

eucrim

2019 / 4

THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM



Focus: 2019 – Anniversary Year for European Criminal Law

Dossier particulier: 2019 – Année anniversaire pour le droit pénal européen

Schwerpunktthema: 2019 – Ein Jubiläumsjahr für das Europäische Strafrecht

Some Memories of the Third Pillar

Dr. h.c. *Hans G. Nilsson*

20 Years since Tampere – The Development of Mutual Recognition in Criminal Matters

Lorenzo Salazar

10 Years after Lisbon – How “Lisbonised” Is the Substantive Criminal Law in the EU?

Peter Csonka and Dr. Oliver Landwehr

OLAF – 20 Years of Protecting the Financial Interests of the EU

Margarete Hofmann and Stanislav Stoykov

The European Public Prosecutor’s Office (EPPO) – Past, Present, and Future

Francesco De Angelis

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

Contents

News*

European Union

Foundations

- 226 Fundamental Rights
- 226 Area of Freedom, Security and Justice
- 227 Security Union
- 229 Legislation

Institutions

- 230 Council
- 230 OLAF
- 230 European Public Prosecutor's Office
- 231 Europol
- 231 Eurojust
- 232 European Judicial Network (EJN)
- 232 Frontex

Specific Areas of Crime / Substantive Criminal Law

- 232 Protection of Financial Interests
- 232 Corruption
- 233 Money Laundering
- 234 Organised Crime
- 234 Cybercrime
- 235 Environmental Crime

Procedural Criminal Law

- 235 Data Protection
- 238 Victim Protection

Cooperation

- 240 Police Cooperation
- 240 Judicial Cooperation
- 242 European Arrest Warrant
- 246 Financial Penalties
- 247 Law Enforcement Cooperation

Council of Europe

Specific Areas of Crime

- 248 Corruption
- 251 Money Laundering

Procedural Criminal Law

Articles

2019 – Anniversary Year for European Criminal Law

- 253 Some Memories of the Third Pillar
Dr. h.c. *Hans G. Nilsson*
- 255 Twenty Years since Tampere – The Development of Mutual Recognition in Criminal Matters
Lorenzo Salazar
- 261 10 Years after Lisbon – How “Lisbonised” Is the Substantive Criminal Law in the EU?
Peter Csonka and Dr. Oliver Landwehr
- 268 OLAF – 20 Years of Protecting the Financial Interests of the EU
Margarete Hofmann and Stanislav Stoykov
- 272 The European Public Prosecutor's Office (EPPO) – Past, Present, and Future
Francesco De Angelis

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

Guest Editorial

Dear Readers,

20 years ago, the European Council gave Justice and Home Affairs policy an unprecedented boost by setting out an ambitious agenda to simplify judicial cooperation and to enhance criminal justice across the Union. The Tampere Programme has led to many successful initiatives. I intend to continue this work.

In her Mission letter the President *von der Leyen* has assigned me an immensely stimulating task: “to focus on the pursuit of social justice in its broadest sense, from the rule of law to crime prevention, judicial cooperation and consumer protection.” I want first to ensure that new ground-breaking legal projects are becoming a reality on the ground. The new European Public Prosecutor’s Office (EPPO) or the General Data Protection Regulation (GDPR) are two flagship projects that require commitment to bear fruit. The EPPO is currently in its setting-up phase and remains my highest priority. To protect effectively EU financial interests, it needs to be provided with the necessary resources and to start operating by the end of this year. The GDPR’s full implementation should be evaluated in the first Commission report in May. Moreover, I will ensure the promotion of consumer right, through the adoption of the Representative Actions Directive and other initiatives under the Consumer Agenda.

Nevertheless, further progress is needed to make the EU a genuine area of freedom, security and justice. The 2020 Work Programme of the European Commission has already provided a clear view of the two main directions our action will take in the years to come.

First, the Commission will continue fostering the core values that forged the Union’s strength and identity. “A new push for European democracy” implies defending the rule of law and the respect of fundamental rights in the most effective ways. President *von der Leyen* entrusted me to lead the new Rule of Law Mechanism and design ways to better monitoring the respect of EU values in Member States. In this regard, I will always seek to prevent issues before they occur, or resolve them at an early stage. Respect for the Rule of Law is crucial for the effective application of EU law, as it guarantees the protection of all other values and is essential for mutual trust between Member States. In concrete terms, the Commission developed

a toolbox and decided to establish an annual review cycle. To support this comprehensive mechanism, I will prepare an annual Rule of Law report.

Second, the Commission will promote an EU Security Union Strategy to face the increasingly complex threats that emerged in recent years. To better fight cross-border crime (terrorism, money laundering, environmental crimes) at EU level, judicial cooperation must complement and follow-up to police efforts to bring perpetrators to justice. I want Eurojust to become an even more proactive facilitator in cross-border proceedings. Moreover, we must keep pace with digitalisation to improve constantly the efficiency of our justice systems. Enabling the secure exchange of evidence, including electronic evidence, within the Union and with international partners, is another key priority for going forward. I am particularly attached to enhancing cooperation between judicial practitioners through new initiatives that facilitate the mutual recognition of judicial decisions. Our efforts will aim at increasing mutual trust among judges and prosecutors so that our instruments based on mutual recognition such as the European Arrest Warrant, are implemented in a correct manner in all EU Member States, at further developing judicial training and improving information exchange.

Providing a high degree of security, offering protection from crime, and at the same time guaranteeing rights and freedoms is truly a challenging mission. Yet it is a mission that matches EU citizens’ demand for more protection of their fundamental rights.

I hope you will enjoy reading this issue dedicated to various anniversary events related to European criminal law in 2019.

Didier Reynders,
Commissioner for Justice and Consumer Affairs



Didier Reynders



European Union*

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

Foundations

Fundamental Rights

FRA Looks into Facial Recognition Technology

At the end of November 2019, FRA [published a paper](#) looking into the fundamental rights challenges involved when public authorities deploy live facial recognition technology for law enforcement purposes.

According to the paper, the following key aspects should be considered before deploying facial recognition technology in real life:

- A clear and detailed legal framework should regulate the use of facial recognition technology and determine when the processing of facial images is necessary and proportionate;
- The processing of facial images for verification purposes should be clearly distinguished from the processing of facial images for identification purposes, as the risk of interference with fundamental rights is higher in cases of identification, which therefore requires stricter necessity and proportionality testing;
- Facial recognition technology is like-

ly to raise fears of a strong power imbalance between the state and the individual and should therefore only be used in exceptional cases, i.e., to combat terrorism or to detect missing persons and victims of crime;

- The use of facial recognition technology during demonstrations may prevent people from exercising their freedom of assembly or association and should therefore be considered disproportionate or unnecessary;
- The risk of incorrectly flagging people must be kept to a minimum, and anyone who is stopped as a result of facial recognition technology must be treated in a dignified manner;
- Fundamental rights considerations, such as data protection or non-discrimination requirements, should be necessary requirements in the procurement of facial recognition technology;
- Public authorities should obtain all necessary information from the industry to carry out a fundamental rights impact assessment of the application of facial recognition technology they aim to procure and use;
- Close monitoring by independent supervisory bodies with sufficient powers,

resources, and expertise should be guaranteed.

The FRA paper is a valuable tool for public authorities when considering fundamental rights implications in their plans to use the new technology in real life. (CR)

Area of Freedom, Security and Justice

Lisbon Treaty: 10 Years Area of Freedom, Security and Justice

On 1 December 2019, the new European Commission under the lead of its new President, Ms *Ursula von der Leyen*, marked the tenth anniversary of the entry into force of the Treaty of Lisbon. The 1st of December 2019 also [marked ten years of the integration](#) of the former intergovernmental cooperation scheme in justice and home affairs (the so-called third pillar of the Maastricht Treaty) into a full-fledged EU policy with the aim of establishing an area of freedom, security and justice. With the entry into force of the Lisbon Treaty, the [EU Charter of Fundamental Rights](#) also became legally binding.

The last ten years brought about a number of achievements in justice and home affairs, e.g.:

- Better connectivity of law enforcement authorities by means of the next generation of the Schengen Information System;
- Increased efforts in the fight against crime, including sexual abuse and ex-

* If not stated otherwise, the news reported in the following sections cover the period 16 November – 31 December 2019.

exploitation of children, trafficking in human beings, terrorism, and cybercrime;

- Completion of the instruments on judicial cooperation in criminal matters, e.g., the European Investigation Order, the European Protection Order, and the Regulation on Freezing and Confiscation;

- Improved data protection by means of the data protection law enforcement Directive (2016/680).

On the occasion of the ceremony, *Ursula von der Leyen* [stated](#):

“There could be no better day for the new College of Commissioners to begin our work than this anniversary. Starting today, we are the guardians of the Treaties, the custodians of the Lisbon spirit. I feel this responsibility. It is a responsibility towards our predecessors, our founding fathers and mothers, and all that they have achieved. But it is also a responsibility towards our children. The responsibility to leave them a Union that is stronger than the one we have inherited.” (TW)

Updates on Legislative JHA Items

The Finnish Council Presidency updated the JHA Ministers about the [progress achieved on current legislative proposals](#) in the area of freedom, security and justice during its presidency at the Council meeting on 2–3 December 2019. In the area of home affairs, the proposals include:

- Regulation on preventing the dissemination of terrorist content online;
- Home affairs funds (Asylum and Migration Fund, Internal Security Fund, Border Management and Visa Instrument Fund);
- ETIAS consequential amendments;
- Regulation on the False and Authentic Documents Online (FADO) system;
- Visa Information System (VIS) Regulation;
- Schengen Borders Code.

In the area of justice, progress on following files is reported (among others):

- Regulation on European Production and Preservation Orders for electronic

evidence in criminal matters (e-Evidence Regulation) and Directive on legal representatives for gathering e-evidence in criminal proceedings;

- Relevant funds (Justice Programme and the Rights and Values Programme);
- Directive on the Protection of persons reporting on breaches of Union law (Whistleblowing Directive). (TW)

Security Union

JHA Ministers Conclude Debate on Future of EU Internal Security

The Finnish Council Presidency summed up the outcome of discussions on the EU’s way forward regarding internal security issues. The discussion was launched at the beginning of the Finnish Presidency in July 2019 (see [eucrim 2/2019](#), p. 84). The [final Presidency report](#) was discussed at the meeting of the Justice and Home Affairs Ministers on 3 December 2019. The reflections detailed in the report contribute to the implementation of the strategic agenda 2019–2024 in the area of justice and home affairs. Future EU policy will concentrate on the following four issues:

- Proactive approach to new technologies: The EU needs an integrated and comprehensive approach in this field. An innovation lab is to be established within Europol in order to assess the needs for new technologies and their risks to law enforcement and to promote communication with the industry and academia. Law enforcement authorities should be involved at an earlier stage in the technological processes, which mainly take place in universities and the private sector. Moreover, the EU should take into account internal security and law enforcement interests in new legislation relating to new technologies.
- Effective information management: Future law enforcement cooperation will increasingly be based on information systems and their interoperability. Law enforcement authorities will have access to a much larger volume of data and in-

Publication “European Union Instruments in the Field of Criminal Law and Related Texts”

In December 2019, the Council General Secretariat’s Criminal Law Team published a compendium of selected texts on legal instruments (106 texts) relevant for EU criminal law. It includes instruments adopted by the EU Institutions on the following:

- Cooperation in criminal matters (including mutual recognition of judicial decisions);
- Instruments concerning substantive criminal law;
- Extracts from the Treaties;
- Agreements between the EU and third countries, such as those relating to mutual legal assistance.

In addition to an index, the publication also contains electronic bookmarks. By clicking on the links in the content section, the reader quickly arrives at the text he/she is looking for. The electronic version of the book (PDF) is available free of charge via the [Council website > Documents & Publications](#). Hard copies are also available. (TW)

formation than ever before. Therefore, the EU must ensure that information systems are supplied with high-quality, timely, and complete data and are used effectively. The EU must also develop a clear vision on crime analysis; this includes the provision of sufficient human and financial resources to process and analyse information. In addition, the new EU interoperability framework must be used effectively, which necessitates appropriate and continuous training for the end-users.

- Multidisciplinary cross-border cooperation: The EU needs a horizontal, integrated, and coherent approach towards tackling the evolving, cross-cutting nature of security threats, such as CBRN weapons and hybrid activities. Therefore, the EU must ensure multidisciplinary, operational cooperation that goes beyond cross-border law enforcement cooperation, thus also involving other

authorities, such as civil protection actors. It must also remove obstacles to operational cross-border cooperation, e.g., differences in national decision-making processes, legislation, and operating models; differences in national data collection and data processing practices; etc. Reflections on better methods of working together and the exchange of information involving new technologies should be intensified. This could, for instance, include unmanned autonomous systems, automatic number plate recognition technologies, and single-search interfaces for available databases. The EU should also aim towards a common law enforcement culture, which involves improving language skills, learning about each other's cultures, and exchanging best practices. Another field of action is the constant monitoring of the EU JHA agencies' tasks and responsibilities. Cooperation among them must be increased, as they will continue to play a significant role in the future. Adaptations to their legal framework must be assessed; in particular, Europol's legal base may be further adapted in view of the request and reception of personal data directly from private parties.

■ **Comprehensive approach to security:** The security threat landscape is sure to change in the future. This requires better coordination, resources and technological capacities as well as a better situational awareness and preparedness. Hybrid threats, disinformation, use of new technology and the internet for criminal activities, violent radicalisation and right-wing extremism are the major challenging areas, which EU action should be focused on. (TW)

Salzburg Forum Declaration

On 6–7 November 2019, the Salzburg Forum met in Vienna/Austria. Austria briefed the home affairs ministers of the EU Member States at the [JHA Council meeting on 2–3 December 2019](#) about the outcome of the meeting. The ministers for the interior at the Salzburg Forum launched a [declaration](#) that discuss-

es the main challenges in home affairs policy at the regional level. In substance, the declaration deals with two issues: 1) human smuggling, borders, and security; 2) the functioning of the Dublin and Schengen systems.

As regards human smuggling, borders and security, the declaration calls on the European Union to focus more strongly on the fight against human smuggling along the Eastern/Central Mediterranean routes. The declaration points to bi-/multilateral cooperation in Central/Southeast Europe and to various agreements at the European and regional levels, which led to good progress in the fight against human smuggling and the enhancement of border protection. The Salzburg Forum also stressed that it is now time to take concrete operational measures, however, and made several proposals in this regard. Ultimately, cooperation along the Eastern Mediterranean route should become a best practice model for joint efforts in the fight against human smuggling. This would be a good contribution to the “Whole-of-Route” approach proposed by the Finnish EU Council Presidency.

As regards the Dublin/Schengen system, the declaration stresses that the EU's asylum system (based on the Dublin legal framework) is not working properly and that the Schengen system must be reinforced. The Salzburg Forum calls for a new approach to migration, which must include “rules on asylum and migration in the EU that are accepted, consistently implemented and enforced by all EU Member States.” Moreover, the declaration sets out the goals and parameters by means of which the Forum will contribute to the new pact on asylum and migration, which will be drawn up by the new European Commission.

[The Salzburg Forum](#) is a Central European security partnership that was initiated by Austria in 2000. The main goal is to strengthen regional cooperation in the field of internal security. Fields of cooperation include:

■ Illegal migration and asylum;

- Police cooperation;
- Information exchange;
- Cooperation in case of major events;
- Witness protection;
- The fight against drugs;
- Police training, etc.

The Member States of the Salzburg Forum are: Austria, Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania, Slovakia, and Slovenia. Close dialogue is held with Western Balkan countries and Moldova. There are at least two Salzburg Forum Ministerial Conferences per year. (TW)

CJEU Rules on Public Security Measure within EU Competence on Approximation of Laws

On 3 December 2019, the CJEU dismissed an action of the Czech Republic that sought the annulment of Directive 2017/853 of 17 May 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons. The [case reference is C-482/17](#).

In view of the abolishment of the internal borders within the Schengen area, the 1991 Directive lays down the conditions under which various categories of firearms can be acquired and held for civil purposes as well as the requirements for the prohibition to acquire firearms for reasons of public safety. With the revision of 2017, the European Parliament and the Council introduced stricter rules for the most dangerous, deactivated, and semi-automatic firearms in response to terrorist acts and in order to prevent the misuse of firearms for criminal purposes.

The Court held that the measures taken by the European Parliament and the Council in the contested directive (Directive 2017/853) do not entail breaches of the principles of conferral of powers, proportionality, legal certainty, protection of legitimate expectations, and non-discrimination as alleged by the Czech Republic in support of its action.

First, the Czech Republic argued that the 2017 Directive could not be based

on Art. 114 TFEU (approximation of laws of the Member States in relation to the functioning of the internal market) because the main objective exclusively pursues a higher level of public security. Moreover, there is currently no legal basis in the Treaties for the adoption of the established prohibitions. Art. 84 TFEU specifically excludes harmonisation in the fields of prevention of crime and terrorism.

The CJEU held, however, that, where an act based on Art. 114 TFEU has already removed any obstacles to trade in the area that it harmonises, the EU legislator is not prevented from adapting that act to any change in circumstances or any development of knowledge with regard to its task of safeguarding the general interests recognised by the Treaty, e.g., the fight against international terrorism and serious crime in order to pursue public security. Moreover, the CJEU pointed out that the contested Directive cannot be regarded in isolation, but should include a look at the existing rules that it amends, which are important in order to identify the legal basis. Otherwise the paradoxical result would occur that the amendments could not be based on Art. 114 TFEU, whereas it would have been possible to achieve the same normative result by a full recast of the initial Directive. Ultimately, the CJEU cannot see that the contents of the contested Directive have nothing to do with the internal market. On the contrary, the 2017 Directive adjusts the balance between the free movement of goods and the security of EU citizens. In sum, there is no violation of the principle of conferral of powers.

Second, the Czech Republic argued that a breach of the principle of proportionality exists. In this context, the Czech Republic particularly blamed the EU institutions for not having carried out an impact assessment. In addition, it raised doubts as to whether the measures adopted are appropriate to achieve the objective of combating the misuse of firearms.

The CJEU, by contrast, found that the EU legislator has broad discretion when it makes political, economic, and social choices. This discretion is subject to a limited judicial review. The CJEU examined the 2016 Interinstitutional Agreement on Better Law-Making. Indeed, the Commission should, as a rule, carry out an impact assessment if a legislative initiative has significant economic, environmental, or social implications. However, not carrying out an impact assessment cannot necessarily be regarded as a breach of the proportionality principle. The EU legislator is only required to have sufficient information enabling it to assess the proportionality of a planned measure. Therefore, during the legislative procedure, co-legislators must take into account the available scientific data and other findings that became available, including scientific documents used by the Member States during Council meetings. The CJEU observed that the EU legislature had at its disposal numerous analyses and recommendations covering all the issues raised in the Czech Republic's argument. These analyses and recommendations did not prove a manifest inappropriateness in relation to the objectives of ensuring public safety and security for EU citizens and the functioning of the internal market in firearms for civilian use. As a result, the CJEU did not see a violation of the EU institution's wide scope of discretion.

In addition, the CJEU rejected specific arguments of the Czech Republic against certain provisions and found no breach of the principles of proportionality, legal certainty, and the protection of legitimate expectations of categories of owners or holders of weapons (potentially subject to a stricter regime under the contested directive).

Ultimately, the CJEU rejected the argument of the Czech Republic that the 2017 Directive is discriminatory because it includes a specific provision that is only valid for Switzerland (to which the Directive also applies as a Schengen country). This provision is a derogation

from the general prohibition on converting automatic firearms into semi-automatic firearms. It takes into account the specific Swiss military system based on general conscription and having had in place over the last 50 years a transfer of military firearms to persons leaving the army. The Czech Republic argued that such derogation introduces unequal treatment between Switzerland and the other EU/EFTA Member States.

The CJEU found, however, that the principle of equality first requires establishing that Switzerland and the EU/EFTA Member States are in a comparable situation as regards the subject matter of this derogation. This is not the case here because Switzerland is able to trace and monitor the persons and weapons concerned due to its long-standing culture and tradition. Hence, the country fulfils the public security and safety objectives pursued by the contested directive. This cannot be assumed for the other Member States. (TW)

Legislation

Legal Practitioner Training in 2018

After the European Commission announced in December 2018 that the EU achieved its goals of training legal practitioners on EU law in 2017 already – two years ahead of schedule (see eucrim 1/2019, p. 10) – the Commission confirmed that even more records were broken in 2018. In 2018, more than 190,000 legal practitioners (judges, prosecutors, court staff, bailiffs, lawyers, and notaries) took part in trainings on EU law or the law of another Member State. Altogether, there was a 148% increase in training between 2011 and 2018. In total, more than one million legal practitioners have attended trainings on EU law since 2011. As in previous years, an upward trend in the number of participants and training activities since 2011 is noticeable. This trend especially applies to judges, court staff, and bailiffs in 2018.

These are the main results of the [eighth Commission report on European judicial training in 2018](#), which was published at the end of December 2019. For the first time, the report includes the progression of the number of participants for the professions monitored over the last eight years; this is based on [the European Commission Staff Working Document on the evaluation of the 2011–2020 European judicial training strategy](#). Other conclusions of the report are as follows:

- Although the absolute number of participants increased, there is a considerable difference if the percentage of participants is interpreted in relation to the total number of their profession;
- While over 63% of judges of the responding Member States received continuous training on EU law, for example, only 4,83% of lawyers in private practice did;
- Again, judges, prosecutors, and notaries received far more training on EU law or on the law of another Member State than members of other legal professions did;
- In Germany, for instance, nearly 80% of prosecutors were trained on EU law, but less than 10% of lawyers.

The Commission concedes, however, that the picture of the real training situation is incomplete due to data gaps. There is, for instance, a lack of data from private training providers for lawyers, which means this only allows for a limited assessment. Also, data collection varies from Member State to Member State and some Member States do not even respond to the questionnaire. The Commission concludes that the results nonetheless indicate differences in trainings between professions and Member States. There are still challenges ahead, most notably for lawyers, court, and prosecution office's staff and bailiffs' training. The lessons from the report and the above-mentioned strategy evaluation will feed into the Commission's reflection on the post-2020 strategy for European

judicial training, which is currently being elaborated. (TW)

Institutions

Council

Croatian Presidency Programme

On 1 January 2020, Croatia took over the Presidency of the Council of the European Union. Under the motto "A Strong Europe in a World of Challenges," the Croatian Presidency's [programme](#) is built around four pillars

- A Europe that develops;
- A Europe that connects;
- A Europe that protects;
- An influential Europe.

Regarding judicial cooperation in criminal matters, the Croatian Presidency's priorities are to finalise the trialogue negotiations on the e-evidence package and to lay the necessary groundwork for the work of the European Public Prosecutor's Office. Furthermore, the Presidency will focus on implementation of the EU's existing legal instruments for judicial cooperation in criminal matters.

Priorities in the area of home affairs include migration management, external border protection and Schengen, the interoperability between information systems, and a comprehensive approach towards internal security, focusing on resilience to cyber-attacks, hybrid threats, and the dissemination of fake news.

Another focal point is the external dimension of justice and home affairs. In this regard, the Croatian Presidency strives to reach an agreement with the USA on the exchange of e-evidence, on intensifying joint efforts in the fight against terrorism through the exchange of information from conflict-affected areas, and on fighting serious international organised crime.

Further priorities in the area of justice include the development and promotion of e-Justice, digital platforms, and modern technologies; the continuation

of discussions on improving the educational system for judicial officials in the EU; and finalisation of the Regulation establishing the Justice programme and the Regulation establishing the Rights and Values programme.

The Croatian Presidency is the third in the current trio Presidency, following Romania (January–June 2019) and Finland (July–December 2019). (CR)

OLAF

High-Level Conference on Customs Fraud in Helsinki

On 14–15 November 2019, the Finnish Customs and OLAF organised a [high-level conference in Helsinki](#) at which participants discussed current trends and appropriate responses to customs fraud. The event (entitled "Strategies to fight customs fraud in a globalised trading landscape") brought together national customs officials and representatives from EU bodies, including OLAF, Europol, Frontex, and the EU Intellectual Property Office (EUIPO). Discussions centred around the challenges of customs fraud, e.g., underevaluation, misdeclaration, and smuggling. They also included best practices on how to prevent, investigate, and detect customs fraud in the face of a growing volume of consignments, particularly as a result of the boom in e-commerce. (TW)

European Public Prosecutor's Office

State of Play in Establishing the EPPO

The justice ministers of the Member States were informed about the state of play of the implementation of the EPPO Regulation at the JHA Council meeting on 2/3 December 2019. The Commission regularly briefs the Council on the setting up of the new EU body. The most recent progress was summarised in a [non-paper](#) of 22 November 2019.

The [press release on the December JHA Council meeting](#) also reported

that the newly appointed EPPO Chief Prosecutor, Ms *Laura Codruța Kövesi*, who took office on 1 November 2019 (see [eucrim 3/2019](#), p. 164), presented her vision and plans for the office. She stressed that work on several areas is necessary to achieve the objective of making the EPPO operational by the envisaged date, i.e., by the end of 2020. These include the:

- Implementation of the PIF Directive;
- National adaptations to the EPPO Regulation;
- Appointment of the European prosecutors to complete the constitution of the college;
- Agreement on the number of delegated prosecutors;
- A functional case management system.

She also highlighted the importance of providing the EPPO with adequate human and financial resources, so that it can fulfil its task efficiently. (TW)

Europol

Data Requests from Private Parties

At its JHA meeting on 2/3 December 2019, the Council adopted [Conclusions on Europol's cooperation with private parties](#). While respecting the supporting role of Europol with regard to actions carried out by the competent authorities of the Member States, the Council acknowledges in its Conclusions the urgent operational need for Europol to request and receive data directly from private parties. Hence, it has called on the European Commission to take this into account as part of its review of the implementation of the Europol Regulation (EU) 2016/794. (CR)

Compliance with Terrorist Finance Tracking Programme Agreement

On 14 November 2019, the European Data Protection Supervisor (EDPS) published his [inspection report](#) on Europol's compliance with Article 4 of the TFTP Agreement (Agreement between the EU and the USA on the processing and trans-

fer of Financial Messaging Data from the EU to the US for the purposes of the Terrorist Finance Tracking Program ([O.J. L 195, 27.7.2010](#))). Europol's role under the Agreement is to make sure that the data on financial transfers requested by the US and stored in EU territory is necessary for the fight against terrorism and the financing of terrorism and that each request is defined as narrowly as possible.

In general, the report concludes that Europol does a good job of verifying US requests. Nevertheless, the report outlines eight recommendations for Europol to consider when carrying out these activities. The most important recommendation set forth by the EDPS is for Europol to be able to ask US authorities for additional information when checking that their requests actually meet necessity requirements in terms of countries and message types. Other recommendations concern, for instance, the verification process and security measures. (CR)

Eurojust

First Day as an Agency

On 12 December 2019, Eurojust officially became the European Agency for Criminal Justice Cooperation, with its new [Regulation](#) taking effect the same day (see also [eucrim news of 18 February 2019](#)).

