of a legal framework that includes adequate defence rights and ensures that the issuing of warn-

ings is subject to effective judicial oversight. In light of this, threat warnings are usually unsuitable as part of a purely voluntary cooperation mechanism.

In order to address the danger of an erroneous prognosis, the issuing of threat warnings requires reliable evidence indicating that criminal abuse of a particular obliged entity, or multiple obliged entities, by a particular individual or entity is likely. In other words, the available information must give rise to a high probability that the individual or entity in question is already abusing, or will abuse, the obliged entity or obliged entities for the commission of financial crime.

The target must be notified of the warning as soon as this is possible without endangering relevant investigations. Exceptions to this notification requirement may apply, in particular, to individuals and entities outside the EU – namely, insofar as they are not listed as beneficial owners in Member States' central bank-account registers or central beneficial-ownership registers and thus seemingly do not hold significant economic interests in the EU. In any case, after learning of the threat warning, targeted individuals and entities must be able to challenge the warning and the underlying threat assessment in court.

To prevent excessive implementation of warnings, obliged entities should be clearly instructed by the authorities on how to handle warnings. Most importantly, obliged entities may adopt adverse measures to the detriment of a customer on the basis of a warning only if there are reasonable grounds to suspect that this customer is related to the threat in question. To avoid circumvention of this rule, the content of a warning may be disclosed only to a small number of compliance staff members inside the obliged entity, and this content may generally not be included in the data used by the obliged entity for its regular CDD screening. Individuals and entities affected by a warning must be able to effectively challenge its implementation through a complaint to the authority in charge of supervising obliged entities' data processing.

To avoid endangering investigations and prevent the undue stigmatisation of targeted persons, laws should require the addressees of a warning to treat it confidentially and not to disclose it to third parties, in some cases not even to other branches of the same obliged entity. Apparent breaches of such dissemination rules should be thoroughly investigated and be made subject to adequate sanctions. In any case, the scope of dissemination of a warning must be proportionate to the gravity of the particular threat in question. Consequently, the dissemination of a warning to a large number of obliged entities will be justified only under excep-

tional circumstances, whereas warnings addressed to only one obliged entity, or to only a small number of obliged entities, may be subject to less demanding conditions. ([ParTFin report, p. 69–79](#))

2. Risk Notifications

Meaning and purpose

Risk notifications allow the FIU (or potentially, in some cases, other authorities) to inform an obliged entity that a specific situation entails a high financial crime risk and should therefore be subject to additional CDD measures. This does not necessarily mean that the authorities have concrete information linking a customer to criminal activity. As is characteristic for a risk-based approach, a high risk may also result from particular features of a business relationship or transaction that signal merely a high statistical likelihood of criminal activity (for example when an individual opens numerous bank accounts within a short period of time without any apparent lawful reason). Risk notifications may single out specific customers or transactions; alternatively, they can point to other individual red flags (such as specific IP addresses or postal addresses) that the authorities believe to indicate a high financial crime risk.

Consequently, risk notifications – whether they refer to a specific customer or not – are meant to support obliged entities in their risk management by identifying situations in which they should scrutinise particular customers. This reflects the idea that the authorities are sometimes better placed than obliged entities to identify financial risks, even though it may still be speculative whether these dealings are actually linked to crime. Risk notifications thus allow obliged entities to put the spotlight on the applicable customers and, by performing additional CDD measures, check whether the filing of a SAR is called for. In other words, a risk notification requires the obliged entity to find out whether there are reasons to think that a high-risk situation is in fact related to crime. ([ParTFin report, p. 79](#))

Field of application

Risk notifications are a tool for FIUs to support obliged entities' implementation of the AML/CFT regulatory framework. As such, notifications may, in particular, be issued as a form of post-SAR feedback to the reporting entity. However, the FIU should be entitled to issue a notification even in the absence of a prior SAR. FIUs should usually exercise discretion as to whether or not to issue a notification in a particular case. However, legislators should consider defining situations in which an obliged entity may be entitled to

receive a risk notification. This could be useful, especially if an obliged entity has repeatedly filed SARs regarding one and the same customer relationship over a long period of time without receiving any substantive feedback from the FIU or from investigative authorities. Insofar as the FIU enjoys discretion, the law should establish clear criteria for its case selection in order to avoid undue preferential treatment of some obliged entities. ([ParTFin report, p. 84–86](#))

Concerns

It is important to stress that risk notifications are meant merely to support obliged entities' CDD by identifying customers and transactions that should be subject to particular scrutiny. Conversely, risk notifications are not meant to say that specific customers are actually linked to crime. Herein lies the biggest challenge: when the authorities label a customer as constituting a high financial crime risk, it is very likely that obliged entities that receive this information will not subject this customer to additional scrutiny but will instead abstain from the relationship. In other words, instead of managing the risk, many obliged entities will prefer to avoid it altogether. However, this would mean that risk notifications fail their purpose. More importantly, affected customers would be exposed to de-risking and possibly lose vital business opportunities – in both cases essentially due to the authorities' interference, and without there necessarily being any evidence that these customers are involved in crime.

