



Focus: Rebalancing Effectiveness and Fundamental Rights

Dossier particulier: Rééquilibrage entre efficacité et droits fondamentaux

Schwerpunktthema: Neugewichtung von Effektivität und Grundrechten

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The Commission Proposal Amending the OLAF Regulation

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

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Imprint

* The news contain internet links referring to more detailed information. As from 2018, these links are being embedded into the news text. They can be easily accessed by clicking on the underlined text in the online version of the journal. If a 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,

Since the launch of the project to establish a European Public Prosecutor's Office, concerns have continuously been voiced over the standard of protection of fundamental rights in criminal proceedings. The criticism is directed at the European Union firmly moving towards a more efficient prosecution, but disregarding the need for strengthening the protection of fundamental rights in transnational criminal proceedings. It has been constant during the past decades, gaining momentum after implementation of the 2002 Framework Decision on the European Arrest Warrant (FD EAW). The Commission could no longer ignore the critical voices being raised by academics, human rights associations, and practising lawyers. This led to approval of the 2009 Roadmap on procedural safeguards in criminal proceedings, which finally crystallized in a series of directives on the minimum rights to be guaranteed to suspects and accused persons.

It is no longer true that the EU has ignored the need to protect the fundamental rights of suspects and defendants. The results achieved so far cannot be overlooked. Recognizing the achievements should not, however, lead to complacency. Despite the important progress made in terms of human rights, more can certainly be done. A vigilant attitude is necessary to reject self-satisfaction and continue moving forward in improving the protection of fundamental rights in the Area of Freedom, Security and Justice (ASFJ).

This being said, there are certainly areas – precisely regarding detention conditions in some Member States – where the desired balance between the need for effective cooperation and the protection of fundamental rights is far from being achieved, as shown by the *Aranyosi and Căldăraru* case before the CJEU. However, the highly sensitive case involving the EAW against Carles Puigdemont, who is accused of rebellion and embezzlement in Spain, has brought the topic of judicial cooperation in criminal matters to the forefront of the public debate – both legally and politically. This is certainly an exceptional case without precedent at the EU level, and it could even be considered negligible if one looks at the quantity of effectively executed EAWs. Its impact – not only on the media and on general public opinion – raises important questions that should

lead to rethinking the principles of the AFSJ. The EAW issued by a Spanish judicial authority for surrender of a person detained in Germany shows how interpretation of the double criminality requirement can erode the principle of mutual recognition set out in Art. 82 TFEU, and Art. 1(2) FD EAW.

The judges in Luxembourg have repeatedly emphasised that the aim of the EAW is to facilitate cooperation, that Member States have a primary obligation to cooperate,

and that the grounds for refusal – except those provided for under Art. 3 FD EAW – should not as a rule be mandatory. Moreover, in the *Gundza* case – although it is not a EAW case –, the Court already stated that the double criminality condition is an exception to the general rule of recognition of judgments, and it did not exclude a flexible approach by the competent authority of the executing State. A strict legal interpretation of the requirement of double criminality might be technically correct, but it appears to contradict the general rule, i.e., the obligation to cooperate. In the end, the condition of double criminality is based less on the protection of fundamental rights than on a deeply rooted concept of national sovereignty. The *Puigdemont* case has again shown that the debate on the main principles that should govern a legal area built upon mutual recognition and mutual trust is not over yet. Instead, one should discuss the meaning of the principles and the main refusal grounds, including the double criminality requirement and its “cousin,” the speciality rule. The CJEU will be called upon to play a crucial role in settling the “right balance” when building a single judicial space.

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Lorena Bachmaier



European Union*

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

Foundations

Area of Freedom, Security and Justice

Brexit: Political Guidelines for EU's Position in Negotiations

On 23 March 2018, the European Council [adopted guidelines](#) that set out the overall framework for the future relationship between the EU and the UK after Brexit. The European Council welcomes the [draft Withdrawal Agreement](#) presented by the Commission on 28 February 2018 and takes note of the [European Parliament resolution of 14 March 2018](#) on the framework of the future EU-UK relationship. The EU leaders call for intensified efforts regarding the remaining withdrawal issues and issues related to the territorial application of the Withdrawal Agreement, notably as regards Gibraltar, and they reiterate that “nothing is agreed until everything is agreed.”

The guidelines stress that the future partnership should include ambitious provisions on the movement of natural persons, based on full reciprocity and non-discrimination among Member States, and on related areas, such as the

coordination of social security and recognition of professional qualifications. Furthermore, a balanced, ambitious, and wide-ranging free trade agreement should be initiated that entails sufficient guarantees for a “level playing field.” The European Council makes clear that such an agreement cannot, however, offer the same benefits to the UK as EU membership, and it cannot amount to participation in the Single Market or parts thereof.

Beside trade and economic cooperation, the guidelines also address other topics, including law enforcement and judicial cooperation in criminal matters. They “should constitute an important element of the future EU-UK relationship in the light of the geographic proximity and shared threats faced by the Union and the UK, taking into account that the UK will be a third country outside Schengen.” The future partnership in this field should cover the following elements:

- Effective exchanges of information;
- Support for operational cooperation between law enforcement authorities and judicial cooperation in criminal matters;
- Dispute settlement mechanisms.

Of interest is also the EU-27 position on the exchange of data. Several components of the future relations should include rules on data. The data protection level should be governed by Union law.

Whether the timetable to finalise the negotiations over the withdrawal agreement by the end of October 2018 is realistic remains doubtful, due to the very contradictory positions of the UK. (TW)

Brexit: Material for Discussions on Future Framework in JHA Area

The European Commission Task Force for the Preparation and Conduct of Negotiations with the United Kingdom under Article 50 TEU has already published documents on how the future framework of police and judicial cooperation in criminal matters could be shaped. These documents are available in the form of slides. They aim at contributing to internal preparatory discussions on the scope of the future EU-UK relationship. They are based on the political guidelines established by the European Council in April 2017 and March 2018.

The first set of [slides of 29 January 2018](#) outline the consequences of the UK withdrawal, the transition period in the JHA area, and models for the future framework as regards the exchange of security-relevant data, support for operational cooperation, and judicial cooperation in criminal matters.

The second set of [slides of 18 June 2018](#) translate the latest European Council guidelines on Brexit negotiations of 23 March 2018 into specific content in

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

a future EU-UK agreement. They also provide a comparison between the EU and UK positions in the JHA field.

All negotiation documents on the so-called Art. 50 negotiations with the UK can be retrieved here. (TW)

Brexit Preparedness

In January 2018, the [European Commission launched a website](#) that informs citizens and stakeholders of the consequences of the UK's departure from the EU in a range of policy areas. The website is fed with documents on an ongoing basis that provide information on the legal and practical implications of the UK's withdrawal and the EU rules in a given policy area. The Commission also regularly provides updates on the Brexit negotiations, aiming at preparing the public if the EU Treaties cease to apply to the UK from 30 March 2019, 00.00h (CET). Regarding the area of European criminal law and the protection of the EU's financial interests, the following notices to stakeholders are of interest so far:

- [Withdrawal of the UK in the field of customs and taxation](#);
- [Withdrawal of the UK in the field of data protection](#).

In the area of customs and indirect taxation, the Commission has also published a [position paper on customs related matters required for an orderly withdrawal of the UK from the Union](#). (TW)

Security Union

Package of Measures to Further Build Up Security Union

On 17 April 2018, the Commission proposed a series of measures aimed at curbing security threats in the EU. The measures – under the overall title “[Defining terrorists the means and space to act](#)” – include:

- Strengthening the security of EU citizens' ID cards and non-EU family members' residence documents;
- Improving cross-border access by law enforcement authorities to finan-

Report

EPRS: Cost of Non-Europe in the Fight Against Terrorism

On 28 May 2018, the European Parliamentary Research Service (EPRS) published a report on the [cost of non-Europe in the fight against terrorism](#). It continues the series of several cost-of-non-Europe reports increasingly covering the European criminal law field, such as the cost of non-Europe reports on organised crime and corruption (see *eucri* 1/2016, p. 10 and the article by *Wouter van Ballegooij* in *eucri* 2/2016, pp. 90-93), on procedural rights and detention conditions (see *eucri* 4/2017, p. 174), and on [equality and the fight against racism](#) and xenophobia (published in March 2018). The interim results of the relevant studies on the added value of EU mechanisms in the AFSJ was presented in October 2017 (see the untapped potential of the AFSJ, *eucri* 4/2017, p. 163).

Cost-of-Non-Europe (CoNE) reports generally aim at examining the possibilities for gains and/or the realisation of a “public good” through common action at the EU level in specific policy areas and sectors. They attempt to identify areas that are expected to benefit most from more in-depth EU integration and for which the EU's added value is potentially significant. CoNE reports are part of setting the EU's legislative agenda.

The latest CoNE report on terrorism (for a summary, see [here](#)) was authored by Dr. *Wouter van Ballegooij* and *Piotr Bakowski* (both in the EPRS). The annexed paper was produced by RAND – a non-profit global policy think-tank – at the request of EPRS. The report maps the current gaps and barriers and estimates both economic impact and the impact on individuals in terms of protecting their fundamental rights and freedoms. In the final section, it provides options for action and cooperation at the EU level to address the identified gaps and barriers, in addition to an estimate of their potential costs and benefits.

It is estimated that, since 2004, terrorism has cost the EU about €185 billion in lost GDP and around €5.6 billion in lost lives, injuries and damages to infrastructure. Trade, foreign direct investment, and tourism is also harmed. The report also states, however, that certain counter-terrorism measures have had a disproportionate effect on suspects and wider groups within society, in particular in violation of fundamental rights.

The report mainly concludes that EU action could address gaps in effectiveness and fundamental rights protection by developing an evidence-based EU criminal policy cycle involving the European Parliament and national parliaments. It is further argued that the effectiveness and fundamental rights compliance of counter-radicalisation programmes should be strengthened, the framework for counterterrorist financing further refined, and a European law enforcement culture fostered. (TW)

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cial information (details under “Money Laundering”, p. 13);

- Establishing European rules on law enforcement authorities' access to electronic evidence (details under “Law Enforcement Cooperation”, p. 35);
- Tightening the rules on the explosive precursors;
- Strengthening controls on the import and export of firearms.

As regards ID cards, a [proposed Regulation](#) intends to put an end to the diverging standards among the EU Member States as regards security features of ID cards as well as residence documents issued to EU nationals and/or their fam-

ily members. Uniform EU legislation should minimize the risk of falsification and identity fraud. The proposed minimum common security measures for ID cards and residence documents will include the following:

- Inclusion of two different sets of biometric identifiers (facial images and fingerprints) – this follows a similar approach already taken for security features of passports;
- Establishment of phase-out rules: non-compliant cards will phase out at expiry or within a maximum of five years or two years for less secure (i.e. non-machine readable) cards;

■ Introduction of an EU-wide maximum validity for ID cards of 10 years.

The proposal does not touch upon the Member States' right to design/offer ID cards or to introduce a uniform EU ID card.

The [proposed Regulation on the marketing and use of explosive precursors](#) aims at closing gaps by which criminals, in particular terrorists, can acquire dangerous substances to make homemade explosives. Therefore the Commission proposes stricter and more uniform rules on explosive precursors that include the following:

- Adding two new substances and concentration limits to the list of banned chemicals;
- Expanding the reporting obligations to online operators and sales;
- Obliging economic operators to report suspicious transactions to authorities within 24 hours;
- Further restricting access to the general public who will only be able to obtain certain restricted precursors with a licence: security screening and criminal-record checks of public buyers are to be carried out;
- Putting an end to current registration systems in place in some Member States.

The proposal distinguishes between “professional user” and “a member of the general public,” the latter having possibilities to obtain explosive precursors only if licenced.

Ultimately, a [recommendation proposed](#) by the Commission provides guidance to Member States regarding more effective and better implementation of the 2012 Regulation on export and import of firearms for civilian use. As a result, the Commission recommends, in particular:

- Establishment of improved control procedures, including systematic background checks of individuals by using ECRIS and by consulting the Conventional Arms export control information system (COARM), which contains notifications of refusal of export authorisation;

■ Enhanced information exchange among the Member States.

The package of measures presented on 17 April 2018 must be seen in the context of the establishment of a Security Union, which is one of the priorities of the *Juncker* Commission. The presentation was linked with the regular Commission progress report on initiatives in the fight against terrorism (for these progress reports, see, e.g., eucrim 3/2016, p. 123).

Better protecting European citizens is also a top priority in the [Joint Declaration](#) of 14 December 2017 agreed on by the Commission President, the EP President, and the Council Presidency (see eucrim 4/2017, p. 165). The Commission therefore called upon the co-legislators, i.e., Council and EP, to treat the proposals as a matter of urgency. (TW)

[Reform of the European Union](#)

[EU Citizens Called On to Debate on Future of EU “at 27”](#)

On 9 May 2018, Europe Day, the European Commission launched an [online public consultation on the future of Europe](#). The consultation includes 12 questions for all European citizens to utter their views on the direction the EU should take in the future. The online survey was prepared by a so-called “Citizens’ Panel” of 96 Europeans, which convened on 5-6 May 2018. The questions also include “justice” topics, such as security and migration. The online survey is available in all official EU languages.

The online public consultation aims at completing the ongoing debate on the future of the Union “at 27” – after the UK’s withdrawal from the EU. The debate was initiated by the [Commission’s White Paper of 1 March 2017](#) (see eucrim 1/2017, p. 5) and Commission President *Juncker*’s [“Catching the wind in our sails” speech](#) of 13 September 2017. The new debate on how the EU should be shaped after the UK’s Brexit has already triggered reactions from

several governments of the EU Member States (see eucrim 1/2017, pp. 3-6).

Nonetheless, the EU is trying to involve the European citizens in the debate as much as possible. Hence, the online public consultation is also part of the wider so-called [“Citizens’ Dialogues”](#) that started in 2012 with town hall meetings. Within the framework of the discussion on the future of the EU, the Commission plans to intensify the dialogues up to the European Parliament’s elections in May 2019. Some Member States, such as Ireland, Sweden, and Bulgaria, have already organised citizens’ dialogues in different formats between their leaders and their citizens, at the same time taking up the ideas of French President *Macron* on “Democratic Conventions on the Future of Europe”.

The online public consultation runs until 9 May 2019. An interim report on the White Paper process is planned for the December 2018 summit of the European Council. A final report, including the results of the online public consultation, will be presented on 9 May 2019 at the first summit of the EU-27 in Sibiu, Romania. This summit takes place just a few weeks before the European elections. For further background information, see also the Commission [press release IP/18/3706](#). (TW)

[Legislation](#)

[Public Consultation to Prepare Future EU Training Strategy](#)

On 2 February 2018, the Commission started a [public consultation](#) in order to evaluate the 2011 European judicial training strategy and to design the new European judicial training strategy for 2019–2025.

The consultation is open to all citizens and stakeholders interested in the future of European judicial training strategy. The training involves all practitioners in the area of justice, e.g., judges, prosecutors, court staff, bailiffs or enforcement

officers, lawyers, notaries, mediators, legal interpreters and translators, court experts, prison management and staff, and probation officers.

In its 2011 Communication “Building trust in EU-wide justice. A new dimension to European judicial training,” the Commission set ambitious objectives to be reached by 2020, e.g., to ensure that half of all legal practitioners in the EU (approx. 700,000) are trained in EU law (see also eucrim 1/2017, 8-9). Training topics cover not only specific issues of judicial cooperation, but also the Union’s core values (e.g., the rule of law) and human rights law (CFR, ECHR, etc.).

An accompanying [roadmap](#) identifies issues where there is room for future improvement. In addition, the roadmap sets out new developments to be targeted by future training, such as ethics, the rule of law, and independence of the judiciary. One priority is the improvement of and support for training on judicial cooperation in criminal matters, in particular counter-terrorism and fighting cybercrime.

The public consultation runned until 26 April 2018. It is designed as an online survey and provides two questionnaires: a [general one](#) and a [specific one](#) addressed to the main stakeholders (EU-level training providers for justice professionals, EU-level representatives of justice professions, and EU-level associations of justice professionals). (TW)

Institutions

Council

Programme of the Bulgarian Presidency

On 1 January 2018, the Bulgarian Presidency of the Council of the EU took up its work and published its [programme](#). Its priorities in the area of criminal justice include the following:

- Institutionalisation and operationalisation of the European Public Prosecu-

tor’s Office (EPPO) and the development of relations with partner institutions and services, including Eurojust, Europol, OLAF, third countries, and international organisations;

- Trilogues on draft legislative acts in the area of criminal justice, the fight against money laundering, mutual recognition of freezing and confiscation orders, exchange of information on criminal records of third country nationals, and the Eurojust Regulation;

- A general approach on the proposal in the area of fighting fraud and counterfeiting of non-cash means of payment;

- Effective implementation of the revised EU Internal Security Strategy and its three main pillars: fight against organised crime, terrorism, and cybercrime;

- Launch of the new 2018-2021 EU policy cycle for organised and serious international crime;

- Efficient implementation of the Passenger Name Record (PNR) Directive, prevention of radicalisation, and countering the phenomenon of foreign fighters;

- Enhanced cooperation with the countries of the Western Balkans in fighting serious and organised crime, terrorism, and border control.

In the field of border management, the Bulgarian Presidency will strive for the following:

- Interoperability of information systems and databases;

- Finalisation of negotiations on the legislative package to reform the Schengen Information System;

- Political agreement on extension of the mandate of the European agency for managing large-scale information systems (eu-LISA);

- Agreement on amendments to the Schengen Borders Code, thereby adapting the Schengen legal framework to new challenges in the area of security.

The Bulgarian Presidency will last until end of June and will be followed by Austria taking over for the second half of 2018. (CR)

European Court of Justice (ECJ)

ECJ: Judicial Statistics 2017

According to its [Judicial Statistics 2017](#), the number of cases brought before the Court of Justice and the General Court of the EU exceeded 1600 in 2017 as it did in 2016: a total of 1656 cases were brought before the two courts, and 1594 cases were closed by the courts.

A new record was set for the number of cases registered at the Court of Justice in 2017 with 793 new registrations, including 533 requests for a preliminary ruling, which is a 13% increase compared to 2016. The average duration of proceedings regarding requests for a preliminary ruling remained stable at 15,7 months in 2017.

While the number of actions for failure of a Member State to fulfil obligations continued to go up in 2017, the number of appeals lodged before the Court was considerably lower than in the two previous years at 141 cases in 2017 compared to 206 in 2015 and 168 in 2016. Nevertheless, the average duration of appeal proceedings increased to 17,1 months in 2017 compared to 12,9 months in 2016, which can be explained by the complexity of the cases under appeal in the given period.

The new organisation of the General Court led to an improvement, as 140 more cases could be closed in 2017 than in 2016, an increase of 18,5%. Furthermore, the duration of proceedings decreased by 13% compared to 2016 with an average of 16,3 months for cases decided by judgment or order. In total, 917 cases were brought before the General Court, and it closed 895 cases in 2017. (CR)

OLAF

Commission Makes OLAF Fit as Partner of EPPO

On 23 Mai 2018, the European Commission tabled a proposal to amend Regulation (EU, Euratom) 883/2013 concern-

ing investigations conducted by the European Anti-Fraud Office (OLAF). The proposal ([COM\(2018\) 338](#)) is mainly a reaction to the new institutional set-up in the fight against fraud affecting the EU budget after the establishment of the European Public Prosecutor's Office in 2017. The new body is designed to investigate, prosecute, and bring to judgment criminal cases detrimental to the EU budget. Its full operability is limited to the EU Member States that agreed on the EPPO by means of enhanced cooperation (see details in [eucrim 3/2017](#), pp. 102-104). The creation of the EPPO triggers several legal questions, such as its interaction with other European law enforcement bodies, in particular OLAF. OLAF is the existing EU body currently responsible for protecting the EU's financial interests from fraud, corruption, and other forms of illegal behaviour detrimental to the EU's budget. In addition, the tabled proposal takes up key recommendations from the evaluation of OLAF's legal basis, i.e., Regulation 883/2013 (see [eucrim 3/2017](#), pp. 101-102 and the articles devoted to the evaluation in [eucrim 4/2017](#)).

Against this background, the amendments to OLAF's existing legal basis pursue a threefold objective:

- Adapting the operation of OLAF to the establishment of the EPPO;
- Enhancing the effectiveness of OLAF's investigations;
- Clarifying and simplifying certain provisions of Regulation 883/2013.

According to the proposal, in the future OLAF will concentrate on conducting administrative investigations in the EU Member States participating in the EPPO. In this context, the added value of OLAF's work will be especially to ensure administrative recovery and prepare the ground for administrative and disciplinary action, thus preventing further harm to the EU budget outside criminal prosecution. Furthermore, OLAF will continue to operate in those Member States not presently participating in the EPPO in the same way as today.

Regarding the relationship between OLAF and the EPPO, the proposal contains the following:

- General principles defining the relationship between the two bodies;
- Reporting obligations from OLAF to the EPPO if OLAF learns about facts that may trigger the EPPO's competence in accordance with Article 24 of Regulation 2017/1939;
- Rules on the non-duplication of investigations, on OLAF's support to EPPO, and on complementary investigations.

Concrete modalities of cooperation and exchange of information are to be laid down in working arrangements between OLAF and EPPO.

Further amendments to the OLAF Regulation relate to improvements on the effectiveness of OLAF's investigative function. In this context, the proposal also addresses the following issues:

- Removing ambiguities and obstacles as regards on-the-spot checks and inspections and the assistance of national authorities in such matters;
- Giving OLAF better access to bank account information stored in national registries;
- Enabling more efficient cooperation with regard to VAT fraud;
- Enhancing the admissibility of OLAF-collected evidence;
- Extending procedural guarantees for persons involved in OLAF investigations.

After the Regulation on establishing the EPPO and the PIF Directive, the amendments to the OLAF Regulation constitute the third milestone in the EU's new approach towards better fighting irregularities against the EU budget (for the PIF Directive, see [eucrim 2/2017](#), pp. 63-64 and [Juszczak/Sason](#), [eucrim 2/2017](#), pp. 80-87).

The [Commission also pointed out](#) that the proposal to amend Regulation 883/2013 focuses on targeted, important changes from a short-term perspective in order to strengthen OLAF's legal framework. One reason for this is that

the amendments should be in force when the EPPO starts its operational work (expected for 2020). Hence, a more extended reform of OLAF is not ruled out in the long run, since first experiences with the operational cooperation between the EPPO and OLAF will have been gained in the 2020s. (TW)

Debate on Key Features of OLAF and EPPO Relations

After the Commission tabled its evaluation report on OLAF Regulation No. 883/2013 in October 2017 (see details in the [special eucrim issue 4/2017](#)), the Council (in its ECOFIN formation) examined the report (see [eucrim 3/2017](#), p. 100). The Commission suggested a "two-step approach", i.e.:

- A light, targeted revision of the OLAF Regulation in the first half of 2018 to address, in particular, the relationship between OLAF and the newly established European Public Prosecutor's Office (EPPO);
- A more substantial revision of OLAF's legal basis at a later stage, possibly under the mandate of the new European Parliament and the Commission post-2019.

Subsequently, delegations of the Member States met in working parties within the Council and agreed on several topics that should or should not be covered in its first, light revision. These issues are summarised in an "[outcome of proceedings](#)" document drafted by the General Secretariat of the Council on 16 February 2018. Accordingly, the "light revision" should include provisions on the following topics:

- Clarification of competences, including rules on (1) cooperation with the EPPO during the selection proceedings in order to determine early on which office is competent for handling a specific case; and (2) supporting and complementary administrative investigations;
- Avoidance of duplication of work, including rules on (1) notification procedures; and (2) the practicalities of cooperation, e.g., liaison officers;
- Information exchange;

Report

RENFORCE Researchers Conclude a Comprehensive Comparative Report on the OLAF Legal Framework on the Exchange of Information

Under the auspices of the Utrecht Centre for Regulation and Enforcement in Europe (RENFORCE), an international team of researchers has recently concluded a report entitled '[Exchange of information with EU and national enforcement authorities: improving the OLAF legislative framework through a comparison with other EU authorities](#)'. The project was co-funded under the Hercule III Programme of the European Commission/OLAF. Headed by Dr. Michele Simonato, Prof. Dr. Michiel Luchtman and Prof. Dr. John Vervaele, the report analyses OLAF's legislative framework for the exchange of information in the pre-investigative and investigative phase, identifies legal obstacles which prevent OLAF from realising its mandate, and elaborates possible solutions to these obstacles.

The project uses a comparative approach and analyses the transfer of information to OLAF, DG Competition, the European Central Bank and the European Securities and Market Authority by their respective national partners in six legal orders (Germany, Hungary, Italy, Luxembourg, the Netherlands and the United Kingdom). The report takes stock of the current legal framework of the four authorities at EU level, offers overviews of the state of the art in the six national legal orders, provides an integrative comparative analysis and gives policy recommendations. The results are of great interest and importance to EU policy makers, legislators, the European academic community, the authorities themselves, as well as their national partners.

The comparative analysis reveals significant differences between the OLAF legal framework and the other four EU authorities. Although all of the authorities have been entrusted with powers of law enforcement, the comparison between them highlights a series of problems with regard to OLAF's current legal framework on the exchange of information. These problems relate to the unclear and diverging legal frameworks of OLAF's partners at the national level, causing OLAF to have to work with partners with very different mandates; to the fragmentation of rules across different sectors of OLAF's competences (income and expenditure); to a lack of a clear and binding legal EU rules and corresponding national rules to provide information to OLAF; as well as to unclearities in the EU provisions on how OLAF is to deal with that information.

Contributors to the project included RENFORCE researchers Dr. Mira Scholten, Dr. András Csúri, Argyro Karagianni LLM and Koen Bovend'Eerd LLM and external researchers: Prof. Dr. Martin Böse and Dr. Anne Schneider (both University of Bonn), Prof. Peter Alldridge (Queen Mary University of London), Prof. Katalin Ligeti, Prof. Silvia Allegrezza, Dr. Valentina Covolo and Dr. Angelo Marletta (all University of Luxembourg).

This report is a part of three 'Hercule'-funded projects and is related to a RENFORCE project led by Prof. Michiel Luchtman entitled 'The rise of EU law enforcement authorities – Protecting fundamental rights and liberties in a transnational law enforcement area', funded by the Netherlands Organization for Scientific Research under the Innovational Research Incentives Scheme (VIDI scheme 2015). The first 'Hercule' report focused on OLAF's investigative powers (executed in 2016-2017) and the third (and final) 'Hercule' project on the use of evidence acquired by OLAF and the other authorities in national court proceedings is currently executed at the University of Luxembourg under the lead of Prof. Katalin Ligeti and Dr. Angelo Marletta.

Koen Bovend'Eerd LLM and Prof. Dr Michiel Luchtman

- Cooperation between OLAF and Member States not participating in the EPPO;
- Cooperation between AFCOS and OLAF in cases in which the EPPO could be implicated.

The paper notes that some delegations put forward, additional issues that should be tackled in the first phase of the reform, e.g.:

- Further provisions in relation to AFCOS;

- Common rules on the preparation and implementation of on-the-spot checks;
- Rules providing for the admissibility of OLAF's final reports as evidence in national administrative or judicial proceedings;
- Rules on the admissibility of evidence collected by OLAF and the EPPO for use by the other office.

Generally, delegations requested that any additional administrative burden or additional resources for OLAF should be avoided, while ensuring that OLAF is equipped to continue exercising its mandate. (TW)

GC Clarifies Relationship between Union and National Law in OLAF External Investigations

On 3 May 2018, the General Court (GC) delivered an important judgment in which it clarified the relationship between Union law and national law when checks against economic operators are carried out by OLAF. The GC confirmed that checks are a matter of EU law, and national law is only relevant in cases of assistance by national authorities.

In the case at issue ([T-48/16](#)), OLAF conducted investigations against a French company (Sigma Orionis SA). OLAF revealed that the company had manipulated staff timesheets and excessively declared personnel salaries in projects funded by EU programmes. On the basis of OLAF's report, the Commission adopted administrative sanctions against Sigma Orionis, consisting of excluding the company from future participation in subsidies, suspending payments for current projects, and terminating several grant agreements.

Sigma Orionis initiated proceedings against this decision before the General Court, mainly arguing that the Cour d'Appel d'Aix-en-Provence (France) had stopped criminal pre-trial proceedings because certain pieces of evidence contained in OLAF's final investigation report cannot be used. The French Court argued that, during on-the-spot checks at the company's premises in France

conducted by OLAF with the support of the French authorities, procedural guarantees and defence rights had not been respected. Therefore, the applicant argued that the Commission had to take into account this national decision, as a consequence of which it was not entitled to base its decision against the applicant on OLAF's conclusions.

The GC, however, rejected all arguments put forward in this context.

Regarding the first applicant's argument that the Commission did not respect the authority of the French court that annulled the investigative findings, the GC clarified that a decision of national courts not to use evidence in an OLAF report does not affect the Commission's possibility to found administrative decisions, such as those in question, on OLAF's findings. The GC ruled that only the European courts are competent to declare invalid an action by an EU body and that this is not up to the national courts.

Secondly, Sigma Orionis argued that the national law of France was applicable when OLAF carried out on-the-spot checks vis-à-vis the company. However, national provisions were not respected, since a warrant issued by a judicial authority had been missing, national police officers had not accompanied the OLAF investigators, and the company had not been informed about its right to oppose the checks. By contrast, the GC held that national law only comes into play if coercive measures are needed to impose checks. A "right to oppose" is not existent, however, in the applicable provisions. In the absence of opposition by the economic operator (as in the case at issue), on-the-spot checks and inspections are conducted by OLAF on the basis of Regulation 883/2013 and Regulation 2185/1996 and based on written authorisation by the Director-General of OLAF. National law is then irrelevant. Since the applicant did not oppose to OLAF's checks and OLAF inspectors upheld Union law, no legal consequences can be drawn in favour of the applicant.

Regarding the third argument, that the inspections led by OLAF violated the company's fundamental rights (in particular its defence rights pursuant to Art. 47 CFR), the GC pointed out that, indeed, non-respect of fundamental rights by OLAF can ban suspension of payments or the termination of grant agreements by the Commission. The GC further ruled, however, that no violation of fundamental rights can be argued because Union law neither provides a "right to oppose" nor – *a fortiori* – a right to be informed of such a right. By making reference to the CJEU's decision in *Melloni*, the GC further argued that more extensive national rules (even if they are of a constitutional nature) cannot thwart this conclusion because this would infringe the Union's law "effet utile."

In sum, the judgment of the GC in *Sigma Orionis* further restricts the procedural safeguards of persons affected by OLAF inspections (if they do not oppose). In addition, the prevalence of Union law over national law in such cases has been affirmed.

The GC's judgment led the Commission to further clarify the extent to which national law applies in external OLAF investigations in its recent proposal on amending the current [OLAF Regulation 883/2013](#). (TW)

Convictions for Large-Scale Tobacco Smuggling

On 20 March 2018, [a criminal court in Turin, Italy sentenced](#) several individuals to prison, seized their assets, and ordered them to pay over €150 million to the Italian customs and tax authorities. It is the provisional end (the judgment is subject to appeal) of a large-scale tobacco contraband network that was dismantled by OLAF and Italian and German law enforcement authorities in 2014.

The Turin court validated the investigative results of OLAF and its partners. The proceedings in Italy retrieved only a part of the total loss to the EU and national budgets. The proceedings were/

are also being conducted in Belgium, Germany, Romania, Bulgaria, Spain, Lithuania, and Poland. (TW)

Hungary: OLAF Investigations Lead to Prison Sentence Against EU Funds Fraudster

In February 2018, the director of a Hungarian company [was convicted at first instance](#) to three and a half years of imprisonment because he was held responsible for having managed a fraud scheme against EU funds. The case was originally investigated by OLAF; together with a so-called judicial recommendation, its findings were submitted to the Hungarian authorities in 2017. An indictment was filed in 2017.

OLAF revealed that the company had applied for EU and national funds for the replacement of machinery; the machinery was never replaced, however, and false declarations and invoices were used to hide the fraud. The total damage to the budgets amount to €2.45 million, worth €2.1 million in EU funds alone. The judgment by the Hungarian Court is subject to appeal. (TW)

OLAF and Guardia di Finanza Detect Large-Scale Fraud in the EU's Research and Innovation Fund

On 16 February 2018, OLAF reported a successful strike against an intricate fraud scheme that siphoned off more than €1.4 million from the EU's Research and Innovation fund. An Italian-led consortium set up the fraud scheme, with alleged partners in France, Romania, and the UK. The funds were initially received in order to develop two hovercraft prototypes for nautical emergency purposes. However, OLAF investigators, in close cooperation with the Guardia di Finanza in Italy, discovered that the Italian beneficiaries had neither the structural nor the economic conditions to carry out the project. Instead, they used artificial accountings to siphon off money, claiming false expenses.

The investigation was named "[Operation Paper Castle](#)" because part of

the EU money received was used to redeem a mortgage on a castle face with foreclosure. In addition, the UK partner company only existed on paper and was owned by the Italian partner.

As a result of the investigations, OLAF send two judicial recommendations, one to the Public Prosecutor's Office of Genoa and another to the City of London Police in the UK as well as a financial recommendation to the Directorate-General for Research and Innovation of the European Commission. The project leader is facing charges of embezzlement and fraud against the EU, false accounting, fraudulent bankruptcy, and fraudulent statements in Italy.

OLAF stressed that the operation is the result of a close and constant cooperation with law enforcement authorities in the different EU Member States. It also showed that OLAF plays a decisive role in fraud cases of a transnational nature, as it was able to map out and put an end to the fraudulent activities. (TW)

European Public Prosecutor's Office

EPPO – Implementation Phase Started

At their [informal meeting in Sofia on 26 January 2018](#), the Ministers for Justice discussed the next steps in successful implementation of the European Public Prosecutor's Office (EPPO). After having finalised the legal framework in October 2017 (see [eucrim 3/2017](#), pp. 102-104), it is now up to the European institutions to establish the effective functioning of the new European body that will investigate, prosecute, and bring to justice criminal offences against the EU's financial interests.

The Commission briefed the ministers on the steps planned as regards the establishment and initial administrative management of the office. *Věra Jourová*, Commissioner for Justice, Consumers and Gender Equality, stressed that the EPPO will be "a game changer" in the way it will fight VAT fraud, fraud against

EU funds, and corruption (see also [eucrim 3/2017](#) editorial, p. 93). A very important part of the build-up phase is the recruitment of key staff for the EPPO, in particular the European Chief Prosecutor. *Ms Jourová* reiterated the Commission's intention to have the EPPO up and running by the end of 2020.

In their debate, the ministers focused on the relationship between the EPPO and other European Union bodies and institutions, in particular Eurojust, OLAF, and Europol. They stressed that the establishment of the EPPO should not intervene in their administrative and functional integrity. The ministers emphasised the need to draft detailed and clear rules for cooperation with partner organisations in order to improve cooperation and avoid duplication of investigative action.

During the meeting, the Netherlands announced that it is considering joining the EPPO in the future (see also [eucrim 4/2017](#), p. 165). It would then be the 21st EU Member State to support the new body, which was established by a group of 20 EU Member States as an enhanced cooperation measure. (TW)

EPPO – First Implementation Measures Launched

On 23 February 2018, the Bulgarian Council Presidency released information about the state of play regarding preparations for implementing the EU Regulation of October 2017 establishing the European Public Prosecutor's Office. The following preparatory measures so far are the most notable:

- Appointment of the interim Administrative Director;
- Setting up of the EPPO Expert Group;
- Delegated Act listing the categories of operational personal data and the categories of data subjects;
- Selection and appointment of the European Chief Prosecutor;
- Vacancy notice for the European Chief Prosecutor;
- Selection of the European Prosecutors;

- Case Management System;
- Budget.

The [Presidency paper](#) also summarises the current state of play as regards the most intensively debated topic, i.e. the cooperation between the EPPO and other EU bodies, in particular OLAF. As far as OLAF is concerned, the Council already agreed on key features in the working groups (see also news on OLAF above). They were endorsed by the [JHA Council at its meeting on 9 March 2018](#).

In essence, Member States agreed that a smooth cooperation between OLAF and the EPPO must be established so that the two bodies can properly exercise their competences under the EPPO Regulation.

In this context, the Bulgarian Presidency highlighted that the characteristics of the EPPO as an investigative agency should be taken into account when information and reports necessary for triggering criminal investigations are provided by OLAF. (TW)

Malta to Join EPPO?

At the JHA Council meeting on 9 March 2018, [Malta expressed](#) interest in joining the European Public Prosecutor's Office.

Malta is the second EU Member State that may join the new EU scheme designed to effectively combat EU fraud, after 20 EU Member States already agreed to establish the EPPO under an enhanced cooperation in October 2017 (see [eucrim 3/2017](#), pp. 102-104). The new government of the Netherlands also voiced its intention to be part of the EPPO after the Dutch elections last year (see [eucrim 4/2017](#), p. 7). (TW)

Europol

New Executive Director Appointed

On 8 March 2017, *Catherine de Bolle* was [appointed new Executive Director of Europol](#) by the European Council.

Catherine de Bolle currently holds the position of Commissioner General of

the Belgian Federal Police. Her term at Europol will begin on 1 May 2018 when the term of the current Executive Director, Rob Wainwright, ends (see also *eu-crim* 4/2017 p. 165).

EDPS Opinion on International Agreements with Eight Third Countries

On 20 December 2017, by means of eight Recommendations, the Commission has sought to obtain authorisation from the Council to start negotiations with Algeria, Egypt, Israel, Jordan, Lebanon, Morocco, Tunisia and Turkey in order to conclude international agreements concerning the exchange of personal data between Europol and competent authorities of these eight third countries.

In his [Opinion 2/2018](#) of 12 March 2018, the European Data Protection Supervisor (EDPS) makes general and specific recommendations to ensure that the negotiated agreements will adduce appropriate safeguards within the meaning of the Europol Regulation. Recommendations, for instance, include to ensure full consistency with Article 8 of the Charter in the receiving third countries, in particular with the purpose limitation principle, the right of access, the right to rectification and the control by an independent authority specifically stipulated by the Charter. Furthermore, it must be ensured that the level of protection resulting from these agreements be essentially equivalent to the level of protection in EU law. (CR)

Operation against Glass Eel Trafficking

At the beginning of April, a two-year [investigation against an organised criminal group illegally exporting glass eels](#) to Asia. The operation led to the successful arrest of 10 members of the OCG, the seizure of 350 kg of live glass eels, and €40,000 in cash.

The European glass eel (*Anguilla anguilla*) is protected under the Convention on International Trade in Endangered Species (CITES) of Wild Fauna

and Flora with a zero quota ban on shipments to non-EU countries.

Operation Elvers was conducted by the Spanish Guardia Civil, Portuguese authorities, and Europol under the umbrella of Project Lake, a project launched by Europol to counter environmental crime. (CR)

Migrant Smuggling Ring Dismantled

On 21 March 2018, a joint operation between Slovenia, Kosovo, the European Union Rule of Law Mission in Kosovo (EULEX), and Europol led to the [arrest of 12 migrant smugglers operating in the Balkans](#). Over the past year, this organised criminal group smuggled 300 people to Europe, earning an estimated monthly income of €900,000. (CR)

Trace an Object

At the end of February 2018, Europol uploaded 25 new objects to its [Stop Child Abuse – Trace an Object](#) webpage (see *eu-crim* 2/2017, p. 61)

Since publication of the website in May 2017, Europol has received more than 18.300 tips from the general public, which led to the identification of 70 objects. 25 of them could even be traced to one country or a reasonable number of likely countries of production, with investigation ongoing in many of them. (CR)

Partnership with FIOD

On 16 February 2018, Europol signed a [strategic partnership](#) on financial investigations with the Dutch Fiscal Information and Investigation Service (FIOD).

Through the partnership, the level of information exchange between the two agencies will be increased:

- Cooperation;
- Mutual assistance;
- Expertise and knowledge sharing.

Furthermore, joint project groups are to be established in order to specifically address the topics of offshore centres, high-end money laundering, new payment methods, and virtual currencies as well as legal barriers and difficulties.

Coalition against Financial Crime

At the beginning of February, Europol, Thomson Reuters and the World Economic Forum launched a [new public/private coalition](#) with the aim to mobilise and influence decisions-makers at the highest levels in the fight against financial crime and modern slavery.

In particular, the coalition wants to raise awareness among global leaders on the topic of financial crime as a critical challenge with grave financial and human consequences; promote more effective information sharing between public and private entities on a coordinated, global level; and establish enhanced processes to share compliance best practice and approaches to more robust customer due diligence.

