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THE EUROPEAN CRIMINAL LAW ASSOCIATIONS' FORUM

Dynamic Relation between Criminal Law and Administrative/Civil Law
Rapport dynamique entre le droit pénal et le droit administratif/civil
Zusammenwirken von Strafrecht und Verwaltungs- bzw. Zivilrecht

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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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Guest Editorial

Dear Readers,

This eucrim issue focuses on the link between administrative and criminal law, which is becoming conspicuously manifest in environmental law. An in-depth evaluation of Directive 2008/99/EC on the protection of the environment through criminal law revealed that it has had no noticeable impact on Member State practice in the enforcement of EU environmental law. On 15 December 2021, the European Commission responded by adopting a proposal for a new directive of the European Parliament and of the Council on the protection of the environment through criminal law, intended to replace said Directive 2008/99/EC (COM(2021) 851 final).

The improvements to EU environmental criminal law contained in this proposal extend the scope of the directive to many more areas that affect the environment and natural resources, introduce common and clear definitions of environmental criminal offences in some areas, and include a proposal to specify punishment for inciting, aiding and abetting criminal offences committed intentionally. Of major importance in view of creating an EU-wide level playing field is the proposal to provide minimum maximum sanctions for natural and legal persons, including minimum maximum sanctions not less than 5% or 3% of the total worldwide turnover of the legal person or undertaking in the business year preceding the fining decision. Additional sanctions include the obligation to reinstate the environment within a given time period, disqualification from practicing business activities, closure of establishments of the type used for committing the offence, and the withdrawal of permits and authorisations to pursue activities resulting in commission of the offence. This last sanction illustrates that environmental criminal law today is still largely dependent on administrative law, because the required conduct is often defined in individual or general administrative acts, and thus these acts also define what should be considered a criminal offence. Furthermore, the proposal also provides for aggravating and mitigating circumstances, the freezing and confiscation of the proceeds derived from and instrumentalities used or intended to be used in the commission of or contribution to the commission of the environmental offences referred to in the directive. Other improvements concern the provisions on the protection of persons who report environmental offences or assist their investigation, and the right for members of the public concerned to participate in proceedings, next to the provisions concerning prevention, resources, training, and investigative tools. Given the rise of environmental crime worldwide and throughout Europe as documented by UNEP, Interpol, Europol, and Eurojust, strengthening the criminal law framework to combat environmental crime is needed more urgently than ever.

Luc Lavrysen

Not all environmental offences require criminal law enforcement, however, and some crimes can or should be dealt with by means of the administrative sanctioning track. In this respect, it is of course crucial that an integrated enforcement policy take shape that defines in detail the role of both the administrative and the criminal enforcement tracks to close gaps. In this regard, it is very important that the Commission proposal contains a provision to the effect that Member States shall take the necessary measures to establish "appropriate mechanisms for coordination and cooperation at strategic and operational levels among all their competent authorities involved in the prevention of and the fight against environmental criminal offences." This is also backed by the general approach adopted by the Council on 9 December 2022. Such mechanisms shall *inter alia* be aimed at "ensuring common priorities and understanding of the relationship between criminal and administrative enforcement." Hence, the need to develop an integrated enforcement policy of EU environmental law, encompassing both tracks, is fully endorsed by the Council. It is now up to the Member States to make it work.

Prof. em. dr. Luc Lavrysen, President (NL) of the Constitutional Court of Belgium

News

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European Union

*Reported by Thomas Wahl (TW), Cornelia Riehle (CR), and Anna Pingen (AP)**

Foundations

Fundamental Rights

Poland: Rule-of-Law Developments November-December 2022

This news item continues the overview of recent rule-of-law developments in Poland (as far as they relate to European law) since the last update in eucrim 3/2022, 168–169.

■ 9 November 2022: Following the declaration of 30 Supreme Court judges of 17 October 2022 (→eucrim 3/2022, 169), in which they refuse to adjudicate in panels with neo-judges (i.e. judges nominated after the controversial judicial reforms of 2018 by dependent, politicized institutions), the struggle goes into the next round. The press reports that, on the one hand, the new Chamber of Professional Liability at the Supreme Court, which replaced the former and illegal Disciplinary Chamber, is still composed of neo-judges and some neo-judges filed a motion to remove said 30 Supreme Court judges from office. On the other hand, legal experts believe that also the new Chamber is in conflict with European law. It is also unclear as to whether decisions in which neo-judges participated are valid. Meanwhile, the Polish President *Andrzej Duda* appointed a judge to chair the Chamber who is considered moderate and is not a neo-judge.