Novelties set into motion under the Regulation EU 2018/1727 include a new governance structure (with an Executive Board of six members), new powers for the national Members, new procedures for the work of the College, and stronger democratic oversight. Relations with other institutions and agencies such as the EJC, Europol, and the EPPO have been set out. The types of serious crime for which Eurojust is competent now include genocide and war crimes.

In addition, Eurojust is now run by a new data protection regime, adapting it to the revised EU legal framework on data protection. The European Data

Protection Supervisor (EDPS) is responsible for the external supervision of Eurojust, replacing the Joint Supervisory Body (JSB). While the UK and Ireland decided to opt-in to the Eurojust Regulation, Denmark is not bound by it. Hence, on 11 December 2019, a cooperation agreement between Denmark and Eurojust took effect (see [eucrim news of 20 December 2019](#)). (CR)

New Rules of Procedure

Following the entry into force of its [new Regulation](#), the College of Eurojust adopted new [rules of procedure](#) for Eurojust on 20 December 2019. The rules of procedure outline further functions as well as the election and dismissal procedures of the President and Vice-Presidents of Eurojust. Furthermore, they regulate the meetings of the College, its quorum, and its voting rules.

The composition and functioning of the Executive Board as well as the appointment of the administrative director form another integral part of these rules. The rules of procedure also set forth rules for written and preparatory consultation procedures, working groups, and on how to handle declarations of interest, conflicts of interest, information duties, and resolutions of disagreements. (CR)

100 Action Days Coordinated by Eurojust

At the end of November, Eurojust had coordinated its [100th action days](#) since 2011. The 100 action days resulted in 3355 searches; the seizure of more than €210 million in cash, luxury cars and jewellery; and halted criminal activities worth nearly €2 billion.

During the action days, national authorities are able to use a purpose-built coordination centre at Eurojust. There they have access to dedicated and secure lines of communication enabling them to simultaneously conduct arrests, searches, interviews of suspects and witnesses, seizures of evidence, and the freezing of assets in real-time across several countries.

Since the first action days held upon the initiative of the French Desk at Eurojust in 2011 and concerning the smuggling of irregular migrants, action days have been held for all sorts of serious crime: cybercrime, terrorism, environmental crime, THB, financial fraud, weapons trafficking, drug trafficking, and financial crime. The latter was the subject of the [100th coordination centre](#), unravelling massive trans-European pay TV fraud. (CR)

European Judicial Network (EJN)

Allocation of Cases to Eurojust and to EJN

On 5 November 2019, Eurojust and the European Judicial Network (EJN) published a [joint report](#) with the aim of assisting practitioners in determining whether a case should be directed to Eurojust or to the EJN.

The report outlines the following items:

- Criteria for assessing which agency should deal with a request for assistance;
- Use of the updated 2018 [Joint Paper](#) on the EJN and Eurojust “What can we do for you?” for redirecting cases;
- Steps to be taken upon receipt of a request from national authorities when it appears to be better suited to the another’s competence;
- Steps to be taken by a national desk at Eurojust upon receipt of a request from another national desk that appears to better fall under the EJN’s competence;
- Existence of national rules preventing the national desks at Eurojust from redirecting a case to the EJN once the case has been opened at Eurojust;
- Steps to be taken when a request has been addressed to both a national desk at Eurojust and an EJN contact point;
- Use of the Eurojust National Coordination System for case-distribution purposes;
- Added value of the EJN-Eurojust double-hat function to the distribution of cases;

■ Liaison between the national desks at Eurojust and EJN contact points, with a view to reaching a common approach on complementarity;

■ Best practices.

The report highlights that the assessment of whether a request should be dealt with by Eurojust or the EJN should be made on a case-by-case basis, taking into account first the complexity of the case, followed by its urgency, as the main criteria. (CR)

Frontex

New Frontex Regulation in Force

On 4 December 2019, the new Frontex Regulation (EU) 2019/1896 entered into force. The main features are summarised in the [press release](#) of 4 December 2019.

The Regulation includes the following strengthening objectives for Frontex:

- Develop integrated planning such as capability development planning, contingency planning, and operational planning;
- Be capable to conduct operations in non-EU countries not neighbouring the EU;
- Upgrade its management system;
- Continue to provide national authorities with operational support on land, at sea, and in the air;
- Provide experts and training in order to further contribute to the fight against cross-border crime;
- Continue to assist national authorities in effective returns of those persons not eligible to remain in the EU;
- Focus on post-arrival/post-return assistance;
- Provide ongoing situation monitoring at external borders, risk analyses, and information exchange on what is happening at the EU’s borders and beyond;
- Engage at least 40 fundamental rights monitoring specialists to be involved in its operations.

The new Regulation also means that Europe’s first uniformed service is in place. Furthermore, Frontex will work

more closely with national authorities in order to better plan the EU’s responses to challenges – rather than merely reacting to crises. (CR)

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

EP Supports Planned EU Legislation against VAT Fraud in E-Commerce

On 17 December 2019, [MEPs backed new EU legislation that aims at curbing VAT evasion in e-commerce](#). The legislation (one Directive and one Regulation) will require payment service providers to keep records of cross-border payments related to e-commerce and to make these data available to anti-fraud authorities. Anti-fraud authorities will have access to a new, central electronic storage system, so that they can better process payment data. Administrative cooperation among the Member States’ tax authorities and payment service providers will also be strengthened. The EP made several proposals on the text in order to make information sharing and prosecution more effective.

The EP has only a consultative function on the pieces of legislation. The exclusive competence to adopt the texts lies with the Council. The latter already reached political agreement in November 2019 (see [eucrim 3/2019](#), p. 169). The Commission tabled the proposals in December 2018. It is estimated that the EU loses €137 billion every year due to e-commerce VAT evasion. (TW)

Corruption

Eurobarometer Survey on Business Attitudes to Corruption

spot light The majority of companies (51%) is sceptical that corruption is being tackled efficiently by law enforcement. This is one of the

main results of the [Eurobarometer survey on the businesses' attitude towards corruption in the EU](#). It was published on 9 December 2019 ([International Anti-Corruption Day](#)). The survey interviewed 7722 businesses in all 28 EU Member States between 30 September and 24 October 2019. It is the fourth survey of this kind (the first one was conducted in 2013, the others in 2015 and 2017). For the 2017 survey, see eucrim 1/2018, p. 13. The surveys include a wide range of topics, e.g.:

- Problems encountered when doing business;
- Business' perception of the level of corruption in their country;
- The prevalence of practices leading to corruption;
- Corrupt practices in public tender and public procurement procedures;
- Investigation, prosecution, and sanctioning of corruption.

Although corruption is not ranked among the top concerns, corruption is seen as a problem by five in ten European companies. The majority of companies think that tax rates, fast-changing legislation and policies (63%), and the complexity of administrative procedures (62%) are the main problems when doing business. Nevertheless, there is wide divergence among the EU Member States. Whereas 88% of companies in Romania see corruption as a problem when doing business in their country, only 5% of companies do in Denmark.

Furthermore, the general businesses' perception of corruption has decreased compared to 2013 (63%, down from 75%). However, the results also vary among the Member States on this point: in 17 Member States, the feeling that corruption is a widespread problem in their country has decreased since 2017 – most considerably in Germany (-25%) – but increased in 11 countries. Other results of the survey are as follows:

- Favouring friends or family members in business and public institutions is by far the most frequently mentioned corrupt practice;

- Over seven in ten companies agree that too close links between business and politics in their country lead to corruption and that favouritism and corruption hamper business competition;

- 30% of companies believe that corruption has prevented them from winning a public tender/procurement contract;

- More than 50% of companies think that corruption in public procurement managed by national and regional/local authorities is widespread;

- 51% of companies feel that anti-corruption measures are not applied impartially.

The survey also gives the reader a look behind the scenes of different business sectors. In this context, the survey reveals that sector analysis indicates significant differences between the sectors as regards corruption. 38% of companies in the healthcare and pharmaceutical sector, for instance, consider corruption to be a problem when doing business, but only 31% do so in the energy industry. The energy industry is also the business with the lowest proportion (19%) of companies that assume corruption has prevented them from winning a public tender/procurement contract; by contrast, around 30% are convinced of this in the construction and telecom/IT sectors. All in all, corruption remains an issue for both large and small companies. (TW)

Money Laundering

Council Frames Future EU AML/CFT Policy

The ECOFIN Council adopted [conclusions on strategic priorities on anti-money laundering and countering the financing of terrorism](#) at its meeting on 5 December 2019 in Brussels. The conclusions are a direct response to the new – more general – strategic agenda for 2019–2024, in which the European Council stated: “We will build on and strengthen our fight against terrorism

and cross-border crime, improving co-operation and information-sharing, and further developing our common instruments.” For the new strategic agenda, see eucrim 2/2019, pp. 86–87. The conclusions also build on the Commission's AML/CFT Communication and the related assessment reports of July 2019 (see eucrim 2/2019, pp. 94 et seq.).

The conclusions underline that “the fight against money laundering and terrorist financing remains a high priority for the European Union.” They not only urge Member States to complete implementation of all relevant Union legislation in the area, but also set clear political guidelines for the European Commission. Hence, the conclusions call for stepping up the Union's AML/CFT legal framework in accordance with international standards as set out by the FATF and MONEYVAL. These standards should be incorporated into EU law in a timely and comprehensive manner. The Commission is particularly invited to do the following:

- Thoroughly assess, as a matter of priority, any possible restrictions stemming from existing legislation (or lack thereof) with regard to efficient information exchange and cooperation among all relevant competent authorities involved in the implementation and supervision of the Union's AML/CFT framework;
- Consider the possibility of creating a coordination and support mechanism for Financial Intelligence Units (FIUs);
- Explore actions to enhance the EU's AML/CFT framework, e.g., by considering to address some aspects with a regulation;
- Explore the opportunities and challenges of using technological innovation to combat money laundering;
- Explore the possibilities, advantages, and disadvantages of conferring certain responsibilities and powers for anti-money laundering supervision to a Union body with an independent structure and direct powers vis-à-vis certain obliged entities.

The Commission is also called on to

report on the outlined actions every six months, starting in June 2020. (TW)

Organised Crime

2019 EU Drug Markets Report

On 26 November 2019, Europol and the EMCDDA published their joint [EU Drug Markets Report](#) for the year 2019, looking at impact and driving forces behind drug markets, the main drug markets in the EU, and how to respond to drug markets. The report finds that the drug market is a major source of income for organised criminal groups (OCGs) in the EU, at a minimum estimated retail value of €30 billion per year.

The report also identifies the following:

- Illicit drugs represent the most valuable market for criminal organisations operating in the EU;
- About two thirds of those engaged in the drug trade are also involved in other criminal activities;
- There are signs of increasing competition between groups, leading to escalating violence within the EU drug market;
- Overall, drug availability in Europe, for both natural and synthetic drugs, remains very high;
- The European drug market is increasingly characterised by consumers having access to a wide variety of high-purity and high-potency products that, in real terms, are usually equivalent in price or even cheaper than they have been over the past decade;
- Developments in the area of precursors have been an important driver in the expansion of drug production;
- The drug market is becoming more globally connected and technologically enabled;
- OCGs are becoming more internationally connected, and they exploit the gaps/differences that exist in regulatory and drug control environments;
- The main drivers of market changes and new threats stem from opportuni-

ties arising from the existence of global commercial markets and the associated logistical developments and digitalisation within these markets;

- The drug market has become increasingly digitally enabled. Both the surface web and darknet markets are used for online drug sales, as are social media and mobile communication apps. Encryption and anonymised services are also being increasingly used by OCGs for secure communication in the trafficking and sale of illicit drugs;
- Levels of production, globally and in the EU, are very high;
- Cocaine production in South America and heroin production in Afghanistan are estimated to be at historically high levels;
- China has gained in importance as a source country for drug precursors and new psychoactive substances;
- Africa has grown in importance due to its growing role as a trafficking and transit area;
- Europe is also a major producer of cannabis and synthetic drugs for the EU market and is, to some extent, a global supplier of MDMA (ecstasy) and amphetamines;
- In some neighbouring countries, OCGs are closely linked to ethnically-based groups residing in the EU, which is changing the dynamics of drug supply.

To tackle the identified problems, the report sets forth the following main targets for action:

- Strengthen efforts to target top-level OCGs active in the global drug market;
- Reduce vulnerabilities at external borders;
- Focus on key geographical locations for trafficking and production;
- Invest in forensic and toxicological capacities;
- Address links to other important security threats;
- Raise awareness about the cost of drug-related violence and corruption;
- Develop response to digitally enabled drug markets;
- Act at the global level. (CR)

Cybercrime

Council Conclusions on Significance and Security Risks of 5G Technology

5G networks will become part of the crucial infrastructure for the operation and maintenance of vital societal and economic functions and a wide range of services essential for functioning of the internal market. The EU must maintain technological sovereignty, however, and promote its approach to cyber security in conjunction with future electronic communication networks. This is stressed in the [conclusions “The significance of 5G to the European Economy and the need to mitigate security risks linked to 5G,”](#) as adopted by the Transport, Telecommunications and Energy Council at its meeting on 3 December 2019. The conclusions set out political guidelines on how the EU should manage the future innovative 5G technology. The Council not only points out the assets of 5G (among others, the aim to make the EU the leading market for the deployment of 5G networks and the development of 5G-based solutions), but also outlines the challenges stemming from 5G technology. Hence, safeguarding the security and resilience of electronic communications networks and services (in particular as regards 5G), following a risk-based approach, is considered important. Against this background, the Council has established the following guidelines:

- Swift and secure roll-out of the 5G networks across the EU, which is key to enhancing the EU’s competitiveness;
- Building trust in 5G technologies is firmly grounded in the core values of the EU (e.g., human rights and fundamental freedoms, rule of law, protection of privacy, personal data, and intellectual property); in the commitment to transparency, reliability, and inclusion of all stakeholders and citizens; and in enhanced international cooperation;
- A comprehensive approach and effective and proportionate security measures, with a focus on security and pri-

vacy by design as integral parts of 5G infrastructure and terminal equipment;

- Addressing and mitigating the challenges for law enforcement (e.g., lawful interceptions);
- Putting in place robust common security standards and measures that must be ensured by all businesses involved;
- Mitigating not only risks of 5G by means of standardization and certification, but also by means of additional measures;

Both the Member States and the Commission (with the support of ENISA) are encouraged to work together in order to ensure the security and integrity of 5G networks. (TW)

Environmental Crime

EU Framework on Environmental Crime under Scrutiny

Ten years after the criminal law directives on environmental crime and ship source pollution were agreed upon, the EU is now carrying out a thorough evaluation and assessment of the legal framework. On 15 November 2019, the Council tabled the [draft final report on the eighth round of mutual evaluations](#), which was devoted to the practical implementation and operation of European policies on preventing and combating environmental crime. The report summarises the main findings and recommendations and draws up conclusions in view of strengthening the prevention of and fight against environmental crime across the EU and internationally.

Since the range of offences covered by environmental crime is broad, the eighth round of mutual evaluations focused on those offences which Member States felt warranted particular attention, i.e., illegal trafficking in waste and illegal production/handling of dangerous materials. The evaluation involves a comprehensive examination of the legal and operational aspects of tackling environmental crime, cross-border cooperation, and cooperation with relevant EU

agencies. Evaluation missions to individual Member States started in September 2017 and ended in February 2019. The evaluation missions resulted in detailed reports on each of the 28 Member States.

The general report underlines, *inter alia*, that environmental criminal offences in the examined areas remain undetected, as this type of crime is often “invisible.” It is therefore considered a “control crime,” which, as such, has to be tackled proactively. The report also includes several recommendations aiming at improving the situation when fighting environmental crime. Member States should, for instance, adopt a comprehensive national strategy setting out priorities to fight these crimes. Another weak point identified was the lack of statistical data on the crimes and of information on the flow of cases from administrative and law enforcement authorities. Therefore, Member States are called on to work out a method by which to collect systematic, reliable, and updated statistics in order to enable a strategic evaluation of the national systems.

In addition to the eight rounds of mutual evaluations, the Finnish EU Council Presidency intensified discussions on the adequacy of the current EU criminal law framework on environmental crime, with the aim of identifying areas in which further approximation of the Member States’ criminal laws may be advisable. To this end, the Finnish Presidency presented a [report on the “state of environmental criminal law in the European Union”](#) on 4 October 2019.

The report lists relevant developments in the EU’s environmental policy since the 2008 Directive on the protection of the environment through criminal law and the 2005 Directive on ship source pollution (amended in 2009). The report also summarises the input given at various meetings regarding further development of the EU’s regulatory framework in the field of environmental criminal law. Discussions focused on the following topics:

- Areas of environmental crime where criminal activity is considered to be more frequent or serious;
- Successes and challenges in counteracting environmental offences;
- Possible additional minimum rules on criminal sanctions in the area of environmental crime;
- The clarity of environmental criminal law.

The justice ministers of the Member States took note of the draft final report on the eighth round of mutual evaluations and the Finnish Presidency report at their [JHA Council meeting on 3 December 2019](#).

The Commission is currently also carrying out a comprehensive evaluation of the 2008 Environmental Crime Directive (cf. the [evaluation roadmap](#)). This evaluation seeks to collect a comprehensive set of data on the scale of environmental crime. It will analyse the effectiveness of the Directive’s current scope and its consistency with other, relevant EU level legislation. Among others, the evaluation is based on a wide public consultation and on targeted consultations with experts and practitioners dealing with combating environmental crime. The results of the evaluation are expected to be published in spring 2020. (TW)

Procedural Criminal Law

Data Protection

Council Conclusions on Widening Scope of PNR Collection

The justice and home affairs ministers of the Member States adopted [conclusions on widening the scope of PNR data](#) at the JHA Council meeting on 2 December 2019. As reported in eucrim 2/2019, p. 105, the Finnish Presidency took the initiative of launching the debate on extending the scope of the EU’s current PNR scheme to forms of transport other than air traffic, such as maritime or railway traffic. The conclusions point out

that, even though some Member States welcomed the initiative, other delegations voiced concern about the timing and potential legal, technical, and financial challenges. Therefore, the ministers are asking the European Commission to carry out a thorough impact assessment on widening the scope of the PNR concept. The aim of the impact assessment is to explore the necessity and feasibility of the collection, storage, and processing of PNR data from other cross-border travelling forms. The conclusions list several aspects in relation to legal, operational, and technical issues that the study must include. (TW)

Council Push on Data Retention to Fight Crime

The Council closely monitors progress made by the Commission in the implementation of Council conclusions on the retention of data for the purpose of fighting crime, which were adopted in June 2019 (see eucrim 2/2019, p. 106). At the [JHA Council meeting of 2–3 December 2019](#), the ministers took note of the progress made and reiterated that the Commission should “pursue all efforts needed to achieve a satisfactory balance between privacy and security concerns at EU level.” The conclusions of June 2019 attempt to find a way out of the impasse that occurred after the CJEU found the 2006 data retention directive and the national data retention regimes of the UK and Sweden to be incompatible with the EU’s Charter on Fundamental Rights. The CJEU did not completely rule out a data retention system, but it must set clear and precise conditions. The conclusions encouraged the Commission to prepare a new legislative initiative, in particular by conducting targeted consultations with stakeholders and supporting a comprehensive study that looks after possible solutions. (TW)

EU-US Privacy Shield – Third Annual Review

Despite efforts made by the United States authorities and the European

Commission to implement the EU-US Privacy Shield, e.g., *ex officio* oversight and enforcement actions, the European Data Protection Board (EDPB) still voiced concerns over adequate data protection that must be addressed by both the Commission and the USA. The [EDPB adopted its third annual review](#) on 12 November 2019.

The EU-US Privacy Shield is a legal framework that protects the fundamental rights of anyone in the EU whose personal data is transferred to the United States for commercial purposes. In operation since 1 August 2016, it allows the free transfer of data to companies that are certified in the USA under the Privacy Shield. By now, more than 5000 companies are already certified under the Privacy Shield, having committed to complying with EU data protection standards. The Shield is reviewed each year. The Privacy Shield must be distinguished from the EU-US Data Protection Umbrella Agreement, which contains a set of data protection rules that apply to all transatlantic exchanges between criminal law enforcement authorities.

According to the EDPB report, the lack of substantial checks remains a particular concern as far as commercial aspects of the Privacy Shield are concerned. Onward transfers, which lead to transfers of data outside the jurisdictions of the American and EU authorities, require more substantial oversight.

As regards access by public authorities to data transferred to the United States under the Privacy Shield, the EDPB regrets the insufficient information basis, which makes it difficult to assess to what extent data are collected for national security purposes. In particular, there have been no follow-up reports by the US Privacy and Civil Liberties Oversight Board (PCLOB). Such reports would be helpful, for instance, to evaluate whether the collection of data under Section 702 FISA is indiscriminate or not and whether or not access is conducted on a generalized basis under the UPSTREAM program. Furthermore, the

EDPB has the impression that the Ombudsperson is not vested with sufficient power to access information and to remedy non-compliance. Thus, the EDPB still cannot state that the Ombudsperson can be considered an “effective remedy before a tribunal” in the meaning of Art. 47 of the EU Charter of Fundamental Rights.

The Commission already concluded its assessment report (third annual review of the functioning of the EU-US Privacy Shield, [COM\(2018\) 495 final](#)) in September 2019. After taking the opportunity to better examine daily experience and practical implementation of the framework, the Commission came to the conclusion that a number of concrete steps should be taken so that the Privacy Shield functions more effectively. Several recommendations have been addressed to the U.S. Department of Commerce and the Federal Trade Commission.

In a [joint statement of 13 September 2019](#), U.S. Secretary of Commerce, *Wilbur Ross*, and *Věra Jourová*, at the time EU Commissioner for Justice, Consumers, and Gender Equality, defended the EU-US Privacy Shield. They underlined that the Privacy Shield plays a vital role in protecting personal data and contributing to the \$7.1 trillion economic relationships between the United States and Europe.

The third annual review of the Privacy Shield was debated in the EP’s LIBE Committee on 9 January 2020. MEPs voiced severe criticism and pointed to shortcomings in the data protection of EU citizens. (TW)

CJEU Rules on Lawfulness of Video Surveillance in Residential Buildings

On 11 December 2019, the CJEU ruled that national provisions which authorise the installation of a video surveillance system on buildings, for the purpose of pursuing the legitimate interest of ensuring the safety and protection of individuals and property, without the consent of the data subjects, are not contrary to EU

law if the processing of personal data carried out by means of the video surveillance system at issue fulfils the conditions laid down in Art. 7(f) of Directive 95/46/EC.

In the case at issue ([Case C-708/18, *TK v Asociația de Proprietari bloc M5A-ScaraA*](#)), the referring Romanian Court had to deal with an action brought by an owner of an apartment located in a residential building. The apartment owner applied for an order that the association of co-owners take out of operation the building's video surveillance system and remove the cameras installed in the common parts of the building because the instalment is contrary to EU's data protection law (Art. 6(1) lit. c) and Art. 7 lit. f) Directive 95/46, and Arts. 7, 8, 52 of the Charter).

The CJEU stressed that video surveillance systems processing personal data are lawful under the following three conditions:

First, the data controller or by the third party or parties to whom the data are disclosed must pursue a legitimate interest. In the case at issue, this condition is generally fulfilled if the controller seeks to protect the property, health, and life of the co-owners of a building. The extent to which the interest must be "present and effective" at the time of data processing did not need to be decided by the CJEU because the video surveillance system was installed after thefts, burglaries, and acts of vandalism had occurred.

Second, personal data must be processed for the purpose of the legitimate interests pursued; it is settled case law in this regard that derogations and limitations in relation to the protection of personal data must apply only insofar as is strictly necessary. In other words, it must be ascertained that the legitimate data processing interests pursued by video surveillance cannot reasonably be as effectively achieved by other means that are less restrictive of the fundamental rights and freedoms of data subjects. In addition, the processing must adhere

to the "data minimisation principle" enshrined in Art. 6(1) lit. c) of Directive 95/46. The CJEU considered the requirements in relation to proportionality to have been met in the present case because the co-owners had installed an intercom/magnetic card system at the entrance of the building as an alternative measure, which proved to be insufficient. The CJEU points out, however, that the referring court must assess whether aspects of the data minimisation principle were upheld, e.g., determine whether it is sufficient if the video surveillance operates only at night or outside normal working hours, and whether it blocks or obscures images taken in areas where surveillance is unnecessary.

Third, the referring court must ensure that the fundamental rights and freedoms of the person affected by the data protection do not take precedence over the legitimate interest pursued. This necessitates a balancing of opposing rights and interests, which depends on the individual circumstances of each particular case in question. According to the CJEU, the following guidelines come to the fore here:

- Member States cannot exclude (categorically and in general) the possibility of processing certain categories of personal data without allowing the opposing rights and interests at issue to be balanced against each other in any particular case;

- Such balancing must take into account the seriousness of the infringement of the data subject's rights and freedoms. It is important whether the data are accessed from public or non-public sources. Processing of data from non-public sources implies that the infringement is more serious because information relating to the data subject's private life will thereafter be known by the data controller and possibly to third parties;

- Account must be taken, *inter alia*, of the nature of the personal data at issue, in particular of the potentially sensitive nature of these data, and of the nature and specific methods of processing the

data, in particular of the number of persons having access to these data and the methods of accessing them;

- For the purpose of the balancing exercise, the data subject's reasonable expectations are also relevant, namely that his/her personal data will not be processed when, in the circumstance of the case, that person cannot reasonably expect further processing of those data;

- Lastly, all these factors must be balanced against the importance (for all the co-owners of the building concerned) of the legitimate interests pursued in the instant case by the video surveillance system at issue, inasmuch as it seeks essentially to ensure that the property, health, and life of those co-owners are protected.

The final assessment of this balancing has been left to the referring Romanian court. (TW)

EDPS: New Proportionality Guidelines

On 19 December 2019, the European Data Protection Supervisor issued [guidelines on assessing the proportionality](#) of measures that limit the fundamental rights to privacy and to the protection of personal data. The guidelines aim at providing policymakers and legislators with practical tools to help assess the compliance of proposed EU measures impacting the fundamental rights to privacy and the protection of personal data with the Charter of Fundamental Rights. Ideally, conflicts between data protection and priorities/objectives of measures are to be minimised at an early stage.