The coalition is seeking additional members. (CR)

SIENA Record in 2017

In 2017, for the first time, more than one million [SIENA messages](#) were exchanged among Europol, Member States and third parties.

SIENA is the Secure Information Exchange Network Application, managed by Europol which enables a swift and secure communication and exchange of operational and strategic crime-related information and intelligence. (CR)

Eurojust

Hit Against Spear Phishing

On 28 March 2018, after a two-year cybercrime investigation, 20 suspects were arrested for [banking fraud](#) that netted €1 million from hundreds of customers of two major banking institutions.

The spear phishing e-mails were used by a Romanian and Italian organised criminal group to impersonate tax authorities. By means of this scam, the group gained access to the online banking credentials of their victims. While common phishing scams generate generic e-mails, spear phishing e-mails are personally addressed to targeted e-mail

users. The content appears to have been sent from a reputable source. When a link in these e-mails is clicked, recipients are led to a fake version of a legitimate website from which their account and contact details are stolen.

The investigation was supported by Eurojust, Europol, and its Joint Cyber-crime Action Taskforce. It was carried out by a Joint Investigation Team of the Romanian Directorate for Investigating Organised Crime and Terrorism, the Romanian National Police, the Prosecution Office of Milan, and the Italian National Police. (CR)

New National Member for the UK

Since March 2018, *Samantha Shallow* officially took up her position as [National Member for the United Kingdom](#) at Eurojust.

In her longstanding professional career, Ms *Shallow* held several positions. One of them was in the Crown Prosecution Service (CPS), including its International Justice and Organised Crime Division, where she last served as Unit Head of the Specialist Fraud Division in the West Midlands. (CR)

New Bulgarian National Member

Since February, *Ivanka Kotorova* holds the position of [National Member for Bulgaria](#) at Eurojust for a four-year period.

Prior to this position, Ms *Kotorova* served as Deputy National Member for Bulgaria at Eurojust. Before joining Eurojust, Ms *Kotorova* held various regional, district, and cassation posts as a public prosecutor at the Bulgarian Prosecution Office, the last of which was as head of the International Department at the Supreme Prosecutor's Office of Cassation in Sofia. (CR)

New Liaison Prosecutor for Montenegro

At the beginning of December 2017, Montenegro appointed a [new Liaison Prosecutor](#) for Eurojust. Before joining Eurojust, Ms *Jelena Lučić Đaletić*

worked as Prosecutor at the High State Prosecutor's Office in Podgorica, Montenegro. (CR)

New National Member for Austria

Austria has a new [National Member](#) at Eurojust since 1 January 2018. Before joining Eurojust, Mr *Gerhard Jarosch* was Deputy Chief Prosecutor in Vienna. Furthermore, Mr *Jarosch* is President of the International Association of Prosecutors (IAP), former President of the Austrian Association of Prosecutors, and former President of the Austrian Prosecutors Personnel Representation.

Mr *Jarosch* succeeds Ms *Gabriela Hornbeck* who had served as National Member for Austria since 2015. (CR)

Coordination Centre Record

In 2017, Eurojust hosted 17 [coordination centres](#), the highest annual number since their creation in 2011.

National authorities and Eurojust may set up a coordination centre when complex cases require the real-time exchange of information and large-scale multilateral actions.

The majority of the 17 coordination centres in 2017 dealt with cross-border financial crime; yet others tackled human trafficking, drug trafficking, and cybercrime. (CR)

Frontex

Cooperation Plan with Moldova

On 26 March 2018, Frontex and the Republic of Moldova signed a new [cooperation plan](#) for the period 2018 to 2020. Under this plan, the exchange of information on migratory flows, the use of relevant data to combat cross-border crime, and initiatives to provide technical assistance to the Moldovan authorities shall be improved. Furthermore, Frontex will set up training programmes for Moldovan border guards on subjects such as return operations, the detection of false documents, and the fight against human trafficking. (CR)

Risk Analysis 2018

Frontex published its annual [Risk Analysis Report](#) in [February 2018](#).

According to the report, the number of illegal border-crossings into the EU in 2017 dropped to its lowest in four years, with 204,700 detections of illegal border crossings between border-crossing points. The numbers decreased on the Eastern Mediterranean and Western Balkan routes but also on the Central Mediterranean. However, detections in the Western Mediterranean doubled from the previous record. According to the report, almost two-thirds of irregular migrants arriving at the shores of the EU were African nationals.

Looking at further numbers, the report states that refusals of entry in 2017 went down by 15% to 183,500 refusals. The number of effective returns by Member States decreased by 14% to 151,400. At 10,200 detections, the number of detections of people smugglers/facilitators went down by 19%. With an increase of 10%, one of the highest numbers since 2013 was reached with regard to detections of document fraud on secondary movements within the EU/Schengen area. Frontex' assistance with returns increased by 33% to more than 14,000 returns in 2017.

Looking at the near future, the report finds that the sea, especially along the Mediterranean routes, remains the most active route for illegal border-crossing into EU. The number of migrants undertaking secondary movements is expected to rise. Given the continuous increase in global mobility and in order to remain effective, border management will increasingly be risk-based to ensure that interventions focused on the movements of high-risk individuals.

As a result of enhanced security features in modern travel documents and stricter migration policies across EU Member States, the report expresses concern that the misuse of genuine travel documents (which includes impersonation and fraudulently obtained documents) will become more wide-

spread in attempts to enter the EU. The report identifies an underlying threat of terrorism-related travel movements and foreign terrorist fighters using irregular migration routes or facilitation networks. (CR)

Operation Themis Started

On 1 February 2018, Frontex launched a new [operation in the Central Mediterranean](#) to assist Italy in border control activity.

The new Operation Themis replaces Operation Triton. Next to search and rescue as crucial components of the operation, Operation Themis features an enhanced law enforcement focus in order to trace criminal activities. The collection of intelligence and other steps aimed at detecting foreign fighters and terrorist threats at the external borders will be additional elements of the operation. (CR)

Agency for Fundamental Rights (FRA)

FRA Calendar 2018

FRA has published its [calendar](#) outlining the key reports, meetings, and events scheduled for the year 2018.

In 2018, the agency will continue to focus on migration and publish periodic reports on migration-related fundamental rights concerns. Further plans involve:

- Targeted reports on discrimination and integration of minorities and migrants, including findings with regard to Roma;
- A major report on the fundamental rights implications of using biometrics in border management;
- A handbook on data protection law. (CR)

Challenges For Civil Society Organisations

A [report](#) drafted by the FRA reveals diverse challenges that potentially affect the work of civil society organisations (CSOs) working on human rights in the

EU. The report, which focuses on 2011-2017, was released on 19 January 2018 in the context of an event hosted by the European Economic and Social Committee (EESC) and its Liaison Group with European civil society organisations and networks.

Challenges reported by the CSOs include the following:

- Disadvantageous changes in legislation or inadequate implementation of laws;
- Hurdles when accessing financial resources and ensuring their sustainability;
- Difficulties in accessing decision makers and feeding decisions into law and policymaking;
- Attacks on and harassment of human rights defenders, including negative discourse aimed at delegitimising and stigmatising CSOs among close to 1,200 competent national authorities from 47 countries and 10 international partners

In order to improve the situation, the EESC has recommended several ideas such as the creation of a European fund for democracy, human rights and values, the establishment of an EU coordinator on civil society freedoms; and the creation of a legally binding European monitoring mechanism, involving the EC, the Council, the EP and the EESC. (CR)

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

Commission Proposes Loss of EU Money if Rule of Law is Not Respected

On 2 May 2018, the Commission tabled its [proposals for a new long-term EU budget](#), also referred to as Multiannual Financial Framework (MFF). The new framework would follow the current budget period that ends in 2020. The MFF would therefore cover the period from 2021 to 2027, and it especially

takes into account the EU-27 after the withdrawal of the UK.

The MFF translates the Union's political priorities into financial terms. The priorities are identified on the basis of the "White Paper on the Future of Europe" of 1 March 2017, the agenda set out by Commission President *Jean-Claude Juncker* in his "State of the Union address" of 14 September 2016, the Bratislava conclusions by the Heads of State or Government of 16 September 2016, and the Rome Declaration of 25 March 2017 (for these events, eucrim 1/2017, p. 3 ff). Other important preparatory documents were the [Commission's Reflection Paper on the future of EU Finances of June 2017](#) and the Commission's [Communication of 14 February 2018](#) setting out the options for the future EU budget.

The Commission proposes a long-term budget of €1,135 billion in commitments (expressed in 2018 prices) over the said period from 2021 to 2027. This is equivalent to 1.11% of the EU-27's gross national income (GNI). This level of commitment translates into €1,105 billion (= 1.08% of GNI) in payments (again expressed in 2018 prices). The [keywords](#) for the new MMF are "a budget for a Europe that protects, empowers and defends," and "a budget that is modern, simple and flexible." The [major general guidelines](#) in the proposal are the following:

- Clear budget focus on "EU added value," i.e., the EU will invest in the "big" areas in which the EU can have a greater impact than public spending at the national level;
- Pooling of resources so that key investments can be taken, e.g., cutting-edge research projects that bring together the best researchers from across Europe, investments in satellites or in expensive supercomputers, etc.;
- Clearer budget and closer alignment with political priorities, including a reduction in funding programmes and bringing together fragmented funding sources;

- Reduction of the administrative burden for beneficiaries and intermediaries;
- More coherent rules on the basis of a single rule book;
- Streamlining of state aid rules;
- More flexibility, i.e., enabling the EU to respond to unforeseen demands quickly and effectively; this includes the establishment of a “Union Reserve” – a new tool that comes into play in case of unforeseen events, crises, or trade disruptions;
- Reform and modernisation of EU spending in the agriculture and cohesion sectors;
- Introduction of a “basket” of new own resources, including revenues from the Emissions Trading System, a new Common Consolidated Corporate Tax Base, and national contributions from non-recycled plastic packaging waste;
- Fairer and more transparent budget by simplifying and reforming the current, complicated system of rebates and “rebates on rebates.”

Note should be taken, in particular, of the Commission’s proposal to interlink sound management of the long-term budget with respect for the rule of law. In this context, the Commission proposes 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” ([COM\(2018\) 324 final](#)). The Commission aims to forge a link between respect for the rule of law, mutual trust, and financial solidarity. Therefore, the Commission is advocating that the EU should be equipped with appropriate measures to protect the Union’s financial interests if generalised deficiencies regarding the rule of law in a specific Member State cause the risk of financial loss. This new legal framework would go beyond the current rules by which the EU Member States and its beneficiaries must already show that their rules and procedures for financial management of EU money are robust and that funding is efficiently protected from abuse or fraud. The new legisla-

tive proposal defines general deficiencies concerning the rule of law in a Member State as they affect the principles of sound financial management or the protection of the EU’s financial interests. The occurrence of the defined situations would open the door for an EU reaction, which may include:

- Suspension of payments or of the implementation of the legal commitment or a termination of the legal commitment;
- Prohibition from entering into new legal commitments;
- Suspension of the approval of one or more programmes or an amendment thereof;
- Reduction of pre-financing;

As regards the procedure, the Commission suggests that the measures be proposed by the Commission and adopted by the Council through the so-called “reverse qualified majority voting.” This means that the Commission’s decision would be deemed to have been adopted by the Council, unless it decides, by qualified majority, to reject the Commission proposal within one month of its adoption by the Commission. The European Parliament should also be fully involved at all stages.

The new rules are a clear reaction from part of the Commission to a number of recent events and developments in some EU Member States that have shaken the presumption that all EU Member States ensure the rule of law and have in-built safeguards to protect citizens from any state power abuse. The EP and the public called for the introduction of legal consequences for EU financing if the rule of law is not respected in a Member State.

The proposed mechanism would, however, only affect state institutions and not the individual beneficiaries of EU funding. Member States would therefore be obliged to continue the implementation of the affected programmes and make payments to beneficiaries, such as Erasmus students, researchers, or civil society institutions. (TW)

Corruption

Country Factsheets on Attitudes towards Corruption

On 20 February 2017, the European Commission published country-specific factsheets to supplement the latest Eurobarometer surveys (Nos. 457 and 470) on public attitudes towards corruption. The factsheets contain breakdowns of key results by Member State, comparing them with results from previous surveys as well as with the EU average.

According to the Commission, the Eurobarometer surveys published in December 2017 indicate that most citizens and business representatives believe that the situation has improved, although corruption is still perceived as a major problem. (TW)

Money Laundering

Commission Proposes Better Access of Law Enforcement to Financial Information

On 17 April 2018, the Commission proposed another piece of legislation that supplements the current anti-money laundering legal framework. By means of a Directive, the Commission wishes to introduce uniform EU-wide rules, so that designated law enforcement authorities of the Member States can directly access centralized national bank account registries or data retrieval systems ([COM\(2018\) 213](#)).

The fourth and fifth Anti-Money Laundering Directives (AMLDs) establish centralized bank account registries (with information on all bank accounts in a given country) or data retrieval systems to which Financial Intelligence Units (FIUs) and anti-money laundering authorities have access. The AMLDs do not, however, regulate how other law enforcement authorities competent in preventing, detecting, investigating, and prosecuting criminal offences can use this information. Under the current system, law enforcement authorities usu-

ally send blanket requests to all financial institutions in their respective Member State or requests via intermediaries in order to obtain bank account information.

The new EU law would oblige Member States to empower their competent law enforcement authorities, such as the police, prosecution services, tax authorities or anti-corruption authorities, to access and retrieve information from said databases. The proposal foresees that the law enforcement authorities have access to limited information, however, namely that which is strictly necessary to identify which banks a person holds bank accounts in (e.g., owner's name and date of birth, bank account number). Access to the contents of the bank accounts or details on transactions is not possible. The latter information must then be subsequently requested from the financial institution.

The proposal includes other “safeguards” to restrict the access to information, among them:

- The search must prevent or support a criminal investigation concerning a “serious criminal offence;” reference is made in this context to the list of offences for which Europol is competent (cf. Regulation (EU) 2016/794);
- Access is only granted to persons within the competent authority specifically designated and authorized to make the query;
- Searches are only possible on a case-by-case basis, thus excluding controls by routine;
- Access and search by the competent law enforcement authorities must be monitored by means of the assessment logs.

In addition, the proposal also provides for a better, more efficient cooperation between FIUs and law enforcement. The Commission intends to remove current obstacles that FIUs face when cooperating with law enforcement authorities. According to the proposal, law enforcement authorities can request information from FIUs and *vice versa*.

An exhaustive list of criminal offences is further provided for each authority to exchange information on a case-by-case basis. The proposal also continues to set deadlines within which information has to be exchanged.

Europol is also integrated into the search and exchange system. The agency will be granted indirect access to bank account registries through its national units. Within the limits of Europol's responsibilities, and justified only on a case-by-case basis, Member States must ensure that Europol national units and FIUs reply to Europol requests related to bank account information and financial analysis carried out by Europol.

The central provisions described above are supplemented by additional ones related to the processing of personal data.

The new legal framework was [presented as part of a series of measures](#) that strive to further build up the so-called Security Union (see also news on “Security Union”). (TW)

New “Microfinancing” Approach to Combat Terrorist Financing

On 1 March 2018, MEPs [adopted recommendations](#) (by 533 votes to 24, with 43 abstentions) on how to deal with terrorist financing. They were submitted to the Council, the Commission, and the Vice-President of the Commission/High Representative of the Union for Foreign Affairs and Security Policy. The idea is that the best way to combat international terrorism is to cut off financial resources. To achieve this goal, international cooperation and the early exchange of relevant information are necessary. In order to ensure this, a formalised European platform should be created that works within the existing structure.

The major recommendations include:

- Prevention of terrorist financing should be seen as a key priority;
- Intelligence agencies should increase their coordination and cooperation and form a European anti-terrorism financial intelligence platform that could be man-

aged, for example, by Europol;

- A centralised database listing suspected persons, entities, and transactions is to be implemented and consistently kept up to date;

- Stronger monitoring of suspicious religious and educational places, institutions, centres, charities, cultural associations, and similar entities, as well as the inclusion of all their transactions in the centralised database;

- The regulation of money transfers, the transfer of precious metals and commodities (especially petrochemicals) as well as cultural goods, e.g., works of art and antiques, by means of documentation;

- Increased transparency with respect to company owners through public registers of legal entities, including companies, trusts, foundations; central registers of bank accounts, financial instruments, real estate ownership, life insurance, and other relevant assets that could be related to money laundering and terrorist financing;

- Making sure that banks monitor prepaid debit cards to ensure identification;

- Dismantling of tax havens;

- Evaluation of the dangers of e-gaming, virtual and crypto currencies, block chain and FinTech technologies to make them controllable.

Furthermore, the EP stressed that Member States and the Commission should prepare annual reports on their progress. (AO)

Trilogue Negotiations on Planned Directive to Counter Money Laundering by Means of Criminal Law

On 17 January 2018, the European Parliament paved the way for the start of [trilogue negotiations](#) between MEPs, the Council, and the Commission as regards the legislative proposal for a directive on countering money laundering by means of criminal law.

The [mandate](#) for MEPs was deemed approved after no objections were received by the deadline of midnight on 16 January 2018. This procedure is in

line with [Rule 69c](#) of the Rules of Procedure of the European Parliament, according to which MEPs can enter into negotiations after having voted to do so in the respective committee responsible for the legislative file. A plenary vote is only necessary if a MEP or a political group requests it before the expiry of a set deadline. Therefore, a full first reading in the plenary of the EP may not be necessary if not requested. This can speed up the start of trilogue negotiations with the Council and the Commission.

The LIBE committee already approved the underlying [report](#) of MEP *Ignazio Corrao* (EFDD/IT) on 11 December 2017. It contains several amendments to the initial Commission proposal of December 2016 ([COM\(2016\) 826 final](#)). For a summary, see *eu crim 4/2016*, pp. 159-160. They include *inter alia* the following issues:

- Crimes defining the term “criminal activity” for the purposes of the directive;
- Punishability of money laundering offenses;
- Extension of the penalties possible for natural persons (particularly including a temporary or permanent ban on entering into contracts with public authorities), temporary disqualification from the practice of commercial activities, and a long-term ban on running for elected offices or holding a position of public servant;
- Tightening up of the circumstances regarded as aggravating circumstances;
- Introduction of provisions on confiscation of property and the proceeds of criminal activities;
- Improved rules on cooperation for the prosecution of money laundering offenses.

The new legislation not only aims at harmonising the criminal offense of money laundering across the EU but also targets the financing of terrorism and organised crime. It is part of the Commission’s [Action Plan against terrorist financing](#), proposed in December 2016.

The trilogue talks can start immediately, as the JHA Council already agreed on its general approach to the draft in June 2017. (TW)

MEPs Disagree on Blacklisting of “High-Risk Countries”

In mid-December 2017 – in line with its custom of following the lead of the international Financial Action Task Force (FATF) – the [Commission decided](#) to include Tunisia, Sri Lanka, and Trinidad & Tobago to its blacklist, sparking controversy within the EP. On 7 February 2018, [MEPs approved](#), by close vote, the Commission’s proposal to add Tunisia, Sri Lanka, and Trinidad & Tobago to the EU’s money laundering blacklist.

A motion by MEPs that opposed this listing did not reach the necessary absolute majority of 376 votes. In the end, 357 MEPs voted in favour of the motion, 283 voted against it, and there were 26 abstentions. Supporters of the motion mainly opposed the inclusion of Tunisia on the list, because they thought that the listing would be counterproductive for the country’s efforts to become a democracy.

The divide within the EP reflects a long-standing dispute between the EP and the Commission. The latter draws up the list based on the Union’s anti-money laundering rules (see also *eu crim 2/2016*, p. 73). The EP largely disagreed with the methodology used by the Commission to compile the list (see *eu crim 2/2017*, p. 67).

According to Art. 9(1) of the fourth Anti-Money Laundering Directive 2015/849 (4AMLD), third-country jurisdictions with strategic deficiencies in their AML/CFT regimes that pose significant threats to the financial system of the Union (“high-risk third countries”) must be identified in order to protect the proper functioning of the internal market. Art. 9(2) of the Directive empowers the Commission to adopt delegated acts in order to identify such high-risk third countries, taking into account strategic deficiencies, and laying down the cri-

teria upon which the Commission’s assessment is to be based. Based on this identification, Art. 18(1) of the 4AMLD calls upon obliged entities to apply enhanced customer due diligence measures when establishing business relationships or carrying out transactions with natural persons or legal entities established in the listed countries. However, the EP has the right to veto the blacklist.

After the initial disagreement, the Commission worked out a new methodology by which to identify high-risk third countries. It agreed with the EP that the new methodology is to be introduced at the beginning of 2018 in order to add and remove countries. (TW)

Tax Evasion

Next Round in the Fight against Financial Crime, Tax Evasion, and Tax Avoidance

On 1 March 2018, [MEPs decided to set up a new special committee for financial crime, tax evasion, and tax avoidance \(TAX3\)](#).

The objective is to continue the work of the TAXE 1 and TAXE 2 special committees (as decided by the European Parliament on 12 February 2015 and on 2 December 2015, respectively), as well as to continue the work of the PANA inquiry committee on money laundering, tax evasion, and tax avoidance (as decided by Parliament on 8 June 2016). In addition to combating tax practices that violate the market, TAX3 shall contribute to the discussion on the taxation of the digital economy; it will examine national tax privileges and third country participation in tax evasion.

Another focus is the investigation of how the circumvention of EU VAT rules could come about, as the revelations of the Paradise Papers suggest.

In addition, a general analysis will be carried out of how well the exchange of information and coordination between Member States and Eurofisc – the EU’s decentralized and multilateral early

warning mechanism for combating VAT fraud – is going.

The TAX3 special committee is to have [45 members](#). The term of office for the committee is 12 months.

The decision could be taken without a vote, because there was no objection to it. (AO)

Chairs of New TAX3 Special Committee

On 22 March 2018, the new special committee on financial crimes, tax evasion, and tax avoidance (TAX3) held [its first meeting](#) at which it appointed a Chair and four Vice Chairs.

- Through acclamation, *Petr Ježek* (CZ, ALDE), former co-rapporteur for the PANA Committee, became the head of the TAX3 Committee.

- *Roberts Zile* (LV, ECR) was appointed First Vice Chair and *Eva Joly* (FR, Greens/ALE) Second Vice Chair.

- In the election of the third Vice Chairman, *Esther de Lange* (NL, EPP) prevailed in a run-off election.

- *Ana Gomes* (PT, S&D) won the run-off election for the fourth Vice Chairman.

The GUE/NGL, EFDD, ENF, and NI, who are also represented on the committee, are thus left empty-handed.

The Special Committee consists of 45 members. Its task is to continue the work of the TAXE1 and TAXE2 special committees and the PANA inquiry committee. Additionally, it is to take up the fight against financial crime during the 12-month term of office that commenced on 1 March 2018. (AO)

EU and Norway Foster Administrative Cooperation to Combat VAT Fraud

On 6 February 2018, the Council and Norway [signed an agreement](#) designed to strengthen administrative cooperation in order to combat fraud and recover claims in the field of VAT.

The main objective is to close a gap in control of the VAT chains used by fraudsters with counterparts located in non-EU countries.

[The agreement](#) lays down rules and procedures for cooperation when ex-

changing any information that may assist in a correct assessment of VAT, monitor the correct application of VAT, and combat VAT fraud. They also address the recovery of claims relating to VAT and regulate administrative penalties, fines, fees, or surcharges.

The agreement follows the same structure that currently used for cooperation between EU Member States and the same instruments, such as electronic platforms and e-forms.

Norway is the first country that the EU has concluded an agreement with in this field. Negotiations started in 2014/2015 after the Council had given a respective mandate to the Commission. Norway is a member of the European Economic Area with a similar VAT system to that of the EU and a well-established tradition of cooperation in the field of VAT with EU Member States.

The agreement must now be approved by the EU and Norway in accordance with their own internal legal procedures. It will enter into force on the first day of the second month after the Parties have notified each other of completion of the internal legal procedures. (TW)

Council Softens EU List of Tax Haven Countries

At its [meeting on 23 January 2018](#), the Economic and Financial Council removed eight jurisdictions from the [EU's list of non-cooperative countries for tax purposes](#). The removal ensued because of commitments at a high political level that address certain EU concerns. The eight jurisdictions are Barbados, Grenada, the Republic of Korea, Macao SAR, Mongolia, Panama, Tunisia, and the United Arab Emirates. They are now on a list of jurisdictions subject to close monitoring.

The first ever common EU list of non-cooperative jurisdictions assumed to be tax havens was agreed on by [Council conclusions adopted on 5 December 2017](#). It is part of the EU's external strategy to fight tax fraud, tax evasion, and

tax avoidance. The main objective of the list is to deter countries that consistently do not play fair on tax matters. The list also aims to encourage countries to enter into a dialogue with the EU in order to meet international good governance standards of taxation.

The listing is the result of a thorough screening of and dialogue with non-EU countries. Non-EU countries are assessed against good governance criteria, agreed on by the EU Member States at the [November 2016 ECOFIN Council](#). They form the basis of a screening “scoreboard.” These criteria relate to the following:

- Tax transparency;
- Fair taxation;
- Implementation of the so-called OECD BEPS measures;
- Substance requirements for zero-tax countries.

BEPS stands for “Base Erosion and Profit Shifting” and refers to tax avoidance strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations.

Jurisdictions signalling cooperation are not listed, as long as they give a clear and concrete commitment to address the tax deficiencies identified by the EU.

Following their removal from the list, nine jurisdictions have currently been deemed to have tax good governance shortcomings: American Samoa, Bahrain, Guam, Marshall Islands, Namibia, Palau, Saint Lucia, Samoa, and Trinidad & Tobago.

Countries appearing on the EU list may face certain sanctions, e.g.:

- Being cut off from a number of EU funds;
- Being referred to in the list by the Commission in other relevant legislative EU proposals, which leads to stricter reporting requirements in the private sector;
- Having defence measures taken against them by EU Member States (although these countermeasures apply in accordance with national law, a coordinated set of possible actions was agreed on at the EU level).

The EU list will be updated at least once a year and listed jurisdictions will be removed from the list once they have addressed EU concerns.

The EU list of non-cooperative jurisdictions in tax matters must be distinguished from other lists that try to motivate “non-willing countries” to adhere to international standards in tax and money laundering matters, e.g. the [OECD list](#) on international tax transparency of June 2017 or the EU anti-money laundering list (for the latter, see also news on money laundering; eucrim 2/2017, p. 67, and eucrim 2/2016, p. 73).

Non-Cash Means of Payment

JHA Council Adopts General Approach on New Law Combating Non-Cash Payment Fraud

At its meeting on 9 March 2018, the Justice Ministers of the EU Member States endorsed a [general approach](#) on new legislation regarding the fight against fraud and counterfeiting of non-cash means of payment. The [proposal for a directive](#) was tabled by the Commission on 13 September 2017 (see eucrim 3/2017, p. 109).

The directive would replace an older framework decision of 2001. The aim of the reform is to update the legislation and keep pace with new technologies fraudsters use. Therefore, the directive would encompass not only traditional non-cash means of payment, such as bank cards or cheques, but also new forms of making payment that have appeared over recent years, e.g., electronic wallets, mobile payments, virtual currencies, etc.

In addition, the directive intends to eliminate operational obstacles that hamper investigation and prosecution. It also foresees the obligation to take preventive measures to enhance public awareness of fraudulent techniques, such as phishing or skimming.

The general approach reached in the Council now opens the door for negotiations with the European Parliament,

which co-legislates on the new law. It is expected that the EP will submit its position in June 2018. LIBE is the responsible EP committee for the legislative dossier. (TW)

Counterfeiting & Piracy

Public Consultation to Establish First Worldwide “Counterfeit and Piracy Watch List”

On 31 January 2018, the European Commission launched a [survey](#) that seeks input from stakeholders to identify online and physical marketplaces outside the EU where counterfeiting, piracy, or other forms of intellectual property abuse are common practice. The results of the stakeholder consultation are to be presented in a future “[Counterfeit and Piracy Watch-List](#)” that identifies and describes the most problematic – especially online – marketplaces. The list aims to encourage the operators and owners of such marketplaces as well as the responsible local authorities and governments to take the necessary actions and measures to reduce the possibility of infringing intellectual property rights of goods or services.

The initiative is part of the Commission’s strategy announced in the 2017 Communication “[A balanced Intellectual Property enforcement system responding to today’s societal challenges](#).” Based on stakeholder input, the watch list will also help to raise the awareness of consumers who might be buying products in those marketplaces. It will also encourage cracking down on intellectual property abuse.

The Commission has requested written contributions from stakeholders in identifying marketplaces that should be included on the 2018 watch list by 31 March 2018. Written comments should be as detailed as possible and include supporting documents. Stakeholders should especially include an assessment of the impact of the marketplace on legitimate trade, any known enforce-

ment activity against the marketplace, and the state of play of any enforcement activity. Replies may be submitted in any of the 24 official EU languages. (TW)

Cybercrime

Decryption Tool for GrandCrab Available

Under the supervision of the General Prosecutor’s Office (DIICOT), together with Bitdefender and Europol, the Romanian Police (IGPR) developed a [decryption tool for victims of GrandCrab ransomware](#). The tool is available free of charge from [www.nomoreransom.org](#).

GrandCrab encrypts files on a victim’s computer. A decryption key is offered against a ransom payment of USD 300-500 in the DASH virtual currency. The ransomware is spread via malicious advertisements published on compromised websites or through fictitious invoices sent as attachments in emails. (CR)

Action Days Against Online Terrorist Propaganda

On 14 and 15 March 2018, two [Referral Action Days](#) took place with the aim of identifying and flagging online terrorist propaganda on WordPress.com, a blogging service, and VideoPress, a video-hosting service for WordPress sites. During the two days, more than 900 instances were reported to the platform moderators for further review and possible removal.

The action days were conducted by Europol’s European Union Internet Referral Unit (EU IRU), together with the national referral units of Belgium, France, the Netherlands, Slovenia, and the United Kingdom. (CR)

Malware Mastermind Arrested

At the end of March 2018, the leader of the criminal gang behind the [Carbanak and Cobalt malware attacks was arrested](#) in Spain. Since 2013, the gang had been

using forms of malware (called Anunak, Carbanak, and Cobalt) to attack banks, e-payment systems, and financial institutions in more than 40 countries. This criminal activity caused a cumulative loss of over €1 billion to the financial industry. By sending spear phishing emails with a malicious attachment impersonating legitimate companies to bank employees, the gang gained access to internal banking networks and infected the servers controlling the ATMs.

The operation was conducted by the Spanish National Police with the support of Europol, the FBI, and the Romanian, Moldovan, Belarussian, and Taiwanese authorities as well as private cyber security companies. (CR)

Racism and Xenophobia

Application of Code of Conduct Countering Illegal Hate Speech Online Positive

On 19 January 2018, the Commission released the results of the [third evaluation](#) of the Code of Conduct on countering illegal online hate speech. The [overall assessment](#) is rather positive since, on average, IT companies removed 70% of all illegal hate speech notified to them by the NGOs and public bodies participating in the evaluation. The removal rate has steadily increased compared to the first and second evaluation rounds, which were carried out in December 2016 and May 2017.

Furthermore, the latest evaluation shows that all participating IT companies fully meet the target of reviewing the majority of notifications within 24 hours, more than 81% on average. This figure has also considerably increased compared to the previous monitoring rounds.

Nevertheless, the Commission notes that the lack of systematic feedback to users remains one of the most important improvement issues for IT companies. A further issue concerns the national police and prosecution services, since criminal

investigation into illegal hate speech offenses should be prompter and more effective, according to the Commission.

Several IT companies, i.e., Facebook, Twitter, YouTube, and Microsoft, have committed to speedily combatting the spread of hate speech content in Europe through the Code of Conduct agreed on with the European Commission in May 2016 (see [eucrim 2/2016](#), p. 76). In the meantime, Google+ and Instagram have also declared that they will join the Code of Conduct, thus further expanding the numbers of actors covered by it.

Through the Code of Conduct, IT companies voluntarily enter into a commitment to assess requests against their rules and community guidelines. Where applicable, the companies also address national laws on combating racism and xenophobia transposing the EU [Framework Decision 2008/913/JHA](#) on combatting racism and xenophobia by means of criminal law. They commit to reviewing the majority of these requests in less than 24 hours and to removing the content, if necessary.

In this context, it should be noted that the Code of Conduct is not a binding legal document. It neither gives governments the right to take down Internet content nor does it count as illegal hate speech or any type of speech that is protected by the right to freedom of expression set out in the CFR.

A monitoring exercise set up in collaboration with a network of civil society organisations located in different EU countries is used to do the evaluation. Using a commonly agreed methodology, these organisations test how the IT companies have applied the Code of Conduct in practice. They do this by regularly sending the four IT Companies requests to remove content from their online platforms. The organisations participating in the monitoring exercise record how their requests are handled, i.e.:

- How long it takes the IT companies to assess the request;
- How the IT companies respond to the request;

- Whether and what feedback they receive from the IT companies.

The most recent exercise was carried out for a 6-week period between 6 November and 15 December 2017.

The Code of Conduct monitoring is only one element of a wider aspiration of the Commission to make online platforms more proactive in the prevention, detection, and removal of illegal content. The Commission is in an ongoing dialogue with IT platforms, civil society organisations, and national authorities to discuss challenges of and progress in tackling the new phenomenon of defamatory content online. Measures also include workshops and trainings organised with companies and other relevant stakeholders. (TW)

Commission Steps Forward to Tackle Illegal Content Online

At a [meeting](#) between five Commissioners and representatives of online platforms on 9 January 2018, the Commission analysed the bulk of EU measures in tackling the spread of illegal content online. The meeting was designed to discuss progress made on this topic. It also fostered the voluntary collaboration between official authorities and private IT companies.

The Commission reiterated its viewpoint that IT companies not only play a key role in innovation and growth in the digital economy but also carry a significant societal responsibility in terms of protecting users and society as a whole. This was also set out in a [Communication of 28 September 2017](#), entitled “Tackling Illegal Content Online – Towards an enhanced responsibility of online platforms.” This Communication lays down several guidelines and principles for online platforms to increase their proactive approaches as regards the prevention, detection, and removal of illegal content online.

Illegal content online includes online terrorist propaganda as well as xenophobic, racist, and illegal hate speech. It also extends to breaches of intellectual prop-

erty rights. Above all, the EU currently encourages efforts towards the automated detection and removal of terrorist propaganda online. (TW)

Commission Recommendation on the Handling of illegal Internet Content

In continuation of the [Communication on “Tackling Illegal Content Online – Towards an enhanced responsibility of online platforms”](#) (marked by the slogan: what is illegal offline is also illegal online), the Commission issued a [Recommendation on 1 March 2018](#). It includes operational measures and related safeguards. Its goal is to free the Internet from illegal content, and it is aimed at both Member States and companies.

Illegal content is any information that does not comply with EU law or the law of the Member States, in particular terrorist content, xenophobic or racist illegal hate speech, child sexual abuse, breaches of intellectual property rights, and unsafe products.

The Recommendation covers three areas:

- Handling of generally illegal online content;
- Special handling of terrorist content;
- Safeguards through the provision of information to the Commission.

According to the Commission, a particular social responsibility rests with online service providers. It calls on them, and also on the Member States, to take effective, appropriate, and proportionate measures against illegal content. This should be done, however, in full compliance with the Charter of Fundamental Human Rights, especially the right to freedom of information and freedom of expression.

Providers should detect and delete illegal content at an early stage; they should not only react, but also develop proactive procedures to prevent illegal content. Providers should also cooperate closely with Member States and among themselves in order to be able to help smaller, economically weaker companies in particular. For the latter reason,

transparency is of enormous importance, as is the installation of safeguards. For example, although the Commission proposes the creation of automated procedures, it calls for human monitoring and verification. Those whose content has been deleted should also have the opportunity to challenge such deletion. For these reasons, the Commission recommends that the providers publish regular reports in order to clarify what content will be deleted.

In addition to the above, the so-called one-hour rule is to apply to terrorist content, which carries the immanent risk of a possible radicalisation of users. According to this rule, terrorist content is to be deleted within one hour, as most damage is caused during this time.

In order to verify the effectiveness of the procedures, the Commission recommends that Member States submit reports to the Commission every three months on removals, the work of hosting services, and on cooperation. In addition, three months after the publication of the Recommendation, Member States should share with the Commission all relevant information on terrorist content. After six months at the latest, Member States should then report all relevant information on illegal content in general. The Commission will then decide whether it intends to take further measures, including specific legislative measures.

A [FAQ](#) and a [Fact-Sheet](#) accompany the Recommendation. They summarise the essential issues and show the Security Union’s course to date in the area of online content. (AO)

Urban Security: Networks in the Fight Against Terrorism

On 8 March 2018, the Commission and the Committee of the Regions issued a [joint statement](#) at the EU Mayors’ Conference. The statement highlights the need for cooperation at all levels of government and with private stakeholders in the fight against global terrorism.

Of particular importance are a functioning exchange of information, the collection of relevant data, the exchange of good practices and training, as carried out in existing forums such as the [Radicalisation Awareness Network \(RAN\)](#), launched by the Commission in 2011.

Reference was also made to the Commission’s Action Plan of 18 October 2017, in which the Commission undertook to support the Member States through targeted funding, practitioners’ networks, and guidelines. In addition, assistance will be given in involving private stakeholders and those in the local sector.

The provision of funding under the [Internal Security Fund for Police](#) is also of key importance and, from October 2018 on, urban security is to become part of the 2015 Urban Innovative Actions Initiative.

As the joint statement pointed out, the fight against terrorism begins at the local level by dealing with poverty, the inclusion of migrants, proper housing and creating good air quality. Addressing these issues helps counteract the very beginnings of radicalisation. Ms *Corina Crețu*, Commissioner for Regional Policy, underlined in her [closing speech](#) that security in cities has a social dimension. This is why access to “quality basic services such as education and healthcare” must be ensured in order to protect the values emanating from European cities: “freedom, universality, creativity, courage, tolerance”. (AO)

Procedural Criminal Law

Data Protection

JHA Council Gives Guidance on Legislative Proposal for Interoperability

At its meeting on 8 March 2018, the Home Affairs Ministers of the EU Member States gave political guidance on the ongoing examination of the legislative

proposals for establishing an interoperability framework between EU information systems.

The [initiative](#), consisting of two legislative proposals, was launched by the Commission in December 2017 (see [eucrim 4/2017](#), p. 174). The aim is to improve the search and comparison of data available in the various EU information systems, by establishing the following interoperability components:

- A European search portal, which would allow competent authorities to search multiple information systems simultaneously;
- A shared biometric matching service, which would enable the search and comparison of biometric data (fingerprints and facial images) from several systems;
- A common identity repository, which would contain biographical and biometric identity data of third-country nationals available in several EU information systems;
- A multiple identity detector, which would verify whether the biographical identity data contained in the search exists in other systems, in order to enable the detection of multiple identities linked to the same set of biometric data.

At the JHA Council meeting, the Ministers concluded, above all, the following:

- The proposed interoperability components adequately address the needs of the end users and will help enhance external border management and internal security;
- Development of central interoperability components will require action at national level, and certain coordination at the EU level to prepare this implementation is needed;
- The Commission should further examine the impact of interoperability at national level.

The majority of Ministers also feel that work should focus on the issues currently on the table, in order to make rapid progress. However, the Commission, together with the Member States, must examine the feasibility of other

longer-term recommendations by the High-Level Expert Group on Information Systems and Interoperability in order to address the remaining information gaps and contribute to the completion of the interoperability landscape.

The discussion on the interoperability proposal is now continuing at the technical level in the Council working groups. (TW)

EDPS Further Critical to Interoperability

On 16 April 2018, the EDPS presented his concerns on the recent Commission's legislative proposals on establishing a framework to ensure interoperability between existing and future EU information systems (see [eucrim 4/2017](#), pp. 174-175). The EDPS' contribution ([Opinion 4/2018](#)) follows up the reflection paper issued in November 2017, in which the EDPS already eyed the plans of the EU institutions on interoperability.

Interoperability is defined as the ability of the EU's large-scale IT systems, such as the Schengen Information System, the Visa Information System, and Eurodac to exchange data and to enable information sharing. The EDPS' opinion of 16 April 2018 contains numerous general and specific recommendations for the proposed legislation.

