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European Law Forum: Prevention • Investigation • Prosecution

The European Public Prosecutor's Office – Potentials and Challenges

Le Parquet européen – Potentiels et défis

Die Europäische Staatsanwaltschaft – Potenziale und Herausforderungen

Guest Editorial by *Laura Codruţa Kövesi*

Marc Engelhart: Compliance with the EPPO Regulation: Study Results on the "Implementation" of Council Regulation (EU) 2017/1939 in the Member States

Danilo Ceccarelli: Status of the EPPO: an EU Judicial Actor

Anthony M. Collins: Judicial Control of the EPPO: The Role of the Court of Justice

Katalin Ligeti: Remarks on the CJEU's Preliminary Ruling in C-281/22 G.K. and Others (Parquet européen)

Peter Csonka and Lucia Zoli: The New Directive on the Violation of Union Restrictive Measures in the Context of the EPPO

2024 / 1 ISSUE / ÉDITION / AUSGABE

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Contents

News

European Union

Foundations

2 Rule of Law
7 Reform of the European Union
7 Area of Freedom, Security and Justice
8 Schengen
8 Ukraine Conflict
11 Digital Space Regulation
14 Legislation

Institutions

16 European Court of Justice (ECJ)
17 OLAF
18 European Public Prosecutor's Office
21 Europol
22 Eurojust
23 Frontex
23 Agency for Fundamental Rights (FRA)
24 European Data Protection Supervisor (EDPS)

Specific Areas of Crime

24 Protection of Financial Interests
28 Money Laundering
29 Tax Evasion
29 Counterfeiting & Piracy
30 Organised Crime
32 Cybercrime
32 Environmental Crime
34 Terrorism
34 Racism and Xenophobia

Procedural Law

34 Data Protection
35 Ne bis in idem
35 Procedural Safeguards
37 Victim Protection
37 Freezing of Assets

Cooperation

38 Police Cooperation
38 Judicial Cooperation
39 European Arrest Warrant
40 European Investigation Order
44 Law Enforcement Cooperation

Council of Europe

Foundations

45 European Court of Human Rights

Specific Areas of Crime

45 Corruption
49 Money Laundering

Legislation

52 Council of Europe Conventions – Latest Developments

Articles

The EPPO – Potentials and Challenges

53 Fil Rouge
Katalin Ligeti and Georgia Theodorakakou

54 Compliance with the EPPO Regulation: Study Results on the "Implementation" of Council Regulation (EU) 2017/1939 in the Member States
Marc Engelhart

58 Status of the EPPO: an EU Judicial Actor
Danilo Ceccarelli

64 Judicial Control of the EPPO: The Role of the Court of Justice
Anthony M. Collins

69 Remarks on the CJEU's Preliminary Ruling in C-281/22 G.K. and Others (Parquet européen)
Katalin Ligeti

76 The New Directive on the Violation of Union Restrictive Measures in the Context of the EPPO
Peter Csonka and Lucia Zoli

Guest Editorial

Dear Readers,

Despite countless challenges and obstacles, the European Public Prosecutor's Office (EPPO) is working. This is no small feat. By the end of 2023, we had over 1,900 active criminal investigations with an overall estimated damage of more than €19 billion. More importantly, in less than three years of operational activity, the EPPO brought to light a whole new continent of crime, as 60% of the estimated damage under our investigation relates to cross-border VAT fraud.

Incidentally, I am sure that what applies to VAT and customs fraud is also valid for the circumvention of EU restrictive measures. I am convinced that we will only start grasping the full extent of this criminal phenomenon once the EPPO's competence has been extended accordingly.

Our work has shown that VAT fraud is no longer a niche criminal activity. It has become one of the most lucrative criminal enterprises in the EU, characterised by low detection rates, minimal risks, and high rewards. Several organised crime groups (OCGs) have scaled their operations in this field to an industrial level. Instead of encountering OCGs occasionally (as initially assumed), we quickly found ourselves pitted against dangerous criminals who do not shy away from extreme violence.

Our main challenges in this regard are:

- First, the level of detection remains unsatisfactory, as we still receive relatively few reports of VAT and customs fraud from countries with major seaports and airports.
- Secondly, the OCGs on our radar started to understand EPPO's uniquely disruptive potential and adapt. The enlargement of the EPPO zone to Poland and Sweden will contribute to restricting these groups' ability to relocate their activities outside of our jurisdiction. However, the possibility for criminal forum shopping remains, given the differences in the criminal laws and criminal procedures in the EPPO zone.
- Thirdly, not enough is being done to cripple the financial capacity of OCGs. Not as a side effect of damage recovery but primarily to disrupt their operational capacity. According to Europol estimates, judicial authorities in the EU seize less than 2% of proceeds of organised crime annually.

Laura Codruţa Kövesi

To do this, as the first transnational prosecution office, we need dedicated and specialized investigators and corresponding cross-border analytical capacities. We also need a much stronger international standing when we exercise our competence in relation to non-EU countries.

The European Court of Justice has already started to clarify key aspects of the EPPO Regulation. We will continue to systematically encourage national judicial authorities to refer pertinent questions to the Court. However, we cannot rely on the Court alone. The EPPO Regulation must be revised in light of the considerable, practical experience gathered in the first three years of operations.

Some suggestions: The national authority competent to decide on conflicts of competence should be able to make a preliminary ruling reference to the CJEU. Provisions on the exercise of the EPPO's competence must be clearer and simpler, especially when it comes to the notion of "inextricably linked offences", so that the EPPO's jurisdiction in sensitive cases cannot be undermined. The EPPO should also exercise competence for all serious crimes committed by EU officials in the exercise of their functions. The unnecessarily cumbersome "Article 31" cross-border cooperation mechanism needs to be improved.

To fight transnational crime more efficiently, we need to be more consistent. It has become abundantly clear that a proposal for a revision of the EPPO Regulation is due. The most pressing issues are on the table. It is now merely a question of political will.

Laura Codruţa Kövesi, European Chief Prosecutor,
European Public Prosecutor's Office

News

Actualités / Kurzmeldungen*

European Union

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

Foundations

Rule of Law

Parliament's Call for Action on Erosion of EU Values

On 28 February 2024, the European Parliament expressed significant concerns over the erosion of democratic principles, the rule of law, and fundamental rights across several EU Member States. In its resolution on the European Commission's 2023 Rule of Law report, the Parliament highlighted both progress and persistent threats to these core values. The report identified the following key issues:

- *Judicial independence and corruption:* Significant disparities in judicial independence among Member States persist, in particular with regard to the appointment of high-level judges. In addition, proposed institutional changes in Slovakia and legislative proposals regarding the amnesty law in Spain are concerning. The persistence of corruption, especially in Hungary, where EU funds are reportedly being used to benefit political allies, is also worrying.
- *Citizenship by investment and protection of the EU budget:* Citizenship by investment schemes, such as the one operated by Malta, should be terminated. Strengthening the EU's anti-fraud architecture and increasing transparency in the European institutions can effectively and efficiently support the protection of the EU's financial interests, overcoming the inherent limitations of national systems.
- *Civil society:* Threats to civil society include proposed restrictions on NGOs in Slovakia and the stigmatization of organizations receiving foreign funding.
- *Minority rights and police conduct:* Minority groups, including religious minorities, LGBTIQ individuals, women, and migrants are often treated poorly in the EU. The use of excessive force by the police, with examples in France and Greece, is contemptible.

In general, MEPs criticized the oftentimes "open and unashamed non-compliance" with EU law on the part of several Member States and stressed that the Commission's monitoring efforts are inadequate and need to be strengthened with tangible enforcement measures. (AP)

CCBE Calls for Promotion of a Fair Justice System in Europe

In anticipation of the 2024 European Parliament elections and the next European Commission, the Council of Bars and Law Societies of Europe (CCBE) issued a manifesto urging EU institutions to uphold and enforce a fair and effective judicial system grounded in justice, fundamental rights, and the rule of law. Launched on 28 March 2024, the manifesto emphasizes the critical role of the independent legal profession in maintaining these values and calls for specific actions to ensure adherence to these principles. The CCBE's key recommendations for future EU policy include the following:

- Resource allocation: Ensure that Member States allocate sufficient financial and human resources to their judicial systems and provide ample EU funding to support the development of a cohesive European justice area. This includes guaranteeing effective cross-border judicial cooperation and accessible legal aid systems.
- Professional training: Implement a funding mechanism to support large-scale, structured training programmes for legal professionals across the EU, enhancing their ability to uphold justice and the rule of law.
- Procedural safeguards: Ensure the proper implementation of existing procedural safeguards in criminal mat-

* Unless stated otherwise, the news items in the following sections cover the period 16 January 2024 – 30 April 2024. Have a look at the eucrim website (https://eucrim.eu), too, where all news items have been published beforehand.

ters and introduce new ones to boost confidence in the mutual recognition of criminal justice measures across Member States.

■ Legislative standards: Advocate for EU legislation that positively impacts the administration of justice and promotes annual dialogues among all justice system stakeholders in order to continuously address and improve issues affecting the rule of law.

CCBE President *Pierre-Dominique Schupp* reiterated the need for continuous efforts to preserve and enhance justice in Europe, emphasizing the importance of political commitment to these foundational principles.

The CCBE represents over one million European lawyers through its member bars in 46 countries, positioning it as a key advocate for the legal profession at the European level. (AP)

EP Worries about Rule-of-Law Developements in Slovakia

On 17 January 2024, the European Parliament (EP) adopted a resolution in which it voiced profound concern over several Slovak government's measures that will weaken the rule of law in the country. This includes the Slovak government's intention to dissolve pivotal anti-corruption bodies, including the Special Prosecutor's Office. The resolution criticised the accelerated legislative process employed to enact amendments to the criminal code and dismantle the Special Prosecutor's Office, pointing out that this jeopardises judicial independence. The amendments are perceived as potentially compromising Slovakia's capacity to effectively address high-level corruption and organised crime.

Notable public opposition to the proposed changes, manifesting in protests and petitions, has been observed. The resolution calls for a comprehensive public consultation process, incorporating the input of experts and civil society organisations. MEPs also denounced any political meddling in the media and civil society, underscoring concerns about the government's proposed limitations on NGOs and public broadcasters.

Furthermore, attention is drawn to the inappropriate and disrespectful remarks made by the Slovak Prime Minister towards a student involved in an academic initiative discussing the state of the rule of law in Slovakia. For the MEPs, this incident demonstrates the government's alarming approach to democratic debate and respect for public institutions.

The European Public Prosecutor's Office has also underscored potential risks to the safeguarding of the EU's financial interests in the case of Slovakia (→eucrim 4/2023, 325–326). (AP)

EP Resolution on Rule of Law and Media Freedom in Greece

In a resolution adopted on 7 February 2024, the European Parliament (EP) voiced profound concerns over the decline in the rule of law and democratic norms in Greece, in particular as regards corruption, media freedom, and judicial independence.

Looking at corruption issues, the resolution refers to scandals involving the distribution of state funds to media outlets and the misuse of spyware by government authorities. MEPs call for more rigorous monitoring and scrutiny of the utilisation of surveillance technologies, e.g., Predator spyware, with a particular focus on their deployment against journalists and political figures.

Regarding the state of the media environment in the country, the text particularly emphasises the perils that journalists face: physical intimidation, legal persecution, and the illicit use of surveillance software. It comes as no surprise that Greece is ranked low in the World Press Freedom Index.

In terms of the independence and oversight of the judicial system, MEPs share grave concerns over the lack of impartiality within the Greek judiciary and the lack of independence of oversight bodies. Attention is also drawn to instances of political influence and intimidation of officials tasked with investigating government actions.

Furthermore, concerns are expressed as regards the treatment of minorities, migrants, and civil society organisations. MEPs call for enhanced protection of human rights and an end to onerous measures against non-governmental organisations.

The resolution has urged the Greek government and the EU to take decisive steps to address the issues raised. The Commission is called on to make full use of the tools available to address the breaches of EU values in Greece. This should include an assessment on the use of EU funds under the Common Provisions Regulation in line with the Charter of Fundamental Rights on the one hand, and an analysis of potential financial measures under the Rule of Law Conditionality Regulation on the other hand (for these tools in general →article by *I. Jaskolska*, eucrim 4/2023, 337–339).

It is not the first time that the EP has raised concerns over the deterioration of EU values in Greece. After a fact-finding visit to Greece in March 2023, a delegation of MEPs found very serious threats to the rule of law and fundamental rights with checks and balances under heavy pressure. (AP)

Poland: Rule-of-Law Developments in the First Half of 2024

This news item continues the overview of the rule-of-law developments in Poland (as far as they are relevant under a European law perspective). It covers the period from the second half of January to the end of June 2024 and follows the overview in →eucrim 4/2023, 308–312.

■ 20 February 2024: The General Affairs Council takes stock of the recent rule-of-law developments in Poland in the framework of the Article 7 TEU procedure. The new Polish Justice Minis-

ter *Adam Bodnar* briefs the Council on the reforms the Polish government has undertaken, and is planning to undertake, to address the issues raised under the Article 7 procedure. He presents an ambitious Action Plan. The Commission also updates ministers on the developments since 15 November 2023 when the last hearing took place. The Commission launched the Article 7 procedure for Poland in 2017; since then, the Council has conducted six hearings with Poland.

■ 23–26 February 2024: After the change of government, the Polish Justice Minister *Adam Bodnar* approves a number of personnel decisions that herald a turnaround from the justice policy of the previous PiS government. He dismisses two neo-judges at the District Court of Poznań. More dismissals of judges appointed by predecessor *Zbigniew Ziobro* are to follow. In addition, *Dariusz Korneluk* is chosen to be the new National Prosecutor. In 2016, when *Ziobro* took over control of the prosecution, *Korneluk* was demoted to a district prosecutor's office and he faced disciplinary action for a critical statement regarding *Ziobro's* prosecution policy. It is the first time that the National Prosecutor was selected by a competition commission. *Bodnar* also announces that there will be further competitions, including the selection of a new director for the National School of Judiciary and Public Prosecution and the European Prosecutor representing the country at the EPPO. Lastly, *Bodnar* signals that he will prepare a bill that will separate the positions of Attorney General and Polish Minister of Justice, merged by the former government.

■ 29 February 2024: the European Commission confirms Poland's participation in the enhanced cooperation on the establishment of the EPPO (→separate news item, infra p. 18).

■ 29 February 2024: The European Commission gives green light to unblock EU money of a total of €137 billion for Poland. The Commission particularly refers to Poland's action plan to restore the rule of law in Poland that the new Polish government under Prime Minister *Donald Tusk* presented on 20 February 2024 (see above). With regard to funding of nearly €60 billion in RRF funds, the Commission positively assesses Poland's fulfillment of several milestones set out in the Council Implementing Decision approving Poland's RRP. This includes the fulfillment of two "super milestones": (1) to strengthen important aspects of the independence of the Polish judiciary through reforming the disciplinary regime for judges; (2) to use Arachne, the EU's IT tool for preventing fraud and irregularities. In addition, the Commission endorses the disbursement of around €76.5 billion from the 2021–2027 Cohesion Policy, Maritime and Fisheries, and Home Affairs funding programmes. In this context, the Commission considers that Poland's reforms have satisfactorily fulfilled the horizontal enabling conditions related to the EU Charter of Fundamental Rights (→article by Lothar Kuhl, eucrim 4/2023, 339–345).

■ 21 March 2024: In the case *Sieć Obywatelska Watchdog Polska v Poland* (application no. 10103/20), the ECtHR finds a violation of Art. 10 ECHR because an NGO was not given access to diaries of meetings of two judges of the Polish Constitutional Court. The request for information was made against the background to verify whether the two judges had met with a politician whose status in criminal proceedings was being decided by the Constitutional Court, thus raising doubts over impartiality.

■ 25 March 2024: A quarrel begins between Polish President *Andrzej Duda* and Minister of Justice *Adam Bodnar* over the dismissal and replacements in the judiciary. *Duda* believes that dismissal of a prosecutor requires consent of the President whereas *Bodnar* argues that the person concerned was never effectively appointed to this position at all. Furthermore, *Duda* claims that *Dariusz Korneluk* has been illegally appointed as the new National Prosecutor (see above).

■ 12 April 2024: The Sejm (the lower house of the Polish parliament) adopts a law that will reform the controversial National Council of the Judiciary (KRS). The KRS restructured since 2018 under the former PiS government has been considered not in line with international standards, acknowledged *inter alia*, by the CJEU and the ECtHR. The main feature will be that the members of the Council will be elected by judges and no longer by the parliament, as has been the case since 2018. Controversially seen is the exclusion of "neo-judges" appointed by the current KRS since 2018, from the possibility of candidacy. Poland's President *Andrzej Duda* announces that he will veto the law.

■ 12 April 2024: Polish Justice Minister, *Adam Bodnar*, appoints a codification commission for the system of common courts and the prosecutor's office. The commission is tasked to clean the law from bad changes introduced during the PiS government and to adapt it to the present times. It will also make proposals what happens with neo-judges appointed by the KRS when it was under the control of the PiS government. Codification commissions for criminal law and civil law with similar tasks were appointed earlier in April 2024. A codification commission for family law will follow.

■ 20 April 2024: Polish Justice Minister, *Adam Bodnar*, initiates a reform of the Polish system of judges' secondments. The new legislation will overturn the policy of former justice minister *Zbigniew Ziobro*. It will also implement a CJEU judgment of November 2021 which declared that the justice minister's power to second judges to higher criminal courts and to terminate the secondments at any time without stating reasons is contrary to Art. 19(1) TEU.

■ 6 May 2024: The Commission announces that it intends to withdraw its reasoned proposal from 2017 that Poland is at "a clear risk of a serious breach of the rule of law". As a result, this decision would close the Article 7(1) procedure for Poland. The Commission positively assesses in particular the following measures from Poland's new government that came to office at the end of 2023: measures to re-establish the independence in the Polish justice system; recognition of the primacy of EU law and commitment to implementing all the CJEU and ECtHR judgments related to rule of law including judicial independence; accession to the European Public Prosecutor's Office. The Commission also considered relevant the Action Plan presented by Poland on 20 February 2024, and the fact that Poland has taken the first concrete steps to implement the Action Plan. The measures under the Action Plan and other steps to promote the rule of law in Poland will continue to be regularly monitored, in particular, under the Rule of Law Report process.

■ 21 May 2024: The General Affairs Council discusses the rule-of-law situation in Poland. The Commission informs ministers about the reasons for its intention to close the Article 7 procedure (see above). The Belgian Council Presidency concludes that "the Council had taken note of the intention of the Commission to withdraw its reasoned proposal" under Article 7 TEU. A clearer statement is blocked by Hungary which said that the Commission's decision was taken "purely on political grounds".

■ 29 May 2024: The Commission formally adopts a decision to close the Article 7 procedure for Poland by withdrawing its reasoned proposal that had triggered this procedure in 2017. The decision is based on the finalized analyses regarding the requirements of Article 7(1) TEU presented on 6 May 2024 (see above). The Commission considers that there is no longer a clear risk of a serious breach of the rule of law in Poland. Commission Vice-President for Values and Transparency, *Věra Jourová,* says: "Today marks an important day for the rule of law in Poland and in the European Union. After more than six years, following the positive steps taken by the Polish authorities as well as the strong support expressed by Member States in that respect, we have now closed the Article 7 procedure for Poland. We will continue engaging with the Polish authorities to support them in their endeavour to promote the rule of law."

■ 29 May 2024: The General Court dismisses an action brought by Poland and confirms that the Commission could legitimately offset the amounts payable in respect of periodic penalty payments for not having ceased mining activities at the Turów mine against amounts owed to Poland by the European Union. The case is referred to as T-200/22 and T-314/22 (*Poland v Commission*). (TW)

Hungary: Rule-of-Law Developments in the First Half of 2024

This news item continues eucrim's regular overview of worrying rule-of-law developments in Hungary as far as implications on Union law, in particular the protection of the EU's financial interests, are concerned. It covers the period from the second half of January until the end of June 2024. It follows up on the overview in eucrim 4/2023, 309–312, which covered developments up to mid-January 2024.

■ 18 January 2024: The Hungarian Helsinki Committee (HHC) and Team ATLO (a project from the Budapest based investigative journalism NGO Atlatszo) launch a scrollytelling tool that informs users about suspended Union funds for Hungary. The tool provides in a user-friendly way infographics, animations and text to explain and present complex and lengthy processes and phenomena with regard to the EU's blocking of funds for Hungary following the European Commission's decision of 13 December 2023 (→eucrim 4/2023, 311). Information is provided in English and Hungarian.

■ 4 February 2024: In a briefing paper, the HHC states that Hungary continues to face systemic overcrowding in its prisons. In addition, there is disproportionate use of physical restraints during criminal trials. According to the HHC, Hungary still falls short of essential European human rights standards for detainees.

■ 7 February 2024: The European Commission opens an infringement procedure against Hungary for its "Protection of National Sovereignty Act", which was adopted by the Hungarian Parliament on 12 December 2023 and has been in force since 22 December 2023 (→eucrim 4/2023, 311). The Act established the Sovereignty Protection Office (SPO) tasked with conducting investigations against individuals and legal entities that are suspected of serving foreign interests or threatening national sovereignty. The Act also punishes certain activities in relation to foreign funding of elections. According to the Commission, the Hungarian legislation at stake violates several provisions of primary and secondary EU law, among others the democratic values of the Union and electoral rights. Hungary has two months to reply to the letter of formal notice.

■ 8 February 2024: In a joint paper, Amnesty International and the HHC analyse how the "Protection of National Sovereignty Act" (see above) is in breach of EU law. The Commission is called upon to swiftly conduct the relevant infringement proceedings (see above, 7 February 2024).

■ 1 March 2024: A credit system in Hungarian penitentiary institutions is launched. The system aims to contribute to a better motivation of prisoners to excel individually. Convicted persons are placed in various catego-

ries; they can earn prisoners credits (e.g., participation in reintegration programmes) allowing to move up to a more favorable category, with individualized targets based on a complex algorithm. The reform is generally welcomed.

- 11 March 2024: The Greens/EFA group in the European Parliament reports that the Legal Affairs Committee (JURI) has voted in favour of the Parliament taking the Commission to the European Court of Justice over the release of €10.2 billion in funds to Hungary last December (→eucrim 4/2023, 311). The press release also says that "the Parliament will file the case in the coming days". Media also reported on these steps. The EP eyes the Commission's release of funds (which were previously frozen due to concerns around judicial independence) ahead of the December summit of the European Council. The EP's action against the Commission was already announced in its resolution of 18 January 2024 (→eucrim 4/2023, 311). In 2021, the EP already brought a court action against the Commission for its failure to activate the conditionality mechanism against Hungary (→eucrim 4/2021, 215).
- 24 April 2024: The European Parliament (EP) adopts a resolution "on ongoing hearings under Article 7(1) TEU regarding Hungary to strengthen the rule of law and its budgetary implications". The EP deplores the lack of meaningful progress on the Article 7 TEU-procedure initiated by the Parliament in September 2018. MEPs see a persistent systemic and deliberate breach of democracy, the rule of law and fundamental rights in Hungary, for which the Hungarian Government bears responsibility. They condemn the adoption of the Protection of National Sovereignty Act and the creation of the Sovereignty Protection Office (→eucrim 4/2023, 311) with extensive powers and a strict system of surveillance and sanctions. They also criticize the Commission's approach to partly release EU money to Hungarian authorities (see above). The Council and the Commission are called on to devote more attention to tackling the systemic dismantling of the rule of law, as well as to the interplay between the various breaches of values identified in EP resolutions.
- 30 April 2024: Less noticed by international media, the Hungarian Parliament passes an act that amends the law on judicial matters. With effect from 9 July 2024, the "Omnibus Act" allows the Hungarian Minister of Justice unlimited access to final and binding or "conclusive" court decisions and decisions taken by the Prosecution Service as well as decisions of investigating agencies. NGOs criticise that the new law attacks the organisational independence of the Hungarian judiciary. They argue that it is unnecessary for its declared legislative purpose, liquidates institutional independence of the judiciary, opens the door to abusive application, and breaches the non-regression principle under Art. 19 TEU.
- 2 May 2024: The HHC publishes a "threat assessment of the 2024 European parliamentary and local elections in Hungary". It provides a summary of some recent legal developments that have taken place since the 2022 general elections in Hungary and report on how Hungary addressed relevant recommendations from the OSCE Office for Democratic Institutions and Human Rights from 2022. The HHC concludes that nearly all recommendations have remained unaddressed.
- 13 June 2024: The ECJ holds in Case C-123/22 that Hungary has not taken the measures necessary to comply with a 2020 judgment that stated that Hungary violated EU law as regards access to the international protection procedure, the right of applicants for international protection to remain in Hungary pending a final decision on their appeal against the rejection of their application, and the removal of illegally staying third-country nationals. The ECJ argues that, for not having recognized this judgment, Hungary disregarded the principle of sincere cooperation and deliberately evaded the application of the EU common policy on international protection as a whole and the rules relating to the removal of illegally staying third-country nationals. The ECJ states that this constitutes an unprecedented and extremely serious infringement of EU law. Hence, the Court orders Hungary to pay a lump sum of €200 million and a penalty payment of €1 million per day of delay.
- 20 June 2024: Ahead of the June 2024 General Affairs Council (see below), a group of Hungarian civil society organisations call on EU Member States to finally take action in the Article 7 TEU-procedure against Hungary that was launched six years ago (see above). In their letter, the organisations submit that evidence of serious and persistent breaches of Article 2 is clear. They also call on the Council to address recommendations to Hungary, in particular with regard to: strengthening the anti-corruption framework, protection of LGBTQI+ people and repeal of the Protection of National Sovereignty Act.
- 25 June 2024: The General Affairs Council holds a hearing as part of the Article 7 TEU-procedure. This was the seventh hearing since the beginning of the procedure in September 2018 triggered by the EP. Exchanges focused on the functioning of the constitutional system and checks and balances, the fight against corruption, the protection of civic space, academic and media freedom, and the protection of LGBTIQ rights in Hungary. Belgian Minister of Foreign and European Affairs Hadja Lahbib said that the concerns remain on the Council's agenda "until the outstanding issues are resolved."
- 25 June 2024: the Sovereignty Protection Office (SPO) launches "specific and comprehensive investigations"

against the Hungarian branch of anti-corruption organisation Transparency International and Atlatszo, a Hungarian investigative journalism NGO established to promote transparency, accountability, and freedom of information in Hungary (see also above). SPO alleges the organisations to be engaged in, and supporting activities that are funded from "subsidies from abroad" and that "influence the decisions by the electorate". SPO passes a list of questions inquiring, inter alia, the financial accounts and the organisations' activities. Both organisations repeatedly voiced their reservations against the law on the protection of national sovereignty adopted at in December 2023 (→eucrim 4/2023, 311). They believe that the investigations were specifically directed against them for this reason.

- 26 June 2024: The 2024 Hungarian Citizen Election Report, jointly prepared by several Hungarian election-related organisations, sees shortcomings in the elections to the EP and local governments of 9 June in Hungary. These include the overwhelming visibility of the ruling parties and the involvement of public resources and third parties in the campaign, a non-inclusive appeals system, and chilling effects by the Sovereignty Protection Office set up by the Protection of National Sovereignty Act and the election-related amendment to the Criminal Code. (TW)

Reform of the European Union

Commission's First Thoughts on Pre-enlargement Reforms

In a Communication of 20 March 2024, the Commission contributed to the discussion on necessary EU internal reforms in the course of enlargement. The Communication looks at the implications of a larger EU in four main areas: values, policies, budget, and governance. As a result, it lays the ground for the pre-enlargement policy reviews announced by President von der Leyen in her 2023 State of the Union address.

The Commission stressed that two processes must evolve in parallel: Candidate countries must fulfill, in particular, the Copenhagen Criteria, which are the essential conditions that all enlargement countries must satisfy to become a Member State. At the same time, the EU itself must be ready to welcome the new Member States and keep its commitments. From the experience of previous enlargements, the EU should follow the strategy of "gradual integration" of enlargement countries into selected EU policies already before accession. With regard to the four areas analysed, the Communication makes the following key statements:

- *Values*: Upholding democracy, rule of law and fundamental rights must continue to be a priority of the EU to ensure a deep-rooted transformation in enlargement countries.
- *Policies*: The Commission reflects on the benefits and challenges, considerations for upcoming policy reviews and avenues of gradual integration with regard to the following fields: enhanced connectivity, climate and environment commitments, food quality and safety, social, economic and territorial convergence, and security commitments.
- *Budget*: Even though the precise financial impact of enlargement is difficult to foresee, enlargement should be factored into the reflections leading to the next Multiannual Financial Framework (MFF). However, other topics will influence the future long-term EU budget as well, such as global volatility, significant security threats, the financial impact of post-COVID recovery and the need to rein in national budgetary trajectories.
- *Governance*: While the Commission has indicated its support to Treaty change, "if and where it is needed", it believes that the EU's governance can be swiftly improved by using the full potential of the current Treaties. This could be done by applying the "passerelle clauses" in the Treaties allowing for a shift from unanimity to qualified majority voting within the Council in key areas and using the possibilities of integration at different speeds as also foreseen in the Treaties.

The Communication kicks off the work on the in-depth policy reviews, which will start in 2025. (TW)

Area of Freedom, Security and Justice

Eurostat Statistics on Prisons in 2022

On 29 April 2024, Eurostat published statistics on prisoners and prison occupancy in 2022. According to the publication, there were 483,593 prisoners in the EU in 2022. This is equivalent to 108 prisoners per 100,000 people. In 2021, the prisoner rate was 106 prisoners per 100,000 people. The highest prisoner rates per 100,000 people in 2022 were in Hungary (200), Poland (190) and Czechia and Slovakia (both 181). The lowest rates were in Finland (52), the Netherlands (64) and Slovenia (65). In Germany, the rate was 69.

11 EU Member States experienced overcrowded prison cells in 2022. The prison occupancy rate is the number of prisoners relative to the official capacity (design capacity) of prisons, multiplied by 100. Overcrowding occurs when the occupancy rate exceeds 100, indicating that there are more prisoners in the prison than it was designed to hold. According to the statistics, the highest overcrowding was observed in Cyprus with an occupancy rate of 226, France (119) and Belgium (118). The lowest prison occupancy rates were recorded in Malta (59), Estonia (62) and Latvia (67). No overcrowding was observed in Germany.

With regard to personnel statistics for police, courts and prisons in Europe, Eurostat concluded that the proportion of women as police officers, profes-

sional judges and prison personnel in the EU continued to increase in 2022. There were 341 police officers, 18 professional judges and 58 employees in adult prisons per 100,000 inhabitants in the EU on average over the 2020–2022 period. (TW)

Schengen

2024 State of Schengen Report

On 16 April 2024, the European Commission published the 2024 State of Schengen report, providing an overview of the past year's developments and setting new priorities for the upcoming year (for the 2023 report →eucrim 2/2023, 114–115; for the 2022 report → eucrim 2/2022, 88–89). The Schengen area, the world's largest free travel zone, is vital for the European Union's competitiveness, facilitating seamless and secure travel for nearly 450 million people. The 2024 report highlighted the following achievements and challenges in 2023:

- *Schengen area performance:* In 2023, the Schengen area remained robust, issuing over 10 million visas and welcoming more than half a billion visitors, reaching 92% that of pre-pandemic levels. This influx significantly bolstered the EU economy.
- *Legislative and governance enhancements:* 2023 saw the adoption of new legislative measures, including revisions to the Schengen Borders Code, the Advance Passenger Information Regulation, and the Directive on information exchange between law enforcement authorities. In addition, an integrated Schengen governance framework was established, strengthening the role of the Schengen Council and enhancing the effectiveness of tools like the Schengen Evaluation and Monitoring Mechanism, the Schengen Scoreboard, and the Schengen Barometer+.
- *Inclusion of Bulgaria and Romania:* Significant progress was made towards the inclusion of Bulgaria and Romania in the Schengen area, with controls at air and sea borders lifted by 31 March 2024. A further Council decision is required, however, to remove checks at internal land borders, which will be taken at a later stage.
- *Alternative border control measures:* The report highlights advances in utilizing alternative measures for internal border controls, as recommended by the Commission in November 2023. Increased cross-border police cooperation in border regions is encouraged to help phase out longstanding internal border controls.

For the first time, the Commission has proposed a "Council Recommendation for the 2024/2025 Schengen Cycle" which aims at facilitating the implementation of the following priority actions identified in the Schengen report:

- Improving the implementation of common priorities through the Schengen governance framework;
- Boosting preparedness, security, and resilience at external borders, including enhanced cooperation with third countries;
- Advancing the digitalization of procedures and systems to increase security and efficiency;
- Intensifying efforts against cross-border crime and preventing unauthorized movements;
- Enhancing the effectiveness of the common EU system for returns through better-integrated cooperation among Member States.

The proposal for said Council Recommendation prepared the Schengen Council meeting on 13/14 June 2024, during which the Council is expected to agree on the priorities for the upcoming 2024/2025 Schengen cycle. The Recommendation is set to be monitored by the Council, with Member States, the Commission and relevant JHA Agencies regularly reporting on specific workstreams. (AP)

Common Criteria on Entering Terrorists and Extremists in SIS

On 11 April 2024, the Belgian Council Presidency circulated a note which lists criteria on when a person should be regarded as a potential terrorist or violent extremist threat ("*Gefährder*"). The note stressed that the criteria are "strictly non-binding". Their goal is to have a common understanding on making entries of individuals into the European databases and information systems by the Member States subject to the legal requirements governing these systems. The systems mentioned are the Schengen Information System (SIS) and the Europol Information System (EIS). Information exchange should be facilitated by Europol Analysis Projects such as "Hydra" and "Traveller".

The note sets out a "basic indicative criterion" for the assessment, along with "indicative auxiliary criteria." Underpinning these two forms of criteria, the note sets as "minimum materiality threshold" (considered as "red line"): the existence of (objective and verifiable) information suggesting that a criminal offence, or future criminal offence, has a certain degree of seriousness, either because of the nature of the offence in question – e.g. membership in a terrorist organisation – or, in the case of a lesser offence, because it is a repeated or ongoing activity.

Yasha Maccanico from Statewatch criticised the approach: "A drive to take action against people in advance of them committing criminal offences is troubling and the umpteenth effort to assert social control over ideas and behaviour." (TW)

Ukraine Conflict

JIT in Ukraine Prolonged

At the end of February 2024, the seven national authorities (Lithuania, Poland, Estonia, Latvia, Slovakia, Romania, and Ukraine) participating in

the Joint Investigation Team (JIT) on alleged core international crimes in Ukraine decided to prolong the JIT for two more years – until 25 March 2026. The JIT was set up in March 2022 (→eucrim 2/2022, 79–80) and has since received support from Eurojust, the United States Department of Justice, the ICC, Europol, the Core International Crimes Evidence Database (CICED), and the International Centre for the Prosecution of the Crime of Aggression against Ukraine (ICPA). The aim of the JIT is to facilitate investigations and prosecutions in the Member States concerned as well as any such measures that may be taken forward to the ICC. (CR)

Working Agreement between Frontex and EUAM

On 19 February 2024, Frontex and the European Union Advisory Mission Ukraine (EUAM Ukraine) signed a working agreement to strengthen their cooperation in combating cross-border crime and dealing with irregular migration at the EU's eastern borders. The agreement is another step towards enhanced border security and integrated border management in Ukraine. Both parties announced that the agreement will mainly promote the European Integrated Border Management (IBM) standards, and expand cooperation in the area of situational awareness and monitoring.

The cooperation between Frontex and EUAM will be another milestone to secure the EU's Eastern border next to the mission in Moldova. Frontex currently deploys over 230 officers at the EU and Moldovan borders with Ukraine. (CR)

EU Reactions to Russian War against Ukraine: Overview February – June 2024

This news item continues the reporting on key EU reactions following the Russian invasion of Ukraine on 24 February 2022: 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 February 2024 to the end of June 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 developments 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; for the developments from October 2023 to January 2024 → eucrim 4/2023, 313–315.

- 6 February 2024: The Council and European Parliament reach a provisional agreement on the Ukraine Facility, a new €50 billion support mechanism for Ukraine's recovery, reconstruction, and modernization, while continuing to assist its EU accession efforts. The Facility will provide coherent, predictable, and flexible support from 2024 to 2027, structured into three pillars: (1) a "Ukraine Plan" for recovery and reforms; (2) the Ukraine Investment Framework for financial support, including grants and loans; and (3) the Union accession assistance for aligning with EU laws. The budget consists of €33 billion in loans and €17 billion in grants. Ukraine can receive pre-financing, and funds will be allocated with a focus on green investments and SMEs. The Facility requires Ukraine to uphold democratic mechanisms, the rule of law, and human rights. A Ukraine Facility Dialogue will involve the European Parliament in overseeing the plan's implementation, with progress monitored by means of a detailed scoreboard.
- 12 February 2024: The Council adopts a decision and regulation clarifying the obligations of central securities depositories holding assets and reserves of the Central Bank of Russia, which have been immobilised due to EU restrictive measures. Specifically, the Council decides that, if a central securities depository holds more than €1 million in assets from the Central Bank of Russia, it must separately account for the extraordinary cash balances accumulating due to EU restrictive measures separately and keep corresponding revenues separate. This decision sets the stage for the Council to potentially establish a financial contribution to the EU budget from these net profits, which could be used to support Ukraine's recovery and reconstruction efforts in the future.
- 23 February 2024: On the second anniversary of the Russian invasion of Ukraine, the President of the European Council, the President of the European Commission and the President of the European Parliament publish a joint statement. They, *inter alia*, stress that the European Union will continue to provide Ukraine with regular and predictable financial support, welcoming the agreed €50 billion financial assistance package for 2024–2027 (see above).
- 23 February 2024: The Council adopts the 13th package of sanctions against Russia, imposing restrictive measures on an additional 106 individuals and 88 entities. These new sanctions target the military and defense sectors, members of the judiciary, local politicians, and individuals responsible for the illegal deportation and military re-education of Ukrainian children. Additionally, 27 new entities are added to the list of those directly supporting Russia's military and industrial complex, including those located in third countries involved in circumventing trade restrictions. The package also expands the scope of restrictions to the export of goods.
- 12 March 2024: The Council decides to extend the restrictive measures against individuals and entities

responsible for undermining or threatening Ukraine's territorial integrity, sovereignty, and independence for another six months, until 15 September 2024. These measures include travel restrictions for individuals, asset freezes, and a ban on providing funds or economic resources to those listed. The sanctions will continue to apply to over 2100 individuals and entities, primarily in response to Russia's ongoing military aggression against Ukraine.

■ 20 March 2024: The European Commission disburses the first €4.5 billion of support from the EU's new Ukraine Facility (see above), providing essential liquidity for Ukraine to finance public wages, pensions, and basic public services. This funding helps Ukraine focus on its war efforts. On this day, Ukraine submits its official Ukraine Plan, which outlines the reform and investment agenda for the next four years and will condition access to further payments under the Facility (see above). The Commission will now assess the Ukraine Plan and propose a Council implementing decision to approve it, enabling regular payments.

■ 21 March 2024: Commissioner for Budget and Administration *Johannes Hahn* and Minister of Finance of Ukraine *Serhii Marchenko* sign an association agreement that allows Ukraine's participation in the Union Anti-fraud Programme (2021–2027). It is the first time that a non-EU/candidate country joins the programme. Ukraine can now benefit from EU funding of measures enhancing its national capacity to protect the Union's budget, such as the purchase of specialised anti-fraud equipment/tools and specific trainings.

■ 21/22 March 2024: The conclusions of the European Council reaffirm the EU's unwavering support for Ukraine's sovereignty and territorial integrity. The EU commits to providing continued political, financial, military, and humanitarian aid, including accelerated delivery of air defense systems and ammunition. The heads of state and government welcome recent security agreements with Ukraine and initiatives for further financial measures, including utilizing Russia's immobilized assets to support Ukraine. They call on to take further action against the circumvention of EU sanctions through third countries. The European Council supports ongoing efforts, including in the Core Group, to establish a tribunal for the prosecution of the crime of aggression against Ukraine.

■ 22 March 2024: The Council imposes restrictive measures on 33 individuals and two entities with alleged links to the sudden death of Russian opposition politician *Alexei Navalny* in a strict penal colony. This decision constitutes a further element of the EU's global human rights sanctions regime. The recently introduced sanctions list comprises the IK-6 corrective colony and the IK-3 maximum security corrective colony, where Navalny was incarcerated from June 2022 until his demise. These colonies have a reputation for subjecting prisoners to physical and psychological pressure, complete isolation, torture, and violence. The head of IK-3, *Vadim Kalinin*, and several deputy heads of the colony are also sanctioned. Furthermore, the Council decides to sanction members of the judiciary as well as high-level officials in the penitentiary system and in the Russian Ministry of Justice.