The guidelines offer a practical, step-by-step method by which to assess the proportionality of new legislative measures, providing explanations and concrete examples. They respond to requests from EU institutions for guidance on the particular requirements stemming from Art. 52(1) of the Charter. The guidelines also complement the EDPS' 2017 "Necessity Toolkit," which guides policymakers in applying the necessity test to new EU measures that may limit the fundamental rights to

the protection of personal data (see eucrim 2/2017, p. 72). (TW)

Victim Protection

Whistleblowing Directive Published

spot light On 26 November 2019, [Directive 2019/1937 “on the protection of persons who report breaches of Union law”](#) was published in the Official Journal (L 305, p. 17). The European Parliament and the Council already agreed on the content of the Directive in April 2019. For the compromise reached on this directive, nicknamed “Whistleblower Directive,” see eucrim 1/2019, p. 27 (with further references on the legislative process, which was closely monitored in eucrim).

The *material scope* of the Directive is limited to specific areas of Union law, where the Union legislator believes in enhancing enforcement if breaches of law are reported. Still, the areas covered by the Directive are broad, including, e.g., public procurement, financial services, product and transport safety, protection of the environment, etc. Union acts that may be breached are set out in the annex to the Directive. The Directive expressly states that protection of the Union’s financial interests is a core area of the Directive’s scope, which is related to the fight against fraud, corruption, and any other illegal activity affecting Union expenditure, and the collection of Union revenues and funds or Union assets.

Legislation in the field of whistleblowing entails a number of legal problems regarding the *relationship with existing reporting mechanisms and conflicting areas*, e.g., the protection of classified information, the protection of legal/medical professional privilege, the secrecy of judicial deliberations, and rules of criminal procedure. The relationships in this regard are set out by the Directive. It also stresses that the Directive’s provisions do not affect the Member State’s responsibility to ensure *national security*. In particular, it shall

not apply to reports of breaches of the procurement rules involving defence or security aspects unless they are covered by the relevant acts of the Union.

Regarding the Directive’s *personal scope*, it broadly applies “to reporting persons working in the private or public sector who acquired information on breaches in a work-related context.” The Directive lists a number of persons who must be included in the protection scheme at least, e.g.:

- Persons having the status of workers in the sense of Union law (including civil servants);
- Persons having self-employed status;
- Shareholders;
- Members of the administrative, management, or supervisory bodies of an undertaking, including non-executive members;
- Volunteers and trainees;
- Any persons working under the supervision and direction of contractors, subcontractors, or suppliers;
- Persons whose work-based relationship has since ended or is yet to begin (e.g., cases in which the information on breaches was obtained during the recruitment process or other pre-contractual negotiations);
- Facilitators and third persons who are connected with the reporting person (such as colleagues or relatives) and the legal entities owned by, or otherwise connected to, the reporting person in a work-related context.

However, persons may benefit from the protection under the Directive only if (1) They had reasonable grounds to believe that the information on breaches reported was true at the time of reporting and that such information fell within the scope of this Directive; and (2) They reported either internally in accordance with Article 7 or externally in accordance with Article 10, or made a public disclosure in accordance with Article 15.

The latter refers to the *reporting system* established by the Directive. The provisions mainly follow the flexible ap-

proach pushed through by the European Parliament. Accordingly, Member States shall “encourage” reporting through *internal* reporting channels before reporting through external reporting channels, where the breach can be addressed effectively internally and where the reporting person considers that there is no risk of retaliation. However, a whistleblower may also choose to *directly report* breaches to competent authorities. The Directive sets out the obligations, the necessary framework, the procedure, and the follow-up for both the internal and external reporting channels. This includes the obligation for companies with at least fifty workers to establish such channels and procedures for internal reporting and for follow-up.

Public disclosure (i.e., making information on breaches available in the public domain) – the third form of reporting – is protected by the Directive under the following conditions:

- (1) The person first reported internally and externally, or directly externally, but no appropriate action was taken in response to the report within the time-frame referred to in the Directive; or (!)
- (2) The person had reasonable grounds to believe that:
 - (i) the breach may constitute an imminent or manifest danger to the public interest, such as where there is an emergency situation or a risk of irreversible damage; or
 - (ii) in the case of external reporting, there is a risk of retaliation or there is a low prospect of the breach being effectively addressed, due to the particular circumstances of the case, such as those where evidence may be concealed or destroyed or where an authority may be in collusion with the perpetrator of the breach or involved in the breach.

Member States have the duty to ensure that the *identity* of the reporting person is *not disclosed* to anyone beyond the authorised staff members competent to receive/follow up on reports, without the explicit consent of that person. By way of derogation, the identity of the report-

ing person may be disclosed if this is a necessary and proportionate obligation imposed by Union or national law in the context of investigations by national authorities or judicial proceedings, including those with a view to safeguarding the rights of defence of the person concerned. In these cases, safeguards also apply to the reporting persons, e.g., he/she must be informed before his/her identity is disclosed, and he/she must receive a written explanation of the reasons for the disclosure.

Another key element of the Directive involves *protection measures against retaliation*. This includes obligations for Member States to prohibit any form of retaliation against whistleblowers. In this context, the Directive provides a non-exhaustive list of prohibited retaliatory acts. It includes not only work-related measures, e.g., suspension/dismissal, demotion, or withholding of promotion, but also acts harming the whistleblower's reputation, blacklisting, and psychiatric or medical referrals.

Beyond the prohibitions, Member States are obliged to proactively take the necessary measures to ensure that the whistleblower is protected from retaliation. Such measures include the following:

- Persons who report breaches or publicly disclose them shall not be considered to have breached any restriction on disclosure of information and shall not incur liability of any kind in respect of such a report or public disclosure, provided that they had reasonable grounds to believe that the reporting or public disclosure of such information was necessary to reveal a breach pursuant to this Directive;
- Reporting persons shall not incur liability in respect of the acquisition of or access to the information reported or publicly disclosed, provided that such acquisition or access did not constitute a self-standing criminal offence;
- If whistleblowers suffered a detriment, it shall be presumed that the detriment occurred in retaliation for the

report or public disclosure (inversion of the onus of proof);

- Provided that they had reasonable grounds to believe that the reporting or public disclosure was necessary to reveal a breach, reporting persons can seek dismissal of legal proceedings, including those for defamation, breach of copyright, breach of secrecy, breach of data protection rules, disclosure of trade secrets, or for compensation claims based on private, public, or on collective labour law;

- If information includes trade secrets, but the reporting person meets the conditions of the Directive, such reporting or public disclosure shall be considered lawful.

Furthermore, the Directive requires Member States to make available a number of support measures to whistleblowers, e.g.:

- Comprehensive and independent information and advice on procedures and remedies available, on protection against retaliation, and on the rights of the person concerned;
- Effective assistance from competent authorities;
- Access to legal aid in accordance with EU law (i.e., Directive (EU) 2016/1919 and Directive 2008/52/EC applicable in criminal and in cross-border civil proceedings) and national law.

Ultimately, Directive 2019/1937 obliges Member States to provide for “effective, proportionate and dissuasive *penalties*” applicable to natural or legal persons who hinder or attempt to hinder reporting; retaliate or bring vexatious proceedings against whistleblowers; or breach the duty of maintaining the confidentiality of their identity. In addition to compensating damages, effective, proportionate, and dissuasive penalties must also be put in place against reporting persons who knowingly reported or publicly disclosed false information.

The Directive only establishes minimum rules, i.e., Member States can introduce or retain more favourable rules on whistleblowers' protection. They

may also extend protection as regards areas or acts not covered by the Directive (see above for the material scope). Member States must implement the Directive by 17 December 2021. Regarding the obligation for legal entities in the private sector with 50 to 249 workers to establish internal reporting mechanisms, Member States have time until 17 December 2023. (TW). ■

Council Conclusions on Victims' Rights

The Finnish EU Council Presidency addressed the subject of victims' rights. During the Presidency, delegations of the EU Member States agreed on [conclusions on victims' rights](#) that were adopted at the JHA Council meeting on 2–3 December 2019. The conclusions first take stock of the comprehensive EU framework in this field, including legislative and non-legislative measures. Second, they outline how the existing EU framework can be strengthened, more efficient implementation can be improved/made, and the way forward be developed. The conclusions identify concrete actions and initiatives to be taken by the Commission and the Member States.

The European Commission is invited to draw up an EU strategy for 2020–2024 on victims' rights (for a corresponding demand by the Special Advisor, see *eu-crim* 1/2019, p. 27). The strategy should be comprehensive and cover all victims of crime, with a special emphasis on victims of violent crimes. It should include a systematic approach to ensure victims' effective access to justice and compensation. The Commission should also evaluate the existing legislation. The evaluation should particularly focus on a review of the established compensation scheme, such as the 2004 Directive relating to compensation to crime victims.

EU agencies, such as Eurojust, FRA, the European Institute for Gender Equality and the European Network on Victims' Rights (ENVR) are invited to examine how to improve cooperation between competent authorities concern-

ing victims of violent crime in cross-border cases.

Member States are called on, *inter alia*, to ensure the complete and correct transposition and effective practical implementation of the existing EU legislation on victims' rights. Member States should also strive for involving all actors likely to come into contact with victims (comprehensive and holistic approach). The functioning of national compensation policies must be improved. (TW)

Cooperation

Police Cooperation

Council Gives Green Light for UK Exchange of Fingerprint Data via Prüm Network

On 2 December 2019, the [JHA Council formally approved](#) the United Kingdom's participation in the Prüm fingerprint exchange system. After having concluded that the UK has fully implemented the general provisions on data protection for the purpose of Prüm automated data exchange with regard to dactyloscopic data, the UK is, in principle, ready to exchange fingerprint data with the other EU Member States that are part of the Prüm network.

Council Decision 2008/615/JHA provides for the automated transfer of DNA profiles, dactyloscopic data and certain national vehicle registration data (VRD) for the purpose of prevention and investigation of criminal offences and subject to certain conditions and procedures. The Council Decision transferred into EU law a former convention concluded outside the EU framework in Prüm, a German village. The convention strived for enhancing police cooperation between some EU Member States. After having opted-out from the Council Decision in 2014, but having rejoined it in 2016, the UK applied for being part of the data exchange system. According to said Council Decision, the supply

of personal data for a specific Member State needs prior evaluation and is subject to a decision of the Council.

[In its conclusions](#), the JHA Council stresses, however, that, "by 15 June 2020, the UK review its policy of excluding suspects' dactyloscopic files. If by then the UK has not notified the Council that it is making these data available, the Council will within three months review the situation with a view to the continuation or termination of Prüm automated dactyloscopic data exchange with the UK." Despite this warning, a real operational start is still dependent on an implementation decision, which the Council must take after consultation of the European Parliament.

How the EU and the UK will proceed if the UK leaves the EU is not mentioned in the Council conclusions and [other EU documents](#).

In technical terms, both searches of the UK and searches by the UK will require the establishment of a technical interface with every other EU Member State – a process that can take years to complete, as [Statewatch reported](#).

Statewatch also points to the fact that – if operable – the UK will provide fingerprints from nine million convicted individuals to the Prüm network, i.e. 98% of the total number of individuals whose fingerprints are stored in the UK Police National Computer. (TW)

Judicial Cooperation

Council Conclusions on Alternative Measures to Detention

One of the topics high on the agenda of the Finnish EU Council Presidency in the second half of 2019 was the debate on alternative measures to detention (see eucrim 2/2019, p. 109). The topic concerns EU policy debate since many years, but gained increased attention in the last years when prison overcrowding and bad prison conditions in some EU Member States have undermined mutual trust and thus have hampered

judicial cooperation between the EU Member States (see also, for instance, eucrim 3/2019, pp. 177–178 [the *Dorobantu* case]). At its meeting on 2–3 December 2019, the ministers for justice of the Member States adopted [conclusions on alternative measures to detention](#). The conclusions identify a number of concrete actions to be taken at the national level, the EU level and the international level. Member States are encouraged to do the following:

- Explore the opportunities to enhance, where appropriate, the use of non-custodial sanctions and measures, such as a suspended prison sentence, community service, financial penalties, and electronic monitoring (and similar measures based on emerging technologies);
- Consider enabling the use of different forms of early or conditional release;
- Consider the scope for and benefits of using restorative justice;
- Provide for the possibility to apply non-custodial measures also in the pre-trial stage of criminal proceedings;
- Ensure that information concerning the legislation on non-custodial sanctions and measures is easily available for practitioners throughout criminal proceedings;
- Provide adequate legal training to practitioners;
- Improve practical training notably as regards the use of EU instruments designed to prevent detention in cross-border situations, i.e. Framework Decision on probation and alternative sanctions (2008/947/JHA) and Framework Decision on European supervision order (2009/829/JHA);
- Pay particular attention to the needs of vulnerable persons, e.g. children, persons with disabilities and women during pregnancy and after giving birth;
- Improve capacity for probation services;
- Share best practices.

Regarding the EU level, particularly the Commission is invited to:

- Increase awareness of the benefits of non-custodial sanctions and measures

among policy-makers and practitioners;

- Carry out a comparative study to analyse the use of non-custodial sanctions and measures in all Member States so as to support the dissemination of national best practices;

- Enhance the implementation of the mentioned two Framework Decisions;

- Develop training for judges and prosecutors through the European Judicial Training Network (EJTN), as well as for prison and probation staff through the European Penitentiary Training Academies (EPTA);

- Launch regular experts' meetings on detention and non-custodial sanctions and measures.

Regarding the international level, the conclusions mainly emphasise the importance of close cooperation with the Council of Europe, so that synergies can be found. The Commission and the Member States should consider ways in which to promote the dissemination of the Council of Europe standard-setting texts, the relevant ECtHR case law and the CPT recommendations regarding detention and the use of non-custodial sanctions and measures. (TW)

FRA Report on Detention Conditions— New Tool for Legal Practitioners Dealing with EAWs

spot light In December 2019, FRA published [a report on criminal detention conditions in the EU](#). The report responds to the Commission's request to compile certain basic information on prison conditions and existing monitoring mechanisms in Member States. FRA stresses that the report does not intend to compare and rate EU Member States, but instead aims at assisting judges and legal practitioners in their assessment of mutual recognition instruments, in particular the European Arrest Warrant. The question of when the execution of an EAW can be denied because of bad prison conditions is a persistent problem (see, recently, the CJEU judgment in Case C-128/18, reported in eucrim 3/2019, pp. 177–178;

see also the seminar report on the EAW AWARE project in this issue).

The report looks at five core aspects of detention conditions in EU Member States:

- Cell size;
- Amount of time detainees can spend outside of their cells, including outdoors;
- Sanitary conditions;
- Access to healthcare;
- Whether detainees are protected from violence.

For each of these aspects, the report gives an overview of the minimum standards at the international and European levels and explains how these standards are translated into national laws and other rules within the EU Member States.

Regarding cell space, the report concludes that the problem of overcrowding is a persistent issue in many EU Member States, despite the establishment of detailed minimum standards and guidelines on prison cell space at national, European, and international levels.

While serious issues can also be found in many Member States with regard to hygiene and sanitary conditions, the report notes a gradual improvement in the situation in prison facilities in the EU.

Regarding time spent outside cells and outdoors, the report finds that inmates benefit from only one hour a day outside their cells. Consequently, lock-up times last up to 23 hours per day, which is considered intolerable.

Looking at inmates' access to healthcare, the report states that all Member States provide medical services on the premises of detention facilities. However, the report also finds that a shortage of medical staff often leads to delays in medical examinations.

Lastly, the report finds inter-prison violence a cause for extreme concern – it is a critical issue in most Member States.

The report complements [FRA's database on detention conditions](#). The database centralizes national standards, jurisprudence, and monitoring reports

on detention conditions in all 28 EU Member States (see separate news item). (CR)

New Online Database on Conditions and Monitoring of Criminal Detention

FRA offers a new database on detention conditions in all 28 EU Member States on its website. This new [Criminal Detention Database 2015–2019](#) offers information about selected core aspects of detention conditions such as cell space, sanitary conditions, access to healthcare, and protection against violence.

The database contains detailed information on the relevant case law of the European Court of Human Rights (ECHR) and the Court of Justice of the European Union (CJEU) as well as monitoring reports and statements of various national, European, and international bodies on detention conditions in the EU Member States. Furthermore, the database offers country-specific information, e.g., legal standards at the national level and who the responsible authorities for executing the EAW are.

The database is targeted at judges and legal practitioners involved in cross-border cases. It aims at serving as a “one-stop-shop” for practitioners seeking information about criminal detention conditions in any given EU Member State. The database is complemented by the FRA report on detention conditions in the EU, which was published in December 2019 (see separate news item) (CR)

EU-US Reaffirm Their Partnership to Tackle Security Threats

On 11 December 2019, representatives of the European Union – including new Commissioner for Justice, *Didier Reynders*, and the Finnish and Croatian ministers of justice and of the interior on behalf of the current and incoming Council Presidencies – met in Washington D.C. with U.S. Attorney General *William Barr* and Acting Secretary for Homeland Security *Chad Wolf* for the [EU-U.S. Ministerial Meeting on Jus-](#)

[tice and Home Affairs](#). The Ministerial Meeting is held twice a year in order to oversee transatlantic cooperation in the area of Justice and Home affairs and address common security threats.

The December meeting was the first EU-U.S. Ministerial Meeting after the EU started its new political cycle. Both sides reaffirmed their strong commitment to foster the transatlantic partnership and pursue their dialogue on Justice and Home Affairs, building on the existing operational cooperation and best-practice exchanges on matters of common interest. The following issues were discussed and considered as priority areas for future cooperation:

- Regarding the fight against terrorism (which remains the top common priority), both sides consider important the sharing of information gathered in zones of combat for use in criminal proceedings as admissible evidence. In this context, continued operational cooperation between the relevant agencies, including Europol, was highlighted;
- By referring to the EU-U.S. PNR agreement, the use of Passenger Name Records (PNR) for the purpose of preventing, detecting and investigating terrorist offenses and related travel also remains important. The EU and the U.S. will work together in order to establish ICAO standards on PNR for law enforcement purposes implementing United Nations Security Council Resolution 2396;
- Hybrid threats and risks related to new emerging technologies, in particular 5G, are the main area in which cooperation will be fostered, so that the partners can react to the changing environment of security threats;
- The U.S. and the EU will join their efforts to establish rules on lawful access for law enforcement authorities to digital evidence, including when encrypted or hosted on servers located in another jurisdiction;
- Resilience to combat interferences into electoral processes will be strengthened;

The next EU-U.S. Ministerial Meeting will be held in the first half of 2020 in Croatia. (TW)

European Arrest Warrant

CJEU Clarifies Its Case Law on Concept of “Judicial Authority” Entitled to Issue EAWs

spot light On 12 December 2019, the CJEU provided further guidance under which conditions public prosecutor’s offices can be regarded as “issuing judicial authority” within the meaning of Art. 6(1) of the 2002 Framework Decision on the European Arrest Warrant (FD EAW). Uncertainties were triggered after the CJEU’s judgments of May 2019, in which the Court found that the German public prosecutor’s offices are exempt from the concept of “issuing judicial authority” because they may be subject to directions or instructions from the executive. The Court distinguished this case from the Prosecutor General of Lithuania who was considered a “judicial authority” that can issue EAWs, under the condition that his/her decisions are subject to court proceedings fully meeting the requirements inherent to effective judicial protection. For these landmark judgments, see *eu crim* 1/2019, pp. 31–34.

► *The Cases at Issue*

In the three cases decided on 12 December 2019, courts in Luxembourg and the Netherlands, which had to deal with the execution of EAWs, casted doubts whether the requirements set up in the decisions of May 2019 are met in view of the French, Swedish and Belgian public prosecutor’s offices. The cases are referred to as follows:

- Joined Cases [C-556/19 PPU](#) and [C-626/19 PPU](#) (French Public Prosecutor’s Office);
- Case [C-625/19 PPU](#) (Swedish Prosecution Authority);
- Case [C-627/19 PPU](#) (Belgian Public Prosecutor’s Office).

While the cases on EAWs issued by

the French and Swedish public prosecutor respectively concern EAWs for the purpose of conducting criminal prosecutions, the “Belgian” case concerned an EAW issued for the purpose of enforcing a criminal judgment.

► *Questions by the Referring Courts*

Regarding the French public prosecutor’s office, the referring courts considered the following problems that may undermine the required independence in accordance with the CJEU’s case law:

- Although the French Ministry of Justice cannot direct instructions in specific cases, it may issue general instructions on criminal justice policy;
- The issuing French public prosecutor is subordinate to his/her hierarchical superiors, and is therefore obliged to follow instructions/directions;
- He/she is, at the same time, the competent prosecuting body and the authority that controls the conditions for issuing EAWs and their proportionality, which raises doubts on impartiality.

In addition, the referring Dutch court observed that there is no separate legal remedy for the person concerned against the decision to issue an EAW and its proportionality. Instead, the public prosecutors rely on the decision of the (investigative) judge who examines the lawfulness of the issuance of the national arrest warrant. This argument was also put forward as regards the Swedish public prosecutor who issues EAWs after the criminal first instance court had ordered pre-trial detention against the suspect.

► *The CJEU’s Arguments Regarding the French and Swedish Public Prosecutor’s Offices*

Referring to its judgments of May 2019, the CJEU clarified that the examination of whether an authority participating in the administration of criminal justice – but which is not a judge or court – capable in an EU Member States to issue EAWs falls under the concept of “judicial authority” within the meaning of the FD EAW requires a two-step approach. First, it must be examined

Report

AWARE: Seminar on the European Arrest Warrant and Conditions of Detention

Bremen/Germany, 24–26 October 2019

On 24 to 26 October 2019, the Higher Regional Court of Appeal (*Oberlandesgericht*) in Bremen/Germany, together with the Bremen Ministry of Justice and Constitution, held a three-day seminar as part of an EU Justice Programme-funded series of three seminars looking at use of the European Arrest Warrant ([EAW AWARE](#)). The seminar in Bremen was attended by 38 European judicial and legal practitioners and academics from eight EU Member States.

The purpose of the seminar series is to incorporate different perspectives stemming from practitioner experience in order to address the challenges of EAW implementation and policy: decision-making information, use of existing provisions in national law, and informal judicial cooperation. A particular focus is on the obligations of the executing Member State courts to examine the detention conditions in the issuing Member States, alongside broader issues involving the protection of human rights of the requested person.

Following a welcome from Secretary of State for Justice for the Federal State of Bremen, *Björn Tschöpe*, practitioners heard from *Daniel Burdach* from the Registry of the European Court of Human Rights (ECtHR) regarding the ECtHR's rulings on the standards for prison detention conditions under the European Convention of Human Rights. Raising awareness among national executing judges for existing tools and the ECtHR's benchmark criteria are key goals of the EAW AWARE seminars. Mr. *Burdach* presented a detailed review of cases pertaining to the major problems of overcrowding and inappropriate detention facilities; he concluded by listing existing resources on the ECtHR factsheets and on the HUDOC database. In the afternoon session, Dr. *Klaus Schromek*, Presiding Judge at the Bremen Higher Regional Court of Appeal, provided European practitioners with broader context on criminal procedure in Germany. His colleague Dr. *Ole Böger* focused on the relevance of human rights protection in application of the EAW in the case law of European and domestic courts. He highlighted that both the European Court of Justice (ECJ) – especially in the *Aranyosi and Căldăraru* case (C-404/15), which had been initiated by a referral for a preliminary decision by the Bremen Higher Regional Court of Appeal – and the German Federal Constitutional Court require the courts of the executing Member States to ensure the human rights protection of the requested person in the issuing Member State. Dr. *Böger* also discussed remaining issues concerning the precise scope and content of these duties on the part of the executing Member States' courts, also referring to practical solutions for the future, e.g., enhanced databases and the facilitation of closer co-operation between judicial authorities of the issuing and executing Member States.

The first day of the seminar was concluded by Dr. *Ralf Riegel*, Head of the International Criminal Law Division at the German Federal Ministry of Justice and Consumer Protection, who led an engaging debate on the need for reform of the national and the international basis in EAW proceedings.

Dr. *Riegel* tackled practical concerns of EAW proceedings both in the issuing state (such as use of a central EAW authority) and in the executing state (for instance, at which point and under what conditions representation by legal counsel should be organised).

Bearing in mind this focus on detention conditions, participants made onsite visits to both Bremen Correctional Facility and Bremen Secure Treatment Unit of the Psychiatric Treatment Centre. They heard first-hand accounts from staff, and the visits fueled the discussion that detention conditions are not to be understood as either an “east vs. west” issue or as the fault of unwilling regimes. Instead, improved conditions depend on investment and the capacity for renovation, and improvements must often accommodate changing factors such as new demographics. All this within the uniquely challenging requirements of a secure environment. The onsite visits ultimately led to a better understanding of the human rights relevance of detention conditions, with a particular emphasis on the need for open communication between the relevant authorities in the European spirit of mutual trust and cooperation.

Additional afternoon sessions were conducted, according to a prioritised agenda, including the following:

- Analysis of the German *Puigdemont* case and its reception in Spain (Mr. *Florentino Ruiz Yamuza*, Judge in Huelva/Spain);
- Rejection of surrender and problems/practice in relation to the enforcement of foreign sentences in Germany (Mr. *Christian Schierholt*, Chief Senior Public Prosecutor, Celle/Germany);
- Extradition and Fair Trial, focusing on the ECJ's judgment in “LM” (C-216/18) and its reception in EU Member States from a comparative law perspective (Mr. *Thomas Wahl*, Senior Researcher at the Max Planck Institute for Foreign and International Criminal Law, Freiburg/Germany);
- The perspective of suspects and lawyers on extradition proceedings, with a focus on possibilities for avoiding detention (Dr. *Anna Oehmichen*, defence lawyer from Knierrim & Kollegen, Mainz/Germany).

By bringing users of the EAW tool together with such a diverse, practical agenda, these seminars are designed to support, discuss, and build mutual trust and recognition of decisions between neighbouring European judiciaries and to promote consistent use of European bodies. The second seminar will take place in Bucharest/Romania from 23 to 27 March 2020 and the third in Lisbon/Portugal from 28 September to 2 October 2020. Persons and institutions interested in the material developed during EAW AWARE are warmly encouraged to get in touch with *Rhianon Williams* (rhianon.williams@justiz.bremen.de).

Rhianon Williams, EAW AWARE Project Coordinator within Bremen Ministry of Justice

Report

The 2019 Annual Conference on International Extradition and the European Arrest Warrant

Lake Iseo, Italy, 24–25 June 2019

25 law professors and practising lawyers from around the world gathered in Sarnico, Italy in the last week of June 2019 to brainstorm on current developments in extradition law and the practice of the European Arrest Warrant (EAW). The meanwhile fourth edition of the annual conference on International Extradition and the EAW was held at Hotel Cocca, on the shores of beautiful Lake Iseo (Italy). For the previous editions of this meeting of persons interested in extradition law, see *eu crim* 3/2018, p. 160; *eu crim* 3/2017, p. 118, and *eu crim* 3/2016, pp. 132–133. As in previous years, the 2019 conference attracted experts from many countries, including the United States, Mexico, Canada, Belarus, the England, Scotland and several countries in Continental Europe.