Yet risk notifications can negatively impact on affected customers even when obliged entities initially comply with the purpose of the notification and manage the risk instead of terminating their relationship with the affected customers. The fact that a customer was singled out as a high risk by the authorities is likely to harm this customer's reputation in the eyes of any obliged entity that learns about the notification, even if no concrete facts are found that link the customer to criminal activity. Obliged entities might assume, possibly rightly so, that dealings with such a customer may attract greater scrutiny from supervisory authorities and therefore entail a particular risk of being sanctioned for inadequate CDD. ([ParTFin report, p. 79–84](#))

Safeguards

To prevent risk notification from becoming a trigger for de-risking and similar consequences (such as the imposition of additional fees), the law must provide stringent rules on how obliged entities treat customers affected by a risk notification. As a minimum, an obliged entity should generally be under an obligation not to adopt adverse measures

against such a customer during a waiting period. During this period, the obliged entity may take such measures only if it becomes aware of substantial reasons to file a SAR or if there are commercial reasons that require fundamental reassessment of the business relationship in question. To ensure adherence to this obligation, the obliged entity should inform the FIU about any significant changes in the business relationship during the waiting period.

As a crucial safeguard for protecting the reputation of a customer that has been subject to a notification, the recipient obliged entity should be strictly prohibited from sharing the notification and its content with third parties without prior authorisation by the FIU. This prohibition could be supplemented by additional safeguards, such as disclosing the risk notification to only a small number of vetted contact persons in the obliged entity or establishing a secure location where representatives from obliged entities interact with the authorities without having the possibility to produce records of the shared information. The law could empower the recipient obliged entity to require clarification from the FIU on whether its risk management of the customer in question is adequate. The obliged entity should, in this case, be entitled to rely on the FIU's assessment unless major changes subsequently occur in the risk profile of the customer in question.

Lastly, individuals and entities that were subject to a risk notification should be informed of the notification once this is no longer likely to tip off suspects or otherwise endanger investigations. They should furthermore be provided with effective remedies against an arbitrary issuing of risk notifications as well as against an unlawful handling of risk notifications by an obliged entity. Building on already-existing remedies required by the GDPR, such remedies should include the possibility to complain to the authority in charge of supervising the data processing of obliged entities. To ensure the effectiveness of such remedies, risk notifications and all communications between the FIU and obliged entities related to such notifications should be fully documented and accessible to this authority. ([ParTFin report, p. 86–93](#))

3. Risk indicators

Risk indicators, whether in the form of typology papers or in any other form, are an established tool used, not least by FIUs and supervisory authorities, to provide the private sector with strategic information. Risk indicators do not point to particular business relationships or particular transactions, and therefore they typically do not constitute a significant interference with fundamental

rights. As such, the issuing of risk indicators does not normally require extensive legal safeguards.

However, more recent practices show that risk indicators can go beyond the description of financial crime methods and additionally contain information about the national or geographic origin or other personal characteristics of perpetrators. The inclusion of such details may sometimes be desirable, for example when it enables risk indicators to highlight the activities of particular criminal organisations.

Legislators should provide appropriate safeguards for cases in which risk indicators have the potential to effectively single out customers with specific personal traits (for instance persons with a particular ethnic or religious background). For example, the issuing authority should be required in such cases to consult with an independent body to determine whether the potentially discriminatory effect of the envisioned risk indicator is justified by its added operational value in the fight against financial crime. Such safeguards would not only limit unintended consequences but, by providing legal certainty, also encourage competent authorities to improve the quality of risk indicators. ([ParTFin report, p. 93–99](#))

4. Financial analysis requests

Meaning and purpose

Via a financial analysis request, a competent authority asks an obliged entity to analyse its customer data in order to produce findings that may be of relevance for the authorities. Such requests can, for example, seek to determine whether a particular individual indirectly controls a particular company, or help retrace the flow of money through a long chain of seemingly unconnected companies. For the requested analysis to produce meaningful findings, the requesting authority will regularly need to provide the obliged entity with information about suspects or with other tactical or strategic information. The more relevant the information shared with the obliged entity, the more the obliged entity will usually be able to direct its analysis in ways that produce added value for the authorities.