■ 16 November 2022: In a dispute on releasing candidate lists for the new National Council of the Judiciary, the Supreme Administrative Court ruled that the Polish Constitutional Tribunal has been infected with illegality and has lost its ability to adjudicate lawfully since it is controlled by so-called "stand-in judges" who were unlawfully appointed by the ruling PiS party. As a result, the Supreme Administrative Court refused to stay the proceedings and to wait for a decision by the Constitutional Tribunal before which the case was brought in parallel.

■ 17 November 2022: Polish NGOs that are associated with the Polish right-wing government contest the selection of independent and critical NGOs for the National Recovery Plan Monitoring Committee. The Committee is to supervise the implementation of the reforms and investments that Poland receives from the EU Recovery and Resilience Fund. The appointment is a pre-condition for disbursement of the money. The responsible Polish minister will now choose the members of the Committee anew.

■ 29 November 2022: *Igor Tuleya*, a symbolic figure of independent and free judges in Poland, files a third application to the ECtHR because the Polish court presidents, appointed by the Polish Minister of Justice, have not implemented the judgments ordering his reinstatement.

■ 2 December 2022: In an open letter, 13 Polish NGOs urge the OSCE Office for Democratic Institutions and Human Rights (ODIHR) "to send a Full-Scale Election Observation Mission to Poland in autumn 2023 to observe our country's parliamentary elections." Since the election promises to be highly polarized and the possibility of widespread election fraud has been raised, a full election observation mission from the part of ODHIR should ensure a level playing field for all participants.

■ 15 December 2022: According to Advocate General (AG) *Collins*, several parts of the Polish law of 2019 amending rules on the organisation of the ordinary courts and on the Supreme Court is not compatible with EU law. The AG's opinion refers to an action for failure to fulfil obligations brought by the Commission against Poland (Case C-204/21). The AG recommends the CJEU upholding the Commission's action with respect to the following pleas which result in breaching the requirement of an inde-

* Unless stated otherwise, the news items in the following sections (both EU and CoE) cover the period 1 November – 31 December 2022, if not stated otherwise. Have a look at the eucrim website (https://eucrim.eu), too, where all news items have been published beforehand.

pendent and impartial tribunal within the meaning of EU law:

- Prohibition on judges and courts to raise or address the question as to whether a judge has been legally appointed or can exercise judicial functions;
- The corresponding disciplinary regime which makes the examination by a judge of compliance with the requirements of an independent and impartial tribunal previously established by law, a disciplinary offence;
- Jurisdiction of the Disciplinary Chamber to hear and determine cases having a direct impact on the status of judges and trainee judges and the performance of their office.

Ultimately, the AG takes the view that the obligation on judges to declare their membership of a political party, an association or a post in a non-profit foundation, and to publish those data, breaches EU data protection law because sensitive data are processed without the Polish law having established adequate safeguards.

■ 15 December 2022: AG *Collins* delivers his opinion in references for a preliminary ruling that deal with the lawfulness of lifting a Polish judge's immunity from prosecution and suspending him from hearing cases assigned to him (Joined Cases C-615/20 and 671/20). The AG underpins that the Disciplinary Chamber of the Polish Supreme Court at issue has not met the requirements of independence, impartiality and tribunal previously established by law as stated in his opinion in Case C-204/21 (→supra). Therefore, the Disciplinary Chamber cannot be considered authorized to prosecute judges or suspend judges from their office. The AG stressed that the Polish courts have the right to disregard contrary rulings of the Polish Constitutional Court if they consider them to be inconsistent with EU law and refuse to apply any national rule that requires them to comply with those rulings. In addition, the AG requests Poland to ensure that the Disciplinary Chamber's jurisdiction is exercised by an independent and impartial tribunal previously established by law as well as the nullification of the effects of the resolutions which that Chamber adopted.

■ 15 December 2022: In two references for preliminary rulings brought to the CJEU by Polish courts (Joined Cases C-181/21 and C-269/21), the AG examines the compatibility of various elements of the revised procedure to appoint judges in Poland with EU law. According to the AG, the CJEU should rule that the submitted factors are by themselves insufficient to reach the conclusion of an incompatibility with the principle of prior establishment by law of a court or tribunal (recognised by Art. 19(1) subara 2 TEU). The referring courts raised doubts as to (1) the lack of participation of a judicial self-governing body in the appointment procedure; (2) the role of the National Council of the Judiciary (KRS) in the appointments since the KRS consists, for the most part, of members chosen by the legislature, and (3) the insufficient possibilities for unsuccessful candidates to challenge the procedure for the appointment of judges to the ordinary courts. The AG referred to previous case law and argued that Art. 19(1) TEU (read in conjunction with Art. 47 of the Charter) must be interpreted in the sense that the appointment process gives rise to systemic doubts in the minds of individuals as to the independence and impartiality of the judges. This threshold has not been met in the references. (TW)