The seminar began with a report by UK barrister *Mark Summers QC* – who appears on a regular basis in extradition cases, including *Assange v. Sweden* in 2012 – on the current Hong Kong crisis that originated from the proposed reform to extradition arrangements.

A number of presenters offered country reports, namely on The Netherlands (by researcher *Joske Graat*), Finland (by Ministry of Justice officer *Taina Neira*), Switzerland (by lawyers *Gregoire Mangeat* and *Alice Parmentier*), Scotland (by advocate *Mungo Bovey QC* from the Faculty of Advocates of Scotland), Belarus (by lawyer *Alaksiej Michalevic*), and Poland (by lawyer *Urszula Podhalanska*). *Thomas Wahl* (an extradition expert from the Max Planck Institute for Foreign and International Criminal Law) offered an update to certain key aspects of the EAW jurisprudence in Germany and the European Court of Justice. In the 2018 edition, Wahl presented the controversial *Puigdemont* case from a German perspective; this time, we heard a presentation by *Paul Bekaert*, a Belgian lawyer, who represented Carles Puigdemont in the Belgian EAW case. Paul Bekaert also summarised the decisions of Belgian courts in other notable extradition cases when freedom of expression was at stake.

In separate sessions, *Nicola Canestrini*, a criminal lawyer from Italy, raised the question of how “free movement” rights can impact on the extradition of EU citizens to third countries while *Anna Oehmichen* (a lawyer and University lecturer from Germany) described how the abuse of the Interpol red notice (issued in the case at issue by the Dubai authorities, for a criminal offence that seems to exist only in the UAE) could lead to major violations of the fundamental rights of the requested persons. Finally, *Stefano Maffei* of the University of Parma, one of the organisers of the conference, announced the publication of his new book “*Extradition Law and Practice*”, which offers an overview of the typical course of an extradition case and the description of 30 notable extradition cases.

Other participants included Canadian law student *Camille Baril*; Italian lawyer *Vanni Sancandi*; Italian graduate student *Irene Milazzo*; *Sibel Top*, a PhD student at the Institute of European Studies (IES) in Brussels; *Mariana Melgarejo* from the UK embassy in Mexico city; *Björn Weißenberger*, *Florian Fuchs* and *Mohammed Arjun Zahidul* (German law students) and *Kylie Zaechelein*, *Trenten Bilodeaux* and *Paul Borges* (from the University of the Pacific Mc George School of Law).

The Vth International Extradition Conference will be held in Northern Italy on 22–23 June 2020. All those interested should email the team of organisers at stefano.maffei@gmail.com.

structions on criminal policy. Likewise, it does not matter that the authority is responsible for conducting criminal prosecutions nor that the staff is under the direction and control of their hierarchical superiors, and thus obliged to comply with the instructions within this hierarchy. As a result, the CJEU concludes that the French public prosecutor’s office – in contrast to the German one – fulfils the requirement of independence. French public prosecutors can make an independent assessment of the necessity of issuing an EAW and its proportionality, and they can exercise that power objectively.

Second, the CJEU clarified the requirement (established by the previous case law) that there must be the possibility of bringing court proceedings against the decision of the public prosecutor to issue an EAW, and these court proceedings must comply with the principle of effective judicial protection. The Luxembourg judges pointed out that the EAW system contains a two-tiered protection of the individual’s procedural and fundamental rights. The protection at the first layer – the national decision on a national arrest warrant – must be supplemented by a protection as regards the issuance of the EAW (second layer). This implies that the requirements inherent in effective judicial protection must be afforded at least at one of the two layers. The establishment of a separate legal remedy against the decision to issue an EAW is only one possibility. Instead, legal orders of the EU Member States can also meet the criteria of judicial protection if the proportionality of the decision of the public prosecutor’s office to issue an EAW is judicially reviewed before, or practically at the same time as that decision is adopted, or even subsequently. It is also fine if such an assessment is made in advance by the court adopting the national decision that may subsequently constitute the basis of the EAW. In conclusion, the French and Swedish systems satisfy those requirements.

whether the Member State afforded the authority a status that sufficiently guarantees independence for the issuing of EAWs. This independence is excluded if the authority is at risk of being sub-

ject to directions or instructions in a specific case from the executive. By contrast, the independence is not called into question by the fact that the Minister of Justice may issue general in-

► *The CJEU's Arguments Regarding the Belgian Public Prosecutor's Office and the EAWs Issued for Enforcing Sentences*

Regarding the specific case where the EAW was issued for the purpose of enforcing a custodial sentence imposed by a final judgment ("the Belgian case"), the CJEU found that the requirements of effective judicial protection is satisfied by the judicial review carried out by the enforceable judgment on which a subsequent EAW is based. The CJEU argued that in these cases it makes no sense to require a separate appeal against the public prosecutor's decision. The executing judicial authority can presume that the decision to issue an EAW resulted from judicial proceedings in which the requested person had all the necessary safeguards in respect of his/her fundamental rights. In addition, the CJEU points out that the FD EAW already contains a proportionality assessment because EAWs can only be issued for the purpose of enforcing custodial sentences if the sentence is at least four months.

► *Put in Focus*

In sum, the CJEU ruled that the French, Swedish and Belgian public prosecutor's offices satisfy the requirements for issuing an EAW.

It seems that Germany is the only EU Member State at the moment where its public prosecutor's offices are not entitled to issue EAWs following the CJEU ruling in the Joined Cases C-508/18 and C-82/19 PPU. In a judgment of 9 October 2019, the CJEU already confirmed the validity of EAWs issued by the Austrian public prosecutor (see eucrim 3/2019, p. 178). All EU Member States also replied to a questionnaire issued by Eurojust advocating that their national public prosecutor's offices are not affected by said CJEU judgment of May 2019 on the "German case" (see eucrim 2/2019, p. 110).

The question remains, however, whether the CJEU overshot the mark with its May ruling. As the German government argued in the proceedings

before the Court, there had never been a single case in which the German ministries of justice issued directions or instructions towards a public prosecutor to issue or not to issue EAWs. Like in the Swedish and French system, the basis for issuing an EAW (for the purpose of prosecution) is the investigative judge's decision on whether a national arrest warrant is to be issued. It must also be questioned whether the examination of the prerequisites to issue EAWs is a routine for the national judges – more or less rubber-stamping the prosecutor's applications. In short, a rather concrete assessment of the individual cases would have been the much better approach instead of scrutinising the legal situation of independence in an abstract way.

Interestingly, the CJEU differs in its judgments of 12 December 2019 from the opinion of the Advocate General. AG *Campos Sánchez-Bordona* concluded in his [opinions of 26 November 2019](#) that the French public prosecutor's office cannot be regarded as an "issuing judicial authority." He argued that the concept of the independence of the judicial authority implies that the public prosecutor is not subject to any hierarchical constraint or subordination. This includes not only the reception of instructions in specific cases, but also of general instructions as it is the case in the French system.

AG *Sánchez-Bordona* also advocated more stringent requirements as regards the individual's legal protection. According to his opinion, the requested person must be able to challenge the EAW issued by the public prosecutor before a judge/court in the issuing Member State, without having to wait until he is surrendered, as soon as this warrant has been issued (unless this would jeopardise the criminal proceedings) or notified to him.

Finally, the AG set out a divergent view as regards EAWs issued by the public prosecutor for the purposes of enforcing a custodial sentence. The AG required that the enforceable decision must be capable of being the subject of

court proceedings similar to those that apply in the case of EAWs issued for the purpose of conducting criminal prosecution. Thus, he voiced doubts whether the Belgian system affords the necessary legal protection.

In conclusion, one cannot dismiss the impression that the judges in Luxembourg strived for mitigating the consequences of their initial ruling on the German public prosecutors by its subsequent judgments of October and December 2019 (Austrian, French, Swedish and Belgian public prosecutor's offices). The latter judgements stress more the procedural autonomy of the EU Member States since the Court acknowledged that procedural rules may vary as regards the implementation of sufficient procedural safeguards. (TW) ■

AG Opinion in EAW Case against Rapper: Legislation at Time of Offence Governs Interpretation of Thresholds

On 26 November 2019, Advocate General (AG) *Michał Bobek* issued his [opinion in the extradition case of rapper Valtònyc](#). The CJEU has to interpret Art. 2(2) of the 2002 Framework Decision on the European Arrest Warrant (FD EAW) following a request for preliminary ruling by the Court of Appeal of Ghent, Belgium. The background of the case (C-717/18) is as follows:

In 2017, the National High Court of Spain convicted *Josep Miquel Arenas* (who performs under the name *Valtònyc*) to 3.5 years of imprisonment for rap songs that he published online in 2012 and 2013. The most severe sentence (2 years) referred to the offence of "glorification of terrorism and the humiliation of the victims of terrorism". At the time of the commitment this was the maximum sentence laid down for this offence in the Spanish Criminal Code. In 2015, however, Spain amended the offence and introduced a maximum of three years of imprisonment for "glorification of terrorism and the humiliation of the victims of terrorism." The rapper fled Spain to Belgium where he lives since 2017. In

2018, the Spanish authorities issued a European Arrest Warrant to Belgium for the purpose of executing the custodial sentence of 2017. In the EAW form, the Spanish authorities ticked the box “terrorism” with regard to the offences that gave rise to penalty. As a consequence, the double criminality requirement is not to be verified by the executing Belgian authorities in accordance with Art. 2(2) FD EAW. Art. 2(2) stipulates, however, that in these cases the offences must be punishable in the issuing Member State by a custodial sentence or a detention order for a maximum period of at least 3 years and as they are defined by the law of the issuing Member State.

By its reference for preliminary ruling the Ghent Court of Appeal seeks clarification which version of the Spanish criminal law is relevant in order to determine the “minimum maximum threshold” in Art. 2(2) FD EAW. Is the reference point the maximum custodial sentence applicable to the case at hand, i.e., the law that applies when the offence was committed (here: 2 years, as the offences were committed in 2012/2013)? Or is it the maximum sentence provided for by the national law in force at the time of issuing the EAW (here: 3 years following the amendment of the Spanish Criminal Code in 2015)?

AG *Bobek* clearly favours the first approach. He recommends the CJEU deciding that Art. 2(2) FD EAW refers to the criminal legislation applicable in the issuing State to the specific criminal offence(s) to which the EAW relates. In other words, it is the law actually applicable to the facts of the case to which recourse has to be made in order to assess the maximum threshold of at least three years – the precondition to dispense with the verification of double criminality. According to the AG, this conclusion results from the context of the provision and the purpose of the FD. Although the CJEU’s case law is guided by the principle that an EAW can be denied only exceptionally, the AG underlines that other values, such as fundamental rights, must

be respected, too. He also makes a distinction between a “structural effectiveness” of the FD and an “individual effectiveness” (effectiveness of a specific EAW in an individual case). The latter is difficult to translate into generally efficient and operational rules.

In its final remarks, the AG stresses several issues that are problematic in the case at issue, but are not subject of the questions brought to the CJEU. These issues include the significance of the fundamental right of freedom of expression in the present criminal case; the question whether the “glorification of terrorism and the humiliation of the victims of terrorism” can be subsumed under “terrorism” in the list of the 32 offences for which the verification of double criminality is excluded in the FD; and the effect of the interpretation of Art. 2(2) on Art. 2(4) FD EAW. (TW)

Financial Penalties

CJEU: No Loopholes against Enforcement of Foreign Fines

On 5 December 2019, the CJEU published an [important judgment](#) on the Framework Decision on the application of the principle of mutual recognition to financial penalties (FD 2005/214/JHA). In the case at issue ([C-671/18](#)), which was referred to the CJEU by a Polish court, the question was, among others, whether the contentious liability of persons in whose name the vehicle is registered for road traffic offences is in line with European fundamental rights. In the affirmative, this may be a reason for denying a request to recognise and execute a fine imposed in another EU country.

► *Facts of the Case and Legal Question on Liability:*

In the case at issue, the Dutch authorities imposed a fine of €232 against Polish national Z.P. in respect of road traffic offences in the Netherlands. Although the offences were committed by the driver of Z.P.’s vehicle and not by Z.P. person-

ally, he can be held liable under Dutch law as the person in whose name the vehicle is registered. This form of liability is known in many European countries, whereas in others, e.g., Poland, criminal liability only lies with the individual. The referring court argued that holding somebody liable solely on the basis of information of vehicle registration data, and without any investigation being carried out, in particular in determining the actual offender, may be contrary to the principle of the presumption of innocence. Requests seeking execution of such imposed fines could then be unenforceable on the basis of Art. 20(3) of said FD.

► *The CJEU’s Response:*

By interpreting Art. 48 of the Charter of Fundamental Rights which enshrines the principle of the presumption of innocence, the CJEU refers to the ECtHR case law concerning Art. 6(2) ECHR. The ECtHR held that the Dutch law is compatible with the presumption of innocence, in so far as a person who is fined can challenge the fine before a trial court with full competence in the matter and that, in any such proceedings, the person concerned is not left without any means of defence in that he or she can raise arguments based on Article 8 of the Netherlands Highway Code. The CJEU adds that objections against the presumption of liability of the person in whose name the vehicle is registered as laid down in the legislation of the issuing State (here: the Netherlands) are unfounded, provided that that presumption can be rebutted. Z.P. had these possibilities also in the present case.

The CJEU pointed out that FD 2005/214 is intended to establish an effective mechanism for cross-border recognition and execution of final decisions imposing financial penalties. Grounds for refusal to recognise or enforce such decisions must be interpreted restrictively.

► *Infringements of Defence Rights?*

Regarding a second set of questions of whether Z.P. had effective defence

rights, the CJEU noted that the person concerned must have had sufficient time to contest the decision in question and to prepare his defence, and was in fact provided with the decision imposing the financial penalty. It is in line with the FD and the Charter right to an effective legal remedy if the decision was notified to the person concerned in accordance with the legislation of the issuing state. The CJEU also held a period of six weeks as time limit for exercising the right of appeal (starting with the date of decision) sufficient to guarantee the person's defence rights.

► *Put in Focus:*

The CJEU confirms its case law established in other mutual recognition instruments that grounds for refusal are to be interpreted in a very restrictive way. Denial of requests can only be the exception, also when fundamental rights infringements may be at stake. In the present judgment on financial penalties, the CJEU also concludes that the law of the issuing state on liability of persons prevails over potentially differing laws of other EU Member States. Therefore, the judgment has not only an impact to Poland, but also to other EU countries for which liability of persons who did actually not commit an offence is alien. (TW)

Law Enforcement Cooperation

EU Digital Evidence Situation Report

spot light On 20 December 2019, [Europol published a new report](#), giving an overview on the status of access of EU Member States to electronic evidence held by foreign-based Online Service Providers (OSPs) in the context of criminal investigations. Looking at the year 2018, [the new EU Digital Evidence Situation Report \(SIRIUS\)](#) looks at the volume of requests from EU Member States to OSPs, the main reasons for refusal or delay of EU requests, and the main challenges in the process.

According to the report, over 74% of EU law enforcement requests to the eight major OSPs in 2018 originated in three EU Member States: Germany, France, and the UK. The three OSPs most frequently requested were Facebook (30%), Google (26%), and Apple (24%). The overall success rate of requests to major OSPs in 2018 was calculated at 66%. The most frequently needed type of data in the majority of investigations appeared to be traffic data (e.g., connection logs, IP addresses, number of messages), followed by basic subscriber information (e.g., name, e-mail, phone number), and content data (e.g., photos, mail/message content, files).

Looking at issues encountered by EU law enforcement, with requesting data from OSPs, the main problems identified by the report are the lengthy MLA proceedings, the lack of standardized company procedures when receiving requests from EU law enforcement, and how to determine the type of data held by companies. Further issues outlined in the report include the short data retention period, the lack of timely response in urgent cases, and the non-standardization of OSP policies.

Reasons for refusal or delay in processing direct requests, as given by the OSPs, include wrong identifiers, overly broad requests, requests concerning non-existing data or data requiring judicial cooperation, the lack of reference to Valid Legal Basis (VLB) under the domestic legislation of the requesting authority, the wrong legal entity of the OSP being addressed, and the lack of requests for preservation. Other challenges faced by the OSPs are language barriers, how to ensure the authenticity of received documents, and misunderstandings caused by little or no previous knowledge on the part of requesters of OSP services and products.

The report provides for several recommendations to both the OSPs and EU law enforcement agencies. OSPs are asked to provide clear guidelines for law enforcement authorities, including

information about which data sets can be requested and to which legal entity the data requests should be addressed; to prepare periodic transparency reports on requests from EU authorities, including standardized data categories across OSPs and files in CSV formats; and to clearly inform the requesting authority of the reasons for rejection without delay. EU law enforcement agencies are asked to provide periodic trainings to officers dealing with cross-border requests to OSPs; to establish Points of Single Contact (PSCs) within the law enforcement agency to deal with the most relevant OSPs; and to collect statistics on cross-border requests to OSPs.

The report is an outcome of the SIRIUS project, which was launched by Europol in October 2017. The project was initiated in response to the increasing need of the EU law enforcement community to access electronic evidence for internet-based investigations. More than half of all criminal investigations today include a cross-border request to access e-evidence (such as texts, e-mails, or messaging apps). The SIRIUS project is spearheaded by Europol's [European Counter-Terrorism Centre](#) and [European Cybercrime Centre](#), in close partnership with [Eurojust](#) and the [European Judicial Network](#). It aims to help investigators cope with the complexity and volume of information in a rapidly changing online environment, by providing guidelines on specific OSPs and investigative tools. Europol established a platform for experts (restricted access) by means of which the multidisciplinary SIRIUS community can have access to a wide range of resources.

The EU Digital Evidence Situation Report provides empirical information on e-evidence in a systematic and comprehensive way for the first time. It not only includes information from all EU Member States but also comprises data from both judicial and police authorities. Another added value is the input by 12 OSPs (mainly based in the USA, e.g.,

Airbnb, Facebook, Google, Microsoft, Twitter). The report is sure to influence discussion on the establishment of a new legal framework on e-evidence at the EU level (see, recently, eucrim 3/2019, pp. 179 et seq. with further references) (CR)

Commission Updates on E-Evidence Negotiations with US and at Council of Europe

At the [JHA Council meeting of 2–3 December 2019](#), the Commission updated the Council on the state of play of the negotiations for an EU-US agreement on cross-border access to e-evidence, on the one hand, and on a second additional Protocol to the Budapest Convention, on the other hand. The Council gave green light for both negotiations when it endorsed the respective mandates in June 2019 (see eucrim 2/2019, p. 113). Regarding the EU-US agreement, three meetings took place (September, November, and December 2019), where the parties mainly stated their starting negotiating positions.

Negotiations on the second protocol to the Budapest Convention on Cybercrime advanced at the Council of Europe, but several important topics have still to be addressed.

Both the EU-US agreement and the protocol to the Budapest Convention are designed to complete the respective EU regime on e-evidence which is currently negotiated between the European Parliament and the Council (see eucrim 3/2019, pp. 181 et seq.). The new legal frameworks are to facilitate access to electronically stored data that is needed for prosecuting crimes. It would establish new forms of assistance, in particular by enabling law enforcement authorities to directly request private IT service providers to hand over the data. For further information about the ongoing developments in the field of e-evidence, see also eucrim 3/2019, pp. 179 et seq., eucrim 2/2019, pp. 113 et seq., and eucrim 1/2019, pp. 38 et seq. with further references. (TW)

Meeting of EU Justice and Home Affairs Agencies

On 22 November 2019, the heads of the nine [EU Justice and Home Affairs \(JHA\) agencies met](#) at Europol's headquarters in The Hague. The topics of discussion were as follows:

- Implementation of the New Strategic Agenda 2019–2024;
- State-of-play of the interoperability project;
- Common efforts in reinforcing diversity and inclusion in the workplace.

As a result of the meeting, the agencies' representatives signed a [common statement](#) to highlight the importance of inclusive corporate culture and strong diversity and to ensure equal opportunities for all staff members while embracing their diversity.

The following nine agencies are

members of the JHA Agencies Network:

- European Asylum Support Office (EASO);
- European Border and Coast Guard Agency (Frontex);
- European Institute for Gender Equality (EIGE);
- European Monitoring Centre for Drugs and Drug Addiction (EMCDDA);
- European Union Agency for Fundamental Rights (FRA);
- European Union Agency for Law Enforcement Cooperation (Europol);
- European Union Agency for Law Enforcement Training (CEPOL);
- European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA);
- European Union Judicial Cooperation Unit (EUROJUST). (CR)



Council of Europe*

Reported by Dr. András Csúri (AC)

Specific Areas of Crime

Corruption

GRECO and FEDE Launch New Anti-Corruption Education Module

On 20 December 2019, GRECO and the Federation for Education in Europe (FEDE), an international NGO having participatory status with the CoE, presented an [education module on anti-corruption](#) for the 2019–2020 academic year. The module includes summary sheets, takeaway messages, and test questions. It will be part of FEDE's

course on European Culture and Citizenship, reaching out to over 10,000 school students annually. An overview is provided in factsheets. The main focus is on the [definition, forms, and cartography of corruption](#) as well as its [causes and how to fight it](#).

GRECO: *Ad hoc* Report on Greece

On 18 December 2019, GRECO published an [ad hoc report on Greece](#). In the past, GRECO, together with the Or-

* If not stated otherwise, the news reported in the following sections cover the period 16 November – 31 December 2019.

ganisation for Economic Co-operation and Development (OECD), had strongly criticised the Greek government for watering down the anti-corruption legislation already in place – especially for downgrading the bribery of public officials from a felony offence to a misdemeanor, thereby also introducing more lenient criminal sanctions. As a consequence, GRECO and the OECD opened joint *ad hoc* procedures.

The latest report states that the procedures resulted in the partial reintroduction of stronger criminal legislation in respect of bribery offences as of 18 November 2019. GRECO underlines that, despite this positive development, the effects of last year's legislative amendment will be long-lasting, because the acts committed in the meantime and before November 2019 will only be punishable as misdemeanors.

In addition, GRECO recommends that the Greek authorities introduce a system whereby aggravating circumstances in bribery offences have a proportionate impact on the sanctions to be imposed. While GRECO is pleased to note that the power of the Minister of Justice to suspend criminal proceedings harmful to international relations has been excluded with regard to corruption offences, it recommends extending the scope of Greek criminal legislation on bribery offences in a foreign context, in line with the CoE Criminal Law Convention.

Lastly, the report points out two circumstances that further weaken the fight against corruption and possibly other related crimes: on the one hand, the general possibility of refraining from prosecution for misdemeanors punishable by up to three years in prison; on the other hand, the specific and total exemption from criminal responsibility for corruption committed in relation to the President of the Republic, whether it involves accepting or granting bribes. GRECO calls on the Greek authorities to reconsider this situation and reiterates the need for Greece to comply with

international standards against money laundering and the fight against the financing of terrorism.

GRECO: Compliance Reports

In December 2019, GRECO published a number of compliance reports from the Fourth Evaluation Round. The following is a summary of the reports that were adopted on Armenia, Malta, and Poland.

On 12 December 2019, GRECO published its [second compliance report for the Fourth Evaluation Round on Armenia](#) (dealing with corruption prevention in respect of members of parliament, judges, and prosecutors). According to the report, Armenia satisfactorily implemented/dealt with seven of the eighteen recommendations. The current low level of compliance with the recommendations is “globally unsatisfactory” according to GRECO's [Revised Rules of Procedure](#). With respect to members of parliament, GRECO expects more progress in public consultations on draft legislation and less use of fast-track procedures when adopting new legislation. Also, parliamentarians still do not have a comprehensive code of conduct providing appropriate guidance on integrity-related matters. As far as judges are concerned, an appropriate appeal mechanism remains to be introduced in disciplinary cases, with a need to distinguish between confidential counseling and disciplinary mechanisms. The latter is also true with regard to prosecutors.

On 13 December 2019, GRECO also published its [Second Compliance Report for the Fourth Evaluation Round on Malta](#). Malta satisfactorily implemented four of the nine recommendations contained in the Fourth Round Evaluation Report. With respect to members of parliament, GRECO states that, although the Act on Standards in Public Life was adopted and the Parliamentary Commissioner for Standards was appointed, there is a need to ensure appropriate supervision and enforcement of rules on the declaration of assets, interests, and outside activities as well

as standards of ethics through a range of effective, proportionate, and dissuasive sanctions, which has not yet been fully addressed by the authorities. The Code of Ethics for Members of Parliament still needs to be reviewed, and the authorities should take further steps to provide regular awareness-raising and other activities for parliamentarians on the prevention of corruption. As regards the judiciary, GRECO acknowledges the increase in the budget for training purposes by the Judicial Studies Committee as a positive step. However, there is still a need for a training programme for newly appointed judges, including judicial ethics, as well as a regular in-service training programme. Targeted guidance and counseling on corruption prevention and judicial ethics is also needed for those who sit in court (judges, magistrates, and adjudicators of boards and tribunals).

On 16 December 2019, GRECO published a [follow-up assessment](#) on Poland concerning the country's compliance with the Fourth Evaluation Round. Poland has implemented seven of 16 recommendations and only one of six recommendations for a more recent *ad hoc* procedure addressing specific judicial reforms (2016–2018). The overall low level of compliance with the recommendations is “globally unsatisfactory” within the meaning of GRECO's [Revised Rules of Procedure](#). With regard to Members of Parliament, only one of the recommendations was implemented; therefore, GRECO urges the authorities to take steps towards compliance. As regards prosecutors, there is a lack of guidance on conflicts of interest and related issues, while the draft law on transparency of public administration – also concerning judges – is still at an early stage.

In respect of judges, following the 2016–2018 judicial reform and GRECO's reaction in form of an *ad hoc* procedure with six further recommendations, the provisions on the early retirement of Supreme Court judges were

repealed. Also, those judges who had retired under the provisions of the 2017 amendments to the Law on the Supreme Court were reinstated. Nevertheless, the measures taken to address any of the other recommendations are still considered insufficient. Nothing has been done to amend the provisions on the elections of members of the National Council of the Judiciary, to reduce the involvement of the executive in the internal organisation of the Supreme Court, to amend the disciplinary procedures applicable to Supreme Court judges, to amend the procedures for appointing and dismissing presidents and vice-presidents of ordinary courts, and to amend disciplinary procedures applicable to judges of ordinary courts.

While GRECO considers all recommendations of the Rule 34 Report to be of importance, it is currently most concerned about the developments with regard to disciplinary proceedings. As GRECO previously noted, there are allegations of disciplinary proceedings being misused to exert pressure on judges, for instance to submit requests for preliminary rulings to the Court of Justice of the European Union. GRECO therefore reiterates that, in the current system, the executive has overly strong involvement in these proceedings, which leaves judges increasingly vulnerable to political control, therefore undermining judicial independence.