In essence, the EDPS acknowledges the need for information sharing in order to manage current challenges, such as migration, terrorism, and cross-border crime. The EDPS points out, however, that the current plans would considerably alter the structure and operation of the IT systems. Interoperability would not only lead to purely technical changes but mark a "point of no return", according to the EDPS, with significant, complex effects to the interpretation of fundamental legal principles traditionally applicable in this area. As a consequence, the EDPS calls on the Commission and the EU legislators to engage in a wider debate on the future of information exchange in the EU, the governance of interoperable databases, and the safeguarding of

fundamental rights (see also the [press release EDPS/2018/04](#)).

The EDPS further emphasizes that the current plans go beyond being a technical tool to (only) facilitate the use of the EU's information systems, since the proposal introduces new possibilities to access and use the stored data in order to combat identity fraud, facilitate identity checks, and streamline access to non-law enforcement information systems (such as those initially created for immigration purposes) by law enforcement authorities. A new central database would store a huge amount of personal data, including biometric data. A data breach could therefore harm a very large number of individuals, and such database could become a dangerous tool for fundamental rights. In addition, allowing law enforcement authorities to routinely access information not originally collected for law enforcement purposes has serious implications on the protection of fundamental rights and principles, in particular the purpose limitation principle.

Against this background, the EDPS recommends, *inter alia*, the following:

- Building the central database upon strong legal, technical, and organisational safeguards, clearly defining its purpose, and setting the conditions and modalities for its use;
- Clearly identifying and further assessing the problem of identity fraud among third-country nationals in order to make the legislation appropriate and proportionate;
- Regulating more strictly and precisely the access and use of data in cases of identity checks;
- Taking into account fundamental data protection principles, e.g. purpose limitation, during all stages of implementation of the legislation;
- Introducing the principles of data protection by design and by default.

The EDPS opinion is flanked by other opinions, such as those presented by the Article 29 Data Protection Working Party and by the Fundamental Rights Agency at nearly the same time. (TW)

Data Protection Experts Give Critical Statement on Planned Interoperability

On 11 April 2018, the Article 29 Data Protection Working Party (WP29) adopted its [opinion](#) on the Commission proposals to establish a framework of interoperability between the EU information systems in the field of borders and visas and police and judicial cooperation, asylum and migration (for the legislative proposals, see *eu crim 4/2017*, pp. 174-175). The opinion must be seen in the context of other, nearly parallel statements issued by the EDPS and the EU's Agency for Fundamental Rights.

The WP29 opinion gives a detailed, critical analysis of the proposed architecture and its components, access rights, the data protection regime, coordination of the supervision, specific safeguards for children, the elderly and disabled persons, data retention and the keeping of logs, and data security.

In general, the WP29 criticises the proposal not having made an impact assessment of data protection aspects. In particular, the Commission failed to explain which data protection regime will apply to which operation.

Specifically, the WP29 opinion concludes, *inter alia*, the following:

- The creation of a common, central database for the purpose of overall identification, the Common Identity Repository (CIR), which includes biometric data, is not necessary and proportionate;
- The impact of identity fraud on the internal security of the Union has not been sufficiently established;
- Access rights for police officers with regard to overall identity checks is regulated in a disproportionate manner so far, particularly lacking safeguards to justify the use of data for additional law enforcement purposes;
- The controllership of the EU database must be regulated more precisely and clearly concerning the applicable data protection regime;
- Specific, additional protection should be introduced as regards data processing

involving children, the elderly, and disabled persons;

- Retention periods must be more strongly justified;
- In terms of data security, better security measures are needed, in particular for sensitive data, such as biometric data;
- Coordination of supervision should be placed under the responsibility of the European Data Protection Board (EDPB).

In view of the numerous concerns, the WP29 calls upon the Commission and the Union's legislator to provide an analysis of less intrusive means to reach the goals set in the proposals, so that the choices made and the proportionality principle can be justified. Furthermore, the WP29 recommends substantially amending the proposed law during the negotiations to ensure better data protection safeguards and enhanced legal certainty.

It should be noted that, as from 25 May 2018, the WP29 has been replaced by the European Data Protection Board (EDPB) under the EU General Data Protection Regulation. The WP29 was made up of a representative of the data protection authorities from each EU Member State and the EDPS. Its main tasks were to advise the European Commission on data protection questions of EU legislation and to promote the consistent application of the EC's Data Protection Directive 95/46. (TW)

FRA Opinion on Interoperability

On 11 April 2018, FRA published its [Opinion](#) on the implications of increased levels of interoperability for fundamental rights. It looked at the proposed Regulations on establishing a framework for interoperability between EU information systems (borders and visas) and on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum, and migration).

The Opinion contains individual opinions addressing a number of issues: non-

discrimination and a general fundamental rights safeguard clause; objectives of interoperability; reporting and statistics; the right to information; the right of access, correction and deletion; and how to mainstream fundamental rights in the implementation of the Regulations.

The four main components at the heart of the Regulations are a European Search Portal (EPS); a shared Biometric Matching Service (BMS); a Common Identity Repository (CIR), and a Multiple-Identity Detector (MDI).

The European Search Portal (ESP) intends to allow competent authorities to search multiple IT systems simultaneously, using both biographical and biometric data. Searching and comparing biometric data (fingerprints and facial images) from several IT systems will be enabled via the shared Biometric Matching Service (BMS). The Common Identity Repository (CIR) shall contain biographical and biometric identity data of third-country nationals available in existing EU IT systems. And, finally, the Multiple-Identity Detector (MID) will make it possible to check whether the biographical and/or biometric identity data contained in a search also exists in other IT systems. (CR)

AG: Minor Offences Can also Justify Police Access to Retained Data

On 3 May 2018, Advocate General (AG) *Henrik Saugmandsgaard Øe* delivered a notable opinion on the scope of data protection in criminal law enforcement situations. According to the AG, Union law does not preclude investigative measures by which national authorities seek identification data from certain mobile phones held by electronic communication service providers, even if the criminal offense is not of a serious nature. The reference for the case is [C-207/16 \(Ministerio Fiscal\)](#).

The case relates to the interpretation of Art. 15(1) of Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communication sector. Ac-

ording to Art. 15(1), Member States may restrict the scope of certain rights and obligations laid down in the Data Protection Directive 95/46 if such restrictions constitute a necessary, appropriate, and proportionate measure in a democratic society to safeguard [*inter alia*] the investigation, detection, and prosecution of criminal offences.

The case is seen in the light of the CJEU's previous case law on data protection, in particular regarding its judgments in C-293/12 and C-594/12 (*Digital Rights Ireland*) and C-203/15 and C-698/15 (*Tele2 Sverige*). The question arose as to whether the exception made by secondary Union law allowing access to retained data is restricted to "serious" criminal offenses only, in order to be compatible with the fundamental rights guaranteed in Art. 7 and 8 GRC, i.e., the right to respect private and family life and the right to protection of personal data. As a consequence, another question emerged, i.e., how the seriousness of crime must be determined, so that an interference into said fundamental rights can be justified.

These questions were posed in an action before the Provincial Court, Tarragona/Spain, where an appeal was brought against a previous judicial decision that denied police authorities the possibility to obtain communication data held by mobile phone operators. In the case at issue, Spanish police were investigating the robbery of a wallet and a mobile phone and therefore wanted various telephone operators to release telephone numbers that had been activated within a certain time period (approx. 12 days) after the robbery as well as the personal data of the owners/users of these telephone numbers corresponding to the SIM cards activated. The court of preliminary investigation refused this request on the grounds that Spanish law limits the communication of the data retained by the telephone operators to serious offences only, i.e., offences punishable by a term of imprisonment of more than 5 years.

Upon appeal by the Ministerio Fiscal (Spanish Public Prosecutor's Office), the Provincial Court of Tarragona referred the following two questions to the CJEU:

- Can the sufficient seriousness of the offences, as a criterion which justifies interference with the fundamental rights recognised in Art. 7/8 GRC, be determined by taking into account only the sentence that may be imposed in respect of the offence investigated, or is it necessary to identify in the criminal conduct particular levels of harm to individual and/or collective legally-protected interests?
- If the CJEU follows the first alternative, what should be the minimum threshold? Would it be compatible with a general provision setting a minimum of 3 years of imprisonment (corresponding to the present Spanish law that came into force after the decision of the court of preliminary investigation)?

First, the AG confirms the admissibility of the reference for a preliminary ruling. He considers Directive 2002/58 applicable in the present case, since the CJEU in *Tele2* confirmed that national legislation relating to the retention of data for the purpose of combating crime falls within the scope of that directive. In addition, the Directive encompasses situations such as those at issue, even if the data to be collected only refer to the users' "identity" and not to "location" or "communication" as such.

Secondly, as regards the *res materiae*, the AG recommends that the CJEU not directly answer the first question but instead reformulate it. In the AG's opinion, the concept of the "seriousness" of criminal offences had been developed by the CJEU in the cases *Digital Rights* and *Tele2* to address other situations than those dominating the case at issue. He clarifies that, from the previous CJEU's case law, a link can be discerned between the seriousness of the interference into fundamental rights and the seriousness of the reason justifying the interference, in particular with regard

to the proportionality principle. The AG opines that the CJEU would apply the concept of the seriousness of the offence only in case of data retention where no differentiation, limitation, or exception is made as regards the persons affected, the means of electronic communication, and the type of data. The AG further points out that the case at issue shows several differences in comparison to the situations decided by the CJEU in *Digital Rights* and *Tele2*, such as:

- Targeted measure;
- Data solely relate to identity;
- Restricted category of subscribers or users;
- Specific means of communication;
- Data sought for a limited period;
- Harmful effects for the persons concerned only slight and circumscribed.

The AG therefore concludes that, in the present case, the interference is not serious (i.e., the disclosure of the sought data does not entail a serious infringement of privacy), as a consequence of which even criminal offences that are not particularly serious may justify such interference (i.e., the disclosure of data requested from the telephone operators). The AG further justifies this conclusion by pointing out that the wording of Art. 15(1) of Directive 2002/15 does not limit an exception to the confidentiality of telecommunications to "serious" offences but only to "criminal offences."

Last but not least, the AG makes further alternative suggestions on the possible criteria for determining the sufficient seriousness of an offence should the CJEU not follow his approach. In this context, the AG concludes the following:

- The concept of "serious crime" within the meaning of the case law in *Digital Rights* and *Tele2* is not an autonomous concept of EU law (its content therefore need not be defined by the CJEU);
- Only a non-exhaustive body of assessment criteria can classify a criminal offence as "serious" within the meaning of the relevant CJEU's case law.

If the CJEU were to answer the sec-

and question, the AG recommends that the Member States should be free to set the minimum level of the penalty relevant for that purpose, provided that they comply with the requirements of EU law, in particular the requirement set by the fundamental rights of the CFR.

In terms of balancing fundamental rights and the effectiveness of law enforcement action, the opinion contains some explosive points. Among them, the AG introduces a new category of data retention to which nearly unlimited access on the part of law enforcement authorities is possible. Lawyers have already criticized the AG's approach as a step backwards in the protection of fundamental rights and freedoms. (TW)

Partial Success for Schrems' Campaign Against Facebook

On 25 January 2018, the CJEU decided on the place of jurisdiction in a case of alleged privacy violations and the question of whether a class action is possible against social media companies ([Case C-498/16](#)).

The background of the case is a lawsuit involving *Maximilian Schrems*, an Austrian resident and well-known privacy activist, and Facebook Ireland, where the company has its European headquarters. Mr. Schrems, who has a private Facebook account, is alleging Facebook of violating numerous Austrian and European data protection rules. He brought several claims against Facebook Ireland Ltd. before the civil court in Vienna, Austria. In addition, Mr. Schrems was able to assign other consumer claims to his action and argues that the Austrian courts have international jurisdiction for a consumer class action against Facebook.

In contrast, Facebook held the action inadmissible, arguing that Mr. Schrems is not a "consumer," since he also uses Facebook for professional purposes, as a result of which he is not entitled to bring actions before a court in his place of domicile ("consumer forum"). Furthermore, Facebook purported that the

assigned claims are not applicable to the consumer forum.

After the first-instance court in Vienna (*Landesgericht für Zivilrechtssachen Wien*) basically followed the arguments of Facebook and dismissed Schrems' action, the Supreme Court of Austria (*Oberster Gerichtshof*) referred the questions to the CJEU for a preliminary ruling. It seeks clarification on the conditions under which the consumer forum can be invoked based on Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

The CJEU replied that class actions against Facebook in Austria are indeed inadmissible, but it backed Schrems in so far as he is entitled to file individual actions before courts in his place of residence (Austria), even though Facebook is located in Ireland.

The CJEU held, in particular, that Schrems' activities – publishing books, lecturing, operating websites, fundraising, and being assigned the claims of numerous consumers for the purpose of their enforcement – do not entail the loss of a private Facebook account user's status as a "consumer." Therefore, he can invoke the "consumer forum" according to Art. 16 of said EC Regulation. In accordance with this provision, a consumer may bring proceedings against the other party to a contract in the courts for the place where the consumer is domiciled. The CJEU mainly argued that an interpretation of the notion of "consumer" that excluded the above-mentioned activities would have the effect of preventing an effective defence of the rights that consumers enjoy. They enjoy these rights in relation to their contractual partners who are traders or professionals, including those rights relating to the protection of their personal data. Such an interpretation would disregard the objective set out in Art. 169(1) TFEU of promoting the right of consumers to organise themselves in order to safeguard their interests.

As far as the assigned claims are concerned, the CJEU held that Regulation No 44/2001 established a special system in order to protect the consumer as the party deemed economically weaker and less experienced in legal matters than the other party to the contract. Therefore, a consumer is protected only as far as he, in his personal capacity, is the plaintiff or defendant in proceedings. Consequently, an applicant who is not himself a party to the consumer contract in question cannot enjoy the benefit of the jurisdiction relating to consumer contracts. This is also true for consumers to whom other claims have been assigned.

The decision of the CJEU is a partial victory for Schrems, who can pursue his individual claims against Facebook in his home country of Austria in which the lawsuit is much cheaper than in Ireland. Schrems is fighting against Facebook in a series of actions. Currently, complaints are pending before the Irish Data Protection Commissioner and the Irish High Court, where Schrems is arguing that Facebook has not correctly implemented the CJEU's ruling of 6 October 2015 ([Case C362/14](#)). In this judgment, initiated by Schrems, the CJEU took down the EU-US Safe Harbour agreement and, in essence, prohibited the data transfer from Facebook EU to US surveillance bodies (see also [eucrim 3/2015](#), p. 85). (TW)

Commission Prepares for Effective Implementation of New EU Data Protection Legislation

25 May 2018 marks the date of the direct applicability of the General Data Protection Regulation (GDPR), two years after its adoption and entry into force. The GDPR will bring about a significant change in the data protection landscape of the EU, since it replaces the 20-year-old "Data Protection Directive" 95/46/EC. In view of this event, the Commission published a Communication on 24 January 2018 ([COM\(2018\) 43 final](#)): a guidance paper taking stock of the preparatory work done so far and an

outlook on further useful steps to ensure that all elements for a successful entry into effect of the new Union framework are in place.

Against this background, the Communication includes the following elements:

- Recapping the main innovations and opportunities opened up by the new EU data protection legislation;
- Stocktaking of the preparatory work so far at the EU level;
- Outlining what the European Commission, national data protection authorities, and national administrations still need to do to bring the preparation to successful completion;
- Setting out measures that the Commission intends to take in the coming months.

In addition to the guidelines, the Commission also [launched an online toolkit](#), available in all EU languages and containing FAQs, practical examples, and web-links offering clearer and more practical guidance on the adoption of the new rules. It is mainly directed at citizens and businesses to help them better understand the GDPR. (TW)

European Data Protection Day – EU Enters Into New Era in 2018

28 January marks European Data Protection Day. In a [joint statement](#) in advance year's (published on 26 January 2018), four Commissioners stressed that 2018 is going to be a landmark year for data protection in Europe. They mainly referred to the General Data Protection Regulation (GDPR), which will become reality in May 2018.

The statement summarizes the main novelties introduced by the new data protection legislation as follows:

“The European Union is proud to lead the way and set a high standard for data protection worldwide. We are committed to promote our data protection values at international level. Our economies heavily depend on international data flows. We launched in 2016 the EU-U.S. Privacy Shield to facilitate exchanges

with the U.S. We are now discussing with Japan to finalise the formal steps for allowing the free flow of personal data between the EU and Japan. These exchanges fully respect our data protection standards, while facilitating trade.

We are committed to making sure that security, trade and protection of personal data go hand in hand with modernisation and innovation, both at European and global level.” (TW)

Ne bis in idem

CJEU Delivers Leading Judgments on Combination of Administrative and Criminal Penalties

On 20 March 2018, the CJEU [delivered three judgments](#) that addressed a fundamental question in relation to the *ne bis in idem* principle as set out in Article 50 CFR, namely whether it is possible to combine administrative and criminal proceedings/penalties.

Art. 50 of the Charter provides that “no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law” (*ne bis in idem* principle). This article prohibits a duplication of both proceedings and penalties of a criminal nature for the same acts and against the same person.

Limitations of this principle may, however, be justified on the basis of Art. 52(1) CFR. Therefore, the limitation must be provided for by law, respect the essence of the respective rights and freedoms, and – subject to the principle of proportionality – may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

The Court essentially concluded that a duplication of criminal proceedings/penalties and administrative ones (although they are criminal in nature) against the same person with respect

to the same acts may be possible under certain conditions. The CJEU argued that the *ne bis in idem* principle could be limited to protect the financial interests of the European Union and its financial markets, but that this restriction must not go beyond what is strictly necessary to achieve the objective.

The cases had been referred to the CJEU by Italian courts and concerned Italian law. Notwithstanding, the issue occurred during the proceedings before the CJEU to which extent Art. 50 CFR must be interpreted in line with recent case law of the ECtHR on the *ne bis in idem* rule as enshrined in Art. 4 of Protocol No 7 annexed to the ECHR. (AO/TW)

CJEU: Criminal Penalty in Addition to Penalty in Tax Proceedings to Combat VAT Fraud Possible

In the case [C-524/15, Luca Menci](#), the CJEU had to give guidance as to whether criminal proceedings against an individual – for the same act – can be brought after an administrative penalty was already imposed for not having paid high amounts of value added tax (VAT).

In the case at issue, the Italian tax authorities imposed an administrative penalty (30% of tax debt) against Italian citizen Luca Menci. After this decision became final, the public prosecutor launched criminal proceedings with respect to the same acts before the Tribunale di Bergamo (District Court, Bergamo, Italy). It was argued that the failure to pay VAT constituted a criminal offence provided for and punishable by Art. 10a(1) and Art. 10b(1) of the Decreto legislativo n. 74 (“Legislative Decree No 74/2000”).

The Tribunale di Bergamo posed the question whether Art. 50 CFR, read in the light of Art. 4 of Protocol No 7 annexed to the ECHR, must be interpreted as precluding national legislation allowing criminal proceedings to be brought against a person for failing to pay VAT (due within the time limit stipulated by

law), although that person has already been made subject to a final administrative penalty in relation to the same acts.

The referring court was of the opinion that the provisions of Legislative Decree No 74/2000 require that the criminal and administrative proceedings are to be conducted independently and therefore do not prevent a person from being subject to criminal proceedings after imposition of a final administrative penalty.

The CJEU first assessed whether the proceedings and penalties at issue in the main proceedings were criminal in nature and reiterated its case law setting out the criteria for determining this requirement – opening the door to Art. 50 CFR. In this context, the following three criteria are relevant:

- The legal classification of the offence under national law;
- The intrinsic nature of the offence;
- The degree of severity of the penalty that the person concerned is liable to incur.

The CJEU considered the second criterion (the intrinsic nature of the offence) to be fulfilled, because the Italian law allowing imposition of an administrative penalty in addition to the amount of VAT due has a punitive purpose. According to the CJEU, this purpose is “the hallmark of a penalty of a criminal nature for the purposes of Article 50 of the Charter.”

After having confirmed that the second requirement of Art. 50 CFR – the existence of the same offence – is given, the CJEU considered the Italian practice indeed a limitation of the *ne bis in idem* principle. Yet, this may be justified on the basis of Art. 52(1) of the Charter.

In this context, the CJEU clarified the criteria for the proportionality test within the meaning of Art. 50 CFR. Hence, the following aspects must be examined when national legislation allows the duplication of administrative and criminal penalties:

- National legislation must pursue an objective of general interest and the duplicated proceedings and penalties must pursue additional objectives;

- It must provide for clear and precise rules allowing individuals to predict which acts or omissions are liable to be subject to such a duplication;

- It must ensure coordination of the proceedings so that disadvantages resulting from such proceedings are limited to what is strictly necessary in order to achieve the objective;

- It must limit the severity of all the penalties imposed to what is strictly necessary in relation to the seriousness of the offence concerned.

The CJEU concluded that the Italian legislation seems to comply with these requirements. However, it is for the referring court to assess the proportionality of the practical application of the Italian legislation in the context of the main proceedings. Above all, the referring court must balance the seriousness of the tax offence at issue, on the one hand, and the actual disadvantage for the individual from the duplication of proceedings and penalties at issue, on the other.

In the end, the CJEU noted that the established case law in *Menci* ensures a level of protection of the *ne bis in idem* principle not contrary to that laid down in Art. 4 of Protocol No 7 annexed to the ECHR. The ECtHR held in *A and B v Norway* that a duplication of tax proceedings and criminal proceedings/penalties punishing the same tax law violation does not infringe the *ne bis in idem* principle if the tax and criminal proceedings in question are sufficiently closely connected in substance and time.

The CJEU’s ruling is remarkable as it deviates from the [opinion of the Advocate General](#). Under the conditions of the case, the AG doubted that the essence of the *ne bis in idem* principle will actually be respected. In particular, the AG believes that a limitation of the principle is not necessary within the meaning of Art. 52 CFR, since the Member States have at least two different solutions available for penalising non-payment of VAT (administrative, criminal, or a combination of the two). The single-

track systems are able to guarantee this penalisation as well. Thus, unlike the Luxembourg judges, the AG concluded that the infringement of *ne bis in idem* is unjustified in the *Menci* case. The Court, however, continues to give the Member States the effective possibility to determine the method of penalisation of such acts themselves by sacrificing part of the right not to be tried or punished twice in criminal proceedings for the same criminal offence. (TW/AO)

CJEU: Italian Legislation Combining Administrative and Criminal Sanctions Against Market Manipulation Does Not Respect EU’s *ne bis in idem* Principle

In a judgment of 20 March 2018 on the combination of administrative and criminal proceedings/penalties, the CJEU ruled that Art. 50 CFR precludes national legislation that allows an administrative proceeding imposing penalties of a criminal nature for unlawful conduct consisting in market manipulation for which the same person has already been finally convicted, provided that the conviction is capable of punishing that offence effectively, proportionately and dissuasively.

In the case at issue ([C-537/16, *Garlsson Real Estate and Others*](#)), the Italian National Companies and Stock Exchange Commission (Commissione Nazionale per le Società e la Borsa, – “Consob”) imposed an administrative fine of €10.2 million on Mr. Stefano Ricucci and other enterprises for market manipulation in 2007. In his appeal to the Court of Cassation (Corte suprema di cassazione), Mr. Ricucci stated that he had already been finally (criminally) convicted and sentenced with respect to the same act in 2008, even though the criminal penalty was later pardoned.

The Court of Cassation raised the question of whether Art. 50 CFR, read in the light of Art. 4 of Protocol No 7 annexed to the ECHR, must be interpreted as precluding national legislation that permits the possibility to bring administrative proceedings against a person for

unlawful conduct consisting in market manipulation for which the same person has already been finally convicted. It also posed the question as to whether said Art. 50 CFR confers on individuals a directly applicable right in the context of a dispute such as the one at issue in the main proceedings.

As in its judgment in case [C-524/15, Luca Menci](#) (delivered on the same day), the CJEU affirmed first the criminal nature of the administrative proceedings and, second, an intervention in the *ne bis in idem* rule. As a third step, the Court examined a possible justification in accordance with Art. 52 CFR. In this context, the CJEU applied the proportionality test as developed in *Menci*. While it regards the protection of the integrity of the EU financial market and public confidence in the financial instruments as an objective of general interest, the CJEU denies the strict necessity for it – unlike in the *Menci* case.

The CJEU argued that the requirement of coordinating procedures to limit the disadvantages caused by the duplication of procedures and penalties to what is strictly necessary would not be respected if the criminal conviction itself is effective, proportionate, and dissuasive enough under national law. Subject to final determination by the referring Italian court, it appears in the present proceedings that the criminal conviction already achieves the objective of protecting markets. This means that the act of bringing administrative proceedings of a criminal nature with respect to the same acts is too excessive.

In this context, it should be noted that criminal and administrative liability for market manipulation is regulated in the same act in subsequent sections. Hence, the CJEU also observed that the relevant national rules do not deal with the duplication of an administrative fine of a criminal nature and a term of imprisonment (but only regarding to the duplication of pecuniary penalties). This is considered a further indicator that national legislation cannot guarantee that

the severity of the penalties imposed is limited to what is strictly necessary in view of the seriousness of the offence concerned.

The CJEU added that this result is not altered if the person concerned was pardoned, as happened in this case, since Art. 50 CFR protects those who have already been finally acquitted or convicted. This protection also extends to those persons who were sentenced to a criminal penalty that was subsequently extinguished as a result of a pardon.

The answer to the second question is limited to the observation that, according to settled case law, Art. 50 CFR is directly applicable in such a case.

As a result, the CJEU and the Advocate General came to the same conclusion in this case, although the [AG advocated](#) a different line of argumentation (as in case C-524/15, *Menci*). By contrast to the AG, the Luxembourg judges expressly clarified that the proportionality of national legislation cannot be called into question by the mere fact that the Member State concerned chose to provide for the possibility of a duplication of administrative and criminal proceedings. The reason for this is that otherwise said Member State would be deprived of the freedom of choice afforded by EU law. (TW/AO)

CJEU: Acquittal in Criminal Proceedings Can Block Administrative Fines

On 20 March 2018, the CJEU rendered decisions in two cases that dealt with another aspect within the framework of the admissibility of the duplication of administrative and criminal penalties under EU law. The [joined cases C-596/16 and C-597/16 \(Enzo Di Puma and Antonio Zecca\)](#) concerned the conflict of obligations imposed by EU law, i.e., on the one hand, to respect the *ne bis in idem* principle enshrined in Art. 50 CFR, and, on the other hand, to provide for effective, proportionate, and dissuasive penalties for insider dealing (Directive 2003/6/EC).

In the cases at issue, the Italian National Companies and Stock Exchange Commission (Commissione Nazionale per le Società e la Borsa, – “Consob”) imposed administrative fines against Mr. Di Puma and Mr. Zecca because of their participation in insider dealing. In their appeal proceedings, they argued that, in criminal proceedings against them for the same acts, the criminal courts held that the acts constituting the offence of insider dealing were not established. Therefore, Mr. Di Puma and Mr. Zecca were acquitted in the criminal proceedings. Under Italian procedural law, judgment of acquittal has a *res judicata* effect with regard to administrative proceedings for the same acts.

The referring Corte suprema di cassazione (Court of Cassation, Italy) called into question whether this *res judicata* effect is in line with the obligations for EU Member States to effectively combat insider dealing in accordance with Art. 14(1) of Directive 2003/6.

The CJEU stated that said Art. 14(1) requires that, in order to apply effective, proportionate and dissuasive administrative sanctions for violations of the prohibition on insider dealing, the competent national authorities must also establish facts proving such an act. In the present case, however, the criminal proceedings had merely shown that the facts of the insider dealing had not been proven.

Although Art. 14(1) of Directive 2003/6 does not regulate the effect of a final criminal judgment on an administrative procedure, the principle of *res judicata* is of such importance that Union law does not require the non-application of national legislation governing *res judicata*.

As a result, the CJEU ruled that the obligation of Member States under Art. 14(1) of Directive 2003/6 to provide for effective sanctions cannot lead to a breach of the principle of *res judicata*.

The CJEU added that Art. 50 CFR confirms this result. The Court first notes that, according to the wording of Art. 50 CFR, the scope of protection extends to

situations in which a person is finally acquitted.

Although the bringing of proceedings for an administrative fine of a criminal nature in addition to criminal proceedings is, in principle possible, this limitation to Art. 50 CFR must be justified on the basis of Art. 52(1) CFR. Here, the CJEU follows the approach developed in the cases [C-524/15](#) (*Luca Menci*) and [C-537/16](#) (*Garlsson Real Estate SA*).

The CJEU concluded that the principle of proportionality had not been respected in the given case. The continuation of administrative proceedings following a final acquittal in criminal proceedings obviously goes beyond what is necessary to achieve the objective of protecting financial markets and public confidence in financial instruments. The CJEU stated that there was no basis whatsoever for continuing the administrative proceedings after the acquittal in the criminal proceedings. (TW/AO)

Freezing of Assets

Draft Regulation on Mutual Recognition of Confiscation and Freezing Orders Passes First Review in the EP

On 17 January 2018, the European Parliament confirmed that MEPs can start trilogue negotiations with the JHA Council and the Commission as regards the legislative draft on a regulation on mutual recognition of freezing and confiscation orders. The [confirmation](#) goes back to [Rule 69c](#) of the Rules of Procedure of the European Parliament (see also news on Money Laundering at p. 15).

The original proposal was tabled by the European Commission on 21 December 2016 ([COM\(2016\) 819 final](#); see [eucrim 4/2016](#), p. 165).

The position of the European Parliament is based on a [report](#) by LIBE committee member and MEP [Nathalie Griesbeck](#) (ALDE, FR). It suggests several amendments to the Commission's draft, including in particular:

- Broadening the scope of the type of assets that can be seized or confiscated;
- Introducing tighter deadlines for the execution of a confiscation order;
- Possibility for the issuing authority to set specified dates for execution of the order if confiscation or freezing is urgent;
- Changing some mandatory grounds for refusal into optional ones, e.g., the non-maintenance of formal requirements, extraterritorial jurisdiction, or double criminality;
- Prioritizing the compensation of victims;
- Promoting the re-use of frozen and confiscated assets for social purposes.

The EP's amendments introduce several safeguards that should improve the protection of individuals. For instance, a refusal ground of "ordre public" is proposed. It would allow the executing authority to refuse the recognition of a confiscation or freezing order if there are substantial grounds for believing that executing it would be incompatible with the obligations of the executing State in accordance with Article 6 TEU and the Charter. This clause also appears in the Directive on the European Investigation Order and is called for in legal literature.

Furthermore, third parties are to be better protected. Recognition of a confiscation order can be refused if it relates to a specific item of property not belonging to the natural or legal person against whom the confiscation order was made (in the issuing Member State) or to any other natural or legal person who was a party to the proceedings (in the issuing State).

The amendments of the EP also introduce obligations to inform interested parties following the execution of a confiscation or freezing order. Provisions on effective legal remedies have been foreseen.

The main aim of the new legislation in the form of a regulation (the first in the area of mutual legal assistance within the EU) is to make freezing and confiscation of property more efficient.

Only an estimated 1.1% (€1.2 billion) of all criminal proceeds in the EU are ever confiscated. The regulation would replace two pieces of former legislation (see [eucrim 4/2016](#), p. 165). It is part of the Commission's [Action Plan against terrorist financing](#) of December 2016. The Union's legislators consider the adoption of the proposal together with the directive on harmonising the money laundering offense by criminal law a priority.

Trilogue talks may start immediately, since the JHA Council already adopted a [general approach](#) on the topic at its meeting of 8 December 2017 (see [eucrim 4/2017](#), p. 176-177). (TW)

Victim Protection

Commission Proposes EU-Wide Rules on Whistleblowers' Protection

On 23 April 2018, the [Commission presented](#) a long-awaited legislative proposal on the protection of whistleblowers. The proposal for a "Directive on the protection of persons reporting on breaches of Union law" ([COM\(2018\) 218 final](#)) is accompanied by a Communication entitled "Strengthening whistleblower protection at EU level" ([COM\(2018\) 214 final](#)). Additional supporting documents and annexes are provided for, including existing EU rules on whistleblowing, an overview of Member States' legislative framework, a comparative table on the principles on whistleblowing of the Council of Europe, the results of the public consultation on whistleblowing protection, and reports from an external study on the subject matter. All documents can be retrieved [here](#).

In particular, the European Parliament, civil society organisations, and trade unions have consistently put pressure on the Commission to come up with such legislative action (see [eucrim 4/2017](#), p. 176). Better protection of persons who report or disclose information on activities harming public interests

(whistleblowers) is deemed especially necessary for the following reasons:

- Whistleblowers have increasingly played a crucial role in the revelation of scandals, as witnessed in the recent Dieselgate, LuxLeaks, Panama Papers, and Cambridge Analytica scandals; they are also important for the protection of the EU's financial interests – often vital for OLAF's work and that of the future European Public Prosecutor's Office;
- Whistleblowers, however, regularly become victims of retaliation and/or intimidation, which in turn causes fear of reporting grievances;
- The protection of whistleblowers across the EU is currently fragmented and considered insufficient, so that whistleblowers are confronted with uncertainties about the varying legal orders across Europe.

By means of the proposed Directive, the Commission intends to lay down minimum standards for the protection of persons who report unlawful activities or abuse of EU legislation. This includes the following areas:

- Public procurement;
- Financial services, prevention of money laundering, and terrorist financing;
- Product safety;
- Transport safety;
- Environmental protection;
- Nuclear safety;
- Public health;
- Food and feed safety, animal health and welfare;
- Consumer protection;
- Data protection and security of networks or information systems;
- Breaches relating to the EU's competition rules;
- Breaches affecting the EU's financial interests as defined by Art. 325 TFEU, Directive 2017/1371, and Regulation No. 883/2013;
- Breaches relating to the internal market as far as certain rules on corporate taxes are concerned.

The Directive further sets the obligations for public authorities and private

companies as well as the conditions and protection measures for the persons reporting and the persons concerned by the allegations.

The Directive mainly establishes the following obligations:

- As a general rule, all private companies with more than 50 employees or with an annual turnover of over €10 million, all State and regional administrations/departments, and all local municipalities of more than 10,000 inhabitants are obliged to establish *internal reporting channels* and procedures for reporting and following up on reports.
- The said private and public entities must fulfil certain conditions of procedure for internal reporting and follow-up, including the following obligations:
 - To ensure confidentiality of the reporting person's identity;
 - To designate a responsible person or department to follow up on the reports;
 - To provide feedback to the reporting person within a "reasonable timeframe," at the latest three months after the report.
- The obligation for EU Member States to establish independent and autonomous *external reporting channels* to designated competent authorities (in this context, the proposal sets out further criteria for the independent and autonomous design of the external reporting channels);
- These authorities must give feedback to the reporting person within three months (extendable to six months) about the follow-up on the case.

It is foreseen that three tiers of reporting be established: In general, the whistleblower must first report information to his/her employer using internal reporting channels. However, he/she can directly use the external channels (second tier) or, where relevant, address EU institutions, under the following conditions:

- Internal channels do not exist;
- The use of internal channels is not mandatory (e.g., reports by non-employees); or

- Internal channels do not function or could not reasonably be expected to function (e.g., because of a fear of retaliation; concerns about confidentiality; concerns about the destruction of evidence; avoidance of imminent substantial danger to life, health, safety of persons, the environment, etc.).

As a last resort, the whistleblower can also publicly disclose information, e.g., to the media or civil society organisations (third tier). This is considered possible under two conditions:

- The whistleblower reported internally and/or externally first, but no appropriate action was taken in response to the report within the timeframe referred to;
- The whistleblower could not reasonably be expected to use internal and/or external reporting channels due to imminent or manifest danger to the public interest, or to the particular circumstances of the case, or where there is a risk of irreversible damage.

The proposed Directive further provides a set of measures to protect the whistleblower from retaliation if the conditions under the new EU law are met. These measures must be implemented by the EU Member States and include, inter alia:

- Entities must be prohibited from taking certain action against whistleblowers such as suspension or dismissal, demotion or withholding of promotion, coercion, intimidation or harassment, discrimination or unfair treatment, etc.
- Reporting persons' access to legal advice;
- Reversal of the burden of proof, so that it is up to the person taking action against a whistleblower to prove that the detriment was duly justified;
- Reporting persons' access to remedial measures against retaliation, including interim relief pending the resolution of legal proceedings;
- No liability for whistleblowers for disclosing information, thus creating a ground of immunity;
- Increased protection in judicial proceedings, as a result of which whistle-

blowers can, for instance, rely on EU law as a defence if legal actions are taken against the whistleblower outside the work-related context (e.g., for defamation, breach of copyrights, breach of secrecy, or for compensation requests).

However, the Directive will also provide protection for persons affected by malicious whistleblowing or unjustified allegations in a report. In this context, the proposal stresses that the persons concerned must fully enjoy the right to an effective remedy and to a fair trial as well as the presumption of innocence and the right of defence.

In the accompanying [Communication](#), the Commission calls upon Member States to foster awareness raising, give guidance to businesses and the staff of national authorities, and provide for appropriate training measures. Member States are also encouraged to consider extension of the Directive's scope to other areas and go beyond the minimum rules set by the EU law. (TW)

Cooperation

Judicial Cooperation

CJEU: Extradition Justifiable Despite EU's Prohibition of Discrimination

On 10 April 2018, the CJEU delivered a [long-awaited judgment](#) in a delicate legal question: whether the Union's prohibition of discrimination on grounds of nationality (Art. 18 TFEU) affects national provisions that only ban the extradition of one's Member States own nationals to third countries. In the affirmative, these national bans need to be extended to all Union citizens.

The debate was sparked by the CJEU's [judgment of 6 September 2016](#) in the *Petruhhin* case (C-182/15, see also eucrim 3/2016, p. 131) and experienced a boost from the present "*Pisciotti* case" (C-191/16).

In the case at issue, *Romano Pisciotti*, an Italian businessman, was arrested on

17 June 2013 at Frankfurt airport during a stopover on his flight from Nigeria to Italy. The arrest was based on an extradition request from the United States, where Mr. Pisciotti had been criminally charged for cartel infringements. German courts, i.e. the Higher Regional Court of Frankfurt a.M. and the Federal Constitutional Court, considered extradition to the US permissible. They specifically rejected the defendant's argument that a provision in the German constitution, according to which "no German may be extradited to a foreign country" (Art. 16(2) sentence 1 of the Basic Law), is unlawfully confined to German nationals. The German courts held that the Union's principle of non-discrimination on grounds of nationality referred to in Art. 18 TFEU is not applicable to extradition to third States.

After the German government had granted Mr. Pisciotti's extradition, he sued the German state for damages before the civil law division of the Regional Court of Berlin (*Landgericht Berlin*) – the first-instance court in Germany for damages against the State. These civil law claim proceedings must be distinguished from the extradition proceedings.

The Regional Court of Berlin indicated that it did not share the opinion of the Federal Constitutional Court and the Higher Regional Court of Frankfurt in the extradition proceedings. Consequently, the Regional Court referred questions for a preliminary ruling to the CJEU. In essence, the Regional Court of Berlin wished to know whether the "extradition courts" were manifestly wrong when they denied the applicability of Art. 18 TFEU and unlawfully treated nationals of other EU Member States unequally compared to German nationals.

First, following its *Petruhhin* judgment, the CJEU states that the extradition of *Mr. Pisciotti* to the USA indeed falls within the scope of Art. 18 TFEU for two reasons: first, the extradition request was made based on the 2003 EU-USA extradition agreement; second, Mr.

Pisciotti exercised his freedom to move and reside within the territory of the EU Member States, as conferred by Art. 21 TFEU. The fact that Mr. Pisciotti was arrested when he was in transit in Germany is irrelevant in this regard.

Secondly, the CJEU notes that the 2003 EU-USA agreement on extradition allows an EU Member state to prohibit extradition of its own nationals on the basis of either the provisions of a bilateral treaty or rules of its constitutional law. However, this discretion must be exercised in accordance with primary Union law. In this context, the CJEU further rules that there is indeed a difference in treatment within the meaning of Art. 18 TFEU. The unequal treatment of an Italian citizen compared to German nationals, however, and the resulting restriction to the free movement of a person under Art. 21 TFEU can be justified in the given case.

In this context, the Court again refers to the *Petruhhin* judgment and stresses that preventing the risk of impunity is a decisive issue when assessing its justification. In addition, the CJEU found, as in *Petruhhin*, that the objective of the measure (here: extradition to third countries) must not be attained by less restrictive measures. Yet, importantly, the CJEU made the point that the requested EU Member State must consider extradition to the home country of the person sought, i.e. Italy, as a less restrictive solution. Hence, the requested EU Member State is obliged to inform the Member States of which the Union citizen is a national when applying an extradition agreement and to give priority to a possible EAW, provided that state has jurisdiction and wants to prosecute the same offence. The CJEU expressly rejects arguments put forward by some governments that this "*Petruhhin* approach" would undermine the effectiveness of extradition rules on determining the state to which the person should be surrendered in case of multiple extradition requests (e.g., Art. 10 EU-USA extradition agreement).