Reform of the European Union

Granting EU Candidate Status to Bosnia and Herzegovina

At the summit of 15 December 2022, the European Council endorsed the decision to grant the status of EU candidate country to Bosnia and Herzegovina. However, before accession negotiations can formally be launched, Bosnia and Herzegovina still has to implement further reforms. This mainly concerns the rule of law, the fight against corruption and organised crime, migration management and human rights. The country also needs to move forward with constitutional reform and electoral reform.

Thus, the following eight countries are currently recognised by the EU as candidates for accession: Turkey, Ukraine, Moldova, as well as in the Western Balkans Northern Macedonia, Montenegro, Serbia, Albania and Bosnia-Herzegovina. Kosovo has also submitted its application for EU membership to the European Council. (TW)

Follow-up to Conference on Future of Europe

On 2 December 2022, the European Parliament (EP) hosted a feedback event at which representatives from the EU institutions and over 500 citizens assessed the follow-up to the proposals agreed at the Conference on the Future of Europe in spring 2022 (→eucrim 2/2022, 84–85 and briefing paper of the EP Research Service of 30 November 2022). The debate involved a wide range of topics, including:

■ Institutional reforms that would be needed to implement the Conference's proposals in their entirety, including those on the taxation of multinationals and cooperation in the external dimension of EU affairs;

■ The digital transition;

■ Migration-related challenges;

■ Threats to European values and the EU budget;

■ Revision of the EU Treaties and the potential activation of passerelle clauses in the existing framework;

■ Making further improvements in the communication between the EU institutions;

■ Lessons learned for participatory democracy.

MEPs stressed that the EP will continue to do whatever it takes to ensure that it fulfils its core mission of keeping the EU accountable towards all Europeans, while presenting concrete examples on how the Conference's proposals have

become key drivers in EP's work. They reiterated Parliament's call to establish a Convention to revise the EU Treaties (→eucrim 2/2022, 85).

The Council has produced a comprehensive analysis of the proposals and related measures contained in the Conference's final report. This analysis was updated in November 2022 in order to reflect the actions undertaken since 9 May by the EU institutions, especially the Council, to implement the Conference proposals.

On the eve of the feedback event, the Commission explained in a press release how it followed up to the Conference's proposal by means of different types of responses. As a concrete follow-up to the Conference's proposal to better embed European citizens in the policy-making process, the Commission hosted the first European Citizens' Panel in Brussels on 16 December 2022, which allowed citizens to provide their input on how to step up action to reduce food waste in the EU. (TW)

Area of Freedom, Security and Justice

Training of Justice Professionals in 2021

On 22 December 2022, the Commission published the eleventh report on training on EU law for justice professionals (in particular, judges, prosecutors, lawyers, court/prosecutors' offices staff, notaries and bailiffs, and more generally prison and probation staff). The figures of the report refer to the year 2021. It provides an overview of the participation of legal professionals in initial and continuing training in EU law, including information on the training of young justice professionals, the variety of training activities and the quality of judicial training. The report also serves to monitor the objectives of the European Judicial Training Strategy 2021–2024 adopted by the Commission in December 2020 (→eucrim 4/2020, 264).

In 2021, more than 240,000 justice professionals received training in EU law or the law of another Member States. This is a considerable increase (approximately 30%) compared with the years before the pandemic (for the 2019 report →eucrim 4/2020, 263–264). Other main results of the report include the following:

- The COVID-19 pandemic has had a significant impact on judicial training: while there is an upward trend for lawyers, court/prosecutors' offices staff and notaries, notably due to an increase in online training, other professions (in particular judges) have not reached the level of pre-pandemic years;
- No profession reached the new quantitative target for annual continuing training as set in the European Training Strategy 2021–2024;
- The EU (co-)funded training for more than 36,000 participants, i.e. 15% of all justice professionals who received training on EU law in 2021.

As found in past annual reports, considerable differences remain in the level of training participation across Member States and across the various justice professions. At the same time, the need for dedicated training increases, in particular due to new challenges for justice professionals and justice systems. According to the Commission, this confirms that more needs to be done and that ambitious, targeted training activities are needed for most legal professionals. The Commission stressed that the implementation of the 2021–2024 Training Strategy will remain the key priority in the next years. In this context, it will make further efforts in the digitalisation of justice systems, such as the further development of the European Training Platform (→eucrim 4/2020, 272). (TW)

Schengen

Croatia Joins Schengen Area

On 8 December 2022, the Council adopted a decision on full application of the Schengen acquis in Croatia. After verification and in accordance with the applicable Schengen evaluation procedures, the Council found that the necessary conditions for application of all parts of the relevant *acquis* have been met in Croatia, including the effective application of all Schengen rules in accordance with the agreed common standards and fundamental principles.