GRECO: Kazakhstan Becomes 50th Member State

On 1 January 2020, Kazakhstan became GRECO's 50th member state. As reported in eucrim 3/2019, p. 184, Kazakhstan signed an Agreement on 15 October 2019 involving the privileges and immunities of representatives of GRECO and members of evaluation teams, in this way paving the way for the country's membership. After ratification of the Agreement, Kazakhstan is now a member of GRECO and, as such, is subject to the GRECO's assessment in respect of the various areas addressed in its evalua-

Council of Europe Treaty	State	Date of ratification (r) signature (s) of accession (a), entry into force (e)
Protocol amending the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No. 222)	Switzerland Lithuania Netherlands San Marino Germany	21 November 2019 (r) 14 October 2019 (r) 16 July 2019 (s) 16 May 2019 (s) 16 May 2019 (s)
Additional Protocol to the Council of Europe Convention on the Prevention of Terrorism (ETS No. 217)	Slovenia Germany Slovakia	25 November 2019 (r) 30 August 2019 (r) 16 May 2019 (r)
Council of Europe Convention against Trafficking in Human Organs (ETS No. 216)	France Latvia Montenegro Croatia Portugal	25 November 2019 (s) 9 July 2019 (r) 1 June 2019 (e) 16 May 2019 (r) 1 March 2019 (e)
Protocol No. 16 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 214)	Slovakia Netherlands Andorra Greece	17 December 2019 (r) 1 June 2019 (e) 16 May 2019 (r) 5 April 2019 (r)
Fourth Additional Protocol to the European Convention on Extradition (ETS No. 212)	Azerbaijan Italy	15 October 2019 (s) 30 August 2019 (r)
Third Additional Protocol to the European Convention on Extradition (ETS No. 209)	Italy Portugal	30 August 2019 (r) 8 April 2019 (r)
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (ETS No. 201)	Azerbaijan Tunisia	19 December 2019 (r) 15 October 2019 (a)
Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (ETS No. 198)	Monaco	23 April 2019 (r)
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 San Marino	17 December 2019 (s) 1 July 2019 (e)
Convention on Cybercrime (ETS No. 185)	Peru San Marino	26 August 2019 (a) 1 July 2019 (e)
Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182)	Russia Italy	16 September 2019 (r) 30 August 2019 (r)
Convention on the Transfer of Sentenced Persons (ETS No. 167)	Ghana	1 July 2019 (e)
Second Additional Protocol to the European Convention on Extradition (ETS No. 098)	Ireland	21 June 2019 (e)
Additional Protocol to the European Convention on Extradition (ETS No. 086)	Germany	16 May 2019 (s)

Selection of recent CoE treaty changes in the area of criminal law (compiled by Clara Arzberger). The complete table is available at: <https://eucrim.eu/ratifications/>

tion rounds. GRECO's membership now spans three continents – Europe, America, and Asia – and covers a population close to 1.2 billion people.

Money Laundering

Evaluation of Russia's AML/CFT System

On 17 December 2019, the Financial Action Task Force (FATF), the Eurasian Group, and MONEYVAL published a [mutual evaluation report on Russia's](#) anti-money laundering (AML) and countering the financing of terrorism (CFT) system. The report comprehensively assesses the effectiveness of Russia's AML/CFT measures and its compliance with the FATF's Recommendations in these fields.

Since the last assessment in 2008, Russia has strengthened its understanding of the ML and TF risks it faces and developed a robust legal framework to address them. Russia has conducted national risk assessments (NRAs) for both ML and TF. The joint report largely agrees with the results. The country is generally perceived as a source country for proceeds of crime, but it is not a major centre for laundering the proceeds of crime committed in other countries. Nevertheless, Russia is vulnerable to a wide range of ML risks; the ML NRA identified embezzlement of public funds, crimes related to corruption and abuse of power, fraud in the financial sector, and drug trafficking as the prevalent types of criminal activity with the potential to generate illicit proceeds. A large proportion of criminal proceeds generated in Russia are laundered abroad, which makes the tracing of proceeds of crime to other countries an important focus of the assessment. The main TF risks in Russia relate to foreign terrorist fighters (FTFs) destined for and returning from the ISIL-controlled areas of Iraq and Syria, but Russia also faces domestic terrorist threats.

The authorities have a very strong understanding of the risks of the country's ML/TF, and the risks identified appear to be comprehensive and justified. The country has also taken a number of measures that have led to concrete results. Nevertheless, it still needs to improve its approach to monitoring and to prioritise the investigation and prosecution of complex ML cases, particularly money being laundered abroad.

The legal framework in Russia takes adequate account of the risks identified, and the country has a strict policy to combat ML and TF, supported by strong national coordination and cooperation. However, the country still needs to improve its capacity to freeze assets related to terrorism, terrorist financing, and the proliferation of weapons of mass destruction without delay and to ensure that this freezing obligation is extended to all natural and legal persons.

Russia has strengthened its supervision of the banking sector and has now reduced the risks of criminals owning or controlling financial institutions. There are still shortcomings in licensing, however, and the sanctions for banks that do not meet the AML/CFT requirements are neither effective nor dissuasive.

In general, financial and certain non-financial institutions, such as accountants and auditors, possess a good understanding of how their services could be used to launder the proceeds of criminal activity or TF. As Russia is a major centre for precious metals and stone mining, however, the understanding of risk in this sector does not match the country's own risk assessment.

Procedural Criminal Law

CEPEJ Publishes New Tools

At its 33rd plenary meeting in Strasbourg on 5 and 6 December 2019, the European Commission for the Efficiency

of Justice (CEPEJ) adopted [guidelines on knowledge sharing among judges](#). In a profession traditionally challenged by the culture of isolation, the guidelines aim to improve judges' know-how and interpersonal skills and to strengthen knowledge sharing between them as well as collaboration with external actors, thereby also ensuring the delivery of quality of justice. CEPEJ acknowledges that various mechanisms for this purpose have already been well implemented in European countries, including meetings between judges and external actors – team development for judges in order to enable them to focus on decision making. That said, the guidelines stress, in particular, the importance of computer tools aimed at both the exchange between judges and their access to judicial news. At the same time, CEPEJ stresses that the excessive development of these tools as a source of information can also be counterproductive and may pose a security problem. Therefore, the guidelines recommend supervision of the development of IT tools.

In order to promote mediation and ensure implementation of the relevant CEPEJ guidelines, three new tools were adopted in the form of awareness-raising programmes: one for [judges to ensure the efficiency of judicial referral to mediation](#), one for [lawyers to assist clients in mediation](#), and one for [notaries](#). For judges, the aim of the tool is to raise their awareness on mediation in civil and family matters, criminal matters (adults and minors), and administrative matters.

In order to harmonise the meaning of the terms and definitions used in CEPEJ documents, the members of the CEPEJ also adopted a [Glossary of CEPEJ terms](#). Lastly, at the plenary meeting, CEPEJ also adopted its [activity programme](#) for 2020–2021. Concrete actions to implement it will be taken in January 2020.

Fil Rouge

This issue is dedicated to the evolution of the Union's area of justice since the European Council conclusions of 1999, known as the Tampere Programme. It also reflects the developments in the protection of the EU's financial interests, 1999 having marked the setting up of OLAF. Many authors in this issue have personally contributed to these advancements.

Hans Nilsson – one of the founding fathers of the Union's justice area – shares his memories of the "third pillar" through which the Union initially developed criminal law and judicial cooperation instruments prior to the Lisbon Treaty. He fondly remembers the creative times in the Council of Europe, which I shared with him for a few years. The author goes on to explain how various events and political will drove the Union's criminal justice policy forward, under gradually evolving treaty frameworks, culminating in a comprehensive set of legal instruments and Union-level bodies under the Lisbon Treaty. He rightly points out that the underlying question in this area was and is not only the balance between efficiency of law enforcement and individual rights protection, but also between Union legitimacy and national sovereignty.

Lorenzo Salazar, who also relentlessly contributed to the creation of the EU's justice area, reviews the history and functioning of mutual recognition in criminal matters. While recognising the concept's spectacular progress in terms of range and efficiency for judicial cooperation, he critically assesses the current fragmentation of Union instruments and their user-friendliness. Drawing on the Tampere Programme's pioneering role, he analyses recent strategic guidelines adopted by the European Council under Article 68 TFEU and regrets their lack of ambition and vision.

Oliver Landwehr and I look at another core field in the EU's justice area, i.e., the harmonisation of substantive criminal law in the EU. We take stock of the progress that gained new momentum with the Lisbon Treaty (which entered into force 10 years ago in 2009) and provided the possibility to

recast former third pillar instruments into Directives. We argue that a mutual understanding of commonly used legal notions is a key condition for good implementation and look at policy areas in which harmonisation of substantive criminal law could play a role in the future.

Margarete Hofmann (who directly witnessed the creation of OLAF when she joined the cabinet of the Budget Commissioner in 1999) and co-author *Stan Stoykov* (policy officer at OLAF) analyse the last 20 years of the EU body protecting the EU's financial interests. They not only point to OLAF's achievements, but also to future challenges as regards both the changing institutional landscape in conjunction with the EPPO and newly emerging fraud trends. In the latter context, OLAF's work may be closely interlinked with other EU policy areas, such as the protection of the environment, the climate, and food safety.

Lastly, *Francesco de Angelis* – the founding father of the European Criminal Law Associations and initiator of the *Corpus Juris* – provides a historic review of the EPPO, evoking the ground-breaking *Corpus Juris* project and then analysing the final legislative act's compliance with the principles of subsidiarity and proportionality. He indicates that the EPPO as a supranational office is not fully proportionate to its objective, given the dimension of currently known EU fraud. Proportionality would be achieved, however, if the EPPO's material competence were to be extended to other offences, such as environmental crimes. He argues that the Union budget and the environment both deserve European-level protection as "European goods."

All articles recognize and demonstrate that the evolution that started 20 years ago, whether to protect the Union's financial interests or to develop its area of freedom, security and justice, is a process that will continue and, perhaps, one day merge into one.

Peter Csonka,

Directorate General for Justice and Consumers, European Commission; Member of the eucrim Editorial Board

Some Memories of the Third Pillar

Dr. h.c. Hans G. Nilsson

When I took office as Head of Division of Judicial Cooperation at the Council of the EU on 1 July 1996, we were three officials in the division. In the Commission Task Force, led by the late Sir *Adrian Fortescue*, there were hardly more officials dealing with judicial cooperation, first and foremost Ms *Gisèle Vernimmen*. Twenty years later, the situation would be considerably different.

Before taking office in the above-mentioned division, I had spent the previous ten years working at the Council of Europe, where I was used to two meetings a year for a working party having a specific mandate to elaborate “a product”, i.e., a Recommendation, a report, or even, on rare occasions, a Convention. The experts (and the Secretariat) reigned and it was possible to do research in between the very few meetings, to make informal contacts, and to test solutions/texts. The Council of Europe adopted a considerable body of legal texts. I worked on money laundering, corruption, cybercrime, sentencing, and DNA testing, to name a few.

In 1995 and 1996, the Council of the EU adopted two Conventions on criminal law (a convention on simplified extradition and a general extradition convention). Neither ever entered into force. The Europol Convention, drafted within the strand of police cooperation under the Maastricht Treaty, was adopted in 1995, but it took until 1999 for all nine necessary, supplementary texts (for the purpose of being able to handle personal data) to be adopted before Europol could begin functioning.

Thus, on 1 July 1996, all was calm; the EU would continue to develop some Conventions or possibly Joint Actions under Maastricht (that no one except those in the Legal Service of the Council knew the legal value of) and work would go slowly forward. One month later, 300,000 people were demonstrating on the streets of Brussels. These were the “*marches blanches*” following the horrendous “Dutroux Affair” in which several underaged children had been kidnapped, raped, and died of suffocation in a cellar. Belgium tabled a Joint Action on sexual exploitation of children and trafficking in human beings at the K4 meeting in Dublin during the Irish Council Presidency in September 1996 (the Commission, at that time, had no criminal law competence under the Maastricht Treaty). I was charged with assisting the Presidency and the Belgian delega-

tion in negotiating the Joint Action. After two to three months of intense negotiations, a political agreement was reached on a text at the December 1996 JHA Council where the last sticking point was whether an “s” should be added or not in one of the language versions (it was a question of singular or plural).

The substance of that Joint Action was later to culminate in two Framework Decisions under the Amsterdam Treaty and then be transformed into the first two Directives under the Lisbon Treaty. This became a relatively common pattern of the Third Pillar of the EU: earthshaking events (57 dead Chinese in a container, the attacks on 9/11, etc.) led politicians to feel the need to show that they were acting, to a proposal from a delegation or sometimes the Commission, to rapid negotiations, and to heavy political pressure to produce quick results. The negotiations on the European Arrest Warrant are a prime example. The Council of Europe method secured more well-considered legal texts but sometimes also more watered-down ones.

The Amsterdam Treaty changed the landscape. Decisions were still taken by unanimity, but Framework Decisions became the most important instrument of action with their binding effect on the Member States (although without direct effect). Another important advancement was that the European Court of Justice in Luxembourg was given a more direct role in adjudication. The Court used it quickly in the landmark *Pupino* Case in which the legal effect of Framework Decisions was clarified (the difference between direct effect and indirect effect, however, seems razor-thin). The Commission was also given a right of initiative in the Third Pillar and the Member States’ initiatives decreased. At the end of the period governed by the Amsterdam Treaty, about 50% of the initiatives were taken by the Commission. More than 35 Framework Decisions and Decisions were adopted by unanimity under the Third Pillar, so much so that Ministry of Justice officials started to speak about legislative fatigue. All Framework Decisions and Decisions had been adopted without the impact of the European Parliament – opinions were given but not taken into account; it was the Council that decided by unanimity.

The increase in the development in terms of financial support to the Area of Freedom, Security and Justice (AFSJ) has been

staggering. I remember the days when we discussed the financial terms of the Grotius Programme – a few hundred thousand euros – whereas today we are looking at more than one million euros, if not more. Current spending on the entire AFSJ is more than 100 times larger.

In 1996, it was only the fledgling Europol that was on the verge of becoming an agency/institution/body of the Third Pillar. Since then, the development has been exponential. Some of the networks that have been set up are already operational. We started carefully by setting up judicial cooperation networks and continued doing so. The European Judicial Network (in Criminal Matters) was among the first to be set up, and it is still going strong, as there is a need for direct bilateral cooperation. It solves thousands of cases each year.

When I started to push for the setting up of Eurojust in October 1996, my superiors said that Eurojust was “fifteen Prosecutors and a Secretary”. In 2018, Eurojust provided support to 6500 investigations of serious organised crime and supported over 200 Joint Investigation Teams (JITs). In addition, it supported the use of some 1000 European Investigation Orders and the execution of more than 700 European Arrest Warrants. We set up Networks on JITs, Genocide, Crime Prevention and Trafficking in human beings. In the policing field, an efficient network was set up to capture fugitive criminals. Eurojust became the platform for housing the secretariats of a number of networks. Having a functioning secretariat was previously the Achilles heel for the networks.

In spite of the relative success of the Third Pillar, it was also criticised in several quarters: the cooperation lacked democratic legitimacy, the European Parliament was *de facto* not involved in the decision-making, the rule of unanimity was used to stifle negotiations, and the Court was rarely called upon to clarify texts that had been adopted. In addition, the Third Pillar was too secretive and repressive. There was no transparency in negotiations, and no consideration was given to the individual rights of victims and suspects in criminal proceedings.

The Giscard d’Estaing Convention had already sought to remedy a number of the shortcomings through approval of the draft Constitution for Europe, but, as is well known, both France and the Netherlands voted against it. Instead, the “Reform Treaty” was drafted after a period of reflection of several years. With some minimal changes, mostly of a symbolic character, the Lisbon Treaty (in reality two treaties) was able to enter into force on 1 December 2009 during the Swedish Council Presidency. The Treaty was “accompanied” by the Stockholm Programme, which was adopted two weeks later by the European Council – in the same manner as the Tampere conclusions that had accompanied the entry into force of the

Amsterdam Treaty and the Hague Programme that was supposed to “accompany” the draft Constitution.

The Lisbon Treaty revolutionised the adoption of binding texts on criminal law at the multilateral level. Nowhere in the world had 28 States ever banded together to adopt binding instruments having direct effect after negotiations, with a directly elected parliament having equal standing as the Member States (represented in the Council). In addition, the texts were liable to be interpreted by the European Court of Justice and, after a transition period of five years, the texts adopted under the Amsterdam Treaty could also be brought before the Court for interpretation, either through preliminary rulings (which was already a possibility in 18 Member States) or through infringement proceedings of the Commission.

On the one hand, some parts of the Third Pillar still remain in the Lisbon Treaty, such as the unanimity rule under very specific circumstances, but, on the other hand, the Lisbon Treaty allayed most of the previously voiced criticism. As far as the question regarding repression vs. individual rights is concerned, the Swedish Presidency – apart from the Stockholm Programme – drafted an Action Plan on individual rights for suspects in criminal proceedings, which was a step-by-step approach to the infected, more comprehensive Framework Decision on procedural safeguards, which had previously failed during the German Council Presidency (due to the “tyranny” of the rule of unanimity). The Action Plan was followed for several years, and a number of procedural rights instruments were adopted. The Hungarian Council Presidency took the same approach to the rights of victims a few years later, with similar success.

New challenges have emerged for the Member States, the Council, the Commission, and the European Parliament. Cybercrime is still a constant threat, the implementation of adopted instruments is still not up to par, and the challenge of the UK leaving the Area of Security and Justice still has to be met. Organised crime and cross-border movements of criminal groups, trafficking in human beings, drug trafficking, and violence against women is on the rise. The Union has a lot to do (in so far as it has the competence to act).

When one looks back at the Union’s involvement in criminal law, there are a number of issues that can be contemplated. First, the Council of Europe no longer has the monopoly on drafting and adopting European instruments in relation to criminal law. Nevertheless, the work of the Council of Europe, though less political, is very useful and may serve the Union when adopting instruments with greater legal force. Second, the Union does not have unlimited competence in criminal law, whereas the Council of Europe in principle does. The Council of Europe will therefore always be able to work in

those areas. Third, there will always be areas of “conflict”; grey zones where both the Council of Europe and the Union will claim some form of competence. Prison rules and everything relating to prison conditions are a typical example.

Another issue is the fact that the European Union has enormous political clout in criminal law matters, much more than the Council of Europe or the United Nations. Its instruments, mostly Directives and Regulations, are very efficient compared to international conventions, particularly where the interpretative power of the European Court of Justice is brought to bear. Moreover, through its financial programmes, the European Union is able to contribute to the development of criminal law in a number of areas in several ways (seminars, expertise, training, exchange programmes, etc.). The fact that the European Court of Justice has had full competence since 2014 has been crucial for the development of a comprehensive and coherent criminal law within the European Union.

In conclusion, a lot has happened over the past 20 years, and a lot will happen in the future. It will be interesting to continue to follow the developments in this important area of law, which has enormous potential. The implementation of the European Public Prosecutor’s Office will no doubt mark an important step in this direction.

Dr. h.c. Hans G Nilsson

Honorary Professor, College of Europe, Bruges
Former Head of Division Fundamental Rights
and Criminal Justice, General Secretariat of the
Council of the EU



Twenty Years since Tampere

The Development of Mutual Recognition in Criminal Matters

Lorenzo Salazar

Twenty years having passed since the Conclusions of the European Council in Tampere, which proposed the principle of mutual recognition as the “cornerstone” of judicial cooperation within the Union, the author takes the opportunity to reflect on the main achievements in this sector before and after the entry into force of the Treaty of Lisbon. From the enthusiasm following the adoption of the European Arrest Warrant to the recently achieved European Investigation Order and the Regulation on freezing and confiscation orders, the panorama of mutual recognition still seems to be characterized by excessive fragmentation. After Tampere and following the adoption of the consecutive programmes of action of 2004 (The Hague) and 2009 (Stockholm), no really new strategic guidelines have been adopted by the heads of state and governments, notwithstanding the clear mandate assigned to them by Art. 68 TFEU. Looking forward to the new Strategic Guidelines to be adopted in March 2020, the European Council indeed seems to have for a long while abdicated from its leading role in streamlining objectives in the sector of criminal justice, an area that would enormously benefit from clear orientation guidelines for future initiatives of the new European Commission. As examples, the article proposes fostering the rationalization and simplification of the disparate instruments of cooperation and forging the future relationship between the European Public Prosecutor’s Office (EPPO) and Eurojust, in particular concerning the possible expansion of their respective competences and scope.

I. Introduction

More than two decades have already passed since October 1999, when the European Council, meeting in Tampere during the first Finnish Presidency of the Council of the European Union, devoted the core of its discussions to Justice

and Home Affairs – for the very first and only time. The “Tampere Conclusions” are the most far-reaching strategic document in the Justice and Home Affairs (JHA) sector to date. At the time of their adoption, they were still relatively new, having been introduced by the Maastricht Treaty only six years earlier.

Throughout these years, the European Union took the first steps in what, for it, was still *terra incognita*, until then quite exclusively populated by bilateral treaties among states and by the multilateral Conventions of the Council of Europe; the latter were often very far-reaching in their objectives but not always ratified in a complete and satisfactory manner. During this pioneer period, the Union pursued, first of all, a sort of *re-cycling* of already adopted Council of Europe instruments, in order to improve them and adapt them to the specific needs of the smaller community of EU Member States: the two Extradition Conventions of 1995 and 1996, together with the preparation of the mutual legal assistance Convention (which was adopted in 2000 only), were a clear example of the continuation of the “traditional” method already inaugurated with the European Political Cooperation (EPC) established under the 1986 Single European Act.

With the adoption of the Convention on the Protection of the European Communities’ Financial Interests of 26 July 1995, with its Protocols, and of the Convention on the Fight against Corruption of 26 May 1997, the EU abandoned a monocultural approach based on judicial cooperation only and crossed the thin red line of the approximation of criminal law. Meanwhile, new ways to improve cooperation at a practical level were experimented with, such as the exchange of liaison magistrates, the adoption of a manual of good practices, or the creation of judicial networks. This is to say that the Tampere Conclusions were not created in an institutional wasteland: the Union was already trying, though in a hesitant way, to find its own way in the already crowded Justice and Home Affairs area. The entry into force of the Treaty of Amsterdam on 1 May 1999, with its new potential of competences and instruments in the JHA sector, made it even more urgent to find a more robust and structured policy, which the European Council provided just a few months later.

II. “The Cornerstone of Judicial Cooperation...”

Though usually associated with the Tampere Conclusions, it should be recalled that neither the idea of nor the term mutual recognition were entirely new. They originate from point 39 of the Conclusions adopted in June 1998 in Cardiff, under the UK Council Presidency, in which the European Council recognised the need to enhance the ability of national legal systems to work closely together and asked “to identify the scope for greater mutual recognition of decisions of each others’ courts.” The Conclusions were then further announced by the subsequent action plan,¹ adopted on 3 December 1998, which provided that a process should be initiated with a view to facilitating mutual recognition of decisions and enforcement of judgments in criminal matters within two years of entry into force of the Amsterdam Treaty.

Against this background, the Tampere Conclusions dealt with all the traditional matters of Justice and Home Affairs: “Asylum and Immigration, Civil and Criminal Justice, Fight against Crime and External Policy.” Under the chapter entitled “A Genuine European Area of Justice,” together with the subjects of access to justice and convergence in civil law matters, special attention was devoted to mutual recognition of judicial decisions. Under point 33 of the Tampere Conclusions, after having affirmed that cooperation between authorities and the judicial protection of individual rights would be facilitated by enhanced mutual recognition of judicial decisions and judgements and the necessary approximation of legislation, the European Council endorsed the principle of mutual recognition as “the cornerstone of judicial cooperation in both civil and criminal matters within the Union,” which should apply both to judgements and to other decisions of judicial authorities.

While calling for the adoption, by December 2000, of a programme of measures to implement the principle of mutual recognition, the Tampere Conclusions also indicated the first priorities to be pursued through its implementation: in the first place, the replacement of extradition by the simple transfer of persons already sentenced and fast-track procedures for other cases; secondly, application of the principle to pre-trial orders, in particular to measures aimed to freeze and seize evidence or assets. The programme of measures requested by the European Council was promptly drafted by the Commission and discussed by the JHA Council at the end of 2000, then published in January 2001.² It listed a set of 24 measures hierarchically ordered by a scale of priorities from 1 to 6. This was just a few months before the 9/11 attacks in New York and Washington that suddenly also revolutionized this scale of priorities – together with the world as we used to know it.

III. How It Should Have Gone and How It Went

“9/11” provoked the effect, among others, of reverting the order of priorities just established in the Action Plan to implement the principle of mutual recognition. Though rated only in the third place in the order of priorities established by the Commission, the European Arrest Warrant became a top priority after the extraordinary European Council meeting held on 21 September 2001. The heads of state and government convened in the aftermath of the attacks and put the introduction of a European Arrest Warrant in first place among the different measures aimed to enhance police and judicial cooperation. The arrest warrant had to be adopted, as a matter of urgency, by December of the same year, which ultimately happened despite fierce opposition by the Italian Government till the very final stage.

It only took less than ten weeks of intense negotiations to agree an instrument,³ which was destined to have an unprecedented impact on judicial cooperation in criminal matters in Europe, far more important than any other previous or future instrument at that time. This was obviously only possible as a result of the unique political pressure that ensued after the terrorist attacks in the USA, which also enabled fast agreements to be reached on the establishment of Eurojust, on the definition of a terrorist act, and on the agreements on extradition and mutual legal assistance between the EU and the United States.

The rest of the story can be read in the pages of the EU's Official Journal: the European Arrest Warrant was soon followed by the framework decision on the execution of freezing orders,⁴ in 2003 already, but it then took much more time to reach an agreement on the 2005 framework decision on the application of the principle of mutual recognition to financial penalties⁵ and on the one on confiscation orders adopted in 2006.⁶ It was then quite on the eve of the entry into force of the Lisbon Treaty, with the perspective of its "ordinary legislative procedure" (co-decision with the European Parliament and qualified majority), when a last set of framework decisions was adopted in 2008: on taking account of previous convictions in another Member State of the EU,⁷ on recognition of judgments in criminal matters for the purpose of their enforcement in the EU and for allowing the transfer of prisoners between Member States,⁸ on the supervision of probation measures and alternative sanctions,⁹ and on the European Evidence Warrant (EEW).¹⁰ In 2009, it was the turn of the framework decisions on enhancing the procedural rights of persons in case of decisions rendered *in absentia*¹¹ and on mutual recognition of decisions on supervision measures as an alternative to provisional detention.¹²

After the entry into force of the Lisbon Treaty, a number of mutual recognition directives were adopted, as leftovers from the previous era, i.e., the directive on the European protection order,¹³ which offers protection beyond borders to victims, in particular women, of violent behaviour and stalking, and the directive on the European Investigation Order (EIO) in criminal matters,¹⁴ which replaced the unfortunate precedent of the European Evidence Warrant.