■ 10 April 2024: The General Court upholds actions for annulment brought by two Russian businessmen against their inclusion on the lists of restrictive measures for the period from 28 February 2022 to 15 March 2023. The Court finds that the reasons set out by the Council were not sufficiently substantiated and no additional evidence was adduced to justify the inclusion or maintenance of the complainants on the list (Cases T-301/22, *Aven v Council* and T-304/22, *Fridman v Counci*).

■ 16–17 April 2024: OLAF hosts the first in-person operational meeting of the G7 Sub-Working Group on Export Control Enforcement. Experts discuss latest trends in research and analysis to further strengthen the fight against the circumvention of sanctions against Russia and Belarus. Since summer 2023, OLAF coordinates customs operations against the export of dual use goods from the EU to Russia/Belarus in circumvention of the EU's sanctions against the countries in war.

■ 17/18 April 2024: Reaffirming its conclusions of 21/22 March 2024, the European Council, *inter alia*, backs proposals to direct extraordinary revenues stemming from Russia's immobilised assets for the benefit of Ukraine and calls for their swift adoption.

■ 14 May 2024: The Council positively assesses the "Ukraine Plan", which sets out the intentions of the government of Ukraine regarding the recovery, reconstruction and modernisation of the country, and the reforms it plans to undertake as part of its EU accession process in the next four years. The Council's positive decision also paves the way for regular disbursements under the Ukraine Facility (see above). The Commission is enabled to disburse up to €1.89 billion in pre-financing to Ukraine.

■ 17 May 2024: The Council decides to suspend the broadcasting activities in the EU of four additional media outlets: Voice of Europe, RIA Novosti, Izvestia, and Rossiyskaya Gazeta. The suspension is due to their role in spreading and supporting Russian propaganda.

■ 21 May 2024: The Council adopts legal acts mandating that net profits from unexpected revenues accruing to central securities depositories (CSDs) in the EU, due to EU sanctions, will be used to support Ukraine (see also above). CSDs holding Russian sovereign assets and reserves over €1 million must contribute financially from their net profits, which have been accumulating since 15 February 2024. The funds will be allocated as follows:

90% to military support via the European Peace Facility and 10% to Ukraine's defense industry and reconstruction through EU programmes.

■ 27 May 2024: The Council imposes sanctions on two individuals, *Artem Marchevskyi* and *Viktor Medvedchuk*, and the media outlet "Voice of Europe" for spreading propaganda to justify Russia's aggression against Ukraine. The sanctions include asset freezes and travel bans. These actions are part of a broader EU effort targeting over 2100 individuals and entities undermining Ukraine's sovereignty and integrity (see above).

■ 27 May 2024: The Council establishes a new sanctions framework targeting those responsible for human rights violations, civil society repression, and undermining democracy in Russia. The Council's approval comes after a proposal by the High Representative for Foreign Affairs and Security Policy in reaction to the death of opposition politician *Alexei Navalny* in February 2024 (see above). The new regime allows the EU to target also those who provide financial, technical, or material support for, or are otherwise involved in or associated with people and entities committing human rights violations in Russia. The measures include asset freezes and travel bans for individuals and entities, including the Federal Penitentiary Service of the Russian Federation as well as 19 individuals linked to the death of *Alexei Navalny* and other political persecutions. The regime also restricts trade in equipment and technology used for internal repression.

■ 24 June 2024: In order to weaken Putin's regime, the EU Council adopts the 14th package of sanctions against Russia, targeting sectors like energy, finance, and trade. Key measures include a ban on reloading Russian LNG in EU territories, restrictions on battlefield goods, and a prohibition on using the Russian financial messaging service SPFS. The EU also bans funding from Russian state sources to EU political parties and NGOs, targets specific vessels aiding Russian warfare, and broadens flight and road transport bans. Further export and import restrictions are also imposed, including on dual-use goods and intellectual property rights, with additional protections for EU operators against damages from sanctions enforcement. The Council also agrees on further measures that seek to prevent circumvention from EU sanctions, such as strengthened due diligence obligations for EU operators selling battlefield goods to third countries.

■ 24 June 2024: As part of the comprehensive 14th package of sanctions, the Council imposes restrictive measures on an additional 69 individuals and 47 entities for actions undermining Ukraine's territorial integrity, sovereignty, and independence. The new listings target businesspersons, propagandists, public figures, military members, judiciary officials, those responsible for deporting Ukrainian children, and FSB members involved in religious persecution in Crimea. Companies involved in circumventing EU sanctions and transporting weapons, including the Volga Dnepr Group and Sovcomflot, are also listed. The sanctions extend to the International Children's Center Artek, the Kadyrov Foundation, and the Belarusian Republican Youth Union for their roles in the deportation and re-education of Ukrainian children.

■ 27 June 2024: In its conclusion, the European Council reiterates the EU's unwavering commitment to continue to provide political, financial, humanitarian and military support for Ukraine and its people "for as long as it takes and as intensively as needed." EU leaders also acknowledge Ukraine's current and future military, budgetary and reconstruction needs. In this context, the Commission, the High Representative and the Council are invited to take work forward in order to provide additional funding for Ukraine by the end of the year in the form of loans serviced and repaid by future flows of the extraordinary revenues with a view to reaching approximately €50 billion.

■ 29 June 2024: The Council adopts sanctions targeting the Belarusian economy due to the regime's involvement in Russia's war of aggression against Ukraine. These sanctions basically mirror several of the restrictive measures already in place against Russia, and include: a ban on the export of dual-use goods and technologies, maritime navigation goods and luxury goods to Belarus; a ban on the import of gold, diamonds, helium, coal and mineral products from Belarus; a ban on the provision of certain services; a requirement for EU exporters to insert the so-called "no-Belarus clause" in future contracts through which they contractually prohibit the re-exportation to Belarus or re-exportation for use in Belarus of sensitive goods and technology, battlefield goods, firearms and ammunition. Similar to measures against Russia, the Council adopts additional anti-circumvention measures. (TW/AP)

Digital Space Regulation

Law Enforcement Experts: Action against End-to-End Encryption Needed

European police chiefs called on industry and governments to take urgent action to ensure public safety on social media platforms. The privacy measures currently in place, such as end-to-end encryption, prevent technology companies from identifying and reporting all offences on their platforms. They will also prevent law enforcement agencies from obtaining this evidence and using it in investigations to prevent and prosecute the most serious offences, such as terrorism, child sexual abuse, human trafficking, drugs smuggling, murder, and economic crime. The industry must

build in security by design in order to enable detection of harmful and illegal activities. The democratic governments must put in place frameworks that give law enforcement the information needed to keep publics safe, the Chiefs added.

The statement, supported by Europol, was published on 21 April 2024 – at the same day when Meta's Messenger platform rolled out end-to-end encryption.

The statement by the European police chiefs came amid further requests from the part of law enforcement agencies to torpedo the introduction of stronger end-to-end encryption by tech companies. On 21 May 2024, the High-Level Group (HLG) on Access to Data for Effective Law Enforcement adopted 42 recommendations for the further development of Union policies and legislation to enhance and improve law enforcement access to data. The recommendations, *inter alia*, call for the re-introduction of mass telecommunications surveillance ("data retention") and the undermining of encrypted communication systems.

In July 2024, media leaked a "non-paper" that was produced by the Swedish government and circulated in the Council stating that "a fundamental change in perspective" in the fight against terrorism and organised crime is needed, because too many proposals are "watered down" by fundamental rights considerations. The Swedish government proposed a four-pronged approach involving the establishment of "adequate EU institutional working methods"; "Follow the money"; "Going Dark – Access to digital data"; and "Making the most of operational support."

NGOs and some MEPs raised eyebrows at the push from the law enforcement side. Even though no formal proposals have been made yet, they criticised the suggestions to be an "excessive leap directly into a fully monitored society." (TW)

High Level Group on Data Access Criticised

An open letter of 10 January 2024, signed by 21 digital rights and civil society organisations, criticised the current working arrangements of the High Level Group on Access to Data for Effective Law Enforcement (HLEG). It calls on the HLEG to ensure transparency, participation, inclusion and accountability, notably through the involvement of civil society in ongoing discussions held by the Group.

The HLEG was established in 2023. It is tasked to explore the problems that law enforcement practitioners face in their daily work, and to define potential solutions to overcome them. The aim is to ensure the availability of effective law enforcement tools to fight crime and enhance security in the digital age. Specific focus will be on the need for law enforcement practitioners to have adequate access to data.

The open letter calls to mind that one of the HLEG's objectives is to "establish a collaborative and inclusive platform for stakeholders from all relevant sectors" in order to find commonly accepted solutions. However, NGOs and data protection organisations have widely been excluded from the meetings so far with having had only the possibility to submit written comments.

In view of the HLEG's approach on the access to data on users' devices, the letter further states:

"[W]e are deeply concerned that the very premise of the HLG objectives is to push for a 'security by design' approach in all EU existing and future policies and legislation. We understand this framing as an attempt to impose a law enforcement 'access by design' obligation in the development of all privacy-enhancing technologies, which would result in a serious impediment to people's exercise of their fundamental rights to privacy and data protection and to freedom of expression, information and association."

Ultimately, the organisations call for a diligent approach to making all possible documents public (in particular, the minutes of the meetings) and proactively engaging with civil society. (TW)

Start of the DSA: New Rules for Safer, Fairer Online Platforms Across the EU

On 17 February 2024, the Digital Services Act (DSA), the EU's comprehensive regulatory framework for the digital space, became applicable to all online intermediaries operating within the EU. This landmark legislation is designed to foster a safer, fairer, and more transparent online environment (→eucrim 4/2022, 228–230). The DSA establishes new obligations for online platforms, thereby ensuring that EU users are safeguarded against the dissemination of illicit goods and content and that their rights are respected when they engage in online interactions, share information, or make purchases.

Since the end of August 2023, the DSA has already applied to 17 Very Large Online Platforms (VLOPs) and two Search Engines (VLOSEs) designated in April 2023 (with more than 45 million monthly users on average →eucrim 1/2023, 14). On 20 December 2023, the Commission designated three other platforms as VLOPs. These three platforms (Pornhub, Stripchat, XVideos) must comply with the more stringent obligations under the DSA until the end of April 2024, but the general DSA obligations apply to them from 18 February 2024 onwards.

The Commission intends to adopt additional guidelines and implementing acts throughout 2024 to further support the DSA's objectives. These include guidelines on risk mitigation measures for electoral processes, a public consultation on the data access delegated act, and the adoption of transparency report templates. These efforts are designed to maintain a robust and coherent regulatory environ-

ment that enhances the safety and fairness of the online space for all EU citizens. (AP)

New Eurojust Factsheet on the Digital Services Act

On 19 March 2024, Eurojust published a flyer explaining the new Digital Services Act (DSA), which became fully applicable in February 2024. The DSA is part of the digital service package that also comprises the Digital Markets Act (DMA) (→eucrim 4/2022, 228–230).

The flyer was prepared by the Intellectual Property Crime (IPC) Project at Eurojust, which aims to boost cooperation and ensure a more coherent and robust response against IP infringements across the EU. It provides updated timelines, lists very large online service providers as they were designated by the Commission and highlights the enforcement element of the DSA.

The DSA increases due diligence for providers of online intermediary services with the aim of achieving greater transparency and accountability of intermediary service providers. The rules of the DSA apply to online service providers acting as online intermediaries in the EU – irrespective of the location of their headquarters —, connecting consumers with goods, services, and content. The DSA groups online service providers into different categories: intermediary services, hosting services, online platforms, very large online platforms (VLOPs), and very large online search engines (VLOSEs). Each category is subject to a set of specific due diligence obligations.

As of 25 April 2023, the European Commission designated 17 VLOPs and 2 VLOSEs. VLOPs are Alibaba AliExpress, Amazon Store, Apple AppStore, Booking.com, Facebook, Google Play, Google Maps, Google Shopping, Instagram, LinkedIn, Pinterest, Snapchat, TikTok, Twitter, Wikipedia, YouTube, and Zalando. VLOSEs include Bing and GoogleSearch. Under the DSA, VLOPs and VLOSEs are subject to new obligations regarding user empowerment, diligent content moderation, protection of minors, transparency and accountability, and risk assessment.

Cooperation obligations under the DSA include an obligation on the part of the intermediary services to inform the authority requesting information of the receipt of the order and any effect given to it. Information service providers are obliged to cooperate with national judicial and administrative authorities by taking down illegal content or providing requested information about a specific user. In addition, the DSA regulates how to set up a notice and action mechanism for individuals or entities to notify online platforms of existing illegal content, and it contains an obligation to install internal complaint handling and dispute settlement mechanisms.

The DSA introduces multiple layers of transparency reporting obligations for intermediaries concerning content moderation, based on the type of service provider. Another area regulated by the DSA is the liability of providers of intermediary services. While the DSA maintains some of the key principles set out in Directive 2000/31/EC on electronic commerce, it also introduces a novelty: intermediaries are not to be held liable for any voluntary actions taken in good faith against certain types of objectionable content ("Good Samaritan Protection").

The flyer focuses on how the DSA applies to copyright violations. In the area of copyright-protected content, the DSA, together with Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market, stipulates new obligations for online content-sharing service providers. While the DSA establishes general rules and mechanisms applicable to service providers, the Directive is sector-specific and applicable in areas not covered by the DSA. For instance, obligations to notify about suspicions of criminal offences are not applicable to intellectual property crimes, except when they involve a threat to the life and safety of persons.

Lastly, the tasks and powers of the European Commission, the European Board of Digital Services (EBDS), and national Digital Service Coordinators to enforce the DSA are explained. For VLOPs and VLOSEs, due to the potential cross-border impact should they fail to comply with the DSA obligations, the European Commission is the primary regulator, equipped with a set of exclusive, investigative, and enforcement powers. (CR)

Compliance of Gatekeepers Under the DMA

As of 7 March 2024, six major tech companies — Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft — that were designated as gatekeepers by the European Commission in September 2023, are now required to comply fully with all obligations set forth in the Digital Markets Act (DMA). The DMA was designed to enhance competition and fairness in the EU's digital markets by establishing new regulations for ten core platform services (search engines, online marketplaces, app stores, online advertising, messaging, etc.). The objective is to confer new rights upon European businesses and end users (→eucrim 4/2022, 228–230).

Business users in the EU who rely on services provided by these gatekeepers now have new opportunities to leverage the enhanced competition and fairness provided by the DMA. Such entities can benefit from fair competition with the aforementioned gatekeeper services, request interoperability to offer innovative services, sell apps through alternative channels, access data generated on gatekeeper platforms, and promote offers and finalise contracts outside of the gatekeeper's platform.

Furthermore, end users will also see significant benefits. They may select alternative app stores and services, exercise greater control over their data by determining whether gatekeepers may link their accounts, facilitate the transfer of data between services, and utilize alternative electronic identification or in-app payment services.

In anticipation of these impending changes, the gatekeepers have undertaken measures, which have been subjected to external scrutiny, to ensure compliance. The gatekeepers are further required to furnish independently audited descriptions of the techniques employed for consumer profiling. They are now obliged to demonstrate tangible compliance with the DMA and to submit corresponding reports, which are accessible to the public on the Commission's DMA webpage. The European Commission will examine these compliance reports and assess the efficacy of the implemented measures, taking into account feedback from stakeholders through compliance workshops.

If gatekeepers do not comply with the DMA, the Commission can take formal enforcement actions, including the imposition of fines of up to 10% of the company's total worldwide turnover, which can go up to 20% in case of repeated infringement.

UPDATE: On 13 May 2024, the Commission designated the large online travel agency booking.com as gatekeeper under the DMA. The decision follows after a self-assessment, submitted by Booking on 1 March 2024, that it meets the relevant thresholds. Booking now has six months to comply with the relevant obligations under the DMA. In parallel, the Commission has opened a market investigation in relation to the online social networking service X. X objected to be a gatekeeper arguing that it does not qualify as an important gateway between businesses and consumers even though it may meet the quantitative thresholds under the DMA. The Commission must complete this investigation within five months. (AP)

Legislation

New Directive Criminalises Violation/ Circumvention of EU Restrictive Measures

spot light On 29 April 2024, Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673 was published in the Official Journal (*OJ L, 2024/1226).* The Directive lays down EU-wide minimum rules for the prosecution of violation and circumvention of EU sanctions in Member States. Even though restrictive measures have been an essential part of the Unions foreign and security policy for a longer time, the Directive comes in reaction to Russia's aggression against Ukraine. It is an additional tool of crime control over an unprecedented number of restrictive measures in order to weaken Russia's economic base and curtail its ability to wage war. As a first step, the Council included the violation of Union restrictive measures as "EU crime" in the list of Art. 83(1) TFEU that gives the EP and Council the competence to establish minimum rules concerning the definition of criminal offences and sanctions via Directives. For the context and the Commission proposal, see news by *Anna Pingen* →eucrim 4/2022/225 and the article by *Wouter Van Ballegooij* →eucrim 2/2022, 146–151.

Member States are obliged to criminalise certain conduct where it is intentional and in violation of a prohibition or an obligation that constitutes a Union restrictive measure or that is set out in a national provision implementing a Union restrictive measure. Such conduct includes:

- Making available funds/economic resources or breaching/circumventing asset freeze and/or economic resources related to a "designated person, entity or body";
- Providing false or misleading information to conceal the fact that a designated person, entity or body is the ultimate owner or beneficiary of funds or economic resources;
- Failing to comply with an obligation to report to the competent administrative authorities laid down by acts setting out Union restrictive measure;
- Breaching and circumventing trade control measures (even if only the result of serious negligence at least where the conduct relates to items included in the Common Military List of the European Union or to dual-use items listed in Annex I and IV to Regulation (EU) 2021/821) – that conduct can involve trading, importing, exporting, selling, purchasing, transferring, transiting or transporting goods, as well as providing brokering services, technical assistance or other services relating to those goods, where the prohibition or restriction of that conduct constitutes a Union restrictive measure;
- Providing financial services or performing financial activities (e.g. financing and financial assistance, providing investment and investment services, issuing transferable securities and money market instruments, accepting deposits, dealing with in banknotes, providing credit rating services and providing crypto-assets and wallets);
- Providing services other than financial ones (e.g., legal advisory services, trust services, public relations services, accounting, auditing, bookkeeping and tax consulting services, business and management services, IT consulting, broadcasting, architectural and engineering services);
- Breaching or failing to fulfil conditions under authorisations granted by competent authorities to conduct activities.

The Directive introduces a monetary threshold. Member States are, in principle, not obliged to establish a criminal offence for the conducts described if they respectively involve funds, economic resources, goods, services, activities, or transactions of a value of less than €10,000. However, Member States must ensure that the threshold is met if an offender carries out a series of acts linked together and of the same kind. The monetary threshold does not apply to violations of travel bans.

The Directive allows two exemptions from criminal liability:

- Legal professionals do not need to report information that they receive from, or obtain on, one of their clients, in the course of ascertaining their legal position or performing the task of defending or representing that client in, or concerning, judicial proceedings, including providing advice on instituting or avoiding such proceedings, i.e., such legal advice remains subject to the obligation of professional secrecy (except where the legal professional is intentionally taking part in the violation of Union restrictive measures, where the legal advice is provided for the purposes of violating Union restrictive measures, or where the legal professional knows that the client is seeking legal advice for the purposes of violating Union restrictive measures);
- Justified is humanitarian assistance for persons in need or activities in support of basic human needs provided in accordance with the principles of impartiality, humanity, neutrality and independence and, where applicable, with international humanitarian law.

The violation of Union restrictive measures is now also a predicate offence for money laundering in accordance with Directive 2018/1673.

Legal persons may also be held liable if one of the aforementioned offenses is committed for the benefit of that legal person by any person who has a leadership position within the legal person. Liability must also be triggered when the lack of supervision or control by such a person enabled the commission of the offense by a person under their authority. Both legal persons and natural persons may be prosecuted.

Moreover, the Directive directs Member States as regards penalties for natural and legal persons. In order to achieve a level of effective, dissuasive and proportionate penalties, minimum levels for the maximum term of imprisonment are set for natural persons. Depending on the nature of the offense and whether the value of the goods, services, transactions or activities exceeds €100,000, maximum terms of imprisonment range from at least one year to at least five years. Where military equipment or dual-use goods listed in Annex IV to Regulation 2021/821 are involved, the maximum penalty should be at least five years' imprisonment. Accessory penalties or measures, such as fines, withdrawal of permits and authorisations that gave rise to the criminal offence, and disqualifications to hold leading positions within the concerned legal person, should also be available in criminal proceedings.

Penalties against legal persons can be criminal or non-criminal in nature, but the type and level of the fines must be effective, dissuasive and proportional. The maximum levels of fines provided for in the Directive for the offences defined in it should apply at least to the most serious forms of such offences. Member States can choose to set the maximum levels of fines either as a percentage of the total worldwide turnover of the legal person concerned, or in fixed amounts.

The level of penalties is further approximated through the introduction of common aggravating and mitigating circumstances. Aggravating circumstances include, for instance, the involvement of false or forged documents; commission of the offence by a professional service provider in violation of the professional obligations of such professional service provider; and the offender destroyed evidence, or intimidated or influenced witnesses or complainants.

Next to the level of penalties, the Directive also imposes obligations for limitation periods both for the prosecution/adjudication of the criminal offence and the enforcement of a penalty imposed. Limitations periods shall be at least three years, provided that such limitation period may be interrupted or suspended in the event of specified acts.

Further provisions of the Directive include obligations for Member States to implement measures to enable the freezing and confiscation of instrumentalities and proceeds from criminal offenses and of funds or economic resources subject to EU sanctions. They must also ensure the availability of effective and proportionate investigative tools. Lastly, provisions of the Directive relate to the jurisdiction in particular as regards cross-border offences, the collection of statistical data, the designation of a unit or body ensuring coordination and cooperation between law enforcement authorities and authorities in charge of implementing Union restrictive measures, and cooperation between competent authorities of Member States, the Commission, Europol, Eurojust and the European Public Prosecutor's Office.

Next steps: Member States must transpose the Directive into their national laws by 20 May 2025. The Commission is required to provide an implementation report by 20 May 2027 and a report evaluating the impact and effectiveness of the Directive by 20 May 2030.

For the new Directive, see also the article "The New Directive on the Violation of Union Restrictive Measures in the Context of the EPPO" by *Peter Csonka* and *Lucia Zoli* (→article section, in this issue). (TW)

Enhanced Criminal Law Rules to Combat Child Sexual Abuse

On 6 February 2024, the Commission introduced a proposal to update criminal law rules aimed at addressing child sexual abuse and exploitation more effectively. The revised rules would expand the scope of offenses, impose stricter penalties, and introduce specific requirements for prevention and victim support. This proposal complements other EU initiatives that reinforce the fight against child sexual abuse and exploitation offences, based on the EU strategy for a more effective fight against child sexual abuse for 2020–2025 adopted in 2020.

It is closely linked to the planned Regulation on preventing and combating child sexual abuse online proposed in 2022 (→eucrim 2/2022, 91–92). The Regulation would mandate Internet companies to detect, report, and remove child sexual abuse material from their services. If adopted, the Directive would provide the definition of what is a criminal offence because it constitutes child sexual abuse material and solicitation. In other words: the Directive constitutes the criminal law pillar upon which the proposed Regulation stands.

The main contents of the updated rules of the Directive are as follows:

- Broadening the definition of offenses to include the live streaming of child sexual abuse and the possession and exchange of pedophile manuals;
- Covering child sexual abuse material created using deep fakes or AI-generated content;
- Strengthening the mechanisms for prosecution and victim support;
- Extending the period during which victims can report abuse and seek justice;
- Granting victims the right to financial compensation in order to address the long-term impacts of abuse while Member States would be required to establish coordination mechanisms for prevention programmes and victim assistance.

The Commission also proposed enhancing prevention measures, with increased investment in awareness campaigns about online risks to ensure safer internet use for children. The proposal imposes new requirements for criminal record checks for recruiters. Member States would be obliged to provide criminal records as complete as possible in response to such record requests, using the European Criminal Record Information System. Another measure includes that professionals working closely with children are mandated to report any offenses.

The proposal will now be discussed in European Parliament and the Council. Once adopted, the new directive will replace Council Framework Decision 2004/68/JHA. (AP)

Institutions

European Court of Justice (ECJ)

Reform of CJEU Statute Adopted

The Council and the European Parliament agreed on the reform of the Statute of the Court of Justice of the EU amending Protocol No 3 on the Statute of the Court of Justice. The EP adopted the draft regulation on 27 February 2024 and the Council gave green light to it on 19 March 2024. The final act was signed on 11 April 2024. Under the amendment, jurisdiction to give preliminary rulings is transferred from the Court of Justice to the General Court in the following areas:

- The common system of value added tax;
- Excise duties;
- The customs code;
- The tariff classification of goods under the combined nomenclature;
- Compensation and assistance for passengers whose transport services are delayed or cancelled or who are denied boarding;
- The scheme for greenhouse gas emission allowance trading.

The General Court will be assisted by one or more Advocates General in dealing with requests for a preliminary ruling transmitted.

The Court of Justice will retain jurisdiction to hear and determine requests for a preliminary ruling that raise independent questions relating to the interpretation of primary law, public international law, general principles of Union law or the Charter of Fundamental Rights of the European Union.

Furthermore, the reform introduces an extended filtering mechanism for appeals against decisions of the General Court when they concern a decision of a Union body, office, or agency (with an independent board of appeal). Under the amendment, a case that has been considered by an independent board of appeal and then by the General Court can only proceed to the Court of Justice if it raises a significant issue with respect to the unity, consistency, or development of EU law.

With regard to the transparency of proceedings, the reform provides that written observations submitted by an interested person pursuant to Art. 23 of Protocol No 3 will be made public on the Court's website in reasonable time after the proceedings have been closed, unless that person raises objections to the publication of his/her own written submissions.

Over the next several months, next to the amended Statute of the Court of Justice, the Rules of Procedure of the Court of Justice and the Rules of Procedure of the General Court will need to be modified and adopted. The publication of all three texts will be coordinated such that they can enter into force at the same time. (CR)

CJEU: Judicial Statistics 2023

On 23 March 2024, the Court of Justice of the European Union (CJEU) published its judicial statistics for the year 2023. Looking at the number of

cases brought before the Court of Justice (ECJ) and the General Court, 2023 once again confirmed an upward trend, with 2092 new cases brought before the two courts, passing the threshold of 2000 new cases for the first time.

The key statistics for both courts:

- In 2023, the Court of Justice received 821 new cases, the General Court 1271 new cases (including a series of 404 cases concerning changes to the voluntary supplementary pension scheme for Members of the European Parliament, which are essentially identical);
- 1687 cases were completed by both courts;
- 2990 cases were pending before both courts.

The key statistics for the Court of Justice:

- The average length of proceedings, all types of cases taken together, amounted to 16.1 months;
- Similar to previous years, preliminary rulings and appeals account for over 90% of all cases brought before the Court of Justice;
- The Court noted an increased number of direct actions (60 new cases in 2023). This can be explained by the increase in the number of actions for annulment (Poland alone lodged seven actions in 2023) and by the increase in the number of actions brought by a Member State for failure to fulfil obligations;
- The largest number of questions referred to the Court of Justice for preliminary rulings in 2023 concerned the area of freedom, security and justice (82). Most of these questions involved the interpretation of rules on the right of asylum and the system of international protection. In addition, many questions referred for a preliminary ruling concerned the areas of taxation (53), consumer protection (52), and transport (40);
- References for a preliminary ruling came mainly from German (94), Bulgarian (51), and Polish (48) courts.

The key statistics for the General Court:

- The average length of proceedings was 18.1 months;
- In 2023, the General Court's reform, providing for the doubling of its judges, took full effect;
- The General Court completed 904 cases;
- 2023 saw an increase in cases brought before the Court in the fields of intellectual property (310) and economic and monetary policy, in particular banking law;
- Litigation in conjunction with restrictive measures remained at a high level but dropped to 63 cases in 2023 compared to 103 cases in 2022;
- The number of cases closed by extended formations of five judges increased by 23% (123 cases) in 2023.

The CJEU's annual report also highlighted the negotiations on two important legislative amendments, i.e. the transfer to the General Court of the jurisdiction to give preliminary rulings in six specific matters and the extension of possibilities for the Court of Justice to determine whether an appeal against a decision of the General Court should be allowed to proceed (→news item above). (CR)

OLAF

Operational Partnership Conference between OLAF and EPPO

On 22/23 April 2024, OLAF and the EPPO held an Operational Partnership Conference in Brussels. Prosecutors and financial investigators from the EPPO and investigators, forensic experts and analysts from OLAF convened to share experiences and best practices as well as to discuss challenges in the investigation of complex cross-border fraud damaging the EU budget.

According to the EPPO Regulation, the two bodies should maintain a close relationship based on mutual cooperation within their respective mandates and on information exchange. The relationship shall aim in particular to ensure that all available means are used to protect the Union's financial interests through the complementarity and support by OLAF to the EPPO. On 5 July 2021, European Chief Prosecutor *Laura Kövesi* and OLAF Director-General *Ville Itälä* signed a working arrangement that sets out the future operational cooperation between the EPPO and OLAF (→eucrim 2/2021, 80). (TW)

OLAF's Operational Work January-June 2024

This news item summarises OLAF's operational work in the first half of 2024 (January to June 2024) in reverse chronological order. It follows the reports on operations supported by OLAF in →eucrim 4/2023, 318.

- 26 June 2024: OLAF investigators supported Hungarian customs in tracking down a site in Budapest where counterfeit air fresheners from Turkey were stored. 140,000 pieces of counterfeit air fresheners are found, with an estimated value of approximately €300,000. Counterfeit aerosols not only damage the budget but are also a danger to health and the environment.
- 4 June 2024: Alerted by OLAF, Dutch authorities succeed in one of the most important strikes against the import of illicit fluorinated greenhouse gases (F-gases). Dutch authorities stop three trucks from Turkey that were transporting over 3,500 cylinders, containing approximately 40 tonnes of F-gases without the necessary permits and quota. Having a high impact on global warming, the import of F-gases into the EU is strictly regulated and OLAF constantly analyses and passes on information and intelligence on suspicious shipments and operators.
- 14 April 2024: OLAF takes stock of operations against tobacco smuggling in 2023. International operations in-

volving OLAF led to the seizure of 616 million illicit cigarettes, 140 tonnes of raw tobacco and 6 tonnes of water pipe tobacco. OLAF's report also informs of trends and patterns of tobacco smuggling. Seizures of illicit cigarettes inside the EU, for instance, show that traffickers and illegal producers increasingly divide production into smaller units in order to move their tools and goods faster if raided by law enforcement.

- 13 February 2024: OLAF and Europol informs the public of operation SHIELD IV. Operation SHIELD IV was carried out between April and October 2023 targeting misused or counterfeit medicines, doping substances, illegal food or sport supplements and counterfeit COVID medical supplies (for previous SHIELD operations →eucrim 4/2022, 234–235). The operation involved law enforcement, judicial, customs, medical and anti-doping authorities from 30 countries across three continents that were supported/coordinated by Europol, OLAF, Eurojust, INTERPOL, the European Union Intellectual Property Office (EUIPO), Frontex, and the World Anti-Doping Agency (WADA). Operation SHIELD IV carried out nearly 4000 inspections and led to criminal charges of 1284 individuals. Four underground labs were dismantled and over 90 websites shut down. Seizures worth €64 million included: 186,754 tablets, 193,759 packages and 350.32 kg of erectile dysfunction medications, as well as 21,888 tablets and 1016 vials of anabolics.
- 7 February 2024: With OLAF's support, Polish Customs dismantle a missing trader fraud scheme involving the trade in e-bikes from China. By falsifying import documentation and abusing transit procedures, the e-bikes were smuggled to warehouses in Poland where they were sold to European customers via online platforms with high profits. The operation tracked down 20,000 e-bikes. The estimated damage to the EU and national budgets is at least €8 million of anti-dumping and countervailing duties and €4 million of VAT.
- 6 February 2024: OLAF and the Italian Customs (Agenzia delle dogane e dei monopoli – ADM) report on the Joint Customs Operation "Bellerophon". The operation uncovered a missing trader fraud scheme that evaded VAT of more than €18 million. The traders illegally used VAT exemptions when importing goods (mainly textiles, footwear and toys) from China to Greece with Italy as the final destination. Operation Bellerophon involved nine Member States and was carried out in June 2023. Follow-up investigations lasted until January 2024. During the operation, customs authorities also seized 27,000 counterfeit hats and clothing items, as well as 4 million cigarette packs.
- 4 January 2024: Thanks to OLAF's supports an organised criminal group producing and selling illicit medicinal products is dismantled. Polish law enforcement authorities raid and shut down factories and warehouses of the group, and seize several tons of falsified medicinal products and components necessary for their production. Nine suspects are arrested. Probably having operated for over a year, the group marketed the products, mainly anabolic steroids, via websites. OLAF supported the operation by having provided expert advice and liaised with the national authorities in other EU Member States concerned, thus enabling to connect the dots. The estimated amount of the confiscated material amounts to 50 million zloty, equivalent to around €11.5 million. (TW)

European Public Prosecutor's Office

Poland Joins the EPPO

On 29 February 2024, the European Commission confirmed Poland's participation in the enhanced cooperation on the establishment of the EPPO (COM Decision (EU) 2024/807). The Decision entered into force twenty days after its publication in the Official Journal of the EU. Poland notified the Commission of its intention to participate in the enhanced cooperation scheme on 5 January 2024.

The appointment of the European Prosecutor for Poland is currently pending for the EPPO to become operational in Poland. Up to 24 European Delegated Prosecutors will serve the EPPO on a decentralised level in Poland (in three or four EPPO offices, including one in Warsaw). The EPPO will investigate crimes affecting the financial interests of the Union committed in Poland after 1 June 2021. Poland is the 23rd of the 27 EU Member States that participates at the EPPO. Sweden also expressed its intention to join. (CR)

EPPO Signs Working Arrangement with Czechia's Supreme Audit Office

On 28 February 2024, the EPPO and the Supreme Audit Office of the Czech Republic (SAO) signed a Working Arrangement to facilitate and foster the exchange of information on suspicious financial transactions relating to facts and offences falling within the remit of the EPPO.

The main purpose of the Arrangement is to establish and maintain a cooperative relationship between the two bodies. It includes the exchange of strategic information relevant for the exercise of the other party's competence. The exchange of information can be put on hold if this may hamper ongoing investigations or jeopardise the security of individuals.

Moreover, the parties undertake to designate contact points for the exchange of information and operational cooperation. They will also cooperate on trainings in areas of common interests and organise joint training activities. Next to these substantial issues, the Arrangement includes confidentiality and data protection rules. (CR)

EPPO and France's Treasury Cooperate in Fraud against the RRF

On 17 January 2024, the EPPO and France's Treasury, together with its Interministerial Anti-Fraud Coordination Mission (MICAF), signed a Working Arrangement to foster the detection of fraud involving the Resilience and Recovery Facility (RRF). In France, the implementation of the National Recovery and Resilience Plan is coordinated by the French Treasury. As a practical measure, the newly established Working Arrangement also includes a template for reporting possible fraud to the EPPO's office in France as well as a handbook.

The RRF is a temporary instrument of the European Commission to finance reforms in and investments by EU Member States from the beginning of the pandemic in February 2020 through 31 December 2026 (→eucrim 1/2021, 151). The Member States have outlined their plans for reform and investment that are to be subsidised by the RRF fund. (CR)

EPPO Requests Budget Increase

In mid-February 2024, the College of the EPPO sent an urgent request to the European Parliament, the Council of the EU, and the European Commission to increase the 2024 budget of the Office from €7.8 million to €79.7 million. The request was motivated by the impending accession of new Member States (Poland and possibly Sweden) to the EPPO and the acceleration of the disbursement of NextGenerationEU funding. The increased budget will allow the Office to employ more staff for operational and administrative support in Luxembourg as well as more European Delegated Prosecutors.

NextGenerationFunding is a temporary recovery instrument of the EU to support Europe's economic recovery from the coronavirus pandemic and to build a greener, more digital, and more resilient future. The centrepiece of NextGenerationEU is the Recovery and Resilience Facility (RRF), a temporary instrument to finance reforms by and investments in EU Member States from the beginning of the pandemic in February 2020 to 31 December 2026. The EPPO is also leading numerous investigations into expenditure fraud in conjunction with these funds. (CR)

EPPO's Annual Report 2023

spot light On 1 March 2024, the EPPO published its Annual Report for the year 2023. The report gives an overview of the EPPO's operational activities and the activities of its College, permanent Chambers, and 140 European Delegated Prosecutors (for the 2022 report →eucrim 1/2023, 18, for the first report 2021 →eucrim 1/2022, 15–16).

Last year, the European Delegated Prosecutors Association was formally registered, aiming to facilitate better cooperation between the EPPO's Central Office and its decentralised level. Key figures for the year 2023 are:

- Receipt and processing of 4187 crime reports (26% more than in 2022);
- Opening of 1371 investigations (58% more than in 2022);
- Total of 1927 active investigations and an overall estimated damage of €19.2 billion;
- 206 active investigations related to NextGenerationEU funding, with an estimated damage of over €1.8 billion.
- VAT fraud accounted for 17.5% of the overall damage with an estimated damage of €11.5 billion;
- Of the 4187 crime reports, 2494 were from private parties and 1562 from national authorities;
- Only 108 reports came from EU institutions, bodies, offices, and agencies.

Looking at these numbers, the report concludes that the level of detecting fraud affecting the financial interests of the EU in the participating Member States has further improved. Public awareness about the EPPO has increased, but there was no improvement in terms of detection and reporting on the part of EU institutions, bodies, offices, and agencies.

In 2023, the EPPO opened 58% more investigations than in the previous year, corresponding to damage estimated at €12.28 billion. In addition, it filed 50% more indictments (139) than in 2022, bringing more perpetrators of EU fraud to judgment before national courts. National judges granted European Delegated Prosecutors freezing orders worth €1.5 billion.

The majority of investigated offences identified in active EPPO cases concern non-procurement expenditure fraud (1486), VAT revenue fraud (806), and inextricably linked offences (599). Next in line are offences such as non-VAT revenue fraud, procurement expenditure fraud, money laundering, PIF-crime focused criminal organisation, corruption, and misappropriation. Most of the active funding fraud investigations took place for agricultural and rural development programmes as well as regional and urban development programmes. However, such investigations also took place for other programmes, involving recovery and resilience, employment, social cohesion, inclusion and values, maritime and fisheries, research and innovation, international cooperation, education and culture, mobility, transport, energy, digitalisation, asylum, migration, integration, industry and entrepreneurships, climate and environment, and security and defence.

Next to the general overview, the annual report analyses the operational activity, relevant judicial activity, typologies of identified active EPPO cases, and active fraud investigations for each of the 22 Member States participating in the EPPO in 2023. Looking at its relationship with non-participating Member States and non-EU countries in 2023, cooperation with Poland and Ireland took effect, and a working arrangement with the Ministry of Justice of the Kingdom of Denmark was

signed. Furthermore, the agency concluded working arrangements with the National Anti-Corruption Bureau of Ukraine, the Albanian Special Anti-Corruption Structure, and the Prosecutor's Office of Bosnia and Herzegovina.

Lastly, the annual report provides an overview on IT, security, corporate services, staff development, human resources, transparency, relations with the general public and the press, activities of the legal service, data protection, and financial resources (with a budget of €66 million for the delivery of the EPPO's mission in 2023). (CR)

Overview of Convictions in EPPO Cases: January – March 2024

The following is an overview of court verdicts and alternative resolutions in EPPO cases, which continues the overviews given in previous eucrim issues (last →eucrim 4/2023). A brief analysis of EPPO's news reports from January to March 2024 is presented in reverse chronological order.

- 20 March 2024: Investigation 'Cheap Ink' results in the conviction of four individuals in Italy. The investigation uncovered a massive VAT carousel fraud scheme involving the sale of toner cartridges and office supplies at cheap prices. The main heads were two entrepreneurs from Padua/Italy. The fraudsters systematically evaded VAT, amassing profits estimated at €58 million. By means of an abbreviated procedure, the Italian court convicts the defendants of participation in a criminal organisation, VAT fraud, money laundering, forgery of public documents, and forgery of signatures. One defendant accused of being a straw man is acquitted. The first court decision is still subject to appeal.
- 2 February 2024: As the first of several defendants, the Berlin Regional Court convicts a former notary to two years of imprisonment (on probation) for forgery and false notarisations. The conviction comes following an investigation into an €80 million VAT fraud scheme involving luxury cars and medical face masks (→eucrim 2/2023, 125 > entry 27 July 2023). The notary was considered a gang member responsible for false notarisations and forgeries.
- 10 January 2024: The Regional Court of Ostrava in Olomouc (Czechia) convicts a business owner and his company of EU funding fraud. According to the court, they knowingly violated the conditions of a project financed under the European Regional Development Fund (ERDF) for which they received subsidies from the Czech Ministry of Industry and Trade. The owner is sentenced to three years of imprisonment (on probation), a penalty to the amount of €40,672, and prohibition from being involved in subsidy procedures in any capacity for a period of eight years. The company has to pay a fine amounting to €81,344 and is prohibited from receiving grants and subsides for a period of ten years. (CR)

EPPO's Operational Activities: January – March 2024

This news item provides an overview of the EPPO's main operational activities from 1 January to 31 March 2024. It continues the periodic analyses of recent issues (last: →eucrim 4/2023, 322–324) and reports in reverse chronological order.