This decision was made, after the European Parliament (EP) had endorsed the full application of the Schengen acquis in Croatia in a resolution of 10 November 2022. In another resolution of 18 October 2022, the EP invited the Council to allow Romania and Bulgaria to join the Schengen area. On 16 November 2022, the Commission adopted a Communication on full application of the Schengen acquis in Bulgaria, Romania, and Croatia, calling upon the Council to take the necessary decisions without any further delay, thus allowing these three countries to join the area without internal border controls.

While the Council decided in its December meeting on full application of the Schengen acquis for Croatia, a small minority of states blocked the accession of Romania and Bulgaria into Schengen; thus the required unanimity for Schengen accession on the part of the EU Member States could not be reached for these two countries which joined the EU in 2007.

As a consequence of the accession of Croatia to the Schengen area, persons will no longer be subject to border inspections at internal land and sea borders between Croatia and the other members of the Schengen area starting on 1 January 2023. As a result of the necessity to align the lifting of border checks with the dates of the IATA summer/winter time schedule, checks at internal air borders will also be eliminated starting on 26 March 2023. Beginning on 1 January 2023, Croatia will also be able to issue Schengen visas and fully utilize the Schengen Information System (SIS). In accordance with Decision

No. 565/2014/EU, national short-stay visas issued by Croatia before 1 January 2023 will continue to be valid for the duration of their validity for transit through the territory of other Member States or for intended stays on their territories that do not exceed 90 days in any 180-day period. (AP)

Ukraine Conflict

Commission Proposes Penalisation of Violation of Restrictive Measures

spot light

Against the background of Russia's war in Ukraine, the Commission proposed adding the violation of Union restrictive measures to the areas of crime laid down in Art. 83(1) of the Treaty on the Functioning of the European Union (TFEU) in May 2022 (→eucrim 2/2022, 75–76 and the article by Wouter van Ballegoij in the same issue). Following the Council's adoption on 28 November 2022, the Commission put forward on 2 December 2022 a proposal to harmonise criminal offences and penalties for the violation of EU restrictive measures.

Under Art. 83(1) TFEU, the European Parliament and the Council may establish minimum rules concerning the definition of criminal offences and sanctions in areas of particularly serious crime with a cross-border dimension. The crimes currently covered in this article include terrorism, trafficking in human beings, the sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime, and organised crime.

The introduction of restrictive measures by the EU in response to Russia's attack on Ukraine demonstrated how challenging it is to locate the assets controlled by oligarchs, who hide them in various jurisdictions by using intricate legal and financial structures. By launching the new directive, the EU pursues the following aims:

- To ensure that the restrictive measures adopted in this context are fully implemented;
- To close existing legal loopholes;
- To increase the deterrent effect of violating EU sanctions in the first place.

The proposal for a Directive on the definition of criminal offences and penalties for the violation of Union restrictive measures (COM(2022) 684 final) includes a list of criminal offences that violate EU sanctions:

- Making funds or economic resources available to or available for the benefit of a designated person, entity, or body;
- Failing to freeze these funds;
- Enabling the entry of designated persons into the territory of a Member State or their transit through the territory of a Member State;
- Entering into transactions with third countries, which are prohibited or restricted by EU restrictive measures;
- Trading in goods or services whose import, export, sale, purchase, transfer, transit or transport is prohibited or restricted;
- Providing financial activities which are prohibited or restricted;
- Providing other services which are prohibited or restricted, such as legal advisory services, trust services and tax consulting services;
- Breaching or failing to fulfil conditions under authorizations granted by competent authorities to conduct activities.

The proposal also clarified under which circumstances the circumvention of an EU restrictive measure is to be penalised. In addition, it will set common basic standards for penalties both for natural and legal persons. In the next step, the proposal will be discussed by the European Parliament and the Council. (AP)

Council: Strengthening Fight against War Crimes in Ukraine

On 9 December 2022, the Council adopted conclusions on the fight against impunity in Russia's war of aggression against Ukraine. The Council called on Member States to adopt the necessary legislative measures to fully implement the definition of core international crimes and modes of liability enshrined in the Rome Statute and to allow the exercise of universal jurisdiction or other forms of domestic jurisdiction over core international crimes committed abroad.