Only recently, at the end of 2018, the first Regulation in the field of mutual recognition, on freezing and confiscation orders was agreed.¹⁵ It was adopted in order to replace the provisions of Framework Decision 2003/577/JHA, as regards the freezing of property only but leaving aside the freezing of evidence, and of Framework Decision 2006/783/JHA on confiscation. The added value of the regulation is not limited to its self-executing legal value, when compared with the pre-Lisbon framework decisions, but is amplified by the fact that

freezing and confiscation orders are not confined to proceeds of a criminal offense only but can be imposed more extensively "within the framework of proceedings in criminal matters."

IV. The Epigones of Tampere

After Tampere, the European Council adopted two other comprehensive action programmes in the JHA sector, i.e., the "Hague Programme"¹⁶ in 2004 and the "Stockholm Programme"¹⁷ in 2009, respectively, at the end of a Dutch and a Swedish Presidency. It is a commonly shared opinion that, when compared to Tampere, the added value of these further programmatic documents is not necessarily proportionate to the growing number of pages they occupy in the Official Journal and that, irrespective of their dimension, none of them has presented a content of substance which could be compared with the 1999 Tampere Conclusions.

The 2004 Hague Programme, adopted with the Constitutional Treaty still in prospect, proposed that further realization of mutual recognition should be pursued through the development of equivalent standards for procedural rights in criminal proceedings, "based on studies of the existing level of safeguards in Member States and with due respect for their legal traditions." This certainly had the merit to call to attention the urgent need to foster the protection of the rights of individuals in the context of the common Area of Freedom, Security and Justice. It did not, however, successfully contribute to the conclusion of already ongoing negotiations on the proposal for a framework decision on certain procedural rights in criminal proceedings throughout the European Union,¹⁸ which was not adopted by the end of 2005, as requested by the European Council. We had to wait for the new Treaty of Lisbon and the adoption of the Roadmap on procedural rights,¹⁹ which paved the way for the directives on procedural rights adopted after the entry into force of the new Treaty. The heads of state and government also invited the Council to adopt, by the end of 2005, the Framework Decision on the European Evidence Warrant and invited the Commission to present its proposals on enhancing the exchange of information from national records of convictions and disqualifications, in particular those of sex offenders, thus laying the foundation for the ECRIS system.

The 2009 Stockholm Programme, coincidentally adopted with the entry into force of the Lisbon Treaty, stressed the need to enhance the cross-border dimension of judicial cooperation in criminal matters by using the principle of mutual recognition. The European Council stated that existing instruments in the area were to be considered as constituting "a fragmentary regime", while a new approach should have been "based on the principle of mutual recognition but also taking into account

the flexibility of the traditional system of mutual legal assistance.” Without naming and shaming it explicitly, the Conclusions intended to refer to the substantial failure of negotiations on the European Evidence Warrant (EEW) concluded just a few months earlier. The EEW was in fact only applicable to evidence that already existed and therefore covered only a limited spectrum of judicial cooperation in criminal matters with respect to evidence, while the new model praised in the Stockholm Programme was to have a broader scope, covering as many types of evidence as possible. The conclusions of the European Council certainly promoted the adoption of the directive on the European Investigation Order, which has been in force in Member States since mid-2017, but did not seem to provide substantial additional input in the field of judicial cooperation or mutual recognition but encouraging the extension of the principle to “all types of judgments and decisions of a judicial nature, which may, depending on the legal system, be either criminal or administrative.”²⁰

As explicitly stated in the text, the Stockholm Programme was the first to define strategic guidelines for legislative and operational planning within the Area of Freedom, Security and Justice in accordance with the new Art. 68 TFEU. Unfortunately, it was not only the first but also the last of the strategic guidelines.

The European Council made a new attempt in its conclusions adopted in June 2014,²¹ but they are so general and vague that they cannot be termed “strategic guidelines.” Such guidelines should be adopted (at least) at the beginning of each new EU legislature, which also coincides with the renewal of the Commission and the appointment of the President of the European Council (which was indeed also the case from Tampere to Stockholm even without the new Treaty in force). For almost a decade since Stockholm, the European Council indeed seems to have abdicated from establishing such long-term, strategic planning in the justice sector, confining its role to taking care of recurring “emergencies,” such as illegal migration and terrorist attacks, only.

Since nature dislikes vacuum, it is evident that the space left by the European Council has been occupied by others, in particular by state governments and by the European Commission. The latter grasped the possibility not only to implement the 2009 Stockholm Programme and the Roadmap on procedural rights in the last ten years but also to elaborate autonomous strategies without being bound by the natural checks and balances established under the Lisbon Treaty. Looking at the annual Commission Work Programmes,²² it can be readily observed that, in the field of justice, the programmes merely provide a list of instruments already on the table or that are in the Commission service pipeline. They have no strategic added value, while trying at the same time running

after the recurrent emergencies in the field of terrorism and security or immigration.

On 20 June 2019, the European Council adopted a new Strategic Agenda 2019–2024,²³ which, among the other priorities, also emphasises the importance of protecting citizens and freedoms and promoting European interests and values on the global stage, though in very general terms. On the same occasion, the European Council also announced that it will follow the implementation of these priorities closely and define further general political directions and priorities as necessary.

V. The Way Forward

In order to strike the right balance in the present situation – as it is and as it could or should be – it must be stressed that the “strategic guidelines” to be defined by the European Council under Art. 68 TFEU only have an inspiring and orientating role of a political nature. The guidelines should not interfere, as they have not in the past, with the European Commission’s right to initiate legislative proposals, which is nonetheless still not a monopoly under Art. 76 TFEU. The demand for a revised role of the European Council in the medium-/long-term program planning of the JHA sector should under no circumstances be understood undermining the essential role of the Commission in the preparation of new legislative initiatives or as a *reprise en main* attempt by national governments in an old-fashioned intergovernmental atmosphere. A renovated strategic planning would help prevent the risk of such initiatives being adopted under the duress of events only or of being deprived of a different perspective when taking into consideration the interests of the stakeholders – i.e., judges, prosecutors, defense lawyers, victims, and accused persons – notwithstanding the well-established procedures of consultation already in place in the Commission.

Today, a new Commission and a new President of the European Council are in charge. The 2020 Croatian Council Presidency, building on the work of the Romanians and the Finns, has already provided food for thought to “feed” the more general Strategic Agenda 2019–2024. At the informal Justice and Home affairs Council organised on 23–24 January 2020 in Zagreb, Croatia, the draft Strategic Guidelines were presented for consideration by the Ministers,²⁴ starting a process that – after endorsement by the Council (JHA) on 12–13 March 2020 – will be submitted to the European Council meeting on 26–27 March 2020 which shall eventually adopt the new Guidelines under the chapeau of Art. 68 TFEU. As far as criminal justice is concerned, the draft Guidelines put emphasis on improving the implementation of existing instruments, filling gaps in the legislative framework where they exist, strengthening mutual

trust among Member States, developing networks and fostering coordination and synergies between them. Regarding substantive criminal law, the clear message is that it should only be developed “cautiously [and] where necessary” while new *acquis* in the area of criminal law must be “based on the real needs of the EU,” a precondition which “is relevant to the extension of the competence of the EPPO as well.” As anybody can see, nothing to really write home about ...

When looking at the mission letter of the new Justice Commissioner, it is very clear that upholding the rule of law across the Union will be his priority, together with more general aims, such as “enhancing judicial cooperation and improving information exchange.” By contrast, he receives a much more precise and prescriptive mandate in reference to the EPPO: the Justice Commissioner will support its setting-up but will also have to “work on extending its powers to investigate and prosecute cross-border terrorism.” The mission letter seems to take a clear stand on the option proposed by paragraph 4 of Art. 86 TFEU, which provides that the European Council, acting “unanimously after obtaining the consent of the European Parliament and after consulting the Commission,” may decide to extend the powers of the EPPO to include other forms of serious crime having a cross-border dimension.²⁵

It is true that the Commission already presented a communication²⁶ on this subject to the European Parliament and to the European Council as a contribution to the leaders’ meeting in Salzburg on 19–20 September 2018. If one analyses the outcome of the discussions at the summit, however, it would be pretentious to conclude that the heads of state and government devoted any special attention to the document; it hardly found any mention in the “Leaders’ Agenda” on internal security,²⁷ while the Strategic Agenda 2019–2024, adopted in June 2019, does not contain any reference to it at all.

The possible extension of the EPPO’s competences to cover cross-border terrorist crimes is *the* good example of how the absence of clear strategic planning by the European Council – which is not only in charge of, but also the sole legislator of, the specific file on the EPPO – can be detrimental and leave the room open for uncoordinated interventions inside or outside the EU institutional framework. Ten years have elapsed since the Lisbon Treaty entered into force, and the European Council had all the time needed to carefully consider the issue, even before presentation of the proposal²⁸ for the Regulation on the establishment of the EPPO by the Commission in July 2013, all throughout the negotiations and after their conclusion in October 2017.

In this context, it should also be recalled that Art. 85 TFEU deals with another fundamental actor in the area of European

criminal justice, i.e., Eurojust, defining its mission but at the same time also providing the legal basis for conferring new tasks to the agency, in particular the initiation of criminal investigations, their coordination, and the resolution of conflicts of jurisdiction among the prosecutorial authorities of Member States. None of the new powers specifically set by the Treaty was provided to the agency by the recently adopted Regulation on Eurojust;²⁹ no discussion on the opportunity or desirability of using the legal basis provided by the Treaty to move towards a real “Eurojust 2.0,” by conferring more incisive and binding powers of intervention to the agency, took place during the never-ending negotiations.

It could be argued that a strengthened Eurojust may also play a vital role in the fight against “serious crimes having a cross-border dimension,” which is also a prerequisite for the possible scope of a “Super EPPO” under paragraph 4 of Art. 86 TFEU. It would be easy to find arguments for and against the question of whether a more robust Eurojust could better serve in scope to fight serious transnational crime in a more or less efficient way than a strengthened EPPO. At the same time, due consideration should also be given to the different procedures provided for implementing the two provisions of the Treaty: an ordinary legislative procedure of co-decision for Art. 85 and a special procedure of adoption by the European Council “acting unanimously after obtaining the consent of the European Parliament and after consulting the Commission” for Art. 86 para. 4 TFEU. It is beyond the scope of this contribution to take a final stand on which of the two solutions should be given preference or priority – but the issue raised demonstrates the persistent need for political and more explicit guidance in the JHA sector by the body in charge of it, i.e., the European Council, in this way respecting the specific role of each institution in the delicate balance of powers provided by the Lisbon Treaty.

VI. Final Remarks

What has been achieved in view of the *implementation* of the principle of mutual recognition twenty years after the European Council’s Conclusions of Tampere? A similar, rather critical conclusion must be drawn as that reached above on the absence of political guidance by the European Council. The “fragmentary regime,” which was already denounced in the 2009 Stockholm Programme, did not disappear after the adoption of the European Investigation Order; practitioners are still obliged to make use of a variegated set of different legal tools, depending on the subject matter (extradition, mutual legal assistance, transfer of prisoners, pre- and post-sentence surveillance, etc.); depending on the Member States involved, they sometimes even need to apply other sets of instruments. The

Stockholm Programme already asked for the new instruments to be more “user-friendly” for practitioners – which is the absolute prerequisite for a new legal regime when replacing an already established instrument – and to focus on problems that are recurring in cross-border cooperation, such as issues regarding time limits and language conditions or the principle of proportionality. The recent case law of the European Court of Justice has, in the past decade, also contributed to further defining and clarifying the concepts of mutual recognition and mutual trust, with particular reference to their impact on practical implementation of the European Arrest Warrant, where the rights of the person to be surrendered are considered to be potentially jeopardized.³⁰

On the one hand, any future reconsideration of existing instruments in the field of mutual recognition should therefore take into account the need to avoid further fragmentation, promoting instead a process of simplification of the instruments to be put at the disposal of the practitioners; such instruments should become even more user-friendly by also taking inspiration from the flexibility of the traditional system of mutual legal assistance. It should not, for instance, be necessary to fill out a long and sometimes complicated multilingual form just to request information from another judicial authority when a simple and short mail message in a commonly understood language would be sufficient.

On the other hand, real mutual trust must be established and reinforced among all judicial authorities required to implement and put into practice the principle of mutual recognition. We are all well aware that this trust cannot be established by decree but should be based on respect for the rule of law by all the actors involved in judicial cooperation in criminal matters. Their respective state governments, which are frequently accused (not without reason) of infringing this principle, in particular by exercising various forms of undue pressure on the judiciary, should also pay heed.

Against these flagrant violations, the European Union is already considering appropriate reactions, such as the ones put forward in the recent proposal for a Regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in the Member States,³¹ which includes reductions in commitments and the suspension of payments. As an alternative, or in parallel with them, other innovative avenues could also be explored that are directly related to judicial cooperation, including the possibility to suspend cooperation based on mutual recognition instruments with those Member States who would be declared to be in serious breach of the founding values referred to in Art. 2 TEU.

Mutual recognition is a privilege; it cannot and should not be accorded for free.



Lorenzo Salazar

Deputy Prosecutor General to the Court of Appeal of Naples

1 Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam establishing an area of freedom, security and justice, *O.J. C* 19, 23.1.1999, 1–15.

2 *O.J. C* 12, 15.1.2001, 10–21.

3 Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, *O.J. L* 190, 18.7.2002, 1–18.

4 Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence, *O.J. L* 196, 2.8.2003, 45–55.

5 Council Framework Decision 2005/214/JHA of 24 February 2005 on the application of the principle of mutual recognition to financial penalties, *O.J. L* 76, 22.3.2005, 16–30.

6 Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, *O.J. L* 328, 24.11.2006, 59–78.

7 Council Framework Decision 2008/675/JHA of 24 July 2008 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, *O.J. L* 294, 11.11.2009, 32–34.

8 Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union, *O.J. L* 327, 5.12.2008, 27–46.

9 Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, *O.J. L* 337, 16.12.2008, 102–122.

10 Council Framework Decision 2008/978/JHA of 18 December 2008 on the European evidence warrant for the purpose of obtaining objects, documents and data for use in proceedings in criminal matters, *O.J. L* 350, 30.12.2008, 72–92.

11 Council Framework Decision 2009/299/JHA of 26 February 2009 amending Framework Decisions 2002/584/JHA, 2005/214/JHA, 2006/783/JHA, 2008/909/JHA and 2008/947/JHA, thereby enhancing the procedural rights of persons and fostering the application of the principle of mutual recognition to decisions rendered in the absence of the person concerned at the trial, *O.J. L* 81, 27.3.2009, 24–36.

12 Council Framework Decision 2009/829/JHA of 23 October 2009 on the application, between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as an alternative to provisional detention, *O.J. L* 337, 16.12.2008, 20–40.

- 13 Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European protection order, *O.J. L* 338, 21.12.2011, 2–18.
- 14 Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014 regarding the European Investigation Order in criminal matters, *O.J. L* 130, 1.5.2014, 1–36.
- 15 Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders and confiscation orders, *O.J. L* 303, 28.11.2018, 1–37. See also T. Wahl, “Regulation on Freezing and Confiscation Order, (2018) *eu crim*, 201.
- 16 *O.J. C* 53, 3.3.2005, 1–14.
- 17 *O.J. C* 115, 4.5.2010, 1–37.
- 18 COM(2004) 328 final.
- 19 Resolution of the Council of 30 November 2009 on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, *O.J. C* 295, 4.12.2009, 1–3.
- 20 See point 3.1.1. of the Conclusions
- 21 Extract from the 26–27 June 2014 European Council Conclusions concerning the area of Freedom, Security and Justice and some related horizontal issues, *O.J. C* 240, 24.7.2014, 13–15.
- 22 See COM(2018) 800 final, 6–7; COM(2017) 650 final, 7–8; COM(2016) 710 final, 11–12; COM(2015) 610 final, 11–12.
- 23 Cf. <https://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019–2024-en.pdf>; see also T. Wahl, “European Council: Security

Remains Priority Area in the Next Five Years”, (2019) *eu crim*, 86.

24 See joint discussion paper for both justice and home affairs submitted by the Croatian Presidency to the other delegations and debated at the Informal JHA Council in Zagreb on January 23rd–24th 2020: <https://eu2020.hr/Events/Event?id=149>

25 For the discussion on the extension of EPPO’s consequences, see also C. Di Francesco Maesa, “Repercussions of the Establishment of the EPPO via Enhanced Cooperation”, (2017) *eu crim*, 156, and F. De Angelis, “The European Public Prosecutor’s Office – Past, Present, and Future” in this issue.

26 “A Europe that protects: an initiative to extend the competences of the European Public Prosecutor’s Office to crossborder terrorist crimes”, COM(2018) 641 final; see also T. Wahl, “COM Communication Extending EPPO Competence”, (2018) *eu crim*, 86.

27 <https://www.consilium.europa.eu/media/36409/leaders-agenda-note-on-internal-security.pdf>

28 COM(2013) 534 final.

29 Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA, *O.J. L* 295, 21.11. 2018, 138–183.

30 See, in particular, CJEU, Joint Cases C-404/15 and C-659/15 (*Pál Aranyosi and Robert Căldăraru v Generalstaatsanwaltschaft Bremen*).

31 COM(2018) 324 final.

10 Years after Lisbon

How “Lisbonised” Is the Substantive Criminal Law in the EU?

Peter Csonka and Dr. Oliver Landwehr*

10 years ago, on 1 December 2009, the Treaty of Lisbon entered into force and brought judicial cooperation in criminal matters from the sphere of intergovernmental cooperation fully into the fold of EU law and policies. Almost all former framework decisions in the field of substantive criminal law have now been “Lisbonised,” i.e., recast in the ordinary legislative procedure as legal acts (directives) of the Union in the sense of Art. 288 TFEU. However, in recent years, the enthusiasm of the early years has waned a bit and there seems to be little appetite for bold new legislative projects. Against this backdrop, the present article takes stock of the progress made in the harmonisation of substantive criminal law in the EU and attempts to look into its future.

I. Introduction

When the Treaty of Lisbon entered into force on 1 December 2009, the new legal foundation ushered in a new area for the European Union. Qualified majority voting in the Council and equal participation of the European Parliament in law-making became the default rules when the former co-decision procedure was recast as the “ordinary legislative procedure”. The Union acquired full legal personality and the pillar structure was abolished. The Charter of Fundamental Rights was elevated to the status of primary law. And, crucially, in the present context, the former intergovernmental cooperation in the area

of justice and home affairs was inserted into the Treaty on the Functioning of the European Union (TFEU) as the new Title V “Area of Freedom, Security and Justice,” directly after the title on free movement of persons, services, and capital. Indeed, this “area” was even promoted to a Union goal in Art. 3(2) of the Treaty on European Union (TEU).¹

It may sound surprising then that, when it comes to the Union’s competence for substantive criminal law, the Lisbon Treaty did not bring with it any enlarged law-making powers but actually restricted, to some extent, the Union’s competence in this field when compared to the situation under the Treaty of

Amsterdam. In light of the provisions in the TFEU, it is clear that the Union has no mandate to harmonise or codify criminal law comprehensively. The harmonisation of procedural law is limited, in principle, to three specific areas² and can only take place “to the extent necessary to facilitate mutual recognition of judgments and police and judicial cooperation having a cross-border dimension.” In short, the Union cannot adopt a complete code of criminal procedure, and any harmonisation in the area of criminal procedure must be based on the need for judicial cooperation.

Likewise, in the area of substantive criminal law, similar (albeit not identical) restrictions apply, as the Union’s competence has been limited to establishing “minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension,” areas which are moreover exhaustively listed in Art. 83(1) TFEU. The criminal “annex competence” to ensure the effective implementation of Union policies in areas that have been subject to harmonisation measures has been explicitly codified in Art. 83(2) TFEU, thereby excluding any recourse to unwritten “implied powers”. A new legal basis was finally created in Art. 325(4) TFEU but rejected by the Council at the first opportunity.

To explain this further and provide some background, the evolution of EU substantive criminal law will be briefly outlined below in section II. Section III will then sketch out the *status quo* of the harmonisation of substantive criminal law in the EU in order to answer the question set out in the title. Lastly, in section IV, we will try to look into the future and ask *quo vadis* EU (substantive) criminal law?

II. A Brief History of EU Criminal Law and Legal Bases

Unsurprisingly, criminal law and policy was absent from the original founding Treaties of what was, at the time, a regional economic integration organisation.³

1. From Schengen to Lisbon

The development of the Union’s competence in the area of criminal law dates back to the Convention Implementing the 1985 Schengen Agreement (1990) and the Treaty of Maastricht (1992).⁴ While the original TEU contained provisions on cooperation in the fields of justice and home affairs (Title VI), competence to harmonise criminal law was not directly mentioned in these Treaty provisions. This did not, however, prevent the Union from adopting various conventions under international law (notably, on the protection of the financial

interests of the Union⁵) whose clear purpose was to define the elements of certain criminal offences and relevant sanctions for them.

As is so often the case in the evolution of EU law, however, the real impetus for change in EU competences may well have emerged even earlier from the jurisprudence of the European Court of Justice. In fact, Member States’ obligation to protect the Community’s financial interests, including by means of criminal law, had already been formulated in the late 1980s in the famous landmark judgment of the Court in the Greek Maize Case.⁶ In this ruling, the principle of effective and equivalent protection as regards the protection of the Union budget was born, and language from that judgment, for instance on “effective, proportionate and dissuasive” sanctions, still resonates today in the Directive on the fight against fraud to the Union’s financial interests by means of criminal law (the so-called “PIF Directive”).⁷

In the Treaty of Amsterdam (1997), the Union’s competence to harmonise criminal law was, for the first time, unambiguously recognised through the inclusion of new provisions on the subject.⁸ The introduction of a new legal instrument called “framework decision” in the field of justice and home affairs represented a paradigm shift. Even though criminal law was still confined to intergovernmental cooperation under what was then the third pillar of the Union (rather than the Community method), framework decisions were acts of Union law, not public international law. In 1999, a special European Council, held in Tampere/Finland, adopted conclusions of great symbolic and programmatic significance that were to guide the development of European criminal law for many years to come.⁹

In the following years, the Council adopted a large number of framework decisions in the area of criminal law and cooperation.¹⁰ In addition, the European Court of Justice, in another landmark judgment, held that, while it is generally true that neither criminal law nor the rules of criminal procedure fall within the Community’s competence, this did not prevent the Community legislature from obliging Member States to adopt criminal law measures that are necessary to ensure that the rules laid down in a certain policy area (in the case at hand, on environmental protection) are fully effective.¹¹

Ultimately, the Treaty of Lisbon (2007) expressly recognised, for the first time, the competence of the Union to ensure a high level of security through the approximation of criminal laws, if necessary.¹² According to this Treaty, substantive criminal law can be harmonised according to three different legal bases: Art. 83(1) TFEU (to regulate “Euro-crimes”), Art. 83(2) TFEU (to ensure the effective implementation of EU policies), and Art. 325(4) TFEU (to protect the EU’s financial interests).

2. Euro-crimes (Art. 83(1) TFEU)

Under Art. 83(1) TFEU, the EU may adopt directives establishing minimum rules in respect of a list of ten specific offences (the so-called “Euro-crimes”): terrorism, trafficking in human beings, sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime, and organised crime. The list is exhaustive.¹³ Additional Euro-crimes can only be defined by unanimous decision of the Council and with the prior consent of the European Parliament. A legal basis for a comprehensive codification of substantive criminal law has not been included in the Treaties.

The minimum rules may cover the definition of punishable acts, i.e., elements determining what behaviour is to be considered as constituting a criminal act as well as the type and level of penalties applicable to such acts. Euro-crimes are offences which, by definition in the Treaty, deserve to be dealt with at the EU level because of their particularly serious nature and their cross-border dimension.

3. Offences related to ensuring the effective implementation of EU policies (Art. 83(2) TFEU)

As mentioned above, the European Court of Justice has held that the EU is also competent to adopt common minimum standards on the definition of criminal acts and sanctions if these are indispensable for ensuring the effectiveness of a harmonised EU policy. This ancillary or annex competence developed by the case law in the area of environmental crime and ship-source pollution has been expressly codified in the Treaties: Art. 83(2) TFEU authorises the European Parliament and the Council, acting on a proposal from the Commission, to establish “minimum rules with regard to the definition of criminal offences and sanctions,” where the approximation of criminal laws and regulations of the Member States is essential to ensure the effective implementation of a Union policy in an area that has been subjected to harmonisation measures. It follows that a recourse to unwritten “implied” powers is no longer possible.¹⁴

4. Offences related to the protection of the financial interests of the EU (Art. 325 TFEU)

It has always been a problem for the EU that the protection of its very own budget is at the mercy of the Member States’ willingness to investigate and prosecute.¹⁵ In a context of budgetary austerity, protecting the European taxpayers’ money and fighting the abuse of EU public funds is even

more of a priority for the Union. This priority is reflected in the TFEU, which sets out the obligation, and legal basis, for the protection of the financial interests of the EU in a dedicated article. While its predecessor, Art. 280 of the Treaty establishing the European Community, explicitly excluded measures concerning the application of national criminal law or the national administration of justice, Art. 325(4) TFEU contains no such limitation. It follows, *a contrario*, that the article is a legal basis not only for administrative measures but also for measures to protect the EU’s financial interests by means of criminal law.¹⁶

III. The Harmonisation of Substantive Criminal Law in the EU

Against this historical background, this section will analyse the progress that has been made in the harmonisation of substantive criminal law over the past ten years, since the Lisbon Treaty came into effect.