- 29 March 2024: At the end of March, the EPPO in Vilnius and the Lithuanian Financial Crime Investigation Service carries out active evidence-collecting activities with regard to suspected fraud involving a former assistant of a Lithuanian Member of the European Parliament. The investigation concerns the non-performance or imitation of actual functions of a parliamentary assistant with the aim of obtaining renumeration and collecting unemployment benefits.
- 26 March 2024: Under the codename 'Fuel Family', the EPPO in Naples, Bologna, and Rome (Italy) dismantles a criminal gang alleged to have imported fuel into the Italian market while systematically evading VAT. The alleged criminals are believed to have imported the fuel from suppliers in Croatia, Slovenia, and other countries, using a chain of more than 40 "missing traders" in Italy, who would vanish without fulfilling their tax obligations. The fraudulent activities are believed to have generated invoices for simulated transactions amounting to over €1 billion, causing an estimated damage of around €260 million in unpaid VAT. The criminal group is also suspected of laundering over €35 million in illicit proceeds. As the fuel could be sold at extremely advantageous prices, the fraud also distorted the principles of fair competition on the market.
- 6 March 2024: An Italian entrepreneur is charged with engineering a €41.8 million VAT fraud scheme and misappropriating €6.7 million in public funds, among other offences. The investigation by the EPPO in Milan (Italy) showed that the entrepreneur committed intra-community VAT carousel fraud via two companies owned and operated by him as well as a chain of missing traders active in the wholesale trade of computer equipment and broadcasting technology. Furthermore, the entrepreneur fraudulently received public funding based on forged documentation that falsely represented the company's economic, asset-based, and financial reality as well as the fictitious establishment of a company.
- 6 March 2024: The EPPO in Cologne (Germany) brings charges against five main suspects of an organised crime group, who are suspected of engaging in large-scale VAT fraud involving international trade with more than 10,000 cars that generated a total turnover of over €190 million and VAT losses of €53.7 million. 60 persons are suspected of participating in the organised group or supporting the main suspects. During investigation 'Huracán'

130 cars were confiscated in June 2023 (→eucrim 2/2023, 127 > entry 14 June 2023); 90 cars had already been sold by the authorities, with a view to recovering the financial damage. Other seized goods include real estate and €2 million in cash.

■ 28 February 2024: The EPPO in Munich and Cologne (Germany) moves against a suspected criminal organisation that allegedly orchestrated a €195 million VAT carousel fraud through the sale of smartphones, small electronic devices, and protective face masks. By means of a complex criminal eco-system, the criminal organisation created layers of shell companies, straw men, fictitious identities, and secret communications. Under the investigation cluster 'Midas', more than 180 searches are carried out and 14 people arrested in 17 countries. Over 680 tax and police investigators support the investigative measures. 14 European Delegated Prosecutors in 12 Member States team-up with numerous national authorities, Europol, and Eurojust to take action.

■ 27 February 2024: The large-scale investigation 'Final Toast' (conducted by the EPPO in Palermo (Italy)) leads to precautionary measures against ten suspects, one of whom the son of a member of the 'Santapaola' mafia clan. The criminal association is suspected of aggravated VAT fraud involving beverages, money laundering, fraudulent bankruptcy, and EU funding fraud. Through a system of fake invoices for non-existent goods, fictitious transactions via foreign-based companies, and missing traders, the beverages could be sold at artificially low prices, undercutting legitimate competitors and resulting in VAT losses exceeding €30 million. Additionally, the suspects received co-funding from the EU for the organisation of training courses for employees of various affiliated companies that never took place.

■ 25 January 2024: An investigation led by the EPPO in Turin (Italy) results in the freezing of almost €40 million and the seizure of 47 bank accounts, 11 real estate properties, four cars, and €56.000 in crypto currencies as well as the shutdown of several websites. The suspected criminal organisation allegedly used a chain of fictitious companies in several EU Member States to sell tyres for cars and other motor vehicles to customers in Italy via various e-commerce platforms, without collecting or reimbursing VAT in any EU Member State. The company is estimated to have generated a turnover of €178 million. (CR)

Europol

Court of Justice Establishes Joint and Several Liability between Europol and the Member State

On 5 March 2024, the Grand Chamber of the Court of Justice issued its judgement in Case C755/21 P, involving the appeal of Mr Marián Kočner against Europol. In his appeal, Mr Kočner sought to set aside the judgment of the General Court of the EU of 29 September 2021 (Case T-528/20 →eucrim 3/2021, 146)

➤ *Background of the dispute*

In 2018, following the murder of Slovak journalist J. Kuciak and his fiancée M. Kušnírová, the Slovak authorities conducted extensive investigations in which, at the request of the Slovak authorities, Europol secured and transferred data stored on two cell phones (suspected to belong to Mr Kočner) and on a USB storage device. In May 2019, the Slovak press published extensive information, in particular transcripts of private conversations that originated, among other things, from the cell phones in question. In consequence, Mr. Kočner brought an action before the General Court claiming that Europol had breached its data protection obligations by disclosing the information at issue to the public before the reports had even been communicated to the Slovak authorities. For this reason, Mr Kočner sought compensation for the damage he allegedly suffered as a result of the disclosure by Europol of personal data and the inclusion by Europol of his name on the "Mafia lists".

➤ *The General Court's judgment*

In its judgement of 29 September 2021, the General Court explained that the EU can only have non-contractual liability for damage allegedly caused by EU agencies if three cumulative conditions are fulfilled, namely (1) the unlawfulness of the conduct alleged against the agency, (2) the fact of damage, and (3) the existence of a causal link between said conduct and the damage being complained about. The General Court dismissed Mr. Kočner's application on the grounds that no evidence could be found that the disclosure of the transcriptions could be imputable to Europol. The same was held true in relation to the inclusion of Mr. Kočner's name in the "Mafia lists".

➤ *The appeal judgment*

In its appeal judgement of 5 March 2024, the Court of Justice set aside the judgment of the General Court in the following point: The Court of Justice held that EU law lays down rules under which Europol and the Member State (in which the damage resulting from unlawful data processing occurred) are jointly and severally liable in the context of cooperation between them. For such joint and several liability to be assumed, the individual concerned must show only that unlawful data processing causing him or her to suffer damage has been carried out in the course of cooperation between Europol and the Member State concerned. Contrary to what the General Court previously held, there is no need for the data subject to establish additionally to which of these two entities that unlawful processing is attributable.

With regard to the dispute itself, the Court of Justice acknowledged that

the disclosure to unauthorised persons of data relating to intimate conversations of Mr Kočner triggered liability. This infringed Mr Kočner's right to respect for his private and family life and his communications and adversely affected his honour and reputation, which caused him non-material damage. The Court of Justice granted Mr Kočner compensation in the amount of €2000 as reparation for that damage. (CR)

Frontex Signs Joint Statement with Europol

On 31 January 2024, Frontex and Europol signed a joint statement to further enhance their cooperation, particularly in the fields of combating migrant smuggling and human trafficking. The joint statement on cooperation and complementarity between the two EU law enforcement agencies outlines how they can better coordinate activities to complement each other and how they can identify concrete short- and long-term priority actions. Both agencies stated their commitment to prioritising joint activities that will pursue the following:

- Further strengthen the mutual exchange of information at all levels, including operational information;
- Increase their joint operational impact on cross-border crime, in particular migrant smuggling and trafficking in human beings;
- Enhance the agencies' solid partnership, reflecting both sides' complementary roles, capabilities, and expertise;
- Intensify joint synergies towards the result-driven implementation of each other's mandates (avoid duplication of efforts, fill identified gaps, and seek for further alignment);
- Facilitate the speedy conclusion of the working arrangement, so that the full potential offered by the enhanced mandates of both agencies can be fully realised;
- Support the development of new capabilities, in particular through Frontex's active contribution to the European Innovation Hub and through Europol's support in the development of the European Travel Information and Authorisation System (ETIAS) and interoperability. (CR)

Eurojust

First-Time Eurojust Support for EPPO Investigation

On 29 February 2024, Eurojust reported that, for the first time, the Agency supported an investigation led by the EPPO against a large-scale cross-border missing trader intra-community fraud. The scheme involved trade in electronic goods and protective face masks via companies based in several European countries. As the missing trader companies were based in Sweden, which is not yet participating in the EPPO, and most of the VAT damage was caused there, one of the two investigations led by Eurojust aimed at identifying ongoing linked investigations in Sweden.

In addition, Eurojust facilitated cooperation between the EPPO and Denmark, Hungary, an d Poland (all EU Member States not participating in the EPPO) and the United Kingdom. It also facilitated cooperation between Sweden and Malta. (CR)

First Liaison Officer for Iceland

On 12 March 2024, Ms *Kolbrún Benediktsdóttir* took up her duties as Iceland's first Liaison Prosecutor for Eurojust. Prior to accepting this position, Ms *Benediktsdóttir* worked as Deputy

What Can the EJN or Eurojust Do for You?

In April 2024, the EJN and Eurojust published an updated version of a joint paper informing judicial practitioners in the EU Member States of the services and assistance in international cooperation in criminal matters that both bodies provide. The paper explains the role, tasks, and mandate of the EJN and Eurojust and sets out the situations in which either of the two should be consulted.

Eurojust is the main addressee for practitioners seeking support with:

- Coordination of investigations and prosecutions;
- Organisation of coordination meetings and coordination centres;
- Prevention or resolution of conflicts of jurisdiction;
- Facilitation and support of Joint Investigation Teams;
- Coordination and facilitation of requests for judicial cooperation to and from third States;
- Facilitation of judicial cooperation in complex matters, urgent cases, or in situations in which other cooperation channels are not feasible.

The EJN, through its Contact Points, is the best source to facilitate the quick and informal exchange of information between judicial authorities. Furthermore, it facilitates judicial cooperation between practitioners seeking information on how to:

- Receive assistance from another Member State;
- Identify the competent executing authority abroad;
- Obtain more detailed information on the legal and procedural requirements laid down by the law of a requested Member State;
- Electronically create a request for judicial cooperation;
- Obtain legal and practical information on EU legal instruments in criminal matters.

Both bodies are in close contact with one another, however, and readily ensure that each request is dealt with in an efficient and effective manner. (CR)

District Prosecutor in Iceland and taught at the Faculty of Law of the University of Iceland. Ms Benediktsdóttir is the twelfth Liaison Prosecutor from a non-EU country at Eurojust. Liaison Prosecutors from third countries can open requests for cross-border judicial cooperation with authorities of EU Member States and vice versa. (CR)

Frontex

Frontex 2023 in Brief

On 16 February 2024, Frontex presented the highlights of 2023 and the main operational achievements in the form of its digital leaflet "2023 in brief". Looking back to 2023, Frontex main achievements include the following:

- Employed 2500 EU border guards on average each month;
- Supported 24 operations;
- Rescued 43,000 people at sea;
- Supported the return of over 39,000 people who have received return decisions from the national authorities.

Together with 44 countries and international organisations over the world, the Agency supported one of the largest global operations against human trafficking. 50 officers were deployed within days to support Finnish authorities at their Eastern border with Russia. The Agency also launched a new operation in North Macedonia with more than 100 European border guards supporting local authorities with border surveillance and border checks. In addition, in 2023, the Agency tested a new decentralised command structure: operations are no longer coordinated from its headquarters in Warsaw but from the centre of the operation. Lastly, for the first time, first-line border checks of officers of the Agency were carried out at a border outside of the EU (between Moldova and Ukraine) in 2023.

With regard to fundamental rights, all 46 Fundamental Rights Monitors received the full training and started working in 2023. Frontex's Fundamental Rights Office was active in 30 countries, especially Greece, Italy, Spain and Romania. It monitored around 50 return flights and processed more than 50 complaints. (CR)

2024 Evaluation of Frontex Regulation

On 2 February 2024, the Commission adopted the evaluation of Regulation (EU)2019/1896 on the European Border and Coast Guard. It assessed the impact, effectiveness, and efficiency of Frontex together with an Action Plan to support its implementation.

Overall, the evaluation concludes that Frontex has significantly contributed to strengthening the management of the EU's external borders in full compliance with fundamental rights. The agency's operational support to Member States, its Standing Corps supporting Member States on the ground, and its support with implementing return measures are seen as playing a decisive part in the EU's effort to manage external borders and address migratory challenges. An additional positive factor is the increased cooperation of the agency with partner countries. Also, the evaluation finds that Frontex is governed by a strong fundamental rights framework that ensures respect for fundamental rights in all its activities.

Areas in which further improvement is needed include the following:

- Implementation of the agency's new organisational structure;
- Elimination of delays in setting out plans for its capabilities, such as technical assets and staff regarding border management and return;
- More strategic guidance for its return-related activities.

In consequence, the Action Plan contains a number of recommendations to be implemented by the Agency, its Management Board, the Member States, and the Commission. They focus on areas such as operations, repatriations, situational awareness, integrated border management, fundamental rights, and data protection. (CR)

Agency for Fundamental Rights (FRA)

FRA Signs Agreements with Frontex and eu-Lisa

On 12 March 2024, FRA signed two new agreements to strengthen its partnership and cooperation with Frontex and eu-Lisa.

The cooperation plan established between FRA and eu-Lisa (the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice) for the years 2024–2026 aims at sharing knowledge, expertise, and best practices between the agencies as well as cooperating in the areas of mutual interest:

- Exchange information and know-how;
- Cooperate in the field of training;
- Cooperate in the area of data protection, for communication and events, and for policy coordination and practices.

The working arrangement signed between FRA and Frontex aims to support compliance with fundamental rights in the implementation of European Integrated Border Management and consultation on fundamental rights-related activities. Forms of cooperation include the following:

- Participation in annual meetings and selected events;
- Exchange of information, expertise, and best practices;
- Collaboration in research;
- Development of joint fundamental-rights related products;
- Temporary personnel exchanges in the form of extended visits and the appointment of designated Points of Contact.

The agreement also provides for cooperation between the agencies on the

development of European Border Surveillance System (EUROSUR) components with regard to compliance with the fundamental rights framework for surveillance and data analytics technologies. Where necessary for the exercise of the Frontex Fundamental Rights Officer's mandate, the bodies may also cooperate on matters related to promoting the respect for fundamental rights. (CR)

European Data Protection Supervisor (EDPS)

EDPS Annual Report 2023

On 9 April 2024, the European Data Protection Supervisor presented its Annual Report 2023. The Report looks back to the EDPS' activities in 2023 with regard to "supervision and enforcement", "policy and consultation", and "technology and privacy".

When presenting the report on 9 April before the EP's LIBE Committee, EDPS *Wojciech Wiewiórowski* highlighted the EDPS's work in the field of artificial intelligence (AI). The EDPS steered legislation, e.g., the AI Act (→eucrim 4/2023, 316–317), particularly bringing in pleas for a human-centric approach to AI and compliance of AI regulation with the fundamental rights to privacy and data protection. The EDPS has also been active in promoting the EU values and principles on AI and related data protection issues at the global level.

In the field of home affairs, the EDPS took a critical stance on the proposed Regulation on Child Sexual Abuse Material (→eucrim 2/2022, 91–92), which plans for the scanning of communication on a large scale that may lead to the surveillance of society in an irrevocable way. Matters in the area of freedom, security and justice were also at the centre of the EDPS' supervisory powers over EU institutions, bodies, offices and agencies . In 2023, the EDPS notably focused on:

- Preparing for the supervision of the interoperability framework;
- Reinforcing cooperation between the EDPS and national data protection authorities, which included the coordination of supervisory actions;
- Scrutinising the processing of personal data by Frontex from debriefing reports in the context of joint operations;
- Assessing Europol's processing of biometric data;
- Monitoring new ways of cooperation between Europol and EU Member States in the production of operational analysis;
- Providing advice on the setting up of new systems to process operational personal data by Eurojust (war crime module) and the EPPO (new environment to conduct operational analysis).

Looking ahead, the EDPS emphasised that further resources were invested in technology monitoring and innovation. The EDPS also highlighted that the year 2024 marks the 20th anniversary of the institution. Celebrations of the anniversary will be based on four key pillars:

- A book and a timeline that analyses key data protection milestones and the EDPS' influence and history in this remit over the last two decades;
- 20 talks with leading voices from around the world who share their unique perspective on how data protection and privacy shape their respective fields;
- 20 initiatives aimed at further emboldening individuals' fundamental rights;
- The European Data Protection Summit – Rethinking Data in a Democratic Society, taking place on 20 June 2024, in Brussels, Belgium.

In conclusion, the report points out that the EDPS is a forward-looking data protection authority, which must anticipate the challenges and opportunities ahead in order to equip itself with enforceable regulatory tools that protect individuals' personal data in an era that shapes the digital world of people, businesses and governments. (TW)

Specific Areas of Crime

Protection of Financial Interests

Deal on EU Budget Increase

In February 2024, the European Parliament and the Council gave green light to three legislative acts that reinforce the EU long-term budget and provide additional funding in order to react to new challenges, such as Russia's war against Ukraine. The acts include a regulation amending the multiannual financial framework (MFF) for 2021–2027, as well as regulations establishing the Ukraine Facility and the Strategic Technologies for Europe Platform (STEP). They were published in the EU's Official Journal of 29 February 2024.

The revision of the EU budget will make available additional funds totalling €64.6 billion: additional funds (= "fresh money") of €21 billion; redeployment of €10.6 billion and loans to support Ukraine of € 33 billion. This is the first time that a mid-term MFF review has led to a net increase in spending ceilings. The following additional expenditure is planned until the end of the 2027 financial period:

- €50 billion for the Ukraine Facility (€17 billion in grants and €33 billion in loans);
- Migration and border management: €2 billion;
- Neighbourhood and the world: €7.6 billion;
- Flexibility Instrument: €2 billion;
- Solidarity and Emergency Aid Reserve: €1.5 billion;
- Strategic Technology Platform for Europe (STEP): €1.5 billion.

The Ukraine Facility will pool the EU's budget support to Ukraine into one single instrument, providing coherent, predictable and flexible sup-

port for the period 2024–2027 to Ukraine. The money will be used for Ukraine's recovery, reconstruction and modernisation as well as for supporting reforms as part of the country's accession path to the EU.

The Strategic Technology Platform for Europe (STEP) will consolidate and enhance investments into crucial technologies in the fields of digital and deep tech, cleantech and biotech. Various EU programmes will be streamlined, including cohesion policy funds, InvestEU, Horizon Europe, the European Defence Fund, the Innovation Fund and the Recovery and Resilience Facility. STEP will also include awarding a Sovereignty Seal for relevant projects showcasing them in a Sovereignty Portal.

In line with EP's demands, the budget revision also introduces a mechanism to tackle the escalating costs linked to the repayment of the NGEU recovery plan amid surging interest rates. (TW)

Deal on Reform and Growth Facility for the Western Balkans

In April 2024, the Council and the European Parliament reached agreement on a €6 billion Reform and Growth Facility for the Western Balkans. The facility is the financial pillar of a general Reform and Growth Plan for six Western Balkan countries proposed by the Commission in November 2023.

The funding is composed of €2 billion in grants and €4 billion in highly concessional loans. At least half of the overall envelope will be allocated through the Western Balkans Investment Framework (WBIF), supporting infrastructure investments and connectivity, including transport, energy, green and digital transitions. The remaining part will be released as direct support to the national budgets.

The idea of the facility is to provide increased financial assistance to Western Balkan partners in exchange for socio-economic and fundamental reforms defined in ambitious reform agendas. Reform agendas must be prepared by the Western Balkan partners and are approved by the EU. In order to receive EU support, the countries need to uphold several general preconditions, such as respect of effective democratic mechanisms. Funds will be released twice a year, based on requests by the Western Balkan partners and following verification by the Commission.

The Facility for the Western Balkans is part of the mid-term revision of the EU's multiannual financial framework (→preceding news). It is complementary to EU assistance already provided through the Instrument for Pre-accession Assistance (IPA).

In February 2024, the European Court of Auditors (ECA) published its opinion on the facility. The auditors suggested that additional EU money should be better protected. They also criticised that they were unable to assess the extent to which the intended €6 billion in support is likely to contribute to achieving the facility's main objectives because an impact assessment had not been provided. (TW)

Two ECA Reports Assess Rule-of-Law Efforts to Protect the EU Budget

spot light In February 2024, the European Court of Auditors (ECA) published two reports that examine the Commission's steps designed to ensure that EU money is properly spent to Member States if they do not comply with the EU's rule of law values.

➤ *ECA report on Conditionality Regulation*

Special Report 03/2024 entitled "The rule of law in the EU – An improved framework to protect the EU's financial interests, but risks remain" assessed appropriateness and consistency of the protection of the EU's financial interests through the Conditionality Regulation, together with relevant provisions under the Recovery and Resilience Facility (RRF) Regulation and the 2021–2027 Common Provisions Regulation covering cohesion policy funds (→articles by *Iwona Jaskolska* and *Lothar Kuhl* in eucrim 4/2023, pp. 337–345). The audit sample included Bulgaria, Greece, Hungary, Italy, Poland and Romania.

The ECA welcomed the Conditionality Regulation as an improvement in the EU's rule-of-law framework and it acknowledged that the block of money to Hungary in 2022 was duly justified – to date the only concrete case in which the the Regulation was applied. However, several aspects make the Regulation difficult to apply, in particular, the requirement to establish a sufficiently direct link between breaches of principles of the rule of law and the EU's financial interest. The ECA also points out that not all major EU spending programmes (e.g., the Common Agricultural Policy) have protective tools equivalent to those set out under the RRF and the Common Provisions Regulation for cohesion policy. With regard to the Commission's steps taken under the new legal framework, the ECA identified several shortcomings, including the following:

- No yet fully developed administrative capacity on the part of the Commission to apply the Conditionality Regulation;
- No systematic assessment and documentation of the impact on the EU's financial interests for all Member States in which the Commission identified challenges to the rule of law;
- Discontinuation of the Coordination and Verification Mechanism (CVM) for Bulgaria and Romania in September 2023 despite unresolved reforms covered by the CVM and no resumption under the new rule-of-law instruments of these issues.

The ECA also found a number of risks that undermine the effectiveness of the budgetary and remedial measures, such as:

- The application of the Conditional-

ity Regulation may result in a mere box-ticking exercise with no real improvements on the ground;
- Risk of remedial action being reversed once budgetary measures are lifted.

These risks are exacerbated by the fact that political considerations may ultimately play a major role in decision-making. The auditors criticised that, in December 2023, rule-of-law decisions on Hungary had to be taken at the same time as voting on the Ukrainian accession talks to which Hungary initially objected. The auditors recommend that any proposal to lift budgetary measures must be based on solid evidence.

➤ *ECA report on the Commission's annual rule of law report*

The second ECA report reviews the Commission's annual Rule of Law Report – a preventive tool that presents the Commission's assessment of significant rule of law developments in EU Member States, including recommendations on the issues identified. It is a relatively new tool in the EU's toolbox to protect rule-of-law issues; the first report was published in 2020 (→eucrim 3/2020, 158–159). ECA's review provides a descriptive and informative analysis identifying potential challenges and opportunities as well as issues for further scrutiny, e.g. the Report's methodology or its relationship with other rule-of-law tools.

The auditors point to the very low implementation rate of the Report's recommendations for Member States (only a tenth of the recommendations were fully implemented and one third saw no progress). A "weakness" of the Report is that it relates to developments over a previous year even though some recommendations may require a concerted effort over several years to implement. In addition, the findings of the report are not legally enforceable and the Commission must rely on the sincere cooperation of the Member States.

The auditors identified opportunities to improve the evidence trail for the assessment process to document better how the European Commission decides which issues to look into and how it classifies their level of seriousness. They also found that the terminology used to classify rule-of-law issues in the Report differs from the terms used by other EU rule-of-law tools. For example, a "serious concern" in the Rule of Law Report is not equivalent to a "serious and persistent breach of values" under the Article 7 TEU procedure, or to a "breach of the principles of the rule of law" under the Conditionality Regulation. Lastly, the auditors recommend that the methodology of the Report could be made more transparent. (TW)

Mid-term Evaluation of the Recovery and Resilience Facility

On 21 February 2024, the European Commission presented the mid-term evaluation of the Recovery and Resilience Facility (RRF), the centrepiece of the NextGenerationEU coronavirus recovery plan. At the beginning of April, the European Court of Auditors pointed to several challenges of this special fund painting a less encouraging picture for the future.

Unprecedented in scale and ambition, the RRF was established in February 2021 with the twofold objective of supporting Member States in their recovery from the COVID-19 pandemic as well as strengthening their resilience and making EU economies and societies greener, more digital and more competitive (→eucrim 3/2021. 351). The RRF is also crucial in addressing urgent challenges, such as dealing with the impact of Russia's war of aggression against Ukraine. Reforms and investments are detailed in Member States' recovery and resilience plans.

➤ *The Commission's evaluation report*

The Commission presented its main findings on the mid-term evaluation in a Communication. The Communication assesses the progress made so far in implementing the RRF, looks at what has worked well and what could be improved, and outlines the way ahead. It is accompanied by a staff working document that provides further details on the evaluation.

According to Commission President *Ursula von der Leyen*, NextGenerationEU continues to support economic recovery and drives positive change across the EU after three years in existence. The report stresses that a real difference on the ground could be made with the help of the RRF, for instance:
- Over 28 million megawatt hours (MWh) in energy consumption have been saved;
- Over 5.6 million additional households now have internet access via very high-capacity networks;
- Almost 9 million people have benefitted from protection measures against climate-related disasters, e.g., floods and wildfires.

By the end of 2023, more than 1,150 milestones and targets had been assessed by the Commission as satisfactorily fulfilled.

The Recovery and Resilience Facility also considerably contributed to public investment increases. The Commission estimates that the EU's real GDP is going to increase by up to 1.4% in 2026 due to the NGEU.

Updates of the national plans led to positive effects in the Member States' economies. These updates increased the size of EU support for the economies with close to €150 billion. The Commission also draws positive conclusions with regard to country-specific recommendations issued in the context of the European Semester. Member States were enabled to implement long-awaited reforms in a wide range of policy areas, notably to support the green and digital transitions, and to improve social and institutional resilience.

Looking at the lessons learned, the mid-term evaluation highlights the broad support from Member States and other stakeholders for the performance-based approach of the RRF, where payment of EU funds is conditional on meeting agreed milestones and targets. Paying out on the basis of progress and results achieved, rather than costs incurred, provides predictability and accountability for both Member States and the Commission, the report says.

Room for improvement is particularly seen with regard to the RRF's reporting and control system. According to the report, Member States' authorities at all levels found the audit and control procedures too complex. In addition, Member States complained about overlapping audits by national authorities, the Commission and the European Court of Auditors. The simultaneous spending of cohesion policy funds, which follow different rules and rely, for the most part, on cost-based controls, also contributed to this perception. The Commission will identify areas of potential administrative simplifications while ensuring the protection of the EU's financial interests and transparency as to how funds are implemented and the fulfilment of milestones verified.

➤ *The European Court of Auditors' criticism*

In contrast to the Commission, the European Court of Auditors (ECA) cautioned against jumping to conclusions on the RRF's achievements too early. In a press release of 2 April 2024, the auditors pointed out that, as of late March 2024, only just over a third of the funds available for disbursement under the facility have been paid out. A problem is the "competition" between the RRF and cohesion funding leading to absorption in some Member States. Three EU countries (the Netherlands, Ireland and Sweden) even have not yet received any RRF funding. Given that there are only two years left for the instrument, pressure for spending exists, which, as past experience demonstrated, does not bode well for the quality of the programmes, the ECA says. The ECA believes that spending mistakes and fraud will increase also due to the fact that RRF funds are subject to less scrutiny and more self-policing.

The ECA expressed its concerns about the repayment of the loans taken from the financial markets for RRF funding. Interest rates have considerably increased in recent years, but there is no dedicated source of EU funding to pay back the loans. Auditors estimate that interest charges could rise to as much as €27 billion for the EU's entire multi-year budgeting period, doubling initial estimates. The ECA wonders whether repayment (due between 2028 and 2058) simply will be passed down to the next generation of taxpayers. (TW)

EP Remarks on 2022 PIF Report

On 18 January 2024, the European Parliament (EP) adopted a resolution assessing the 34th Annual Report on the protection of the European Union's financial interests and the fight against fraud – 2022 (the PIF Report 2022 →eucrim 2/2023, 135).

In general, MEPs noted that the numbers of fraud and irregularities damaging the EU budget are still extremely high. They also stated that involvement of civil society in tackling fraud is crucial to enhance prevention and detection, in particular investigative journalism must be given support. It was stressed that corruption, particularly high-level corruption, including in EU institutions, is a particularly serious crime with the potential to extend across borders, undermining citizens' trust in democratic institutions in the EU and in the Member States. The EP supported mainstreaming anti-corruption into EU policy design. Furthermore, the EP favoured setting up an adequate procedure by which OLAF is granted access to concerned MEP's offices, computers and email accounts in cases of substantiated corruption suspicions.

Looking at revenue, MEPs were concerned over the overall number of fraudulent and non-fraudulent irregularities related to Traditional Own Resources (TOR) being 7.6 % higher in 2022 compared to the five-year average (2018–2022) and the overall amounts affected by such irregularities, as estimated and established by Member States, also noticeably having increased (by 47%, reaching €783 million). They recalled that strengthening administrative cooperation as well as effective cooperation between OLAF and the EPPO are essential to increase the collection of revenue to the EU budget.

Several problems were observed in relation to expenditure, such as the length of administrative procedures dealing with fraudulent cases in the area of rural development and direct payments, the lack of transparency in the spending of public money by the Commission during the COVID-19 pandemic, the high number of irregularities reported in 2022 affecting the European Regional Development Fund (ERDF), the European Social Fund (ESF), and the Instrument for Pre-Accession Assistance (IPA), and flaws in addressing fraud risks by audit authorities in the Member States.

Key challenges remain with regard to the protection of the EU's financial interests for the money spent within the framework of NextGenerationEU (NGEU) and the Recovery and Resilience Facility (RRF). In this context, the resolution, *inter alia*, called on the following:

- Member States' control systems must ensure that RRF-funded investment projects comply with EU and national rules; if necessary, they must put in place additional safeguards to address any accountability gap;
- Member States should share their best procedures in order to facilitate

more coordinated and fraud-proof processing of the funds;

- In particular, the countering of fraud, corruption, conflicts of interest and double funding should receive appropriate resources and attention by the Commission;
- The Commission must continuously monitor the fulfilment of the milestones and targets relating to the protection of the financial interests of the EU and apply all necessary measures in the event of lack of compliance or the reversal of previously fulfilled milestones;
- The Commission must resolve several issues, such as the lack of sufficient supervision by coordinating bodies, incomplete anti-fraud strategies, missing elements in fraud risk assessments, etc.

The EP expressly welcomed the "NextGenerationEU – Law Enforcement Forum" (NGEU-LEF), a joint initiative co-led by Europol and Italy, bringing together Europol, the EPPO, OLAF, Eurojust, the European Union Agency for Law Enforcement Training and national authorities by providing a forum for intelligence sharing and the coordination of operations to tackle the infiltration of organised crime into the legal economy, and to protect the NGEU stimulus package.

The EP maintained that digitalisation has boosted the prevention/detection of fraud and simplified administrative procedures. Digitalisation needs to be at the heart of every anti-fraud strategy, including the National Anti-Fraud Strategies (NAFS). It emphasised that the Early Detection and Exclusion System (EDES), as the EU's blacklist, has huge potential for flagging people and companies that misuse EU funds, and EDES should be extended to all types of management modes, in particular to shared management. The Commission and the Member States should strive for a single database that consolidates, centralises and publishes information on the recipients of EU funding provided by Member States and other implementing entities.

With regard to the EU anti-fraud architecture and key measures in 2022, the EP welcomed the actions launched by the Commission in 2022 to enhance the level of protection of the EU's financial interests but calls for further vigilance and complementary actions in this field. MEPs regretted the fact that the participation of Member States in the EPPO is not obligatory. They noted with concern that, by the end of 2022, three Member States (Finland, Ireland and Poland) still indicated that they had not adopted any strategy for protecting the EU's financial interests. Five Member States (Belgium, Spain, Luxembourg, the Netherlands and Romania) indicated that they were in the process of establishing one. The EP urged the Member States to adopt NAFS to show that they take the protection of EU funds seriously.

Lastly, the resolution includes several remarks on the external dimension of the protection of the EU's financial interests. Given that an increased number of irregularities in 2022 related to funding of non-EU countries, the Commission is called on to maintain an adequate monitoring level on these funding initiatives and to report to the EP about possible systemic issues detected in the deployment of the resources. In addition, MEPs believed that funds under the Neighbourhood, Development and International Cooperation Instrument – Global Europe (NDICI-Global Europe) for assistance in non-EU countries and the resources allocated for Europe's response to the war in Ukraine are not adequately monitored and controlled.

MEPs recommended the suspension of budgetary support in non-EU countries, including candidate countries, where the authorities manifestly fail to take genuine action against widespread corruption, while ensuring that the assistance reaches the civil population through alternative channels. They strongly advised that the EU become a fully operating member within GRECO where the EU has currently only observer status. (TW)

Money Laundering

Commission's Report on Fourth AML Directive

On 11 March 2024, the European Commission published a report assessing the implementation of Directive 2015/849 – the fourth anti-money laundering Directive (AMLD 4). This assessment was required by Art. 65 of the Directive and takes into account the amendments made by Directive 2018/843 (the fifth anti-money laundering Directive – AMLD 5).

The assessment is based on two surveys conducted by the Commission services among Member States, as well as contributions from the European Banking Authority (EBA) and a study carried out by the Council of Europe. The report is accompanied by a Commission staff working document including a detailed analysis of the contributions.

The assessment report addresses the following issues:

- The Commission's account to verify the Member States' compliance with the AML/CFT Directive;
- Measures with regard to risk assessment and risk mitigation;
- Information access by competent authorities and FIUs, information exchange and international cooperation;
- Collection of and access to beneficial ownership information of corporate and other legal entities incorporated outside of the Union;
- Customer due diligence in business relationships with politically exposed persons;
- Recognition of fundamental rights;
- Need for new legislative proposals on several specific topics, in particular virtual currency user databases and asset recovery offices.

The Commission concluded that substantial improvements have been made in particular in the fields of information exchange and cooperation between AML/CFT supervisors in the financial sector. Several issues identified in the assessment report have been anticipated by the comprehensive AML/CFT reform proposed in 2021 and finalised in 2024 with a new regulatory and institutional AML/CFT framework (→eucrim news of 18 July 2024). (TW)

Tax Evasion

ECJ Rules on Taxable Person in Case of VAT Fraud

On 30 January 2024, the ECJ ruled in Case C-442/22 (*Dyrektor Izby Administracji Skarbowej w Lublinie*) on the question who is the taxable person for VAT if fake invoices were issued.

In the case at issue, employees of a Polish petrol station collected discarded payment receipts and created new, false invoices for the quantities of fuel stated on them. They then sold the invoices to entities that unduly received VAT refunds. The corresponding VAT has not been paid into the State budget. The Polish tax authorities levied VAT from the company (the employer) as taxable person arguing that the fraudulent conduct was made possible due to the lack of adequate supervision and organisation within the company that hired the employees.

The referring Polish court asked who must be established to be "the person who enters the VAT" within the meaning of Art. 203 of the 2006 VAT Directive (and who is therefore liable to pay that VAT) if an employee has issued a fake invoice showing VAT using the employer's identity as a taxable person, without that employer's knowledge or consent.

The ECJ found that VAT cannot be payable by the apparent issuer of a false invoice if he is acting in good faith and the tax authorities know the identity of the person who actually issued the invoice. In this case, the actual person who issued the invoice is obliged to pay the VAT. In order to be considered to be acting in good faith, the employer must exercise due diligence reasonably required to monitor the conduct of its employees and thus prevent the issuing of false invoices by using its details. According to the ECJ, any other interpretation of the VAT Directive would run counter to the aim of combating tax evasion. It is now for the national authorities/court to assess, in the light of all the relevant factors, whether the employer has exercised such due diligence. (TW)

Updated Non-Cooperative Tax Jurisdictions List

On 20 February 2024, the Council removed the Bahamas, Belize, the Seychelles, and Turks and Caicos Islands from its list of non-cooperative jurisdictions for tax purposes. The removal of the Bahamas and Turks and Caicos Islands from the list was influenced by the OECD Forum of Harmful Tax Practices (FHTP), which observed improvements in these jurisdictions' enforcement of economic substance requirements. Belize and the Seychelles had originally been included on the list because of unfavorable assessments in October 2023, when the OECD Global Forum admonished their exchange of information upon request; however, recent regulatory amendments in these jurisdictions have prompted a supplementary review by the Global Forum. Pending the outcome of this review, Belize and the Seychelles have now been relocated to "the grey list" (Annex II), reflecting ongoing cooperation and commitments to tax reform. Albania and Hong Kong were removed from the "grey list".

After the update, the "black list" now comprises 12 non-cooperative jurisdictions for tax purposes: American Samoa, Anguilla, Antigua and Barbuda, Fiji, Guam, Palau, Panama, Russia, Samoa, Trinidad and Tobago, the US Virgin Islands, and Vanuatu.The Council expressed regret that these jurisdictions have not yet fully aligned with international tax cooperation standards and urges them to improve their legal frameworks. On the "grey list" are currently ten countries.

Work on the list is a dynamic process. Since 2020, the Council updates the list twice a year. The next revision is scheduled for October 2024. For more background information on the list →eucrim 1/2020, 18. (AP)

Counterfeiting & Piracy

Commission Presents Toolbox against Counterfeiting

On 19 March 2024, the European Commission issued its Recommendation on measures to combat counterfeiting and enhance the enforcement of intellectual property rights. The Recommendation is designed as toolbox to promote and facilitate effective cooperation between rightsholders, providers of intermediary services, and competent authorities, and seeks to promote good practice and use of appropriate tools and new technologies. It also addresses specific tools for small and medium-sized enterprises (SMEs) since they are more likely to fail than larger companies when affected by counterfeiting. The overall aim of the Recommendation is to encourage all relevant entities and bodies to take effective, appropriate, and proportionate measures to combat IP-infringing activities both in the online and offline environments. The Recommendation focuses on five key areas:

- Fostering cooperation, coordination and information sharing to protect innovation and investments;
- Advancing IP enforcement procedures;
- Adapting IP practices to AI and virtual worlds;

- Providing SMEs with tools to better protect their intangible assets;
- Fostering IP awareness, training, and education among all relevant stakeholders.

All players in the value chain are called upon to exchange information on activities that infringe intellectual property rights. Service providers in the areas of transport, logistics, payment, social media and domain names should prevent the misuse of their services. For example, the establishment of reporting mechanisms and identification systems is recommended, as is the use of technologies to recognise counterfeit goods online. The Member States' authorities should also use AI systems to combat unauthorised goods and online content. To protect against cyber-attacks, the promotion of existing tools such as training is proposed. With regard to enforcement, the promotion of alternative dispute resolution procedures is encouraged. Member States are required to ensure adequate compensation for damages and to reassess the sanctioning of intentional counterfeiting and piracy by criminal organisations and the authorisation of undercover investigation methods.

The recommendation follows up on the 2020 Intellectual Property Action Plan. It pools findings of a broad consultation with relevant stakeholders and experts that had been being carried out since 2021. Even though the measures proposed are not binding or interpret binding law, the Commission, together with the European Union Intellectual Property Office (EUIPO), will closely monitor the effects and implementation of the Recommendation. An assessment of its effects is planned no later than three years after the adoption. The Commission will then decide whether additional measures are needed at EU level, taking into account technological developments and evaluations of the EU legal framework on the enforcement of IP rights and the fight against counterfeiting.

Counterfeiting and piracy remains a pressing concern with a huge impact on the EU's economy. In 2019, nearly 6% of all EU imports were counterfeit products (almost €119 billion in value) and leading to losses of €15 billion in tax revenues and more than 670,000 jobs. (TW)

Organised Crime

Launch of European Ports Alliance

On 24 January 2024, the European Commission and the Belgian Council Presidency officially launched the European Ports Alliance and its Public Private Partnership. Strengthening the resilience of logistics hubs through a European Ports Alliance is one of the key priorities outlined first in the EU Roadmap to fight drug trafficking and organised crime, adopted on 18 October 2023 (→eucrim 3/2023, 257). It also implements Commission President Ursula von der Leyen's commitments to take strong action in 2024 to fight drugs smuggling and criminal infiltration into European ports.