The CJEU ultimately holds, however, that the German authorities maintained the rule of less restrictive measures by having informed the Italian consulate upon *Mr. Piscioti's* arrest and further communicated with the consulate during the extradition proceedings. Since Italy did not issue a European Arrest Warrant between the time of *Mr. Piscioti's* extradition detention in Germany and the time of his surrender to the USA, the extradition at issue could be lawfully granted in terms of EU law.

The CJEU's judgment in *Pisciotti* further solidifies the CJEU's groundbreaking judgment in the *Petruhhin* case. It follows the main lines of argument that were already put forward by AG Bot in his [opinion](#) of 21 November 2017. Interestingly, beyond the CJEU's judgment, the AG further points out the legal and practical difficulties for EU Member States in following the CJEU's judgment in *Petruhhin*. One problem is that the home country of the Union citizen rarely has the necessary information to issue a European Arrest Warrant and start its own prosecution if the crime was committed abroad. Furthermore, the AG stressed that clauses in the FD EAW and in extradition agreements on how to handle multiple extradition requests counteract the rationale of the CJEU in *Petruhhin* in that a EAW should always be given priority over an extradition request to an Union citizen from a third state. (TW)

European Arrest Warrant

CJEU Interprets Refusal Ground of Trials *in absentia* in the Context of Revocation of Suspended Convictions

Courts are increasingly encountering the problem of whether the newly introduced Art. 4a of the FD EAW (which regulates the conditions under which a EAW can be refused if the person is not present in the “trial resulting in the decision”) applies to decisions taken during the execution phase of a custodial sentence.

In August 2017, the CJEU had occasion to define the term “trials resulting in the decision” in two cases: one in the context of appeal proceedings (C-270/17 PPU (*Tada Tupikas*)) and one in the context of handing down cumulative sentences (C-271/17 PPU (*Slawomir Andrzej Zdziasek*)). Both cases were brought to the CJEU by the *Rechtbank Amsterdam* (District Court, Amsterdam) – the central court that handles the execution of all European Arrest Warrants in the Netherlands.

The *Rechtbank Amsterdam* requested a preliminary ruling anew from the CJEU (C-571/17 PPU, *Samet Ardic*). In the case at issue, the Dutch court had to deal with the execution of a European Arrest Warrant against Mr. Ardic with a view to executing two custodial sentences imposed by German courts. The peculiarity in the case was that the sentences had initially been suspended on probation, but the execution of the remainder of the sentences was ordered after Mr. Ardic persisted in infringing the prescribed conditions and evading the supervision and guidance of his probation officer as well as the supervision of the courts. Mr Ardic did not appear at the proceedings resulting in the revocation decisions, but he was present during the main trial at which he was found guilty. The Amsterdam court now wanted to know whether the revocation decision constitutes a “trial resulting in the decision,” which would make Art. 4a of the FD EAW applicable and therefore open the possibility to refuse the EAW from Germany.

In its reply of 22 December 2017, the CJEU first points out that the concept as referred to in Art. 4a FD EAW must be given an autonomous and uniform interpretation within the European Union. It draws on the above-mentioned judgments in *Tupikas* and *Zdziasek*.

It follows from these judgments that Art. 4a(1) FD EAW must be interpreted to mean that “the concept of ‘decision’ relates to the judicial decision or decisions concerning the criminal conviction

of the interested person, namely the decision or decisions that definitively rule, after an assessment of the case in fact and in law, on the guilt of that person and, where relevant, on the custodial sentence imposed on him.”

After referring to corresponding case law of the ECtHR on the applicability of Arts. 6 and 7 ECHR, the CJEU clarified that the refusal ground of Art. 4a FD EAW is not applicable to a decision relating to the execution or application of a custodial sentence previously imposed, except where the purpose or effect of that decision is to modify either the nature or quantum of that sentence and the authority that adopted it enjoyed some discretion in that regard.

The CJEU concluded that, in the present case, the decisions to revoke the suspension do not fall under one of these exceptions, because the intention was not to review the merits of the case.

In this context, the CJEU further noted that – if Art. 4a FD EAW should be applicable – a potential margin of discretion in relation to the revocation must refer to the level or the nature of the sentences imposed on the person concerned. In the present case, however, the German courts only enjoyed discretion as regards the revocation or maintenance of the suspension with additional conditions, but not the level or nature of the sentence itself.

The CJEU mainly underpinned these conclusions by referring to the “*effet utile*” of the new surrender system based on mutual recognition of judicial decisions and mutual trust in the EU. Furthermore, the CJEU pointed out that the conduct of the person convicted must be considered, in particular the fact that he did not comply with the conditions during the probationary period. Therefore, he cannot be unaware of the consequences that may result from an infringement of the conditions to which the benefit of such a suspension is subject.

For a detailed analysis of the CJEU's case law on trials *in absentia* in the framework of the EAW, see the article of *L. Bachmaier* at p. 56. (TW)

CJEU Sets Conditions for Surrender of Minors

On 23 January 2018, the CJEU delivered its [judgment in the Piotrowski case \(C-367/16\)](#). The case had been referred to the CJEU by the Court of Appeal, Brussels/Belgium and concerned the scope and possible depth of examination as to the ground for refusal in Art. 3(3) of the Framework Decision on the European Arrest Warrant (FD EAW). Art. 3(3) allows the judicial authorities of the executing State to refuse to execute the EAW if the person concerned, owing to his age, may not be held criminally responsible for the acts upon which the arrest warrant is based under the law of the executing State. It is the first time that the CJEU was asked to interpret the refusal ground covering minors deemed responsible for having committed offences in another EU Member State. For a summary of the case as well as the opinion of the Advocate General, see [eu-crim 3/2017](#), p. 119.

In its first question, the Belgian court basically wanted to know whether Art. 3(3) FD EAW allows the refusal of all persons not having reached the age of majority under the law of the executing state. The CJEU opposes this view and points out the wording, the *travaux préparatoires*, and the current legislative context of the FD with Directive 2016/800 laying down minimum rules concerning the protection of the procedural rights of children, i.e., persons under 18 years of age. In this context, Art. 3(3) of the FD EAW is to be interpreted such that the executing judicial authority must refuse to surrender only those minors (a) who are the subject of a European Arrest Warrant and (b) who, under the law of the executing Member State, have not yet reached the age at which they are regarded criminally responsible for the acts that formed the basis of the arrest warrant.

In its second question, the referring court sought to ascertain, in essence, whether Art. 3(3) FD EAW is to be interpreted (a) as meaning that the ex-

ecuting judicial authority must simply verify whether the person concerned has reached the minimum age required to be regarded as criminally responsible in the executing Member State for the acts on which a EAW is based or (b) as meaning that that authority may also determine whether additional conditions relating to an assessment of the circumstances of the minor in the case, which the prosecution and conviction are specifically subject to under the law of that Member State, have been met.

The CJEU favours the first alternative. The executing authorities simply need to verify the minimum age requirement for being held criminally responsible in the executing State for the acts on which the EAW is based. Any additional conditions relating to an assessment of the individual cannot be considered. The CJEU argues that this approach results from the wording, the context, and the overall scheme of Art. 3(3) as well as from the objectives pursued by the FD EAW. Any additional conditions leading to an assessment would run counter the principle of mutual recognition enshrined in the FD EAW. (TW)

Irish High Court Questions Fair Trial Guarantee in Poland after Surrender

On 23 March 2018, the Irish High Court filed a [request for a Preliminary Ruling](#) under Article 267 TFEU. It concerned a request for surrender from Poland on the basis of a European Arrest Warrant (EAW).

In the case at issue ([2018] IEHC 153, the Minister for Justice and Equality v. *Celmer*), the Republic of Poland sought the extradition of a Polish citizen based on three EAWs in connection with drug offences.

The defendant referred to a document of the [European Commission “Reasoned proposal in accordance with Article 7\(1\) of the Treaty on European Union regarding the rule of law in Poland” of 20 December 2017](#), in which the Commission concludes that the more than 14 consecutive laws passed in Poland within

the last two years have posed a serious threat to the independence of the judiciary and the separation of powers and thus also to the rule of law. For these reasons, the Irish High Court was concerned that the defendant could become a victim of arbitrariness if extradited.

In the 2016 case [Aranyosi and Căldăraru \(C-404/15\)](#), the CJEU ruled that, in the face of general or systematic weaknesses in the protection of the accused in the state concerned, the executing judicial authority must seek further information from the state concerned in order to clarify whether there are substantial grounds for exposing the individual accused to such risk.

The Irish High Court is now asking the CJEU whether further specific information needs to be collected if the court finds that the right to a fair trial has been so blatantly violated by the Member State concerned that the rule of law is no longer guaranteed. If so, how far does the duty of information go and what guarantees are necessary for a fair trial?

The case is sensitive because the foundations of the underlying principles of EU cooperation in criminal matters – mutual trust and mutual recognition – are shaken by the reference. The CJEU’s decision is likely to set a precedent, as the Irish High Court has already indicated that more Polish nationals being sought under an EAW are in custody and have requested that their case be stayed pending the CJEU’s decision.

The reference for the preliminary ruling is registered with the CJEU as [case C-216/18 PPU \(Minister for Justice and Equality\)](#). (AO)

Lawyers Organisations: Rule-of-Law Violations Have Direct Impact on Judicial Cooperation

On the occasion of the reference for a preliminary ruling drafted by the Irish High Court, questioning recognition of a EAW issued by Poland because of the fundamental rights situation in the country, the Council of Bars and Law Socie-

ties in Europe (CCBE) and the Federation of European Bars (FBE) issued a [joint statement](#) on the rule of law and the principle of mutual recognition.

The statement emphasizes the rule of law as an important European value, which requires an independent judiciary that is free from undue political interference and guaranteed access to justice and fair trial procedures. Threats to the rule of law can have real implications on mutual trust – the cornerstone of judicial cooperation within the EU that is based on the principle of mutual recognition of judicial decisions.

The CCBE and FBE urge the Polish government to uphold the elements of the rule of law described above. Otherwise, confidence and trust become lost, and the EU's cooperation scheme will no longer function. (TW)

No Decision on *Aranyosi II* Case by CJEU

On 15 November 2017, the CJEU released an order in which it stated that no decision will be taken on a reference for a preliminary ruling on the CJEU's case law on detention conditions by the Higher Regional Court of Bremen. After the CJEU's landmark judgment of 5 April 2016 in the *Aranyosi/Căldăraru* case, the Higher Regional Court launched a second reference for a preliminary ruling regarding the surrender of *Mr. Aranyosi* (case C-496/16 – *Aranyosi II*). The Higher Regional Court sought clarification on the concrete procedure of determining whether there is a real risk of inhuman or degrading treatment within the meaning of Art. 4 CFR regarding the detention conditions that an extradited person may face in the state issuing a European Arrest Warrant. It mainly wanted to know to which prisons the assessment of the detention conditions must be extended.

The CJEU observed, however, that the Hungarian court had rescinded the warrants against *Mr. Aranyosi*, meaning that no European Arrest Warrant was currently being implemented. Therefore,

the CJEU clarified that there was no need to decide on the merits of the case since the questions referred are only of a hypothetical nature.

The order of the CJEU is only available in [German](#) and [French](#). (TW)

Higher Regional Court of Bremen Submits “*Aranyosi III*”

On 27 March 2018, the Higher Regional Court of Bremen/Germany, submitted a request to the CJEU seeking clarification of the CJEU's case law on detention conditions as set out in the *Aranyosi/Căldăraru* case. The case is referred to at the CJEU as [C-220/18 \(“Generalstaatsanwaltschaft \[Detention Conditions in Hungary\]”\)](#). The underlying decision of the Higher Regional Court of Bremen can be retrieved [here](#) (in German only). A press release is available [here](#) (in German only).

This is the third request to the CJEU by the Bremen court after having lodged the landmark *Aranyosi/Căldăraru* case and the so-called *Aranyosi II* case. The CJEU had declared the latter inadmissible in its decision of 15 November 2017, since no valid EAW was currently in place.

However, another EAW case in relation to Hungary triggered further questions as to the extent to which surrender to Hungary is possible despite questionable detention conditions there that may infringe the person's rights under Art. 4 CFR. These questions were not solved by the CJEU's first judgment in *Aranyosi/Căldăraru* and are treated differently by German courts in daily extradition practice. They include the following:

- The impact of possible legal remedies on the surrender decision, which can be brought up by the detained person in the issuing country;
- The scope of assurances on detention conditions by the authorities in the issuing state;
- The possible extent to which the executing authorities can examine detention conditions in the issuing country, i.e., whether examination is restricted to the

first detention centre the person sought is likely to be held in or whether it can be expanded to other jails to which the person may be transferred.

The reference by the Bremen court is the second one within a short time period. In February 2018, the Higher Regional Court of Hamburg lodged a reference for a preliminary ruling, posing a number of similar questions on detention conditions that were triggered by the CJEU's judgment in *Aranyosi/Căldăraru*. See also the Federal Constitutional Court's decision of 19 December 2017 that called upon the Hamburg court to file this reference. (TW)

Federal Constitutional Court Calls for German Courts to Consult CJEU on Detention Conditions

German courts are still struggling with the problem as to the extent to which persons can be surrendered if detention conditions in another EU country risk violating the ban on inhuman and degrading treatment in accordance with Art. 3 ECHR.

This question was also the subject of a constitutional complaint before the Federal Constitutional Court (FCC) by a person sought via European Arrest Warrant. He was to be surrendered to Romania because he was suspected of having committed property and document fraud offences. The Higher Regional Court of Hamburg had initially held surrender admissible and dismissed the objection that the suspect may face detention conditions in Romania that are not in line with the ECHR. It mainly referred to the CJEU's judgment of 5 April 2016 in the *Aranyosi/Căldăraru* case and argued that the required test of a real risk of inhuman or degrading treatment of individuals detained in the issuing Member State cannot be affirmed. It further argued that, although it is true that the personal space in prison cells is below what is required by the ECtHR, the size of the space is only an indicator. German courts should make an “overall assessment” of the detention conditions and

consider the “functioning of criminal justice” that would be impeded if Germany refused extradition and the offender went unpunished. This would result in “safe havens” if persons could no longer be surrendered to certain EU Member States.

The FCC was expected to take up the case in order to further refine its approach to the “identity review” of the European Arrest Warrant as set out in its leading decision of 15 December 2015 and further developed in an order of 6 September 2016.

In its decision of 19 December 2017, the FCC did not, however, rule on the substantial issues of the case but instead blamed the Higher Regional Court for not having made a reference for a preliminary ruling to the CJEU. This failure is considered a violation of the right to one’s lawful judge (Art. 101 para. 1 sentence 2 of the Basic Law (*Grundgesetz*)).

The FCC mainly argued that it cannot be discerned from the case law of the CJEU (in particular in *Aranyosi/Căldăraru*) which specific minimum standards derive from Art. 4 CFR in relation to detention conditions and what determines the applicable review of detention conditions under European Union law. Hence, the case law of the CJEU is incomplete, and it is up to the judges in Luxembourg to further develop the law.

Moreover, the FCC observed that the Higher Regional Court of Hamburg had assessed the case law of the ECtHR on Art. 3 ECHR selectively. The FCC also considered it a mistake that the Higher Regional Court referred to the functioning of criminal justice (“no safe havens”) as an argument in favour of surrender, since it the European courts must clarify whether this issue plays a role within the framework of absolute guarantees, e.g., Art. 4 CFR and Art. 3 ECHR respectively.

The order of the FCC in the present case can be retrieved [here](#). A press release is available in [German](#) and [English](#). (TW)

Reference for Preliminary Ruling on Detention Conditions by Higher Regional Court of Hamburg

Following the judgment of the Federal Constitutional Court blaming the Higher Regional Court of Hamburg for not having sufficiently taken into account a person’s right to a lawful judge, the Higher Regional Court of Hamburg lodged a reference for a preliminary ruling to the CJEU. The decision was taken on 8 February 2018. The case is referred to as [C-128/18 \(*Dorobantu*\)](#) at the CJEU.

The Higher Regional Court seeks clarification from the CJEU by posing numerous questions related to the minimum standards of detention conditions pursuant to Art. 4 CFR and the effects of these standards on the presumption of a “real risk” of fundamental rights violation.

An English summary of the Higher Regional Court’s decision has been provided by the lawyer Dr. *Anna Oehmichen* and can be [retrieved here](#). (TW)

German Court: Surrender of Catalan Leader Puigdemont Possible But No Serious Flight Risk

The surrender of *Carles Puigdemont*, who promoted the independence of Catalonia from Spain, became a matter for German authorities. On 25 March 2018, while returning to Belgium from a trip to Finland, *Puigdemont* was apprehended north of Germany, near the border to Denmark, by the German police on the basis of a European Arrest Warrant that had been reissued against him two days earlier.

The EAW was first based on the criminal offence of “rebellion.” Spanish authorities argued that *Puigdemont* insisted on carrying out a referendum on independence despite warnings of violent confrontations with the Spanish Federal Police. In fact, violent confrontations occurred in several Catalan cities between people who wished to vote and the Spanish police.

Secondly, Spanish authorities sought surrender for “corruption” in the form of

embezzlement of public funds. This accusation was, in essence, based on the fact that a budget law had been enacted by the parliament of Catalonia obliging the Catalan government to supply public funds for the referendum on the political future of Catalonia.

The [Prosecutor General at the Higher Regional Court of Schleswig applied for ordering extradition detention against *Puigdemont*](#). On 5 April 2018, the first senate of the Court only partially endorsed the Prosecutor General’s application. Although it ordered extradition detention, it immediately stayed the arrest warrant’s execution and set out certain conditions vis-à-vis *Puigdemont*. *Puigdemont* was released on bail (set at €75,000) and must report to police once a week. The full text of the decision is available [here](#) (German only). A press release is available [in English](#) and [in German](#).

The first senate of the Higher Regional Court for the State of Schleswig-Holstein argued that this decision was justified, since a surrender based on the most severe offence of “rebellion” (for which Spanish law provides imprisonment up to 30 years) would *ab initio* not be granted. This does not hold true for the accusation of “corruption” in the sense of “embezzlement” of public funds.

In its reasoning, the Higher Regional Court, by way of a preliminary remark, first states the all German authorities involved acted lawfully; in particular was the German police obliged to apprehend the person sought on the basis of a valid EAW. The Higher Regional Court further set out that – according to German law – extradition detention can only be ordered if it does not appear *ab initio* that extradition will not be granted (Sec. 15(2) of the [German Act on International Cooperation in Criminal Matters \[AICCM\] – Gesetz über die Internationale Rechtshilfe in Strafsachen](#)).

In this context, the Higher Regional Court had to deal with the decisive question of whether the requirement of double criminality was fulfilled for

the accusation of “rebellion”. Since the accusation does not fall under the list of categories of offences defined in Art. 2(2) FD EAW for which double criminality does not need to be established (Sec. 81 No. 4 AICCM), the Higher Regional Court had to apply Sec. 3(1) AICCM. This provision stipulates that extradition shall not be granted unless the offence is an unlawful act under German law or unless *mutatis mutandis* the offence would also constitute an offence under German law. The latter – the German law uses the notion of “*sinngemäße Umstellung des Sachverhalts*” – means that a recharacterisation or reorganisation of the facts must “*mutatis mutandis*” match a provision of German criminal law.

Hence, the Higher Regional Court stated that the given facts must be conceived as if the prime minister of a German federal state intends to lead its state into independence from the federation and organises a referendum on independence for which the citizens of his state are entitled to vote. Furthermore, it must be assumed that the German prime minister knew that the Federal Constitutional Court considered the planned referendum unconstitutional, and it must have been anticipated pursuant to police warnings that confrontations may occur between voters and police forces on the election day.

Given, the Higher Regional Court held that Puigdemont’s behaviour may fall under the German criminal offense of high treason (Sec. 81 of the German Criminal Code), but the elements of crime of this provision are not fulfilled. This provision necessitates that a person undertakes, by force or through threat of force, to undermine the continued existence of the Federal Republic of Germany or to change the constitutional order based on the Basic Law of the Federal Republic of Germany.

The Higher Regional Court pointed out that the element of “force” (*Gewalt*) could not be affirmed. Its interpretation was set out by a fundamental [decision](#)

[of the Federal Court of Justice \(*Bundesgerichtshof*\) in 1983](#). As a result, to assume “force,” it does not suffice that an actor threatens with or applies force in order to make a constitutional institution behave in a desired way. Instead, it is necessary that the force that is being applied against others puts so much pressure on the constitutional institution that this pressure is suitable to bend the institution’s opposing will. This was not the case with *Puigdemont* because the acts of violence – according to their nature, scope, and effect – were not capable of putting so much pressure on the Spanish government that it would have considered itself forced “to surrender to the demands of the perpetrators of the violence.”

As regards the accusation of “corruption,” according to Art. 432, 252 of the Spanish Criminal Code, the Higher Regional Court held that it is, in principle, correct that double criminality does not need to be established, since “corruption” falls within the categories of offences under Art. 2(2) FD EAW (see above). However, “the ticking of the box of corruption in the EAW form” must be plausible. In this context, the Higher Regional Court demanded further information from the Spanish judicial authorities, since an embezzlement of public funds can only be assumed if the costs for the referendum were actually paid by the Spanish state’s budget and the person sought initiated this. The EAW lacked information in this regard. Therefore, extradition for the offense of “corruption” is not excluded *ab initio*.

In conclusion, the Higher Regional Court for the State of Schleswig-Holstein decided that there was indeed a danger that *Mr. Puigdemont* may avoid the extradition proceedings or the execution of the extradition, but this danger did not necessitate the ordering of extradition detention. The danger is greatly reduced because surrender for the accusation of “rebellion” is inadmissible. Therefore, less intrusive means to safeguard the extradition proceedings could

be applied in the case at issue, such as the release on bail.

In a subsequent decision of 22 May 2018, the first Senate of the Higher Regional Court rebuffed a new application by the Prosecutor General to give effect to the warrant for extradition detention. The Court held that the submitted information is still insufficient to affirm a danger of *Puigdemont* avoiding the extradition proceedings. It is now up to the Prosecutor General to file an official application to the Court to decide on the admissibility of surrender. For the full decision, [see here](#). A press release is available [in English](#) and [in German](#).

[First commentaries on the decision](#) of 5 April 2018 put forward that the Higher Regional Court should have examined further criminal offenses in the German Criminal Code that could have triggered criminal responsibility for *Puigdemont*’s conduct. Furthermore, it was criticized that the Higher Regional Court cannot open a backdoor by denying the surrender of “embezzlement of public funds.” Whether the referendum was paid by private purse or whether public funds were used can only be assessed by the Spanish authorities. Yet others argued that, in a single legal area governed by the principles of mutual trust and mutual recognition, the executing state is only entitled to examine whether a similar criminal offence exists *in abstracto*. Therefore, the Higher Regional Court had to file a reference for a preliminary ruling to the ECJ in order to clarify the yardsticks for the double criminality requirement. (TW)

European Investigation Order

State of Play of EIO Implementation

After transposition by Cyprus and Poland, 20 of 26 EU Member States, which are bound by [Directive 2014/41/EU](#) regarding the European Investigation Order in criminal matters, are now able to use the new tool in the area of mutual legal assistance within the EU ([last reviewed 7 February 2018](#)).

On 25 January 2018, the European Commission issued a [reasoned opinion](#) to Austria, Bulgaria, Luxembourg, and Spain for failing to transpose the EU rules on the EIO in time. The Commission had sent a formal notice to these Member States in July 2017 already and the reasoned opinion is the second step of the infringement procedure. If the concerned States fail to act within two months, the case may be referred to the CJEU. (TW)

First Case on Interpretation of EIO Brought Before CJEU

The first preliminary ruling procedure on substantial matters of the Directive is currently pending at the CJEU. A Bulgarian court lodged the reference in May 2017 ([Case C-324/17 – Criminal proceedings against Ivan Gavanozov](#)). The Bulgarian court referred the following questions to the CJEU:

“1. Are national legislation and case-law consistent with Art. 14 of Directive 2014/41/EU regarding the European Investigation Order in criminal matters, in so far as they preclude a challenge, either directly as an appeal against a court decision or indirectly by means of a separate claim for damages, to the substantive grounds of a court decision issuing a European investigation order for a search on residential and business premises and the seizure of specific items, and allowing examination of a witness?;

2. Does Art. 14(2) of the directive grant, in an immediate and direct manner, to a concerned party the right to challenge a court decision issuing a European investigation order, even where such a procedural step is not provided for by national law?;

3. Is the person against whom a criminal charge was brought, in the light of Art. 14(2) in connection with Art. 6(1) (a) and Art. 1(4) of the directive, a concerned party, within the meaning of Art. 14(4), if the measures for collection of evidence are directed at third party?;

4. Is the person who occupies the property in which the search and seizure

was carried out or the person who is to be examined as a witness a concerned party within the meaning of Art. 14(4) in connection with Art. 14(2) of the directive?” (TW)

Law Enforcement Cooperation

Commission Proposes Legislative Framework for E-Evidence

On 17 April 2018, the European Commission [tabled legislative proposals](#) that frame EU law allowing European law enforcement authorities to quickly and more efficiently secure and obtain electronic evidence (“e-evidence”). There was much debate in the run-up to the proposal, with [calls for legislative action being uttered by the Council](#), on the one hand, and doubts by private companies and civil society organisations being voiced about the need for such action, on the other (see also eucrim 4-2017, p. 178).

The measures now proposed by the Commission consist of a “Regulation on European Production and Preservation Orders for electronic evidence in criminal matters” ([COM\(2018\) 225](#)) and a “Directive laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings” ([COM\(2018\) 226](#)).

The core measure is the proposal for a Regulation. It lays down EU-wide binding rules under which law enforcement authorities in the EU can order a service provider offering services in the Union to produce or preserve electronic evidence in cross-border situations. The main feature is that requests can be directly submitted to the private companies, irrespective of the location or storage of the data and without involving foreign state authorities in the first place.

Although the Regulation is inspired by the principle of mutual recognition, it shifts away from the traditional approach of European cooperation in criminal matters. The place of the storage of

the data is no longer the decisive factor for jurisdiction, but instead the sole criterion is the private entity’s operation in the EU.

The Commission argues that the use of traditional measures of mutual legal assistance (MLA) are slow and cumbersome if law enforcement authorities intend to obtain data stored in electronic form, such as IP addresses, e-mails, documents in clouds, etc. Furthermore, public-private cooperation has proven inefficient, since it often relies on a voluntary basis, in particular if the service provider is based in a third country, e.g., the United States.

Another main problem is the lack of legal certainty, since national obligations for service providers to cooperate with law enforcement authorities are fragmented.

As a result, the proposal aims at the following:

- Adapting cooperation mechanisms to the digital age;
- Improving legal certainty for authorities, service providers, and persons affected;
- Maintaining sufficient safeguards for the rights and freedoms of all concerned.

The main *contents* of the proposed Regulation are the following:

- Establishing a European Production Order allowing a judicial authority in one EU Member State to request e-evidence (e.g., e-mails, texts, or messages in apps) directly from a service provider irrespective of the location of the data;
- Obliging the service provider, in principle, to transmit the requested data to the issuing authority within 10 days at the latest, within 6 hours in case of emergency;
- Establishing a European Preservation Order allowing a judicial authority in one EU Member State to oblige a service provider to preserve specific data in order to enable the authority to request this information subsequently via MLA, a European Investigation Order, or a European Production Order;
- Carrying out the preservation without

undue delay and, as a rule, upholding it for 60 days.

The proposal for a Regulation sets out several *conditions and safeguards*. These are as follows:

- The orders can only be used in criminal proceedings, thus excluding their use for preventive purposes;
- The orders need to be validated *ex ante* by a judicial authority;
- The orders only apply to stored data, thus excluding real-time interception of telecommunications;
- The measure is limited to what is necessary and proportionate for the purposes of the relevant criminal proceedings;
- A European Production Order requesting transactional or content data can only be issued for “more serious offences,” i.e., offences punishable in the issuing state by a custodial sentence of a maximum of at least three years or for specific cybercrime-related or terrorism-related offences as referred to in the proposal (while an order for subscriber and access data and a Preservation Order can be issued for any criminal offense);
- Limited possibilities of the service provider to object to a European Production Order, e.g., if the order is formally incomplete or unspecific, in case of *force majeure*, *de facto* impossibility, a manifest violation of the Charter of Fundamental Rights of the EU, or a manifest abuse;
- Establishment of specific review procedures in favour of the service providers if the obligation to provide data conflicts with competing obligations from the law of a third country, e.g., the USA;
- Persons affected by the measure, e.g., customers of the service provider, are ensured to have the protection laid down by the EU’s data protection law (Regulation 2016/679 and Directive 2016/680) plus the right to an effective remedy against the European Protection Order. Another provision proposes that immunities and privileges, which protect the data sought in the Member State of the service provider, be taken into account by the court in the issuing Member State

if it assesses the relevance and admissibility of evidence.

If the service provider does not comply with an order by the deadline or without providing sufficient reasons, an enforcement procedure is triggered involving the competent authorities of the EU Member State where the order has to be enforced. The enforcing authority may also deny the request on the basis of very limited grounds for refusal.

The proposal for the Directive on legal representatives aims at overcoming current different approaches of EU Member States towards imposing obligations on service providers in criminal proceedings, depending on whether they provide services nationally, cross-border within the EU, or from outside the Union. Therefore, the Directive makes it mandatory for service providers to designate a legal representative in the EU to receive, comply with, and enforce orders on gathering e-evidence.

The proposal already faced [criticism from civil society organisations](#) and business associations. They argue that it cannot be up to private companies to decide on the right balance between law enforcement and the fundamental rights of citizens. Furthermore, the new proposal would undermine existing MLA procedures and give up most of the achieved MLA principles. They also pointed to the European Investigation Order as an already existing, efficient MLA instrument that could be improved in the future but does not need to be replaced by the European Production Order. Others consider the proposal to be opening “Pandora’s box,” since it is an incentive for other countries, less committed to the rule of law (such as Russia, Turkey, or China), to act in the same way and therefore jeopardize European companies. Business organisations expect economic losses for the service providers, since they may no longer protect their customers’ interests appropriately. Ultimately, some critics argue that the effects of the e-evidence measure may be low, since criminals will seek and

find other ways to escape access to their data by law enforcement authorities.

Notwithstanding this criticism, the EU is in a tight spot, since the USA adopted the so-called [CLOUD Act enacted in March 2018](#). “CLOUD Act” stands for “Clarifying Lawful Overseas Use of Data Act”. Its purpose is similar to the e-evidence proposal of the European Commission. It allows U.S. federal law enforcement to compel U.S.-based technology companies, via warrant or subpoena, to provide requested data stored on servers – regardless of whether the data are stored in the USA or on foreign soil. It also foresees that, by means of “executive agreements,” law enforcement authorities from foreign “qualified countries” will have equal access to the data of the U.S. companies.

Furthermore, the Council of Europe is currently [preparing an additional protocol to its 2001 Cybercrime Convention](#), which addresses e-evidence. Accordingly, law enforcement authorities may directly cooperate with providers of other jurisdictions. International production orders shall modify the existing MLA and make the fight against crime speedier and effective.

The legislative proposal on e-evidence comes with a series of measures presented on 17 April 2018. The package of measures was entitled [“Denying terrorists and criminals the means and space to act”](#). (TW)

EU Justice and Home Affairs Agencies’ Network Sets Priorities

On 25 January 2018, the EU Justice and Home Affairs agencies’ network presented its [work in 2017 and priorities for 2018](#) to the LIBE Committee.

The network is currently composed of nine agencies: CEPOL, EASO, EIGE, EMCDDA, eu-LISA, Eurojust, Europol, FRA, and Frontex. EIGE took over the chair of the network from the EMCDDA on 1 January 2018.

In 2017, the network focused on the increased role of the Internet and the use of cyberspace for criminal purposes.

Its priorities in 2017 included technical support for the implementation of the European Agenda on Migration and for the European Agenda on Security as well as a conference on “The internet for criminal purposes – challenges and opportunities for the work of the JHA agencies.”

In 2018, the network plans to continue its efforts to improve the management of the EU’s external borders, thus fighting organised crime and counteracting terrorism and cybercrime. Priorities will be given to the impact of digitalisation on women and men in the policy areas covered by the network. They will also include the analysis of gender equality through the collection and usage of sex-disaggregated data and gender statistics for relevant operational areas of the JHA agencies. (CR)

Global Customs-Police Operation Seizes 41,000 Cultural Goods

From October to early December 2017, a first-time global customs-police operation, codenamed [ATHENA](#), took place to counter the illicit trafficking of cultural objects, theft, and looting as well as internet sales.

The results were as follows:

- Over 41,000 cultural goods, e.g., coins, paintings, drawings, furniture, musical instruments, porcelain, archaeological and paleontological objects, books, manuscripts, and sculptures were seized;
- Thousands of internet marketplaces were monitored;
- Tens of thousands of checks and controls in various airports, ports, and other border crossing points as well as in auction houses, museums, and private homes were conducted.

Operation ATHENA was organised by the World Customs Organisation (WCO) in cooperation with INTERPOL. 81 countries were involved worldwide. The Spanish Guardia Civil and Europol coordinated the actions focused on Europe, which were codenamed Operation PANDORA II. (CR)



Council of Europe*

Reported by Dr. András Csúri

Foundations

Reform of the European Court of Human Rights

Protocol 16 to ECHR Enters into Force

On 12 April 2018, France ratified Protocol 16 to the Convention on Human Rights as the tenth state and thereby triggered its [entry into force](#) from 1 August 2018. It will then apply to Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, and Ukraine. Protocol 16 enables higher national courts to transmit to the ECtHR requests for an advisory opinion on questions of principle regarding the interpretation or application of the rights and freedoms guaranteed by the ECHR. The Protocol applies to cases pending before the national courts. The advisory opinions of the ECtHR are reasoned and non-binding.

The Court’s Results for 2017

On 25 January 2018, *Guido Raimondi*, President of the European Court of Human Rights, presented the [ECtHR’s annual results](#). 2017 saw an increase in the number of incoming applications, mainly as a result of new cases brought against Turkey. The number of pending applications decreased by 17%, however, when compared to the end of 2016. This decrease can be traced back to the considerably high number of inadmissible cases that resulted from failure to exhaust domestic remedies. In this context,

the President highlighted the importance of the principle of subsidiarity, placing the States at the forefront of protecting the rights and freedoms guaranteed by the Convention. The principle is the cornerstone of the Convention system, obligating applicants to avail themselves of all effective domestic remedies. It also requires the Member States to eliminate structural problems, e.g., by setting up such remedies.

The number of pending cases at the end of 2017 was down 29% compared to the end of 2016.

The Member States with the highest number of judgments against them were Russia, Turkey, Ukraine, Romania, Bulgaria, and Greece. At the end of 2017, the majority of pending cases were against Romania, Russia, Turkey, Ukraine, and Italy.

Court Launches Series of New Factsheets

On 16 January 2018, The ECtHR released a series of five new factsheets on its case law on the following themes:

- Access to the Internet and the freedom to receive and impart information;
- Deprivation of citizenship;
- Legal professional privilege;
- Accompanied and unaccompanied migrant minors in detention.

The factsheets have been published on the [Court’s website](#) and provide a

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

rapid overview of the most relevant cases on specific topics. They have been translated into various languages and aim to increase awareness about the Court's judgments in order to improve the domestic implementation of the Convention.

Human Rights Issues

First Female Commissioner for Human Rights

On 3 April 2018, *Dunja Mijatović* [took up the post](#) as Council of Europe Commissioner for Human Rights. A national of Bosnia and Herzegovina, she is the first woman to hold this post, succeeding *Nils Muižnieks* (2012–2018), *Thomas Hammarberg* (2006–2012), and *Alvaro Gil-Robles* (1999–2006).

Ms Mijatović expressed her priority as being the engagement of governments and societies at large in implementing the relevant rules and treaties.

Commissioner for Human Rights: Annual Activity Report

On 19 January 2018, *Nils Muižnieks*, Council of Europe Commissioner for Human Rights, [presented](#) his last annual report on the activities carried out during 2017. It includes an assessment of the state of human rights in Europe. The [activity report](#) states that, in 2017, the human rights situation continued to deteriorate in many European countries.

Old crises intensified, including:

- The ongoing conflict in Ukraine, where neither the Commissioner nor other international human rights organisations gained access to assess the situation first-hand.
- The human rights crisis in Turkey, with growing numbers of journalists and human rights defenders in detention.
- The rule-of-law crisis in Poland, with the adoption of new legislation further undermining the independence of the judiciary and the separation of powers.
- The neglected needs of many victims of war crimes in the Western Balkans,

after the ICTY ceased its operations.

- The crisis in Catalonia.
- The persecution of people on the basis of their actual or perceived sexual orientation or gender identity in the Russian Federation and Azerbaijan.

New crises emerged:

- Due to an outpouring of revelations about sexual harassment and sexual assault, the Commissioner devoted considerable effort to promoting ratification and implementation of the Istanbul Convention.
- The space for human rights defenders and NGOs shrank in many places in Europe, which made the Commissioner address this issue, amongst others, with the Ukrainian, Romanian, and Hungarian authorities.
- The situation of journalists and media freedom was a focus of country visits in Bosnia and Herzegovina and missions to Kosovo and Ukraine.

Ultimately, migration, the reunification of refugee families, and questionable European efforts to halt the flow of migrants from Libya, including returning persons to countries where they could face torture or inhuman or degrading treatment or punishment, continued to dominate the agenda.

The report concludes that commitment to human rights values and standards seemed to be weakening and that it is crucial to improve the quality of the debate and the level of awareness about human rights.

Specific Areas of Crime

Corruption

GRECO: Fifth Round Evaluation Report on Iceland

On 12 April 2018, GRECO [published its fifth round evaluation report on Iceland](#). Corruption was in the centre of recent controversies in Iceland, especially after the financial crisis in 2008 and following the resignation of two successive gov-

ernments and other senior government officials.

[GRECO states](#) that the Icelandic society's increasing intolerance towards such misconduct is well reflected in these resignations, but this should not remain the sole response to serious misbehaviour. The government established an anti-corruption steering group in 2014, but no strategic action or overarching policy was elaborated to promote integrity in state institutions. Therefore, GRECO calls for more robust conduct of rules concerning gifts, other benefits, and contacts to third parties seeking to influence government work. Additional measures should be taken concerning revolving doors and parallel activities. The system for periodic declaration of assets should be strengthened, taking into account the risk that assets may be deliberately registered under someone else's name.

The Police and Icelandic Coast Guard are the most trusted public institutions in the country. That said, the report recommends increasing overall resources of the police and reviewing the current organisation, which places all district commissioners under the direct authority of the respective Minister. The report also finds that the widespread system of renewable five-year contracts generates additional risks of political pressure and that filling of vacancies should, as a rule, be based on open competition and objective criteria. With regard to law enforcement officers, Iceland should introduce also more robust rules of conduct regarding gifts, conflicts of interest, and political activities.

GRECO: Fifth Round Evaluation Report on Finland

On 27 March 2018, GRECO published its [fifth round evaluation report on Finland](#). The country generally scores highly in perception surveys on the fight against corruption, and the risk of actual bribery is considered to be low. That said, recent scandals, such as a major corruption scheme in the Helsinki Police

raised the question as to whether trust, the most prominent Finnish anti-corruption instrument, is in itself a sufficiently effective tool. [The report encourages](#) the police to strengthen its internal control processes and the Border Guard to review its integrity policy. Additionally, the country needs to develop an overarching protection system for whistle-blowers.

At the government level, there is a need to establish clear standards of conduct for ministers and senior government officials and to increase their awareness concerning specific integrity challenges, especially given the privatisation processes underway. Ultimately, GRECO encourages political consensus to be reached on the anti-corruption strategy of the country for the period 2017-2021.

GRECO: Fifth Round Evaluation Report on Slovenia

On 8 March 2018, GRECO [published its fifth round evaluation report on Slovenia](#), the first country to have been the subject of a report in the new monitoring round. This evaluation round looks at measures that states have put in place to prevent and combat corruption in top executive functions and law enforcement agencies. With regard to these functions, GRECO looks into issues such as conflicts of interest, the revolving door phenomenon between different sectors, the declaration of assets, and accountability mechanisms (see eucrim 2/2017, p. 76.). Regarding Slovenia, the [evaluation report calls](#) for proactive prevention of conflicts of interest, greater transparency, and more resources to the national anti-corruption body. Among the positive developments, the report notes the balanced gender representation in the Slovenian government. In GRECO's first ever gender-based recommendation, however, the report calls for the recruitment and integration of women at all levels of the police to reflect the composition of the population.