Member States should also enable close judicial cooperation with the International Criminal Court (ICC) and support the Ukrainian Prosecutor General's Office. In addition, Member States are called on to cooperate with the Atrocity Crimes Advisory Group and to strengthen cooperation with EU agencies and stakeholders, such as Eurojust, Europol, the European Judicial Network, the Genocide Network, the EU Advisory Mission for Civilian Security Sector Reform in Ukraine (EUAM Ukraine), and the Network of National Experts on Joint Investigation Teams (JITs Network). The Council further recommended that Member States streamline the collection/sharing of information between relevant authorities and stakeholders who come into contact with war crime victims. Awareness should also be raised among Ukrainian refugees of the possibility of giving testimony in Member States on the core international crimes they may have been victims of and/or witness to.

The Council called on the Commission to support specialized training and capacity-building activities for law enforcement, judicial authorities, and other relevant authorities. The Commission is to enhance the financial, logistical, technical, and substantive support available to Member States in their efforts to efficiently investigate and collect evidence of core international crimes, including increases in the funding of joint investigation teams. The Council asked the Commission to continue supporting national and international investigative and evidence-gathering mechanisms, specifically with respect to battlefield evidence.

EU bodies, including Eurojust, Europol, the Genocide Network, and

EUAM Ukraine, are called on to continue providing support and guidance and to enhance their mutual cooperation. Lastly, the Council called on Ukraine to accede to the Rome Statute of the International Criminal Court. (AP)

European Council Confirms Unity against Russia

Following the Council conclusions on the fight against impunity regarding crimes committed in connection with Russia's war of aggression against Ukraine of 9 December 2022 (→separate news item), the Heads of State or Government of the EU Member States adopted conclusions on further issues regarding Russia's war in Ukraine and its consequences for the EU at their summit on 15 December 2022. Next to Russia's military aggression against Ukraine and support measures to Ukraine, the conclusions of the European Council related, *inter alia*, to energy and economy, security and defense, the Southern Neighbourhood partnership, and transatlantic relations.

With regard to Ukraine/Russia, the European Council reiterated its resolute condemnation of Russia's war of aggression and reaffirmed the Union's full support for Ukraine's independence, sovereignty, and territorial integrity within its internationally recognized borders. It also fully backed Ukraine's inherent right of self-defense against the Russian aggression. EU leaders invited the European Investment Bank, in close cooperation with the Commission and international financial institutions, to step up its support for Ukraine's most urgent infrastructure needs.

They welcomed and encouraged further efforts to ensure full accountability for war crimes and the other most serious crimes in connection with Russia's war of aggression against Ukraine and underlined the Union's support for the investigations by the Prosecutor of the International Criminal Court. They also welcomed the reinforcement of EU restrictive measures against Russia, including through the EU's ninth package of sanctions, and underlined the importance of ensuring the effective implementation of restrictive measures.

On the question of energy and economy, the European Council stressed the importance of strengthening coordination with regard to the next storage filling and heating season. It called for the swift finalization of discussions on the Renewable Energy Directive, the Energy Efficiency Directive, and the Energy Performance of Buildings Directive. In light of the impact of high energy prices in Europe, the European Council emphasised the importance of safeguarding Europe's economic, industrial, and technological base and of preserving the global level playing field. In this respect and in response to the impact of high energy prices, the Commission should conduct an analysis and make proposals by the end of January 2023 with a view to mobilizing all relevant national and EU tools as well as improving framework conditions for investment, including through streamlined administrative procedures.

In order to enhance security and defense, EU leaders called on the European Parliament and the Council to swiftly adopt the European Defense Industry Reinforcement through the common Procurement Act (EDIRPA). They also recommended that implementation of military mobility infrastructure projects, including dual-use infrastructure projects, be further accelerated. Lastly, the conclusions called for a strong EU policy on cyber defense, building on the recent joint communication of the Commission and the High Representative. (AP)

EU Reactions to Russian War against Ukraine: Overview November – December 2022

This news item continues the reporting on key EU reactions following the Russian invasion of Ukraine on 24 February 2022: the impact of the invasion on the EU's internal security policy, on criminal law, and on the protection of the EU's financial interests. The following overview covers the period from the beginning of November 2022 to the end of the year 2022. For overviews of the developments from February 2022 to mid-July 2022 →eucrim 2/2022, 74–80; for the developments from the end of July 2022 to the end of October 2022 →eucrim 3/2022, 170–171.