The partnership comes against the background that European ports, which account for 75% of EU external trade volumes and 31% of EU internal trade volumes, are particularly vulnerable to drug smuggling. Criminal networks increasingly use violence, corruption and intimidation to secure their smuggling activities in ports. Ports are the main gateway for drugs smuggled into the EU, which is also shown by the fact that 70% of all drugs seizures take place at EU ports.

The European Ports Alliance is based on three main elements:

- Mobilising the customs community against drugs trafficking;
- Strengthening law enforcement operations in ports and against the criminal organisations orchestrating drugs trafficking;
- Setting up a Public-Private Partnership helping against drugs smuggling and involving all relevant stakeholders, including ports authorities, private shipping companies and private operators working in ports.

Measures to improve security in all EU ports include:

- Provision of €200 million for funding modern equipment to help customs authorities scan containers and check imports more efficiently;
- Specific law enforcement operations in ports with increased support by Europol, Eurojust, the EPPO and the European Multidisciplinary Platform Against Criminal Threats (EMPACT);
- Protection of logistics, information, staff, and processes in ports through the Public-Private Partnership.

Looking at the institutional side of the Public-Private Partnership, meetings at the ministerial level will be held annually. They will identify remaining challenges, set strategic priorities and assess progress made. Senior official meetings will take place to prepare and follow up on the priorities set by the annual ministerial meeting. (TW)

Belgian Council Presidency: Better Fight against Organised Crime and Drug Trafficking

At the Justice and Home Affairs (JHA) Council Meeting on 4/5 March 2024, the Belgian Council Presidency discussed steps forward with regard to the fight against organised crime and drug trafficking – one of the priorities of the Belgian Council Presidency in the first half of 2024 (→eucrim 4/2023, 317).

As regards judicial aspects, Belgium pointed out its two strands of work: First, the plan to set up a network of prosecutors specialised in the fight against organised crime. The Presidency outlined the scope and tasks of this network and its link with Eurojust. Second, it is envisaged to strengthen judicial cooperation with third countries. Member states' re-

sources in third countries should be better pooled and coordinated. The EU will also put stronger pressure on non-cooperative jurisdictions (safe haven countries).

In the area of home affairs, the execution of the EU roadmap to fight drug trafficking and organised crime of October 2023 (→eucrim 3/2023, 257) is in progress. In this context, actions focus on mapping the criminal networks that pose the biggest threats to society, preventing criminal networks from recruiting children and young people, and boosting EU cooperation with countries in Latin America and the Caribbean. The EU Home Affairs Ministers agreed on recommendations regarding the implementation of best practices from Member States' capabilities to fight drug trafficking. Best practices include:

- Providing strategic means – such as offensive and defensive national drug strategies – to fight drug trafficking;
- Mapping illicit drug flows through the conclusion of information-sharing agreements;
- Disrupting criminal networks for instance by running automatic Schengen Information System checks for vehicles entries/exits in logistics hubs;
- Increasing the resilience of logistics hubs by reinforcing the maritime surveillance system.

Another key priority in the fight against organised crime and drug trafficking is the European Ports Alliance which was officially launched in January 2024 (→preceding news item).

At the JHA Council Meeting on 13/14 June 2024, the Belgian Presidency took stock of its actions against organised crime and drug trafficking during its term in the first half of 2024. The Home Affairs Ministers approved conclusions on the Europol report "Decoding the EU's most threatening criminal networks", which was presented in April 2024 (→following news item). Strengthening efforts in mapping high-risk criminal networks is seen as a fundamental step to further enhancing their dismantlement. The mapping exercise of high-risk criminal networks should also be conducted every two years.

As regards justice matters, the EU Justice Minister adopted conclusions on setting up a European Judicial Organised Crime Network and on strengthening judicial cooperation with third countries in the fight against organised crime. The Presidency also informed about the cooperation that has taken place in the course of the past six months with countries from Latin America and the Caribbean to address transnational crime. A major outcome of this cooperation was the La Paz Declaration that was adopted on 22 February 2024 in the framework of the high-level meeting of the EU-CELAC Coordination and Cooperation Mechanism on Drugs. The Declaration sets out five priorities for bi-regional cooperation and coordination in addressing the global narcotic drug situation. (TW)

Key Features of Most Threatening Criminal Networks in the EU

spot light At the beginning of April 2024, Europol presented its first report on the most threatening criminal networks operating in the EU. With the aim of deepening our understanding of the key characteristics of these networks, the report "Decoding the EU's most threatening criminal networks" identifies 821 criminal networks that represent the highest threat to the EU's internal security. It is based on a dataset designed specifically for the purpose of the report, which EU Member States and third countries contributed to.

According to the report, these 821 networks are active in a range of crime areas: drug trafficking, fraud, property crime, migrant smuggling, and trafficking in human beings (THB), etc. Drug trafficking, however, remains the major activity, with more than 50% of the networks involved in it and 36% even having a singular focus on this area of crime. Each of the 821 networks is unique, varying significantly in terms of composition, structure, criminal activity, territorial control, longevity, types of cooperation, and a range of other dimensions. Nevertheless, some key capabilities stand out as determining characteristics. Having decoded the ABCD of these networks, the report identified the following four common traits:

- *Agile*: 86% of the most threatening criminal networks are able to extensively infiltrate and misuse legal business structures (LBS). This helps their criminal business thrive, launder their criminal profits, and shield them from detection. They implement growth and survival strategies (e.g., countermeasures or corruptive practices to obtain information on law enforcement investigations or to influence judicial proceedings) that sustain them over long periods of time. Underscoring this finding, 34% of the most threatening criminal networks have been active for over 10 years. Furthermore, such networks also respond swiftly to new opportunities and challenges (e.g., new technologies), including those posed by law enforcement. Strong cohesion among network members is another key success factor for these networks.
- *Borderless*: The most threatening criminal networks have an international and often global reach, but they tend to limit their criminal activity to a region or a limited number of countries. 76% of the most threatening criminal networks are present/active in two to seven countries. The composition of networks is very international, with nationals from all EU Member States and many other countries around the world cooperating within the networks. Hence, 68% of networks are composed of members with multiple nationalities.

- *Controlling*: The most threatening criminal networks tend to specialise in one main criminal business and operate with a large degree of independence. They are characterised by a strong leadership that is often located close to operations but can also keep command remotely from global locations. Consequently, the leadership of 82% of the most threatening criminal networks is settled either in the main country of activity or in the country of origin of the key members.
- *Destructive*: As mentioned above, half of the most threatening criminal networks are involved in drug trafficking as their main activity. 71% of these networks engage in corruption to facilitate criminal activity or obstruct law enforcement or judicial proceedings. While 32% do not use violence to avoid detection by law, most networks use violence and intimidation as an inherent feature of their modus operandi. Furthermore, some of the most threatening criminal networks recruit members, even minors, from a section of the young and vulnerable population. These methods have a severe impact on the EU, its citizens, and society.

Europol stressed that information on these common traits identified in the report can be used as follows:

- As a starting point for further analysis and action;
- To enable policy-makers to make informed strategic decisions;
- To help law enforcement target the most threatening criminal actors active in the EU.

Welcoming the report, on 13 June 2024, the Council invited the EU Member States, the European Commission, and Europol to build on the results of the report, to further develop the intelligence picture on high-risk criminal networks, and to further ensure an effective policy response to the threat posed by these networks through strategic, tactical, and operational measures. (CR)

Heroin and other Opioids Flood EU Drug Market

The threat posed by heroin and other opioids to the EU are analysed in a report published by Europol and the EMCDDA on 24 January 2024. According to the report, opioid use remains a major part of the drug problem in Europe. While heroin is the most frequently used illicit opioid, other opioids such as methadone, buprenorphine, tramadol, fentanyl derivatives, and benzimidazole opioids (nitazenes) are also available illicitly. The number of high-risk opioid users in the EU is estimated at approx. 1 million. Based on data from 2021, the minimum estimated annual retail value of the heroin market is €5.2 billion (with a probable range of €4.1 billion to €6.7 billion based on data from 2021). The quantity of heroin seized by EU Member States more than doubled to 9.5 tonnes in 2021 — the highest amount in 20 years — with large individual consignments being detected at seaports. The EU counts around 1 million high-risk opioid users.

Looking at key areas for action at the EU and Member State levels in order to respond to developments in the illegal heroin and other opioids market, the report identifies the need to take action as follows:

- Improve the strategic intelligence picture;
- Strengthen responses to reduce supply and enhance security;
- Boost international cooperation;
- Invest in capacity-building;
- Strengthen policy, public health, and safety responses.

The report also points out that the trafficking and distribution of heroin is the mainstay activity for some criminal networks operating in the EU; they rely on well-established infrastructure and contacts. As with other drug types, the abuse of legal business structures, money laundering and corruption are among the key enablers of the illicit heroin market. (CR)

Cybercrime

LockBit Ransomware Disrupted

After a month-long operation, law enforcement officers from 10 countries, together with agents from Europol and Eurojust, compromised and took control of LockBit's primary platform and other crucial infrastructure belonging to the cybercriminal group's ransomware operation. The work of the international taskforce "Operation Cronos" significantly compromised the criminal group by the end of February 2024: more than 200 cryptocurrency accounts were frozen, 34 servers taken down, 14,000 rogue accounts closed, and two persons arrested.

LockBit emerged at the end of 2019 using the name "ABCD" ransomware. Over the past three years, this ransomware became the most frequently deployed ransomware variant worldwide. The criminal operation offered 'ransomware-as-a-service', with a core team creating its malware and running the website. It also licensed out its code to affiliates, who launch attacks causing billions of euros worth of damage.

By means of "Operation Cronos", law enforcement officials managed to develop decryption tools designed to recover files encrypted by the LockBit ransomware. These solutions are available for free in 37 languages on the "No More Ransom" portal. (CR)

Environmental Crime

New EU Rules on Protection of the Environment through Criminal Law

spot light

On 30 April 2024, Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC was published in the EU's Official Journal. On 16 November 2023, the European

Parliament (EP) and the Council reached a provisional agreement on the proposal presented by the Commission in December 2021 (→eucrim 4/2021. 219). The EP formally adopted the act at the end of February 2024, the Council adopted it at the end of March 2024.

The Directive establishes minimum EU-wide standards for the definition of environmental criminal offences and penalties, replacing the previous 2008 legislation. In addition, the new legislation includes measures to prevent and combat environmental crime and to effectively enforce Union environmental law. In detail, the Directive provides obligtations for the Member States to set up rules on the following issues:

- Definition of conduct that is considered an environmental criminal offence;
- Punishability of inciting, aiding and abetting, and attempt;
- Penalties for natural persons;
- Liability of legal persons;
- Penalties for legal persons;
- Aggravating circumstances;
- Mitigating circumstances;
- Freezing and confiscation of instrumentalities and proceeds from the criminal offences referred;
- Limitation periods;
- Jurisdiction;
- Investigative tools available for investigating or prosecuting criminal offences referred;
- Protection of and support for whistleblowers;
- Publication of information in the public interest and access to justice for the public concerned;
- Preventive measures;
- Provision of adequate resources;
- Provision of specialised regular training;
- Coordination and cooperation between competent authorities within a Member State;
- Cooperation between Member States and the Commission, and Union bodies, offices or agencies;
- Establishment of a national strategy on combatting environmental criminal offences;
- Recording, production and provision of anonymised statistical data that allow the monitoring of the effectiveness of the measures to combat environmental criminal offences.

The main features of the Directive include the following: The directive is applicable to offences perpetrated within the European Union, although Member States may elect to extend their jurisdiction to cover crimes committed outside their territories. The directive notably expands the list of criminal offences from nine to twenty, encompassing new crimes such as timber trafficking, the illicit recycling of ship components, and serious violations of chemical legislation. Furthermore, a clause pertaining to "qualified offences" has been incorporated into the legislation, targeting intentional acts that result in significant environmental degradation. These would include offences comparable to ecocide with catastrophic results such as widespread pollution or large-scale forest fires – offences that are already covered by the law of certain Member States and that are under discussion in international fora.

The penalties for these crimes are severe. Those who commit intentional offences resulting in death are liable to a maximum prison sentence of at least ten years, while other offences may result in imprisonment of up to five years. Qualified offences are subject to a maximum prison sentence of at least eight years. As regards fines for legal persons, Member States are able to choose between levying them according to the company's turnover or to set fixed amounts: for the most serious offences fines must be at least 5% of their total worldwide turnover or €40 million; for other offences fines must be at least 3% of turnover or €24 million. Additional sanctions include environmental restoration obligations, exclusion from public funding, and the withdrawal of permits.

Member States must also lay down rules concerning limitation periods necessary to combat environmental crime effectively, without prejudice to national rules that do not set limitation periods for investigation, prosecution and enforcement. Limitation periods depend on the minimum maximum penalty for imprisonment as defined in the Directive.

It is ensured that persons reporting offences will be provided with support, that judges, prosecutors, police and other judicial staff will undergo specialised regular training, and that Member States will organise awareness-raising campaigns to reduce environmental crime. They can also establish a fund to support prevention measures and tackle the consequences of environmental offences. In cross-border cases, national authorities will be required to cooperate among themselves and with other competent bodies, such as Eurojust, Europol or the European Public Prosecutor's Office.

Next steps: Member States are required to adapt their national laws accordingly by 21 May 2026. The Commission is required to submit an implementation report to the European Parliament and to the Council by 21 May 2028. By 21 May 2031, the Commission shall carry out an evaluation of the impact of the Directive addressing the need to update the list of environmental criminal offences referred to in Arts. 3 and 4. With regard to the unlawfully and intentionally committed offences (defined in Art. 3(2) of the Directive), the Commission is called on to regularly consider if there is a need to amend the criminal offences covered.

Criticism: Stakeholder criticised the legislative project in advance. Criticism included the overly broad definition of offences and the fact that the directive would open the door to corporate (environmental) criminal law. (TW/AP)

Terrorism

Report on the Dissemination of Terrorist Content Online

On 14 February 2024, the Commission adopted a report on the implementation of Regulation (EU) 2021/784, which addresses the dissemination of terrorist content online (→eucrim 2/2021, 95–97). The Regulation applies as of 7 June 2022 (→eucrim 2/2022, 112) The report evaluates the implementation of the Regulation by Member States and online platforms, as well as its effect on the prevention of the dissemination of terrorist content online. The main findings in the report include the following:

- *Designation of authorities*: As of 31 December 2023, 23 Member States have appointed competent authorities to issue removal orders, leading to around 350 orders to remove terrorist content.
- *Coordination and tools*: Cooperation between Member States and Europol, particularly through Europol's Internet Referral Unit (EU IRU), has been effective. The "PERCI" tool, launched on 3 July 2023, has facilitated the processing of removal orders and referrals, with 14,615 referrals processed by the end of 2023.
- *Hosting Service Providers' compliance*: Providers have taken proactive steps, including specific terms and conditions to limit the spread of terrorist content, and measures for the notification of imminent threats to life.
- *Remedies*: On the basis of information provided by the Member States, at least twelve Member States have "effective procedures" in place to enable hosting service providers and content providers to challenge a removal order. However, providers have not challenged such orders so far.
- *Support for smaller providers*: The Commission has launched projects to help smaller hosting service providers comply with the Regulation.
- *Infringement proceedings*: The Commission initiated proceedings against 22 Member States for not fully complying with the Regulation, resulting in increased notifications of competent authorities under Art. 12(1) of the Regulation and the closure of 11 infringement proceedings.

Overall, the report concludes that the Regulation has been effective in reducing the dissemination of terrorist content online, thereby ensuring the safety and security of EU citizens. (AP)

Racism and Xenophobia

EP Urges Council to Criminalise Hate Speech and Hate Crime

On 18 January 2024, the European Parliament (EP) adopted a resolution that calls on the Council to take a decision to include hate speech and hate crime among the list of "EU crimes" under Article 83(1) TFEU. The Commission tabled a corresponding proposal in December 2021 (→eucrim 4/2021, 221). MEPs criticise the Council's inaction for two years, even though hate is on the rise. Member States are urged to give up their opposition against the draft decision. The resolution also highlighted the following points:

- All forms of discrimination and hate, including hate speech and hate crimes, contradict the core values of the EU such as human dignity, freedom, democracy, equality, and respect for human rights;
- The underreporting of incidents against vulnerable groups and varying levels of legal protection across Member States hinder effective responses;
- There is an urgent need for a common EU approach establishing minimum standards for defining and penalizing hate speech and hate crime offenses;
- Special attention is needed for minors and vulnerable groups in order to ensure their protection from hate speech and hate crimes, including in digital spaces;
- The EU must improve data collection on hate incidents and take care for robust support systems for victims, including legal protection, access to justice, and specialized support services.

The inclusion of further crimes, not yet explicitly listed in Art. 83(1) TEU requires a unanimous decision in the Council. This decision is the necessary prerequisite for the Commission to table a concrete proposal on harmonised definitions and penalties for the crime in question. (AP/TW)

Procedural Law

Data Protection

ECJ Ruling on Right to Erasure of Biometric and Genetic Data

On 30 January 2024, the ECJ delivered its judgment in Case C-118/22 (*NG*) involving the Director of the National Police Directorate-General at the Bulgarian Ministry of the Interior (*Direktor na Glavna direktsia "Natsionalna politsia" pri MVR – Sofia*). The Court ruled that the indefinite and indiscriminate storage of biometric and genetic data of individuals convicted – by final judgement – of intentional offenses, such as fingerprints, photographs, and DNA profiles, is contrary to EU law.

The case arose in Bulgaria, where a person convicted of perjury was unable to have their data removed from police records, despite legal rehabilitation. Under Bulgarian law, data related to criminal convictions are stored indefinitely, to be deleted only upon the individual's death.

The judges in Luxembourg found this practice inconsistent with EU law, which requires that the grounds for storing such data must be periodically reviewed. They emphasised that, while the biometric and genetic data of a convicted person may be essential for the purposes of prevention, detection, investigation, and prosecution of

criminal offences, not all convicted individuals pose the same level of risk for the commission of future offenses, and therefore across-the-board data retention until death is unjustified. The judgment mandates that national laws must provide mechanisms for regular assessment of the necessity of data retention by the data controller as well as grant individuals the right to request the deletion of their data when it is no longer necessary. This decision ensures that data retention practices respect individuals' rights to privacy and data protection under EU law.

In January 2023, the ECJ already held that Bulgaria's law providing for the systematic collection of biometric and genetic data for the creation of police records was incompatible with the EU's data protection rules (Case C-205/21, *V.S.* →eucrim 1/2023, 32–33). (AP)

ECJ Ruling on Fingerprints in Identity Cards

On 21 March 2024, the ECJ delivered its judgment in Case C-61/22 (*RL*) involving the city of Wiesbaden, the capital of the German state of Hesse, regarding the mandatory inclusion of two fingerprints in identity cards. In the case at issue, a German citizen objected to the City of Wiesbaden's refusal to issue an identity card without his fingerprints. For the Opinion of the Advocate General (AG) *Laila Medina* in this case →eucrim 2/2023, 150–151.

The Court found that the obligation to insert two complete fingerprints into the storage medium of identity cards is compatible with the fundamental rights to respect for private life and protection of personal data. Although it constitutes a limitation of said fundamental rights, the measure is justified by the objectives of preventing the production of false identity cards and identity theft and ensuring the interoperability of verification systems.

However, the ECJ declared the underlying regulation requesting this measure (Regulation (EU) 2019/1157 of the European Parliament and of the Council of 20 June 2019 on strengthening the security of identity cards of Union citizens and of residence documents issued to Union citizens and their family members exercising their right of free movement) invalid because it was adopted on an incorrect legal basis, namely following the ordinary legislative procedure instead of the special legislative procedure requiring unanimity in the Council. Despite this irregularity, the ECJ decided to uphold the Regulation until a new one is adopted on a correct legal basis, with a deadline set for 31 December 2026. This decision was made to avoid serious negative consequences for EU citizens and their safety. (AP)

Procedural Safeguards

Comparative Study on Access to Classified Data in National Security-Related Immigration Cases

In a study, released in April 2024, national experts explored and compared the extent to which European standards are applied in 25 EU Member States with regard to the access to State classified information in immigration-related proceedings. The study relates to administrative decisions against foreign nationals who pose a threat to national security and are not granted the right to enter or reside in EU Member States. These decisions are mainly based on – generally classified – security information to which the foreign national has access only in exceptional cases and to a certain extent. The CJEU and ECtHR, however, established procedural standards of access, including, as a key element, the need to provide the applicant with a specific and concrete decision, at least by disclosing the "essence of the grounds" of reasons.

The study underscores the significance of the utilisation of the "essence of the grounds concept" in defining national frameworks concerning applicants' defence. It revealed that 12 of 25 researched EU countries (Denmark and Italy were not researched) do not adhere to the required standards of administrative decisions based on classified data, six countries apply the essence of the grounds concept to some extent but inconsistently, and only seven countries fully comply with European law in this regard.

The study also found that national frameworks generally do not allow applicants' access to classified information supporting decisions of state security allegations. Two main judicial avenues for challenging access restrictions were identified across EU Member States: first, through the review of the primary administrative decision containing the security findings, and second, via a separate access procedure specifically for challenging non-disclosure. In some countries access is contingent to a – sometimes complex – declassification procedure.

The study concludes that it is insufficient to solely grant courts with access to classified data; it is essential for individuals facing national security allegations to have access to the essence of the grounds, which empowers them to effectively exercise their defence rights. Considering the situation in some countries, the authors also advocate legislative reforms in compliance with the CJEU's and ECtHR's case law. (TW)

Ne bis in idem

2024 Update on Ne Bis In Idem Case Law

In February 2024, Eurojust published an updated edition of its overview of the CJEU case law on the *ne bis in idem* principle in criminal matters under Art. 50 of the Charter of Fundamental Rights of the European Union and Arts. 54 to 58 of the Convention Implementing the Schengen Agreement (CISA). Where relevant, reference is also made to the European Convention on Human Rights (ECHR) and the case-law of the European Court of Human Rights (ECtHR). The overview covers 37 judgements starting with the landmark ruling in Gözütok/Brügge of February 2003 and ending with the

judgment in case C-58/22 (*Parchetul de pe lângă Curtea de Apel Craiova*) of 25 January 2024.

The update contains summaries of the CJEU's judgments and sets out the territorial, temporal, and material scope of the principle. The last section is dedicated to the possible limitations to the ne bis in idem principle (the "enforcement condition", duplication of proceedings and penalties of a criminal nature, and state declarations under Art. 55 CISA). (CR)

ECJ: Prosecutorial Orders Not to Take Further Action Do Not Automatically Bar Other Criminal Proceedings

On 25 January 2024, the ECJ delivered a ruling interpreting the *ne bis in idem* principle in Art. 50 CFR with regard to two diverging decisions on criminal liability from different prosecution services (Case C-58/22 – *NR v Parchetul de pe lângă Curtea de Apel Craiova*).

➤ *Facts of the case*

In the case at issue, NR, the president of Romanian company BX, demanded from some employees to pay a sum of money which she was required to pay, on pain of their contracts of employment being terminated. Her demand not having been satisfied, she issued and signed decisions terminating those contracts. The employees concerned then brought two criminal complaints against NR to two different prosecution services.

The first criminal case before the public prosecutor's office of Slatina, Romania, was conducted *in rem* for the offence of extortion; the public prosecutor in charge adopted, on the basis of a report of the police force in charge of the investigation and without conducting further interviews, an order that no further action be taken. The pre-trial chamber of the Slatina court of first instance rejected an application by the chief prosecutor to reopen the case; the order that no further action be taken in the case therefore became final.

The second criminal proceedings before the public prosecutor's office of Olt, Romania, were conducted *in personam* against NR for the offence of passive corruption. They resulted in a judgment by the Olt Regional Court sentencing NR to a suspended term of imprisonment.

The referring *Curtea de Apel Craiova* (Court of Appeal, Craiova, Romania) was unsure whether the order not to take action by the public prosecutor in Slatina barred any further criminal proceedings, and thus the judgment by the tribunal in Olt infringed NR's right from Art. 50 CFR.

➤ *The ECJ's jurisdiction*

The ECJ first confirmed its settled case-law on the wide application of the CFR to situations that, at first glance, do not clearly relate to Union law. The conditions of Art. 51(1) CFR, according to which the provisions of the Charter are addressed to the Member States only when they are implementing EU law, are considered satisfied in the present case because NR was convicted for the offence of passive corruption and the underlying national law provision ensured the transposition of Framework Decision 2003/568 into the Romanian legal order.

➤ *The "bis" condition*

As regards the merits of the case, the ECJ recalls that the application of the principle *ne bis in idem* is subject to a twofold condition, namely, first, that there must be a prior final decision (the "*bis*" condition) and, secondly, that the prior decision and the subsequent proceedings or decisions must concern the same facts (the "*idem*" condition).

In addition, it recalls that two requirements must be fulfilled in view of the "*bis*" condition:

- Further prosecution has been definitively barred, in accordance with national law;
- The order barring further public prosecution was adopted following a determination as to the merits of the case and not on the basis of merely procedural grounds.

Given the rejection by the Slatina court not to reopen criminal proceedings, the ECJ considers the final nature of the order not to take action and thus sees the first requirement met. However, the ECJ doubts whether the second requirement is met: although the order by the prosecutor in Slatina may contain an assessment of the material elements of the offence alleged, such as, *inter alia*, an analysis of the criminal liability of NR, as the alleged perpetrator of that offence, the failure to interview witnesses could constitute an indication of the lack of such an examination. This is now for the referring court to verify.

➤ *The "idem" condition*

In order to establish the "same criminal offence" as formulated in Art. 50 CFR, the ECJ reaffirms its settled case-law that the legal classification under national law of the facts and the legal interest protected are irrelevant. However, it found that the conduct of the first criminal proceedings *in rem* and the conduct of the second ones *in personam* "cannot be regarded as irrelevant for the purpose of that assessment." It is apparent that NR had not formally acquired the status of a suspect in the first proceedings. In order to recognise the *ne bis in idem* principle, there must be an identity of persons in the two criminal proceedings at issue. This requires that the legal situation as criminally liable for the acts constituting the offence being prosecuted has been examined vis-à-vis NR which seemed not the case.

The ECJ concludes that several aspects of the case speak against regarding NR as having been "finally acquitted" as a result of the first prosecutorial order.

➤ *Put into focus*

The case at issue gave opportunity for the judges in Luxembourg to recall the principles of the ECJ's settled case-law with regard to the applicabil-

ity of Art. 50 CFR and the conditions "bis" and "idem" provided therein. The case calls to mind that, even though the conditions are interpreted broadly in favour of defendants, the requirements as developed and refined in the ECJ's case-law, must be duly assessed in each individual case. There are two main takeaways from the judgment: First, a decision by a prosecutor may not be considered "final" if essential witnesses who are apparently known to the law enforcement authorities have not been interviewed. Second, the "same facts" can only be established if the two criminal proceedings in question concretely eyed the same person. As a result, it is prevented that Art. 50 CFR is misused by "shopping" for the best first decision. (TW)

Victim Protection

Anti-SLAPP Directive Published

spot light After the European Parliament and Council had finally signed the act on 11 April 2024, Directive (EU) 2024/1069 on protecting persons who engage in public participation from manifestly unfounded claims or abusive court proceedings ("Strategic lawsuits against public participation" – commonly dubbed "SLAPP") was published in the EU's Official Journal of 16 April 2024. For the Commission's proposal →eucrim 2/2022, 119.

The "Anti-SLAPP Directive" provides safeguards against manifestly unfounded claims or abusive court proceedings in civil or commercial matters with cross-border implications brought against natural and legal persons on account of their engagement in public participation. The main safeguards include the following:

- Natural or legal persons who have been targeted by a SLAPP can request the early dismissal of any claims that are deemed to be without merit;
- In the event that a court determines the proceedings to be abusive, it may require the claimant to bear the burden of all legal costs (unless the defendant's costs are excessive) and provide financial security for the costs of the proceedings and potential damages;
- Judges may impose penalties or other equally effective measures on those initiating SLAPP cases as a means of deterring such actions.
- It is also incumbent upon EU Member States to refuse to recognize or enforce judgments from third countries that are manifestly unfounded or abusive.

In order to provide additional support to SLAPP victims, Member States must facilitate the involvement of associations, organisations, and trade unions in assisting defendants. Comprehensive information on available procedural safeguards and remedies must be provided in a central location.

Timing: Member States must bring into force the laws, regulations and administrative provisions necessary to comply with the Directive by 7 May 2026. The Commission must assess the application of the Directive by 7 May 2030. (AP)

Freezing of Assets

New Directive on Asset Recovery and Confiscation

spot light In April 2024, the European Parliament and the Council adopted new EU-wide minimum rules on the tracing, identification, freezing, confiscation and management of property within the framework of proceedings in criminal matters. Directive (EU) 2024/1260 on asset recovery and confiscation was published in the EU's Official Journal of 2 May 2024. The respective Commission proposal was tabled on 25 May 2022 (→eucrim 2/2022, 76).

The Directive applies to a wide range of crimes, referring to other EU directives that set out minimum rules for criminal offences, such as organised crime, terrorism, trafficking in human beings, drug trafficking, corruption, and money laundering. It will also apply to the recently adopted Directive on the criminalisation of Union restrictive measures (→separate news item, supra pp. 14–15). Therefore, profits can be more easily confiscated from persons or companies circumventing EU sanctions, such as those imposed with regard to Russia's aggression against Ukraine.

The Directive obliges Member States to have, among other things, the following rules/measures in place:

- Measures to enable the swift tracing and identification of instrumentalities and proceeds, or of property which is, or might become, the object of a freezing or confiscation order in the course of proceedings in criminal matters;
- Where an investigation is initiated in relation to a criminal offence that is liable to give rise to substantial economic benefit, asset-tracing investigations shall be carried out immediately by competent authorities;
- Measures to enable the freezing of property and, in the event of a final conviction, the confiscation of instrumentalities and proceeds stemming from a criminal offence;
- Rules allowing Member States to confiscate property of a value corresponding to the proceeds of a crime;
- Possibility of confiscation of criminal assets or property of equal value transferred to a third party, if the third party knew or should have known that the purpose of the transfer or acquisition was to avoid confiscation;
- Possibility of confiscation of instrumentalities, proceeds or property where criminal proceedings have been initiated but cannot be pursued because of one or more of the following circumstances: illness, abscondence, and death of the suspect/accused person or if the limitation period for the relevant criminal offence prescribed by national law is below 15 years and

has expired after the initiation of criminal proceedings;

- Possibility of confiscation of unexplained wealth where the assets concerned are linked to activities carried out as part of a criminal organisation and generate significant economic gain;
- Victims claims against the person who is subject to a confiscation measure must be taken into account within the relevant asset-tracing, freezing and confiscation proceedings and Member States must take the necessary measures to return the property to the victim if he/she is entitled to restitution;
- Obligation for Member States to adopt a national strategy for asset recovery by 24 May 2027 at the latest, and to make updates at regular intervals of no longer than five years.

The new legislation also provides for the sale of frozen property, under certain conditions and even before final confiscation, for example when the property is perishable or when the costs of storing or maintaining the property are disproportionate to its market value.

From an institutional viewpoint, the Directive reinforces asset recovery offices, whose role will be to facilitate cross-border cooperation in relation to asset tracing investigations. They will be tasked with tracing and identifying criminal money, in support of asset tracing investigations carried out by national authorities and the European Public Prosecutor's Office. They will also trace and identify instrumentalities, proceeds or property which are the subject of a freezing or confiscation order issued by a body in another Member State. Asset recovery offices must be given access to the relevant databases and registers in order to carry out these tasks (e.g. national property registers, national citizenship and population registers, national registers of motor vehicles, aircraft and watercraft, commercial registers and national registers of beneficial owners).

Furthermore, Member States must set up or designate asset management offices that will manage frozen or confiscated property directly or provide support to other competent bodies.

The Directive entered into force on 22 May 2024. It must be transposed by 23 November 2026. (TW)

Cooperation

Police Cooperation

Prüm II Regulation Enters Into Force

spot light On 5 April 2024, Regulation (EU) 2024/982 on the automated search and exchange of data for police cooperation, and amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, (EU) No 2019/817 and (EU) 2019/818, was published in the Official Journal of the EU. The so-called "Prüm II Regulation" builds upon the existing Prüm legislation that established a framework for searching and exchanging information between the competent authorities of the Member States. It lays down the conditions and procedures for automated searching of DNA profiles, dactyloscopic data, and certain vehicle registration data.

As a novelty, the Prüm II Regulation contains two new data categories: facial images and police records (reference numbers of suspects and convicted criminals). It also lays down rules for the exchange of core data after a confirmed biometric data match. Upon claims by the European Parliament, the Regulation reiterates the importance of a human decision before information is released. In addition, a due diligence clause ensuring that data exchanges fully respect fundamental rights, and a proportionality check on exchanges is included.

Under the new Regulation, queries to search for missing persons or to identify human remains are possible in all data categories, provided that this is permitted under national law. Other innovations include the establishment of the European Police Records Index System (EPRIS) to allow for the automated exchange of police records. Furthermore, it adds Europol to the Prüm framework, allowing the agency to search national databases in order to cross-check information it has received from third countries.

The European Parliament gave its green light on 8 February 2024, and the Council on 26 February 2024. The Regulation was signed on 13 March 2024 and entered into force on 25 April 2024.

The "upgrade" of the Prüm framework was proposed by the Commission in December 2021 as part of the "EU Police Cooperation Code" (→eucrim 4/2021, 225–226). Civil society organisations heavily criticised the new initiative putting forward doubts about the necessity and proportionality of the measures and voicing concerns over serious fundamental rights risks (→eucrim 3/2022, 194 and eucrim 3/2023, 263). (CR)

Judicial Cooperation

Transfer of Criminal Proceedings: Political Agreement and ECBA Opinion

On 1 March 2024, the European Criminal Bar Association (ECBA) released an opinion on the proposal for a Regulation on the transfer of proceedings in criminal matters. The Commission initiated the legislation in April 2023 (→eucrim 1/2023, 40). It aims to establish an EU instrument with uniform conditions for the transfer of criminal proceedings initiated in one EU Member State and to be transferred to another. The law will be critical in ensuring that the best-placed country investigates or prosecutes a criminal offence and in preventing unnecessary

parallel proceedings (of the same suspect) in different EU Member States.

The ECBA's opinion reacts to trilogue negotiations between the Council, the European Parliament (EP) and the Commission and focuses on two aspects:

- The right to an effective remedy;
- The right of suspects or accused persons to request a transfer of proceedings.

The ECBA stresses that, given the wide discretion for national authorities as to whether a case should be transferred, the suspect and accused person must have an effective possibility of review in both the requesting and the requested Member State. Additional precise provisions are needed in this regard in line with the EP's position. These provisions must include the right to inspect the case files, in order to make an informed decision on whether to apply for remedies and on what grounds. Furthermore, the EU law must provide for a mandatory hearing before the competent judge, in order to ensure that the arguments brought before the judge are heard and considered in the subsequent court decision. The suspensive effect of the request for transfer after the issuing of an indictment, as proposed by the Commission, should be maintained.

As regards the right of suspects or accused persons to request a transfer of proceedings, the ECBA calls on the legislator not to water down the respective provision and to respect the equality of arms.

On 6 March 2024, the negotiators of the Belgian Council Presidency and the EP announced that they reached a provisional agreement on the Regulation. The suspect or accused person, or a victim, have, in accordance with the procedures laid down in national law, a right to propose to the competent authorities of the requesting or requested State that criminal proceedings be transferred under the conditions set out in the Regulation. The country in which the criminal investigation is taking place and which wishes to transfer the proceedings to another country must give due consideration to the legitimate interests of the suspect or accused person as well as the victim. The new law will also foresee an obligation that the accused or suspect and the victim must be informed about the intention to transfer proceedings and should be given the opportunity to provide an opinion about this transfer.

Suspects, accused persons and victims will also have the right to an effective legal remedy in the requested State against a decision to accept the transfer of criminal proceedings. The Council and EP agreed that the time limit for seeking an effective legal remedy is no longer than 15 days from the date of receipt of the reasoned decision to accept the transfer of criminal proceedings. The final decision on the legal remedy must be taken without undue delay and, where possible, within 60 days.

The text now needs to be formally adopted by the Council and EP. This will happen after the elections to the EP. After having been published in the Official Journal, the Regulation can enter into force. The regulation will start to apply two years after its entry into force. (TW)

How to Involve the Office of the Prosecutor of the ICC in a JIT

On 13 February 2024, Eurojust published a factsheet explaining the ways in which the Office of the Prosecutor of the International Criminal Court (ICC-OTP) may be involved in Joint Investigation Teams (JITs). The flyer explains the steps to be taken to formally include the Office and outlines the support offered by Eurojust and the JIT Secretariat during the different phases of the JIT.

The ICC-OTP is an independent organ of the ICC. It is responsible for examining situations under the jurisdiction of the ICC, i.e., genocide, war crimes, crimes against humanity, and crimes of aggression. Where these crimes appear to have been committed, the Office carries out investigations and prosecutions against the alleged perpetrators. (CR)

European Arrest Warrant

FRA Report Sees Room for Improvement to Guarantee Rights in EAW Proceedings

At the end of March 2024, the EU Fundamental Rights Agency (FRA) published a report on how the principles and rights in European Arrest Warrant (EAW) proceedings are upheld in practice. The report is a response to a call from the Council towards FRA to extend its previous work on the application of the procedural rights directives to the specific application of selected procedural rights and safeguards in surrender proceedings. The report is based on desk research and interviews with persons involved in the proceedings, including requested persons and lawyers. It covers 19 EU Member States: Belgium, Croatia, Cyprus, Czechia, Estonia, Finland, Germany, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Slovakia, Slovenia, Spain and Sweden.

The report is divided into the following four thematic chapters; each chapter considers different aspects of EAW proceedings and the corresponding procedural rights of requested persons at stake, with a look at both the law and practice:

- The fundamental rights implications of issuing and executing EAWs, focusing on proportionality aspects of issuing an EAW and fundamental rights-based grounds for non-execution (mainly violations of the prohibition of torture and inhuman or degrading treatment and the right to a fair trial);
- The right to access to a lawyer in EAW proceedings and the role it plays

in ensuring respect for other procedural rights;
- The right to information in EAW proceedings;
- The right to interpretation and translation.

The report ends with a conclusion summarising the main findings. Key findings of the report are:
- The principles of mutual trust and recognition can lead judicial authorities to overlook personal circumstances, such as ill-health, family situation, or detention conditions in the issuing country. Therefore, it is important that wider rights implications of cross-border transfers are assessed in each individual case or even alternatives to ensuring justice without using the EAW are considered.
- Due to a lack of knowledge and ability defendants are hindered in their right to choose a lawyer freely instead of having State-appointed lawyers in the arresting state. Member States are called to improve mechanisms, together with the bar associations, that enable defendants to hire their own lawyer if they wish to do so; this should be accompanied by lists of lawyers experienced in EAWs that can be provided to the defendants. Member States should also ensure that sufficient time and adequate facilities are available to enable the requested persons to consult with their lawyers before the first hearing.
- Defendants are often either unaware of their right to have legal assistance not only in the executing country but also in the issuing country or they do not get help finding one. Hence, several measures should be implemented to ensure effective access to dual representation. These measures should include better guidance for police and judicial authorities highlighting the need to inform requested persons about this right without delay. Issuing Member States are encouraged to follow the good practice of including the name of the lawyer representing the requested person in the issuing state in the EAW form, or, if the person does not have a lawyer, to attach a list of lawyers to the EAW form.
- Even though requested persons, in general, are informed about their rights, the reasons for arrest and the content of the EAW, information is often delayed or information is not fully understood. As a result, materials should be provided in simple and accessible language avoiding legal jargon. Training, checklists and guidance could ensure the police and legal professionals inform those arrested so that defendants fully understand proceedings.
- Looking at translation and interpretation, the problem remains that often quality is poor. Sometimes this is due to short deadlines and the difficulty in finding people to translate less widely spoken languages. Member States should ensure, in every case where it is necessary, the availability of qualified interpreters and translators. If there is a lack of suitable interpreters and translators, pooling interpreters and translators between countries should be implemented. It is also important that Member States ensure an adequate standard, e.g., by introducing mechanisms for verifying interpreters' and translators' actual ability to understand, interpret and translate legal terms and concepts.

In sum, FRA's report on EAW proceedings and the rights guaranteed therein provides evidence to enable a critical assessment of the practical implementation of the Framework Decision on the EAW – 20 years after its entry into force. (TW)

European Investigation Order

ECJ Ruled in EncroChat Case

spot light On 30 April 2024, the ECJ delivered its judgment in the EncroChat case (Case C-670/22, *M.N.*). The case concerned the retrieval of German user data stored on a Europol server by the German Federal Criminal Police Office. The French police had been able to infiltrate the encrypted telecommunications service EncroChat, whose devices were often being used by criminals. This French operation led to several follow-up investigations, also in Germany.