On a more general note, GRECO welcomed Slovenia's well-developed

anti-corruption legal framework and the fact that ministers do not enjoy immunity in criminal and administrative proceedings. It remains concerned, however, about the wide gap between the legislation and its implementation in practice and about the fact that the assets declarations of top officials are neither published nor properly scrutinised. GRECO calls on the government to be more proactive in preventing and managing conflicts of interest involving ministers and cabinet members, e.g., by ensuring timely publication of their asset declarations and widening their scope to include dependent family members. For more effective implementation, the report calls for a better legal basis to be given to the Commission for the Prevention of Corruption in order to be able to check the assets of ministers' family members.

GRECO praised the Slovenian police for steps taken over the years to prevent corruption within its ranks, which have led to an increased level of public trust. The police now have in place a comprehensive anticorruption infrastructure, operational internal checks, and a public complaints system. GRECO calls for additional improvements in the refinement of risk management tools, the control of secondary employment, and the protection of whistle-blowers.

GRECO: Fourth Round Evaluation Report on the Russian Federation

On 22 March 2018 GRECO published its [fourth round evaluation report on the Russian Federation](#). The fourth evaluation round was launched in 2012 in order to assess how Member States address corruption prevention in respect of Members of Parliament (MPs), judges, and prosecutors (for more recent reports, see eucrim 4/2016, pp. 168-169; 1/2017, pp. 22-23; 2/2017, pp. 76-77; 3/2017, pp. 121-123; 4/2017, pp. 179-181).

With corruption being a serious and pervasive problem in the country, [GRECO observed](#) that the Russian authorities have themselves recognised the

need to tackle the phenomenon. They have already taken a number of measures to this end, including regular National Anti-Corruption Action Plans, the setting up of the Presidential Council for Countering Corruption, and a number of legislative reforms. There is also growing awareness and expectation among the general public surrounding this issue.

Regarding MPs, there are a number of strong safeguards in place, but GRECO lists some critical issues that need urgent attention. Codes of ethics applying to MPs need to be established in order to provide a compass for avoiding conflicts of interest. The transparency of the legislative process should be strengthened by generalizing the practice of public consultations and by facilitating media accreditation. The transparency of declarations of assets needs to be increased together with stronger monitoring mechanisms and a wide range of sanctions for the different types of breaches. Further guidance should also be drawn up regarding the acceptance of gifts in a professional or private capacity.

Significant efforts have been made to address corrupt behaviour within the judiciary. That said, the independence of the judiciary, including from other state bodies, remains a general concern. GRECO recommends tightening the prevention of corruption for judges, especially in the recruitment procedure, by putting stronger emphasis on the ethical qualities and integrity of candidate judges. Selection, recruitment, and promotion of judges should take place on the basis of objective criteria and by reducing the influence of the executive. The report also recommends putting the issue of conflicts of interest back at the heart of the Judicial Code of Ethics and providing further guidance for situations in which judges are offered gifts and other advantages.

The prosecution service plays a central role in fighting corruption in the Russian Federation, and a wide range of internal regulations have been adopted

for this purpose. That said, there are potential weaknesses in the system, which GRECO recommends addressing. Accession to the profession could be more transparent, especially regarding candidates not coming from within the ranks of the prosecutor's office. The allocation of cases needs improvement, including a fair and equitable distribution of workload and by protecting case assignment from undue influence. Once again, practical guidance is important regarding the reporting of gifts. Ultimately, the reactively closed prosecutorial system, based on a strict hierarchical structure and lines of command, needs to be subject to public accountability.

GRECO: Judicial Reforms in Poland Trigger First Ever *ad hoc* Assessment

On 29 March 2018, GRECO published the first ever [ad hoc report](#) on one of its Member States. This preliminary report was triggered by exceptional circumstances in Poland, concerning certain aspects of two recent laws, which have led to serious violations of CoE anti-corruption standards. The amendments, which entered into force this year, resulted in excessive influence of the Polish parliament in appointing judges. Additionally, the tenure of Supreme Court judges became a *de facto* re-appointment system given the combination of a lower retirement age and the power of the Polish President to prolong their mandates. [GRECO recommends](#) not applying the new retirement age to currently sitting judges. The report also recommends amending disciplinary procedures against Supreme Court judges in order to exclude potential undue influence from the legislative and executive powers. GRECO further criticizes the excessive discretionary powers of the Minister of Justice vis-à-vis the judiciary with regard to case assignment and the method for random case allocation. Ultimately, GRECO is concerned about the fact that the powers of the Public Prosecutor General/Minister of Justice vis-à-vis the prose-

cution services have increased since the Office of the Public Prosecutor General was merged into the Ministry of Justice in 2016.

Altogether, the report stresses that, through these amendments, basic principles of the judicial system have been affected in such a critical way and to such an extent that the previous assessment of the judiciary by GRECO (see eucrim 1/2013, p. 13) is no longer valid in crucial parts. The Polish judiciary will be re-assessed by GRECO in 2018.

GRECO: *Ad hoc* Report on Romania

On 11 April 2018, GRECO published an [ad hoc report on Romania](#), expressing concern over certain aspects of the laws recently adopted by Parliament on the status of judges and prosecutors, on its judicial organisation, and on the Superior Council of Magistracy as well as on draft amendments to criminal legislation. The evaluation was carried out in an extraordinarily urgent manner, as the recent reforms could imply serious violations of anti-corruption standards.

[GRECO calls upon](#) Romania to abandon, in particular, the creation of the new special prosecutor's section for the investigation of offences in the judiciary and to introduce additional safeguards in relation to appointments and dismissal procedures for senior prosecutors by the executive branch of power. The report also puts its finger on the draft amendments to criminal legislation, which, if adopted, would clearly contradict the Criminal Law Convention on Corruption. Additionally, foreign countries perceive the planned amendments to criminal procedure as a threat to the effectiveness of mutual legal assistance.

In the end, the report criticises a series of draft laws, which would considerably weaken the incriminating effect of various corruption-related offences in the Criminal Code. If adopted, bribery and trading in influence would no longer apply to elected officials, and abuse of office would be completely decriminalised for damages up to €200,000.

Money Laundering

MONEYVAL: Fifth Round Evaluation Report on Ukraine

On 30 January 2018, MONEYVAL published its [fifth round evaluation report on Ukraine](#) (for the accompanying press release, [see here](#)). MONEYVAL calls for more dissuasive sentences for the relevant crimes, more resources, and the need to investigate and prosecute high-level cases more actively.

The executive [summary of the report](#) states that the country faces significant ML risks, with corruption and illegal economic activities (including fictitious entrepreneurship, tax evasion, and fraud) being the major ML threats. One of the prevalent mechanisms is the so-called conversion center through which funds are siphoned from the real into the shadow economy. Corruption generates substantial amounts of criminal proceeds and seriously undermines the effective functioning of certain state institutions and the criminal justice system. Among the positive initiatives since the last evaluation, MONEYVAL mentions the adoption of a dedicated law in 2014 to strengthen the procedure of financial monitoring and enhance efforts to fight corruption through the establishment of the National Anti-Corruption Bureau of Ukraine and the National Corruption Prosecutors Office. Further significant statewide measures to mitigate the risks are currently being implemented, but law enforcement focuses more on the inception phase. The authorities have a reasonably good understanding of ML and FT risks, but there is room for improvement in areas such as cross-border risks, risks posed by the non-profit sector, and legal persons. The country should address the risks posed by fictitious entrepreneurship, the shadow economy, and the use of cash, all of which are considered to pose a major ML risk.

The Ukrainian FIU generates financial intelligence of a high order and produces good-quality operative analysis. Additionally, spontaneous case referrals

regularly trigger investigations into ML, associated predicate offences, or FT. Law enforcement agencies also seek intelligence from the FIU on a regular basis. The report states, however, that the FIU's IT system is out-dated, and staffing levels are no longer adequate to deal with the workload. Reporting appears to be in line with the country's risk profile and has resulted in a significant number of case referrals to law enforcement agencies.

ML is considered an adjunct to a predicate offence, which requires a conviction for the predicate offence and almost always results in more lenient sentences. Therefore, MONEYVAL experts recommend introducing a provision into the Criminal Code, which would clearly state that a person might be convicted of ML, even in the absence of conviction for predicate offence.

The National Bank of Ukraine (NBU) has a good understanding of risk and applies an adequate risk-based approach to the supervision of banks. The application of preventive measures by the banking sector is seen as broadly effective. Steps have been taken to achieve more transparency regarding the beneficial ownership of banks and towards removing criminals from the control of banks. In addition, the NBU has applied a range of sanctions to banks. Nevertheless, significant improvements are necessary on the part of most other supervisory authorities in performing their functions and by non-bank institutions and designated non-financial businesses and professions in applying preventive measures.

Since 2014, active steps are being taken against persons with connections to the former Communist regime; result-

ing in two court convictions so far, one of which was for ML with a significant volume. The report calls for more prosecutions and convictions in cases involving high-level corruption, theft and embezzlement of state assets, not only by persons connected with the former regime, but also by current state officials and their associates.

As far as FT is concerned, since 2014, the Security Services have concentrated on the consequences of international terrorism, which resulted in indictments, but not in convictions. Financial investigations are being undertaken in parallel with all terrorism-related investigations. MONEYVAL stressed that the legal framework is still not entirely in line with international standards, and no FT funds or other assets have been frozen in Ukraine.

Articles

Articles / Aufsätze

File Rouge

25 years ago, the Treaty of Maastricht entered into force and led the EU into a new criminal law era by conferring competences in the field of judicial and police cooperation. The ever challenging task of striking a fair balance between effective enforcement of criminal law and the individuals' fundamental rights protection was instantly elevated from the national to European level.

The struggle to find this balance during the past 25 years is explored in this issue. The first article by *E. Popa* astutely reiterates that the notion of "freedom, security and justice" coined by Maastricht's successor – the Amsterdam Treaty – already implies the tension between effectiveness and fundamental rights. She argues that the balance is jeopardized by a multi-speed Europe, as exemplified by the rising problem of prison overcrowding. Other authors in this issue also emphasises the ECJ having only recently become aware of its role as arbiter of fundamental rights protection within the framework of Union law. Reflecting on the *Taricco* saga, *C. Di Francesco Maesa* analyses whether the higher fundamental rights protection guaranteed by

national constitutions can be used as an argument against the effective enforcement of Union law.

The extent to which mutual recognition instruments are limited by fundamental rights is still the subject of heated debate regarding the European Arrest Warrant. *L. Bachmaier* addresses the right balance in this context by analysing the ECJ's recent case law on trials *in absentia*. In the aftermath of the *Arranyosi* case, *D. Vilas Álvarez* proposes tackling fundamental rights in the EAW scheme.

Striking the much needed balance in EU criminal law will enter a new dimension when the European Public Prosecutor's Office becomes operational as a new supranational player in the prosecution of PIF crimes. Fundamental rights protection must not only be achieved within its own criminal investigations (see *Bachmaier*) but also within the interplay with other bodies, in particular OLAF (see article by *K. Bovend' Eerd*). Lastly, the article by *S. Cassese* reflects on how the EU is called on to react if individual Member States put fundamental rights – an essential value of the Union – at risk.

Thomas Wahl, Managing Editor eucrim

A Game of Chance

The Future of the AFSJ

Elena E. Popa*

The article offers a critical reflection on the ongoing debate over the "Future of Europe" scenarios envisioned in the European Commission's White Paper of 1 March 2017. Five potential scenarios are described, which enable a peek into the future, and the article explores whether the European Union's status quo should change towards a new, ambitious vision or just continue muddling through. The desirability and feasibility of the most favoured scenario ("those who want to do more do more" – a multi-speed Europe) will be tested in the Area of Freedom, Security and Justice (AFSJ). It will be argued that the clash between the three supposedly interlinked notions of freedom, security, and justice is the main obstacle hindering more coherence and uniformity in this area. This will be demonstrated by analysing the "root of the problem," i.e., prison overcrowding. By taking

a closer look at European detention conditions, the impracticability of having a “multi-speed AFSJ” becomes apparent, due to the potential tensions it might create among the Member States and their domestic legal systems. The normative value of this assessment also becomes evident when discussing three (possible) future outcomes. Ultimately, it is up to the EU Member States to choose between the following: a multi-speed AFSJ, a utopian EU criminal law policy, or just a common EU legal culture.

I. Introduction

The five scenarios formulated in the European Commission’s White Paper on the Future of Europe represent a potential peek into the future, and the following paragraphs will investigate whether the European Union’s status quo should shift towards a new, ambitious vision or just continue muddling through. This paper will focus on the third scenario, i.e., a multi-speed Europe, which has been endorsed by the leaders of the big four EU Member States: Germany, France, Italy, and Spain. The purpose of this article is twofold: firstly, it tries to explore the feasibility of the third scenario envisioned in the European Commission’s White Paper on the Future of Europe, i.e., “those who want to do more do more,” and secondly, it examines and tests this scenario in the Area of Freedom, Security and Justice (AFSJ) by looking at European detention conditions. This particular focus will exemplify whether the current challenges can somehow be tackled more efficiently in the setting of a “coalition of the willing states.”¹

In the first section (below II.), the constitutional aspects of the EU, such as sovereignty and integration, will be touched upon, since it is also important to perceive the AFSJ in the broader context of European integration. After assessing the reality and impact of having a multi-speed AFSJ, the analysis will devote particular attention to the internal challenges that this single area faces. In the second section, I will argue that this common space has been built on a paradox, i.e., a form of “territorial unity”² based on three supposedly interlinked notions: freedom, security, and justice. Specifically, each of these three concepts will be associated with quantifiable issues such as the mutual recognition principle (based on mutual trust), fundamental rights, public security, and EU citizenship. It will be argued that the clash between the three supposedly interlinked notions of freedom, security, and justice constitute the main obstacle in achieving more coherence and uniformity in this European space. This will be demonstrated by looking at what I believe is the “root of the problem,” i.e., prison overcrowding. Therefore, the second section (III.) tests the feasibility of the third scenario by taking a closer look at European detention conditions.

The impracticability of having a “multi-speed AFSJ,” due to the potential tensions it might create among the Member States and their domestic legal systems, will become readily apparent. Examples will be provided to emphasize the spill-over effects that poor detention conditions have, not only for

the EU citizens but also for the Member States. Overall, the concerns voiced in this paper can be viewed in light of the current tug-of-war between the domestic and supranational levels, which in turn can be translated as an issue of “fragmented institutionalism.”³ The normative value of this paper will become evident when discussing three possible outcomes for the future of the AFSJ. It should be emphasized, however, that, in the end, it is up to the EU and its Member States to make this choice. It will be interesting to see which possibility will they favour: a multi-speed AFSJ, a utopian EU criminal law policy, or just a common EU legal culture?

II. The Future of the AFSJ

The European Commission released its “White Paper on the Future of Europe” on 1 March 2017.⁴ This guiding document sets out the main challenges and opportunities for Europe in the coming decade. Firstly, the paper analyses the “driving forces” of Europe’s future. Secondly, it presents five scenarios on how the EU could evolve by 2025. This depends on how the Union responds to the on-going challenges. Moreover, these scenarios aim at creating a vision for the EU after UK’s Brexit. The drafters of the paper did not, however, envision concrete actions or policy prescriptions. Thus, as *Armin Cuyvers* notes, these five scenarios are not mutually exclusive, which means that, in the end, a combination of the different scenarios can also be contemplated.⁵ Even though the European Council was divided on the presented vision of a multi-speed EU (third scenario), the leaders of Germany, France, Italy, and Spain – the “Big Four” – endorsed it. Therefore, it will be interesting to see whether this leads to a situation where diverging perspectives (e.g., in relation to security information, criminal evidence, transfer of prisoners, etc.) of the “willing States” clash. The following paragraphs will only consider this third option and takes the AFSJ as a testing area. We will explore the potential impact in the AFSJ should the idea of a multi-speed EU become a fully-fledged political effort.

1. Main Concerns

Under the proposed model of a “coalition of the willing”, a group of countries deepen their cooperation in certain areas such as security or justice matters. The issue of having different speeds of integration within the EU means that, by advancing integra-

tion among some countries, questions regarding the cohesion of the EU will arise. The challenge may then translate into a situation in which policies of integration produce a hostile environment within the EU, especially among those states that were not included in the process. In order to understand the potential consequences of the third scenario, one needs to first become familiar with the concept of sovereignty, which can be viewed as a claimed status that is usually asserted when this status is challenged. Here, it is important to note that *Cuyvers*, while discussing the potential conflict between sovereignty and integration, has tried to emphasise that this tension should be actually exposed as a clash between two strands of sovereignty, i.e., internal (the people) and external (the state) sovereignty.⁶

This relationship is described in the sense of a confederal notion of sovereignty. By making a comparison with the US federal system, *Cuyvers* highlights the fact that confederal systems, such as the EU, incorporate extra-state and even non-state entities into the national constitutional framework for the delegation of sovereign powers. As a result, the state loses some of its sovereignty, but the people do not lose their sovereignty. He therefore argues that European integration does not conflict with sovereignty as such but only with external concepts of sovereignty. He further states that we are witnessing a relative decline of external sovereignty and a relative ascendance of internal sovereignty.⁷ In the AFSJ, one could infer this from the 2017 EU Citizenship Report, which envisions that the vast majority's belief leans towards a more common EU action in order to address security threats.⁸

The external sovereignty claim has been at the core of the AFSJ since its inception.⁹ This was due to its link with sensitive areas such as criminal law, security, migration, and border control, which are closely related to the nation-state. As a result, Member States were unwilling to abandon the intergovernmental structure entirely.¹⁰ Particularly, since the drafting of the Maastricht Treaty, the Member States have tried to keep EU criminal law outside the supranational arena.¹¹ After the Amsterdam Treaty, the AFSJ emerged, and it was the Tampere Council conclusions in 1999 and the subsequent Hague and Stockholm programmes¹² that established the foundations for a European criminal law. The resulting institutional arrangement reflects a compromise, something that *Stephen Coutts* describes as a "halfway house between supranationalism and intergovernmentalism."¹³ The Lisbon Treaty has been perceived as a step closer to constructing the AFSJ as a common space and, eventually, more as a European public order.¹⁴ Even after its consolidation and incorporation into the supranational architecture, the AFSJ was seen by many as lacking a "*particular finalité*."¹⁵ Beyond abstract commitments, EU criminal law aspects are addressed in a fragmented way, and one can easily observe that there is no general broad criminal policy theme.¹⁶

Therefore, the main concerns for having a multi-speed Europe, in which only the willing States get to be involved, stem from the very fact that the framework in which it takes place cannot be characterized by uniformity and coherence, and it forces one to choose between either the EU or the Member States.¹⁷ A European criminal justice system is a vital part of securing the European public interest and, as a result, it should be more than the sum of the parts its Member States have endowed it with. By viewing European criminal law as set within a broader context that of a justice system, a clear condition that this new system requires is a quasi-constitutional setting. The current European criminal justice system can be regarded as undermining the constitutional relationship governments have with their citizens.¹⁸ As mentioned above, this occurs because, in the AFSJ, the external sovereignty component has often clashed with the internal one, and this in turn allowed national governments to create a forum in which their one-sided criminal policy concerns dominate. Therefore, this policy area essentially remains one driven purely by political will via *ad hoc* action (e.g., unanimity requirements and emergency break provisions) and, as such, the current structure ignores the revolutionary character of EU criminal law. The next section will discuss these issues and their consequences in light of a multi-speed AFSJ.

2. AFSJ at a Crossroads Between Sovereignty & Integration

As we have seen, by applying the multi-speed scenario to the current AFSJ mechanism, one could argue that the current structure of the system will not be affected *per se*; thus, the idea of deeper cooperation will be preserved in the future. A possible outcome would be that the Member States are unresponsive to the overall concept of deeper integration, especially when asked to support certain areas of AFSJ cooperation.¹⁹ However, it is clearly not what the current situation (i.e., EU crisis on different fronts such as immigration flows and detention, threatened EU financial interests, overcrowded prisons, etc.) demands. Ostensibly, by allowing the possibility of having too many "speeds" that go in different directions, it seems that the AFSJ will become too prone to differentiation and exceptionalism.²⁰

Thus, it can be argued that the way forward is not to have a small group of countries that advance integration among themselves but to move towards a new criminal justice system in the AFSJ that takes into account not only cultural diversity (of the various national systems, both for practical and constitutional reasons)²¹ but also other imperative needs such as fundamental rights and security. Consequently, rather than dealing with the traditional questions such as the division of

competences between the Union and its Member States, one should pay attention to questions that are more directly related to the EU constitutional structure, e.g., the balance between fundamental rights, on the one hand, and the States' interest in public order, security, and migration control, on the other.²²

In the broader EU context, the question of conferral of powers is much more than the mere consideration of whether a law was enacted legitimately.²³ This is mostly due to the existence of EU law that builds and relies extensively on the willingness of its Member States to accept the supranational character of the Union. Consistency, however, stems directly from the principle of conferral, and a lack of consistency in the EU, especially in the AFSJ, might result in legal uncertainty, which in the context of the Court of Justice of the European Union (CJEU) case law, would have an adverse effect on, for example, the rights of EU citizens and effective judicial protection.²⁴

Therefore, as noted by *Neil Walker*, one cannot think of the AFSJ as forming a “natural unity” especially in terms of a clearly defined project.²⁵ As such, the AFSJ is sometimes seen as a *factio iuris*, which reflects this ambiguous idea that, irrespective of the new EU competences in this area, they “shall not affect the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security” (Article 72 TFEU).²⁶ However, configuring the AFSJ to what *Massimo Fichera* calls “a space in which imperialistic and functional elements are disguised under a thin veil of normativity”²⁷ may be difficult to achieve, especially if one disregards the balance between the three “common constitutional commitments” of freedom, security and justice.²⁸

III. “A European Public Order:” Moving Towards an EU Criminal Law Policy?

Despite the above-mentioned hurdles, the AFSJ has constantly evolved into a complex set of institutions, agencies, legislative initiatives, and principles. This, however, is in sharp contrast with the loss of legitimacy and appeal that the EU is currently experiencing.²⁹ The following paragraphs will offer a visionary approach by focusing on the more sensitive area of criminal law. It will be argued that there is an immediate need to construct an EU criminal law policy so as to avoid the “legislative chaos” inherent in the “patchwork structure” of the AFSJ.³⁰ In order to understand this argument, it is important to first look at the clash between three supposedly interlinked notions of freedom, security, and justice. By doing so, I will show why this conflict constitutes the main obstacle in achieving more coherence and uniformity in this European space.

I will demonstrate the impracticability of having a multi-speed AFSJ by testing and applying this hypothesis to the issue of detention conditions. The feasibility of applying the third scenario to the current AFSJ structure will be assessed by looking at prison overcrowding which I consider the “root of the problem”. Potential tensions might be created among the Member States and their domestic legal systems. The normative value of this assessment will become evident when discussing three (possible) future outcomes. Thus, the following will consider alternative options to the multi-speed scenario in order to avoid a fragmented system subject to the principle of attributed powers.³¹

1. The Challenge of Balancing Freedom, Security & Justice

The AFSJ is a unique concept that has the goal of creating and strengthening the European judicial area by combining two different elements: sovereignty and integration.³² However, in order to have an efficient, coherent, and fair system of police and judicial cooperation there is a need for a more coordinated approach. A successful policy that leads to such an outcome requires a strong foundation of mutual trust,³³ which in turn requires a certain degree of approximation in order to be achieved.³⁴ Even though the AFSJ is characterised as an important step in the process of EU constitutionalisation, it seems that its supposedly interconnected notions of freedom, security and justice have yet to acquire an autonomous meaning and weight in this process.³⁵ Striking a balance between these values is an important step towards constructing the AFSJ as a “legal and political, but mainly as a moral space,” as *Fichera* puts it.³⁶ This is a difficult task for both the EU and the Member States, since one can clearly observe the EU’s insistence on adopting a dominant security approach.³⁷ Many scholars have argued that the keystones of EU integration (such as EU citizenship, the four freedoms, the uniform and effective implementation of EU law, etc.) are “exposed to the expansion of the security discourse.”³⁸ The prevalent idea that the other two values, freedom and justice, need to be seen “through the lens of security”³⁹ has to be considered in order to understand how this will affect the multi-speed AFSJ.

If one considers the leading academic perspective, i.e., that the AFSJ is permeated by a security discourse,⁴⁰ one can observe that the security dimension becomes the precondition for the exercise of free movement (the “freedom” aspect of the AFSJ).⁴¹ However, while free movement rights can only be enjoyed if they are not threatened or undermined by criminality, these rights also need to be secured, i.e., free from measures that arbitrarily constrain individual liberty. One can immediately observe how narrowly the concept of freedom has

been constructed in the AFSJ. This is also the case for the notion of justice, which has been perceived mostly in procedural terms, and it has been frequently seen to form “a core part of the rule of law.”⁴² Unsurprisingly, the rule of law is considered an EU constitutional principle and is listed in the Treaty as one of the foundational notions on which the EU has been built.⁴³ It is also closely connected to the constitutional question concerning the objectives the EU should safeguard and the limits set by the Treaty.⁴⁴ Yet, the substantive legitimacy of a political community is premised not only upon the establishment of the rule of law but also upon subjecting it to popular self-determination, i.e., a people’s freedom to determine one’s own constitutional form.⁴⁵ Therefore, the AFSJ should be seen in the context of EU constitutionalisation as “a way of dealing with Europe’s complexity and multilevel realities.”⁴⁶ The following section will elaborate on the “root of the problem,” i.e., having a multi-speed AFSJ and, as a result, some alternatives will be suggested.

2. The Challenge of Prison Overcrowding as a Testing Ground

In April 2001, the European Court of Human Rights (ECtHR) took a major turn in direction in its case law. In response to *Peers v. Greece*,⁴⁷ the Court declared that unsatisfactory detention conditions (e.g., overcrowding resulting in poor living space, inadequate ventilation, and lack of hygiene) could constitute a breach of Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).⁴⁸ This judgment made clear that the Member States of the Council of Europe may run the risk of being convicted in case they fail to tackle the problem of overcrowding. Moreover, at the EU level, the prison overcrowding relates to mutual recognition of judgments, with the CJEU having to deal with this issue on several occasions.⁴⁹ It has done so by balancing fundamental rights against the mutual recognition principle. In the criminal justice area, this can become problematic, since it fails to appreciate that security interests need to present a necessary and proportionate deviation from a fundamental right, as becomes clear from Article 52(1) of the Charter.⁵⁰ It will be argued that, despite the case law on the matter, overcrowding still represents a key challenge in many European prisons.⁵¹ As a result, the following paragraphs will also take into account the debate on whether detention conditions may be considered an aspect of criminal procedure and therefore something that falls within the scope of EU competence to approximate.⁵²

In order to understand the widespread problem,⁵³ attention should be given to the harmful effects, both in quantitative and qualitative terms. Quantitatively, prison overcrowding is often seen as “the mismatch between prison capacity and the

number of prisoners to be accommodated.”⁵⁴ Qualitatively, the impact of overcrowding on the prisoner can be described as “a subjective feeling of insecurity and insufficient living space” and with respect to the staff as “a sense of overload and uncontrollable situations.”⁵⁵ Thus, the harmful effects affect not only the prison administration but also the prisoners, staff, and society as a whole. As noted in Recommendation Rec (99)22 concerning prison overcrowding of the Council of Europe, these issues “represent a major challenge to prison administrations and the criminal justice system as a whole, both in terms of human rights and of the efficient management of penal institutions.” It is important to reiterate the urgency of remedying this problem, since there are various risks pertaining to both fundamental rights and internal security of the EU. For example, in July 2017, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has publicly stressed the serious consequences of overcrowding for prisoners and staff due to the Belgian authorities’ failure to comply with existing prison capacity standards.⁵⁶

It is now necessary to examine this issue in light of the mutual recognition principle and fundamental rights. Accordingly, the application of the mutual recognition principle in the AFSJ implies a certain degree of automaticity, in the sense that judicial decisions taken in one Member State should be accepted in another Member State. In the criminal law area, the CJEU interpreted this principle as meaning that “Member States are in principle obliged to give effect to a European Arrest Warrant.”⁵⁷ These definitions are closely related to the goals of free movement and the integration method of home state control, which means that, once the requirements of the home state are fulfilled, the (judicial) product or person moves freely.⁵⁸ In the context of surrender procedures, one needs to stress the Court’s recent shift in approach,⁵⁹ whereby mutual recognition can be limited when there is a risk of a human rights violation (e.g., in case a person needs to be surrendered to a Member State that has serious overcrowding issues). However, this limitation has been constructed as an additional non-execution ground based on fundamental rights in the Framework Decision on the European Arrest Warrant. This may become a problematic situation that has direct effect on EU measures and judicial cooperation, since, according to the mutual trust principle (the corollary of mutual recognition), there is a presumption of compliance with international obligations (including fundamental rights).⁶⁰

In terms of fundamental rights, the issue of overcrowding is considered a significant source of inhuman and degrading treatment.⁶¹ This has also been reiterated by the ECtHR.⁶² For example, if there is a risk that the requested person (under a EAW) will be subject to such treatment, the executing authorities need to postpone the warrant until the issuing authority

has provided assurances that eliminate the risk.⁶³ Such a mechanism is controversial for two reasons. First, by relying on assurances, one involuntarily creates two classes of EU citizens, i.e., those that are detained in adequate conditions and those that remain in inadequate conditions because they were not arrested abroad.⁶⁴ Second, by requesting assurances (i.e., by consulting ECtHR case law and UNHCR reports), the competent national authorities are encouraged to act as “delegates for the application of European fundamental rights law.”⁶⁵ Thus, by attributing judicial review powers to cases of potential human rights violations, it allows national authorities to transgress into their counterparts’ legal system. This in turn might become a source of great tension among the Member States, which, until recently, were used to adhering to mutual recognition based on trust.

IV. Conclusions

In the early 90s, at the inception of the AFSJ, few would have imagined that this area would go so far in terms of both material scope and legislation, especially in such a short time.⁶⁶ As such, the AFSJ can be broadly conceptualized as the realization of the internal market principle of free movement, along with associated concerns as to individual rights.⁶⁷ Beyond the bare AFSJ label, however, there is not much coherence immediately apparent, in the sense of an attempt to construct a new policy out of the Member States’ diverse parts.⁶⁸ In the context of a multi-speed scenario, it has been seen that the Member States may be unreceptive to the overall concept of deeper integration, especially when asked to support other areas of AFSJ cooperation. This is because such cooperation can be perceived and presented as what *Eleanor Sharpston* calls “an enlightened defence of their national sovereignty,” rather than “the undesirable pooling of national sovereignty within a post-nation state universe.”⁶⁹

Some argue that, in order to remedy the current challenges, the EU needs to shape an EU criminal law policy. Some scholars argue that, by having a common criminal policy, the EU will be able to guide legislative development and, as a result, re-

flect on the goals of criminal law, also in light of social and political consideration.⁷⁰ Others⁷¹ advocate a purely legalistic approach. However, as we have seen there are a number of challenges (i.e., the principle of conferral, the balancing of the three notions “freedom, security and justice”, and the issue of coping with diversity) that the development of an EU criminal law policy faces in light of the specific EU context. Thus, the main point is that the constitutional fencing of asymmetry stemming from differentiation has to be counterbalanced against EU’s political nature and its irregular justifiability.⁷²

Given the multiple actors involved, the challenge of uniform implementation, while ensuring respect for diversity, is pressing and urgent. For this reason, I propose that the European Council should take up the task of drafting a single European criminal law policy. According to the Treaty and in particular Article 68 TFEU,⁷³ the European Council would be the most evident choice for drafting a global approach in relation to an EU criminal policy, since it could make the required political choices after a multidisciplinary consultation of all stakeholders involved, including practitioners. On the other hand, one can infer from the strategic guidelines of June 2014⁷⁴ that the European Council has radically changed its approach by choosing not to focus on an ambitious project for the AFSJ. While the Stockholm Programme emphasized the need for harmonisation of EU substantive criminal law, the European Council Conclusion contained minimal – if any – references to criminal law harmonisation. This new, limited approach may pose problems for a more active European Council in the field of EU criminal policy. This discussion is still in its early stages, and it is still not known whether the Member States will perceive this as an intrusive option that challenges respect for diversity. However, a less intrusive approach would be to develop a common EU legal culture among criminal justice practitioners with the help of the European Judicial Training Network,⁷⁵ whereby mutual trust would be strengthened across all levels of the national criminal justice system. Therefore, it remains to be seen which choice the EU and its Member States will favour: will it be a multi-speed AFSJ, a utopian EU criminal law policy or just a common EU legal culture?

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- 38 *Ibid*; See also D. Kostakopoulou, “The Area of Freedom, Security and Justice and the European Union’s Constitutional Dialogue” in C. Barnard (ed.), *The Fundamentals of EU Law Revisited*, 2007, p. 174.
- 39 For example, the Vienna Action Plan [1999] O.J. C 19/1, 23 January 1999, para. 6: “which considers that freedom includes the ‘freedom to live in a law-abiding environment in the knowledge that public authorities are using everything in their individual and collective power [...] to combat and

- contain those who seek to deny or abuse that freedom”; On the expansive nature of security, see further M. Fichera, ‘Security issues as an existential threat to the community, in: M. Fichera and J. Kremer (eds.), *Law and Security in Europe: Reconsidering the Security Constitution*, 2013, p. 85.
- 40 For more information about the security discourse and how the concept has been defined, see B. Hudson, S. Ugelvik (eds.), *Justice and Security in the 21st Century: Risks, Rights and the Rule of Law*, 2012, pp. 200 et seq.; See also M. Trybus and N.D. White, ‘Conclusions on the Current State of European Security Law’ in M. Trybus and N.D. White (eds.), *European Security Law*, 2007, p. 354.
- 41 M. Fichera (2017), *op. cit.* (n. 27), p. 38.
- 42 S.E.M. Herlin Karnell, ‘Two Conceptions of Justice in EU Constitutionalism: The shaping of security law in Europe’, Inaugural lecture delivered on the 29 October 2014, Vrije Universiteit Amsterdam, p. 11; See also A. J. Williams, *The Ethos of Europe: Values, Law and Justice*, 2011.
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Effectiveness and Primacy of EU Law v. Higher National Protection of Fundamental Rights and National Identity

A Look through the Lens of the *Taricco II* Judgment

Costanza Di Francesco Maesa

The European Court of Justice (ECJ) finally delivered a judgment that puts an end to the so-called *Taricco* saga – at least for the time being. More importantly, this *Taricco II* judgment (Case C-42/17 – *M.A.S. & M.B.*) deals with the relationship between the principles of primacy, effectiveness, and direct effect of EU law, on the one hand, and the concept of national (and particularly constitutional) identity of the Member States, on the other. It also addresses the extent of the possibility for Member States not to apply EU law if it conflicts with an overriding principle guaranteed by their national constitution. In this context, the article aims to assess, firstly, whether the Court overruled its *Melloni* doctrine with this judgment. Secondly, the article analyses whether the Court, at least implicitly, answered the sensitive question of who is the ultimate judge responsible for assessing whether the “identity clause” enshrined in Art. 4(2) TEU has been violated or not. In conclusion, it is argued here that the ECJ did not overrule its previous jurisprudence (in particular *Melloni*) and that the ECJ considers itself the ultimate judge for assessing the compatibility of EU legislation with “overriding national principles.”

I. Introduction

On the 5th of December 2017, the European Court of Justice (hereinafter “ECJ”) finally delivered a judgment that put an end to the so-called *Taricco* saga – at least for the time being. More importantly, the judgment (called the *Taricco II*) deals with the relationship between the principles of primacy, effectiveness, and the direct effect of EU law and the concept of national (and particularly constitutional) identity of the Member States (hereinafter “MS”). It also addresses the extent of the possibility for MS not to apply EU law if it conflicts with an overriding principle guaranteed by their national constitution. The solution adopted by the Court is a compromise, which has settled a longstanding dispute with the Italian courts, transforming what could have been a war between courts into a dialogue between them.

In this context, the present article aims at analysing the tension between the primacy and effectiveness of EU law, on the one hand, and the (higher) protection of fundamental rights guaranteed by the national constitutions and respect for the national identity of the MS, on the other hand, through the lens of the *Taricco II* judgment. In order to address these issues, the *Taricco* saga is outlined in the following section (II), in order to understand how the tension between the effectiveness of EU law and the national protection of fundamental rights raised. Section III offers an assessment of *Taricco II*, by analysing whether the ECJ decided to overrule its *Melloni* doctrine and whether the ECJ answered the problematic question as to who

is the ultimate judge responsible for assessing whether an obligation deriving from EU law undermines the principles inherent to the national identity of a Member State. Some conclusions are drawn in the last section (IV).

II. Tension between Effectiveness and Fundamental Rights in the *Taricco* Saga

The *Taricco II* judgment is the last in a back-and-forth between the ECJ and the Italian courts. It is, in particular, the decision taken by the ECJ in response to the question referred to it for a preliminary ruling by the Italian Constitutional Court (hereinafter “ItCC”), which originated by the ECJ’s findings in the first *Taricco* judgment. The latter was delivered in 2015 by the ECJ upon request for a preliminary ruling by an Italian criminal court. The Italian court questioned the compatibility of national rules on limitation periods, such as the fourth paragraph of Art. 160 of the Italian Criminal Code as amended by Law No 251/2005,¹ with Directive 2006/112. According to the above-mentioned Italian provision, the limitation period applicable to value added tax (hereinafter “VAT”) offences, if interrupted, can be extended by only one quarter of its initial duration, after which the proceedings are definitely to be considered time-barred. The referring court asked whether this provision introduced a VAT exemption not laid down in Art. 158 of Directive 2006/112. The ECJ reformulated the referred question in such a way as if the referring court was seeking to ascertain whether the national rule at issue impeded

the effective fight against VAT evasion in the MS concerned. As it stood, the national rule had the effect of leading to the *de facto* impunity of the persons accused of VAT fraud in a large number of cases as a result of the expiry of the limitation period. If the rule amounted to such an impediment, it would be incompatible with Directive 2006/112 and, more generally, with EU law²

The ECJ stated that the national authorities should consider the Italian provisions at issue incompatible with EU law (in particular, with Art. 325(1) TFEU, Art. 2(1) of the PFI Convention as well as Directive 2006/112, read in conjunction with Art. 4(3) TEU), if the application of these provisions on the interruption of limitation period had the effect of ensuring the impunity of the perpetrators of serious VAT fraud offences.³ EU law, and specifically Art. 325 (1) and (2) TFEU, in fact obliges the MS to ensure that cases of serious fraud “are punishable by criminal penalties which are, in particular, effective and dissuasive,” the ECJ argued. Moreover,

the measures adopted in that respect must be the same as those which the Member States adopt in order to combat equally serious cases of fraud affecting their own financial interests.⁴

The need to ensure the *effective* fight against VAT fraud led the ECJ to equally affirm that “criminal penalties may nevertheless be essential to combat certain serious cases of VAT evasion in an *effective* and dissuasive manner.”⁵ It did so despite MS being free to choose the form of the penalties used (at least in theory) in order to effectively protect the Union’s financial interests.

The use of criminal sanctions is thus interpreted by the ECJ in the *Taricco* case – as in its “environment judgments” of 2005 and 2007⁶ – in a functional way.⁷ This means, as *Mitsilegas* wrote, that

criminal law is not viewed as a self-standing EU policy or field of competence, but rather as a means to an end enabling the Union to achieve effectiveness with regard to its policies and objectives.⁸

The specific Union policy in this case, the implementation of which should be ensured by the MS, was the protection of the Union’s financial interests and the relevant provision was a primary EU law provision, *i.e.*, Art. 325 TFEU. To this end, the ECJ affirmed the direct effect of Art. 325 TFEU⁹ insofar as it obliges the MS to “counter illegal activities affecting the financial interests of the European Union through dissuasive and effective measures” and “to take the same measures to counter fraud affecting those interests as they take to counter fraud affecting their own financial interests.” It concluded that national provisions unable to give full effect to Art. 325 TFEU are to be disapplied.¹⁰

However, provided that the EU is a union of law in which fundamental rights have a prominent role,¹¹ national authori-

ties must also ensure that the fundamental rights of the persons concerned are protected, if they decide to disapply national provisions conflicting with EU law.¹² Despite stating that it is up to the national authorities to ascertain whether fundamental rights (especially the principle of legality) are violated by disapplication of the national provisions at issue, the ECJ, in its first *Taricco* judgment, assigned itself the task of determining whether disapplication of the limitation period provisions at issue would infringe the principle of legality, as interpreted by itself and by the ECtHR. In this regard, the ECJ played the role of a “quasi-constitutional” court,¹³ acting not only as the judicial authority competent to assess the validity of EU law or deciding on the interpretation of EU law but also as the judicial authority competent to assess the consequences of disapplication of national law to the fundamental rights protected at the EU level.