- 8 November 2022: The Economic and Financial Affairs Council gives political guidance on a more structural solution for the EU's financial assistance for Ukraine in 2023. The ministers underline the urgency of this issue and favour a framework providing the predictability and flexibility to allow the Commission to mobilise resources via bond issuance and within agreed budgetary limits.
- 9 November 2022: Building on previous Macro-Financial Assistance packages, the Commission proposes a support package for Ukraine of up to €18 billion for 2023: the Macro-Financial Assistance+ (MFA+) instrument. By means of stable, regular, and predictable financial assistance (instead of providing assistance on an ad-hoc basis), the MFA+ would help cover a significant part of Ukraine's short-term funding needs in 2023. The funds would be provided through highly concessional loans to be repaid over the course of maximum 35 years, starting in 2033. The MFA+ instrument would be accompanied by reforms to help Ukraine move forward to becoming a member of the EU. To secure funds for the loans, the Commission proposes borrowing on capital markets using a diversified funding strategy.
- 11 November 2022: The Commission announces that, together with the support by the European Investment Bank (EIB), the European Bank for Reconstruction and Development (EBRD) and the World Bank, around €1 billion will be mobilised for the EU-Ukraine Solidarity Lanes. The Solidarity Lanes were established in May 2022 as part of a common response to Russia's military aggression in order to ensure the export

of Ukraine's agricultural goods and the export/import of other goods, so that a lifeline for Ukraine's economy could be maintained.

■ 15 November 2022: The Council launches the European Union Military Assistance Mission in support of Ukraine (EUMAM Ukraine) to assist Ukraine in the face of the ongoing Russian war of aggression. The aim of the mission is to enhance the military capability of the Ukrainian Armed Forces in order to allow them to defend Ukraine's territorial integrity and sovereignty within its internationally recognised borders as well as to protect the civilian population. EUMAM Ukraine has a non-executive mandate to provide individual, collective, and specialised training to up to 15,000 Ukrainian Armed Forces personnel across multiple locations in the territory of EU Member States. In addition, the Council adopts an assistance measure worth €16 million under the European Peace Facility (EPF) to support the capacity building of the Ukrainian Armed Forces by the EUMAM Ukraine.

■ 22 November 2022: In its Opinion 7/2022 on the Commission's new borrowing strategy for financial aid to Ukraine, the European Court of Auditors warns that the future financial needs of the EU could be affected if the EU budget „headroom" were to cover the risk of a default in Ukraine. This is particularly since there are currently no plans to increase the size of the headroom accordingly.

■ 23 November 2022: In light of the deliberate attacks and atrocities committed by Russian forces and their proxies against civilians in Ukraine, the destruction of civilian infrastructure, and other serious violations of international and humanitarian law, a European Parliament resolution recognises the Russian Federation as a state sponsor of terrorism. MEPs call on the EU and its Member States to put in place a proper legal framework so that the EU can officially designate states as sponsors of terrorism. Russia must be added to such a list, which would improve the sanctioning of Russia. In the meantime, Russia and Belarus must be put on the EU's high-risk third country list on anti-money laundering and countering the financing of terrorism and Russian-funded armed groups (including the Wagner Group) should be put on the EU's terrorist list. Moreover, the EP urge the EU to adopt further measures that will isolate Russia internationally.

■ 24 November 2022: The European Parliament approves the MFA+ package and therefore the €18 billion loan for Ukraine for 2023.

■ 30 November 2022: The President of the European Commission, *Ursula von der Leyen*, issues a statement on Russia's accountability and the use of Russian frozen assets. She acknowledges that Russia must pay for its crimes, in particular for its crime of aggression against a sovereign state. *Von der Leyen* makes clear that Russia and its oligarchs must compensate Ukraine for the damage caused as well as cover the costs for rebuilding the country.

■ 30 November 2022: The statement by Commission President *Ursula von der Leyen* (→supra), is accompanied by a Commission press release, in which different options to Member States are presented with a view to make sure that Russia is held accountable for the atrocities and crimes committed in Ukraine during the war. Due to the fact that the crime of aggression committed by the highest political and military leadership of Russia cannot be prosecuted by the ICC and in order to ensure that justice is served, the Commission proposes two alternate options: (1) a special independent international tribunal based on a multilateral treaty or (2) a specialised court integrated into a national justice system with international judges (a hybrid court). The Commission also proposes creating a new structure to manage frozen and immobilised Russian public assets, invest them, and use the proceeds for Ukraine.

■ 6 December 2022: The Economic and Financial Affairs Council adopts one of the three pieces of legislation that aim to provide a structural solution by financially supporting Ukraine in 2023: an amendment to the Financial Regulation allowing the financing of the macro-financial assistance to take place within the so-called diversified funding strategy.