The ECJ responded to a number of issues put forward by the Regional Court of Berlin (*Landgericht Berlin*) that cast doubt on the lawfulness of European Investigation Orders issued by the Frankfurt General Public Prosecution Service of Frankfurt a.M. The aim had been to receive consent from France for use of data from the infiltration of EncroChat devices by French and Dutch authorities as evidence in German criminal proceedings.

➤ *Background of the case before the ECJ*

The service company EncroChat provided encrypted mobile phones that were often used by criminals, e.g., for the purpose of illegal drug trafficking – as in the case before the Regional Court of Berlin. With the assistance of Dutch experts and authorisation by a French investigative judge, the French police were able to install a Trojan software on the terminal devices via a simulated update and thus read the chat messages of thousands of users in real time, including those who used the network for criminal activities. This led to several follow-up investigations, including in Germany.

The German Federal Police Office (*Bundeskriminalamt – BKA*) was able to retrieve the intercepted data relating to EncroChat users in Germany from a Europol server. By means of European Investigation Orders (EIOs), the General Public Prosecution Service of Frankfurt sought *ex post* authorisation for the transmission and use of these data in German criminal proceedings.

The Regional Court of Berlin submitted a series of questions on the lawful-

ness of the EIOs to the ECJ relating to the following issues:

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

For further information on the background of the referral →eucrim 3/2022, 197–198. For the Advocate General's opinion →eucrim 3/2023, 264–265. For the law enforcement operation against EncroChat →eucrim 1/2021, 22–23 and eucrim 2/2023, 163–164.

➤ *The ECJ's replies*

The ECJ partly divided the questions into subtopics, partly reformulated them, and considered them together. In general, the judges in Luxembourg considered it decisive that the EIO had been issued in order to obtain evidence that was already in the possession of the competent authorities in the executing State (here: France) and not to seek specific evidence that first would have had to be collected in the executing State by carrying out investigative measures. In detail, the judges in Luxembourg gave the following replies to the Regional Court of Berlin:

➤ *Had the EIO to be issued by a judge?*

With its first question, the Regional Court of Berlin asked whether Arts. 2(c) and 6(1) of Directive 2014/41 (the EIO Directive) should be interpreted as meaning that an EIO for the transmission of said evidence must necessarily be issued by a judge.

The ECJ noted that the Directive includes a public prosecutor among the authorities, who, like a judge, court, or investigating judge, is understood to be a "judicial authority" competent to issue EIOs without the necessity of validation. It is crucial for the ECJ whether, in purely domestic situations, public prosecutors can issue orders for the transmission of evidence already in the possession of another competent national authority. In this context, the ECJ pointed to Section 100e(6) no 1 of the German Code of Criminal Procedure (*Strafprozessordnung – StPO*), which regulates the use of personal data obtained by covert remote search of information technology systems for *other* criminal proceedings. The ECJ acknowledged the German government's statement that, in this case, the transmission of the data could be ordered by a public prosecutor and does not need prior approval by a judge (as is necessary for the original order for a covert remote search).

➤ *Under which conditions could the EIO be issued?*

As to the second question, the ECJ verified whether and, if so, under what conditions Art. 6(1) of the EIO Directive precludes a public prosecutor from issuing an EIO for the transmission of evidence already in the possession of the competent authorities of the executing State in which that evidence was acquired. Evidence in said case had been acquired via the interception – by those authorities on the territory of the issuing State – of telecommunications of all the users of EncroChat mobile phones that enabled end-to-end encrypted communication through special software and modified hardware.

Looking at the required review of the necessity and proportionality of issuing the EIO (Art. 6(1)(a) of the EIO Directive), the ECJ found that the assessment must be carried out in the light of the national law of the issuing State, taking into account that evidence already in the possession of the competent authorities of the executing State has been transmitted. Against this backdrop, the ECJ provided the following two clarifications:

- It is not necessary that, at the time when the EIO in question is issued, suspicion, based on specific facts, of a serious offence in respect of each person concerned exists if no such requirement arises under the national law of the issuing State (here: German StPO);
- It is irrelevant that the integrity of the data gathered by the interception measure cannot be verified because of the confidentiality of the technology underpinning that measure, provided that the right to a fair trial is guaranteed in the subsequent criminal proceedings.

Looking at the requirement that the EIO "could have been ordered under the same conditions in a similar domestic case" (Art. 6(1)(b) of the EIO Directive), the judges in Luxembourg reiterated that a distinction must be made between two differing situations. The first situation concerns circumstances in which the investigative measure indicated in the EIO consists of obtaining existing evidence already in the possession of the competent authorities of the executing State, that is to say, the transmission of that evidence to the competent authorities of the issuing State. The second situation concerns circumstances in which the collection of evidence is sought via a specific investigative measure, i.e., the evidence does not yet exist. Since the first situation applies in the present case, the ECJ ruled that the issuing of an EIO is not subject to the same substantive conditions as those that apply in the issuing State in relation to the gathering of that evidence. Moreover, the fact that, in this case, the executing State (here: France) gathered evidence on the territory of the issuing Sate (here: Germany) and in its interest is irrelevant in that respect.

The judges in Luxembourg added, however, that the EIO Directive also guarantees judicial review of compliance with the fundamental rights of the persons concerned. Therefore, it is necessary that a party must be "in

a position to comment effectively on a piece of evidence that is likely to have a preponderant influence on the findings of fact." If this is not the case, the national court must find an infringement of the right to a fair trial and exclude that evidence in order to avoid such an infringement.

➤ *Who must be notified under Art. 31 of the EIO Directive, if at all?*

In another set of questions, the Regional Court of Berlin asked, in essence, whether Art. 31 of Directive 2014/41 must be interpreted as meaning that a measure entailing the infiltration of terminal devices for the purpose of gathering the traffic, location and communication data of an internet-based communication service constitutes an "interception of telecommunications", within the meaning of that article. And, if answered in the affirmative, whether this interception must be notified to a judge of the Member State on whose territory the subject of the interception is located.

The ECJ first clarified that the concept of "telecommunications" used in Art. 31 of the EIO Directive must be given an independent and uniform interpretation throughout the EU. Considering the wording, context, and objective of Art. 31, the ECJ found that the infiltration of terminal devices for the purpose of gathering communication data as well as traffic or location data from an internet-based communication service indeed constitutes an "interception of telecommunications" within the meaning of Art. 31(1) of Directive 2014/41.

Secondly, as to the question of which authority must be notified, the ECJ observed that both the wording of Art. 31(1) ("competent authority") and the EIO form leave this question open. It follows that the Member States on whose territory the subject of the interception is located must designate the authority for the purpose of notification. However, the intercepting Member State (here: France) can submit the notification to any appropriate authority of the notified Member States (here: Germany) if it is not in a position to identify the competent authority in that State.

➤ *What is the scope of protection of Art. 31 of the EIO Directive?*

In the context of Art. 31 of the EIO Directive, the Regional Court of Berlin also asked whether this provision intends to protect the rights of users affected by a measure for the "interception of telecommunications" within the meaning of that article, and whether that protection would extend to the use of the data thus collected in the context of a criminal prosecution initiated in the notified Member State.

The ECJ pointed out that the interception of telecommunications amounts to an interference with the right to respect for the private life and communications – enshrined in Art. 7 CFR – of the target of the interception. Thus, Art. 31 intended not only to guarantee respect for the sovereignty of the notified Member State but also to ensure that the guaranteed level of protection in that Member State with regard to the interception of telecommunications is not undermined, in short: it also protects the rights of the affected users.

➤ *Does EU law require the exclusion of unlawfully obtained evidence?*

With this last question, the Regional Court of Berlin queried whether the principle of effectiveness requires national criminal courts to disregard information and evidence obtained in breach of the requirements of EU law in criminal proceedings against a person suspected of having committed criminal offences.

The ECJ reiterated its case law on the admissibility of information obtained contrary to EU law in criminal proceedings. As a rule, the principle of procedural autonomy enables the Member States' powers to establish procedural rules for actions intended to safeguard the rights that individuals derive from EU law. However, this rule has two limits:

- The national rules cannot be less favourable than the rules governing similar domestic actions (the principle of equivalence);
- They cannot render impossible in practice or make excessively difficult the exercise of rights conferred by EU law (the principle of effectiveness).

Referring to Art. 14(7) of the EIO Directive, the judges in Luxembourg clarified in this respect that, in criminal proceedings against a person suspected of having committed criminal offences, national criminal courts are required to disregard information and evidence if that person is not in a position to comment effectively on that information and on that evidence and the said information and evidence are likely to have a preponderant influence on the findings of fact.

➤ *Put into focus*

At first glance, the ECJ appears to strengthen those in favour of the usability of the data from the EncroChat police hack operation in the EU Member States. As Advocate General *Carpeta's* Opinion (→eucrim 3/2023, 264–265) already suggested, the arguments against their use on the grounds of a breach of EU law are weak. According to both the Advocate General and the ECJ, the decisive fact is that the EIO issued by the Frankfurt public prosecutor in the present case was in order to obtain evidence already in possession of the competent authorities in the executing State. In such cases, the ECJ considers the requirements for such an EIO to lawfully obtain existing information to be significantly lower compared to a case in which an EIO is issued in order to initiate the collection of evidence.

On closer inspection, however, the ECJ deviates in part from the Advocate General's conclusions and various backdoors remain open. This leaves glimmers of hope for defence lawyers of clients against whom criminal

proceedings were initiated as a result of the surveillance. These backdoors must be skillfully exploited in further proceedings before German courts. The following statements by the ECJ may serve as starting points:

- The ECJ reinforces the importance of Art. 31 of the Directive. It is now beyond question that the French authorities should have informed the German side of the measure. It may be true that the German Federal Criminal Police Office and the German Public Prosecutor General's Office were informed in this case. However, they should have forwarded the information to the judge/court responsible under German law. This was a deliberate circumvention of the requirement for a court decision (*Richtervorbehalt*). Under German law, circumventing this requirement of jurisdiction normally leads to a ban on the use of evidence.
- The ECJ emphasises the individual-protecting nature of Art. 31. This was still questioned by the Federal Court of Justice (*Bundesgerichtshof – BGH*; on the BGH decision in the EncroChat case →eucrim 1/2022, 26–37). The individual-protecting function of Art. 31 must therefore be given greater weight than has been accorded by the German courts to date when striking a balance between the interest in criminal prosecution and safeguarding the interests of the person concerned. It is also important that the function of protecting the individual cannot be reduced to whether or not the person concerned can seek legal protection in the intercepting state (here: France): the ECJ makes it clear that the notified state must ensure legal protection, as the notified state is where the person concerned must seek appropriate legal review.
- The ECJ emphasises that Art. 6(1)(b) of the EIO Directive applies, meaning that the measure could also be ordered in a comparable (purely) domestic case. The German Federal Court of Justice still rejected the applicability of this standard to cases in which evidence is in the possession of the executing State (→eucrim 1/2022, 26–37). The ECJ follows the German Federal Government's submission that the public prosecutor's office could also have requested disclosure of the information under German law in accordance with Section 100e StPO and that this does not imply suspicion of a specific criminal offence in cases of "chance discovery". It is questionable, however, whether the federal government's view is correct, because it overlooks the fact that, under German law, the basic measure (the overt remote search of information technology systems, also called the online search) must at least be based on a concrete suspicion of an offence and does not permit mass access to unspecified information systems. Another important issue is: at least this basic measure should have been ordered by a special division of the regional court (and not just by the local judge, as is usual for other investigative measures). It cannot be denied that, in the entire chain of information transfers, the legality of the basic measure was never examined by a court in accordance with German law, but could easily be overridden by the much more far-reaching possibilities of French law. This would amount to inadmissible forum shopping on the part of law enforcement.
- Finally, the ECJ stresses in two areas that the defence could "comment effectively" on the evidence and the method of its collection. It is probably undisputed that the evidence had a preponderant influence on the criminal court's findings, as the criminal convictions in almost all instances were based on the analysis of the chats on the EncroChat devices. The ECJ goes even further: if the defence was not able to take a proper legal stance, there is an absolute ban on the use of evidence following a breach of EU law. In this context, it should be recalled that the EncroChat case was primarily characterised by the secrecy of the Trojan used. In particular, the French authorities invoked military secrecy and thus refused to disclose their method. The ECJ now requires that the integrity of the transmitted evidence can be examined by the defence, at least at the time the evidence was actually handed over to the competent German authorities. However, the ECJ leaves open which data the defence could actually have accessed to check for integrity and what an "effective comment" means in practice. It is to be feared that these issues will continue to be disputed in court.

The question of the use of EncroChat data as evidence is sure to keep German courts busy due to – and despite – the ECJ's ruling. The decision leaves room for manoeuvre for both supporters and opponents of the use of the EncroChat data. Due to unclear statements by the ECJ, particularly regarding the scope of the rights of the defence with regard to the integrity of the data, the EncroChat case may keep the judges in Luxembourg busy again. In this context, it should be recalled that, in November 2023, the Regional Court of Berlin submitted the second reference for preliminary ruling to the ECJ in relation to criminal proceedings from the EncroChat outcome (the case was registered on 19 April 2024 as Case C-675/23, M.R. v Staatsanwaltschaft Berlin →following news item). The Berlin court was dissatisfied with the Advocate General's application of the facts in the case analysed here. In the new referral, the court once again emphasised the unspecific mass surveillance by the EncorChat police operation and the serious interference with fundamental rights of telecommunication users, including the lack of adequate legal remedies. It remains to be seen whether the ECJ will provide the Berlin court with clearer answers in this second case. (TW)

Attempt for Second Reference for Preliminary Ruling in EncroChat Case

On 19 April 2024, the CJEU officially registered the second reference for a preliminary ruling in the EncroChat case: Case C-675/23 (*Staatsanwaltschaft Berlin II*). As the first case (C-670/22, *M.N.* →eucrim 3/2022, 197–198) also this case was submitted by the Regional Court of Berlin (*Landgericht Berlin*) in Germany.

Having lodged this second reference in November 2023, the Regional Court of Berlin sought to clarify several peculiarities of another criminal case before it in relation to the EncroChat operation. The EncroChat operation (→eucrim 2/2021, 106) concerned the infiltration by means of Trojan software of a server managed by the encrypted phone network EncroChat in Roubaix (France). By means of the Trojan, French law enforcement authorities were able to read the chat messages of thousands of users in real time, not only those who were using the network for criminal activities. The French authorities were also able to make the hacked data available to the Member States in which the users were located. In the wake of this operation, several criminal proceedings were opened in Germany, particularly as regards drug trafficking – the criminal offence at issue before the Regional Court of Berlin. The German law enforcement authorities believed that the retrieval of data in this way sufficed for the legitimate use of the data in German criminal proceedings for the following reasons:

- They had been taken from a Europol server by the German Federal Police Office;
- An *ex post* authorisation via a European Investigation Order (EIO) had been issued by the General Public Prosecution Office of Frankfurt a.M.;
- The EIO had been executed by the French investigative judge overseeing the law enforcement operation.

According to the Berlin court, the circumstances of the case at issue may lead to a new interpretation of Directive 2014/41 regarding the European Investigation Order in criminal matters (EIO Directive). The questions referred were similar to those submitted in the first case C-670/22, but the Berlin court stresses that the facts of the case differ from the presumptions on which the Advocate General (AG) based her opinion in the first case (→eucrim 3/2023, 264–265). As a result, the Berlin court asked the ECJ to also consider alternative factual situations and rule on the following:

- Whether the requirements under Art. 6 of the EIO (proportionality of the German EIO and compliance with the requirement that an EIO can only be ordered under the same conditions in a similar domestic case) have been fulfilled;
- Which consequences must be drawn for the criminal proceedings at issue in the event of breach of the EU rules.

The reference mainly highlights the following about the EncroChat operation:

- It was intentionally coordinated by European law enforcement agencies;
- It willfully also targeted the surveillance of users outside the territory of France;
- The surveillance extended to persons against whom there were absolutely no concrete suspicions for having been involved in crimes or in criminal organisations.

In essence, the Berlin court argues that the corresponding measure – an online search according to the German Code of Criminal Procedure – would never have been possible if the server had been infiltrated on German territory. Furthermore, the court sees contradictions in the AG's reasoning compared to the more stringent CJEU case law on data retention.

Note: The reference for a preliminary ruling was lodged after the AG's opinion in Case C-670/22 (M.N.) but before the ECJ's final judgment in this case on 30 April 2024 (→preceding news item). On 8 August 2024, the referring court informed the ECJ that it did not wish to maintain its request for a preliminary ruling. By order of 3 September 2024, the Registrar of the Court of Justice ordered the case to be removed from the register. The ECJ will therefore not rule on the reference for a preliminary ruling. (TW)

Law Enforcement Cooperation

Fifth SIRIUS Report

On 18 December 2023, Eurojust, Europol, and the European Judicial Network (EJN) published the 2023 edition of the SIRIUS European Union (EU) Electronic Evidence Situation Report.

The report provides an overview of the EU's electronic evidence landscape from the perspective of law enforcement, the judiciary, and service providers. It concludes with a series of recommendations aiming to improve existing processes and to prepare for the application of new rules. The 2023 edition especially focuses on the adoption of the EU's Electronic Evidence legislative package (→eucrim 2/2023, 165–168) consisting of:

- Regulation (EU) 2023/1543 of 12 July 2023 on European Production Orders and European Preservation Orders for electronic evidence in criminal proceedings and for the execution of custodial sentences following criminal proceedings;
- Directive (EU) 2023/1544 of 12 July 2023 laying down harmonised rules on the designation of designated establishments and the appointment of legal representatives for the purpose of gathering electronic evidence in criminal proceedings.

The report recommends the following initiatives for EU law enforcement agencies:

- Initiate preparations for implemen-

tation of the EU electronic evidence legislative package;
- Include training on cross-border access to electronic evidence in routine training programmes for investigators and first responders;
- Ensure active engagement of their Single Point(s) of Contact (SPoCs) in the SIRIUS SPoC Network.

The report calls on the judiciary to do the following:
- Enhance knowledge and build capacities on available legal instruments for cross-border access to electronic evidence;
- Prepare for the use of new instruments in conjunction with upcoming legislative changes related to the cross-border gathering of electronic evidence;
- Strengthen mutual trust and the exchange of expertise on the cross-border gathering of electronic evidence.

Lastly, service providers have been asked to initiate preparations for compliance with the new e-evidence legislation, to engage in international events organised by SIRIUS, and to share policy updates with the SIRIUS Team. (CR)

Council of Europe**

Reported by Dr. András Csúri

Foundations

European Court of Human Rights

ECtHR Updates Rules of the Court and Issues New Practice Directions

In the first quarter of 2024, the ECtHR implemented several procedural reforms. They were adopted by the Plenary Court in December 2023 and February 2024, respectively.

On 22 January 2024, the ECtHR incorporated changes to Rule 28 by expressly codifying the existing practice according to which the parties to the proceedings may request recusal of a judge. Rule 28 implements the principle of judicial impartiality. The updated rule is accompanied by a Practice Direction (issued on the same day by the President of the Court). It further clarifies the procedures provided for in Rule 28, which ensures that parties can practically and effectively raise any concerns about the impartiality of a judge and the procedure to be followed in such instances. To ensure the fullest possible transparency and accessibility, a complete list of the different judicial formations operating within each of the five ECtHR Sections, including the list of single judges designated by State, were also made available on the Court's website.

On 28 March 2024, the Court also published amendments to Rule 39 on interim measures. They aim to clarify and codify the existing practice on interim measures. *Inter alia,* explicit reference is made to the fact that interim measures are applicable in cases where there is "an imminent risk of irreparable harm to a Convention right".

The new version also explains which decision-making bodies can be seised of interim-measure requests. The accompanying revised Practice Direction now contains detailed guidance as to the substantive and procedural aspects of the Court's interim-measure procedure, the exceptional circumstances in which these may be granted, and when they may be reconsidered by the Court.

The current version of the amended Rules of Court (version of 28 March 2024) is available on the ECtHR's website under "Official Texts".

Launch of HUDOC Case-Law Database in Romanian

On 5 April 2024, the ECtHR launched the Romanian interface of its case law database HUDOC. It was developed in cooperation with the European Institute of Romania and with the support of the TJENI project.

With over 3,000 texts uploaded in Romanian, the interface aims to further increase the understanding of the Court's case law among legal professionals and the general public. Further material in Romanian is available on the ECtHR knowledge-sharing platform ECHR-KS and on the Court's YouTube channel.

The Romanian HUDOC database joins the existing English, French, Armenian, Georgian, Russian, Spanish, Turkish, and Ukrainian versions of HUDOC. HUDOC already contains over 36,000 case-law translations in 34 languages other than English and French.

Specific Areas of Crime

Corruption

GRECO: Fifth Round Evaluation Report on the Czech Republic

On 4 March 2024, GRECO presented its 5th round evaluation report on the Czech Republic. The country has been

a member of GRECO since 2002, with a good track record in implementing GRECO recommendations: 89% of the first evaluation round have been fully implemented, 58% of the second evaluation round, and 77% of the third evaluation round. The compliance procedure under the fourth evaluation round is still ongoing, with six recommendations out of fourteen not implemented and seven only partly.

In the past five years, the Czech Republic's position in Transparency International's Corruption Perception Index was somewhere between the 38th and 49th rank. According to the TI Global Corruption Barometer 2022, 85% of respondents living in the Czech Republic think that government corruption is a big problem (EU average: 62%). And, in the 12 months prior to the questioning, the country has the highest score in the EU (57% of the respondents against an EU average of 29%) when it comes to the use of personal connections for public services.

The Czech police is seen as the institution being least affected by corruption, with only 6% of respondents considering most of its members as corrupt, according to the Global Corruption Barometer, and 62% of respondents trusting the police when it comes to reporting a corruption case (EU average: 58%).

The Czech Republic has a well-established legal framework to fight corruption. However, progress with some key pieces of legislation has recently been very slow: the reform of the Civil Service Act, the Public Prosecution Act as well as the adoption of the Act on Lobbying or the Act on Whistleblower Protection.

In order to prevent corruption in respect of persons with top executive functions (PTEFs), including the Prime Minister, ministers, deputy ministers, ministers' advisers as well as members of the police, GRECO recommends the following:

- Regulating the recruitment process and obligations of ministers' individual advisers, and applying appropriate rules on conflicts of interest to them;
- Laying down rules on adequate integrity checks prior to the appointment of ministers, deputy ministers, and individual advisers in order to identify and manage possible risks of conflicts of interest;
- Carrying out risk analysis specifically covering PTEFs' specific integrity risks on a regular basis and including remedial measures in a dedicated anti-corruption programme at the government level;
- Adopting and publishing a code of conduct for PTEFs', complemented with clear guidance regarding conflicts of interest and other integrity-related matters, and coupled with a credible and effective mechanism of supervision and sanctions;
- Developing efficient internal mechanisms to promote and raise awareness of integrity matters in the government, including confidential counseling and training of PTEFs at regular intervals;
- Introducing rules on how PTEFs may engage in contact with lobbyists and other third parties who seek to influence the government's legislative and other activities, disclosing sufficient information about these contacts;
- Strengthening the duty to declare ad hoc conflicts of interest by making it applicable to all PTEFs and to all situations or activities connected with their functions, and by making such declarations public and excluding the persons concerned from decision-making;
- Strengthening the system of incompatible and outside activities by summarising the applicable rules in one single text; ensuring that such activities are prohibited unless the person has received a written authorisation based on a considered determination, which shall be made available to the public;
- Ensuring that a full set of rules on gifts and other benefits be applicable to all PTEFs, with a reporting obligation for gifts and other benefits, and making this information available to the public in a timely manner;
- Broadening the rules on post-employment restrictions to cover all PTEFs and avoid potential conflicts of interest when the employment concerns a field of activity subject to authorisation or scrutiny by the body the person is leaving;
- Making ministers' individual advisers subject to the same disclosure requirements as ministers and deputy ministers.

Regarding law enforcement agencies, GRECO made the following recommendations:

- Increasing the representation of women at all levels in the police, particularly at the managerial level;
- Providing for practical guidance on the code of ethics and the binding instruction on rules of conduct;
- Introducing mechanisms of confidential counseling on ethical and integrity matters for police staff;
- Carrying out security checks relating to the integrity of police officers at regular intervals throughout their career;
- Reviewing the system of donations and sponsorships to the police, setting safeguards against conflicts of interest, and publishing donations and sponsorships online on a regular basis;
- Publishing online centralised statistics on complaints against police staff and measures taken in this respect.

In total, GRECO addressed 20 recommendations to the Czech Republic whose implementation will be assessed through the compliance procedure in 2025.

GRECO: Fifth Round Evaluation Report on the Republic of Moldova

On 4 March 2024, GRECO presented its 5th round evaluation report on the Republic of Moldova. The country has been a member of GRECO since 2001

and undergone four evaluation rounds.

93% of recommendations were implemented in the first evaluation round, 67% in the second evaluation round, and 88% in the third evaluation round. In the fourth evaluation round, dealing with corruption prevention in respect of parliamentarians, judges, and prosecutors, only 33% of all recommendations have been fully implemented to date; in its last publicly available Compliance Report, GRECO concluded in this context that the low level of compliance was "globally unsatisfactory."

In Transparency International's Corruption Perceptions Index 2024, Moldova ranked 91st of 180 countries, with a score of 39 out of 100 (on a scale where 0 means highly corrupt and 100 very clean), showing a steady increase compared to the previous two years (a score of 36, ranking 105th in 2021 and a score of 34, ranking 115th in 2020). However, challenges in investigating and prosecuting high-level corruption became visible in the banking fraud and Russian laundromat cases, which led to other fraud and money laundering schemes in the country's banking, financial, and insurance sectors.

In a report from 2023, the European Commission saw no significant progress in the prosecution of high-level corruption cases and long-standing criminal cases, although the track record of high-level corruption convictions increased slightly.

In March 2022, the Republic of Moldova submitted its application to join the EU and was subsequently granted candidate country status. The European Commission presented nine steps that the country needs to address to further progress on the enlargement path, amongst which is "to complete … the comprehensive justice system reform, … including through efficient use of asset verification", "to fight corruption at all levels by taking decisive steps towards proactive and efficient investigations, and a credible track record of prosecutions and convictions", and "to enhance the involvement of civil society in decision-making processes at all levels". On 8 November 2023, the European Commission recommended opening accession negotiations with Moldova in view of "important progress" made on meeting the nine steps.

GRECO acknowledges progress in setting up an institutional and legal framework to promote integrity and prevent corruption in the top executive functions of the central government and its law enforcement agencies (presently the Moldovan Police and the Border Police). This institutional setting includes the National Anti-corruption Centre, the National Integrity Authority (ANI), and the Anti-corruption Prosecutor's Office. A national integrity and anti-corruption strategy is in place, with work underway on a new strategy for the period 2024–2028. The integrity legal framework comprises several laws regulating issues such as the assessment of institutional integrity, the management of institutional corruption risks, and the declaration and verification of assets and personal interests. New laws came into force more recently on access to public-interest information and on the protection of whistleblowers (2023 and 2024, respectively).

However, GRECO's report identifies a number of areas where improvement is needed. Regarding central governments (top executive functions), GRECO recommends the following:

- Adopting clear rules on integrity checks for PTEFs as part of their recruitment in order to identify, avoid, and manage potential and existing conflicts of interest;
- Making the names, functions (responsibilities), salary, and information on ancillary activities in respect of presidential advisers, ministerial advisers, and experts or consultants (non-tenured advisers) public;
- Broadening the spectrum of registers of institutional corruption risks by covering PTEFs more specifically, including regular updates of the registers;
- Adopting code(s) of conduct for PTEFs, covering all relevant integrity matters and making these public, together with practical guidance, coupled with a credible and effective mechanism for supervision and enforcement, including appropriate sanctions;
- Providing dedicated awareness-raising trainings for PTEFs on integrity-related matters, when taking up their positions and at regular intervals thereafter, and making confidential counseling available on integrity-related issues;
- Introducing rules on how PTEFs engage in contacts with lobbyists and other third parties who seek to influence the government's decision-making processes, decisions, and other activities;
- Ensuring that the internal audit service of the President's Office and all ministries, including the State Chancellery, be fully staffed and fully operational;
- Establishing an effective supervision mechanism to implement the rules on post-employment restrictions in respect of PTEFs;
- Ensuring an equal and fair distribution of workload and consistency of decisions of integrity inspectors within the National Integrity Authority by establishing an effective internal oversight mechanism;
- Including all PTEFs in the list of categories of officials who may be investigated and prosecuted by the anti-corruption prosecutor's office for the commission of certain corruption and corruption-related offences.

As regards the Police and the Border Police, GRECO makes the following recommendations:

- Taking proactive measures to increase the representation of women at all levels, particularly at middle and senior managerial levels;
- Taking measures to comply with the requirements laid down in the new

freedom of information legislation, as regards, e.g., the increase of proactive transparency, the creation of a register of requests for public interest information;
- Handling information requests within the statutory time limit, and ensuring the proportionate application of the legitimate grounds for limitations of access to information;
- Providing dedicated regular trainings on risk management to police officers, who are involved in the preparation and finalisation of risk registers;
- Developing and publishing dedicated (separate or joint) code(s) of ethics covering all relevant integrity matters, coupled with practical guidance and an enforcement mechanism;
- Carrying out systematic integrity checks of law enforcement officers, including sensitive functions and managers, prior to recruitment and throughout their career;
- Establishing a merit-based, competitive, and transparent process for the selection and appointment of deputies to the Chief of the Police, and limiting *ad interim* promotions to exceptional situations;
- Increasing the level of remuneration to establish attractive wages for the lower ranks (entry level);
- Establishing an effective supervision mechanism to implement the rules on post-employment restrictions;
- Taking measures for the practical implementation of the obligations stemming from the whistleblowers' protection legislation.

GRECO will assess Moldova's level of compliance with regard to the implementation of the 25 recommendations in 2025.

GRECO: Fifth Round Evaluation Report on Armenia

On 18 April 2024, GRECO published its 5th round evaluation report on Armenia.

The country has been a member of GRECO since 2004. It has been subject to four evaluation rounds with 75% of GRECO recommendations implemented in the joint first and second evaluation rounds, and 100% in the third evaluation round. Regarding the fourth evaluation round, 50% of GRECO's recommendations have been fully implemented and 50% partly implemented. The compliance procedure under that round is ongoing.

Following the 2018 Velvet Revolution, the Armenian Government initiated a reform programme to root out corruption, modernise public governance, decrease the size of the shadow economy, alleviate tax evasion, and tackle monopolies and oligarchies.

Armenia issued an anti-corruption strategy and action plan as well as reformed established/specialised anti-corruption institutions. Anti-corruption measures included a register of beneficial ownership. As a result, Armenia has been among the first countries publishing data online on beneficial ownership; this effort started with an initial focus on extractive industries but has gradually extended to other sectors. From January 2023 on, the requirement to declare beneficial ownership applies to all companies, including those under state ownership.

Large-scale investigations were opened to prosecute high-level corruption and kleptocratic networks connected to previous regimes. Regarding persons with top executive functions (PTEFs), constitutional reforms to change the system of government from a presidential to a parliamentary system came into force in April 2018. The Law on Public Service (LPS), which applies to PTEFs, provides rules on ethics, prevention of corruption, declaration of property, income, interests and expenditures (asset declarations), and mechanisms to implement them. Armenia's new anti-corruption strategy (2023–2026) comprises some measures targeting PTEFs, but they are yet to be developed, including through systematic performance of integrity checks prior to appointment.

GRECO finds the scope of post-employment restrictions, their monitoring, and their enforcement to be the crucial weakness of the system. This is all the more true given the overlap between political and economic interests in Armenia.

Access to information legislation is reasonably comprehensive, but there is no dedicated institutional body, which would ensure systematic and independent review, monitoring, and the promotion of a unified implementation practice. The legislation provides institutional mechanisms to engage civil society and the public at large in the decision-making process, including an electronic platform for public consultations, public hearings, and consultative bodies. However, in practice, not all of them are fully functional and effective. The adoption of lobbying rules remains an outstanding matter.

Against this background, GRECO recommends the following in respect of central governments (top executive functions):
- Clarifying and regulating the legal status of unpaid advisors, subjecting them to the highest standards of transparency, accountability, and integrity;
- Carrying out risk analysis covering PTEFs' specific integrity risks on a regular basis, including relevant remedial measures in anti-corruption strategies and action plans;
- Adopting a code of conduct for PTEFs, coupled with credible and effective supervision and enforcement;
- Carrying out an independent impact assessment of the implementation of the legislation regarding access to information, with a particular focus on the use of exceptions, the timeliness of responses, the practice of proactive disclosure, and effective enforcement.
- Compiling and publishing official statistics on information requests and complaints related to refusals and delayed or incomplete responses.
- Considering the establishment of a dedicated independent oversight body

for the systematic review, monitoring, and promotion of a unified implementation practice of the freedom of information legislation;

- Ensuring the meaningful participation of civil society, including its engagement in the early stages of decision-making, allowing sufficient time for consultations, and sharing public suggestions to the maximum possible extent;
- Introducing detailed rules and guidance on the interaction of PTEFs with lobbyists and other third parties, who seek to influence the government's legislative and other activities, with sufficient information about the relevant details of these contacts;
- Broadening the time limits and scope of post-employment restrictions in respect of PTEFs and establishing an effective reporting, monitoring, and enforcement mechanism in this regard;
- Providing the Corruption Prevention Commission with adequate financial and personnel resources to effectively perform its tasks with respect to PTEFs.

With regard to corruption among law enforcement authorities, the GRECO report focuses on the police as the primary law enforcement body implementing the government's policy aimed at combating crime and other law infringements, maintaining public order and security. The police are currently undergoing a major structural reform, which started in December 2019. One of the weaknesses in the police is the lack of both a dedicated anti-corruption policy/strategy and a risk assessment. No information is being gathered on whether the current post-employment practices may constitute a vulnerability for the police.

Armenia has a dedicated, rather comprehensive Law on Whistleblowing (last amended in 2022). However, there is still a deeply rooted culture against reporting. Additional action appears necessary to build trust in whistleblower reporting and advisory channels as well as in the available protection measures.

Regarding the police, GRECO therefore recommends the following:

- Taking additional dedicated measures to strengthen the representation of women at all levels;
- Reviewing internal and external media messaging, response times to public queries, and proactive messaging on internal and external matters by the police;
- Publishing information on complaints received, action taken, and sanctions applied against police officers;
- Strengthening the capacity of the staff responsible for communicating to the press and the general public, with the aim of enhancing transparency and public confidence in the police force;
- Adopting a dedicated and operational anti-corruption action plan based on systematic and comprehensive review of risk-prone areas, accompanied by targeted mitigating and control measures and structures (which are subject to regular evaluation and impact assessment);
- Adopting and publishing a code of conduct to address modern challenges of policing that covers all relevant integrity matters in detail;
- Accompanying the code with practical guidance as well as effective awareness-raising and confidential advisory measures;
- Strengthening integrity checks during staff recruitment and systematically carrying out routine vetting during an officers' police career;
- Providing the Internal Security and Anti-Corruption Department of the police with adequate material, financial, and personnel resources to perform its tasks proactively and efficiently;
- Better protecting whistleblower anonymity and further developing internal reporting channels, for example by adopting confidential reporting procedures.

The Armenian authorities are expected to report back to GRECO on the implementation of the 22 recommendations by 30 September 2025. After that, GRECO will again assess the country's level of compliance.

Money Laundering

MONEYVAL: Fifth Round Evaluation Report on Montenegro

On 1 February 2024, MONEYVAL published its fifth round evaluation report on Montenegro. Even though Montenegro is not an EU Member State, the country uses the EURO as its *de facto* official currency since 2002, with the banking sector – the country's most significant financial industry – holding 93% of the total assets in the financial system in 2021.

The geographical location of Montenegro in the Balkan region impacts the risks related to the smuggling of drugs, migrants, tobacco, and arms as well as human trafficking, with transnational organised crime groups (OCGs) exploiting the system to undertake these crimes and pursuing loan sharking activities (usury).

Since the last comprehensive evaluation in 2015, Montenegro has taken a number of actions to strengthen its legal and institutional anti-money laundering (AML) and countering the financing of terrorism (CFT) framework

MONEYVAL found that under the Financial Action Task Force (FATF) standards used for assessment, Montenegro obtained a substantial level of effectiveness in two out of 11 areas: (1) in understanding money laundering (ML) and terrorist financing (TF) risks, and (2) in international cooperation where the authorities are commended for their efficient and effective cooperation with respect to both evidence and intelligence exchanges.

In the other nine areas Montenegro was considered to have moderate levels of effectiveness, where major

improvements are required. The main findings by MONEYVAL can be summarised as follows:

- The understanding of the competent authorities on ML risks is reasonable and goes beyond the analysis and findings of the national risk assessments (NRAs), which often lack depth. The AML/CFT strategic action plans address the identified ML/TF risks to a large extent, however a number of actions are still pending.
- Law enforcement authorities have access to a wide range of financial intelligence and other relevant information; they actively communicate and coordinate with each other and the financial intelligence unit (FIU) during investigations. The FIU accesses a broad range of information which is routinely used for operational and tactical analysis but to a lesser extent for strategic analysis. Financial intelligence is mainly used to develop evidence on and trace proceeds of crime but is not sufficiently used to identify and investigate ML. Reporting is low across all sectors.
- The number of ML investigations and prosecutions is relatively low compared to the volume of convictions for high-risk predicates. The prosecutors often prefer pursuing the confiscation of proceeds of crime rather than investigating and prosecuting associated ML. The number of ML convictions is also low. The type of ML prosecutions and convictions is inconsistent with the country risks, with third-party ML, stand-alone ML, and ML from foreign predicates being insufficiently pursued. Criminal sanctions should be more effective, proportionate, and dissuasive.
- The overall value of confiscated assets derived from the commission of high-risk predicate offences (including drug trafficking perpetrated by Montenegrin OCGs and high-level corruption) remains low. More efforts are necessary to trace, seize, and confiscate foreign proceeds and proceeds moved abroad. The controls on cross-border cash movements have yielded some results; more efforts are needed however. Confiscation of falsely/not declared cross-border movements of cash is not available as a sanction in Montenegro. Direct access to information on cross-border cash movements by the FIU recently started being used for tactical analysis to detect ML/TF suspicions and is yielding positive results.
- The authorities demonstrated a good understanding of TF risks going beyond the conclusions of the NRA. The understanding of the TF risk exposure of certain sectors such as banks, money or value transfer services, and non-profit organisations is limited. Montenegrin authorities adopt an intelligence-based approach to detect terrorism and TF suspicions, which ensures a sufficient and effective level of detection and immediate coordinated response. There have been neither convictions nor prosecutions for TF, which is in line with the country's risk profile to a certain extent.
- The most material sector by far in Montenegro is the banking sector which demonstrated a good understanding of ML risks and good level of implementation of AML/CFT obligations. The understanding of ML risks was adequate across most other non-bank financial institutions. The understanding of TF risks is limited across sectors.
- There is a solid licensing regime for banks, a good understanding of ML risks, but a limited understanding of TF risks. The Central Bank of Montenegro has established an adequate risk assessment framework and risk-based supervision for several years, which requires further development in particular regarding the imposition of pecuniary fines via the misdemeanour procedure. An adequate level of understanding of the ML risks posed by legal persons was demonstrated by some authorities.
- Montenegro has put in place several measures aimed at preventing the misuse of legal persons including the requirements of registration and holding a bank account. However, there are concerns surrounding the availability of accurate, adequate, and up-to-date beneficial ownership information.
- Montenegro provides a wide range of legal assistance in an efficient manner using bilateral and multilateral agreements and international networks. The FIU however is not as proactive when it comes to the spontaneous sharing of intelligence with its counterparts.

MONEYVAL's report provides a number of recommendations on how the Montenegrin AML/CFT system can be strengthened. The country is expected to report back to MONEYVAL in December 2025 as part of its enhanced follow-up reporting process.

MONEYVAL: Fifth Round Evaluation Report on Azerbaijan

On 12 February 2024, MONEYVAL published its fifth round evaluation report on Azerbaijan. Its geographical, transcontinental location impacts the risks related to drugs smuggling and higher risk jurisdictions. The most important sector within the financial industry is the banking sector, holding 95% of the country's total assets. Since 2014, when MONEYVAL last evaluated Azerbaijan, the country has taken several actions to strengthen its legal and institutional anti-money laundering and countering the financing of terrorism (AML/CFT) framework and has started to put in place the elements of an effective AML/CFT system.