The performance of this role has been eyed by the ItCC, which affirmed that the ultimate control of compliance of EU law with the supreme principles of national legal orders should be entrusted to the national Supreme Courts.¹⁴ Thus, the ItCC submitted a request for a preliminary ruling to the ECJ asking whether the obligation deriving from Art. 325 TFEU, as interpreted in the first *Taricco* judgment, should be applied even if such an obligation conflicts with an overriding principle of the Italian legal system.¹⁵ The ItCC particularly affirmed that, in order for the ItCC not to exert the “counter-limit” doctrine, the ECJ should afford national authorities the possibility to continue applying national provisions, even if they are incompatible with the EU law, in case their disapplication is in contrast with an overriding principle of the national constitutional order and therefore jeopardises the national identity of a given MS.¹⁶ In fact, in the ItCC’s view, the competence to ascertain whether EU law, as interpreted by the ECJ, conflicts with principles pertaining to a MS’ “constitutional identity,”¹⁷ referred to in Art. 4 (2) TEU,¹⁸ belongs to the relevant national authorities.¹⁹

The compromise solution adopted by the ECJ in the *Taricco II* case nevertheless gives only a partial answer to the questions posed by the ItCC. In fact, in its judgment of 5 December 2017, the ECJ neither refers to Art. 4 (2) TEU, nor expressly addresses the issue of compatibility of the rule set out in the *Taricco* judgment with the overriding principles of the Italian constitutional order. Instead, “Luxembourg” confirms the main findings following from its previous *Taricco* judgment, at least as far as interpretation of Art. 325 TFEU is concerned. Even if not contested by the ItCC, the ECJ particularly reiterates, first, that Art. 325 TFEU is an EU primary law provision that has direct effect.²⁰ Secondly, the Court reaffirms that “it is for the Member States to ensure that the Union’s financial interests are protected”²¹ and that, in order to achieve this objective, MS “are free to choose the applicable penalties”; how-

ever, at the same time, it stresses that “criminal penalties may be essential to combat certain cases of serious VAT fraud in an effective and deterrent manner.”²² As a result, the Court reaffirms that MS shall be considered

in breach of their obligations under Article 325(1) and (2) TFEU if the criminal penalties adopted to punish serious VAT fraud do not enable the collection in full of VAT to be guaranteed effectively

or if “the limitation rules laid down by national law do not allow effective punishment of infringements linked to such fraud.”²³

As regards the consequences of the incompatibility of national provisions with EU law (in particular with Art. 325(1) and (2) TFEU), the ECJ, in the first place, reiterates that it follows from its case law that it is

for the competent national courts to give full effect to the obligations under Article 325(1) and (2) TFEU and to disapply national provisions, including rules on limitation, which, in connection with proceedings concerning serious VAT infringements, prevent the application of effective and deterrent penalties to counter fraud affecting the financial interests of the Union.²⁴

Secondly, it reinforces the view taken in the first *Taricco* judgment that the Italian authorities, when deciding whether to disapply the provision of the Criminal Code at issue, “are required to ensure that the fundamental rights of persons accused of committing criminal offences are observed.”²⁵ Contrary to the opinion of Advocate General *Yves Bot*,²⁶ the ECJ went further by affirming that national authorities are not obliged to disapply national provisions incompatible with EU law if such a disapplication “entails a breach of the principle that offences and penalties must be defined by law.”²⁷ This also holds true even when, as a result, a national situation incompatible with EU law occurs.²⁸

III. Effectiveness and Primacy of EU Law v. Stronger National Protection of Fundamental Rights and National Identity

Despite the important issue dealt with in the judgment and although a different outcome of the judgment had the potential to jeopardise the entire European legal system – which is based on “a structured network of principles, rules and mutually interdependent legal relations linking the EU and its Member States”²⁹ – in the author’s view, the innovative effect of the *Taricco II* judgment is minimal. The ECJ clearly acted with the intention of avoiding a direct conflict with the ItCC and, to this end, avoided dealing with the questions referred to it by the ItCC regarding primacy and national constitutional identity. As pointed out in the previous section, the ECJ did not expressly address the issue of compatibility of the rule set out in the *Taricco I* judgment with the overriding principles of the Italian constitutional order. It also did not pronounce judgment on the question of who is the ultimate judge responsible for

assessing whether the MS’s “national identity,” referred to in Art. 4(2) TEU, risks being undermined by obligations deriving from EU law.

1. Did *Taricco II* overrule the *Melloni* doctrine?

As regards the relationship between primacy and effectiveness of EU law, on the one hand, and higher national standards of protection of fundamental rights, on the other, in the author’s view, *Taricco II* does not represent an overruling of the *Melloni* doctrine. It also does not constitute affirmation by the ECJ of the general principle that higher national standards of protection of fundamental rights prevail over the application of EU law if the latter conflicts with those standards. The interpretation according to which the ECJ did not overrule the *Melloni* doctrine seems the more coherent one and more consistent with a literal and contextual interpretation of *Taricco II*.³⁰ In this section, the arguments justifying such a position are put forward.

At first reading, one would think that the *Taricco II* judgment reverses the *Melloni* jurisprudence.³¹ As is well known, the ECJ stated in the *Melloni* judgment that the principles of primacy, unity, and effectiveness of EU law is undermined if Art. 53 of the Charter is interpreted as allowing a Member State to disapply EU rules “which are fully in compliance with the Charter where they infringe the fundamental rights guaranteed by that State’s constitution.”³² Art. 53 of the Charter should thus be interpreted as not allowing a Member State to disapply a provision of EU law, even if application of the EU provision is inconsistent with the higher national standard of protection of fundamental rights. In *Taricco II*, however, the ECJ allowed the Italian authorities to apply their national standard of protection of the legality principle, even if it results in “a national situation incompatible with EU law.” It thus seems, at first reading, that the ECJ reversed its previous jurisprudence and made the higher national standards of protection of fundamental rights prevail over the primacy and effectiveness of EU law. However, a careful reading of the judgment proves the contrary. In this regard, I outline at first two existing different opinions ((1) and (2)) before I subsequently propose an own interpretation of this issue ((3)).

(1) In the view of some scholars, the ECJ addressed the issue as to whether it is possible for national authorities not to implement EU law, if the application is at variance with a higher constitutional standard of protection of a fundamental right by providing a new and autonomous interpretation of the principle of legality referred to in Art. 49 of the EU Charter of Fundamental Rights (CFR). In the opinion of these scholars, it is the same principle of legality enshrined in Art. 49 CFR, as interpreted by the ECJ,³³ that prevents the MS from disap-

plying national provisions conflicting with EU law when such a disapplication conflicts with the fundamental principle of legality. In the opinion of *Bassini and Pollicino*, particularly “it is no longer the national understanding of the principle of legality to be in contrast with the obligations stemming from Art. 325 TFEU,” as “we are no longer facing a counter-limit (a purely Italian doctrine) but a very limit that it is EU law to provide, first of all through Art. 49.”³⁴

(2) Other scholars do not think that the Court gave an autonomous European definition of the principle of legality. As *Burchardt* puts it:

the reference to the domestic constitutional law understanding of the principle is [...] a direct reference to a domestic constitutional principle distinct from Art. 49 of the Charter.³⁵

As a result of a conflict of two EU provisions, namely Art. 325 TFEU and Art. 49 CFR, it is therefore argued that the ECJ does not construe an exception to the obligation of disapplication of national provisions conflicting with EU law following from the *Taricco* judgment. On the contrary, an exception to the obligation following from the *Taricco* judgment is *de facto* construed because of the conflict between the understanding of the principle of legality following from a domestic constitutional law and the obligation following from Art. 325 TFEU. *Burchardt* further notes:

Hence, the exception postulated in *Taricco II* is the result of a conflict between EU law and domestic law – with the CJEU only unconvincedly trying to disguise this.³⁶

Therefore, she states:

for the first time in its jurisprudence, the court thus resolves such a conflict between domestic law and EU law not in favour of EU law primacy but in favour of the domestic constitutional law principle – without basing this outcome explicitly on the higher level of protection rationale in Art. 53 of the Charter.³⁷

According to this reasoning, the Court established an exception to the principle of primacy based on the national understanding of the principle of legality. The risky logical consequence of this interpretation is that the principle of primacy of EU law is compromised.

(3) In my view, however, none of these opinions gives a correct interpretation of the Court’s decision. First, the ECJ did not strike a balance between Art. 325 TFEU and Art. 49 CFR, as the two norms are not in fact in conflict. The obligations stemming from Art. 325 TFEU are not limited by Art. 49 CFR. As stated in *Taricco I*,³⁸ the principle of legality enshrined in Art. 49 CFR is not undermined by disapplication of the Italian provisions on the limitation period, provided that, according to the principle of legality and, as interpreted by the ECJ and the ECtHR, the limitation of offences is an institution of procedural criminal law. Therefore, disapplication of limitation period provisions does not infringe the principle of legality as

set out in the Charter. On the contrary, the problem arises in respect of the Italian understanding of limitation rules as an institution of substantive criminal law, which is thus subject to the principle of legality in criminal matters. For this reason, the opinion referred in point (1) is not shared by the author.

The opinion mentioned in point (2) also does not find the author’s agreement, since the ECJ in the *Taricco II* case neither established the prevalence of *national* fundamental rights standards over the *European* ones, nor overruled the *Melloni* doctrine. Two reasons could be put forward. First, immediately after having observed that the fundamental rights of accused persons should be respected by the national authorities when deciding whether to disapply the Italian provisions on limitation rules hampering the effective protection of the Union’s financial interests, the ECJ stressed that the rule established in the *Åkerberg Fransson* judgment,³⁹ and *de relato* in *Melloni*,⁴⁰ still applies.⁴¹ As a result,

national authorities and courts remain free to apply national standards of protection of fundamental rights, *provided* that the level of protection provided for by the Charter, as interpreted by the Court, and *the primacy, unity and effectiveness of EU law are not thereby compromised*.⁴²

In this context, it is clear from a literal interpretation of the two paragraphs in the *Taricco II* judgment that paragraph 47 (in which it is established that the rights of the persons concerned should be respected) is further explained and specified by paragraph 48 (in which it is made clear that the primacy, unity, and effectiveness of EU law should not be compromised by the application of different standards of protection of fundamental rights).⁴³ Such interpretation of the wording of paragraph 48 leads also to coherence, because otherwise paragraph 48 seems contradictory.⁴⁴ At least formally, therefore, the ECJ recognises the validity of the *Melloni* doctrine from the beginning.

A second indicator of the ECJ’s lack of willingness to reverse its *Melloni* jurisprudence is the entire judgment’s lack of any reference to Art. 53 CFR, the interpretation of which was the focal point of *Melloni*. In the author’s view, if the Court had wanted to reverse its jurisprudence, it would have done so expressly, giving a different interpretation of said Art. 53 CFR or, at least, specifying more precisely its previous interpretation of the article, e.g., construing the case at issue as an exception to the general rule.⁴⁵ However, this was not the path followed by the ECJ. In fact, the Court in the *Taricco II* judgment expressly decided not to proclaim a general principle regulating the relationship between higher national standards of protection of fundamental rights guaranteed by national constitutions, inherent in their national identity, and European standards of protection of fundamental rights. The Court neither mentioned Art. 53 CFR, nor Art. 4 (2) TEU, which had been expressly articulated by the ItCC.⁴⁶

The formal silence of the ECJ on these issues might not be considered a conclusive argument either. However, even from a *de facto* point of view (unlike the *Berlusconi* case in which the issue was not dealt with at all⁴⁷), in the *Taricco II* case the ECJ implicitly solved the question in the sense that the relationship between the primacy of EU law and higher national standards of the protection of fundamental rights should continue to be regulated according to the *Melloni* doctrine. The different outcome of the two judgments, *i.e.*, *Taricco II* and *Melloni*, results merely from the two different factual situations examined by the ECJ in each case, while the general rule adopted to decide both cases is the same. As has been stated earlier, both judgments

concern the same question (whether national and higher standards of rights can be applied in EU related issues) but circumstances are not obviously comparable.⁴⁸

It is thus rather obvious that diverging facts and circumstances lead to different outcomes.

The ECJ, in fact, has applied the same *Melloni* rule to different cases, in which the factual circumstances and the legal framework were different. In one case, a specific harmonised legal framework existed,⁴⁹ while it did not exist in *Taricco II* concerning the limitation period.⁵⁰ In one case (the *Melloni* one), differing interpretations of the same rights to an effective judicial remedy and to a fair trial were given by the ECJ according to EU law, namely Articles 47 and 48(2) of the Charter, and by the Spanish Constitutional Court according to its national law. Yet in another case (*Taricco II*), the interpretation of the principle of legality was not under discussion.

The content of the principle of legality was, in fact, interpreted in the same way both at the European and national levels; in order for it to be respected, provisions of criminal law should comply with the requirements of accessibility and foreseeability, as regards both the definition of the offence and the determination of the penalty. They should also comply with the requirement of precision of the applicable criminal law and with the principle of non-retroactivity of criminal law.⁵¹ The issue debated was instead whether this principle applied to limitation rules for criminal offences relating to VAT or not; in this regard, the ECJ stated that it was for the national authorities to assess – on a case-by-case – whether the principle of legality applied to limitation rules in the Italian system and thus whether a disapplication of the provisions at issue risked infringing it. At the same time, the ECJ affirmed that the national authorities should ensure that the primacy, unity, and effectiveness of EU law were not compromised. Thus, there was no divergence of interpretation concerning the meaning of the principle of legality at either the EU or the national level. This is why the Court did not refer to Art. 53 of the Charter: because it did not affirm a new and different rule from the rule in *Melloni*. It simply applied the same

rule to different cases. The difference between the two cases was ultimately – and this is not a tautology – that they were different cases, involving different fundamental rights, different facts, and different legal frameworks.

2. National identity clause

In the author's view, another important implicit statement of the ECJ in *Taricco II* concerns the sensitive question of who is the ultimate judge responsible for assessing whether the “identity clause” enshrined in Art. 4(2) TEU has been violated. Despite being more evident after the entry into force of the Treaty of Lisbon⁵² and the inclusion of the identity clause in Art. 4(2) TEU, which is subject to the jurisdiction of the ECJ (as are all EU law provisions to the extent that specific provisions do not provide otherwise⁵³), the fact that many domestic constitutional courts claimed violation of their national identity⁵⁴ – among them the ItCC in the *Taricco II* case – has called into question this assumption.

In *Taricco II*, despite not pronouncing judgment explicitly on this issue, the ECJ implicitly answered that “the ultimate judge” to assess whether the identity clause has been infringed or not is the ECJ itself for two reasons. First, the ECJ, by not referring to Art. 4(2) TEU excluded its possible violation. Therefore, in a way, the ECJ implicitly pronounced judgment on the issue, thus precluding the ItCC from doing so. Secondly, giving the national court the task of assessing whether the principle of legality had been violated or not in this specific case, the ECJ put forth that it is the ECJ itself which should give national authorities the possibility not to implement EU law if it conflicts with a fundamental right, as interpreted in the national legal order. This conclusion is evident if one compares the judgment at issue with *Melloni*, in which the ECJ explicitly denied the possibility for the national authorities to disapply EU law, even if it conflicts with fundamental principles, as interpreted in the national legal system. It is thus the ECJ which ultimately decides in which cases national authorities may decide not to apply EU law if it conflicts with overriding principles of their national legal systems.⁵⁵

IV. Conclusion

The foregoing analysis shows that in *Taricco II* the ECJ did not overrule its previous jurisprudence and, in particular, its *Melloni* doctrine. On the contrary, despite leaving many questions unanswered, it applied its *Melloni* jurisprudence to the case at issue. The different outcome of the two judgments is merely due to the different factual circumstances and legal frameworks. Thus, the ECJ, also in order to avoid an open

conflict with the Italian Constitutional Court, found a compromise solution, at the same time ensuring respect for the fundamental rights of the individual and not undermining the principle of primacy and effectiveness of EU law. According to the ECJ's reasoning, the assessment as to whether EU legislation may be considered incompatible with overriding na-

tional principles should be carried out on a case-by-case basis: in the first instance, by the European Court of Justice and, only at a later stage, by the competent national authorities. The ECJ implicitly affirmed that the ultimate judge responsible for assessing respect for the so-called "identity clause" referred to in Art. 4(2) TEU is the ECJ itself.

1 Art. 160 of the Italian Criminal Code, as amended by law n. 251/2005, should be read in conjunction with Art. 161 of that same Code.

2 ECJ, 8 September 2015, case C-105/14, *Ivo Taricco et al.*, para. 35. For a discussion of the *Taricco* case, see E. De Busser, "Court Says Italian Law Liable to Affect Financial Interests of the EU", (2015) *eucri*, 80; V. Scalia, "Protection of Fundamental Rights and Criminal Law, The Dialogue between the EU Court of Justice and the National Courts", (2015) *eucri*, 100.

3 ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), paras. 47, 66.

4 ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 43.

5 ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 39.

6 See ECJ, 13 September 2005, case C-17/03, *Commission of the European Communities v Council of the European Union* (Environmental crime case) and ECJ, 23 October 2007, case C-440/05, *Commission of the European Communities v Council of the European Union* (Ship source pollution case). See Art. 83 para. 2 of the TFEU, which has codified the previous jurisprudence of the Court of Justice in the Environmental crime case and Ship source pollution case.

7 For the definition of "functional criminalisation," see V. Mitsilegas, "From Overcriminalisation to Decriminalisation, The Many Faces of Effectiveness in European Criminal Law", (2014) *New Journal of European Criminal Law*, 416.

8 V. Mitsilegas, (2014) *NJECL*, *op. cit.* (n. 7), 416, 419. The same line of reasoning led the ECJ to affirm that national authorities must treat European interests in an equivalent manner to domestic interests (principle of assimilation). For the initial recognition of the principle of assimilation by the ECJ, see the leading case: ECJ, 12 September 1989, case C-68/88, *Commission v Greece* (*Greek Maize*). For an analysis of the relationship between the concept of "functional criminalisation" and the principle of assimilation, see V. Mitsilegas, (2014) *NJECL*, *op. cit.* (n. 7), 416.

9 ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), paras. 49–52, particularly para. 51. See also ECJ, 5 December 2017, case C-42/17, *M.A.S. M.B. (Taricco II)*, paras. 38–39. For an in-depth and critical analysis on this point, *i.e.*, the recognition of direct effect to Art. 325 (1)(2) TFEU, see V. Mitsilegas, "Judicial dialogue in three silences: Unpacking *Taricco*", (2018) 9(1) *NJECL*, 38–42; F. Viganò, "Melloni overruled? Considerations on the 'Taricco II' judgment of the Court of Justice", (2018) *NJECL*, 18–23; R. Sicurella, "Effectiveness of EU law and protection of fundamental rights: The questions settled and the new challenges after the ECJ decision in the M.A.S. and M.B. case (C-42/17)", (2018) *NJECL*, 24–30.

10 ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 49.

11 See ECJ, 23 April 1986, case 294/83, *Parti écologiste "Les Verts" v European Parliament*, para. 23. For a detailed analysis of the rule of law principle in the EU, see L. Pech, "The Rule of Law as a Constitutional Principle of the European Union", *Jean Monnet Working Paper* 04/09, <<http://www.jeanmonnetprogram.org/>> accessed 12 March 2018.

12 See ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 53.

13 On the "quasi-constitutional" role of the ECJ in the *Taricco* case, see E. Billis, "The European Court of Justice: A 'Quasi-Constitutional Court' in Criminal Matters? The *Taricco* Judgment and Its Shortcomings", (2016) *NJECL*, 20.

14 See Corte Costituzionale Italiana [Italian Constitutional Court] (ItCC), (2017) decision n. 24/2017, 6, last para.

15 See ItCC (2017), *op. cit.* (n. 14), 6, para. 1.

16 See ItCC (2017), *op. cit.* (n. 14), 7, para. 3.

17 In this sense, the ItCC made the same reference to national identity as did numerous times the German Constitutional Court. See in particular, Bundesverfassungsgericht (BVerfG) [German Federal Constitutional Court], 2 BvE 2/08, Leitsatz 4 and BVerfG, 2 BvR 2735/14, para. 41.

18 See ItCC (2017), *op. cit.* (n. 14), 6, para. 4.

19 See ItCC (2017), *op. cit.* (n. 14), 7, para. 3. For a detailed analysis of the decision of the Italian Constitutional Court, see F. Viganò, "Supremacy of EU Law vs. (Constitutional) National Identity: A New Challenge for the Court of Justice from the Italian Constitutional Court", (2017) *European Criminal Law Review*, 103.

20 See ECJ, *Taricco II*, *op. cit.* (n. 9), para. 30.

21 See ECJ, *Taricco II*, *op. cit.* (n. 9), para. 33.

22 See ECJ, *Taricco II*, *op. cit.* (n. 9), para. 34.

23 See ECJ, *Taricco II*, *op. cit.* (n. 9), para. 36.

24 See ECJ, *Taricco II*, *op. cit.* (n. 9), para. 39.

25 See ECJ, *Taricco II*, *op. cit.* (n. 9), para. 46, where reference is made to ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 53.

26 Opinion of AG Bot, delivered on 18 July 2017 in *Taricco II*, *op. cit.* (n. 9). For an analysis of the AG's Opinion, see T. Wahl, "Follow-up to the *Taricco* Judgment – AG Calls for Italy to Disapply Absolute Limitation Periods", (2017) *eucri*, 107.

27 See ECJ, *Taricco II*, *op. cit.* (n. 9), para. 59–62.

28 See ECJ, *Taricco II*, *op. cit.* (n. 9), para. 61.

29 See ECJ, 18 December 2014, Opinion 2/13, para. 167.

30 In the sense that this decision could "belittle" the principle of primacy of EU law, see D. Burchardt, "Belittling the Primacy of EU Law in *Taricco II*", *VerfassungsBlog* <<https://verfassungsblog.de/belittling-the-primacy-of-eu-law-in-taricco-ii/>> accessed 12 March 2018.

31 In this sense, see M. Bassini, O. Pollicino, "Defusing the *Taricco* Bomb through Fostering Constitutional Tolerance: All Roads Lead to Rome", *VerfassungsBlog* <<https://verfassungsblog.de/defusing-the-taricco-bomb-through-fostering-constitutional-tolerance-all-roads-lead-to-rome/>> accessed 12 March 2018; D. Burchardt, *op. cit.* (n. 30), who affirms that: "this reduced and somewhat inconsistent argumentation affects the legal framework of "parallel" human rights protection on the domestic and EU level as established by Art. 53 of the Charter and the Melloni and Åkerberg Fransson jurisprudence."

32 See ECJ, 26 February 2013, case C-399/11, *Stefano Melloni v Ministerio Fiscal*, para. 57–64, and particularly 58.

33 For a commentary of Art. 49 of the Charter, see V. Mitsilegas, "Article 49 – Principles of Legality and Proportionality of Criminal Offences and Penalties", in: S. Peers, T. Hervey, J. Kenner and A. Ward (eds.), *The EU Charter of Fundamental Rights. A Commentary*, 2014, p. 1351.

34 M. Bassini, O. Pollicino, *op. cit.* (n. 31), 4.

35 D. Burchardt, *op. cit.* (n. 30), 2.

36 D. Burchardt, *op. cit.* (n. 30), 3.

37 D. Burchardt, *op. cit.* (n. 30), 3.

38 See ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), paras. 54–57.

39 See ECJ, 26 February 2013, case C-617/10, *Åklagaren v Hans Åkerberg Fransson*, para. 29.

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40 It should be noted in this regard that the *Åklagaren v Hans Åkerberg Fransson* judgement expressly refers to the *Melloni*'s one and in particular to para. 60 of the judgment (ECJ, 26 February 2013, case C-399/11, *Stefano Melloni v Ministero Fiscal*, para. 60).

41 See ECJ, *Taricco II*, *op. cit.* (n. 9), para. 47.

42 See ECJ, *Ivo Taricco et al.*, *op. cit.* (n. 2), para. 47. Emphasis added.

43 A clear indication in this sense is given by the inclusion of the expression "in that respect" at the beginning of paragraph 47. This expression is usually used to explain the meaning of something which was previously stated.

44 This reading is supported by the opening phrase of the paragraph, "in particular," which means that what you are saying applies especially to a specific situation (see definition in the Collins dictionary). In the sense that paragraph 47 is contradicted by paragraph 48, see M. Bassini and O. Pollicino, *op. cit.* (n. 31), 2.

45 In the sense that the ECJ created a "hidden exception to primacy", see D. Burchardt, *op. cit.* (n. 30), 3.

46 See ItCC (2017), *op. cit.* (n. 14), 8, paras. 4–5.

47 This question was not in fact addressed by the ECJ in the *Berlusconi* judgment, in which the Court affirmed that rendering judgment on this question was not necessary for the purpose of the disputes in the main proceedings (see ECJ, 3 May 2005, Joined cases C-387/02, C-391/02 and C-403/02, *Silvio Berlusconi et al.*, paras. 70–71). On the contrary, see the

AG Kokott's Opinion of 14 October 2004 in the *Berlusconi* case (mentioned above in this same footnote), paras. 167–168.

48 See C. Peristeridou and J. Ouwerkerk, "A Bridge over Troubled Water – a criminal lawyers' response to *Taricco II* – long read", *VerfassungsBlog* <<https://verfassungsblog.de/a-bridge-over-troubled-water-a-criminal-lawyers-response-to-taricco-ii/>, DOI: <https://dx.doi.org/10.17176/20171213-095140>>.

49 See in this regard ECJ, *Stefano Melloni v Ministero Fiscal*, *op. cit.* (n. 40).

50 See ECJ, *Taricco II*, *op. cit.* (n. 9), paras. 44–45.

51 See ECJ, *Taricco II*, *op. cit.* (n. 9), paras. 51–57.

52 This was not necessary the case when the identity clause was not included on the list in Art. 46 TEU pre-Lisbon. In that case, according to some authors' views, the reluctance of the ECJ to cite the national identity clause in its judgments was caused by the Court's lack of competence; see L.F.M. Besselink, "Respecting Constitutional Identity in the EU. Case Note to Case C-208/09, *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, judgment of the Court (Second Chamber) of 22 December 2010", (2012) *Common Market Law Review*, 671, 678.

53 See Art. 19 TEU and R. Barents, "The Court of Justice after the Treaty of Lisbon", (2010) *Common Market Law Review*, 709.

54 On the difference between national and constitutional identity, see E. Cloots, *National identity in EU law*, 2015.

55 See contra ItCC, decision n. 115/2018, of the 31st of May 2018.

Fundamental Rights and Effectiveness in the European AFSJ

The Continuous and Never Easy Challenge of Striking the Right Balance

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Abstract: In the context of the European Union's area of freedom, security and justice (AFSJ), "the need to strike the right balance" between the effectiveness of criminal prosecution and cooperation in criminal matters, and the protection of fundamental rights, but also between the primacy of EU law and national constitutions, is a core goal. By addressing two precise scenarios, this article attempts to show how the "needed balances" are understood. This analysis will further serve to show whether the EU is moving in the right direction in the field of cooperation matters. The first scenario will focus on the protection of fundamental rights in cross-border investigations within the context of EPPO proceedings under Regulation (EU) 2017/1939. Secondly, a number of aspects regarding the European Arrest Warrant are analysed. The author argues that, even if the AFSJ is advancing in quite a measured way, much can still be done to improve the protection of fundamental rights.

I. Introduction

In the context of the European Union's area of freedom, security and justice (AFSJ), "the need to strike the right balance" has become a kind of slogan representing the wide notion of assessing the proportionality principle. A balance needs to be found between the effectiveness in crime prosecution and cooperation, and the protection of fundamental rights, but also between the primacy of EU law and national constitutions. In

the end, achieving this balance will define the scope of the mutual recognition concept,¹ and such balance should always favour the protection of the fundamental rights, without losing sight of the needs of providing security. The entire history of criminal procedure at the end is the struggle to find this much-needed "right balance." My aim is not to offer a definition and not even an approximation of a concept of the "right balances" in cooperation in criminal matters in the ASFJ. This would be completely illusory and clearly doomed to fail. By addressing

two precise scenarios, I will attempt to show how the “needed balances” are understood, and this should serve to further analyse whether the EU is moving in the right direction in the field of cooperation in criminal matters.²

The first scenario will focus on the protection of fundamental rights in cross-border investigations within EPPO proceedings under Regulation 2017/1939. The project of establishing a supranational prosecutor’s office raised alarm bells within academia and had lawyers warning against the potential risks a powerful supranational prosecution institution would present for the protection of the defendant’s rights and the principle of equality. Now, the moment has come to assess whether those fears are still justified or not (cf. section II.).

Secondly, I will analyse a number of aspects regarding the instrument of cooperation in criminal matters that could be seen as the “jewel of the Crown”, which is the European Arrest Warrant (EAW). In section III, I will address the problems related to trials *in absentia* in the case law of the ECJ in the context of enforcement of EAWs and I will also detail the possible impact of Directive 2016/343 on the presumption of innocence and the right to be present at trial.³ In the end (section IV), I will outline several relevant aspects that should be taken into account when analysing the shortcomings of the mutual recognition principle and the problems of its implementation.

II. EPPO: Fundamental Rights, and Cross-Border Investigations

After years of discussion and negotiations, the EPPO Regulation was finally adopted (hereinafter RegEPPO) in October 2017.⁴ The model agreed upon can be defined as an “integrated model” with a central deciding and coordinating unit, and a decentralised structure where the main actions are carried out through European Delegated Prosecutors (EDP).⁵ The initial idea of establishing a single legal space, where the EPPO would act on investigative measures under its own set of rules that would be applied in a uniform way all across the EU, has completely disappeared in the Regulation. Under the present system, the EPPO will be an indivisible Union body operating as one single Office (Article 8(1) RegEPPO). However, for the purpose of gathering evidence, it continues to operate on the basis of the principle of national territoriality.⁶

The lacking uniformity of this integrated model entails that the national law for the protection of procedural safeguards applies. The defendant is faced with a powerful supranational structure with “delegations” in all EU Member States having access to cross-border evidence, whereas the rights of defence continue to rely on the diverse regulations in the national law

of each State, save the minimum harmonization that the EU Directives on procedural safeguards of suspects and defendants in criminal proceedings foresee.

The EPPO Regulation addresses the protection of fundamental rights at different Recitals,⁷ and Chapter VI is devoted to “procedural safeguards.” This chapter, consisting of two articles, recognises the need to take into account the rights of suspects and the accused enshrined in the EU Charter of Fundamental Rights (Article 41(1) RegEPPO). Article 41(2) follows with the “minimum standards” that must be provided in every Member State’s national legislation, by referring to the EU Directives on procedural safeguards of suspects and defendants in criminal proceedings.⁸ The remainder is a matter of respective national law.

Through the assignment system, the Regulation provides for cross-border cooperation in the gathering of evidence to be carried out between the EDPs in every Member State taking part in the EPPO: the EDP handling a case assigns the necessary investigative measure to one of the EDPs of the State in which it has to be carried out (Article 30(1) RegEPPO). The assisting EDP “shall undertake the assigned measure, or instruct the competent national authority to do so” (Article 31(4) RegEPPO).

The “assignment” is neither subject to any type of recognition procedure nor to any additional conditions. The authority providing the assistance does not oversee the need, adequacy, or proportionality of the measure (save for Article 31(5) lit. c) RegEPPO, see below) or of the *ne bis in idem* principle.⁹ The Regulation also does not include grounds for refusal to execute the assignment. Any circumstance that might appear to affect the execution of the measure shall be communicated by the assisting EDP to his/her supervisor and to the handling EDP.

While this system moves towards mutual recognition in the execution of the requested (assigned) investigative measure, it does not mean that the mutual recognition of evidence has improved. The single office will still have to act within a fragmented legal area. The original idea was to create a single area precisely to overcome the shortcomings of such fragmentation, which entail difficulties for both the prosecution and the accused persons: the former risks evidence obtained abroad being declared inadmissible, and the latter risks not being able to adequately check the legality of the evidence gathered abroad under the rules of a foreign legal system. In short, as regards evidence, the EPPO proceedings will be subject to the same fragmentation as any other transnational criminal proceedings in the EU territory at the moment.

Does this system provide for the “right balance” between more efficient supranational prosecution and protection of the rights

of the defence in these cross-border investigations? First, from the point of view of the protection of fundamental rights, this double-check of the evidentiary measure requested (insofar as it has to comply with the *lex loci* and the *lex fori*) means compliance with the highest standard. If the assigned measure requires judicial authorisation in the issuing State, the EDP assigning the measure shall accompany the judicial warrant (Article 31(3) RegEPPO). If it is only required in the executing State, the assisting EDP shall obtain such authorisation. This approach is similar to the one provided for in the EIO Directive,¹⁰ as the principle of mutual recognition does not allow skipping judicial authorisation if it is needed under the laws either of the issuing or of the executing State. This system guarantees the application of the highest standard of protection for judicial authorisation.¹¹

Second, there is also the possibility that the assisting EDP conducts a certain proportionality test of the assigned measure. In terms almost identical to Article 10(3) of the EIO Directive, Article 31(5) lit. c) RegEPPO allows the assisting EDP to adapt the assignment to the proportionality principle: if the same results can be obtained through another less intrusive measure, he shall contact the handling EDP to resolve the matter bilaterally.

In my opinion, such an assignment system ensures an adequate balance. The problem is not the assignment system, but rather the weaker position of the defence in any transnational setting. From the viewpoint of the defence, apart from the fact that access to cross-border investigative measures might be quite difficult in practice, there are also complex hurdles to overcome in checking the legality of the evidence obtained abroad and thus ensuring compliance with the national rules on admissibility of evidence.¹²

How can defence be improved? Multi-level legal assistance should be granted to this end, with lawyers having knowledge of the different legal orders involved. The Directive on Access to a Lawyer (hereinafter: DAL),¹³ however, does neither address the right to defence in transnational criminal proceedings when evidence is collected in another Member State nor in the assessment of the necessity and proportionality of the evidence collected via assignment. Leaving aside the questioning of the suspect or accused, the DAL does not provide for legal assistance to be granted in both States except for the EAW (Article 10 DAL).

Ultimately, with regard to defendants who lack sufficient financial resources, the Directive on Legal Aid¹⁴ does not grant the right to a lawyer in the procedure of cross-border evidence gathering either. It should be emphasised that, except in cases of detention, the right to free access to a lawyer will only be

granted according to the national law and will only be mandatory if “the interests of justice so require.”¹⁵ Among the cases that justify the granting of free legal aid, it would have been desirable if the Directive on Legal Aid had also included those cases in which evidence is gathered in another Member State, as such cases clearly entail an additional complexity for the defence.

In sum, even if the assignment systems could be viewed as balanced, assessed as a whole, does not ensure the adequate balance. As neither the EU Directive on Access to Lawyer nor the EU Directive on Legal Aid contribute to the adequate protection of the right to an effective defence in proceedings involving cross-border investigations under the EPPO, the protection – if any – is left to the national law of each Member State. Therefore, one can say that EU secondary law has failed in striking the “right balance” between prosecution and defence in cross-border investigations undertaken by the EPPO.

III. EAW: Right Balance Regarding Trials *in absentia*?

The EAW is undoubtedly the most successful instrument of judicial cooperation in the EU based upon the principle of mutual recognition, as confirmed by statistics.¹⁶ While functioning very effectively in most cases, there are certain aspects that might be worth discussing in the context of assessing the “right balance.”¹⁷ The cases related to conviction sentences rendered *in absentia* have been turned out particularly problematic, precisely with regard to Article 4a(1) of the FD EAW.

If the defendant knew about the date and location of the trial (either because he was summoned personally or by any other means unequivocally establishing that he had this knowledge) and was informed about the consequences, such a ground for refusing to execute the EAW shall not be invoked, as it can be presumed that he waived his right to be present at trial. In addition to these two requirements (personal summoning or awareness by official means and information of the consequences of non-appearance),¹⁸ Article 4a(1) lit. b) FD EAW establishes a further presumption of the waiver to appear if

being aware of the scheduled trial, had given a mandate to a legal counsellor, who was either appointed by the person concerned or by the State, to defend him or her at the trial, and was indeed defended by that counsellor at the trial.¹⁹

Article 4a(1) FD EAW has given rise to several references for a preliminary ruling to the ECJ. Have these decisions achieved the right balance between the effectiveness of the EAW and the need to ensure the right to be present at trial? And does Directive 2016/343 provide elements for counterbalancing the interests at stake?

1. The ECJ's approach

The much-discussed judgment in the *Melloni* case, which dealt with the execution of an EAW by Spain for serving a custodial sentence rendered *in absentia* in Italy, addressed the crucial question of which level of protection of fundamental rights must prevail when there is a conflict between the level of protection afforded by national constitutions and by EU law.²⁰ The issue directly affects the role that national constitutional courts and their understanding of fundamental rights play in the EU legal system as well as the scope of fundamental rights recognised in the EU Charter. After reaffirming the primacy of EU law when the unity and effectiveness of EU law are compromised, the ECJ excluded the possibility of accepting any grounds for refusal of the execution of a EAW beyond the ones set out in the framework decision, despite the higher level of protection provided by the Spanish Constitutional Court in cases tried *in absentia*. The importance of this judgment lies not so much in the particular circumstances surrounding the request for Mr. Melloni's extradition, but in the stance taken by the ECJ in defining European inter-constitutionalism. The *Melloni* judgment was widely criticised precisely for not adequately balancing the role of the national constitutional courts *vis-à-vis* the primacy of EU law.

In this context, it is necessary to mention the *Taricco* case,²¹ even if it does not relate to an EAW. In the *Taricco* saga, after the preliminary ruling of the ECJ in 2015, the Italian Constitutional Court filed another preliminary ruling request regarding the enforcement of the first one. The Italian Constitutional Court claimed that enforcement of the first ECJ ruling would run against the Italian "constitutional identity" and therefore asked for further clarification via a second preliminary ruling.²² Unlike the *Melloni* case – where the issue of national constitutional identity was never raised – the Luxembourg Court concluded, in its judgment of 5 December 2017 (*Taricco II*),²³ that the national rules shall be disapplied in order to enforce EU law,

unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed.²⁴

While underlining again the primacy of EU law, in the *Taricco II* case, the ECJ took a much more balanced approach in interpreting Article 53 of the EU Charter and allowing precedence of the national law when it affects an issue of constitutional identity. This judgment is to be welcomed for showing a much more balanced approach towards the complex interplay between courts and for avoiding an open clash of courts on issues regarding the level of protection of fundamental rights.

Recent judgments of the ECJ on the subject matter of trials *in absentia* also show a shift towards a more balanced approach in favour of the protection of fundamental rights.²⁵ The *Dworzecki* case²⁶ dealt with the execution of an EAW issued by a Polish judicial authority for the surrender of a Polish citizen residing in the Netherlands for the execution of several custodial penalties. The defendant was tried *in absentia*, after

the summons was sent to the address which Mr Paweł Dworzecki had indicated for service of process and it was collected by an adult occupant at this address, Mr Paweł Dworzecki's grandfather,²⁷

in compliance with national law. The request for a preliminary ruling by the District Court of Amsterdam concerned the content of Article 4a(1) lit. a) of the FD EAW. The ECJ found that this provision contains autonomous concepts of EU law ("summoned in person" and "by other means actually received official information (...) in such a manner that it can be unequivocally established that he or she was aware of the scheduled trial").²⁸ It also found that indirect summons as handed over in the case

when it cannot be ascertained from the European arrest warrant whether and, if so, when that adult actually passed that summons on to the person concerned, does not in itself satisfy the conditions set out in that provision.²⁹

By requiring that it be unequivocally established that the defendant was aware of the date and place of the trial – and not simply presuming that he was aware of the date and place – the ECJ opted for an interpretation of Article 4a(1) lit. a) FD EAW that is most favourable for the rights of the person convicted *in absentia* when facing the execution of a EAW.