1. Use of legal bases

Even though the new legal framework introduced by the Lisbon Treaty did not fundamentally alter or enlarge the possible scope of EU criminal law, it can be said that it considerably enhanced the possibility to progress with the development of a coherent EU criminal policy, which is based on considerations of both effective enforcement and a solid protection of fundamental rights.

a) Euro-crimes (Art. 83(1) TFEU)

A closer look at the ten Euro-crimes reveals that most of these criminal offences were already covered by pre-Lisbon legislation, i.e., framework decisions. This gives rise to the suspicion that the authors of the Lisbon Treaty may not have chosen them through a systematic evaluation exercise starting with a blank sheet of paper – but rather by looking at existing law. This is a bit unfortunate, as it implies that the enumeration is somewhat random. Moreover, it does not even encompass all pre-existing legislation.¹⁷

Most of the framework decisions on substantive criminal law have now been repealed by directives based on Art. 83(1). They are as follows:

- The 2011 Directive on preventing and combating trafficking in human beings and protecting its victims;¹⁸
- The 2011 Directive on combating the sexual abuse and sexual exploitation of children and child pornography;¹⁹
- The 2013 Cybercrime Directive;²⁰

- The 2014 Directive on the protection of the euro against counterfeiting;²¹
- The 2017 Directive on terrorism;²²
- The 2017 Drugs Directive;²³
- The 2018 criminal anti-money laundering Directive;²⁴
- The 2019 non-cash counterfeiting Directive.²⁵

This means that, of the ten Euro-crimes, seven have been addressed in specific directives.²⁶ While arms trafficking, corruption, and organised crime have not been the subject matter of dedicated directives (yet), they are referred to in the other directives (e.g., as predicate offences for money laundering).

b) Offences related to ensuring the effective implementation of EU policies (Art. 83(2) TFEU)

Unlike the first paragraph of Art. 83 TFEU, the second paragraph of that article does not establish a closed list of specific crimes but makes the prior adoption of harmonisation measures a precondition for the adoption of criminal law measures at the EU level. EU institutions need to make policy choices in terms of the use or non-use of criminal law (instead of other measures, such as administrative sanctions) as tools to enforce legislation and to decide which EU policies require the use of criminal law as an additional enforcement tool. Already in 2011, the Commission issued specific guidance on this point in a Communication which outlined the principles that should guide EU criminal law legislation and the policy areas where it might be needed.²⁷

As is well known, the policies of the European Union are wide-ranging and cover such diverse areas as road transport, environmental protection, consumer protection, social policies, regulations for the financial sector, data protection, and the protection of the financial interests of the EU. All of them require effective implementation but not necessarily through criminal sanctions. Certainly, criminal law can, as a last resort (*ultima ratio*), play an important role when other means of implementation have failed. The development of an EU criminal policy on the basis of Art. 83(2) TFEU is therefore particularly sensitive and the need to introduce criminal measures must be demonstrated in a way that goes beyond the traditional scrutiny imposed by the principles of proportionality and subsidiarity. These considerations may explain why, to date, only two directives have been based on Art. 83(2): the 2014 Market Abuse Directive²⁸ and the 2017 PIF Directive.^{29, 30}

It is easy to see why the Commission, in 2011, chose market abuse as the first area to buttress its administrative regulation of insider trading and market manipulation with criminal sanctions: In the wake of the financial crisis, the case for the added value of action at the European level to strengthen and better

protect the integrity of the EU financial markets was easy to make. Therefore, the 2014 Directive requires Member States to take measures necessary to ensure that insider trading and market manipulation are subject to effective, proportionate, and dissuasive criminal penalties. The Directive thus complements the Market Abuse Regulation,³¹ which improved the existing regulatory framework in the EU and strengthened administrative sanctions. The PIF Directive, however, was also based on Art. 83(2) TFEU, but this was an incorrect legal basis, as will be explained in the following section.

c) Offences related to the protection of the financial interests of the EU (Art. 325 TFEU)

In 2012 already, the Commission proposed a Directive to criminalise fraud and other crimes affecting the financial interests of the Union. This proposal³² was based on Art. 325(4) TFEU, which – after the changes introduced by the Lisbon Treaty (i.e., the deletion of the exclusion of criminal law measures) – offered a new legal basis that was *lex specialis* compared to Art. 83 TFEU. During the negotiations, however, this legal basis was changed to Art. 83(2) by the Council. In the Council's view, all measures of a criminal law nature – irrespective of their purpose – have to be based on articles from Title V of the TFEU.

Surprisingly, the European Parliament accepted this change. Even more surprisingly, the Commission did not attack the choice of legal basis in the European Court of Justice, as it had in previous cases, despite the Court's encouraging jurisprudence on the choice of legal bases, in general,³³ and on criminal law measures, in particular. Indeed, the analogy to the environmental crime directive, in which the judges in Luxembourg annulled Council Framework Decision 2003/80/JHA on the grounds that its main purpose was the protection of the environment and should therefore have been properly adopted on the basis of Community law (at that time Art. 175 EC), is striking.³⁴ It is therefore submitted that an unfortunate precedent was created by not challenging the legal basis of the PIF Directive in court. This means that, in the future, the nature of the measure, rather than its finality, will be considered decisive for the choice of legal basis. Under these circumstances, it seems doubtful if Art. 325 TFEU will ever be used as the basis for criminal law measures.

2. Content and structure

The directives adopted so far all have more or less the same structure and are usually limited to the following:

- Definition of the offences;
- Provisions on aiding and abetting, inciting, and attempt;

- Liability of legal persons;
- Sanctions for natural and legal persons; and
- Jurisdiction.

Some contain additional provisions, e.g., on confiscation, investigative tools, and the exchange of information. Very few go beyond these points and take a more “holistic” approach to criminal law, including provisions for prevention, training, and investigation. For example, the two 2011 Directives on trafficking in human beings and on the exploitation of children contain provisions aimed at preventing the prosecution of victims.³⁵ This aim is achieved, for instance, by the obligations to use “effective investigative tools:” to support and give assistance to victims; to provide for specific assistance, support, and protection measures for child victims; and to compensate victims.

a) Sanctions

So far, the approximation of sanctions was limited to the obligation of Member States to provide for effective, proportionate, and dissuasive sanctions in their national law and to common minimum levels of the *maximum* sanctions against natural persons (the so-called “minimum-maximum penalties approach”). This means that there is no harmonisation of minimum penalties. That is understandable to the extent that criminal penalties are an extremely sensitive area for the Member States, as they touch upon a core area of national sovereignty and very much reflect national traditions and values. Harmonising concrete minimum sentences would thus create huge problems in practice. However, the effect of the current system of approximation on serious cross-border criminality remains difficult to demonstrate.

Therefore, a better approach for the future might be to harmonise penalties according to categories of offences. A directive would not prescribe a concrete minimum sentence (e.g., two years of imprisonment) but instead classify the offence into a system of categories (e.g., a class two offence). The Member States would remain free to determine the range of penalties for each class. This has been advocated in the literature, as it would respect Member States’ sovereignty while at the same time providing for a coherent system of punishment throughout the Union.³⁶

b) Other provisions and legal concepts

The various instruments adopted in criminal matters at the EU level contain references to some legal notions that are used more regularly, such as “serious cases” and “minor cases.” Although one might argue that flexibility needs to be maintained in order to adapt these notions to specific instruments, and also

to the particularities of the national systems of criminal law, it would seem preferable to develop a common understanding of these legal notions. Indeed, the absence of guidance on the interpretation of these legal notions has led to implementation issues, e.g., in the case of the Market Abuse Directive.

Likewise, the concepts of incitement, aiding and abetting, and attempt, which are used in all the criminal law directives, have not been harmonised. Again, it can be argued that the interpretation of these legal notions should be left to national law. Nevertheless, this means that the exact extent of criminalisation will vary between the Member States. It would seem desirable to at least agree on recitals for the coherent application of these concepts.

Another area in which no uniform level has been achieved is the liability of legal persons. This liability can be civil, administrative, or criminal. The directives do not impose criminal liability. Nonetheless, a certain trend towards establishing corporate criminal liability in the past is perceptible. It seems doubtful, however, whether criminal liability is more effective than administrative liability. EU competition law is a striking example of how highly effective administrative sanctions can be and, in all likelihood, how they can even be more severe than criminal penalties. At the end of the day, a fine is a fine for a company, and the absolute amount is more important than its label.

IV. The Way Forward

The 2011 Commission Communication on EU criminal policy³⁷ concluded with a “vision for a coherent and consistent EU Criminal Policy by 2020,” so now is the time for a reality check.

On the one hand, the Communication identified a number of policy areas that have been harmonised and where the Commission considered criminal law measures at the EU level to be required. These areas included the financial sector (market abuse), the fight against fraud affecting the financial interests of the Union, and the protection of the euro against counterfeiting. All of these areas have been “Lisbonised.” On the other hand, the Communication gave examples of other policy areas where the role of criminal law could be explored further as a necessary tool to ensure effective enforcement:

- Road transport, concerning, for instance, serious infringements of EU social, technical, safety, and market rules for professional transports;
- Data protection, in cases of serious breaches of existing EU rules;
- Customs rules on the approximation of customs offences and penalties;

- Fisheries policy, in order to counter illegal, unreported, and unregulated fishing; and
- Internal market policies to fight serious illegal practices, such as counterfeiting and corruption or undeclared conflicts of interest in the context of public procurement.

More than eight years later, none of these areas has been addressed in a Commission proposal. Likewise, as noted above, not all Euro-crimes have been defined in specific directives, either. Corruption and organised crime, in particular, would lend themselves to legislation at the Union level, because they are also already the subject of international conventions³⁸ and have been referred to in Union legislation.³⁹

Moreover, as Commission President *Ursula von der Leyen* noted in her political guidelines for the new Commission,⁴⁰ the EU should do all it can to prevent domestic violence, protect victims, and punish offenders. Therefore, EU accession to the Istanbul Convention on fighting violence against women and domestic violence remains a key priority for the Commission. If the Council continues to block accession, however, the Commission will consider tabling proposals on minimum standards regarding the definition of certain types of violence and strengthening the Victims' Rights Directive.⁴¹ In addition, the Commission will propose adding violence against women to the list of Euro-crimes in the Treaty on the Functioning of the European Union.

At the same time, it must be noted that Member States' appetite for new initiatives seems to be rather limited. In a debate on the "Future of EU substantive criminal law" launched by the Romanian Presidency in 2019, Member States stated that "further 'Lisbonisation' seems unnecessary." They underlined that, at this stage, the emphasis should be on ensuring the effectiveness and quality of implementation of *existing* EU legislation.⁴² Likewise, they saw no need to develop a common understanding of certain notions, such as "serious crime" and "minor cases." Nevertheless, Member States agreed that it may be appropriate to carry out an analysis of the necessity and advisability of establishing (further) minimum rules concerning the definition of criminal offences and sanctions in certain areas, including environmental crime, non-conviction based confiscation, manipulation of elections, identity theft, and crimes relating to artificial intelligence. This was deemed preferable to extending the scope of Art. 83(1) TFEU.

The prediction can thus be ventured that the harmonisation of substantive criminal law on the basis of Art. 83(2) TFEU will continue to make further progress, also in new areas not covered by previous framework decisions. The reticence of Member States as regards any harmonisation of concepts belonging to the "general part" of penal codes will inevitably lead to tension that can only be solved with a bolder approach. It is to be hoped that the Commission does not lose sight of this challenge.



Peter Jozsef Csonka

Head of Unit, General Criminal Law and Judicial Training, Directorate General for Justice and Consumers, European Commission



Dr. Oliver Landwehr

Legal and Policy Officer, Unit General Criminal Law and Judicial Training, Directorate General for Justice and Consumers, European Commission

* The views expressed in this article are those of the authors and do not necessarily reflect the official opinion of the European Commission.

1 On this "new era" in judicial cooperation in criminal matters, cf. e.g. F. Meyer, in: H. von der Gröben/J. Schwarze/A. Hatje (eds.), *Europäisches Unionsrecht*, 7th ed. 2015, Vor Art. 82–86 AEUV, mn. 21 et seq.

2 I.e. admissibility of evidence, rights of individuals in criminal procedure, and rights of victims of crime. According to a flexibility clause in Art. 82(2) (d) TFEU, harmonisation can also concern "any other specific aspects of criminal procedure" that have been identified by unanimous Council decision with consent of the European Parliament.

3 Interestingly, however, the Treaty establishing the European Atomic Energy Community contained from the beginning an obligation to criminally prosecute breaches of professional secrecy by an official, cf. Art. 194(1) of the Euratom Treaty.

4 On the history of EU criminal law, see also D. Flore/S. Bosly, *Droit Pénal Européen. Les enjeux d'une justice pénale européenne*, 2nd ed. 2014, pp. 25 et seq.

5 Convention drawn up on the basis of Art. K.3 of the Treaty on European Union, on the protection of the European Communities' financial interests (O.J. C 316, 27.11.1995, 49), the so-called "PIF Convention" (where PIF stands for the French term "protection des intérêts financiers").

6 ECJ, 21 September 1989, Case 68/88, *Commission v Hellenic Republic*, [1989] ECR 2965.

7 Directive (EU) 2017/1371 of the European Parliament and of the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law, O.J. L 198, 28.7.2017, 29–41. For an introduction into this Directive, see A. Juszczak and E. Sason, (2017) *euocrim*, 80.

8 Art. K.1 and K.3.

9 See the article by Lorenzo Salazar in this issue.

10 E.g.: Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of

instrumentalities and the proceeds of crime (2001/500/JHA); Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA); Council Framework Decision of 13 June 2002 on joint investigation teams (2002/465/JHA); Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the European Union of orders freezing property or evidence; Council Framework Decision 2005/212/JHA of 24 February 2005 on Confiscation of Crime-Related Proceeds, Instrumentalities and Property; Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders; Council Framework Decision 2009/315/JHA of 26 February 2009 on the organisation and content of the exchange of information extracted from the criminal record between Member States.

11 ECJ, 13 September 2005, Case C-176/03, *Commission v Council* (on the legal basis for Framework Decision 2003/80/JHA – Protection of the environment).

12 Art. 67(3) TFEU *in fine*.

13 As a consequence, nowadays there would be no legal basis to recast, as a directive, Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law (*O.J.* L 328, 6.12.2008, 55–58).

14 Cf. F. Meyer, in: H. von der Gröben/J. Schwarze/A. Hatje (eds.), *Europäisches Unionsrecht*, 7th ed. 2015, Art. 83 AEUV, mn. 47.

15 To address this issue, the European Anti-fraud Office (OLAF) was set up to exercise the Commission’s powers to carry out external administrative investigations for the purpose of strengthening the fight against fraud, corruption and any other illegal activity adversely affecting the Community’s financial interests, cf. Art. 2(1) of Commission Decision 1999/352 of 28 April 1999 establishing the European Anti-fraud Office (OLAF) (*O.J.* L 136, 31.5.1999, 20). Moreover, on the basis of Art. 86 TFEU, the European Public Prosecutor’s Office (EPPO) was established by Council Regulation (EU) 2017/1939 of 12 October 2017 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’) (*O.J.* L 283, 31.10.2017, 1).

16 This is the view clearly shared in the doctrine, cf. e.g. H. Spitzer/U. Stiegel, in: H. von der Gröben/J. Schwarze/A. Hatje (ed.), *Europäisches Unionsrecht*, 7th ed. 2015, Art. 325 AEUV, mn. 68, with further references. The opposing view will be discussed below in section III.3.

17 ECJ, *Commission v Council*, *op. cit.* n. 13.

18 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *O.J.* L 101, 15.4.2011, 1–11.

19 Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on combating the sexual abuse and sexual exploitation of children and child pornography, and replacing Council Framework Decision 2004/68/JHA, *O.J.* L 335, 17.12.2011, 1.

20 Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, *O.J.* L 218, 14.8.2013, 8–14.

21 Directive 2014/62/EU of the European Parliament and of the Council of 15 May 2014 on the protection of the euro and other currencies against counterfeiting by criminal law, and replacing Council Framework Decision 2000/383/JHA, *O.J.* L 151, 21.5.2014, 1.

22 Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA, *O.J.* L 88, 31.3.2017, 6.

23 Directive (EU) 2017/2103 of the European Parliament and of the Council of 15 November 2017 amending Council Framework Decision 2004/757/JHA in order to include new psychoactive substances in the

definition of ‘drug’ and repealing Council Decision 2005/387/JHA, *O.J.* L 305, 21.11.2017, 12.

24 Directive (EU) 2018/1673 of the European Parliament and of the Council of 23 October 2018 on combating money laundering by criminal law, *O.J.* L 284, 12.11.2018, 22–30.

25 Directive (EU) 2019/713 of the European Parliament and of the Council of 17 April 2019 on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA, *O.J.* L 123, 10.5.2019, 18–29.

26 Moreover, Directive 2014/42/EU of the European Parliament and of the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union (*O.J.* L 127, 29.4.2014, 39) was based both on Art. 82(2) and Art. 83(1) TFEU.

27 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, “Towards an EU Criminal Policy: Ensuring the effective implementation of EU policies through criminal law”, COM(2011) 573 final.

28 Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on criminal sanctions for market abuse (market abuse directive), *O.J.* L 173, 12.6.2014, 179.

29 *Op. cit.* n. 7.

30 In addition, there are the two directives on environmental crime and ship-source pollution that were adopted prior to the Lisbon Treaty on the basis of Art. 175 EC and Art. 80(2) EC, respectively, following the judgment of the ECJ (cf. n. 11 above): Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law; and Directive 2009/123/EC of the European Parliament and of the Council of 21 October 2009 amending Directive 2005/35/EC on ship-source pollution and on the introduction of penalties for infringements.

31 Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (market abuse regulation), *O.J.* L 173, 12.6.2014, 1.

32 Proposal for a Directive of the European Parliament and of the Council on the fight against fraud to the Union’s financial interests by means of criminal law, COM(2012) 363 final.

33 Cf., *inter alia*, ECJ, Case C-300/89, *Commission v Council* (‘Titanium dioxide’), para. 10, and Case C336/00, *Huber*, para. 30.

34 ECJ, *Commission v Council*, *op. cit.* n. 11, para. 51.

35 Given the nature of the offences, victims can sometimes technically become accomplices in criminal activities, which they have been compelled to commit, cf. Art. 14 of Directive 2011/92, *op. cit.* n. 19.

36 H. Satzger, “The Harmonisation of Criminal Sanctions in the European Union – A New Approach”, (2019) *eu crim*, 115.

37 *Op. cit.* n. 27.

38 Above all, the UN Convention against Corruption (UNCAC) and the UN Convention on Transnational Organised Crime (UNTOC).

39 E.g.: Council Framework Decision 2003/568/JHA of 22 July 2003 on combating corruption in the private sector, *O.J.* L 192, 31.7.2003, 54.

40 Ursula von der Leyen, “A Union that strives for more: My agenda for Europe, Political guidelines of the Commission 2019–2024”, available at: <https://ec.europa.eu/commission/sites/beta-political/files/political-guidelines-next-commission_en.pdf> accessed 16 January 2020.

41 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, *O.J.* L 315, 14.11.2012, 57.

42 See Council doc. 7945/19 of 11 April 2019, p. 7. For the debate in the Council, see also T. Wahl, “Future of EU Substantive Criminal Law”, (2019) *eu crim*, 85.

OLAF – 20 Years of Protecting the Financial Interests of the EU

Margarete Hofmann and Stanislav Stoykov*

In 2019, the European Anti-Fraud Office (OLAF) celebrated 20 years of existence. From today's perspective, the Office could be qualified as one of the most recognisable Directorates-General of the European Commission. This is due to its unique powers, experience and the results achieved over the past twenty years. OLAF's main mission is to investigate fraud against the EU budget, as well as serious misconduct within the European institutions, and to develop anti-fraud policy for the European Commission. For the time being, OLAF has concluded more than 5000 cases and recommended several billion euro be returned to the EU budget. In 2018 alone, OLAF opened 219 investigations after analysing incoming information in 1259 selections. It concluded 167 investigations, which led to OLAF issuing 256 recommendations to competent authorities at EU and national level. This article focuses on the processes that led to the establishment of OLAF, the results that the Office has achieved so far and the new challenges the Office will face in the near future, such as cooperation with the European Public Prosecutor's Office and new priorities for its investigative activities.

I. Introduction

For the last 20 years, the European Anti-Fraud Office (OLAF) has been at the forefront of fighting fraud and protecting the financial interests of the European Union. With an annual budget of nearly €158 billion,¹ the EU must make enormous effort to ensure that the funds are spent correctly and that there are no abuses to the detriment of the European taxpayer.

OLAF has a specific position within the Commission. As a Commission service, OLAF is in charge of developing policy and legislation in the area of preventing fraud and protecting the Union's financial interests under the political guidance of Commissioner *Johannes Hahn*. As an independent body under the leadership of its Director-General *Ville Itälä*, OLAF conducts investigations in cases of fraud, corruption, and other illegal activities affecting the Union budget. In order to guarantee impartiality, OLAF enjoys financial and functional independence when exercising its investigative mandate. With a long record of successful investigations, OLAF could be qualified as one of the most recognisable Directorates-General of the European Commission. This is due to OLAF dealing with such sensitive problems of modern society, such as corruption and misuse of taxpayers' money. With its powers to conduct independent administrative investigations – both in the Member States and within the European institutions, bodies, offices, and agencies – OLAF is an effective partner for national administrative and law enforcement authorities and for the Union's institutions and bodies.

II. The Establishment of OLAF

The first European anti-fraud body UCLAF² was created in 1987 as part of the Secretariat-General of the European Commission. It worked alongside national anti-fraud departments and provided the coordination and assistance needed to tackle transnational organised fraud. UCLAF did not have a Regulation for its activities but relied on general rules such as Art. 280 of the Treaty establishing the European Community,³ Council Regulation 2988/1995,⁴ and Regulation 2185/1996⁵ concerning on-the-spot checks and inspections carried out by the Commission.

From 1995 to 1999, the former Prime Minister of Luxembourg, *Jacques Santer*, headed the European Commission. Despite his firm position on strong financial stability (with the adoption of the Convention on the Protection of European Communities' financial interests⁶ and its protocols), allegations of corruption led to the resignation of the Santer Commission on 15 March 1999. The reason for the resignation was a report⁷ on improving the financial management of the European Commission drawn up by a Committee of Independent Experts, convened by the European Parliament. The Committee found that the current legal framework for combating fraud against the financial interests of the European Communities was incoherent and incomplete. According to the report, the existing framework "(i) fails to recognise and accommodate the true nature of UCLAF, (ii) leaves the legal instruments for investigation, prosecution and punishment of fraud ineffective and (iii) fails to provide sufficient guarantees of individual liberties."

In October 1999, the European Parliament and the Council adopted Regulation 1073/1999⁸ which transformed UCLAF into the European Anti-Fraud Office (OLAF), with a hybrid nature as an investigative office and policy service of the Commission as we know it today. OLAF received more powers⁹ and independence in the conduct of investigations. Internal investigations into Union institutions and bodies also became part of OLAF's mandate.

The Commission set up OLAF to carry out administrative investigations concerning fraud, corruption, and any other illegal activities affecting the EU's financial interests and to help Member States fight fraud. According to its legal framework, OLAF investigates the following matters:

- All areas of EU expenditure (the main spending categories are structural funds, agricultural and rural development funds, direct expenditure, and external aid);
- EU revenue, in particular customs and illicit trade in tobacco products and counterfeit goods;
- Suspicions of serious misconduct by EU staff and members of the EU's institutions.

In accordance with its administrative mandate, OLAF investigates non-fraudulent irregularities as well as criminal behaviour in the Member States (external investigations) and within the European institutions, bodies, offices, and agencies (internal investigations). It plays a significant role in the fight against fraud, corruption, and other illegal activities through its investigations aimed at enabling financial recoveries, disciplinary and administrative action, and prosecutions and indictments.

III. OLAF's Achievements

OLAF is entrusted with the protection of the European budget, both on the expenditure side and on the revenue side. In a wider sense, OLAF contributes to the fulfilment of the EU being a safer place. For the last 20 years, OLAF has solved more than 5000 cases and recommended that several billion euro be returned to the EU budget. In 2018, for instance, OLAF opened 219 investigations after analysing incoming information in 1259 selections. It concluded 167 investigations, which led to OLAF issuing 256 recommendations to competent authorities at EU and national level. As a result of the investigations concluded in 2018, OLAF recommended the recovery of €371 million to the EU budget.¹⁰ Years of experience and a team of highly qualified investigators, forensic experts, and analysts put the Office in the unique position of identifying fraud patterns and efficiently investigating the most intricate and complex cases. Furthermore, as OLAF's primary goal is to ensure that no EU funds are lost to fraud, OLAF experts go to

great lengths to trace defrauded funds, which are often hidden in third countries. In order to solve these complex transnational fraud cases and trace the proceeds of fraud, OLAF works together with national (administrative, law-enforcement and judicial) and international authorities (notably Eurojust, Europol, Interpol). These authorities recognise OLAF as a trusted partner with unique expertise in managing cases of fraud and corruption with EU funds, and ensuring that the EU budget is well protected. OLAF has also a unique investigative mandate to combat tobacco smuggling into the EU which causes huge revenue losses to the budgets of the EU and of the Member States. In complex cross-border cases in particular, OLAF brings significant added value by helping coordinate anti-smuggling operations carried out by customs and law-enforcement agencies across Europe and beyond. In addition to its investigations concerning cases of revenue fraud, OLAF coordinates large-scale Joint Customs Operations (JCOs) involving EU and international operational partners.

The Volkswagen case¹¹ and the UK undervaluation case¹² can be mentioned as examples of OLAF investigations. In the Volkswagen case, the company used a EUR 400 million loan from the European Investment Bank (EIB) to develop a new diesel engine with lower emissions. In reality, the new engine employed the so-called defeat device, which made it possible to reduce emissions during official tests only and not when the car was on the road. Following OLAF's recommendation, the EIB and Volkswagen agreed that Volkswagen would not benefit from EIB funding for several years. Volkswagen also undertook to pay €10 million for EU environmental projects. In the UK undervaluation fraud case, fraudsters made a profit by falsely declaring low values for goods imported into the EU from China. Thanks to OLAF actions, it was established that the EU budgets has suffered losses of €2.7 billion in customs duties.

In addition to its external activities, OLAF also has a unique mandate to carry out internal investigations into the EU institutions, bodies, offices and agencies for the purpose of fighting fraud, corruption and any other illegal activity affecting the financial interests of the Union. The Office investigates serious matters relating to the discharge of professional duties constituting a dereliction of the obligations of EU officials liable to result in disciplinary or criminal proceedings, or an equivalent failure to discharge obligations on the part of Members of institutions and bodies. As an example, in 2018 OLAF investigated serious irregularities in an EU Agency. The allegations referred to irregularities in procurement procedures and to alleged mismanagement of financial and human resources. OLAF investigators looked into specific cases of procurement where exception procedures were used despite the fact that the conditions for their use were not met. OLAF established

that the Executive Director of the Agency failed to ensure that specific procurement procedures were conducted in line with the principles of sound financial management, open competition and transparency. In light of the OLAF investigation the Executive Director resigned from his position. OLAF recommended the recovery of a substantial amount from the Executive Director and invited the Agency to determine other specific amounts resulting from unjustified expenditure.¹³

IV. OLAF in the Changing Institutional Landscape

The European Public Prosecutor's Office (EPPO) is becoming a reality¹⁴ – not yet operational but with an existing legal framework¹⁵ and a Chief European Prosecutor, *Laura Codruta Kővesi*, already appointed. By the end of 2020, when the new body is to become operational, the EU anti-fraud landscape will be different. The establishment of the EPPO is a significant step in strengthening the protection of the EU budget by means of criminal law, which also raises the question of OLAF's role in the future. The ongoing revision¹⁶ of the OLAF Regulation 883/2013 should create the grounds for efficient and effective cooperation between OLAF and the EPPO. With its proposal, the Commission advocates maintaining a strong OLAF alongside the EPPO, so that all available means are used to protect the financial interests of the EU.