■ 8 December 2022: The Council adopts a decision that the EU will not accept Russian travel documents issued in, or to persons resident in, Russian-occupied regions in Ukraine or breakaway territories in Georgia. Such documents will not be recognised as valid documents for visa or crossing the borders in the Schengen area.

■ 9 December 2022: The Council adopts its conclusions on the fight against impunity in Russia's war of aggression against Ukraine (→separate news item).

■ 10 December 2022: The Council adopts the remaining two pieces of the legislative package that will enable the EU to financially help Ukraine with €18 billion throughout 2023. The approval concerns the MFA+ and amendments to the MFF. As a result, the Council paved the way for a better structural financial support to Ukraine in 2023. Prior to the meeting, the Hungarian government, which initially vetoed the legislation, dropped its opposition.

■ 12 December 2022: The Council approves new conclusions on Iran in the light of Iran's military cooperation with Russia, including the delivery of drones deployed by Russia in its war against Ukraine. The Council also adds four persons and four entities to the list of those subject to restrictive measures for undermining or threatening the territorial integrity, sovereignty, and independence of Ukraine. This came in view of their role in the development and delivery of Unmanned Aerial Vehicles (UAVs) used by Russia in the war.

■ 15 December 2022: The European Council adopts conclusions on Russia's military aggression against Ukraine,

EU support to Ukraine and the consequences of the war for energy and economy as well as security and defense (→separate news item).

■ 16 December 2022: The Council formally adopts the ninth package of economic and individual sanctions against Russia. A prior dispute among Member States over possible undesirable side effects of sanctions was settled. The new measures intend to step up pressure on Russia and its government after having intensified hits against civilians and civilian infrastructure in Ukraine. The ninth package significantly expands the list of entities connected to Russia's military and industrial complex by an additional 168 entities, which will restrict free trade of dual-use goods and technology. Regarding the banking sector, the Russian Regional Development Bank and two other Russian banks are added on the list that allows asset freeze and fully bans financial transactions. Furthermore, EU nationals will now be forbidden from holding any posts on the governing bodies of all Russian State-owned or controlled legal persons, entities or bodies located in Russia. In order to fight the Russian Federation's systematic, international campaign of disinformation and information manipulation, the Council initiated the process to suspend the broadcasting licences of four additional media outlets: NTV/NTV Mir, Rossiya 1, REN TV, and Pervyi Kanal. Regarding energy, the EU prohibits new investments in the Russian mining sector. In addition to these economic sanctions, the ninth package puts nearly 200 additional individuals and entities on the list for restrictive measures against individuals affiliated with the Russian regime. Concerned individuals/entities include the Russian armed forces as well as individual officers and companies in the defence industry, members of the State Duma and the Federation Council, ministers, governors, and political parties. The list thus includes individuals who play a key role in Russia's brutal, deliberate missile attacks against civilians, the abduction of Ukrainian children to Russia and the theft of Ukrainian agricultural products.

■ 1 January 2023: The new incoming Swedish Council Presidency (1 January – 30 June 2023) confirms as one of its political priorities that it will consistently continue the sanctions against Russia due to the invasion of Ukraine in February 2022 as well as the military and economic support to Ukraine. In this context, the security architecture of the EU is also to be strengthened. (AP/TW)

Legislation

New EU Rules for Online Platforms

spot light

The European Parliament and the Council agreed on a comprehensive package of legislation establishing new rules for online platforms. The package consists of two Regulations:

■ Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act);

■ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

These two acts had been proposed by the Commission on 15 December 2020 (→eucrim 4/2020, 273–274).

➤ *The Digital Markets Act*

The Digital Markets Act (DMA) supplements competition law and limits the power of large digital companies. It establishes obligations for so-called gatekeepers to comply with in their daily operations. Gatekeeper platforms must allow, for instance, their business users to promote their offer and conclude contracts with their customers outside the gatekeeper's platform. Bans for gatekeeper platforms include, for example, to treat services and products offered by the gatekeeper itself more favourably in ranking than similar services or products offered by third parties on the gatekeeper's platform, and to track end users outside of the gatekeepers' core platform service for the purpose of targeted advertising, without effective consent having been granted.

Non-compliance with the DMA's obligations can lead to:

■ Fines (of up to 10% of the company's total worldwide annual turnover, or up to 20% in the event of repeated infringements);

■ Periodic penalty payments (of up to 5% of the average daily turnover);

■ Additional remedial measures in case of systematic infringements and after a market investigation.