Two further cases in which the ECJ was called upon to interpret the expression "trial resulting in the decision" within the meaning of Article 4a(1) lit. a) FD EAW are also worth mentioning. In the *Tupikas* case,³⁰ the EAW had been issued by a Lithuanian Court, seeking the arrest and surrender of Mr. Tupikas, a Lithuanian national with no fixed abode or place of residence in the Netherlands, for the purpose of carrying out a sentence of imprisonment of one year and four months. Mr. Tupikas appeared at the first-instance trial, where he was sentenced to a custodial penalty. He later appealed that conviction, the appeal was dismissed, and the first-instance sentence confirmed. The issue at stake was whether his absence during the appeal proceedings was relevant under Article 4a(1) lit. a) FD EAW. Should the defendant be considered convicted *in absentia* for the aim of executing the EAW? The ECJ concluded that the concept "trial resulting in the decision" within the meaning of Article 4a(1) FD EAW covers the instance at which the decision on the guilt of the offender was finally adopted; therefore the appeal proceedings fall within that concept.³¹

On the same day, the ECJ took a very similar decision in the *Zdziaszek* case.³² This case concerned an EAW issued by a

Polish court to enforce a custodial sentence, where the second-instance hearing was held *in absentia*, hence the similarity to the *Tupikas* decision.³³ The stance taken by the ECJ in these two judgments is undoubtedly most favourable for the defence rights of the accused person.

Lastly, in the *Ardic* case,³⁴ the ECJ had to deal with the execution of an EAW in the Netherlands issued by the prosecution service of Stuttgart, Germany, with a view to executing two custodial sentences in Germany. Mr. Ardic, a German national residing in Amsterdam appeared at the trial, at which he was sentenced to two custodial penalties, each for one year and eight months. After Mr. Ardic had served a portion of these two sentences, the competent German courts granted a suspension of execution of the remainder of those sentences. Due to an infringement of the prescribed conditions, the suspension was revoked: Mr. Ardic was not present at the proceedings that resulted in the revocation decision, being unaware of them because he was notified by publication according to German criminal procedure law.

For the purposes of applying Article 4a(1) lit. a) FD EAW, the ECJ had to determine whether a decision to revoke suspension of execution of a previously imposed custodial sentence can be equated with a “trial which resulted in the decision”. The Court found that the ‘decision’ concept

must be interpreted as not including subsequent proceedings in which that suspension is revoked on the grounds of infringement of those conditions during the probationary period, provided that the revocation decision adopted at the end of those proceedings does not change the nature or the level of the sentence initially imposed.³⁵

Here, the ECJ followed the case law of the ECtHR and struck a balance between the effectiveness of the EAW and the protection of fundamental rights, also taking into account that the person subject to the EAW would be granted the right to be heard upon being surrendered to the German authorities. This decision cannot be objected to, because the decision rendered *in absentia* affected neither the establishment of the guilt of the defendant nor the nature or quantum of the penalty, but only the conditions for serving the sentence. To my mind, the judgment takes a fully balanced approach to the respect of the fundamental rights.

2. The Impact of Directive (EU) 2016/343

Beside certain aspects of the presumption of innocence, Directive (EU) 2016/343³⁶ includes two provisions on the right to be present at the trial. Article 8 defines the minimum requirements to allow the holding of a trial *in absentia*. Its content is almost identical to that of Article 4a(1) lit. a) of the FD EAW, although the wording in the FD EAW regarding notifications ensures a higher standard.³⁷ Article 9 requires a new trial or

remedy with “fresh determination of the merits of the case” to be provided when the “waiver principle” is not fully established/is not unequivocal.³⁸ The regulation of remedies, however, is left to national procedural rules. Harmonisation is therefore kept to a minimum.

The content of Article 9 ensures the possibility of exceptional remedy against sentences rendered *in absentia* only in cases in which the conditions under Article 8(2) have not been met. To my mind, this is clearly not sufficient to ensure the right to defence, even if the text of Recital 34 might allow a broader interpretation of this provision.³⁹ The way in which Article 9 is drafted, however, does not promote strengthening of the protection of human rights in criminal proceedings in the EU AFSJ, and it also does not even follow the principles set out in the case law of the ECtHR:⁴⁰ in consequence, Article 9 of the Directive can be considered to provide “less than minimum” safeguards. It may be argued that these minimum rules do not prevent national States from providing higher safeguards, but even they do not make null and void the EU Member States’ obligations to follow the case law of the ECtHR. While this is clearly true, the question then is why the EU legislature has opted for such a low standard of harmonisation, going even lower than the standard established by Strasbourg case law: not enabling the defendant to request the re-opening or review of a judgment rendered *in absentia*, when he knew the date of the trial and was represented by lawyer, cannot be said to comply with the fundamental rights of defence. There might be situations in which the defendant should be granted the opportunity to state the reasons why he was deprived of his right to be present at trial or why his rights of defence were infringed upon, even though a lawyer represented him in court.

I am not stating that the right to a new trial should be ensured in all cases, but excluding it when certain conditions are met implies the assumption of significant risks for the protection of fundamental rights. This is confirmed by numerous applications to the ECtHR related to trials *in absentia* and, in particular, the cases *Mariani v. France*⁴¹ and *Sejdovic v. Italy*.⁴²

In sum, while the case law of the ECJ shows a shift in balancing effective judicial cooperation in the execution of EAWs towards the protection of fundamental rights, EU legislation in form of Directive 2016/343 could frankly have done more in granting the right to have the decision rendered *in absentia* revised.

IV. “Right Balance” or Imbalance: What is Ideal and What is Possible in the AFSJ

When discussing the adequate balance between fundamental rights and the effectiveness of judicial cooperation in the

AFSJ, it should not be forgotten that one of the main objectives is to establish an area of justice (Article 67(1) TFUE). An analysis should always be focused on eliminating obstacles that hinder cooperation, but with full respect to human rights and “the different legal systems and traditions of the Member States.” Establishing such an area must necessarily be oriented towards the free circulation of judicial decisions, the free circulation of evidence, and effective cooperation in the arrest and surrender of accused persons. Establishing this freedom of “circulation” in the field of criminal justice can face even greater challenges than the free movement of goods, services, people, and capital.⁴³

Once the internal borders in the EU were (almost) eliminated, it became logical that the EU had to deal primarily with preventing the fragmented legal and judicial spaces from hindering the effective fight against crime in the EU. It did not take long for criticism to arrive. One point of criticism was that the EU’s focus was on prosecuting crimes while disregarding the need to provide protection for the rights of suspects and the accused in transnational criminal proceedings. It is true that, initially, the focus of attention was on the free circulation of judicial decisions and less on the “circulation” of procedural safeguards. The approach was understandable, but the criticism was also legitimate.

Reaching an agreement among the Member States in setting a high standard of protection of human rights has not been possible until now, for various reasons: the diverging national approaches towards procedural safeguards, reluctance to yield sovereign powers, unwillingness to accept additional costs, mistrust towards some Member States, etc. Faced with this situation, the principle of mutual recognition seemed the only feasible solution so far. 20 years after the 1999 Tampere Council agreed on the mutual recognition principle as the cornerstone of judicial cooperation, can its implementation be seen as balanced? In my opinion, the answer is yes.

The answer is also yes to the question whether more can be done, both in improving cooperation and in strengthening the protection of fundamental rights of suspects and the accused. Currently, the functioning of judicial cooperation is not perfect from the perspective of the effectiveness. The protection of fundamental rights of persons subject to transnational proceedings is also less than perfect, as can be seen in the *Aranyosi and Căldăraru* judgment,⁴⁴ in which the degrading and inhumane conditions of certain detention centres in some Member states posed the risk of reversing the mutual recognition principle.

A very recent reference for a preliminary ruling to the ECJ filed by the High Court of Ireland raises again the issue of effectiveness against protection of fundamental rights.⁴⁵ It deals

with the enforcement of a EAW issued by Polish authorities for the purpose of prosecuting a person staying in Ireland for two offences (drug trafficking and participation in an organised criminal group). Based on reports, mainly on the Opinion of the Council of Europe’s Venice Commission on the legislative changes and their effect on the independence of the judicial system in Poland,⁴⁶ the referring court asks whether – at the sight of such cogent evidence of a real risk of denial of justice (violation of Article 6 ECHR) –, the court should carry out further assessments as to the real risks for the individual concerned before deciding on the execution of the EAW.⁴⁷ Is the lack of sufficient safeguards for judicial independence and consequent risks for the rights enshrined in Article 6 ECHR to be interpreted as a refusal ground to execute an EAW in the future? In general, I do not believe that the perils of the rule of law in general should be interpreted as a ground for refusal to execute a EAW. It will be interesting, however, to observe to which extent the ECJ allows the executing authority to take evidence and file inquiries for taking the decision to refuse or not.

Although, the approach and the measures adopted by the EU institutions and ECJ case-law with regard to the judicial cooperation in criminal matters seem balanced, this does not prevent us from recognizing that the situation, both regarding effectiveness of cooperation as well as protection of fundamental rights, can be improved. Some national peculiarities might have to be sacrificed for more efficient cooperation, as witnessed in the *Melloni* case. It will also be necessary for the ECJ to take into account other national specificities that are part of constitutional identity, as seen in the *M.A.S. and M.B* case (known as the *Taricco II* case). The primacy and effectiveness of European law are the principles that shall prevail, but not at any cost. Likewise, not every national understanding of procedural rights should be upheld at the cost of effectiveness within the AFSJ.

In this regard it is necessary to mention, albeit very briefly a recent case regarding an EAW issued against Catalan leader Carles Puigdemont accused of rebellion and embezzlement. Without entering into the details of the precise facts and without aiming to analyse the present stage of the proceedings and decisions already taken, the EAWs sent by the Spanish authorities to Belgium and Germany requesting the surrender of Mr. Puigdemont has certainly brought to the forefront the issues of “mutual trust” and the principle of mutual recognition. This case is interesting for the topic discussed here as it shows that a traditional approach to the concept of sovereignty – and establishing the double criminality as an absolute requirement to comply with the requests for judicial cooperation in the execution of an EAW – undoubtedly weakens the effectiveness of the international judicial cooperation, while it is not necessarily justified on grounds of protection of human rights. Does this approach meet the right balances sought in the AFSJ?

Whatever the outcome in this specific case is and whatever the reasons for the German court to adopt a traditional approach towards the meaning of double criminality in the EAW proceedings is, the entire case leads us to question of whether Europe has really advanced, not so much in terms of cooperation – that is indisputable – but in terms of mutual trust and mutual recognition. So far, the case against Carles Puigdemont gives rise to think that the AFSJ is still far from being a reality, at least when it comes to sensitive cases that are not exempt from the double criminality test. Perhaps a more balanced approach by the national authorities towards cooperation in cases where no human rights issue are at stake should be fostered.

V. Concluding Remarks

As the principle of mutual recognition has been adopted for building the AFSJ, – as long as the Member States do not opt for more legal harmonisation – finding the right balance between the effectiveness of judicial cooperation and protection of fundamental rights is not and will not be an easy task. It has first been shown that the gathering of cross-border evidence by the EPPO in particular by means of the assignment system is adequate. However, the established EPPO regime does not sufficiently ensure the equality of arms of the parties since the EU Directive on access to a lawyer does not give a proper answer to the protection of fundamental rights in transnational proceedings. Granting the right to be assisted by lawyer only for the three investigative measures under Article 3(3) lit. c) of said Directive – assuming that it would also be applicable to transnational proceedings – seems to be clearly insufficient.

Within the EAW scenario – the second issue examined in this article – the ECJ has moved from a rather effectiveness-oriented stance towards a position more attentive to the protection of fundamental rights, as seen in the recent cases relating

to trials *in absentia*. Paradoxically, the provisions included in the EU Directive 2016/343 on trials *in absentia* seem to entail an inadequate balance because it partly shifts away from the ECHR standard.

Mutual trust should not just be presumed; instead, it has to be supported and reinforced with a high standard of fundamental rights protection if Europe is to advance in consolidating the principle of mutual recognition. Much more must be done, especially regarding detention conditions, legal aid, and right to have the judgment *in absentia* revised. So far, however, the judgments of the Luxembourg Court seem to be achieving the “right balance” between the interests at stake, and they show more sensitivity towards the role the Court has to play in protecting fundamental rights. After the *Melloni* case, the protection of the primacy of EU law has been balanced adequately so far, with a view to respecting constitutional identities and fundamental rights.

In situations where none of the affected parties’ interests are fully satisfied, this is due to two reasons: either the solution adopted is imbalanced (thus being a failure) or, on the contrary, it has really struck the best possible balance between the competing interests (thus reached a compromise). In the context of the AFSJ, the achieved balance between effectiveness of judicial cooperation and protection of fundamental rights within the AFSJ, as shown in the two examples analysed, although not perfect, can be viewed as positive. Applying a too strict interpretation of the double criminality requirement for refusing to execute a EAW, however, does not seem to be striking such a good balance as can be shown by the current “Puigdemont case”: in these cases, the effectiveness seems to be undermined by an excessive distrust or by a position too prone to maintaining sovereign powers instead of fostering cooperation. Much has still to be done towards building up trust, because distrust among Member States – justified or not – may also destroy the necessary “right balance.”

1 On the notion of the mutual recognition principle in the AFSJ, see W. van Ballegooij, *The Nature of Mutual Recognition in European Law*, 2015, pp. 119 et seq.

2 See also D. Flore, “The Issue of Mutual Trust and the Needed Balance Between Diversity and Unity,” in: C. Brière and A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law*, 2017, pp. 157 et seq.

3 Directive (EU) 2016/343 of 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings, *O.J. L* 65, 11.3.2016, 1.

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

5 Art. 8 RegEPPO. On the structure and features of the EPPO, see for example, K. Ligeti and M. Simonato, “The European Public Prosecutor’s Office: Towards a Truly European Prosecution Service?”, (2013) *New Journal of European Criminal Law*, 7–22; K. Ligeti and A. Weyembergh “The European Public Prosecutor’s Office: Certain Constitutional Issues”

in: L.H. Erkelens, et al (eds.), *The European Public Prosecutor’s Office. An extended Arm or a Two-Headed Dragon?*, 2015, pp. 53–77.

6 See already L. Bachmaier Winter, “The Potential Contribution of a European Public Prosecutor Office in Light of the Proposal for a Regulation of 17 July 2013”, 23 (2015) *European Journal of Crime, Criminal Law and Criminal Justice*, 121, 133; D. Negri, “Best Practices and Operational Models in Financial-Economic Investigations in Europe in View of the EPPO” in: A. Bernardi and D. Negri (eds.), *Investigating European Fraud in the EU Member States*, 2017, p. 149, 151.

7 See Recitals 80 and 83 to 86.

8 On the contents of the Directives at the sight of the ECHR, see T. Wahl, “Die EU-Richtlinien zur Stärkung der Verfahrensrechte im Spiegel der EMRK”, (2017) *ERA-FORUM*, 311–333.

9 P. Csonka, C. Juszczak, and E. Sason, “The Establishment of the European Public Prosecutor’s Office. The Road from Vision to Reality”, (2017) *eucri*, 125, 129. They call this a *sui generis* system moving away from the mutual legal assistance regime.

10 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.

11 In the same sense, H.H. Herrnfeld, “The Draft Regulation on the Establishment of the European Public Prosecutor’s Office – Issues of Balance Between Prosecution and Defence”, in: C. Brière and A. Weyembergh (eds.), *The Needed Balances in EU Criminal Law*, 2017, p. 382, 406.

12 See S. Gless, *Beweisrechtsgrundsätze einer grenzüberschreitenden Strafverfolgung*, 2007; S. Ruggeri, “Transnational Investigations and Prosecution of Cross-Border Cases in Europe: Guidelines for a Model of Fair Multicultural Criminal Justice” in: S. Ruggeri (ed.) *Transnational Evidence and Multicultural Inquiries in Europe*, pp. 193–228; and S. Ruggeri, *Audi Alteram Partem in Criminal Proceedings. Towards a Participatory Understanding of Criminal Justice in Europe and Latin America*, 2017, pp. 403 et seq.

13 See L. Bachmaier Winter, “The EU Directive on Access to Lawyer: A Critical Assessment” in: S. Ruggeri (ed.), *Human Rights in European Criminal Law*, 2015, pp. 111–131; Z. Durdevic, “The Directive on the Right to Access to a Lawyer in Criminal Proceedings: filling a human rights gap in the European Union legal order” in: Z. Durdevic and E. Ivcevic (eds.) *European Criminal Procedure Law in Service of Protection of European Union Financial Interests: State of Play and Challenges*, 2016, p. 9, 18 et seq.

14 Directive (EU) 2016/1919 of the European Parliament and of the Council of 26 October 2016 on legal aid for suspects and accused persons in criminal proceedings and for requested persons in European arrest warrant proceedings, *O.J. L* 297, 4.11.2016, 1.

15 As regards the criteria for identifying when an “interest of justice” exists in granting the right to free legal assistance, see the ECtHR, 24 May 1991, *Quaranta v. Switzerland*, Appl. No. 12744/87.

16 According to the Commission Staff Working Document “Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2015”, SWD(2017) 320 final, p. 4, the total number of EAWs issued by the 28 Member States in 2015 was 16,144. See also the article of D. Vilas Álvarez, in this issue, p. 64.

17 See L. Bachmaier Winter, *Mutual recognition instruments and the role of the CJEU: grounds for non execution*, (2015) *NJECL*, 505–526; J.A.E. Vervaele, “The European arrest warrant and applicable standards of fundamental rights in the EU”, (2012) *Review of European Administrative Law*, 37–54; S. Ruggeri, *op. cit.* (n. 12), pp. 431 et seq.

18 For a critical view of the lack of precision of the terms used in Article 4a FD EAW, see T. Wahl, “Der Rahmenbeschluss zu Abwesenheitsentscheidungen: Brüsseler EU-Justizkooperation als Fall für Straßburg?”, (2015) *eu crim*, 70, 72–73.

19 Finally, paragraphs (c) and (d) of Article 4a(1) FD EAW define situations in which the EU legislator already establishes the right of the person convicted *in absentia* to challenge the judgment or to enable the re-trial of the case.

20 On the *Melloni* judgment, see L. Bachmaier Winter, “Más reflexiones sobre la sentencia Melloni: primacía, diálogo y protección de los derechos fundamentales en juicios in absentia en el derecho europeo”, (2015) *Rev. Española de Derecho Europeo*, 153–181; L. Bachmaier Winter, “Dealing with European Legal Diversity at the Luxembourg Court: Melloni and the Limits of European Pluralism” in: R. Colson and S. Field (eds.), *EU Criminal Justice and the Challenges of Diversity*, 2016, pp. 160–178; V. Mitsilegas, *Justice and Trust in the European Legal Order. The Copernicus Lectures*, 2016, pp. 112–116.

21 ECJ, 28 September 2015, case C-105/14 *Ivo Taricco and Others*. For the questions raised in this case, see also the article of C. Di Francesco Maesa, in this issue, p. 50.

22 F. Fabbrini and O. Pollicino, “Constitutional Identity in Italy: European Integration As the Fulfilment of the Constitution”, *EUI Department of Law Research Paper No. 2017/06*, Posted: 9 March 2017, available at http://cadmus.eui.eu/bitstream/handle/1814/45605/LAW_2017_06.pdf?sequence=1&isAllowed=y (accessed May 2018), p. 11.

23 ECJ, 5 December 2017, case C-42/17, *M.A.S. and M.B.*

24 ECJ, *ibid.*, para. 62.

25 In the same sense, L. Mancano, “A New Hope? The Court of Justice Restores Balance Between Fundamental Rights Protection and Enforcement Demands in the European Arrest Warrant System” in: C. Brière and A. Weyembergh (eds.), *op. cit.* (n. 11), p. 285, 307.

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26 ECJ, 24 May 2016, case C-108/16, *Pawel Dworzeczki*. See also T. Wahl, (2016) *eu crim*, 80.

27 ECJ, *ibid.*, para. 12.

28 ECJ, *ibid.*, para. 32.

29 ECJ, *ibid.*, para. 54. Here, the ECJ follows the reasoning set out by the ECtHR, 18 May 2004, *Somogyi v. Italy*, Appl. No. 67972/01 as to the elements needed to conclude that the waiver of the right to be present had been unequivocally established.

30 ECJ, 10 August 2017, case C-270/17, *Tadas Tupikas*. See T. Wahl, (2017) *eu crim*, 117.

31 See further ECJ, *ibid.*, para. 99.

32 ECJ, 10 August 2017, case C-271/17, *Slawomir Andrej Zdziaszek*. See T. Wahl, (2017) *eu crim*, 118–119.

33 Cf. in particular ECJ, *ibid.*, para. 111.

34 ECJ, 22 December 2017, case C-571/17, *Samet Ardic*.

35 ECJ, *ibid.* para. 92.

36 *Op. cit.* (n. 3). On the process of adopting this Directive, see S. Cras and A. Erbeznic, “The Directive on the Presumption of Innocence and the Right to Be Present at Trial”, (2016) *eu crim*, 25–35.

37 Under Article 4a FD EAW, the safeguards in the summoning are higher (“summoned in person” or “unequivocally established that he was aware of the scheduled trial”) than under Article 8(2) of Directive 2016/343 (“has been informed”). Both texts are almost identical, and both follow the two main requirements established by the ECtHR (see also Recital 36).

38 The adjective “unequivocal” is not to be found in Article 9 of the Directive, but under Recital 35.

39 Recital 34 Directive 2016/343.

40 See ECtHR judgments, 12 February 1985, *Colozza v. Italy*, Appl. No. 9024/80; 13 February 2001, *Krombach v. France* Appl. No. 29731/96; 18 May 2004, *Somogyi v. Italy*, Appl. No. 67972/01. Although the Court in *Medenica v Switzerland*, 14 June 2001, Appl. No. 20491/92, para. 59, stated that “regard being had to the margin of appreciation allowed to the Swiss authorities, the applicant’s conviction in absentia and the refusal to grant him a retrial at which he would be present did not amount to a disproportionate penalty”.

41 ECtHR, 31 March 2005, *Mariani v. France*, Appl. No. 43640/98. In this case, the defendant knew about the date of the trial before a French court and was represented by lawyer before the trial. It cannot be concluded, however, that he had waived his right to be present, because his absence stemmed from the fact that he was serving a custodial sentence in an Italian prison.

42 ECtHR (GC), 1 March 2006, *Sejdovic v. Italy*, Appl. No. 56581/00.

43 For an interesting comparison of the mutual recognition principle in the internal market and in the AFSJ, see W. van Ballegooij, *op. cit.* (n. 1), pp. 315 ff.

44 ECJ, 5 April 2016, joint cases C-404/15 y C-659/15, *Pál Aranyosi and Robert Căldăraru*.

45 Referenced at the ECJ under case C-216/18.

46 Opinion 904/2017, of the Venice Commission “On the Laws of the Supreme Court, Ordinary Courts and National Council of the Judiciary” of 11 December 2017, accessible under [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e) (accessed 24 May 2018).

47 The referred question reads as follows: “Is it necessary for the executing authority to make any further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law?”.

Use and Abuse of the Concept of Fundamental Rights

An Obstacle for Judicial Cooperation?

David Vilas Álvarez

The focus of this article is on the challenge to which extent EU Member States cooperate. It describes the current landscape of judicial criminal cooperation in the EU, taking into account available data. Hence, one can state that cooperation tools are being increasingly used, but this creates imbalances, which naturally crop up in any cooperation system. This is the starting point for addressing a proper understanding of the various possible reactions in order to tackle these imbalances. One reaction relates to the breach of fundamental rights by the issuing Member State. The article outlines that the results of this strategy, however, could be negative in the long term. Merely mentioning fundamental rights will not make Member States more respectful of them. It is further argued that problems involving fundamental rights should be solved with already existing and tailor-made instruments for this purpose and not by altering the cooperation rationale. On the contrary, by taking the latter route, we risk destroying trust as the basis of mutual cooperation. This risk emerges because it is exclusively linked to the reaction of the authorities of executing Member States. This hypothesis is confirmed by examining the “fundamental rights clauses” in the different cooperation instruments as well as by analysing the CJEU’s recent judgment in the *Aranyosi/C Id raru* case. In conclusion, the author suggests other ways to arrive at a possible limitation of the abusive application of cooperation. Any solution to the abusive use of cooperation tools should involve the issuing Member States, which must be the first to be convinced of the beneficial effects of self-restraint in the application of cooperation tools.

I. Major Current Challenges in the JHA Field: The Balance Between Cooperation and Fundamental Rights

Based on the privilege of being part of the complex European legislative procedure, it is possible to describe several main challenges regarding the next development in the field of justice in Europe. The establishment of the European Public Prosecutor’s Office constitutes the first challenge. Perhaps not because of the powers conferred to this new European body, but because of the simple fact of having a European body so inextricably linked to national criminal jurisdiction. Combining this new European body with national criminal systems, could turn out difficult. However, a swift establishment of the EPPO could overtake the current system of cooperation.

The second challenge arises from new technologies. They pose many questions, but, in general, the discussion revolves around what territoriality means when we discuss the borderless internet and which connecting factors should be used to determine jurisdiction. This discussion is global and not only European. The “Microsoft case”, before the U.S. Supreme Court, the approval of the new Cloud Act in the meantime, and the Commission’s new proposal about e-evidence reveal the common problems we have to face in the coming years.¹

Yet another challenge comes from the field of European harmonisation: some Member States, in particular Germany, believe that the last Commission’s proposals in this area may be

partly too far-reaching in their criminalisation of conducts.² Therefore, they are calling for a restriction of this harmonisation trend.

The latter challenge turns around to which extent European Union Member States cooperate. Since 2004, the European Union has grown by 13 new Member. They joined when some of the main cooperation instruments had already been established. Furthermore, they introduced a new approach to cooperation in justice matters – as show figures, which indicate a considerable expansion of making requests for judicial cooperation.

The focus of this article will be on the latter challenge. The main question that is addressed in the following is in particular about the reasons for and the consequences of the aim of some Member States to systematically introduce a ground for refusal based on the respect for fundamental rights into all current instruments of judicial cooperation in the European Union. Taking into account available data, I will first describe the current landscape that led to the increasing use of cooperation tools and therefore created imbalances (below II.). From this starting point, the Member States’ reactions are addressed under III, in particular the proposed proportionality check is analysed. Section IV outlines the diverging positions between the Council and the European Parliament regarding a multilateral fundamental rights control. My hypothesis that the current developments rather risks destroying trust as the basis of

mutual cooperation than solving the occurred imbalances in cooperation is further underpinned in section V by examining the “fundamental rights clauses” in the different cooperation instruments as well as by analysing the recent CJEU’s judgment in the *Aranyosi/Căldăraru* case. In the last section (VI.), I will suggest other ways to arrive at a suitable future solution limiting the abusive application of cooperation tools.

II. The New Landscape of Cooperation: Data on the Increasing Use of Cooperation Tools – Imbalances of this Use

In order to analyse any development in European judicial cooperation, it is necessary to look at the timeline, even if I can provide here a short glance only. The use of cooperation tools has been undoubtedly increased within the EU in recent years. This would probably also have occurred in a EU of 12 or 15 Member States. The fact remains, however, that an exponential growth can be observed since the accessions of the Eastern European states. Everything reveals that the effects on cooperation by these new arrivals are not proportional to the populations of the new partners, but instead exponential because of different factors.

Some figures confirm this assumption. The successive accessions to the EU since 2004 implied more than a hundred million new European Union citizens.³ In absolute terms, this is a lot. In relative terms, the 13 new Member States⁴ represent a bit more than 20% of the total population of the European Union,⁵ at least before Brexit.

Comparing over the respective population to the requests for cooperation is not an easy task. Proper data are hardly available. This is one of the reasons why all Commission proposals insist on the compilation and completeness of statistics. Nevertheless, it is possible to show some evidence confirming this increasing use.

The European Arrest Warrant (EAW), for instance – probably the most used and best known cooperation tool – offers various statistics that clearly confirm the increasing use of this tool and detail the origin and destiny of the requests. According to the latest data provided by the Commission (2015) 6,894 EAWs were issued in 2005 while 16,144 EAWs were issued in 2015 across the EU. During the same period, 836 EAWs were executed in 2005; while 5,304 EAWs were executed in 2015.

A country-by-country analysis for the period 2004–2015 in the mentioned Commission document shows for the Netherlands, for example, that the 13 new Member States (as mentioned above, representing 20% of the total population of the EU)

issued 37% of the total EAWs to the Netherlands: 27% of them belong only to Poland.

The United Kingdom’s National Criminal Agency also provided data on the use of the EAW. Although the data differ in terms of the total numbers,⁶ comparable results occur: whereas 4,369 EAWs were issued in 2010, this number increased to 13,797 in 2017. From 2009 to 2017, Poland issued 13,185 EAWs to the United Kingdom (21,07% of the total). The 13 new partners represent almost 50% of the total EAWs addressed to the UK.

In conclusion: after having been put in practice in 2004, there is a considerable increase in using the EAW. This is a success. The same conclusion can be tentatively drawn about other cooperation tools, even when the data about them are not as clear and the tools are less successfully used in practice.⁷ Use of the EAW is particularly important among many of the new EU partners, but disproportionate to their population rate in the Union. Therefore, the success of the judicial cooperation policy already depicted naturally creates imbalances among Member States. Awareness of these unequal flows in each Member State consequently determines the negotiation strategies concerning instruments of judicial cooperation.

III. Possible Reactions against Imbalances: Proportionality Checks and Possible Alternative Approaches

The 2007 Commission Report on the implementation of the Council Framework Decision of 13 June 2002 on the European Arrest Warrant and the surrender procedures between Member States (EAW FD)⁸ confirmed that the tool was a success since 2005.

Notwithstanding, two years later, in 2009, the Council faced problems involving implementation of the EAW. The UK, due to its particular situation, started asking for a proportionality test in the executing Member State as solution to the above outlined problems and imbalances. The final report of the Fourth Round Evaluation about the practical application of the EAW again mentioned the imbalances of this system.⁹ The report suggested some ways to tackle this problem. In particular, it recommended a proportionality test in the issuing, not in the executing Member State: worth citing is the following passage of the Council’s report:¹⁰

The application of a proportionality test in issuing an EAW was a recurrent issue during the evaluation exercise. Basically, this proportionality test is understood as a check additional to the verification of whether or not the required threshold is met, based on the appropriateness of issuing an EAW in the light of the circumstances of the case. The idea of appropriateness in this context encompasses different aspects, mainly the seriousness of the offence in connec-

tion with the consequences of the execution of the EAW for the individual and dependants, the possibility of achieving the objective sought by other less troublesome means for both the person and the executing authority and a cost/benefit analysis of the execution of the EAW.

Therefore, recommendation number 9 urged the following:

The Council instructs its preparatory bodies to continue discussing the issue of the institution of a proportionality requirement for the issuance of any EAW with a view to reaching a coherent solution at European Union level. The issue of proportionality should be addressed as a matter of priority.

Consequently, in 2009, Member States agreed that it was better to leave the FD EAW untouched, but to improve its application by addressing existing concerns through guidelines compiled in a handbook, the latest one being issued in 2017.¹¹ However, this smart decision, which had the ultimate goal of creating a more balanced landscape, turned out to be insufficient in reducing the abusive use of EAWs by some Member States.

1. First Indicator: Seriousness of Offence

As we have seen, at least the Council arrived at the conclusion that self-control should constitute the first ingredient. The basis of this self-control should be first consideration of the seriousness of the offence or the use of alternative tools. Everything points towards the fact that this aim failed. In fact, the seriousness of the offence as a criterion for self-restraint when issuing requests is not very compatible with the existing thresholds in Art. 2 of the FD EAW, which itself intend to determine the seriousness of the offence. In relation to this indicator, however, we should mention the harmonisation policy as a possible way out. It could strive for a common sanctioning threshold, which could indirectly alleviate imbalances in the long term and take up so-called “eurocrimes”, i.e. crimes mentioned in Art. 83 TFEU only.

2. Second Indicator: Cost/Benefit Analysis

A second consideration mentioned in the final Council evaluation report was the “cost/benefit analysis.” In my opinion, this is the only feasible approach among the report’s suggestions. Generally speaking, sharing costs is not contradictory with mutual recognition and mutual trust. In fact, assuming some costs by the issuing Member State is an indicator of self-trust, which is the minimum to offer to those whose trust is requested. In recent years some attempts were made to shift from an “each state bears costs occurred” approach to a “cost-sharing model”. In practice, the latter approach implies more costs for the issuing Member State and, indirectly, a more responsible decision when issuing.

Regarding exclusively the EAW, Art. 30 FD EAW states that expenses incurred in the territory of the executing Member State for the execution of an EAW shall be borne by that Member State, but all “other expenses” shall be borne by the issuing Member State. This is the same criterion, in general terms, for all instruments of judicial cooperation up to 2011.

During the negotiations over the Directive (EU) 2016/1919 on legal aid in criminal proceedings, some Member States defended the position that these “other expenses,” should be borne by the issuing Member State if it comes to legal aid in EAW proceedings.¹² The idea behind this argument was based on a twofold consideration: first, the necessity for the arrest and surrender of a requested person for the purpose of conducting a criminal prosecution or executing a custodial sentence / detention order, as requested by the issuing Member State; second, the accessory service of providing legal assistance. In fact, the aim of this approach was to oblige the issuing Member States to finance the legal assistance of the requested person, because this was not included among the expenses to be borne by the executing Member State. Considering the assumption of these costs, the issuing Member State should limit itself to making proportionate requests. However, the majority of the Council rejected this approach.¹³

In the end, this indirect method of introducing proportionality into the issuing of EAWs determined at least the inclusion of current Art. 5(2) of the legal aid Directive, which ensures an “assisting lawyer” for the requested person in the issuing Member State. The provision underscores, however, the fact that this was an already existing right provided by Directive 2013/48 on access to a lawyer. There is no discussion that the costs for this assisting lawyer appointed in the issuing Member State should be borne by its authorities if legal aid requirements are fulfilled.

In any case, the will to introduce shared costs was not very extensive among the Member States, probably because sharing costs is viewed as something very burdensome from a practical point of view.

Other instruments of judicial cooperation in criminal matters also show less tendency for a shared costs model. Instead, the rule is predominant that an executing Member State bears costs incurred on its own territory, whereas the issuing Member State does not make any contribution to the executing one. Such is the case, for instance, in Council Framework Decision 2005/214/JHA on the application of the principle of mutual recognition to financial penalties (Art. 17) or Directive 2011/99/EU on the European Protection Order (Art. 18).

Notwithstanding, some avenues for a shared-cost system, which indirectly encourages proportionality tests in the issu-

ing Member State, are appearing. Arts. 21, 22(10), 23(3) or 30 of Directive 2014/41/EU regarding the European Investigation Order in criminal matters constitute an example of shared costs, albeit based on whether they are extraordinary or not.

According to the draft Art. 32 of the Council's general approach on a Regulation on the mutual recognition of freezing and confiscation orders,¹⁴ a voluntary sharing of costs is possible if these costs are not only exceptional, but also – simply – “large”. In the Framework Decisions to be replaced by this new Regulation, the extraordinary costs-rule is already in place.

In conclusion, the Council considered a proportionality test to be carried out by the issuing Member State (based on the seriousness of the offence) as well as a cost/benefit analysis, in order to encounter the imbalances in judicial cooperation that were reflected on above. As regards the cost approach, the Council has only modestly addressed some effects. The result of the deterrent effect of these measures for disproportionate requests of assistance can be evaluated in a number of years only, but it can already be doubted whether the measures put in place constitute a sufficient remedy in order to balance the excessive inequalities in the field of judicial cooperation.

IV. Multilateral Control of Fundamental Rights: Diverging Views between the Council and the EP

Several years after the aforementioned report of the Fourth Round of Mutual Evaluation, devoted to the EAW, the European Parliament issued a Resolution – dated on 27th February 2014 –, with recommendations to the Commission on a possible review of the EAW.¹⁵

This Resolution urged to solve the problem of the imbalanced use of the EAW in issuing and executing Member States and offered nearly the same solutions as already outlined in section III. Therefore, the Parliament asked for¹⁶

7.b a proportionality check when issuing mutual recognition decisions, based on all the relevant factors and circumstances such as the seriousness of the offence, whether the case is trial-ready, *the impact on the rights of the requested person, including the protection of private and family life*, the cost implications and the availability of an appropriate less intrusive alternative measure.

By contrast to the Council's approach, however, the EP included a reference to the rights of the requested person, including a control of the fundamental rights consequences in each case.¹⁷ More precisely its conclusions contain the claim for¹⁸

7.d. a mandatory refusal ground where there are substantial grounds to believe that the execution of the measure would be incompatible with the executing Member State's obligation in accordance with Art. 6 of the TEU and the Charter, notably Art. 52(1) thereof with its reference to the principle of proportionality.

The approach of the Parliament further differs from the Council's in that a fundamental rights control is not only incumbent to the issuing Member State (which is already obliged to perform a control), but can also be carried out by the executing Member State.

Since the Lisbon Treaty, the link to the principle of mutual trust and fundamental rights is not new, and it has been extensively analysed by many authors, who generally underline the importance of respecting fundamental rights.¹⁹

Even before the Lisbon Treaty, the fundamental rights question in fact appeared at the very beginning of the transposition period of the EAW. Not few Member States included a human rights safeguard in their legislation when implementing the FD. Section 21 of the UK Extradition Act 2003, for instance, obliges national judges to consider whether the person's extradition would be compatible with convention rights within the meaning of the Human Rights Act 1998 and, where deemed incompatible, to discharge the person. Other Member States took up the general clause, as formulated in Art. 1(3) FD EAW, and implemented it as a refusal ground (e.g., Section 73 of the German Act on International Cooperation in Criminal Matters). Yet others rarely apply the fundamental rights clause (but all have included it in their legislation in one way or another). What is certain is that a significant number of Member States interpret the EAW as permitting refusal to execute on human rights grounds.

The Commission uttered concerns when it states in its 2007 EAW Report:²⁰

some Member States have provided for additional mandatory grounds for refusal. Many of these correlate to the Art. 4 optional ground for refusal or to fundamental rights and are discussed under their respective headings (...). However, (...) they go beyond Framework Decision.

The report goes on by mentioning the human rights interventions by some Member States:

For example, an executing authority from Italy may refuse to execute an EAW if the requested person is pregnant or is the mother of a child less than 3 years old, except in circumstances of an exceptional gravity; Denmark shall refuse surrender on the ground of possible threat with torture, degrading treatment, violation of due process as well as if the surrender appears to be unreasonable on humanitarian grounds; in Lithuania, the Criminal Code provides for a mandatory ground for refusal in case where the surrender of the person would be in breach of fundamental rights and (or) liberty.

Against these national behaviours, the 2009 final report on the Fourth Round Evaluation adopted by the Council called for not adding obstacles to mutual recognition. It stated as follows:²¹

there are diverging tendencies in the transposition by the Member States of the optional and mandatory grounds for non-execution laid down in the FD. (...) Some experts noted the different approaches to incorporating Art. 1(3) and related recitals 12 and 13 of the FD into the implementation law and the creation of a specific manda-

tory ground for refusal on this basis in some Member State. (...) The Council, however calls upon Member States to review their legislation in order to ensure that only ground for non-execution permitted under the FD may be used as a basis for refusal to surrender.

For the time being, the current debate between mutual recognition and fundamental rights has shifted in favour of mutual recognition. Things have gradually changed along the developmental lines chronicled in the next point.

V. Multilateral Control of Fundamental Rights: the Current State of Play

Nowadays, there is a sustained will on the part of some Member States, particularly Germany, but also Austria and a few others, to utilize fundamental rights as a filter for foreign decisions. It seems that the European Parliament supports this approach as do a large number of academics. In the following, I will show some consequences of this approach to fundamental rights as an excuse not to cooperate.

1. First consequence: fundamental rights as a refusal ground in criminal cooperation instruments

An explicit refusal ground based on fundamental rights appears in only one instrument: Directive 2014/41/EU regarding the European Investigation Order – EIO (Art. 11(1) lit. f)).

An explanation why this refusal ground was introduced can be found in the recitals: Recital 12 underlines:

the issuing authority should pay particular attention to ensuring full respect for the rights enshrined in Art. 48 of the Charter of Fundamental Rights.