OLAF intends to be a key operational partner for the EPPO from day one. OLAF will put at the disposal of the EPPO its 20 years of experience in the fight against fraud: it will identify cases and report them to the EPPO; support the EPPO in investigations with expertise and operational and analytical tools; and conduct complementary activities to ensure an administrative response to fraud, e.g., the preparation of speedy financial recovery or the taking of measures to protect the budget from further harm. Moreover, where the EPPO is not acting, notably in Member States not participating in the EPPO, OLAF will continue working as it does today.

In view of this continued and central role in the protection of the Union's financial interests, the second objective of the revision of Regulation 883/2013 is to better equip OLAF with investigative tools in order to enhance the effectiveness of OLAF's investigative function. In this regard, the proposal contains a number of targeted changes regarding access to bank account information, on-the-spot-checks and inspections, and VAT fraud. The amendments aim to clarify OLAF's legal framework and would allow it to operate in an effective and more coherent manner in all its investigations.

To ensure both a seamless transition to the new institutional framework and effective cooperation between OLAF and the

EPPO, the amended regulation should be in force by the time the EPPO becomes operational, i.e., the end of 2020.

V. OLAF in the Future

OLAF operates in a challenging, fast-paced environment. The nature of fraud has changed significantly in recent years and keeps shifting in line with a more digitised world, in which trade and activities of criminal groups are increasingly international. OLAF needs to be up to these challenges to be able to deal effectively with the trans-border dimension of fraud.

As part of the European Commission, while being independent in its investigative activities, OLAF is committed to also supporting the priorities of the European Commission. One of them – protecting the environment and combating climate change – is a recognised need for all European citizens. OLAF is already prioritising cases with an environmental dimension given the increased awareness of environmental fraud and its impact on the attainment of environmental objectives and the health and safety of EU citizens. By its participation in major operations using its coordination competence, OLAF is developing knowledge into environmental fraud and achieving successful results. Acting within the limits of its mandate, OLAF has also concluded successful cases involving food, in particular in situations where fraudsters have attempted to import fake or harmful goods into the EU. OLAF will continue to step up its efforts to discover fake and unsafe products, unhealthy food stuff, and illegal operations damaging the environment.

Based on its long-standing experience and expertise in combating fraud, OLAF has also become a knowledge centre on anti-fraud matters and will further enhance this role. The new Commission Anti-Fraud Strategy (CAFS) from April 2019¹⁷ aims to improve the collection and analysis of fraud-related data both at EU level and in the Member States, and reinforce anti-fraud governance across the Commission. The Strategy focuses on improving the quality and completeness of relevant information through connecting different data sources and creating smarter tools to draw operational conclusions. OLAF is leading the implementation of the CAFS and works closely with all Commission services to put in place a wide range of anti-fraud actions, such as tailor-made anti-fraud strategies based on effective fraud risk analysis. This is an important step in the preparation for a new generation of spending programmes in the Multiannual Financial Framework (MFF) 2021–2027.

For 20 years, OLAF has done a great deal to protect the financial interests of the European Union. Strengthening OLAF's legislative framework, alongside the establishment of the

EPPO and above all the close cooperation with all its partners – the Member States and EU institutions as well as Eurojust, Europol, Interpol, and other international agencies – is essential to ensure that the scope of investigations is comprehensive and that the new anti-fraud institutional landscape is effective and functioning smoothly. OLAF will continue using modern technological tools and enhanced operational and strategic

analysis, both for its investigative work and fraud prevention purposes.

This demonstrates that OLAF is fully prepared to meet all new challenges and public expectations, strongly stating that the EU's financial interests will continue to be protected in the best possible way.

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

1 EU budget in 2017 Total: €157.9 billion; Source – European Commission: https://europa.eu/european-union/about-eu/eu-budget/expenditure_en

2 **Unité de Coordination de la Lutte Anti-Fraude (UCLAF).**

3 Treaty establishing the European Community, *O.J. C* 340, 10.11.1997.

4 Council Regulation (EC, EURATOM) No 2988/95 of 18 December 1995 on the protection of the European Communities financial interests, *O.J. L* 312, 23.12.1995, 1.

5 Regulation 2185/1996 concerning on-the-spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities, *O.J. L* 292, 15.11.1996, 2.

6 Council Act of 26 July 1995 drawing up the Convention on the protection of the European Communities' financial interests (*O.J. C* 316, 27.11.1995, 48). The Convention is no longer in force; it was repealed by 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. For the Directive, see the article by A. Juszczak/E. Sason, (2017) *eu crim*, 80.

7 Available at: https://ec.europa.eu/anti-fraud/sites/antifraud/files/docs/body/rep_sages_2_en.pdf.

8 Regulation (EC) No 1073/1999 of the European Parliament and of the Council of 25 May 1999 concerning investigations conducted by the European Anti-Fraud Office (OLAF), *O.J. L* 136, 31/05/1999 P. 0001-0007

9 OLAF's investigative mandate for the protection of the EU's financial interests was initially laid down in Regulations 1073/1999 and 1074/1999. Following Commission proposals in 2004, 2006, and 2011, Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (*O.J. L* 248, 18.9.2013, 1) was adopted and replaced the regulations from 1999.

10 See OLAF 2018 Annual report, p. 12, https://ec.europa.eu/anti-fraud/sites/antifraud/files/olaf_report_2018_en.pdf.

11 EIB Press release: <https://www.eib.org/attachments/press/summary-olaf-report-antrieb-rdi-volkswagen-ag.pdf>.

12 European Commission, Press release: https://ec.europa.eu/commision/presscorner/detail/en/IP_18_5807.

13 See OLAF 2018 Annual report, p. 23–24

14 The 1999 Report on improving the financial management (see n. 7)

Margarete Hofmann

Director, Directorate D, European Anti-Fraud Office (OLAF)



Stanislav Stoykov

Prosecutor from the Prosecutor's Office of the Republic of Bulgaria, Seconded National Expert to the European Anti-Fraud Office (OLAF)



recommended the establishment of the European Prosecutor (Recommendation 59) in three stages: (i) appointment of an independent European Public Prosecutor (EPP); (ii) creation of a national Prosecution Office for European Offences (POEO) in each Member State, and (iii) creation of a single, indivisible European Prosecution Office (EPO) on the basis of the EPP and POEOs.

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

16 Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations, COM(2018) 338 final.

17 Commission Anti-Fraud Strategy: enhanced action to protect the EU budget https://ec.europa.eu/anti-fraud/sites/antifraud/files/2019_mission_anti_fraud_strategy_en.pdf

The European Public Prosecutor's Office (EPPO)

Past, Present, and Future

Francesco De Angelis

This article first gives a brief historic overview of the long road to the establishment of the European Public Prosecutor's Office (EPPO), starting with the first ideas at the meeting of the Presidents of the European Criminal Law Associations in 1995 and worked out in more detail in the Corpus Juris drafts in 1997 and 1999. The driving force was ultimately the instalment of a legal basis in the 2007 Lisbon Treaty, which paved the way for the 2013 Commission legislative proposal and the final Council decision on the Regulation establishing the EPPO by means of enhanced cooperation in 2017. The article also argues that objections to the established scheme – especially those raised by the non-participating countries and national parliaments during negotiation of the Commission proposal – should not be ignored. These objections mainly refer to infringements of the principles of subsidiarity and proportionality. According to the author, the arguments against subsidiarity are unfounded; however, the question remains as to whether the proportionality principle has been upheld, considering the limitation of the EPPO to prosecute PIF offences only. In order to reconcile with proportionality, the author advocates extending the EPPO's competence to environmental crime. He draws several parallels to the situation involving PIF and calls on politicians, civil society organisations, and legal experts to think about the inclusion of crimes against the environment into EPPO's portfolio.

I. Introduction

“Eppur si muove! The Earth revolves around the sun and law also moves on!” With these words, Prof. Mireille Delmas-Marty introduced the 1999 Corpus Juris “Florence proposal.”¹ Who would have thought that, in a gloomy atmosphere of continuously alleged crisis and invoked European disillusion, the European Union would create a new jurisdictional central body: the European Public Prosecutor's Office (EPPO)? Of course, after the Corpus Juris group of eminent European experts proposed it in 1997, we waited in expectation for another 20 years. In this case, *“perseverare”* was not *“diabolicum.”*

Indeed, as stated by Commissioners Guenter H. Oettinger and Véra Jourovà in the Guest Editorial for eucrim 3/2017, the European Public Prosecutor's Office established by Council Regulation (EU) 2017/1939² by means of enhanced cooperation will become an essential part of the existing legal architecture for the protection of the Union's financial interests (PIF). The new body was initially supported by 20 EU Member States;³ the Netherlands and Malta joined the enhanced cooperation scheme in 2018.⁴ The EPPO will be responsible for investigating, prosecuting, and bringing to judgement the perpetrators of criminal offences affecting the financial interests of the European Union as provided for in Directive (EU) 2017/1371 of the European Parliament and the Council of 5 July 2017 on the fight against fraud to the Union's financial interests by means of criminal law – the “PIF Directive.”⁵

The main characteristic of the EPPO as agreed by the Council in 2017 is its structure, consisting of both a central and a decentral level. The central level (with an office in Luxembourg) comprises the European Chief Prosecutor and European Prosecutors, forming the EPPO College. Their operational work is organised in Permanent Chambers that will direct and supervise the European Delegated Prosecutors (EDPs) located in the participating Member States. They are the main actors when investigating, prosecuting, and bringing the EPPO's cases to judgment before the competent national courts. The EPPO is intended to be an effective European response to the fragmentation and heterogeneity of the EU's judicial and prosecutorial space in the PIF area.

II. Genesis of the EPPO

In 1995, the Presidents of the European Criminal Law Associations convened at Urbino University (Italy) to celebrate, in a solemn ceremony, the award of the “Laurea Honoris Causa in scienze politiche” to Mrs. Diemut Theato, at the time acting president of the budgetary control committee of the European Parliament. At the (subsequent) Presidents' meeting, the idea of a European legal area for the protection of the financial interests of the European Communities was launched. To this end, the European Commission's General Directorate for financial control entrusted a group of experts (under the direction of Prof. Mireille Delmas-Marty) with the task of elaborat-

ing guiding principles in relation to the criminal law protection of the Union's financial interests within the framework of a single European legal area. The group delivered its project report in 1997. It became well-known under the title "Corpus Juris (introducing penal provisions for the purpose of the financial interests of the European Union)."⁶ The Corpus Juris maintains the traditional distinction between criminal law (special and general parts) and criminal procedure. Whereas the first 17 Articles are dedicated to substantive criminal law issues, Articles 18 to 35 contain principles of and rules on criminal procedure, including the proposal for creation of a European public prosecutor. The Corpus Juris was intended to apply across the entire territory of EU Member States. However, the Corpus Juris also included a subsidiarity clause, making national law applicable where there is a lacuna in the Corpus. It focused on the procedure before trial, the latter being left to the national judiciary, with the European public prosecutor present during the trial stage in order to ensure continuity of the proceedings and equality of treatment among those being judged, in spite of the differences between national systems.

The Corpus Juris 2000 ("Florence proposal") is a follow-up to the 1997 project, with the aim of analysing the feasibility of the Corpus Juris in relation to the legislations of the Member States. The report encompasses four volumes, including a final synthesis with a revised version of the Corpus Juris. This revised version maintains the original structure with the 35 articles. Another follow-up study was concluded in 2003: the study on "Penal and Administrative Sanctions, Settlement, Whistleblowing and Corpus Juris in the Candidate Countries," coordinated by the Academy of European Law (ERA), with Prof. *Christine Van den Wyngaert* as scientific coordinator. It scrutinized the potential reception of the Corpus Juris in the legal systems of the Central and Eastern European candidate countries.⁷

In December 2001, the Commission took a further important step towards the creation of the European Public Prosecutor in its Green Paper on criminal-law protection of the financial interests of the Community and the establishment of a European Public Prosecutor.⁸ The Green Paper sought practical solutions in implementing the ambitious and innovative European Public Prosecutor project. The Commission notes that the authors of the Corpus Juris proposed a high level of harmonisation of the substantive criminal law, but considers that such harmonisation must be proportionate to the specific objective of the criminal protection of the Community financial interests. The debate is restricted to the minimum requirement for the European Public Prosecutor to be able to operate effectively.

The Corpus Juris and, in particular, the subsequent shaping of the EPPO has been prevalent for many years and has been fre-

quently discussed in the European Parliament and in the Members States by national parliaments, government officials, and academics. It even generated great interest among academics in Latin America and in China and was used as model for the revision of penal codes in Central and Eastern European countries before their accession to the European Union.

III. The Path to the Final Decision

1. The legal basis in the Lisbon Treaty and the 2013 Commission proposal

After the European Council had rejected taking up the European Public Prosecutor concept into the Nice Treaty, the reform of the EU treaties in 2007 provided for the long sought after legal basis for the EPPO. According to Art. 86 TFEU (introduced by the Lisbon Treaty), the Council – by a unanimous decision after obtaining the consent of the European Parliament – may establish the European Public Prosecutor's Office "from Eurojust." It also allows for the initiative of a group of at least nine Member States to seek a Council decision and to establish the EPPO by way of enhanced cooperation. Although controversy on the necessity of an EPPO emerged after entry into force of the Lisbon Treaty on 1 December 2009, the Commission remained committed to the EPPO project and carried out further preparatory work, including expert workshops, stakeholder consultations, and the commission of further scientific studies.⁹ The latter included, for instance, the EuroNEEDS study by the Max Planck Institute for Foreign and International Criminal Law that explored the potential benefits to be gained from a European Public Prosecutor.¹⁰ It also included the project carried out by the University of Luxembourg, under the direction of Prof. *Katalin Ligeti*, which developed model procedural rules for the European public prosecutor.¹¹ The Commission finally presented its proposal for a regulation setting up the European Public Prosecutor's Office in July 2013.¹² It designed the EPPO as an independent Union body with competence to direct, coordinate, and supervise criminal investigations and to prosecute suspects in national courts in accordance with a common prosecution policy. As for the definition of criminal offences affecting the financial interests of the Union, the EPPO proposal simply referred to the solutions of the proposed PIF directive.¹³

2. The 2017 Council Decision

The text adopted by the Council in Regulation 2017/1939 is far from the Commission proposal, the monocratic model having been transformed into a rather complex structure. One cannot help observing that the driving principle of the Union

legislator was that “all national legal systems and traditions of the Member States be represented in the EPPO.” The Member States’ intention was to keep the EPPO functioning under strict scrutiny while maintaining the national judiciary under their guidance. The entire criminal investigative operation remains with the national enforcement authorities. Nevertheless, the EPPO concept was saved, even if it is associated with complex conceptual and operational mechanisms. The EPPO will become operational by the end of 2020.

We should bear in mind, however, that the EPPO has not met the agreement of all EU Member States. Next to Denmark, Ireland, and the United Kingdom with their special position of participation in legislation in the area of freedom, security, and justice, Sweden, Poland and Hungary are still opposing the new supranational body. Not to forget that parliaments from 12 Member States voiced concerns within the so-called yellow card procedure following the Commission proposal. In essence, the main objections put forward were the breach of the subsidiarity and proportionality principles (Art. 5 TEU). The following section briefly comments on these arguments and explores whether these objections are justified.

a) Subsidiarity

Since the end of the 1980s and the early 1990s, the Commission established a number of on-the-spot contacts with the judiciary in the Member States. These missions have repeatedly made evident that the treatment of files concerning cases of fraud against the financial interests of the EU budget was not considered a priority by the national public prosecutors. The reasons invoked were the complexity of European legislation, poor assistance from the national departments managing EU funds, difficulties cooperating with colleagues in other Member States in cases of transnational fraud, “Brussels being far away,” etc. This situation has not fundamentally changed after almost three decades! European money is still considered “*res nullius*” instead of “*res omnium*”. National prosecutors tend not to give the same level of priority to cases of damage to EU interests as to cases where national interests are concerned. The greater difficulty of investigating European fraud cases, low public interest, the length of time involved, and the low probability of a successful outcome are still invoked. This leads to a very poor conviction rate in the Member States.

Within its competence, only a centralised body like the EPPO will be able to systematically follow up cases until they are brought to court. As a result, the number of convictions and amounts of money recovered will increase. The deterrent effect for potential fraudsters must not be ignored. In conclusion, we can assert that the principle of subsidiarity has not been infringed, since the objectives of the treaties in the area of EU

fraud cannot be sufficiently achieved by Member States alone, and that the proposed action is better implemented at Union level.

b) Proportionality

The composition of the European budget has fundamentally changed since the 1990s when the project of a European financial public prosecution service was launched. At that time, around 70% of the EU budget went to agriculture. One third of this amount was for export refunds to third countries and agriculture levies cashed for imports on the revenues side. Large-scale fraud was perpetrated, which had very sophisticated transnational dimensions (carousels). Coordination and cooperation among national investigation services, the police, and public prosecutors were indispensable. Estimates of the financial impact of fraud indicated a figure at 10% of the budget. On the basis of several common agriculture policy reforms, direct aid to farmers and market-related expenditures constitute the bulk of the common agricultural policy (CAP) budget, which nowadays amounts to less than one third of the general budget. From official Commission documents, it transpires that the true dimension of defrauded EU money today would no longer justify proposing such a sophisticated body as the EPPO. The new competences deriving from the PIF Directive apparently lead to the same conclusion. Indeed, VAT fraud will come within EPPO’s competence if it is connected with the territory of two or more Member States and the total damage is at least €10 million. Member States will continue to keep the leading role in this area, however, meaning that the EPPO’s field of action is limited.

IV. New Competences for the EPPO?

The question then arises as to whether the creation of the EPPO exceeds what is necessary to achieve the objectives of the treaties if its competences remain confined to the protection of the EU budget. Respect for the proportionality principle could be specifically questioned, since that which is foreseen is a complex and cost-intensive machinery, far removed from the pellucid quality of the *Corpus Juris* and the simplicity of the 2013 Commission proposal. New tasks for the EPPO therefore seem advisable to corroborate the creation of a new European body. Arguably, the protection of the environment would be an appropriate area of extension.

EU environmental law represents a relevant corpus of detailed norms and constitutes an extraordinary laboratory of European integration. Conceived in the absence of a legal basis, the action of the European institutions currently covers an almost complete legal space. It is an imponent, complex, and chal-

lenging legislation. The term environment refers to the entire spectrum of natural and artificial elements surrounding life. Environmental law means legislation aiming at fighting air pollution, waste proliferation, water pollution, and climate change, and it contributes to the protection of biodiversity. Current EU legislation also enables environmental democracy and the repartition of responsibilities in case of damage. In the beginning, it was an anthropocentric concept, but now it protects the environment *per se*. EU legislation is composed of more than 700 legal acts, both sectoral and transversal. It interacts permanently with national and international laws. It is a catalyst for the development of national and international norms.

As in the PIF area, environmental crimes are mainly punished within the framework of national legislations. In the light of the jurisprudence of the European Court of Justice, EU Directive 2008/99/EC on the protection of the environment through criminal law¹⁴ and EU Directive 2009/123/EC on ship-source pollution¹⁵ have attempted to introduce criminal law harmonisation. Another parallel to the PIF area is that the EU legislator has – one must say, regrettably – confined itself to minimalist intervention. Environmental crimes are usually serious offences and are often forms of transnational crime perpetrated by networks operating across the 28 national jurisdictions whose legal and operational instruments vary from one EU Member State to the other. Europol and Eurojust are hampered by their limited powers; there is no European office like OLAF (the European Anti-Fraud Office) operating in this field. As in the PIF area, environmental crimes do not seem to be a priority for national law enforcement authorities. And as with PIF crimes, crimes against nature seem victimless. The time is ripe to launch a campaign to extend the competences of the EPPO to the protection of the environment, as far as the EU territory is concerned, and to consider cooperation with international law enforcement authorities. The environment, like the budget, can be considered a “European good.” Undoubtedly, environmental crimes would fit into the list of crimes enumerated in Art. 83 TFEU as an area of potential competence for the EPPO.

In his State of the Union address on 12 September 2018, Commission President *Jean-Claude Juncker* announced that the European Commission was proposing, that very day, to extend the responsibilities of the newly established EPPO to include the fight against terrorist offences affecting more than one Member State.¹⁶ With a view to the Sibiu Summit in May 2019, the Commission invited the European Council to take this initiative forward together with the European Parliament. The Commission’s proposal to extend the competence of the EPPO is highly welcome, because it will address the concerns voiced over the principle of proportionality.

At the same time, the initiative is a unique opportunity to extend the scope of the debate to include the protection of the environment. Indeed, there is broad conviction in specialised circles that environmental crime should reasonably be considered among the sectors favoured for a future extension of the material scope of the EPPO, because of its very nature and, above all, the relevance of environmental protection in EU policies. The European Court of Justice considers the environment an essential subject of general interest to the European Union, an essential objective of the European order. Moreover, academics are of the opinion that, in concrete cases, when an environmental crime results in being linked with a PIF crime, the EPPO is already competent for investigation, prosecuting, and bringing to justice the suspected criminals involved.

V. Conclusions

The Commission’s initiative to extend the EPPO’s competences to terrorism should be seized to launch a campaign to add environmental crime to the EPPO’s portfolio. Such a debate should be conducted among all stakeholders, at both the political and legal expert levels, in close cooperation with the DGs Justice and Environment, and with the support of the European Criminal Law Associations. Since the subject of the extension was not treated at the Sibiu summit in May 2019, time is of essence to convince all stakeholders of the necessity to act!

The initiative could be linked to the ongoing debates inside the United Nation institutions on the initiatives of European and international civil society on the crime of ecocide. This concept refers to the destructive impact of humanity on its own natural environment and to the massive damage to and destruction of ecosystems. This initiative should also include adding this crime to the Statute of Rome, as a consequence of which the International Criminal Court would be entitled to prosecute.

Francesco De Angelis
Lawyer



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*, Intersentia 2000, p. 7.

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

3 The original participating Member States are: Austria, Belgium,

Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Slovakia, Slovenia, and Spain.

4 Cf. T. Wahl, “Netherlands and Malta Join EPPO”, [\(2018\) eucrim, 85](#).

5 O.J. L 198, 28.07.2017, 29. For an overview of the Directive, see A. Juszcak and E. Sason, “The Directive on the Fight against Fraud to the Union’s Financial Interests by Means of Criminal Law (PFI Directive)”, [\(2017\) eucrim, 80 et seq.](#)

6 Ed. Economica Paris, 1997.

7 P. Cullen (ed.), *Enlarging the Fight against Fraud in the European Union: Penal and Administrative Sanctions, Settlement, Whistleblowing and Corpus Juris in the Candidate Countries*, Bundesanzeiger-Verlag 2004.

8 COM(2001) 715 final.

9 L. Kuhl, “The European Public Prosecutor’s Office – More Effective, Equivalent and Independent Criminal Prosecution against Fraud”, [\(2017\) eucrim, 135](#).

10 Cf. M. Wade, “A European public prosecutor: potential and pitfalls”, (2013) 59 *Crime Law Soc Change*, 439.

11 Cf. K. Ligeti (ed.), *Toward a Prosecutor for the European Union, Vol. 1. A comparative analysis*, Hart Publishing 2013.

12 COM(2013) 534 final.

13 COM(2012) 363 final.

14 O.J. L 328, 6.12.2008, 28.

15 O.J. L 280, 27.10.2009, 52.

16 Cf. T. Wahl, “COM Communication Extending EPPO Competence” [\(2018\) eucrim, 86](#).

Imprint

Impressum

Published by:

**Max Planck Society for the Advancement of Science
c/o Max Planck Institute for Foreign and International
Criminal Law**

represented by Director Prof. Dr. Dr. h.c. mult. Ulrich Sieber
Guenterstalstrasse 73, 79100 Freiburg i.Br./Germany

Tel: +49 (0)761 7081-0
Fax: +49 (0)761 7081-294
E-mail: u.sieber@mpicc.de



Internet: <http://www.mpicc.de>

Official Registration Number:
VR 13378 Nz (Amtsgericht
Berlin Charlottenburg)
VAT Number: DE 129517720
ISSN: 1862-6947

Editor in Chief: Prof. Dr. Dr. h.c. mult. Ulrich Sieber
Managing Editor: Thomas Wahl, Max Planck Institute for
Foreign and International Criminal Law, Freiburg
Editors: Dr. András Csúri, Utrecht University; Cornelia Riehle, ERA,
Trier

Editorial Board: Peter Csonka, Head of Unit, DG Justice and Con-
sumers, European Commission Belgium; Francesco De Angelis,
Directeur Général Honoraire, Commission Européenne Belgique;
Prof. Dr. Katalin Ligeti, Université du Luxembourg; Lorenzo Sala-
zar, Ministero della Giustizia, Italia; Prof. Rosaria Sicurella, Uni-
versità degli Studi di Catania, Italia

Language Consultant: Indira Tie, Certified Translator, Max Planck
Institute for Foreign and International Criminal Law, Freiburg

Typeset: Ines Hofmann, Max Planck Institute for Foreign
and International Criminal Law, Freiburg

Produced in Cooperation with: Vereinigung für Europäisches
Strafrecht e.V. (represented by Prof. Dr. Dr. h.c. mult. Ulrich Sieber)

Layout: JUSTMEDIA DESIGN, Cologne

Printed by: Stückerle Druck und Verlag, Ettenheim/Germany

**The publication is co-financed by the
European Commission, European
Anti-Fraud Office (OLAF), Brussels**



© Max Planck Institute for Foreign and International Criminal Law
2020. All rights reserved: no part of this publication may be repro-
duced, stored in a retrieval system, or transmitted in any form or by
any means, electronic, mechanical photocopying, recording, or oth-
erwise without the prior written permission of the publishers.

The views expressed in the material contained in eucrim are not nec-
essarily those of the editors, the editorial board, the publisher, the
Commission or other contributors. Sole responsibility lies with the
author of the contribution. The publisher and the Commission are not
responsible for any use that may be made of the information con-
tained therein.

Subscription:

eucrim is published four times per year and distributed electroni-
cally for free.

In order to receive issues of the periodical on a regular basis,
please write an e-mail to:

eucrim-subscribe@mpicc.de.

For cancellations of the subscription, please write an e-mail to:

eucrim-unsubscribe@mpicc.de.

For further information, please contact:

Thomas Wahl
Max Planck Institute for Foreign and International Criminal Law
Guenterstalstrasse 73,
79100 Freiburg i.Br./Germany
Tel: +49(0)761-7081-256 or +49(0)761-7081-0 (central unit)
Fax: +49(0)761-7081-294
E-mail: t.wahl@mpicc.de