A national risk assessment (NRA) on money laundering and terrorist financing (ML/TF) was carried out in 2022. It assessed the TF risk level as medium-high with domestic corruption, tax-related crimes, smuggling, and drug trafficking being the main ML predicate offences. The conclusions of the assessment appear reasonable and were known to the authorities but MONEYVAL recommends further

analysis to substantiate ML-related risks regarding the use of cash in the economy, misuse of real estate, legal persons, and organised crime. In more detail, the key findings of the report are as follows:

- At a policy level, domestic cooperation between the authorities appears to be adequate and has yielded positive results in terms of legislation (adoption of national action plans derived from the NRA findings). Effectiveness of cooperation beyond legislation is less evidenced, however. Given that the authorities perceive immovable property to be the main ML scheme in corruption matters, there remains a lack of suitable measures to fully mitigate the risks.
- The investigative authorities have access to financial intelligence and other information which they use to a certain extent to establish evidence and trace the proceeds of crime linked to ML, TF, and predicate offences.
- Financial intelligence is often gathered directly by the law enforcement agencies (LEA) from the private sector. The conversion rate from intelligence obtained through suspicious transactions reports (STRs) into case investigations and prosecutions is, however, insufficient. Most STRs are received from banks, while the contribution from some of the higher risk sectors remains limited. Whilst the Financial Monitoring Service (FMS) maintained that the quality of STRs is improving, insufficiencies remain; this is reflected in the low number of investigations being initiated from FMS disseminations. Further FMS work to improve their analytical capacity and capabilities and to promote the use of financial intelligence in investigations is therefore necessary.
- Azerbaijan has dedicated LEAs competent to identify and investigate ML offences. Major improvements are needed to pursue the investigation and prosecution of ML effectively, which would benefit from increased domestic cooperation between the relevant authorities at an operational level. While the overall number of ML investigations increased in the last year and some ML cases related to crimes posing high-level ML threats have been investigated and prosecuted, the results are not fully consistent with the risk profile of the country. Most of the prosecutions and convictions achieved pertain to self laundering and legal persons have not been investigated so far for ML.
- Confiscation is pursued as a policy objective to some extent but there is a need for parallel financial investigations to be conducted so that authorities are not solely focused on the establishment of the damage caused by the offence but also on tracing assets.
- Sanctions applied in case of false or undeclared cash do not seem to be entirely proportionate, dissuasive, and effective.
- Azerbaijan has achieved a substantial level of effectiveness for countering TF. The seven convictions secured during the reference period is in line with the risk profile of the country to some extent. The overall effectiveness is impacted by the deficiencies in TF risk understanding. There is no national counter-terrorism strategy, though the authorities adopted some policy documents where TF investigations have been integrated.
- Financial institutions (FIs) reflected their risk understanding and allocated the necessary resources to mitigate risks. The designated non-financial business and professions (DNFBPs) are less focused on risk scenarios which is also reflected in the low level of reporting suspicious activities.
- The customer due diligence (CDD) measures performed are generally sound and risk-based, with the exceptions of smaller non-banking financial institutions, such as life insurance companies, leasing companies, or exchange offices. Banks perform a series of checks and gather information on shareholders and management of their clients and sometimes go further to identify the ultimate natural person who holds control. The effectiveness of managing domestic politically exposed persons (PEPs) is negatively impacted by deficient legislation.
- Fundamental improvements are needed for the supervision of financial institutions and designated non-financial businesses and professions. While the Central Bank of Azerbaijan (CBA) applies basic “fit and proper” entry checks both for qualified owners and persons who can significantly influence the decision-making process, these do not always cover beneficial owners: the identification of potential association with criminals is not checked. The understanding of risks varies amongst supervisors and the risk-based approach needs to be strengthened. Enforcement and sanctioning powers for breaches of professional AML/CFT obligations should also be strengthened.
- The understanding of ML risks varies amongst supervisors. The CBA and the Bar Association demonstrated a better understanding of ML risks than the State Tax Service (STS) and Chamber of Auditors. Notwithstanding the fact that the real estate sector is weighted as bearing higher ML risk, during the period under review there was no supervision for the sector. The overall sanctioning regime is an area for improvement.
- Important steps were taken to prevent the misuse of legal persons, but more proactive measures are required to ensure the transparency of legal persons. Reporting entities should apply the necessary identification and verification measures in case of PEPs and beneficial owners (BOs).
- The country has no BO register and there is no requirement for the legal entities themselves to gather and retain their BOs information. Authorities have easy access to basic information kept by the STS, which is generally accurate and updated. To obtain

BO information the authorities mainly appeal to banks. The quality of BO information is impacted by deficiencies identified at reporting entities.

■ Looking at international cooperation, Azerbaijan achieved a substantial level of effectiveness and was commended for the authorities' capacities to provide and seek constructive assistance in relation to ML, associated predicate offences, and TF. Mutual legal assistance (MLA) is provided in a constructive and timely manner to a large extent despite the unavailability of a case management system and prioritisation mechanism applicable to all competent authorities. Authorities seek MLA to pursue ML and predicate offence investigations. International cooperation on tracing, seizing, and confiscating assets moved abroad is very limited, but authorities are making efforts to overcome this deficiency. The FMS does not entirely effectively seek assistance given risk and context of the country. No international cooperation has been performed by the supervisors in relation to AML/CFT matters.

In line with the follow-up procedures, Azerbaijan is expected to report back to MONEYVAL on progress achieved in improving the implementation of its AML/CFT measures in December 2025.

Legislation

Council of Europe Conventions – Latest Developments

The following table shows the latest developments in connection with ratifications and accessions of criminal/security law-related Council of Europe Conventions. It lists all developments from 1 January 2023 to 30 April 2024. The table is regularly updated on the eucrim website at: <https://eucrim.eu/documentation/ratifications/>.

Council of Europe Treaty	State	Date of ratification (r); accession (a); entry into force (e)
Second Additional Protocol to the Convention on Cybercrime on enhanced co-operation and disclosure of electronic evidence (ETS No. 224)	Japan Serbia	10 Aug 2023 (r) 9 Feb 2023 (r)
Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 223)	San Marino Hungary Portugal Switzerland Bosnia and Herzegovina Slovenia Slovakia Liechtenstein Argentina France Iceland	16 Nov 2023 (r) 19 Oct 2023 (r) 18 Oct 2023 (r) 7 Sep 2023 (r) 7 Jul 2023 (r) 20 Jun 2023 (r) 15 Jun 2023 (r) 17 May 2023 (r) 17 Apr 2023 (r) 27 Mar 2023 (r) 20 Jan 2023 (r)
Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 222)	Portugal Hungary	11 Jul 2023 (r) 13 Feb 2023 (r)
Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (ETS No. 217)	Azerbaijan Norway Ukraine Belgium Finland Luxembourg Andorra	12 Apr 2024 (r) 1 Oct 2023 (e) 14 Sep 2023 (r) 1 Sep 2023 (e) 1 Aug 2023 (e) 1 Jun 2023 (e) 1 Feb 2023 (e)
Council of Europe Convention against Trafficking in Human Organs (ETS No. 216)	France	1 May 2023 (e)
Council of Europe Convention on the Manipulation of Sports Competitions (ETS No. 215)	France Iceland	1 Oct 2023 (e) 1 Apr 2023 (e)
Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 214)	Moldova Montenegro Belgium Romania	1 Oct 2023 (e) 1 Jun 2023 (e) 1 Mar 2023 (e) 1 Jan 2023 (e)
Convention on the counterfeiting of medical products and similar crimes involving threats to public health (ETS No. 211)	Cyprus Côte d'Ivoire	5 Sep 2023 (r) 20 Jul 2023 (r)
Convention on preventing and combating violence against women and domestic violence (ETS No. 210)	Latvia European Union	10 Jan 2024 (r) 1 Oct 2023 (e)
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS No. 198)	Estonia	1 Jan 2023 (e)
Additional Protocol to the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems (ETS No. 189)	Slovakia Iceland	1 Oct 2023 (e) 1 May 2023 (e)
Convention on Cybercrime (ETS No. 185)	Grenada Sierra Leone Tunisia Cameroon Brazil	22 Apr 2024 (a) 19 Apr 2024 (a) 8 Mar 2024 (a) 15 Dec 2023 (a) 1 Mar 2023 (e)
Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 167)	Portugal	11 Jul 2023 (r)
Convention on the Transfer of Sentenced Persons (ETS No. 112)	Kyrgyzstan Brazil	22 Apr 2024 (a) 1 Oct 2023 (e)

Articles

Articles / Aufsätze

Fil Rouge

In June 2021, the European Public Prosecutor's Office (EPPO) started operating, almost four years after the adoption of the founding Regulation (EU) 2017/1939. The past three years have shown the EPPO's great potential in investigating and prosecuting PIF crimes, paving the way for a promising future. However, the functioning of the EPPO has also revealed the constraints and deficiencies of the Regulation. Although the establishment of the EPPO represents a revolution in the field of judicial cooperation in criminal matters, the Regulation is also the result of lengthy negotiations and compromises. Both the effectiveness of the EPPO's investigations and the protection of fundamental rights is affected, given that certain operative modalities of EPPO's competence are still in the ambit of the Member States' national laws. Therefore, the European Commission decided to launch a study to assess the implementation, effectiveness, and efficiency of the Regulation and its working practices in the 22 Member States participating in the EPPO, the results of which were recently published.

This eucrim issue provides an outlook on the future potential of the EPPO and some of the remaining problems. It is partially based on a conference held at the University of Luxembourg in June 2023: "EPPO the way forward: new potentials and challenges". This issue also includes contributions discussing the latest developments concerning the EPPO.

In the first article, *Marc Engelhart* presents the results of the implementation study commissioned by the European Commission. The study shows that the implementation of Regulation 2017/1939 was successful overall but that several problems arose due to the lack of harmonisation of national criminal procedures. One of the overreaching issues concerns the independence of the EPPO, which can be affected by various factors, e.g., the involvement of national authorities in the EPPO's operations and the appointment procedure of European Prosecutors and European Delegated Prosecutors.

Connecting to this latter aspect, the second article, by *Danilo Ceccarelli,* discusses the adequacy of safeguards in place to protect the independence of the EPPO and its prosecutors. The Regulation endorses a prosecutorial-centric criminal justice model that affords the EPPO an active role during the whole criminal process. In light of this, Recital 16 of the Regulation stresses that "since the EPPO is to be granted powers of investigation and prosecution, institutional safeguards should be put in place to ensure its independence." Ceccarelli argues that the safeguards set out in the Regulation inadequately guarantee the independence of the EPPO prosecutors; the appointment procedure is the most significant legal loophole compromising their independence.

Two further articles focus on the hot topic of judicial review of EPPO acts. Judicial review and cross-border investigation mechanisms were subjects of intense controversy during the long negotiation process. The Regulation has left certain questions open that need to be clarified either by amending the Regulation or through interpretation by the CJEU. In a third article, Advocate General *Anthony M Collins* zooms in on the CJEU's jurisdiction to review the acts of the EPPO and provides a brief overview of the cases before the Court. In a fourth article, *Katalin Ligeti* comments on the CJEU's first preliminary ruling on the EPPO Regulation (Case C-281/22), which interprets Arts. 31(3) and 32 regarding the extent of judicial review in the context of gathering cross-border evidence.

In the fifth and last article, *Peter Csonka* and *Lucia Zoli* look at the future of the EPPO. Despite being a recent development in EU criminal law, there are already calls to extend the EPPO's material scope of competence to crimes other than those against the EU's financial interests. The authors examine the possibility of extending the EPPO's competence to the (recently harmonised) crimes for the violation of EU sanctions. They conclude that while it is legally possible to extend the EPPO's competence to such crimes, the decision ultimately rests primarily on the political will of the Member States.

Prof. Katalin Ligeti, Professor of European and International Criminal Law &

Georgia Theodorakakou, PhD Candidate, University of Luxembourg

Compliance with the EPPO Regulation

Study Results on the "Implementation" of Council Regulation (EU) 2017/1939 in the Member States

Marc Engelhart*

The European Public Prosecutor's Office, being the largest project in the history of European Criminal Law, is based on Council Regulation (EU) 2017/1939 ("the EPPO Regulation") but has nevertheless required substantial adjustments to national criminal law in order to function. This article presents the results of a compliance study commissioned by the European Commission to assess whether the national legislation of the 22 Member States participating in the EPPO is in conformity with the EPPO Regulation.

I. Introduction

The establishment of the European Public Prosecutor's Office (EPPO) by Council Regulation (EU) 2017/1939 of 12 October 2017 (hereinafter: "EPPO Regulation")[1] was a major step in European integration and in the field of European criminal law. This historic project posed unprecedented challenges, not only for the newly established body of the Union but also for the Member States. The problems for the Member States stem to a large extent from the complex structure of the EPPO, which, after a rocky and controversial debate on the nature and structure of the possible body, resulted in a compromise that was not acceptable for all Member States: The EPPO was constructed between the borderlines of recognising national sovereignty (given that criminal law is a particularly important and sensitive issue in the national legal systems) and finding an effective approach to transnational criminal investigations (that should go far beyond the existing legal instruments of European cooperation in criminal matters).[2]

Because of the complexity of the structure and hybrid nature of the EPPO, which requires an interplay between national law and EU law, on the one hand, and national authorities and the EPPO, on the other, the EPPO does not operate simply based on the – in principle, directly applicable – EU Regulation. Although the EPPO Regulation takes precedence in the case of conflicting national law, it could by no means solve all legal problems and aspects of national law. Hence it required implementing national legislation – quite unusual for a Regulation.

Against this background, the regular conformity assessment of national measures, which the European Commission regularly carries out as a follow-up to European legislation, was not only of particular interest but also a challenging undertaking in this case. The Commission's Directorate-General for Justice and Consumers (hereinafter: "DG JUST") therefore tasked external experts with a study preparing the assessment.[3] The study culminated in a final report (hereinafter: "Final Report") with two Annexes (Annex 1 and Annex 2)[4] as well as a report replying on specific aspects after an extension of the study (hereinafter: "Extension Report").[5]

II. Overview

The study examined the compliance of the legal systems of the 22 participating Member States (at the time of the study) with the EPPO Regulation. It covered the articles of the Regulation that are relevant to the Member States and thus might require "implementation" in their legal systems, in particular those dealing with the setting-up of a structure for the European Delegated Prosecutors (hereinafter: the "EDPs") and with the relevant rules of procedure governing the work of the EDPs. An assessment of the articles dealing directly with the exclusively European part of the EPPO, such as the provisions relating to the European Chief Prosecutor (hereinafter: the "ECP"), the Permanent Chambers, the College, and (in so far as they do not concern national matters) the European Prosecutors (hereinafter: the "EPs") was not part of the study.[6]

1. Structure of the study reports

The Final Report presents the main findings of the study in the form of a comparative legal analysis. It starts by addressing an overarching issue that has an impact on several compliance issues: the role of national authorities in the EPPO's criminal proceedings, which may affect the overall tasks and independence of the EPPO.[7] It then deals

with the issues regulated by the EPPO Regulation: establishment, tasks, and basic principles;[8] structure, status, and organization;[9] competences;[10] and relevant rules of procedure.[11] A brief section of the report is devoted to procedural safeguards,[12] information processing,[13] financial and staff provisions,[14] and general provisions.[15] Annex I provides an analysis of the situation in each participating Member State, giving an illustrative overview on full compliance, partial compliance, and non-compliance with the EPPO Regulation. Annex 2 provides an equally descriptive article-by-article summary table, which provides a good depiction of which articles are causing problems for national jurisdictions.

As the study identified a number of issues causing "implementation" problems in national law, DG Just requested an extension of the study with regard to the following topics, which are dealt with separately in more detail in the Extension Report: the question of the independence of the EPPO;[16] material competence of the EPPO;[17] operations of the EPPO, especially the right of evocation and the access to information;[18] cross-border-investigations, especially in regard to judicial authorization, the admissibility of evidence, and translations.[19] While the Final Report assesses the compliance of the national legislation of the Member States with the EPPO Regulation, the Extension Report looks at certain aspects of the EPPO Regulation that may impact the effectiveness of the EPPO and its working practices, which do not necessarily stem from the lack of compliance of Member States' national legislation with the EPPO Regulation but extend to other issues that may arise, for example, from the unclear wording of the Regulation itself.

2. Methodology of the study

The study is based on sound comparative research.[20] The country rapporteurs of the participating countries completed a correlation table on the relevant articles of the EPPO Regulation, taking into account the respective national measures of implementation (either already existing measures or measures being drafted specifically for the implementation of the EPPO Regulation into national law). In addition, the country rapporteurs interviewed either an EDP or an EP from the respective jurisdiction. After a review process by the core project team, each country rapporteur drafted a national summary report published in Annex I.[21] The national reports/correlation tables formed the basis for the comparative analysis presented in the Final Report written by the core project team.

For the extension study, an in-depth analysis was carried out of articles that were either problematic because of the wording of the Regulation itself, or because non-compliance has a clear impact on the functioning of the EPPO, or because a significant number of Member States did not fully comply with the EPPO Regulation.[22] The study team conducted structured interviews with EDPs/EPs as well as with representatives of the Operations and College Support Unit at the EPPO's central level. The findings of the interviews are presented in the Extension Report.

III. Results in Detail

The study shows that the vast majority of Member States fully or almost fully comply with the EPPO Regulation.[23] The following presentation is therefore limited to those aspects where no (full) implementation of the requirements was found or to those which impact the effectiveness of the EPPO's functioning.

1. Independence and tasks of the EPPO

The independence of the EPPO is a key concept of the EPPO Regulation, as set out in its Art. 6(1). Independence is, in principle, not a problem in systems that mainly follow an adversarial system (such as AT, BG, CZ, DE, EE, HR, IT, LT, LV, NL, PT, RO, and SK). In these countries, criminal investigations and prosecutions are led by national public prosecutors and the investigative judge rarely intervenes, e.g., only to ensure the protection of fundamental rights during the investigation. However, in legal systems with a more inquisitorial approach (such as BE, EL, ES, FR, LU, and SI), in which an investigative judge traditionally not only exercises judicial control over the investigations but also actively directs the investigative work and/or decides on the prosecution, problems arise on several fronts. These systems still confer some residual powers upon the investigative judge, which hampers the investigative powers of the EPPO as exercised by EDPs/EPs.[24] One example is Belgium, where, pursuant to Art. 79 of the Judicial Code, a dual system of criminal investigations either led by prosecutors or the investigative judge is also applicable to EPPO cases; if the investigations of PIF offences require intrusive investigative measures (as per Arts. 55 and 56 of the Belgian Code of Criminal Procedure), the investigation is led by the investigative judge and not by the Belgian EDPs/EP.[25] Generally speaking, the investigation tasks and the basic principles of the activities of the EPPO under Arts. 4, 5(4), 28, and 30 EPPO Regulation are not fully implemented in all Member States.[26]

However, it is not only the system of investigative judges that causes problems but also the fact that other national authorities (often specialised agencies, such as customs authorities or "higher" prosecution authorities, such as the

Attorney General, or national judicial authorities, such as a Judicial Council) retain their investigative and/or prosecutorial powers. The result is that the EDPs/EPs are unable to exercise the investigation[27] and prosecutorial powers[28] they are required to perform according to the Regulation.[29] In addition to these problematic powers, situations in which reporting obligations to and agreements of national authorities are required before the EPPO can carry out and perform its duties also affect the independence of the EPPO (although to a lesser extent). For example, Dutch law requires the Board of Prosecutors General to check the decision of the EPPO to use certain investigative techniques.[30] This is in conflict with Art. 12(4) EPPO Regulation, which states that in cases in which national law provides for the internal review of certain acts within the structure of a national prosecutor's office, the acts of the EDPs shall be reviewed exclusively by the EPs, on the basis of the internal rules of procedure of the EPPO.

In addition, other factors were identified as potentially affecting the independence of the EPPO: the lack of transparency in the appointment procedure of the EPs; the lack of national career guarantees after the end of the mandate of the EPs (or ECP); the control by national authorities over the "necessary" resources and equipment of the EDPs; and the national authorities' provision of "adequate arrangements" for social security, pension, and insurance coverage.[31]

In contrast to the problems with national authorities, the study did not identify any problems involving the influence of European Union institutions, bodies, offices, or agencies (IBOAs) on the EPPO.[32] The only noteworthy aspect was the access of the EPPO to certain databases. Art. 43(2) EPPO Regulation provides that the EPPO shall have access to information stored in Union databases. Access to databases with a purely/mainly administrative purpose, however, such as ARACHNE (supporting administrative controls in the field of European investment and structural funds), is problematic, as some Member States (AT, DE, DK, FI, and SE) have not agreed to the use of the system for criminal investigations.[33] In this regard, the (general and largely unresolved) question of the use in criminal proceedings of data stored for administrative/preventive purposes also applies to the EPPO.[34]

2. EPPO's competence and its exercise

Concerning the material competence of the EPPO according to Art. 22 EPPO Regulation, the study showed that there are almost no compliance problems.[35] However, this positive assessment cannot conceal the fact that linking the material competence of the EPPO to the offences defined in Directive (EU) 2017/1371[36] (the "PIF Directive") makes the EPPO dependent on the Member States' understanding of these offences. The relevant provisions defining the offences for which the EPPO is competent are not found in the PIF Directive itself but rather in the transposition of its provisions into national law. The way in which the Directive has been transposed varies widely among Member States, so that the offences can only be considered partially harmonised.[37] This lack of harmonisation between the legal systems of the Member States hinders the effective work of the EPPO and may lead to non-aligned practices in the handling of PIF offences in the Member States.[38] In the same vein, Art. 25(3) EPPO Regulation, which elaborates on the exercise of the EPPO's competence in case of non-PIF offences inextricably linked to PIF offences, also raises many legal and practical questions and requires further clarification or harmonisation.[39]

The study also revealed some other problems concerning the exercise of the competence of the EPPO under Arts. 24 and 25 EPPO Regulation. In many Member States, the timely and direct information of the EPPO, the transfer of proceedings to the EPPO, and the attribution of competence between the national prosecution service and the EPPO have not been resolved in a compliant manner.[40] Art. 24(1) EPPO Regulation, for example, stipulates the reporting of possible EPPO cases without undue delay; however, several Member States (BE, CY, CZ, ES, FI, HR, MT, and PT) provide in their legislation that the national authorities should report to a national authority before reporting to the EPPO.[41]

Another example where a large number of Member States do not comply with the EPPO Regulation concerns Art. 25(6), which provides that, in the event of disagreement between the EPPO and the national authorities, the national authorities competent to decide on the attribution of competence for prosecution at the national level, shall decide who is to be competent for the investigation of the case. Member States must therefore designate the national authority that will decide on the attribution of competence. In this context, Art. 25(6) must be read in conjunction with Art. 42(2)(c) EPPO Regulation, which provides that the ECJ shall have jurisdiction to give preliminary rulings on the interpretation of Arts. 22 and 25 EPPO Regulation in the event of a conflict of competence between the EPPO and the competent national authorities. However, many Member States have not designated a national authority as a "court" or "tribunal", which precludes that a request for a preliminary ruling be submitted to the CJEU (which has jurisdiction under Art. 267 TFEU in regard to questions raised before a "court or tribunal").[42]

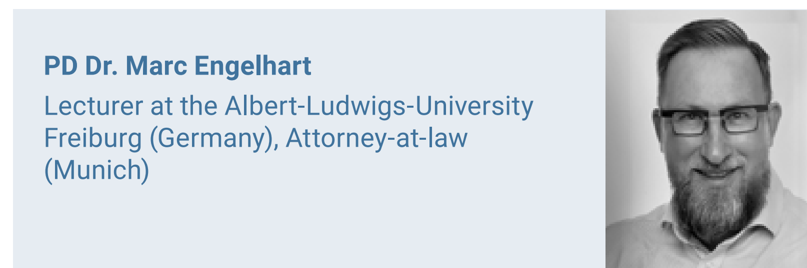
3. Rules of procedure

The majority of Member States fully comply with the procedural rules (which are rudimentary, as they are largely supplemented by national law) on investigation, investigative measures, prosecution, and alternatives to prosecution, as set out in Arts. 26 to 39 EPPO Regulation.[43] The main problems arise in systems with investigative judges.[44] For example, Art. 33(1) EPPO Regulation allows the handling EDP to order or request the arrest or pre-trial detention of the suspect or accused person in accordance with national law. Under Belgian national law, however, an arrest warrant or pre-trial detention requires a "judicial inquiry" and thus falls within the category of measures that are entirely under the control of the investigative judge; in such cases, the EDPs/EP cannot even request that the measures be carried out.[45]

A specific issue that was addressed in the extension study concerned the question of judicial authorisation in the context of cross-border investigations.[46] Art. 31(3) EPPO Regulation requires the assisting EDP to obtain authorisation in accordance with national law if judicial authorisation is required under the law of the assisting EDP. At first sight, the question of compliance with the regulation does not pose a problem, as almost all Member States comply with this requirement.[47] However, the provision is not sufficiently clear if both Member States (of the handling and the assisting EDP) require judicial authorisation or if there are differing standards between them; also unclear is the extent of judicial review that can be carried out within the Member State of the assisting EDP, e.g., if a court in the Member State of the assisting EDP is required to approve an assigned measure already examined by a court in the Member State of the handling EDP. In this context, the question arises as to whether review can be carried out only of enforcement issues or also of the justification and adoption of the measure assigned. This deliberation on the understanding of Art. 31(3) gave rise to the first preliminary ruling on the EPPO Regulation, decided by the ECJ in December 2023.[48] The Court ruled that the review conducted in the Member State of the assisting EDP may relate only to matters concerning the enforcement of that measure, to the exclusion of matters concerning its justification and adoption. It is highly debatable whether this interpretation is in line with the wording of Art. 31(3); in any case, Member States will have to review and possibly partially amend their legislation in order to ensure that it meets the requirements expressed by the ECJ.[49]

IV. Conclusions

The study on the implementation of the EPPO Regulation provides a unique insight into the most ambitious initiative to date concerning its criminal law integration into the EU. It clearly shows the range of existing approaches in the Member States and thus also enables a rarely found comparison of criminal procedural standards. Above all, however, it shows that – despite the complex structure of the EPPO and the great differences between the individual criminal law systems – transposition throughout Europe has been successful overall. However, the problems identified, particularly in the systems with an inquisitorial approach, also make it clear that a supranational criminal law system requires a minimum degree of harmonisation, particularly of the procedural rules according to which it can function and of the structure of national criminal law systems.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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; <https://eur-lex.europa.eu/eli/reg/2017/1939/oj> accessed 30 April 2024.

2 On the long history of the Regulation, see *H. Herrnfeld*, in: H. Herrnfeld, D. Brodowksi and C. Burchard, *European Public Prosecutor's Office: Article-by-Article Commentary*, 2021, Introduction paras. 1–6.

3 The project was led by Spark Legal and Policy Consulting (Patricia Ypma, Célia Drevon, Chloe Fulcher and Angelica Rasiewicz) and Tipik (Sylvie Giraudon) with the support of three key legal experts (John A.E. Vervaele, Katalin Ligeti, and Marc Engelhart) and a network of national legal experts (country rapporteurs).

4 European Commission, Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (JUST/2022/PR/JCOO/CRIM/0004), September 2023; the report is available on the European Parliament's website: <https://www.europarl.europa.eu/thinktank/en/events/details/study-presentation-compatibility-of-nati/20240118EOT08142> accessed 30 April 2024.

5 European Commission, Extension of the Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of European Public Prosecutor's Office ('the EPPO') (JUST/2022/PR/JCOO/CRIM/0004), September 2023; the report is also available on the European Parliament's website: <https://www.europarl.europa.eu/thinktank/en/events/details/study-presentation-compatibility-of-nati/20240118EOT08142> accessed 30 April 2024.
6 In detail, Arts. 1, 2, 3, 7, 8–12(3), 14–16, 17(3), 18–21, 27(4), 28(3), 31(7)(8), 32, 34, 36(2)(4), 38, 41(1)(2), 42(5)-(7), 44, 46, 47–105, 106(2), 107, 108(1), and 109–120 apart from 113(6) were not included in the study.
7 Final Report, *op. cit.* (n. 4), pp. 29–37.
8 Final Report, *op. cit.* (n. 4), pp. 38–42.
9 Final Report, *op. cit.* (n. 4), pp. 43–45.
10 Final Report, *op. cit.* (n. 4), pp. 46–57.
11 Final Report, *op. cit.* (n. 4), pp. 58–77.
12 Final Report, *op. cit.* (n. 4), pp. 78–80.
13 Final Report, *op. cit.* (n. 4), p. 81.
14 Final Report, *op. cit.* (n. 4), pp. 82–83.
15 Final Report, *op. cit.* (n. 4), pp. 84–85.
16 Extension Report, *op. cit.* (n. 5), pp. 17–25.
17 Extension Report, *op. cit.* (n. 5), pp. 26–41.
18 Extension Report, *op. cit.* (n. 5), pp. 42–49.
19 Extension Report, *op. cit.* (n. 5), pp. 50–64.
20 For details see Final Report, *op. cit.* (n. 4), pp. 25–27.
21 The national correlation tables have not been published.
22 See Final Report, *op. cit.* (n. 4), pp. 27–28; Extension Report, pp. 14–16.
23 See especially the visualization in Annex II.
24 Final Report, *op. cit.* (n. 4), pp. 29–37; Extension Report, *op. cit.* (n. 5), pp. 17–25.
25 Final Report, *op. cit.* (n. 4), p. 32.
26 See Final Report, *op. cit.* (n. 4), pp.38–39.
27 Arts 4, 28(1), and 30 EPPO Regulation.
28 I.e., the power to decide whether to prosecute before a national court or to consider a referral of the case, a dismissal, or a simplified prosecution procedure in accordance with Arts. 34, 35, 36, 39, and 40 EPPO Regulation.
29 Final Report, *op. cit.* (n. 4), pp. 35–36; Extension Report, *op. cit.* (n. 5), p. 18.
30 Final Report, *op. cit.* (n. 4), pp. 42, 44.
31 Extension Report, *op. cit.* (n. 5), pp. 19–22.
32 Extension Report, *op. cit.* (n. 5), pp. 22–23.
33 Extension Report, *op. cit.* (n. 5), pp. 45–48.
34 See on the general problem, e.g., Silvia Allegrezza, "Information Exchange Between Administrative and Criminal Enforcement: The Case of the ECB and National Investigative Agencies", (2020) *eucrim*, 302–309.
35 Final Report, *op. cit.* (n. 4), pp. 46–47.
36 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.
37 See, for the differences European Commission, the Second report on the implementation of Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, COM(2022) 466, <https://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2022/0466/COM_COM(2022)0466_EN.pdf> accessed 30 April 2024.
38 For more details, see Extension Report, *op. cit.* (n. 5), pp. 26–38, which assesses whether the wording of Arts. 22 and 25 EPPO Regulation can hinder the practical work of the EPPO.
39 For details see Extension Report, *op. cit.* (n. 5), pp. 31–39.
40 See the Final Report, *op. cit.* (n. 4), p. 48 (overview), pp. 51–58 (details).
41 Final Report, *op. cit.* (n. 4), pp. 51–54.
42 Final Report, *op. cit.* (n. 4), pp. 55–58.
43 Final Report, *op. cit.* (n. 4), pp. 64–70.
44 For more details, see Section III.1 of this Article.
45 Final Report, *op. cit.* (n. 4), p. 69.
46 Extension Report, *op. cit.* (n. 5), pp. 50–55.
47 The only exception is Slovenia, as the EDP cannot execute investigations. He/She can, however, propose that the investigating judge execute investigative measures within the judge's competence, thus hindering the assisting EDP from obtaining such authorisation. See Final Report, *op. cit.* (n. 4), p. 69.
48 ECJ (Grand Chamber), 21 December 2023, Case C-281/22, *G.K. and Others (Parquet européen)*, ECLI EU:C:2023:1018.
49 See, e.g., H. Herrnfeld, "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*)", (2023) *eucrim*, 370–380.

Status of the EPPO: an EU Judicial Actor

Danilo Ceccarelli

This article analyses the institutional role of the European Public Prosecutor's Office (EPPO) in the context of the European Union's legal framework and underlines the nature of its prosecutorial and judicial authority in the Member States. Against this background, the author reflects on whether the current legal and institutional framework provides sufficient institutional safeguards to protect its independence and the independence of its prosecutors, both at the central and domestic levels. According to the author, institutional safeguards exist to protect the independence of the office as a whole, but they are not sufficient to protect the prosecutors. A significant legal vacuum exists with regard to their career progression and to disciplinary procedures involving them, but it is especially the appointment procedure that is not in line with basic rule-of-law principles, which guarantee the independence of prosecutorial and judicial bodies. Institutional safeguards are in place, however, as regards the dismissal of the European Chief Prosecutor and of the European Prosecutors, which can be decided only by the Court of Justice of the European Union.

I. Introduction

The legal definition of judicial authority differs among the legal systems of the Member States of the European Union. Although we cannot claim that there is a pan-European concept of judicial authority, the Court of Justice of the European Union (CJEU) has extrapolated the concept for the purpose of the Framework Decision on the European Arrest Warrant.[1] In doing so, the CJEU chose a broad interpretation of the concept of judicial authority that encompasses not only judges and courts but also other authorities that satisfy the following criteria:[2]

- They participate in the administration of criminal justice;
- They act independently and are capable of exercising their responsibilities objectively, taking into account all incriminatory and exculpatory evidence, without being exposed to the risk that their decision-making power is subject to external directions or instructions, in particular from the executive;
- Their decisions are subject to review by a court in proceedings that meet in full the requirements of effective judicial protection.

In the same vein, the European Court of Human Rights (ECtHR) emphasizes the necessity of independence in order to qualify an authority as judicial. It has ruled, inter alia, that members of prosecuting authorities under the authority of the Minister of Justice, do not satisfy the requirement of independence from the executive and therefore cannot be considered a "judicial authority" for the purposes of Article 5 § 3.[3]

In this article, I will discuss the notion of "judicial authority", claiming that it should not be limited to the designation of judges and courts only but must be construed in a wider sense. I will therefore argue that the European Public Prosecutor's Office (EPPO) – considering its specific functions – possesses all the features to be considered a fully-fledged judicial authority. I will carry out this analysis based not only on the role and on function of the EPPO as a body of the European Union and its first independent prosecutor's office, but especially in respect of the status of its prosecutors, their independence and accountability.

II. The EPPO as an Authority with Judicial Powers

The traditional separation between the executive, legislative, and judicial branches of state power is not part of the structure of the EU Treaties, and there is actually no specific part dedicated to the judiciary. Nevertheless, the provisions of the Treaties related to institutions clearly follow this model of division, establishing executive and legislative institutions and one EU institution with clear judicial power, i.e., the Court of Justice of the European Union (CJEU).

The EPPO is not defined as an EU institution. In the Treaty on the Functioning of the European Union (TFEU), the EPPO is included in Chapter 4 of Title IV, in conjunction with "Judicial Cooperation in Criminal Matters", even though one of the main features of the EPPO is that it takes action as a single office and not by means of judicial cooperation within its participating Member States. Undoubtedly, the EPPO is also not an EU agency: it is different from the agencies established under the same title, i.e., Eurojust and Europol.

According to its founding legislative act – the EPPO Regulation –[4] the EPPO "is established as a body of the Union" (Art. 3). The mandate of the EPPO is to function directly as the Prosecutor's Office of the Union: it is tasked with "investigating, prosecuting and bringing to judgment" the perpetrators of criminal offences affecting the Union's financial interests (Art. 4) and acts "in the interest of the Union as a whole" (Art. 6), whereas the EU agencies "support and strengthen" the action of other authorities.

We can draw the interim conclusion that, within the EU institutional architecture, the role of the EPPO is very peculiar and unprecedented. The EPPO does not rely on national prosecutorial authorities. The EPPO investigates and prosecutes in the Member States directly, without national intermediaries, exercising prosecutorial and investigating powers. In line with Article 86 TFEU, the EPPO exercises its functions before the courts of the Member States.

The latter is especially reflected in Arts. 4, 13(1), and 28 to 40 of the EPPO Regulation, when the European Delegated Prosecutors (EDPs), who are based in the Member States, have, as a minimum, the same powers as the national prosecutors. This creates a hybrid structure, where the EPPO is the centralised prosecutor's office of the Union but has also full prosecutorial authority within the national system of each Member State. In this context, when the law of a Member State confers judicial powers on prosecutors, if the EPPO exercises its competence, it automatically carries out these judicial functions while carrying out its investigation and prosecution.

The concept of the EPPO Regulation may conflict with national systems that provide for an investigative judge as leading authority in the investigative phase. Therefore, some Member States,[5] , have amended their codes of criminal procedure in respect of cases handled by the EPPO in order to ensure correct implementation of the EPPO Regulation. More specifically, these Member States removed

powers traditionally linked with the judicial authority of the investigative judge, transferring them to the independent prosecutors of the EPPO. As a result, the judge is no longer in charge of the investigation in these Member States but only responsible for authorising investigative measures upon the EDP's request and/or reviewing acts of the EPPO intended to produce legal effects vis-à-vis third parties. In doing so, national systems were aligned particularly to Arts. 28 and 42 of the EPPO Regulation, which establish not only that the prosecutors of the EPPO are exclusively in charge of managing investigation and prosecution, but also that their procedural acts, which are intended to produce legal effects vis-à-vis third parties (as well as any failure to adopt procedural acts) are subject to review by the competent national courts.

In light of the above considerations, it follows that the EPPO exercises direct judicial action on behalf and in the interest of the Union and as such possesses the necessary judicial authority.

III. The EPPO as an Independent Judicial Authority

A specific, probably the most important feature of the EPPO, which substantiates its judicial nature, is its external independence.[6]

As indicated above, there are different models of prosecution in the EU Member States,[7] In some Member States, the prosecution service has strong ties with the executive power and may be subordinate to instructions from the government or it is required to report to it. In other few Member States, in order to balance the lack of the independence of the prosecutor, there is an (obviously independent) investigative judge has strong investigative powers. In other Member States, however, the prosecution service is independent, and the prosecutors are fully part of the judiciary.

The EPPO Regulation emphasises the independence of the EPPO in its Art. 6 and recital 16, prohibiting any kind of interference and influence from any authority of the Union and of the Member States and from any persons external to the EPPO. According to Arts. 6(2) and 7, the EPPO is accountable to the EU and the Member States for its general activities but not for its specific investigations and cases, which are protected by confidentiality and only subject to judicial control in line with Art. 42 of the Regulation and national law.

Furthermore, the EPPO does not have links with the executive power even as regards its general prosecutorial policy. According to Art. 9 of the EPPO Regulation, the College of the EPPO (hereinafter: "College") takes decisions on strategic matters and is tasked with ensuring coherence, efficiency, and consistency in the prosecution policy of the EPPO throughout the Member States. Granting the EPPO the authority to elaborate and decide internally its prosecutorial strategy and policy, without either being subject to general instructions from the executive power, or to directives, guidelines and instructions from a hierarchically superior prosecutorial authority linked to the government, means granting to the EPPO full external and internal independence. This is further confirmation of EPPO's independence and a clear severance from the executive power.

IV. Institutional Safeguards: the EPPO and its Prosecutors

Recital 16 of the Regulation clarifies the link between the investigative and prosecutorial powers conferred on the EPPO and the necessity to safeguard its independence: "since the EPPO is to be granted powers of investigation and prosecution, institutional safeguards should be put in place to ensure its independence." It follows, therefore, that the EPPO Regulation considers the EPPO to be a body with judicial functions and, as such, it should be independent.

The ECtHR established requirements for the independence of prosecutors. According to the Court this is strictly connected to judicial function: In a landmark judgement of 2020, the ECtHR maintained:[8]

> [the State should respect the] nature of the judicial function as an independent branch of State power – and the principle of the independence of prosecutors, which (…) is a key element for the maintenance of judicial independence.

The ECtHR also referred[9] to the opinion of the Venice Commission 924/2018, which underlined in respect of appointment methods involving the executive and/or the legislative branch that:[10]

> supplementary safeguards are necessary to diminish the risk of politicisation of the prosecution office. As in the case of judicial appointments … the effective involvement of the judicial (or prosecutorial council), where such a body exists, is essential as a guarantee of neutrality and professional, non-political expertise.

Against this background, the EU must put in place institutional safeguards to ensure the independence of the EPPO in the exercise of judicial activity. As explained above, the current statutory rules and institutional framework guarantee that the EPPO, acting as a single office in all the participating Member States, is not exposed to any risk of being subject to instructions from or being obligated to report to the executive in specific cases.

Nevertheless, the EPPO carries out its mandate through specific organs in charge of prosecutorial and investigating functions. These are the prosecutors of the EPPO, namely the European Chief Prosecutor (ECP) and the European Prosecutors (EP), acting as members of the Permanent Chambers, as well as the European Delegated Prosecutors (EDP). Hence, institutional safeguards should be in place to protect the EPPO as single office but also to protect its prosecutors' statutory independence and their institutional status directly.