Recital 18 further clarifies:

as in other mutual recognition instruments, this Directive does not have the effect of modifying the obligation to respect the fundamental rights and fundamental rights and fundamental legal principles as enshrined in Art. 6 of the Treaty on European Union (TEU) and the Charter. *In order to make this clear, a specific provision is inserted in the text.*²²

In connection with these ideas, two issues need to be explained:

(1) It is true that neither previous nor posterior mutual recognition instruments provided for a refusal ground based upon fundamental rights. They usually contained mention of the obligation to respect them, which naturally flows from primary Union law. This is the case for Art. 1(3) FD EAW (which uses the same language as the first sentence of Recital 18 of the EIO Directive). This is also true for Art. 3 of the FD on financial penalties, Art. 3(4) of the FD on custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement, Art. 1(4) of the FD on probation decisions,

and Art. 5 of FD on supervision measures as an alternative to provisional detention.

In some cases, a recital underlines that is compatible with a refusal on a case-by-case basis. Recital 16 of the FD on supervision measures clearly expresses that

(nothing) should be interpreted as prohibiting refusal to recognise a decision on supervision measures if there are objective indication that it was imposed to punish a person because of his or her sex, race, religion, ethnic origin, nationality, language, political convictions or sexual orientation or that this person might be disadvantaged for one of these reasons.²³

The Council's general approach on the Regulation on the mutual recognition of freezing and confiscation orders²⁴ does, however, not include – like its precedents – any refusal ground based on fundamental rights; it only includes a general reference along the lines expressed above by simply stating in Art. 1(2): “this Regulation shall not have the effect of modifying the obligation to respect the fundamental rights and legal principles as enshrined in Article 6 TEU”.

Notwithstanding, Germany presented a declaration not to join the general approach. This declaration²⁵ perfectly sums up the discussion:

However, cooperation reaches its limits when, in altogether exceptional cases, fundamental rights are no longer safeguarded. From the outset of the negotiations, Germany has therefore advocated drafting a Regulation text that is not only precise and easy to implement in practice, but also includes clear and transparent wording emphasising compliance with fundamental rights in the recognition and enforcement of decisions. Germany's various suggestions to the Member States and the Commission for compromise, some of which were quite far-reaching, were made not least to take account of the most recent case-law of the European Court of Justice. Although the text is otherwise successful in creating a good and practicable legal basis for effective cross-border asset recovery, unfortunately a majority could not be found for anchoring fundamental rights in the text. We will not do justice to the great importance of fundamental rights if we do not clearly and unequivocally emphasise their importance, as we have done in the Directive on the European Investigation Order.

The Parliament defends a similar approach: Amendment 71 of the report on the mentioned proposal for a Regulation on the mutual recognition of freezing and confiscation orders, dated January 2018, introduces a new refusal ground when “there are substantial grounds for believing that executing the confiscation order would be incompatible with the obligations of the executing State in accordance with Art. 6 TEU and the Charter.”²⁶

In June 2018, trilogue negotiations about this issue are taking place. All Member States have accepted introducing a fundamental rights clause: now, the discussion is revolving around using the EIO text or a more restrictive alternative.

It should be noted that, in the given case – regulation on freezing and confiscation –, the objective is mainly to freeze and

obtain properties: apart from those related to fair trial, the fundamental right affected could be the right of property, which has a rank and limitation quite different from other fundamental rights at stake in other cooperation instruments, such as human dignity, liberty, or life. This regulation does not require such a refusal ground compared with the EIO, because the rights at stake are not as basic and unlimited.

(2) The respect for fundamental rights is out of question. The question under discussion is *how* to ensure the adherence of all European authorities, including judicial ones, to fundamental rights when requesting recognition or execution of their decisions in the territory of another Member State.

If we opt for a general clause that mentions fundamental rights outside provisions entailing a refusal ground, we assume that all Member States generally respect fundamental rights, as they should since human rights are a fundamental value of the European Union according to Art. 2 TEU. For this reason, several arguments can be put forward against an exceptional fundamental rights clause giving the executing authorities the possibility of avoiding cooperation when felt necessary or desirable.

First, one should recall that all partners of the EU, which are at the same time partners in the Council of Europe and its flagship the ECHR, assume fundamental rights as a cornerstone of their democracies and constitutional systems, and they control the reality of this statement with their own domestic institutions. On top of that, two European courts (the European Courts of Justice and the European Court of Human Rights) concur with the domestic authorities in ensuring the respect for fundamental rights. As a last resort, Art. 7 TEU introduces a mechanism to be applied to gross breaches of the values enshrined in Art. 2 TEU, including respect for fundamental rights. On this basis an additional supervision by executing Member States about the respect of foreign authorities for fundamental rights when it comes to international cooperation is not considered necessary: the affected person whose rights could be damaged always has remedies and authorities to turn to.

One may argue that certain EU Member States have high rates of convictions by the European Court of Human Rights in Strasbourg,²⁷ and therefore, Member States with low convictions' rates (such as Germany, Denmark, or Spain) may take this as an incentive to control how others apply fundamental rights. This situation, however, cannot justify a general cross-checking of fundamental rights. In particular, when the data of EU Members are compared with the rate of Council of Europe members not belonging to the EU, the well-functioning of the outlined internal controls in the EU is confirmed.

2. Second consequence: the intervention of the European Court of Justice

Recently, we identified another manifestation of the fundamental rights debate through the jurisprudence of the CJEU. The foundations of this jurisprudence appear in its Opinion 2/13, paragraphs 191 to 193 concerning the following ideas: any control by one Member State of the respect for fundamental rights in other Member State should be an exception, because it is contrary to the general principle of mutual trust. Each Member State cannot demand a higher level of protection than that provided by EU law; therefore, any refusal should be interpreted restrictively and the respect for fundamental rights presumed.

This jurisprudence has been reinforced in the *Aranyosi/Căldăraru case* decided by the CJEU.²⁸ The Higher Regional Court of Bremen, Germany, filed two requests for a preliminary ruling, which were joined. In the first case, Mr. Aranyosi, a Hungarian national, lived in Bremerhaven (Germany) with his mother, was unmarried, and had a girlfriend and an eight-month-old child. He denied the offences of which he was accused by the Hungarian authorities – stealing goods twice with a total value around €3700 – and declined to consent to the simplified surrender procedure. In the second case, Mr. Căldăraru, a Romanian national, was convicted and sentenced in Romania to imprisonment of one year and eight months for the offence of driving without a driving licence. In both cases, the German authorities raised concerns about the prison conditions in Hungary and Romania – concerns founded on ECtHR convictions against those states. Therefore, the German court doubted the lawfulness of surrender.

The Court concludes in paragraph 104 of the judgment:

that Art. 1(3), Art. 5 and Art. 6(1) of the Framework Decision must be interpreted as meaning that where there is objective, reliable, specific and properly updated evidence with respect to detention conditions in the issuing Member State that demonstrates that there are deficiencies, which may be systemic or generalised, or which may affect certain groups of people, or which may affect certain places of detention, the executing judicial authority must determine, specifically and precisely, whether there are substantial grounds to believe that the individual concerned by a European arrest warrant, issued for the purposes of conducting a criminal prosecution or executing a custodial sentence, will be exposed, because of the conditions for his detention in the issuing Member State, to a real risk of inhuman or degrading treatment, within the meaning of Art. 4 of the Charter, in the event of his surrender to that Member State. To that end, the executing judicial authority must request that supplementary information be provided by the issuing judicial authority, which, after seeking, if necessary, the assistance of the central authority or one of the central authorities of the issuing Member State, under Art. 7 of the Framework Decision, must send that information within the time limit specified in the request. The executing judicial authority must postpone its decision on the surrender of the individual concerned until it obtains the supplementary information that allows it to discount the existence of such a risk. If the existence of

that risk cannot be discounted within a reasonable time, the executing judicial authority must decide whether the surrender procedure should be brought to an end.

In order to justify this conclusion, the Court takes particularly the following into account:

- limitations of the principles of mutual recognition and mutual trust between Member States can be made ‘in exceptional circumstances’ (see, to that effect, Opinion 2/13, EU:C:2014:2454, paragraph 191);²⁹
- As regards the prohibition of inhuman or degrading treatment or punishment, laid down in Art. 4 of the Charter, that prohibition is absolute in that it is closely linked to respect for human dignity, the subject of Art. 1 of the Charter (see, to that effect, judgment in *Schmidberger*, C-112/00, EU:C:2003:333, paragraph 80). That the right guaranteed by Art. 4 of the Charter is absolute is confirmed by Art. 3 ECHR, to which Art. 4 of the Charter corresponds. As is stated in Art. 15(2) ECHR, no derogation is possible from Art. 3 ECHR.³⁰

They should be exercised after the cooperation between authorities in order to dispel any initial doubt on the part of the executing state. Nobody doubts that it is possible to denounce the conditions of Hungarian and Romanian prisons and demonstrate that they are inhuman and degrading. This is the reason why the Bremen court could find convictions against those countries and information about such facts – for instance, through the factsheets of the ECtHR. Hence, there is no doubt that there are ways to avoid this inhuman treatment in the judicial systems of these Member States, even before the ECtHR if necessary – where they are often convicted.³¹

Therefore, control by a Member State of any breach of fundamental rights related to a decision of another Member State should be an exception, taking into account the absolute nature of the rights at stake. It should also follow any exchange between authorities in order to clear up any misgivings. In order to exercise this control, a general mention of fundamental rights is sufficient: a specific clause applicable before executing all cases would be too far-reaching and is not endorsed by this jurisprudence.

VI. Which Solution in the Future?

I outlined in this article that the current tools of judicial cooperation in the EU are used unevenly among the EU Member States. The triggered imbalance constitutes a real problem for some Member States. This problem has been tackled by some remedies that have been modestly proposed but not properly developed, mainly a proportionality check on the basis of the seriousness of the offence by the issuing state and a costs/benefit approach. It was further submitted here that the temptation reappeared to use fundamental rights as an anchor at the disposal of executing Member States in order to limit “excessive” cooperation rather than really protect the rights of individuals.

It was further argued that a generalised use of fundamental rights by the executing Member States in order to refuse or deny cooperation would lead to more problems than real benefits.

I share the vision of the CJEU, in the sense that, if a risk for an absolute fundamental right appears during an execution procedure, the executing authority cannot look away. It should have a critical eye and inform its counterpart. If the risk persists, the executing authority can refuse the request. For this very reason, the ruling of the Court in fact negates the alternative of having a fundamental rights-based refusal ground in practice. The judgment in *Aranyosi and Căldăraru* therefore underpins my previous hypothesis that a (general) ground for refusal based on respecting fundamental rights in favour for the executing Member State is not necessary. On the contrary, it will only lead to a real step backwards in judicial cooperation, because it would be disproportionately used.

If we deny using a fundamental rights-based refusal ground as the way out in order to restrain abusive use of cooperation tools, we have to work with other solutions. Cost-sharing clauses derived from a cost/analysis approach could be the best way to respond to the challenge of excessive cooperation. It is better to develop systems able to calculate and exchange these costs than putting at risk all the achievements of almost two decades of improving cooperation. Unfortunately, the proposed solution seems to be more a wish than a reality: the fundamental rights clause is about to be confirmed in future cooperation instruments. This is not a good solution for the European Union we need.

1 The Microsoft case had to do with the following main question: whether, in light of EU law and the EU and Irish MLATs, 18 U.S.C. § 2703 nonetheless authorizes a court in the United States to issue a warrant that compels a US-based provider of e-mail services to disclose data stored outside of the United States, i.e. in the EU. On 17 April 2018, after being approved in the Cloud Act, the US Supreme Court issued a *per curiam* opinion stating that the case was rendered moot and vacating and remanded the case back to the lower courts to dismiss the lawsuit. While the case was pending in the Supreme Court, US Congress passed the Clarifying Lawful Overseas Use of Data Act (CLOUD Act), which amended the Stored Communications Act (SCA) of 1986 to resolve concerns from the government and Microsoft related to the initial warrant. The Commission’s proposals on e-evidence are in the first phase of negotiation (cf. COM(2018) 225 final 2018/0108(COD); see also the summary of Th. Wahl in this issue).

2 After harsh exchanges of views, the proposal for a Directive of the European Parliament and of the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA was approved by the Council during its last JHA meeting in March. The negotiation on the Directive (EU) 2017/541 on Combating Terrorism took a similar course.

3 Currently, the population of the new partners is more than a hundred million inhabitants in total (specifically 104,153,854 according to Eurostat’s statistics for 2017).

4 Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia, and Slovenia.

5 Staff Working Document C(2017) 6389 final/SWD(2017) 319 final, https://e-justice.europa.eu/content_european_arrest_warrant-90-en.do (accessed: May 2018): Replies to questionnaire on quantitative information on the practical operation of the European arrest warrant – Year 2015.

6 The reason for this is probably that they are based on statistics of the SIS. Every country in the EAW system has a Sirene (Supplementary Information Request at the National Entry) Bureau. In the UK, this is the NCA. Sirene Bureaux are the legal gateways between authorities requesting an arrest and those carrying out an arrest. Based on their information, statistics are stored at the following site: <http://www.nationalcrimeagency.gov.uk/publications/european-arrest-warrant-statistics/wanted-from-the-uk-european-arrest-warrant-statistics/829-eaw-part-1-master-calendar-year-v1-0-final-2009-2017> (accessed: May 2018).

7 Such conclusions cannot be drawn so easily in relation to other instruments, both in criminal and civil cooperation. It seems that some instruments are not used frequently at all, e.g., the European Protection Order, for which only seven cases have been identified, according to a recent European Parliament report on the topic. The instruments for requesting freezing or confiscation of property or assets may probably be used more, but useful data are not available.

The Report from the Commission pursuant to Article 22 of the Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of the principle of mutual recognition to confiscation orders, COM(2010) 428 final of 23.8.2010 mentions that only 13 MS had transposed the FD 15 months after the deadline. No figures, however, are mentioned. The Impact Assessment accompanying the Proposal for a regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders [COM(2016) 819 final] SWD(2016) 469 final] confirms the lack of statistical data, while the 2014 Directive relating to the EIO did not develop provisions on this topic.

The Report from the Commission based on Art. 14 of Council Framework Decision 2003/577/JHA on the execution in the European Union of orders freezing property or evidence, dated in 2008, mentions that its implementation “is not satisfactory”. This conclusion is mainly drawn from the low number of notifications: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52008DC0885&from=EN>. This is one of the reasons for the current negotiation of a Regulation on the mutual recognition of freezing and confiscation orders.

8 Cf. Report from the Commission on the implementation since 2005 of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, SEC(2007) 979: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52007DC0407&from=EN> (accessed: May 2018).

9 Cf. Council document 8302/4/09 REV 4 LIMITE CRIMORG 55 COPEN 68 EJM 24 EUROJUST 20 of 28 May 2009.

10 Council doc. 8302/4/09 REV 4, *op. cit.*, p. 13.

11 Handbook on how to issue and execute a European arrest warrant (2017/C 335/01), see also *eucri* 4/2017, p. 177.

12 Cf. Council document 14302/14 DROIPEN 120 COPEN 251 CODEC 2019.

13 The CATS minutes (Council document 14984/14 CATS 167) concluded by saying: “The majority of delegations informed that according to their national legislation and ensuing practice they interpret the cost associated with legal aid for the purposes of the execution of an EAW, as cost „incurred in the territory of the executing Member State”, as provided under Art. 30(1) of Framework Decision 2002/584/JHA. Consequently, this cost should be borne by the executing Member State. In this respect, some delegations referred to the need to apply consistently the principle of proportionality when issuing EAW. This issue will be referred for further discussions to the EAW experts formation of the Working Party on Cooperation in Criminal Matters (COPEN).”

14 Council document 15104/17 JAI 1128 COPEN 380 DROIPEN 178 IA 202 CODEC 1946 of 1 December 2017; available at: <http://data.consilium.europa.eu/doc/document/ST-15104-2017-INIT/en/pdf> (accessed May 2018).

15 Report with recommendations to the Commission on review of the European Arrest Warrant (2013/2109(INL)), Committee on Civil Liberties,

David Vilas Álvarez

Spanish State Attorney, Justice Counsellor-Coordinator, Spanish Permanent Representation before the EU



Justice and Home Affairs, Rapporteur: *Sarah Ludford*, available at: <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+REPORT+A7-2014-0039+0+DOC+XML+V0//EN> (accessed: May 2018).

16 See endnote 15, *ibidem*, page 7, recommendation 7.b.

17 As highlighted in the aforementioned citation by the author.

18 See endnote 15, *ibidem*, page 7, recommendation 7.d.

19 This topic is often dealt with by academics, among others:

V. Mitsilegas, “The Symbiotic Relationship between Mutual Trust and Fundamental Rights in Europe’s Area of Criminal Justice”, (2015) 6(4), *NJECL*, 457; V. Mitsilegas, “Mutual recognition, mutual trust and fundamental rights after Lisbon”, in: V. Mitsilegas, M. Bergström, and T. Konstantinides (eds.), *Research Handbook on EU Criminal Law*, 2016, pp. 148 et seq.; T. Cormon, *A Utopia of Mutual Trust: Fundamental Rights in the European Arrest Warrant*, master thesis 2015 Univ. Gent; S. Montaldo, “On a Collision Course! Mutual Recognition, Mutual Trust and the Protection of Fundamental Rights in the Recent Case-law of the Court of Justice”, (2016) 1(3), *European Papers*, 965–996; E. Gill-Pedro and X. Grousot, “Mutual Trust and EU Fundamental Rights after Opinion 2/13”, (2017) 35(3), *Nordic Journal of Human Rights*; S. Douglas-Scott, “The EU’s Area of Freedom, Security and Justice: A Lack of Fundamental Rights, Mutual Trust and Democracy?” (2009) *Cambridge Yearbook of European Legal Studies*, 53–85; E. Xanthopoulou, “Mutual Trust and Rights in EU Criminal and Asylum Law: Three Phases of Evolution and the Unchartered Territory beyond Blind Trust.” (2018) 55, *Common Market Law Review* 489–509; J. Emaus, “The Interaction Between Mutual Trust, Mutual Recognition and Fundamental Rights in Private International Law in Relation to the EU’s Aspirations Relating to Contractual Relations”, (2017) 2(1) *European Papers*, 117–140; L. Bachmaier, “Towards the transposition of Directive 2014/41 regarding the European investigation order in criminal matters”, (2014) *eucri*, 47–60; L. Bachmaier, “Mutual recognition instruments and the role of the CJEU: the grounds for non execution”, (2015) 6(4) *New Journal of European Criminal Law*, 505–526.

20 See endnote 8.

21 See endnote 9. *ibidem*, p. 13.

22 Emphasis by author.

23 See also Recital 12 of the FD EAW.

24 See endnote 14.

25 Council document 15104/17 ADD 1 JAI 1128 COPEN 380 DROIPEN 178 IA 202 CODEC 1946, <http://data.consilium.europa.eu/doc/document/ST-15104-2017-ADD-1/en/pdf> (accessed: May 2018).

26 See EP document, A8-0001/2018 (Rapporteur: Nathalie Griesbeck).

27 Bulgaria, Croatia and Slovenia belong to this group. Data calculated by the author. These data and the rate of convictions by year and by population can be calculated from the publicly available statistics of the ECtHR, taking into account the respective population of the Member States and the number of years from accession to the ECHR.

28 CJEU, 5 April 2016, Joined Cases C-404/15 and C-659/15 PPU.

29 § 82 of the judgement, *ibid*.

30 §§ 85–86 of the judgment, *ibid*. This case has been mentioned several times since its issuing. In the *Piotrowski* case, C-367-16, paras 48 to 50, the CJEU confirm the above-mentioned jurisprudence.

31 These countries occupy 20th and 25th posts among the EU 28 Member States regarding the number of ECtHR convictions per capita and per year; for reference see endnote 27.

Il coraggio che serve all'Europa – The Courage that Europe Needs

Prof. Sabino Cassese

Free translation from Italian into English by Francesco de Angelis and Indira Tie*

With its recent decision of 20 December 2017, the European Union – the most ingenious political construction of the 20th century – reminded Poland that common values have to be respected. Since it is the first time in the history of the Union that this has ever happened, this event deserves reflection.

Let us first look at the nature of the dispute between Poland and the Union. In the Treaty, it is laid down that human dignity, freedom, democracy, equality, rule of law, and respect for human rights are the foundation of the European Union. These values are deeply rooted in supranational principles but also in common constitutional traditions and in the common history of the European States.

Poland, however, appears to be taking a different path. The country has approved 13 laws that foresee systematic interference with legislative and executive powers in the composition, management, and functioning of the judicial courts.

The European Commission has not remained silent; during the past two years, it entered into a dialogue with the Polish government, explaining why the latter is acting wrongly. During this period, the Commission issued one opinion and three “recommendations,” now followed by a fourth one. It exchanged 25 letters with the Polish authorities and organized several meetings. In other words, the Commission followed a preventive procedure of warnings and then issued a formal warning. Now, after the failure of this last procedure, the Commission has launched a far more consequential one.

This so-called “Article 7-procedure” is laid down in the Treaty on European Union. It involves the identification of a clear risk of serious breach of the Union’s common values and can be followed by sanctioning procedures consisting in the suppression of certain rights which Poland derives from being a member of the Union (for instance: the right to vote). By initiating this procedure for the first time, the European Commission draws attention to the fact that respect for some common basic rules is a problem concerning *all* the countries of the Union: common trust, the functioning of the single market,

cooperation in home and justice affairs, mutual recognition, the European arrest warrant, etc.

The procedure proceeds now with all the precautions established in the Treaty (in particular: hearing Poland, deliberation in the Council, and approval by the European Parliament). It represents an important step forward. What was considered interference into the internal affairs of a sovereign State by authorities of other Member States in the past, now – for the first time – takes on an entirely different meaning. The Union has the role of a guardian of the respect for common rules in areas left to the legislation of individual countries in the past (freedom, democracy, independence of the judiciary). The individual governments, for their part, have the obligation to respond not only to their national electors but also to an “assembly of the condominium,” which insists on respect of the common rules (the values enumerated in Art. 2 of the Treaty on European Union). The great jurist, *Guido Calabresi*, was right in saying that the European Union is, in a certain way, more unified than the United States (sometimes put forward as model to be followed), precisely *because* of its common values. One example is the death penalty, which some American states still apply, while the States of the Union unanimously abandoned it.

This Europe, which we complain about daily, has given us not only half a century of freedom (in comparison with millions of deaths and vast destruction during the first half of the past century) but also a construction that shows prudence and courage. The Commission acted prudently when it tenaciously engaged in a dialogue with the obstinate and illiberal Poland for two years. It has now shown courage in taking action and putting Poland under accusation.

* The article was originally published in “Corriere della Sera” on 27 December 2017. Original title: “Il coraggio che serve all’Europa.” We thank Professor Cassese for his consent to the publication of this translation in eucrim. Prof. Sabino Cassese is professor of administrative law and a former judge of the Constitutional Court of Italy.

The Commission Proposal Amending the OLAF Regulation

Koen Bovend'Eerd

On 23 May 2018, the Commission published its Proposal for a Regulation amending Regulation (EU, Euratom) 883/2013 and the accompanying Staff Working Document.¹ This brief article sets out (I) the main outcomes of the evaluation of Regulation 883/2013 completed in late 2017, (II) the objectives and scope of the Commission proposal, and (III) the main proposed changes and their rationale.

I. Outcome of the Evaluation of Regulation 883/2013

The proposal is based on the evaluation carried out by the Commission from 2015 until 2017.² The evaluation was necessary due to recent changes in the institutional and legal landscape for the rules on the protection of the Union's financial interests:³

- The adoption of the PIF Directive in 2017;⁴
- The adoption of the EPPO Regulation in the same year;⁵ and
- The move towards a new Multiannual Financial Framework.⁶

With the above in mind, the Commission evaluation identified the following shortcomings in the OLAF legal framework.

1. Shortcomings related to the establishment of the EPPO

The establishment of the EPPO requires OLAF to adapt its investigative activities. While the EPPO Regulation does not alter OLAF's mandate or competence to conduct administrative investigations, OLAF will need to work in close cooperation with the EPPO in order to allow both authorities to perform their tasks efficiently and effectively. The EPPO Regulation already lays down the main principles for the future cooperation between the EPPO and OLAF.⁷ These principles should be mirrored in the OLAF legal framework. The following issues require particular attention: (a) the handling by OLAF of incoming information and the swift transmission of information to the EPPO, (b) the handling by OLAF of cases referred to it by the EPPO for administrative follow-up, and (c) EPPO requests for operational support from OLAF.⁸

2. Shortcomings related to the effectiveness of OLAF's investigative function

Although the changes brought about by Regulation 883/2013 have proven to be a clear improvement in the ef-

fective conduct of OLAF investigations, the evaluation revealed a number of shortcomings that hamper the effectiveness of OLAF's investigatory work. First, OLAF's powers, and their enforceability by national authorities, are subject to conditions of national law (notably on-the-spot inspections and digital forensic operations). This results in a fragmentation of OLAF's powers and their enforceability in the Member States.⁹ Second, OLAF does not have full access to bank account information, particularly in external investigations. This is problematic because such information is often crucial in unveiling fraud and irregularities with EU monies.¹⁰ Third, OLAF's investigatory powers in the field of valued-added tax (VAT) are unclear.¹¹ According to some, the PIF Regulation applies only to traditional own resources (excluding VAT).¹² All the while, the Court of Justice ruled that VAT is definitively part of the Union's financial interests, which OLAF is to protect.¹³ Fourth, the OLAF Regulation leaves it up to national law to decide on the competences and powers of national anti-fraud coordination services (AFCOS). This results in a considerable diversity in the role, profile, and effectiveness of cooperation between OLAF and the Member States' AFCOS.¹⁴ Fifth, the European Antifraud Office's rules on the admissibility of evidence hamper the effectiveness of its activities. The current OLAF Regulation provides that OLAF reports constitute admissible evidence in national judicial proceedings in the same way and under the same conditions as administrative reports drawn up by national administrative inspectors. This equivalence rule constitutes an obstacle to the effective follow-up of OLAF investigations in some Member States.¹⁵ Last, OLAF's modalities for its coordination activities are unclear. Coordination cases allow OLAF and Member States to coordinate their action in protection of the Union's financial interests. The OLAF Regulation does not specify the role and tasks of OLAF in such coordination cases. This results in a lack of legal certainty for OLAF and for the Member States that depend on OLAF's assistance.¹⁶

3. Other evaluation findings

The evaluation also pointed out a number of other shortcomings requiring improvement. The rules on internal investigations (in particular, the inspection of premises), digital forensic operations, and the transmission of information to third countries and international organisations require clarification. Furthermore, the mandate of OLAF's supervisory committee is ambiguous. In addition, measures to ensure closer cooperation between OLAF and the Union's institutions, bodies, offices, and agencies must be put in place with regard to the early transmission of information by OLAF and the follow-up to financial recommendations. Lastly, the Guidelines on Investigation Procedures should be revised, and internal measures should be taken to ensure the quality of final reports and recommendations.¹⁷

II. Objectives and Scope of the Commission Proposal

Based on the shortcomings identified in the evaluation, the proposal aims to achieve three specific objectives:¹⁸ (1) adapt the operation of OLAF to the establishment of the EPPO, (2) enhance the effectiveness of OLAF's investigative functions, and (3) clarify and simplify selected provisions of Regulation 883/2013 (not discussed in this article). The Commission clarifies that the current proposal does not aim to remedy all shortcomings identified by the evaluation: it is a targeted proposal. The Commission addresses only the most unambiguous findings of the evaluation, aimed at improving the effectiveness of investigations and cooperation with OLAF and at simplifying or clarifying certain provisions. A more far-reaching process to modernise the framework for OLAF investigations, including aspects that call for further and more fundamental reflection and discussion, will be launched later.¹⁹

III. Proposed Changes

1. Proposed amendments on the relationship with the EPPO

The proposal requires OLAF to establish and maintain a close relationship with the EPPO, based on mutual cooperation and on information exchange in order to ensure that all available means are used to protect the Union's financial interests.²⁰ To this end, the Commission proposes a working relationship based on reporting obligations to the EPPO, non-duplication of investigations, and support provided to the EPPO by OLAF.

Under the proposed regulation, OLAF is obliged to report to the EPPO any criminal conduct over which the EPPO could

exercise its competence.²¹ Such a report is to contain, as a minimum, a description of the facts, including an assessment of the damage caused or likely to be caused, the possible legal qualification, and any available information about potential victims, suspects, and any other involved persons.²² OLAF does not have to report to the EPPO in case of manifestly unsubstantiated allegations.²³

The Commission's proposal sets out a non-duplication rule. Under this rule, OLAF may not open a parallel investigation if the EPPO is conducting an investigation into the same facts,²⁴ unless the EPPO requests OLAF's support in the course of an investigation (see below) or if an OLAF investigation complements an EPPO investigation.²⁵ The latter is the case when an OLAF investigation facilitates the adoption of precautionary measures or of financial, disciplinary, or administrative action.²⁶

During an investigation, the EPPO can request OLAF to support or complement its activity, in particular by (i) providing information, analyses (including forensic analyses), expertise, and operational support, (ii) facilitating coordination of specific actions on the part of the competent national administrative authorities and bodies of the Union, and (iii) conducting administrative investigations.²⁷

To facilitate the cooperation with the EPPO, OLAF should agree with the EPPO on working arrangements. Such arrangements establish practical details for the exchange of operational, strategic, technical, and classified information. Furthermore, they should include detailed arrangements on the continuous exchange of information during the receipt and verification of allegations by both OLAF and the EPPO.²⁸

2. Proposed amendments to enhance the effectiveness of OLAF's investigative functions

The proposal clarifies, but does not do away with, references to national law.²⁹ With regard to the OLAF's conduct during on-the-spot checks and inspections, where economic operators submit to a check by OLAF, inspections are subject to Union law alone. This includes the procedural guarantees provided for in the OLAF legal framework, the application of which is clarified in the context of on-the-spot checks and inspections in the new Article 3(5). This provision holds that the economic operator concerned has the right not to incriminate him- or herself and to be assisted by a person of his/her choice. Furthermore, when making statements during on-the-spot checks, the economic operator has the possibility to use any of the official languages of the Member State in which he/she is located. However, when the economic operator does not coop-

erate and – consequently – OLAF needs to rely on national authorities or receives their assistance for other reasons, the proposal maintains the principle that such assistance be provided in compliance with national law.³⁰ This proposal is in line with the other Union bodies' modalities of conducting administrative investigations.

In order to ensure that OLAF has access to bank account information, the Commission proposes that Member States' duty to assist OLAF in the conduct of its investigations should include the transmission of certain bank account information. According to the Commission, OLAF should be given information on account holders held by central bank and payment account registers or automated retrieval mechanisms established by Member States pursuant to the Anti-Money Laundering Directive. When strictly necessary for the purpose of the investigation, OLAF should also be given the record of transactions. This cooperation could take place through Member States' Financial Intelligence Units, without prejudice to the cooperation with other authorities. The Commission envisages that the national authorities act in compliance with their respective national laws.³¹

The Commission's proposal also aims to end the discussion on OLAF's mandate in the area of VAT once and for all. Article 3 clarifies that on-the-spot inspections are now available to OLAF in all areas, including VAT.³² In addition, OLAF is also allowed to exchange information on VAT within the Eurofisc network.³³

With regard to the assistance to be provided by AFCOS, upon OLAF's request – before a decision has been taken as to whether or not to open an investigation, as well as during or after an investigation – the AFCOS must provide, obtain, or coordinate the necessary assistance for OLAF to carry out its tasks effectively. The proposal leaves it up to the Member States to decide on the organisation and powers of their AFCOS. Furthermore, provision is made for the possibility for OLAF to request the assistance of the AFCOS in the context of internal and external investigations and coordination activities as well as for the AFCOS to cooperate among themselves.³⁴

In order to improve on the follow-up of OLAF reports and recommendations in the Member States, the proposal distinguishes between two situations. On the one hand, the equivalence rule will remain applicable to OLAF reports and recommendations in cases of national criminal proceedings (including punitive administrative proceedings). As national law on the use of reports by administrative inspectors in criminal proceedings varies, the Commission deems it appropriate that conditions of national law should apply. On the other hand, the Commission introduces a principle of admissibility of OLAF reports

in administrative proceedings and in judicial proceedings of an administrative, civil, and commercial nature in the Member States. In these cases, admissibility should only be subject to a simple verification of authenticity. The proposal also provides for the admissibility of the reports in administrative and judicial proceedings at the Union level.³⁵

Lastly, the Commission specifies OLAF's role in coordination cases. The proposal states that OLAF may organise and facilitate cooperation between the competent authorities of the Member States, institutions, bodies, offices, agencies, third countries' authorities, and international organisations. To this end, the participating authorities and OLAF may collect, analyse, and exchange information, including operational information. OLAF investigations may accompany competent authorities carrying out investigative activities upon request of these authorities³⁶ OLAF may also participate and exchange information in Joint Investigation Teams.³⁷

IV. Summary

The Commission's proposal does not tackle all problems that the OLAF investigative framework faces today and will face in the coming future, as identified by the evaluation on Regulation 883/2013. However, that was never the object or purpose of the tabled proposal. The commission targets only the most pressing issues, namely the future cooperation with the EPPO, the effectiveness of OLAF's investigative activities, and the clarification and simplification of its legal framework. The amendments do not venture beyond the short term. It is only at a later stage, when OLAF has gained experience in working together with the EPPO, that more fundamental and far-reaching changes are to be made in OLAF's legal framework.

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1 European Commission, "Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by 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 (hereinafter "the Proposal"); European Commission Staff Working Docu-

ment,” Assessment accompanying the document 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”, SWD(2018) 251 final.

2 Art. 19 of Regulation 883/2013 stipulates that, by 2 October 2017, the Commission must submit to the European Parliament and the Council an evaluation report on the application of Regulation 883/2013. Said report must state whether there is a need to amend this Regulation. The Evaluation Roadmap set the wheels in motion in late 2015 and clarified the scope of the evaluation (see European Commission, “Evaluation of the application of Regulation (EC, Euratom) No 2018/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF)”, <http://ec.europa.eu/smArt.-regulation/roadmaps/docs/2017_olaf_001_evaluation_of_regulation_883_2013_en.pdf>). The time period covered by the evaluation is 1 October 2013 to the end of 2016. The output consists of: European Commission Report, “Evaluation of Regulation 883/2013”, COM(2017) 589 final, supported by a European Commission Staff Working Document, SWD(2017) 332 final, OLAF Supervisory Committee, “Opinion No 2/2017”, (Ref. Ares(2017)4762494). In support of the European Commission’s evaluation, ICF, an independent consultancy, was contracted to conduct an external evaluation (see ICF, “Evaluation of the Application of Regulation No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF). Final report”, <https://ec.europa.eu/anti-fraud/sites/antifraud/files/evaluation_of_the_application_regulation_883_en.pdf>). For an overview of the evaluation carried out, see M. Janda and R. Panait, “The OLAF Regulation – Evaluation and Future Steps”, (2017) *eucri*, 182 and K. Bovend’Eerdt, “Learning Lessons – Reflecting on Regulation 883/2013 through Comparative Analysis”, (2017) *eucri*, 188, 189–190.

3 SWD(2017) 332 final, 6; COM(2018) 338 final, 1; SWD(2018) 251 final, 4.

4 Directive (EU) 2017/1371 on the fight against fraud to the Union’s financial interests by means of criminal law, O.J. L 198/29, 27.7.2017.

5 Council Regulation (EU) 2017/1939 implementing enhanced cooperation on the establishment of the European Public Prosecutor’s Office (‘the EPPO’), O.J. L 283/1, 31.10.2017 (hereinafter the EPPO Regulation).

6 Communication from the Commission, “A modern budget for a Union that protects, empowers and defends. The Multiannual Financial Framework for 2012–2027”, COM(2018) 321 final.

7 For a detailed analysis of the (future) cooperation between OLAF and the EPPO, see A. Weyembergh and C. Briere, “The Future Cooperation between OLAF and the European Public Prosecutor’s Office”, 2017, (In-depth analysis for the CONT committee) and A. Venegoni, “The New Frontier of PFI Investigations – The EPPO and its Relationship with OLAF”, (2017) *eucri*, 193.

8 COM(2017) 589 final, p. 7; COM(2018) 338 final, pp. 1–2; SWD(2018) 251 final, pp. 6–8.

9 COM(2017) 589 final, p. 3; SWD(2017) 332 final, pp. 15–16; COM(2018) 338 final, pp. 4–5; SWD(2018) 251 final, pp. 9–10.

10 COM(2017) 589 final, p. 3; SWD(2017) 332 final, p. 18; COM(2018) 338 final, p. 4; SWD(2018) 251 final, p. 12.

11 COM(2017) 589 final, p. 8; SWD(2017) 332 final, pp. 38–39, 40; COM(2018) 338 final, p. 4; SWD(2018) 251 final, pp. 13–14.

12 For instance J. Inghelram, *Legal and Institutional Aspects of the*

European Anti-Fraud Office (OLAF). An Analysis with a Look Forward to a European Public Prosecutor’s Office, 2011, p. 77.

13 ECJ, 8 September 2015, case C-105/14, *Tarrico*.

14 SWD(2017) 332 final, pp. 23–24; SWD(2018) 251 final, p. 10.

15 COM(2017) 289 final, p. 4; SWD(2017) 332 final, pp. 18–22; COM(2018) 338 final, p. 5; SWD(2018) 251 final, p. 11.

16 COM(2017) 589 final, p. 4; SWD(2017) 332 final, p. 34; COM(2018) 338 final, p. 5; SWD(2018) 251 final, p. 14.

17 COM(2017) 289 final, p. 8; SWD(2017) 332 final, pp. 42–43; SWD(2018) 251 final, p. 15.

18 COM(2017) 589 final, pp. 7–8; COM(2018) 338 final, p. 2; SWD(2018) 251 final, pp. 6–15.

19 COM(2017) 589 final, pp. 8–9; COM(2018) 338 final, p. 4; SWD(2018) 251 final, p. 6.

20 Art. 1(4a) of the Proposal, which mirrors Art. 101(1) of the EPPO Regulation. For the rationale, see COM(2018) 338 final, p. 8; SWD(2018) 251 final, p. 17.

21 Art. 12c(1) of the Proposal, which mirrors Art. 24 of the EPPO Regulation. For further rules on what information needs to be provided and under what conditions, see Art. 12c(2) through (6) of the Proposal. For the rationale, see COM(2018) 338 final, p. 9; SWD(2018) 251 final, pp. 18–19.

22 Art. 12c(2) of the Proposal.

23 Art. 12c(3) of the Proposal.

24 Art. 12d of the Proposal, which mirrors Art. 101(2) of the EPPO Regulation; For the rationale, see COM(2018) 338 final, p. 9; SWD(2018) 251 final, pp. 19–20.

25 With regard to OLAF’s support action, see Art. 12e of the Proposal, which mirrors Art. 101(3) of the EPPO Regulation; For the rationale, see COM(2018) 338 final, p. 9; SWD(2018) 251 final, p. 21. With regard to OLAF complementary investigations, see Art. 12f of the Proposal; For the rationale, see COM(2018) 338 final, p. 9; SWD(2018) 251 final, p. 21.

26 For the procedure, see Proposal Art. 12f(1) and (2), which has no mirroring provision in the EPPO Regulation.

27 Art. 12e of the Proposal, which mirrors Art. 101(3) of the EPPO Regulation; For the rationale, see COM(2018) 338 final, p. 9; SWD(2018) 251 final, p. 21.

28 Art. 12g(1) of the Proposal.

29 Art. 3. For the rationale, see COM(2018) 338 final, pp. 9–10; SWD(2018) 251 final, pp. 22–26.

30 Art. 3(7) and 7(3) of the Proposal. The amendments to Article 3 are in conformity with the interpretation given by the General Court in its recent ruling GC, 3 May 2018, case T-48/16, *Sigma Orionis SA v European Commission*, paras. 81–82.

31 Art. 7(3) of the Proposal. For the rationale, see COM(2018) 338 final, p. 10; SWD(2018) 251 final, p. 26.

32 Art. 3(1) of the Proposal. For the rationale, see COM(2018) 338 final, p. 10; SWD(2018) 251 final, p. 27.

33 Art. 12(5) of the Proposal.

34 Art. 12a of the Proposal. For the rationale, see COM(2018) 338 final, p. 11; SWD(2018) 251 final, pp. 27–28.

35 Art. 11(2) of the Proposal. For the rationale, see COM(2018) 338 final, p. 11; SWD(2018) 251 final, p. 27.

36 Art. 12b(1) of the Proposal. For the rationale, see SWD(2018) 251 final, p. 28.

37 Art. 12b(4) of the Proposal. For the rationale, see SWD(2018) 251 final, p. 28.

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