Financial analysis requests essentially reflect the idea that it may be more useful for the authorities if obliged entities analyse their data themselves instead of transferring bulk data to the authorities. Often, such a transfer of bulk data will be unfeasible in any case. Authorities will sometimes also lack the technical infrastructure to perform high-quality analyses. Moreover, unlike the authorities, obliged entities will frequently be able to direct-

ly access information held by branches and subsidiaries in other countries. ([ParTFin report, p. 102–105](#))

Field of application

Financial analysis requests should be available primarily to investigative authorities in the context of criminal investigations and related administrative proceedings, not least in proceedings aimed at non-conviction-based confiscation. Although some Member States may already accept financial analysis requests as part of the conventional powers under the law of criminal procedure (notably powers to subpoena obliged entities), there is to date certainly no consensus on whether the existing powers of competent authorities cover such requests to gather evidence or at least intelligence. Beyond making financial analysis requests available to investigative authorities in the contexts described above, legislators could consider making financial analysis requests available to FIUs in support of their operational analyses. ([ParTFin report, p. 106](#))

Concerns

Financial analysis requests raise problems, first of all, because they can entail highly intrusive processing of personal data. Analysing transaction data and other data collected for the purpose of CDD can yield in-depth insights into a person's private life. The intrusiveness of the analysis is further intensified if the obliged entity, in its analysis, includes information about a person's online activities, such as her use of social networks.

Furthermore, financial analysis requests can be problematic as regards the reliability of the resulting findings. Oftentimes the conclusions of an analysis will, to a greater or lesser extent, be based on unverified assumptions, for example assumptions about the beneficial owner of a company, even though these assumptions will not necessarily be apparent from the analysis result that the obliged entity provides to the requesting authority. The result of a financial analysis can give rise to doubts about its completeness, bearing in mind possible conflicts of interest in cases in which the activities of a suspected customer might at the same time involve compliance failings on the part of the obliged entity.

Financial analysis requests can also raise concerns insofar as the disclosure of sensitive information to obliged entities might produce unintended detrimental consequences, in particular de-risking, for affected customers. Stigmatising detrimental consequences can arise with regard to any affected customer, which is especially concerning because affected customers may include individuals and companies

against whom the criminal suspicion is only weak so far, and, in some cases, customers who are not even suspects. ([ParTFin report, p. 106–112](#))

Safeguards

To address data protection concerns, the requesting authority should specify how the obliged entity must analyse its data, in particular by defining and limiting the scope and nature of customer data to be included in the analysis. Sensitive insights into a person's private life should be sought only when this is proportionate to the seriousness of the criminality at stake and to the degree of suspicion in the particular case. In order to uncover possible sources of error, including a potential discriminatory bias, in the results of an analysis that has been conducted in response to an analysis request, the requesting authority may be required to gain an understanding of the data-processing methods used for the analysis by the obliged entity. If a financial analysis is meant to target individuals, prior authorisation by a judicial or other independent body, or oversight by such a body of the issuing and implementation of the analysis request, can constitute an important safeguard.

As regards the reliability concerns associated with financial analysis requests, legislation could provide guidance on the subsequent use of any resulting findings. Insofar as the analysis is largely automated and the underlying facts are not fully transparent, the findings of analyses conducted in response to requests should generally be used only as investigative leads, not as evidence. Furthermore, legislation should ensure that obliged entities are under an obligation not to withhold any relevant information from the requesting authority when responding to a financial analysis request.

Crucially, to reduce the probability of unintended consequences, obliged entities that receive a financial analysis request should be strictly prohibited from sharing the request and its content with third parties without prior authorisation. To prevent financial analysis requests from prompting de-risking, investigative authorities could be empowered to inform recipient obliged entities whether the individuals or companies targeted by the requests they have received constitute an enhanced financial crime risk. If a recipient obliged entity is informed in this way that a particular targeted customer does not constitute such a risk, and if there are no other significant reasons to the contrary, the obliged entity should be entitled not to treat this customer as a financial crime risk, and should be entitled to rely on this approach vis-à-vis the supervisory authority if this authority criticises the adequacy of the obliged entity's CDD with regard to this customer.

If a financial analysis request is issued by an FIU or other authority before a criminal investigation against the targeted person has been opened, additional safeguards should apply in order to protect as-yet unsuspected individuals. In such cases, the above-described safeguards for risk notifications should apply, because the request will, as regards the recipient obliged entity's risk assessment, usually have the effect of implicitly labelling the targeted customer as an enhanced financial crime risk. ([ParTFin report, p. 106–112](#))

5. Financial monitoring requests

Financial *monitoring* requests go beyond financial *analysis* requests in that they ask obliged entities not only to analyse customer data but also to collect additional data for the benefit of authorities. Monitoring requests can take various

forms, from a request to monitor the activities in a particular payment account to a request to gather extensive information about the activities of a particular customer or in an entire business segment. While the relevant problems and respective solutions largely correspond to those described above for financial analysis requests, some additional challenges need to be addressed. In particular, as monitoring requests can amount to covert surveillance, they will need to respect particularly demanding legal standards, such as prior authorisation by a judicial or other independent body, and subsequent notification of targeted individuals if such notification no longer endangers the investigation. ([ParTFin report, p. 112–115](#))

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5 European Data Protection Board letter to the European Parliament, the Council, and the European Commission on data sharing for AML/CFT purposes in light of the Council’s mandate for negotiations of 28 March 2023, OUT2023-0015, available at: <https://edpb.europa.eu/system/files/2023-04/edpb_letter_out2023-0015_amlcft_ep_en.pdf> accessed 13 February 2024.

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