In line with Art. 96(1) and (6) of the Regulation, the ECP and the EPs are engaged as temporary agents under Art. 2(a) of the Conditions of Employment (hereinafter: "CoE"), whereas the EDPs are engaged as Special Advisors in accordance with Arts. 5, 123 and 124. Art. 96 of the EPPO Regulation specifies that "the Staff Regulations (SR) and the CoE … shall apply to the ECP and the EPs, and the EDPs." The SRs govern the employment of civil servants of the Union in the context of administrative organisations, are hierarchically structured, and are not suitable for regulating prosecutorial and judicial organs. In particular, SRs cannot guarantee that the prosecutors of the EPPO enjoy institutional safeguards protecting their position from external interferences or undue influence. On the contrary, it is worth noting that judges and advocates general of the CJEU enjoy a robust self-governing mechanism under Arts. 2 to 7 of the CJEU Statute, which can effectively guarantee their independence.

Institutional safeguards to ensure the independence of prosecutors include their appointment, career progression, irremovability, dismissal, and disciplinary action. In several Member States, the implementation of these safeguards is overseen by self-governing bodies, such as High Councils. These bodies usually have a mixed structure comprising members of the judiciary/prosecution and lay members. The Venice Commission has repeatedly highlighted that the involvement of these bodies, not only in the appointment but also in the career progression of prosecutors, "is essential as a guarantee of neutrality and professional, non-political expertise."[11] In relation to the EPPO, however, the EU legislator did not establish such a body, thus missing out on this "essential" institutional safeguard.

1. The European Delegated Prosecutors

Within the EPPO, the College has been given self-governing competences, but only as regards the EDPs. Member States must first nominate one candidate for each EDP position, and then the College appoints the EDPs upon a proposal by the ECP. However, both the European Chief Prosecutor and the College are autonomous in determining whether the candidates meet the criteria of independence and have the necessary qualifications for and relevant practical experience in their national legal system as foreseen in Art. 17(2) of the EPPO Regulation. During the first three-year lifecycle of the EPPO, several candidate EDPs nominated by the Member States were already rejected by the College. Although this procedure guarantees the independence of the EPPO in appointing its EDPs, it leaves the nomination procedure unregulated at the Member States level and hence neither guarantees that this is carried out in an efficient[12] and transparent manner, nor without political interferences.

The evaluation and career progression of the EDPs are regulated in decisions adopted by the College[13] in line with Art. 114(c) of the EPPO Regulation and fall entirely within the competence of the College. They are subject to disciplinary procedure inside the EPPO.[14] The final disciplinary decision is made by the College, which can also dismiss the EDP in accordance with Art. 17(3) and (4) of the Regulation. Member States may only decide to dismiss or to take disciplinary action against EDPs for reasons not connected with their responsibilities within the EPPO, and only after informing the ECP.

Overall, the status of the EDPs and their external independence is ensured by the College as a self-governing body, which plays a key (though not exclusive) role, from the time of recruitment until their dismissal and throughout their "European" career. In addition, the EDPs are appointed for a 5-year term, which is renewable without any time limit as foreseen in Art. 17(1) of the Regulation. The Member States cannot intervene in the "European status" of the EDPs and cannot call them back to their national positions.

2. The European Chief Prosecutor and the European Prosecutors

In contrast to the nomination and appointment procedure of EDPs described above, political institutions appoint both the European Chief Prosecutor and the European Prosecutors.

In order to carry out a proper assessment of the professional qualification of the candidates, a "selection panel" is established, composed of 12 members "chosen from among former members of the Court of Justice and the Court of Auditors, former national members of Eurojust, members of national supreme courts, high-level prosecutors and lawyers of recognised competence."[15] Although appointed by EU political authorities (12 members appointed by the Council, of which 11 upon proposal the European Commission, and one proposed by the European Parliament), the panel

is entirely independent, and the professional backgrounds of its members ensure proper assessment of the professional profile of the candidates. Nevertheless, despite its name, the "selection panel" selects neither the ECP nor the EPs, since the evaluation is not binding on the appointing authorities.

In respect of EPs, Member States nominate three candidates. Each Member State retains the autonomy to determine the procedure for, and the authority in charge of, nominating the candidates. The selection panel carries out thorough interviews with the candidates and assesses their professional qualifications. If the panel determines that one or more candidates are not fit for the position, it rejects the nomination; in such cases, the Member State concerned needs to nominate new candidates. Otherwise, the selection panel ranks the candidates and issues a reasoned decision.

The appointing authority of the EPs is the Council of the European Union. The Council does not carry out any interviews and does not interact with the candidates in any way. The decision is taken during a JHA Council in the composition of the Ministers of Justice of the Member States. The proceedings of the preparatory bodies and the meeting of the JHA Council at which the candidates are appointed are not public. The votes, explanations of votes, statements contained in the minutes, and the minutes themselves are not accessible to the public. The EPPO Regulation does not impose any specific requirements on the Council to make a reasoned decision; however, the General Court[16] has established that there is a general obligation to motivate such decisions, which stems from Art. 296 TFEU and Art. 41(2)(c) of the Charter of Fundamental Rights of the EU (Charter). Still, the Council retains a wide discretionary power, which is backed by the General Court:[17]

> [European institutions] have large discretion in assessing and comparing the merits of candidates to a vacant position, and the elements for this assessment do not depend only on the professional skills and the professional value of the candidates, but also on their character, their behaviour and their overall personality.

The appointment of the ECP starts with an open call for candidates published in the Official Journal of the EU. Member States do not have any role in this procedure. Pursuant to its operating rules,[18] the selection panel interviews a sufficient number[19] of the highest-ranked candidates in order to establish a shortlist of three to five[20] candidates to be submitted to the European Parliament and to the Council. After the selection panel finalises the ranking, the European Parliament, at a public hearing of the Civil Liberties Committee, along with the participation of the Budget Control Committee, questions the shortlisted candidates. Once the European Parliament decides which candidate to support, it enters into negotiations with the Council. The ECP is appointed by "common accord" by the European Parliament and the Council.

The selection procedure is more transparent in comparison to that of the EPs, and it seems more consistent with the recommendations of the Venice Commission. In an opinion of 2015on the appointment of high-level prosecutors in Georgia, the Venice Commission stated as follows:[21]

> The Venice Commission, when assessing different models of appointment of Chief Prosecutors, has always been concerned with finding an appropriate balance between the requirement of democratic legitimacy of such appointments, on the one hand, and the requirement of depoliticisation, on the other. Thus, an appointment process, which involves the executive and/or legislative branch, has the advantage of giving democratic legitimacy to the appointment of the head of the prosecution service. However, in this case, supplementary safeguards are necessary in order to diminish the risk of politicisation of the prosecution office. The establishment of a Prosecutorial Council, which would play a key role in the appointment of the Chief Prosecutor, can be considered as one of the most effective modern instruments to achieve this goal. (…) Nevertheless, it is noted that the new procedure for appointing the Chief Prosecutor is still not fully balanced and that the "political element" in the appointment process still remains predominant.

The approach by the Venice Commission is also shared by the European Commission. In a report on Romania within the Co-operation and Verification Mechanism (CVM) of 2017, the Commission formulated the following recommendation:[22]

> Put in place a robust and independent system of appointing top prosecutors, based on clear and transparent criteria, drawing on the support of the Venice Commission.

And the Commission added:[23]

> The fulfilment of this recommendation will also need to ensure appropriate safeguards in terms of transparency, independence, checks, and balances, even if the final decision were to remain with the political level.

As aforementioned, another very relevant aspect related to the institutional safeguards to ensure the independence of prosecutors concern the disciplinary procedure carried out against them. The EPPO Regulation is almost silent in this regard when it concerns the ECP and the EPs. The only relevant provision is Art. 110, referring to Annex IX of the SR as regards the authority of OLAF to carry out internal investigations if the EPPO itself committed unlawful activities affecting the Union's financial interests. In theory, since the ECP and the EPs are temporary agents under Art. 2(a) of the CoE, they should be subject to the disciplinary procedure under Art. 86(3) and Annex IX of the SR. But these provisions are not compatible with the structure of the EPPO and with the institutional position of the ECP and the EPs.

There is neither a legal basis allowing the appointing authority to decide on whether or not to initiate a disciplinary proceeding, nor to compose a disciplinary board and reach a final decision. The non-hierarchical relationship between the EPPO and the appointing authorities of its prosecutors prevents any disciplinary procedure from being brought against them. Most importantly, allowing a political body to make disciplinary decisions on prosecutors would violate the principles of independence of the judiciary and of the separation of powers.

According to the settled CJEU case law, the absence of an independent and impartial disciplinary board, and of a judicial decision-making disciplinary body, would be in breach of the second subparagraph of Art. 19(1) TEU.[24] Moreover, the lack of disciplinary rules guaranteeing at least the examination of the case within a reasonable time and specific rights of defence could violate Arts. 47 and 48 of the Charter.

Similar concerns can be observed with regard to the career progression of the EPs. As a rule, EU temporary agents advance in their careers based on evaluation and performance reports by the appointing authority, in accordance with Arts. 43 SR. In respect of the EPs, however, the lack of a hierarchical structure with the appointing authority and the fact that the latter functions as a political institution of the Union, does not allow for a proper performance evaluation.

Conversely, the EPPO Regulation contains provisions related to the dismissal of the ECP and of the EPs. According to Arts. 14(5) and 16(5), only the CJEU may, upon the application of the European Parliament, the Council, or the Commission, dismiss the ECP and the EPs if it finds that they are no longer able to perform their duties or guilty of serious misconduct. Despite the absence of a clearly defined procedure and the rather general nature of the grounds for dismissal, the exclusive attribution of this power to the only judicial institution of the Union guarantees that the rule of law and the independence of the prosecutors of the EPPO are complied with in this regard.

V. Conclusions

The analysis in this article showed convincing arguments that the EPPO is a judicial actor endowed with judicial authority: the EPPO exercises judicial functions and enjoys independence while doing so. Its procedural acts are subject only to the judicial review of national judges and to the jurisdiction of the CJEU, pursuant to Art. 42 of the EPPO Regulation.

However, the institutional and legislative framework under which the EPPO is currently operating is certainly incomplete. Although the institutional safeguards put in place to ensure its independence as a single operating office seem adequate, the safeguards to protect the independence of its prosecutors are inconsistent and insufficient.

It is not guaranteed, for instance, that adequate safeguards, including transparency, independence, and checks and balances, are in place to counterbalance the predominance of the "political element" in the ECP appointment procedure, which is heavily influenced by the decisions of political institutions. The EPs are even more exposed to political interference in respect of their appointment procedure, because it clearly lacks transparency and independence from the political level.

Therefore, it can be concluded that institutional safeguards are not in line with the rule-of-law principles, the case law of the ECtHR, and the recommendations of the Venice Commission. On the contrary, the EDPs enjoy a higher degree of independence and protection from external interference as a result of the self-governing functions of the College.

It seems necessary to re-consider the institutional architecture of the EPPO, starting from its classification as a judicial institution of the Union, in order to have a fully independent EU prosecutor with the necessary institutional safeguards in place for both the institution and its prosecutors.

Danilo Ceccarelli
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1 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), OJ L 190, 18.7.2002, 1.
2 ECJ (Grand Chamber), 27 May 2019, Joined Cases C-508/18 (O.G.) & C-82/19 PPU (P.I.), paras. 42 to 90; ECJ (Second Chamber), 9 October 2019, Case C-489/19 PPU (NJ/Generalstaatsanwaltschaft Berlin), paras. 26 to 49.
3 ECtHR, 23 November 2010, *Moulin v France,* Appl. no. 37104/06, paras. 57 to 60.

4 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.
5 For instance, France and Spain.
6 On this topic, see C. Burchard, "Article 6 – Independence and accountability", in: H.H. Herrnfeld, D. Brodowski and C. Burchard (eds.), *European Public Prosecutor's Office. Article-by-Article Commentary,* 2021, pp. 32–36.
7 See, for instance, A. Perrodet, "The Public Prosecutor", in: M. Delmas-Marty and J.R. Spencer (eds.), *European Criminal Procedure,* 2002, pp. 415–455.
8 ECtHR, 5 May 2020, *Kövesi v Romania,* Appl. no. 3594/19, para. 208.
9 ECtHR, *Kövesi v Romania, op. cit.* (n. 8), para. 81.
10 Venice Commission, opinion 924/2018 on Romania's amendments to law no. 303/2004 on the statute of judges and prosecutors, law no. 304/2004 on judicial organization, and law no. 317/2004 on the Superior Council for Magistracy, 116th Plenary Session (Venice, 19–20 October 2018), para. 47.
11 Venice Commission, opinion 924/2018, *op. cit.* (n. 10).
12 Slovenia refused to nominate the candidate EDPs until November 2021.
13 College Decision 030/2021 of 21 April 2021 "Laying down rules on the procedure for the appraisal of the European Delegated Prosecutors"; College Decision 080/2021 of 14 July 2021 "Appointing 4 Members of the Appraisal Committee for the European Delegated Prosecutors".
14 College Decision 044/2021 of 12 May 2021 "Laying Down Rules on the Disciplinary Liability of the European Delegated Prosecutors"; College Decision 071/2021 of 9 June 2021 on "Appointing 5 European Prosecutors as Members of the Disciplinary Board for the European Delegated Prosecutors".
15 Arts. 14(3) and 16(2) of the EPPO Regulation.
16 GC, 12 January 2022, Case T-647/20, *Verelst v Council,* paras. 85, 86, 97.
17 GC, Verelst v Council, *op. cit.* (n. 16), para. 116.
18 Council Implementing Decision (EU) 2018/1696 of 13 July 2018, OJ L 282, 12.11.2018, 8.
19 The first selection panel interviewed ten candidates.
20 The first selection panel shortlisted three candidates.
21 Venice Commission opinion 811/2015, on the draft amendments to the law on the prosecutor's office of Georgia, 104th Plenary Session (Venice, 23–24 October 2015), paras. 19 and 20.
22 Report from the Commission to the European Parliament and the Council on Progress in Romania under the Co-operation and Verification Mechanism, COM(2017) 751 final, 15 .11.2017, p. 3.
23 COM(2017) 751 final, *op. cit.* (n. 22), p. 4.
24 ECJ (Grand Chamber), 15 July 2021, case C-791/19, European Commission v Republic of Poland, paras. 59 to 62 and the case law cited therein.

Judicial Control of the EPPO

The Role of the Court of Justice

Anthony M. Collins

This article examines the exercise by the Court of Justice of the European Union of its judicial review jurisdiction with respect to the European Public Prosecutor's Office. It describes the Court of Justice's activities in the framework of the Area of Freedom, Security and Justice, of which the European Public Prosecutor's Office is a key element, before examining the Court's jurisdiction to review the legality of measures taken by the European Public Prosecutor's Office and a number of cases in that context.

I. Introduction

Designed to safeguard the European Union's financial interests and to fight cross-border crime, the European Public Prosecutor's Office (EPPO) ushers in an era of vertical and horizontal cooperation between agencies charged with combatting crime. The idea of a European Public Prosecutor dates back to the Corpus Juris of 1997,[1] ultimately finding its way into EU primary law in Art. 86 of the Treaty on the Functioning of the European Union (TFEU). The European Commission submitted the first proposal for an EPPO Regulation some four years after the entry into force of the Treaty of Lisbon.[2] The proposal faced some resistance, as evidenced by the fact that 14 national parliaments submitted reasoned opinions to the Commission, triggering the so-called "yellow card" procedure under Art. 7(2) of the Treaty on European Union (TEU) and Protocol (No 2) to the TFEU on the application of the principles of subsidiarity and proportionality.[3]

The Commission's proposal having failed to win unanimous support, a group of 20 Member States, joined later by three others, adopted the EPPO Regulation by way of enhanced cooperation.[4] The EPPO Regulation is different from the "single legal area"[5] concept the Commission submitted in 2013. It nevertheless embodies a shift from horizontal judicial cooperation between national authorities to a vertical and more integrated form of cooperation. The EPPO operates as a single office with a two-layer structure, containing a central and a decentralised level. The central level consists of a college of 23 European Prosecutors – one from each participating Member State–, the Permanent Chambers, the European Chief Prosecutor (ECP), the Deputy European Chief Prosecutors, the European Prosecutors and the Administrative Director.[6] The EPPO's decentralised level consists of European Delegated Prosecutors ('EDP') based in participating Member States.[7] The central level monitors and directs the conduct of investigations and prosecutions by the EDPs.[8]

In a society governed by the rule of law, the activities of a body that, in the exercise of its functions at a multi-national and national level, has a direct impact upon citizens' enjoyment of their fundamental rights, must be amenable to judicial control. This article examines the Court of Justice of the European Union's (CJEU) exercise of judicial control over the EPPO.[9] It commences with a description of the CJEU's activities in the framework of the Area of Freedom, Security and Justice (AFSJ), of which the EPPO is a key element. The second part examines the CJEU's judicial review jurisdiction over the EPPO and the third part looks at a number of cases that invoke that jurisdiction.

II. The CJEU's Role in the Area of Freedom, Security and Justice

The Tampere European Council in 1999 heard calls for the establishment of Eurojust and discussed a proposal for a European Arrest Warrant (EAW), a ground-breaking legal instrument based upon the principles of mutual recognition and mutual trust designed to facilitate the cross-border surrender of persons suspected, or convicted, of having committed offences.[10] It was, nevertheless, not until a year after the attacks of September 11, 2001 that Eurojust was established,[11] whilst the Framework Decision on the European Arrest Warrant (FD EAW)[12] took effect in 2004.

Legislative progress on AFSJ measures outpaced a commensurate expansion of the CJEU's jurisdiction to interpret them. Member States could opt-out of the preliminary ruling procedure in this area, thereby leaving it to their courts to interpret these measures without any central guidance. An additional obstacle consisted in the reservation to courts of final instance of jurisdiction to make such references.[13]

The entry into force of the Lisbon Treaty lifted these barriers, thereby facilitating a significant expansion in the CJEU's role in the AFSJ. New treaty provisions, such as Art. 19(1) second paragraph TEU, which states that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law, solidified the judicial protection of individual rights in the national legal orders. Similarly, Art. 47 of the Charter of Fundamental Rights of the European Union (the Charter) enshrined the right to an effective remedy against violations of rights and freedoms conferred by EU law. The CJEU subsequently recognised that both of these provisions had direct effect in the legal orders of the Member States, thus enabling individuals to rely upon provisions of EU law directly before their national courts, which are under a duty to give those provisions full effect.[14]

Art. 267 TFEU empowers all national courts or tribunals to put questions to the CJEU concerning the interpretation of EU law, and the interpretation and validity of measures adopted in the context of the AFSJ. Art. 267 TFEU establishes a division of labour between the Court of Justice and national courts whereby the former rules on the interpretation and the validity of Union acts and the latter decide the facts and any issues of national law that may arise for determination. The EPPO Regulation apportions jurisdiction between these courts accordingly. There is a presumption that national courts ask questions that are necessary in order to enable them to decide the case before them. Where it is clear from the material before the CJEU that the answer sought does not serve that purpose, it will decline jurisdiction to determine the request. The CJEU will sometimes reformulate the questions asked in order to give a referring court an answer that may assist in deciding the issues before it.

Preliminary rulings under Art. 267 TFEU account for around two-thirds of the Court of Justice's caseload. In 2023, preliminary rulings made up 520 of the 821 cases brought before the CJEU. Where a preliminary ruling seeks an interpretation and/or a ruling on the validity of provisions adopted under the AFSJ and an individual is in custody, a national court may seek, and the CJEU will afford, access to an urgent preliminary procedure.[15] That procedure enables the CJEU to reply to questions within an average of 4.3 months, as compared to 16.1 months for the standard preliminary ruling procedure.[16] Between 2019 and 2023, the CJEU received 95 requests for the urgent preliminary ruling proce-

dure, 35 of which raised issues pertaining to judicial cooperation in criminal matters. In 40 cases the Court granted the request.[17]

The CJEU also has jurisdiction in direct actions. The principal relief usually sought in such actions is the annulment of an act, but other remedies, including an award of damages, may also be sought. Art. 263 TFEU sets out the grounds upon which the Court may annul a measure: lack of powers; infringement of an essential procedural requirement; infringement of the Treaties or a rule of law; misuse of powers. Only a person to whom a decision is addressed, or to whom a decision is of direct and individual concern, has standing to bring a challenge by way of a direct action. Direct actions are in the nature of adversarial proceedings. The General Court of the European Union has exclusive jurisdiction to hear direct actions by private individuals or undertakings.

Courts can resolve only those issues that parties decide to litigate before them. For the first half century of its existence, the CJEU addressed almost exclusively what one could broadly categorise as economic matters. The AFSJ is a relatively new — and after the Treaty of Lisbon an enlarged and reinforced — jurisdiction for the CJEU to exercise. It has become one of, if not the principal, subjects of requests for preliminary ruling, with no less than 118 out of the 1,149 cases pending as of December 31, 2023 raising issues touching upon the AFSJ.[18] That proportion is unlikely to diminish in the near future as legislative initiatives including, but not limited to, the EPPO, continue to generate litigation.[19]

As the EU's powers expand, the CJEU has adjusted to the demands of determining novel legal issues. The majority of CJEU members do not purport to specialise in discrete areas of law, even if some of their number have expertise in fields such as competition law. For example, whilst the CJEU has ruled on questions pertaining to Value Added Tax since the enactment of the First VAT Directive in 1967, it is but rarely that Member States have nominated specialists in that field – or even in the area of taxation – as members of the CJEU. That situation is unlikely to change.

III. Judicial Review of EPPO Acts

Art. 86(3) TFEU provides that the regulations establishing the EPPO shall, *inter alia*, determine the rules applicable to the judicial review of the procedural measures that it takes in the performance of its functions. Because national laws and EU law regulate the EPPO's activities,[20] it was not possible to treat the EPPO, which is a body of the European Union,[21] in the same way as other EU agencies and bodies in order to ensure that its activities are subject to judicial review. The Union legislator concluded that both the specific nature of the EPPO's task and its structure, which differed from all other bodies, required the introduction of a new legal regime designed for that specific purpose.[22]

The EPPO Regulation does not disturb the monopoly that Member State courts exercise in criminal matters. Art. 86(2) TFEU recognises that the EPPO carries out its prosecutorial functions before the Member State courts, which requires a high level of engagement with them and with national law enforcement authorities. The principal rule is that EPPO procedural acts intended to produce legal effects vis-à-vis third parties are subject to review by national courts under national law. The same applies where the EPPO, in breach of a legal duty, fails to adopt procedural acts intended to produce legal effects vis-à-vis third parties.[23] Procedural acts include those adopted before the delivery of an indictment, including the decision on the choice of the Member State where an offence is prosecuted.

There is one exception to the principal rule. Where an EPPO decision to dismiss a case is challenged directly on grounds based upon EU law, a person to whom that decision is addressed or to whom that decision is of direct and individual concern may challenge it before the General Court of the European Union.[24]

The EPPO Regulation also grants the CJEU jurisdiction to review the acts or omissions of the EPPO in five specific circumstances: under Art. 268 TFEU in any dispute relating to compensation for damage that the EPPO may cause;[25] Art. 272 TFEU in any dispute concerning arbitration clauses in contracts the EPPO concludes;[26] Art. 270 TFEU in any dispute concerning staff matters;[27] and in any challenge to the dismissal of European Prosecutors, including the European Chief Prosecutor.[28]

The fifth and most important jurisdictions arises in the context of preliminary rulings under Art. 267 TFEU. That procedure may be available where the legality of an EPPO act is challenged before a national court on the grounds of its incompatibility with EU law or where issues arise as to the validity or interpretation of EPPO acts under EU law. This can occur in three circumstances. First, where a point is taken as to the validity of an EPPO procedural act before a national court or tribunal by reference to EU law. The CJEU has no jurisdiction to answer questions concerning the validity of such an act by reference to national law, which situation is consonant with the aforementioned division of jurisdiction between national courts and the CJEU under Art. 267 TFEU.

Second, where questions of the interpretation or of the validity of provisions of EU law must be determined.

Third, where the interpretation of Arts. 22 and 25 of the EPPO Regulation arises in the context of a dispute as to the competence of the EPPO vis-à-vis national authorities. This jurisdiction is additional to that which the CJEU exercises under Art. 267 TFEU to give preliminary rulings interpreting the Treaties and provisions of secondary law at the request of a national court. A national court may refer questions on the interpretation of the Treaties under Art. 267 TFEU and questions on the interpretation of Arts. 22 and 25 of the EPPO Regulation to the CJEU in the same request for a preliminary ruling. In that context national courts must ensure that national procedural rules governing actions for the protection of individual rights granted by EU law are no less favourable than those applicable to similar domestic actions (principle of equivalence) and do not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness).

The EPPO Regulation does not alter the CJEU's jurisdiction to review EPPO administrative decisions, which consist of those that the EPPO does not take in carrying out its functions as an investigator or as a prosecutor but are nevertheless intended to have legal effects vis-à-vis third parties. It is in that context that Art. 42(8) of the EPPO Regulation sets forth a category of EPPO acts that the CJEU may review in the exercise of its jurisdiction under the fourth paragraph of Art. 263 TFEU.[29]

Finally, and in addition to the foregoing, any EU Member State, the European Parliament, the Council or the Commission may bring actions before the CJEU for the annulment of an EPPO measure in accordance with the second paragraph of Art. 263 TFEU and the first paragraph of Art. 265 TFEU.[30]

IV. Cases before the CJEU

(1) In a request for a preliminary ruling from the Oberlandesgericht Wien, Austria, in Case C-281/22, G.K. et al., the Court of Justice was asked to interpret provisions of the EPPO Regulation for the first time. Two individuals and a limited company are suspected of having made false declarations on the importation of biodiesel into the EU, resulting in a loss of revenue of approximately €1,295,000. Since the EU had a financial interest in that revenue, the alleged offences fell within the competence of the EPPO, which commenced an investigation in Germany. At a certain point, the EDP in Germany considered that certain measures had to be carried out in other Member States, including Austria. The German ('handling') EDP entrusted the search and seizure of the accused persons' properties in Austria to an Austrian ('assisting') EDP. Under Austrian law, judicial authorisation is required in order to conduct searches; the assisting EDP sought and obtained that authorisation.

The accused challenged those warrants before the Oberlandesgericht Wien, seeking a judicial review of their substantive legality on the grounds that no criminal offence had been committed in Austria, that there was insufficient reasonable suspicion against them and that the searches were disproportionate and unnecessary. In reliance upon the EPPO Regulation, the assisting EDP submitted that any examination of the substantive reasons for carrying out the investigative measures was to be conducted in the Member State where the investigation commenced, here Germany.

The Oberlandesgericht Wien asked the CJEU to interpret Art. 31(3) and Art. 32 of the EPPO Regulation to determine if the courts of the Member State of an assisting EDP have jurisdiction to conduct a comprehensive judicial review of the legality of the investigative measures they permitted, as in the case of domestic investigations, or whether that review is limited to procedural questions in a case where the EPPO investigation had commenced in a Member State other than that which the investigative measure was executed.

In her Opinion delivered on 22 June 2023, Advocate General *Ćapeta* expressed the view that where the law of an assisting EDP's Member State requires a judicial authorisation to take investigative measures, judicial review before the courts of that state is limited to procedural aspects. It therefore cannot involve a full review of the justification for the adoption of those measures.[31] She justified her proposed approach by the need to ensure the effectiveness of Art. 31(3) of the EPPO Regulation.[32] In its judgment of 21 December 2023, the Court of Justice (Grand Chamber) interpreted Arts. 31 and 32 of the EPPO Regulation to the effect that any review of an assigned investigation measure that requires judicial authorisation by the courts of the assisting EDP's Member State is limited to the enforcement of that measure. Challenges to the justification for, and adoption of, such a measure may, therefore, be the subject of prior judicial review only in the Member State of the handling EDP, here Germany.

(2) Case C-292/23 (European Public Prosecutor's Office v I.R.O., F.J.L.R) arises out of an appeal by accused persons against the legality of summonses that an EDP issued to two third parties to attend as witnesses at their criminal trial. According to the referring court, the Juzgado Central de Instrucción nº 6 de la Audiencia Nacional, Spain, where

an EDP issues such summonses, Spanish law does not contemplate an appeal although such an appeal otherwise exists at Spanish law. The referring court asks the Court of Justice whether the situation that it describes, notably the unreviewable character of the EDP measure under national law, is compatible with, *inter alia*, Art. 42(1) of the EPPO Regulation, Arts. 6 and 48 of the Charter, Art. 7 of Directive (EU) 2016/343,[33] Art. 19(1), second paragraph TEU, Art. 86(3) TFEU, and Art. 2 TEU, read in the light of Art. 47 of the Charter. The resolution of the case may turn upon what precisely the phrase "[p]rocedural acts of the EPPO that are intended to produce legal effects vis-à-vis third parties" which appears in Art. 42(1) of the EPPO Regulation, entails. The hearing in the case is likely to take place before the end of 2024.

(3) Lastly, mention ought to be made of two orders of the General Court of the European Union ruling inadmissible two cases that sought, respectively, the annulment of a decision of the European Chief Prosecutor to request lifting the parliamentary immunity of the applicant based on Art. 29(2) of the EPPO Regulation,[34] and of the Permanent Chamber of the EPPO on the ground that its decision issued in breach of Art. 10 of the EPPO Regulation, which governs the composition of the Permanent Chamber.[35]

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1 M. Delmas-Marty, "Foreword", in: M. Delmas-Marty and J.A.E. Vervaele (eds.), *The implementation of the Corpus Juris in the Member States, Volume I,* 2000, p. 7.
2 European Commission, "Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office", COM(2013) 534 final.
3 H.-H. Herrnfeld in: H.-H. Herrnfeld, D. Brodowski, and C. Burchard., European Public Prosecutor's Office: Regulation z(EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO'): Article-by-Article Commentary, 2021, Introduction para. 4.
4 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 (hereinafter "the EPPO Regulation"). Hungary and Sweden do not participate in the EPPO. Denmark and Ireland have exercised their rights to opt-out of AFSJ cooperation in this area.
5 COM(2013) 534 final, *op. cit.* (n. 2), p. 26.
6 Art. 8 EPPO Regulation.
7 Arts. 8, 10 and 13 EPPO Regulation.
8 Art. 10 EPPO Regulation.
9 References to the CJEU in this article are to the CJEU as institution, which at present consists of the Court of Justice of the European Union and the General Court of the European Union: Art. 19(1) TEU.
10 Presidency Conclusions, Tampere European Council, 15–16 October 1999, paras. 33 and 46.
11 Council Decision 2002/187/JHA of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime; OJ L 63, 6.3.2002, 1.
12 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, OJ L 190, 18.7.2002, 1.
13 Order of 22 March 2002, Case C-24/02, *Marseille Fret SA v Seatrano Shipping Company Ltd.,* EU:C:2002:220, para. 14.
14 Judgment of 2 March 2021, Case C-824/18, *A.B. and Others v. KRS* (Nomination of Supreme Court Judges), EU:C:2021:153, paras. 145–146.
15 The Court heard four such cases in 2023: CJEU Annual Report 2023 'The Year in Review', p. 27.
16 CJEU Annual Report 2023 'The Year in Review', p. 27.
17 CJEU Annual Report 2023, 'Statistics concerning the judicial activity of the Court of Justice', p. 26.
18 CJEU Annual Report 2023 'The Year in Review', p. 27.
19 See, for example, 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) adopted to replace the fragmented and complicated framework for the gathering of evidence in criminal cases with a cross-border dimension by a simplified and more effective system of judicial cooperation based on a single instrument. See, for example, judgment of 30 April 2024, Case C-670/22, *M.N. (Encro Chat)* EU:C:2024:372.
20 Art. 5 EPPO Regulation.
21 Art. 3(1) EPPO Regulation.
22 Recital 86 EPPO Regulation.
23 Art. 42(1) EPPO Regulation.
24 Art. 42(3) EPPO Regulation.
25 Art. 42(4) EPPO Regulation.
26 Art. 42(5) EPPO Regulation.
27 Art. 42(6) EPPO Regulation.
28 Art. 42(7) in accordance with Art. 14(5) and Art. 16(5) respectively EPPO Regulation, ,
29 These include decisions that affect data subjects' rights under Chapter VIII of the EPPO Regulation; EPPO decisions that are not procedural acts, such as those concerning public access to documents and the dismissal of EDPs pursuant to Article Art. 17(3) of the EPPO Regulation, and what are described as "any other administrative decisions." See Recital 89 EPPO Regulation.
30 Recital 89 EPPO Regulation.
31 Opinion of Advocate General *Ćapeta,* 22 June 2023, Case C-281/22, paras. 38–40, EU:C:2023:510.
32 Opinion of Advocate General *Ćapeta, op. cit.* (n. 31) para. 60.
33 Directive (EU) 2016/343 of the European Parliament and of the Council of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, OJ L 65, 11.3.2016, 1). See, for instance, Judgment of 8 December 2022, Case C-348/21, *HYA and Others,* EU:C:2022:965.
34 Order of 16 January 2024, Case T-46/23, *Kaili v Parliament and EPPO,* EU:T:2024:14.
35 Order of 15 December 2023, Case T-103/23, Stan v EPPO, EU:T:2023:871.

Remarks on the CJEU's Preliminary Ruling in C-281/22 G.K. and Others (Parquet européen)

Katalin Ligeti

On 21 December 2023, the CJEU delivered its first judgment in response to the preliminary reference concerning the extent of judicial review in the context of the EPPO's cross-border investigations. The questions referred to the CJEU aimed to shed light on two crucial aspects of the respective legal framework. They address both the forum before which the suspect, or another person negatively affected by an investigative measure of the EPPO, may challenge the substantive reasons for adopting the measure and the scope of judicial scrutiny to be performed by the national court. This article first calls to mind the facts of the case and the legal framework on cross-border investigations laid down in Arts. 31 and 32 of the EPPO Regulation. Next, it analyses the Advocate General's opinion and the findings of the Court and then provides an assessment of the judgment, taking into account the negotiation history of the EPPO Regulation. The author concludes that, even if the CJEU's judgment offers much-needed clarity and legal certainty for carrying out cross-border investigations by the EPPO, the more adequate solution would be if the Commission were to propose an amendment of the EPPO Regulation.

I. Introduction

On 1 June 2021, the European Public Prosecutor's Office (EPPO) started its operational activities,[1] more than 20 years after it was first envisioned by the authors of the Corpus Juris[2] and thanks to the European Commission's sustained advocacy of and support for the criminal law protection of the financial interests of the European Union (EU). The EPPO brings a seminal change to EU criminal justice: instead of working by means of cooperation between national judicial authorities, the EPPO exercises genuine European powers of investigation and prosecution in the Area of Freedom, Security and Justice (AFSJ) to better fight offences affecting the EU's financial interests.

The divergent views of the Member States on vertical criminal-justice integration into the EU led to lengthy and difficult negotiations on the EPPO's establishment. This is mirrored in the compromises embedded in the provisions of Council Regulation (EU) 2017/1939 (the EPPO Regulation),[3] which already attracted criticism during the negotiation process: concerns were voiced over the norms not always providing the required clarity in ensuring both effective criminal enforcement in cases of offences against the EU budget and effective judicial protection of individuals subject to EPPO investigations.[4] It was expected from the outset that the Court of Justice of the European Union (CJEU) would play a pivotal role in resolving such ambiguities through dialogue with the national courts.

It did not take long before the CJEU delivered its first judgment:[5] On 21 December 2023, it responded to the preliminary reference by the Higher Regional Court of Vienna (Austria) that harboured doubts about the extent of judicial review in the context of the EPPO's cross-border investigations.[6] The legal regime on cross-border investigation in the EPPO Regulation aims at enabling European Delegated Prosecutors (EDPs) of different Member States to cooperate in EPPO investigations in an effective manner. It limits to one authorisation the judicial authorisation ("single judicial authorisation") for investigative measures to be carried out in a certain State at the request of the EDP of a different Member State. The questions referred to the CJEU aim to shed light on two crucial aspects of the legal framework related to the EPPO's cross-border investigations: First, they address the forum before which the suspect, or another person negatively affected by the investigative measure of the EPPO, may challenge the substantive reasons for adopting the measure; second, they concern the scope of judicial scrutiny to be performed by the national court.

This article first calls to mind the facts of the case and the legal framework on cross-border investigations laid down in Arts. 31 and 32 of the EPPO Regulation (II.-III.). Then, it analyses Advocate General (AG) *Ćapeta's* opinion on the questions referred and the findings of the Court (IV.-V.). The final part (VI.) assesses the judgment by taking into consideration the negotiation history of the EPPO Regulation.[7]

II. The Preliminary Reference by the Higher Regional Court of Vienna

The case concerned a large-scale tax fraud and organised crime investigation opened by a German EDP, acting on behalf of the EPPO. Since, during the investigations, it was

deemed necessary to gather evidence in other Member States, the German handling EDP assigned the search and seizure of certain business and private premises located in Austria to an Austrian assisting EDP. As such investigative measures require prior judicial authorisation under Austrian law, the assisting EDP obtained authorisation from the competent Austrian courts.[8]

The suspects challenged the judicial authorisation before the Austrian courts[9] and contested, among other objections, both the necessity and proportionality of the measures. In response, the assisting Austrian EDP evoked Art. 31(2) EPPO Regulation, according to which the justification of cross-border investigative measures is to be examined only in the Member State of the handling EDP, while the competent authorities of the Member State of the assisting EDP may only assess the formalities relating to the execution of such measures.

Since Art. 31 EPPO Regulation does not explicitly regulate the situation in which judicial authorisation is required both in the state of the handling and of the assisting EDPs, the Austrian court decided to refer the case to the CJEU. The referring court noted that the wording of Art. 31(3) and Art. 32 EPPO Regulation can be interpreted in such a way that if an investigative measure requires judicial authorisation in the State of the assisting EDP, that measure must be fully examined by a court of the assisting EDP's Member State.[10] The Viennese court stated that such interpretation would result in the measure being the subject of a full examination in two different Member States.[11] Such a double examination would, however, constitute a step backwards compared to the regime established by the Directive on the European Investigation Order (EIO Directive),[12] according to which the executing Member State needs to verify merely certain formal aspects.[13] The cumbersome decision-taking process would contradict the rationale of the newly established EPPO cross-border investigations framework that aims at creating an easier cooperation than that provided for in other mutual recognition instruments.

Against this background, the Higher Regional Court of Vienna decided to stay its proceedings and ask the CJEU about the extent of the judicial review to be carried out by the court of the assisting EDP in the context of EPPO cross-border investigations,[14] also asking whether such an examination should take into account whether the justification and adoption of the measure were already examined by a court in the Member State of the handling EDP.[15] While the reference focused on the substantive scope of review in the court of the assisting EDP's Member State, it is also closely entwined with the applicable national law in terms of procedure, specifically where both Member States require judicial authorisation.[16]

III. Single Judicial Authorisation of the EPPO's Cross-Border Investigations – A Compromise Without Clarity

The procedural rules governing the EPPO's cross-border investigations are the result of a hard-fought negotiation process within the Council Working Group.[17] The original Commission proposal introduced the concept of a "single legal area"[18] where the judicial authorisation of an investigative measure of the EPPO would be valid in the entire area. Accordingly, once a measure has been authorised in the Member State of the handling EDP, it should be possible to carry out that measure in the territory of all EPPO countries without further authorisation of the territorial state of the investigation, with the EDPs acting "in close consultation."[19]

During the negotiations, the Member States departed from the ambitious idea of a single legal area and retained instead the idea of the EPPO operating as a "single office" that would function "over the borders of participating Member States without having recourse to the traditional forms of mutual assistance or mutual recognition."[20] Similarly, the proposal to harmonise national laws of criminal procedure – even if limited to certain types of EPPO investigative measures – failed to pass the subsidiarity control mechanism triggered by some national parliaments.[21]

Modified in this way, the concept of the EPPO required establishing detailed procedural rules clarifying which law is applicable in cases of cross-border investigation and which court is competent to grant judicial authorisation.[22] While all delegations agreed on the premise that the EPPO Regulation should be simpler than the EIO Directive, two different approaches emerged. Some national delegations envisaged a system that used the concept of mutual recognition as a "starting point" and proposed making adjustments where suitable to embrace the idea of the EPPO working as a "single office".[23] The German and the Austrian delegations, in particular, proposed introducing a number of procedural rules mirroring the mutual recognition solutions of the EIO Directive.[24] The majority of national delegations, however, saw the concept of mutual recognition as being incompatible with the *sui generis* nature of the EPPO operating as a "single office"[25] and emphasized the need to ensure a less cumbersome and more efficient system of cooperation with only one judicial authorisation being required – if judicial authorisation is necessary under the law of either Member State.[26]

The system of cross-border cooperation adopted in the final version of Art. 31 EPPO Regulation reflects the majority opinion. It goes beyond the principle of mutual recognition and abandons terminology characterising the mutual recognition instruments.[27] If no judicial authorisation is required under the law of either Member State, the handling EDP, namely the EDP in charge of the investigation, will decide on the adoption of the measure in accordance with his/her national law and simply "assign" it to the assisting EDP, i.e. the EDP located in the Member State where the measure needs to be carried out. The latter, in accordance with both his/her national law and the assignment, is then expected to enforce the measure, which is no longer subject to any type of recognition procedure or grounds of refusal.[28]

If judicial authorisation is required, Art. 31(3) EPPO Regulation provides the following: If judicial authorisation is required only under the law of the handling EDP, the judicial authorisation is to be obtained by the handling EDP before assigning the measure (subpara. 3). In the opposite case, if authorisation is required only by the law of the assisting EDP, the handling EDP may still adopt the measure according to his/her national law and assign it to the assisting EDP; the latter, however, must obtain the necessary judicial authorisation before executing the measure in accordance with his/her national law (subpara. 1). If such authorisation is denied, the handling EDP must withdraw the assigned measure (subpara. 2).

The EPPO Regulation is silent, however, on the application of the *lex loci* and the *lex fori* when judicial authorisation is required by the laws of both the Member State of the handling EDP and the assisting EDP. Recital 72 EPPO Regulation simply states that a single authorisation should apply in cross-border investigations.

The applicable national law is relevant not only for establishing whether judicial authorisation is required. It defines at the same time the forum before which the suspect, or another person negatively affected by the investigative measure of the EPPO may challenge the substantive reasons for adopting the measure. In addition, it regulates the scope of judicial scrutiny to be performed by the national court. Due to the lack of harmonisation of the investigative measures available to the EDPs, the breadth of judicial review depends on the applicable national law and may differ from Member State to Member State.[29] For instance, if national law mandates a detailed analysis of the case file before granting judicial authorisation, "the court of the assisting Member State [could] ask for the translation of the whole file to conduct its own analysis (rather than rubbing stamping the authorisation [of the court of handling EDP's Member State])".[30] This would result in a situation in which full judicial review could take place in the courts of either or both Member States, leading to potentially conflicting outcomes on the same legal question.

Due to the practical difficulties experienced in cross-border investigations, the EPPO issued guidelines on the interpretation of Art. 31 EPPO Regulation in January 2022.[31] The guidelines reiterate that Art. 31 EPPO Regulation creates a "self-standing, sui generis legal basis" for the EPPO's cross-border investigations.[32] Nevertheless, they proclaim that the principle – according to which the substantive aspects for adopting any intra-EU, cross-border measures are governed by the law of the issuing Member State – also applies to EPPO cross-border investigations, as part of the *acquis communautaire*.[33] Consequently, the courts in the assisting EDP's Member State are not allowed to conduct a review, neither *ex ante* nor *ex post*, of the substantive reasons for adopting the investigative measure. In addition, the guidelines specify that, since the EPPO Regulation does not address the question of legal remedies in relation to Art. 31, this matter falls under "pure legal interpretation in accordance with the basic principles of the EU law."[34] In line with Art. 47 of the Charter of Fundamental Rights as interpreted by the CJEU in *Gavanozov II*,[35] Art. 31 EPPO Regulation must therefore be interpreted such that both the judicial authorisation and its substantive reasons must always be subject to legal remedies in the Member State of the handling EDP.

IV. The Advocate General's Opinion

In her Opinion, AG *Ćapeta* first outlined the two contrasting interpretative approaches presented by the intervening parties in the case. The Austrian and the German governments argued that, if the assisting EDP is required by its national law to obtain prior judicial authorisation to carry out the assigned investigative measure, the authorisation should entail a full review not only of the procedural but also of the substantive aspects justifying the measure in the first place (Option 1).[36] Although the Austrian and German governments acknowledged that this approach would undermine the efficiency of the EPPO, the German government agent emphasized, "the Court of Justice is not a repair shop for faulty products. Instead, the faulty product should be returned to the manufacturer for improvement, in our case, the legislature."[37] Otherwise, there would be a risk of interpretation *contra legem*.

In contrast, the Commission, together with the EPPO as well as other Member States, argued that Arts. 31 and 32 EPPO Regulation establish a clear division of tasks between the

handling and the assisting EDPs and their respective national courts, mirroring that between the issuing and the executing authorities in the context of other mutual recognition instruments (Option 2). If prior judicial authorisation is required by the national law of the assisting EDP, the court authorising the measure should review only its mode of execution. As a result, if the national laws of both EDPs' Member States require prior judicial authorisation, two authorisations would need to be issued: the court of the handling EDP would review the justification for issuing the measure; the review performed by the court of the assisting EDP would be limited to the procedural aspects relating to the execution of the measure. This logic would apply even in situations in which the national law of the handling Member State would not require judicial authorisation. The law of the handling Member State should be respected in its choice not to require judicial authorisation, and the judicial authorisation of the assigned Member State would be limited to procedural aspects even in those cases.

After comparing the two interpretations, the AG sided with Option 2, supporting the Commission, the EPPO, and other national governments. First, she reiterated that two interpretative rules of EU law must be respected: (1) the wording in legal rules must be always given some meaning and (2) if several interpretations are possible, the one that guarantees the effectiveness (*effet utile*) of the provision should be adopted.

The AG argued that both Option 1 and Option 2 were plausible interpretations of the EPPO Regulation. The strongest argument presented by the German and Austrian governments rested on the principle that the wording in legal rules must be always given some meaning. According to both governments, Option 2 would make Art. 31(3) EPPO Regulation redundant, since the rules establishing a division of tasks between the handling EDP and the assisting EDP are already contained in Arts. 31(1) and (2) and Art. 32 EPPO Regulation. Nevertheless, according to the AG, even if one adopts Option 2, Art. 31(3) still would not be redundant: restating that the rule relating to the applicable law also applies to judicial authorisation might have been perceived necessary, considering the difficulties related to agreeing on the issue of judicial authorisation during the negotiations. The AG went on to argue that the competence of the CJEU to interpret the EPPO Regulation allows it to restore legal certainty, and there is no need for intervention on the part of the legislator, contrary to the claim of the German and Austrian governments. The AG concluded that the CJEU should choose Option 2, which entails that Art. 31(3) of the Regulation should be construed as allowing the court of the Member State of the assisting EDP to review only aspects related to the execution of a measure while accepting prior assessment by the handling EDP that the measure is justified.[38]

V. The Judgment of the CJEU

In its judgment, the CJEU followed the AG's Opinion but added a new requirement to be implemented by the Member State of the handling EDP when serious interferences with fundamental rights occur.

Starting from a literal interpretation of the provisions, the CJEU reasoned that neither Art. 31 nor Art. 32 EPPO Regulation clarify the extent of the review that may be carried out for the purpose of judicial authorisation by the competent authorities of the respective Member State; a purely textual interpretation is not sufficient to fully address the questions referred. It went on to apply a contextual interpretation and endorsed the arguments presented by the EPPO[39] and confirmed by the AG, recalling that the cooperation established by the EPPO Regulation is "something more but not something different" than the cooperation based on the principle of mutual recognition and mutual trust.[40] Compared with the system laid down in the Framework Decision on the European Arrest Warrant [41] and the EIO Directive, the Court observed that, in the context of judicial cooperation in criminal matters between Member States, the executing authority is generally prevented from reviewing compliance with the substantive conditions necessary for the issuing of a cross-border measure.[42] The Court argued that allowing the competent authority of the assisting EDP to review not only the mode of execution of a measure but also the elements related to its justification and adoption would undermine the objective of the EPPO Regulation. The CJEU concluded that, for the cross-border investigation framework, the EPPO Regulation establishes "a distinction between responsibilities relating to the justification and adoption of an assigned measure, which fall within the remit of the handling European Delegated Prosecutor, and those relating to the enforcement of that measure, which fall within the remit of the assisting European Delegated Prosecutor."[43] According to this division of tasks, "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."[44] However, it added an important qualification: when the assigned investigative measure seriously interferes with the right to private life and the right to property, as guaranteed by Arts. 7 and 17 of the Charter, respectively, it is up to the Member States of the handling EDP "to provide, in national law, for ade-

quate and sufficient safeguards, such as a prior judicial review, in order to ensure the legality and necessity of such measures."[45]

VI. Assessment of the Judgment of the Court

The CJEU largely followed the opinions of the AG and the EPPO/the Commission in deciding that any review conducted by the court of the assisting EDP's Member State may relate only to matters concerning the enforcement of the investigative measure. The Court did, however, feel that the *ex post* judicial review of the legality and the necessity of the investigative measure provided for in Art. 42(1) EPPO Regulation would give suspects and other persons negatively affected by the investigative measure of the EPPO insufficient protection. This would particularly be the case if the EPPO's investigative measure "seriously interferes with the right to private life and the right to property." In such cases, *ex ante* scrutiny must be ensured by the national court of the handling EDP in allowing the substantive reasons for adopting the measure to be challenged.

In requiring *ex ante* judicial control of the EPPO's investigative measure, the Court applied and further specified its existing case law developed in the context of execution of the EIO. In particular, the requirement pronounced in *Gavanozov II*, according to which the right to judicial remedy "necessarily means that the persons concerned by such investigative measures must have appropriate legal remedies enabling them, first, to contest the need for, and lawfulness of, those measures and, second, to request appropriate redress if those measures have been unlawfully ordered or carried out. It is for the Member States to provide in their national legal orders the legal remedies necessary for those purposes."[46] The right to an effective remedy now has to be provided for *ex ante* in the Member State of the handling EPPO for intrusive investigative measures in cross-border investigations. National law must provide for the details of such *ex ante* review of assigned investigative measures, ensuring that the review does not jeopardise the outcome of the measure or even render it superfluous if the suspect is already aware of the ongoing investigation.

What remains striking, however, is that the text of the EPPO Regulation does not unequivocally support the Court's interpretation. Art. 32 read in conjunction with Art. 31(2) seems to underpin the approach taken by the Court. Art. 32 of the EPPO Regulation namely states:

> The assigned measures shall be carried out in accordance with this Regulation and the law of the Member State of the assisting European Delegated Prosecutor. Formalities and procedures expressly indicated by the handling European Delegated Prosecutor shall be complied with unless such formalities and procedures are contrary to the fundamental principles of law of the Member State of the assisting European Delegated Prosecutor.

Art. 31(2) reads:

> The justification and adoption of such measures shall be governed by the law of the Member States of the handling European Delegated Prosecutor.

Reading both provisions together, the courts of the Member State of the assisting EDP should not assess the justification, necessity, or proportionality of the measure. This, indeed, underscores the division of responsibilities between the courts of the handling EDP and the assisting EDP when authorising cross-border investigative measures.[47]

However, this division coupled with the idea of a single judicial authorisation stipulated in Recital 72 of the EPPO Regulation would culminate in a somewhat "awkward compromise".[48] It would namely mean that, if judicial authorisation is required only in the Member State of the assisting EDP, legal remedies in respect of the substantive reasons for the measure would not be available to the suspects or other persons negatively affected by the EPPO's investigative measure, since they would only be possible before the court in the Member State of the handling EDP. This leads to a legal gap in judicial protection contrary to Art. 42(1) EPPO Regulation and Art. 47 of the Charter that protect the right to an effective remedy for the accused person. In particular, Art. 42(1) EPPO Regulation states that procedural acts of the EPPO intended to produce legal effects vis-à-vis third parties shall be subject to judicial review.[49]

To support the daily operations of the EPPO, the guidance note on cross-border investigations *de facto* replaced the requirement of a single judicial authorization with a division between reviewing the substantive reasons for adopting the investigative measure, on the one hand, and reviewing the modalities of its enforcement, on the other.[50] In practice, the EDPs followed the internal guidelines of the College and, even when required only by the law of the assisting EDP, the handling EDPs also requested judicial authorisations in their Member State in order to facilitate the review of the investigative measures by the national courts of the assisting EDP.[51]

Against the backdrop of this practice and the lack of conclusiveness of the EPPO Regulation, the judgment of the Court now supports the system of double authorisation and renders explicit that judicial review of intrusive investigative measures must be available *ex ante* in the Member State of the handling EDP. Even if the Court has been criti-

cised for possibly going beyond the scope of mere judicial interpretation,[52], the judgment is understandable and coherent with its previous case law as well as the objectives of the EPPO Regulation. It is uncontested that the EPPO Regulation aims at enhancing the effectiveness of fighting crimes affecting the EU budget.[53] In this context, the EPPO Regulation cannot be interpreted such that it would render the cross-border investigations of the EPPO more burdensome than cooperation between national prosecutors using the EIO. Allowing the court of the assisting EDP to carry out a full judicial review would require that court to have access to the entire case file, which in turn would need to be sent and translated by the handling EDP. This would be not only more time-consuming and costly than using an EIO but would also present considerable logistical challenges for the handling EDP. Such an approach would undermine the objectives of the EPPO Regulation.

Even if the judgment of the Court provides much-needed clarity and legal certainty for the EPPO when carrying out cross-border investigations, the more adequate solution would be if the Commission were to propose an amendment of the EPPO Regulation. The Commission asked for an impact assessment study in 2023 to identify those provisions in the text of the EPPO Regulation that would require revision – in the light of practice.[54] The impact assessment study markedly pointed to Art. 31 EPPO Regulation as being difficult in practice and lacking clarity and legal certainty; therefore, its future amendment should be considered.[55] Although, the impact assessment study identified a handful of provisions that would also benefit from a revision, it is unlikely that the Commission will soon table such a proposal. The number of successful prosecutions carried out so far by the EPPO as well as the amount of EU funds recovered[56] speak for the success of the EPPO regardless of the imperfections in the text of the EPPO Regulation. The CJEU's seminal judgment in G.K. and Others is therefore likely to remain the pivotal guidance on cross-border investigations of the EPPO. It also triggers the amendment of several national implementing legislations of the EPPO Regulation, namely in those Member States that did not foresee *ex ante* judicial review of EPPO investigative measures.[57]

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1 The EPPO started with 22 EU Member States participating in the enhanced cooperation. Only Denmark, Ireland, Hungary, Poland, and Sweden were outside the operations. After a few years of troublesome relations between the EPPO and Poland, Poland joined the EPPO in February 2024 (Commission Decision (EU) 2024/807 of 29 February 2024 confirming the participation of Poland in the enhanced cooperation on the establishment of the European Public Prosecutor's Office C/2024/1444, OJ L 2024/807, 29.02.2024). According to this Commission Decision, the EPPO will commence its operational activities in Poland once the European Prosecutor from Poland has been appointed. To ensure the efficiency of the EPPO's activities, the Commission decided that the EPPO Regulation will apply retrospectively in Poland to any offence within the competence of the EPPO committed after 1 June 2021, i.e., after the EPPO started its operations. Furthermore, on 16 July 2024, the Commission adopted the decision confirming Sweden's participation in the EPPO (Commission Decision (EU) 2024/1952 of 16 July 2024 confirming the participation of Sweden in the enhanced cooperation on the establishment of the European Public Prosecutor's Office C/2024/4894, OJ L 2024/1952, 18.07.2024). This means that Sweden officially joined as of 17 July 20204. According to the Commission's decision, the EPPO will be able to start its operations and investigations in Sweden 20 days after the appointment of the European Prosecutor from Sweden by the Council, which is expected to take place in autumn. Therefore, at the time of writing, 24 Member States of the EU are participating in the EPPO. Denmark and Ireland have an opt-out from the AFSJ, and Hungary has not announced any interest in joining the EPPO.

2 M. Delmas-Marty and J.A.E. Vervaele (eds.), The implementation of the Corpus Juris in the Member States, Vol. I, 2000.

3 Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office, OJ L 283, 12.10.2017, 1.

4 See K. Ligeti, "The European Public Prosecutor's Office", in: V. Mitsilegas, M. Bergström, and T. Konstadinides (eds.), *Research Handbook on EU Criminal Law,* 2016, pp. 480–504, 480.

5 CJEU, 21 December 2023, Case C-281/22, *G.K. and Others (Parquet européen)*.

6 A summary of the request for the preliminary ruling was published in the following working document: <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=261521&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=265595> accessed 26 July 2024.

7 For the negotiation's history, see E. Duesberg, "Anmerkung zu EuGH (Große Kammer), Urteil vom 21.12.2023 – C-281/22, Europäische Staatsanwaltschaft – gerichtliche Kontrolle", (2024) Neue Juristische Wochenschrift (NJW), 487, 491.

8 CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), paras. 28–29.

9 CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), paras. 30–32.

10 CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), para. 33.

11 CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), para. 34.

12 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 (EIO Directive).

13 Under the EIO Directive, the executing authority shall recognise an EIO and ensure its execution in accordance with the Directive and the procedures applicable in a similar domestic case. Such procedures may require a court authorisation in the executing State, if provided for in its national law (Art. 2(d) EIO Directive). The EIO, however, does not allow for an extensive examination of the case file and, most importantly, specifies that the necessity and proportionality for issuing the EIO are to be assessed exclusively by the issuing

authority (Art. 6(1)(2) EIO Directive). Accordingly, the substantive reasons to issue the EIO must be challenged solely before the competent national court of the issuing Member State.
14 CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), para. 36, questions (1)(3).
15 CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), para. 36, question (2).
16 For further analysis on the preliminary reference, see 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.
17 H. H. Herrnfeld, in: H. H. Herrnfeld, D. Brodowksi, and C. Burchard, *European Public Prosecutor's Office: Article-by-Article Commentary,* 2021, Art. 31, p. 300.
18 Art. 25(2) Proposal for a Council Regulation on the establishment of the European Public Prosecutor's Office, COM(2013) 534 final (original Commission proposal).
19 Art. 18(2) of the original Commission proposal (*op. cit.* n. 18).
20 Council Presidency, "Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – State of Play", Council doc. 13509/1/14, 2014, p. 3.
21 K. Ligeti, *op. cit.* (n. 4), pp. 480–504.
22 Policy Department for Citizens' Rights and Constitutional Affairs, *Towards a European Public Prosecutor's Office,* 2016, p. 31.
23 Opinion of Advocate General *Ćapeta*, 22 June 2023, Case C-281/22, para. 26.
24 Cited in the Opinion of Advocate General *Ćapeta*, *op. cit.* (n. 23), para. 27: "Where a measure needs to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor, the latter shall order the measure in accordance with the law of the Member State of the handling European Delegated Prosecutor and, where necessary, shall apply for a judicial authorisation thereof, or shall request a court order for the measure." And footnote 23: "Where the law of the Member State of the assisting European Delegated Prosecutor requires a judicial authorisation or a court order for recognition of the measure, he/she shall submit the order and, where applicable, the accompanying judicial authorisation to the competent judicial authority of his/her Member State for recognition."
25 H. H. Herrnfeld, *op. cit.* (n. 17), p. 286.
26 H. H. Herrnfeld, *op. cit.* (n. 17), p. 286. See also N. 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,* 15 January 2024, <https://europeanlawblog.eu/2024/01/15/the-judgment-in-g-k-e-a-parquet-europeen-brought-the-eppo-a-pre-christmas-tiding-of-comfort-and-joy-but-will-that-feeling-last/> accessed 26 July 2024.
27 The only reference to mutual recognition can be found in Art. 31(6) EPPO Regulation, which, in agreement with the supervising European Prosecutors, grants the EDPs the possibility to take recourse to legal instruments on mutual recognition or cross-border cooperation if the assigned measure does not exist in a purely domestic situation but would be available in cross-border situations covered by such a legal instrument.
28 Under Art. 31(5) EPPO Regulation, it is possible for the assisting EDP to raise "reasons to consult" solely with the handling EDP. If a solution is not found within a period of seven days "the matter will be referred to the competent Permanent Chamber" who will decide "in accordance with applicable national law" and the EPPO Regulation.
29 S. Allegrezza and A. Mosna, "Cross-border Criminal Evidence and the Future European Public Prosecutor: One Step Back on Mutual Recognition?", in: L. Bachmaier Winter. (ed.), T*he European Public Prosecutor's Office.* The Challenges Ahead, 2018, p. 154.
30 Council Presidency, "Proposal for a Regulation on the establishment of the European Public Prosecutor's Office – Other issues", Council doc. 12344/16, 2016, p. 5.
31 College Decision 006/2022 of 26 January 2022 adopting guidelines of the College of the EPPO on the application of Article 31 of Regulation (EU) 2017/193.
32 College Decision 006/2022, *op. cit.* (n. 31), p. 2.
33 College Decision 006/2022, *op. cit.* (n. 31), p. 2.
34 College Decision 006/2022, *op. cit.* (n. 31), p. 7.
35 CJEU, 11 November 2021, C-852/19, *Gavanozov II,* para. 41.
36 Opinion of Advocate General *Ćapeta*, *op. cit.* (n. 23), paras. 35–37.
37 Opinion of Advocate General *Ćapeta*, *op. cit.* (n. 23), para. 37.
38 Opinion of Advocate General *Ćapeta*, *op. cit.* (n. 23), paras. 71–73. As to the possibility of *ex post* judicial review, see K. Ligeti, "Judicial Review of Acts of the European Public Prosecutor's Office: The Limits of Effective Judicial Protection of European Prosecution" in: *Liber Amicorum Bay Larsen*, 2024, (in press).
39 Opinion of Advocate General *Ćapeta*, *op. cit.* (n. 23), para. 80.
40 Opinion of Advocate General *Ćapeta*, *op. cit.* (n. 23), para. 99.
41 Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States – Statements made by certain Member States on the adoption of the Framework Decision, OJ L 190, 18.7.2002, 1.
42 CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), paras. 58–64.
43 CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), para. 71.
44 CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), para. 71.
45 CJEU, *G.K. and Others (Parquet européen)*, *op. cit.* (n. 5), para. 75.
46 See CJEU, *Gavanozov II, op. cit.* (n. 35) para. 33.
47 According to the European Commission, Romania, and the Netherlands, the proposed interpretation would still be in line with Recital 72 of the EPPO Regulation "as every aspect of the investigative measure would be subject to one single judicial control." See 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 & Others", *European Law Blog,* 26 April 2023, <https://europeanlawblog.eu/2023/04/26/judicial-review-of-investigative-measures-under-the-eppo-regulation-more-to-it-than-it-seems-a-recap-of-the-oral-hearing-in-g-k-others/> accessed 26 July 2024.
48 J. Öberg, "Judicial Cooperation between European Prosecutors and the Incomplete Federalisation of EU Criminal Procedure – CJEU ruling in G. K. e.a. (Parquet européen)", (2024) E*U Law Live Weekend Edition* no 189, p. 2.
49 See K. Ligeti, *op. cit.* (n. 38).
50 N. Franssen, op cit. (n. 26).
51 European Commission, "Compliance assessment of measures adopted by the Member States to adapt their systems to Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor's Office ('the EPPO') (JUST/2022/PR/JCOO/CRIM/0004)", September 2023; p. 53. The report is available on the European Parliament's website: <https://www.europarl.europa.eu/

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thinktank/en/events/details/study-presentation-compatibility-of-nati/20240118EOT08142> accessed 26 July 2024.
52 H. H. Herrnfeld, "Yes Indeed Efficiency Prevails, A Commentary on the Remarkable Judgement of the European Court of Justice in Case C-281/22 *G.K. and Others (Parquet européen)*", (2023) *eucrim*, 370–380.
53 A. Hernandez Weiss, *op. cit.* (n. 47).
54 See M. Engelhardt, "Compliance with the EPPO Regulation", in this issue.
55 European Commission, "Compliance assessment", *op. cit.* (n. 51).
56 See European Public Prosecutor's Office, *EPPO Annual Report* 2023, 2024, p. 10. In 2023, 139 indictments were filed (over 50% more than in 2022).
57 See, for instance, § 3(2) *Gesetz zur Ausführung der EU-Verordnung zur Errichtung der Europäischen Staatsanwaltschaft* (Law implementing the European Union regulation establishing the EPPO) in Germany and, in reaction to the CJEU's judgment, the proposed amendment of this article by Art. 2 *Referentenentwurf eines Gesetzes zur Modernisierung des Verpflichtungsgesetzes und zur Änderung des Europäische-Staatsanwaltschaft-Gesetzes* of 19 July 2024, <https://www.bmj.de/SharedDocs/Gesetzgebungsverfahren/DE/2024_Modernisierung_VerpflG_AEnd_EUStAG.html> accessed 26 July 2024.

The New Directive on the Violation of Union Restrictive Measures in the Context of the EPPO

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This article outlines the new Directive on the violation of Union restrictive measures (EU sanctions), adopted on 24 April 2024. This legislation, initiated by the European Commission in the aftermath of Russia's war of aggression against Ukraine, above all aims to harmonise across the Member States criminal offences and penalties for the violation of EU sanctions, to strengthen the enforcement of EU sanctions, and to facilitate the confiscation of assets subject to EU sanctions. Lastly, the article examines the possible extension of the competence of the European Public Prosecutor's Office (EPPO) to the criminal offences harmonised by the new Directive.

I. Introduction

Union restrictive measures (EU sanctions) are an essential tool to promote the objectives of the Common Foreign and Security Policy (CFSP), as set out in Art. 21 of the Treaty on European Union (TEU). Such objectives include safeguarding the Union's values, fundamental interests, security, independence and integrity; consolidating and supporting democracy, the rule of law, human rights, and the principles of international law; and preserving peace, preventing conflicts, and strengthening international security in accordance with the aims and principles of the United Nations Charter. The European Union has in place more than 40 sanctions regimes against third countries, non-state entities, and individuals, adopted either on its own initiative or to implement United Nations Security Council resolutions. EU sanctions may include obligations to freeze funds and economic resources owned by targeted individuals and entities, prohibitions on entry into or transit through the territory of a Member State (visa/travel bans), arms embargoes as well as sectoral economic and financial measures (such as imports and exports restrictions).

While EU sanctions are adopted by the Council, their enforcement lies with the EU Member States. In particular, Member States' competent authorities are responsible for assessing whether there has been an infringement of the relevant Council Regulations and for taking adequate steps. To this end, Council Regulations setting out EU sanctions systematically include a provision on penalties that require Member States to adopt national rules providing for effective, proportionate and dissuasive penalties to be applied in the event of a breach of their provisions. In response to the Russian aggression against Ukraine, such provision has been strengthened by requiring Member States to "lay down the rules on penalties, including as appropriate criminal penalties, applicable to infringements of the Regulation."[1] Nonetheless, in the absence of EU level harmonisation, implemented penalties provisions for sanctions violations currently differ significantly among the Member States,

as highlighted in a comprehensive report published by the Genocide Network in December 2021.[2]

To address the current fragmentation and strengthen the enforcement of EU sanctions across the Member States, the European Commission took a two-step approach.[3] First, on 25 May 2022, the Commission tabled a Proposal for a Council Decision on identifying the violation of Union restrictive measures as an area of crime that meets the criteria specified in Art. 83(1) of the Treaty on the Functioning of the European Union (TFEU).[4] The Council Decision was adopted on 28 November 2022.[5] Second, and on that basis, the Commission put forward a proposal for a Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures (2 December 2022).[6] After one year of negotiations, a political agreement on the text of the Directive was reached in December 2023. The Directive was then adopted on 24 April 2024[7] and entered into force on 19 May 2024. It will have to be transposed into national law within 12 months from the date of its entry into force (i.e., by 20 May 2025).

II. Main Provisions of the Directive

1. Criminal offences

Art. 3 of the Directive provides for a detailed list of criminal offences related to the violation of EU sanctions. Such offences tackle the violation of individual measures (i.e., asset freezes and travel bans), the violation of economic and financial sectoral measures and arms embargoes as well as the circumvention of EU sanctions. The circumvention offence notably addresses cases in which designated persons, entities, and bodies use, transfer to a third party, or otherwise dispose of funds or economic resources directly or indirectly owned, held, or controlled by them in order to conceal these funds or economic resources. It also applies to cases in which false or misleading information is provided to the competent authorities in order to conceal frozen funds or economic resources. In addition, such offence also covers the failure to report assets belonging to, owned, held, or controlled by designed persons, entities, or bodies and also includes the failure to provide the competent authorities with information on frozen funds or economic resources in breach of the relevant obligations set out in the Council Regulations laying down Union restrictive measures.

Overall, Art. 3 of the Directive maintains the scope and structure of the Commission's initial proposal, with the exception of the proposed criminal offence on the failure to cooperate with the competent authorities, which was taken out in the course of the negotiations.

In addition, Art. 3(2) of the Directive introduces monetary thresholds allowing Member States to distinguish between criminal and administrative offences. This provision, which was inserted by the Council to ensure respect for the criminal law principles of proportionality and *ultima ratio*, enables Member States not to criminalise criminal conduct respectively involving funds, economic resources, goods, services, activities, or transactions of a value of less than €10,000. This threshold does not apply to violations of travel bans.

In terms of *mens rea*, all criminal offences covered by the Directive require intent. Serious negligence, the definition of which is left to national law, is required as a standard for culpability at least for the criminal offence related to the violation of trade restrictions when involving arms or dual-use items.

Lastly, the Directive introduces a specific exclusion from criminal liability for the provision of "humanitarian assistance for persons in need or activities in support of basic human needs provided in accordance with the principles of impartiality, humanity, neutrality and independence and, where applicable, with international humanitarian law." This provision is particularly necessary to ensure sufficient legal clarity and foreseeability for every citizen, especially humanitarian actors, on any possible (criminal) consequences of their actions, so as not to discourage the provision of humanitarian aid when needed and to avoid unintended spillover effects that EU sanctions may produce.

2. Penalties

One of the key objectives of the Directive is to ensure that violations of EU sanctions have similar legal consequences throughout the Union and thus create a level playing field for natural and legal persons. As regards natural persons, Art. 5 of the Directive lays down a graduated system of minimum maximum imprisonment penalties of one, three, and five years (in addition to the general obligation for Member States to lay down effective, proportionate and dissuasive penalties). This system is differentiated on the basis of the gravity of the criminal offence concerned and is applicable once the monetary threshold of €100,000 has been reached. Again, this threshold does not apply to violations of travel bans. In addition to imprisonment, Member States must also provide for ancillary penalties, which may include fines, withdrawals of permits and authorisations, disqualification from holding a leading position within a legal person, etc.

With reference to legal persons, Art. 7 of the Directive obliges Member States to provide for fines as the main penalty for sanctions violations. In this context, one of the novelties introduced by the Directive, compared to previous criminal law instruments, is the calculation method for setting fines at the national level: it is to be based either on the annual worldwide turnover generated by the legal person in the business year preceding the fining decision or the commitment of the offence or on fixed minimum maximum amounts ranging from €8 million to €40 million, depending on the gravity of the offence in question. The introduction of this alternative calculation method is consistent with the approach recently also adopted in the new Directive on the protection of the environment through criminal law.[8] Even though the Commission's proposal previously relied only on annual global turnover figures, which was considered the most effective and fair calculation method for setting fines at the national level, the alternative method based on fixed amounts considerably increases the average fine levels currently applicable in the Member States for sanctions violations.

In addition to fines, Member States can also decide to provide for additional penalties applicable to legal persons in their national systems, such as exclusion from entitlement to public benefits or aid; exclusion from access to public funding, including tender procedures, grants, and concessions; disqualification from the practice of business activities; withdrawal of permits and authorisations; placing under judicial supervision, etc.

3. Confiscation

Another main objective of the new Directive is to facilitate the confiscation of assets and resources subject to EU sanctions when there is a link with a criminal activity. This objective is ensured, in particular, through the interlinkage between this Directive and the new Directive on asset recovery and confiscation,[9] replacing *inter alia* Directive 2014/42/EU (with regard to the Member States bound by the new Directive). Compared to Directive 2014/42/EU, the new Directive on asset recovery and confiscation in fact allows for the confiscation of assets (proceeds or instrumentalities) stemming from a wider set of crimes, including violations of Union restrictive measures.

In addition, the Directive on the violation of EU sanctions introduces a new confiscation regime targeting assets subject to EU sanctions (Art. 10 of the Directive) even where such assets might not be considered proceeds or instrumentalities under the Directive on asset recovery and confiscation. However, this new confiscation regime can only apply in specific cases of sanctions circumvention, i.e., cases in which a listed person (i) uses, transfers to a third party, or otherwise disposes of frozen assets or (ii) provides false or misleading information on frozen assets in order to conceal these assets; in these cases, confiscation must be enabled vis-à-vis a designated natural person, or a representative of a designated entity or body, who has directly committed or participated in the criminal offences concerned. The new regime will have to apply in accordance with the provisions of the Directive on asset recovery and confiscation, particularly regarding the procedural safeguards laid down therein as well as non-standard confiscation methods (i.e., value-based confiscation, third party confiscation, or non-conviction-based confiscation).

4. Enforcement

In view of the overall objective of strengthening the enforcement of EU sanctions, the new Directive introduces two specific provisions concerning internal and external cooperation.

As regards internal cooperation, (Art. 15 of the Directive lays down an obligation for Member States to designate, from among their competent authorities, a dedicated unit or body to ensure coordination and cooperation between law enforcement authorities and authorities in charge of implementing EU sanctions. It also further specifies the tasks of such a unit or body, which include promoting common priorities and an understanding of the relationship between criminal and administrative enforcement, exchanging information for strategic purposes, and ensuring consultation in individual investigations.

In addition, the Directive provides for specific rules on cooperation between Member States' competent authorities, the Commission, and other relevant EU Institutions, Bodies, Offices, and Agencies (IBOAs) such as Eurojust, Europol, and the European Public Prosecutor's Office (EPPO), whose respective roles would come into play within their current competences (Art. 16 of the Directive). The same provision also allocates a specific role to the Commission, which could provide non-operational assistance where appropriate, including via the setting up of an *ad hoc* network of experts and practitioners to share best practices and provide assistance to the competent national authorities. Indeed, the Commission is already playing a relevant coordination role in the field of sanctions enforcement and implementation, notably in the context of the Task Force "Freeze and Seize", set up in the aftermath of Russia's war of aggression against Ukraine, as well as in other relevant Expert Groups already established in the field of Union restrictive measures.

Similarly, the Directive pays heed to the importance of ensuring international cooperation in this field, already ongoing especially through regular exchanges between the Commission, G7 partners, Ukraine, and other relevant third countries.

III. The Possible Extension of the EPPO's Competence to Violations of Union Restrictive Measures

The possibility of extending the competence of the EPPO to violations of Union restrictive measures has been extensively debated over the past several months, especially in conjunction with a statement from the German and French Ministers of Justice of November 2022,[10] speeches of the European Chief Prosecutor,[11] and calls from the European Parliament advocating the extension of the EPPO's competence.[12]

In terms of procedure, pursuant to Art. 86(4) TFEU, an extension of the EPPO's competence to any area of "serious crime having a cross-border dimension" (i.e., beyond crime affecting the EU's financial interests) requires a unanimous decision of the European Council, i.e., by all heads of state or government of the 27 EU Member States. This decision is to be taken after obtaining the consent of the European Parliament and after consulting the Commission.

Furthermore, once the EPPO's competence has been extended, the Council would need to adopt a revision of the EPPO Regulation, so as to give effect to the new competence for the EPPO and introduce any adjustment that may be required for the EPPO to exercise its investigation and prosecution powers on the new criminal offences. This decision of the Council also needs to be taken unanimously by the Member States participating in enhanced cooperation. If this avenue is pursued, the necessary financial, technical, and human resources implications for the EPPO will have to be assessed as well.

From a substantive point of view, there may be a case for extending the EPPO's competence to the criminal offences harmonised by the new Directive. First, as outlined above, Union restrictive measures are an essential tool by which to promote the CFSP objectives. Therefore, as with the EU budget, their effective enforcement could be considered as an interest pertaining to the Union itself, thus justifying criminal enforcement at the EU level.

In addition, the violation of EU sanctions is an area of crime that would be in line with the EPPO's current mandate, as it often requires cross-border investigations into complex economic and financial crimes. This also implies that, at least to a certain extent, the EPPO's staff would already be equipped with the necessary knowledge and expertise in investigating and prosecuting such criminal offences.

Another argument in favour of extending the EPPO's competence is that the EPPO is already competent to handle certain cases of violation of Union restrictive measures as long as they are "inextricably linked" to criminal offences affecting the Union's financial interests. This may be the case, for instance, if customs fraud involves the import into the territory of a Member State of certain goods whose import, export, transit, or transport is prohibited under EU sanctions. In such cases, the EPPO could exercise its competence in accordance with Art. 25(3) of the EPPO Regulation. As outlined above, the new Directive acknowledges this possible role for the EPPO in Art. 16.

At least ten Member States have already expressed their support for a limited extension of the EPPO's competence to violations of EU sanctions, but, in view of the procedure laid down in Art. 86(4) TFEU, the agreement of all Member States on this initiative is of essence.

IV. Concluding Remarks

As stated on several occasions,[13] the Commission is open to continuing its assessment of the feasibility of extending the EPPO's competence to violations of EU sanctions, most notably within the framework of the evaluation of the EPPO Regulation as required by Art. 119 of the EPPO Regulation, [14] taking into account the position of the 27 EU Member States. Such an extension of material competence is obviously and primarily a political decision, as it involves a further transfer of national competences in the area of criminal prosecution to an EU body. When making such a decision, however, the main consideration should be that the EPPO has now given ample evidence of its added value in investigating and prosecuting crimes that threaten the Union's very fabric. This seems to be a clear case for sanctions violations.[15]

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

1 See Art. 15(1) of Council Regulation (EU) No 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, OJ L 78, 17.3.2014, 6.

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2 Genocide Network, Prosecution of sanctions (restrictive measures) violations in national jurisdictions: a comparative analysis, 2021, Annex, <https://www.eurojust.europa.eu/sites/default/files/assets/genocide_network_report_on_prosecution_of_sanctions_restrictive_measures_violations_23_11_2021.pdf> accessed 23 May 2024.
3 For the two-step approach developed by the Commission and further details on the background behind this initiative, see W. Van Ballegooij, "Ending Impunity for the Violation of Sanctions through Criminal Law", (2022) *eucrim, 146–151.*
4 Proposal for a Council Decision on adding the violation of Union restrictive measures to the areas of crime laid down in Article 83(1) of the Treaty on the Functioning of the European Union, COM(2022) 247 final.
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6 Proposal for a Directive of the European Parliament and of the Council on the definition of criminal offences and penalties for the violation of Union restrictive measures, COM(2022) 684 final.
7 Directive (EU) 2024/1226 of the European Parliament and of the Council of 24 April 2024 on the definition of criminal offences and penalties for the violation of Union restrictive measures and amending Directive (EU) 2018/1673, OJ L, 2024/1226, 29.4.2024, 1
8 Directive (EU) 2024/1203 of the European Parliament and of the Council of 11 April 2024 on the protection of the environment through criminal law and replacing Directives 2008/99/EC and 2009/123/EC, OJ 1. On this topic, see: F. Giuffrida and p. Csonka, "The protection of the environment by means of criminal law in the European Union: recent trends and future perspectives", in: M. Luchtman (ed.), *Of swords and shields: due process and crime control in times of globalisation: Liber Amicorum Prof. dr. J.A.E. Vervale, 2023, pp. 387–395.*
9 Directive (EU) 2024/1260 of the European Parliament and of the Council on asset recovery and confiscation, OJ L, 2024/1260, 2.5.2024, 1.
10 See E. Dupond-Moretti and M. Buschmann, Op-Ed "'Violations of EU sanctions must be prosecuted by the European Public Prosecutor's Office'", Le Monde, 29 November 2022, <https://www.lemonde.fr/en/opinion/article/2022/11/29/violations-of-eu-sanctions-must-be-prosecuted-by-the-european-public-prosecutor-s-office_6006013_23.html> accessed 23 May 2024.
11 See *inter alia* Speech of the European Chief Prosecutor, Laura Kövesi, at the Legal Affairs Committee of the *Bundestag* – 9 November 2022, < https://www.eppo.europa.eu/en/media/news/european-chief-prosecutor-laura-kovesi-speaks-bundestag> accessed 23 May 2024.
12 See inter alia European Parliament resolution of 18 January 2023 on the implementation of the common foreign and security policy — annual report 2022 (2022/2048(INI)), OJ C 214, 16.6.2023, p. 26, para. 18: "… calls on the European Public Prosecutor's Office to be tasked with ensuring the consistent and uniform investigation and prosecution of such crimes throughout the EU". A reference to the possible extension of the EPPO's competence is also present in Amendment 5 of the LIBE draft report on the proposed Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures, PE746.946v01–00.
13 *See inter alia* Commissioner Didier Reynders' reply to the oral question addressed by the LIBE Committee at the EP plenary session of 14 June 2023, <https://www.europarl.europa.eu/plenary/en/vod.html?mode=unit&vodLanguage=EN&playerStartTime=20230614-19:29:53&playerEndTime=20230614-19:36:11#> accessed 23 May 2024.
14 Pursuant to Art. 119 of the EPPO Regulation, the Commission should, by 1 June 2026, commission an evaluation and submit an evaluation report on the implementation and impact of the Regulation, as well as on the effectiveness and efficiency of the EPPO and its working practices.
15 *See P. Csonka,* "La Directive relative à la violation des mesures restrictives de l'Union et le Parquet européen", (2023) 4 *Revue du droit de l'Union européenne, 87–103.*

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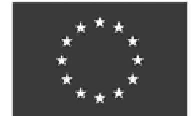

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