The DMA was published on 12 October 2022 in the Official Journal (O.J. L 265, 1), entered into force on 1 November 2022 and applies as of 2 May 2023. As of 2 May 2023, potential gatekeepers must notify the Commission within a period of two months whether their platform exceeds the thresholds provided for by Regulation 2022/1925. Gatekeepers are defined as undertakings providing core platform services, which is presumed in particular if the platform service has at least 45 million monthly active end users and 10,000 yearly active business users established in the Union, or at least €7.5 billion in annual turnover in the last three financial years. After notification, the platform will be assessed and designated as a gatekeeper by the Commission. After this designation, gatekeepers have six months to comply with the obligations foreseen in the DMA.

➤ *The Digital Services Act*

The Digital Services Act (DSA) will complement and update parts of the now 20-year-old E-Commerce Directive. It provides for uniform horizontal rules on due diligence obligations and conditional exemptions from liability for online intermediary services (such as online platforms) as well as common rules on

the implementation and enforcement of the Regulation, including as regards the cooperation of and coordination between the competent authorities. Thus, the DSA aims to contribute to a safe, predictable and trustworthy online environment and the smooth functioning of the EU single market for intermediary services.

The DSA applies to all online intermediaries offering their services in the single market, whether they are established in the EU or outside. The DSA sets obligations tailored to the size and the types of intermediary services. Specific due diligence obligations apply to hosting services, including online platforms, such as social networks, content-sharing platforms, app stores, online marketplaces, and online travel and accommodation platforms. More far-reaching rules apply to very large online platforms, which have a significant societal and economic impact, including very large online search machines. "Very large online platforms and online search engines" are considered those services which have a number of average monthly active recipients of the service in the Union equal to or higher than 45 million.

At the core of the DSA are the new EU-wide rules on countering illegal content online, including illegal goods and services. The DSA foresees standardised procedures for notifying illegal content, uniform rules on access to complaints and redress mechanisms across the single market, EU-wide standards of transparency of content moderation or advertising systems, and the same risk management obligations for very large online platforms. It should be stressed that the DSA does not stipulate a definition of "illegal content" – this is regulated in other laws either at the EU level or at the Member State level. However, the DSA provides that intermediary services must give effect to orders to act against one or more specific items of illegal content issued by national judicial or administrative authorities, irrespective of where the platform is established. The same obligation applies to orders to provide specific information about one or more specific individual recipients of the service.

Users will be empowered to report illegal content in an easy and effective way. Platforms are also obliged to co-operate with "trusted flaggers" (i.e. entities that have demonstrated particular expertise and competence) to identify and remove illegal content. Very large online platforms need to take additional mitigating measures at the level of their overall organisation to protect users from illegal content, goods and services. Obligations include, for instance, the necessity to trace sellers on online market places in order to help identify illegal goods. Online market places must also randomly check against existing databases whether products or services on their sites have been identified as being illegal.

The DSA emphasises, however, that no general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on providers.

Other rules in the DSA include the following:

- Effective safeguards for users, including the possibility to challenge platforms' content moderation decisions;
- Several transparency measures for online platforms, including on the algorithms used for recommendations and better information on terms and conditions;
- Obligations for very large platforms and very large online search engines to prevent the misuse of their systems by taking risk-based action and by independent audits of their risk management systems;
- Ban on certain types of targeted adverts on online platforms (e.g. profiling children or use of special categories of personal data, such as data on ethnicity, political views or sexual orientation);
- Prohibition of "dark patterns" on online interfaces, which distort or impair the ability of recipients of the service to make autonomous and informed choices or decisions;
- Oversight structure to address the complexity of the online space: EU countries will have the primary role, whereby they need to establish a "Digital Services Coordinator" (whose task is to supervise the application of the DSA). Member States will also be supported by a new European Board for Digital Services. For very large platforms, supervision and enforcement lies with the Commission which has enforcement powers similar to those in anti-trust proceedings.

The DSA was published in the Official Journal of 27 October 2022 (O.J. L 277, 1) and entered into force on 16 November 2022. Its rules will apply in two steps:

- From the date of entry into force, very large online platforms and very large online search engines, which are directly supervised by the Commission as regards systemic obligations, now have three months (until 17 February 2023) to publish the number of active monthly recipients on their websites and report it to the Commission. The Commission will then assess whether the platform reaches the threshold of 45 million recipients and should therefore be designated as very large online platform or search engine (→supra). Once designated by the Commission, these platforms have four months to comply with the DSA and to comply with their obligations that go beyond those applicable to all online intermediary services, including the obligation to provide a comprehensive risk assessment under the DSA;
- For smaller platforms, the rules will apply as of 17 February 2024, i.e. fifteen months after entry into force of the DSA. By then, Member States need to empower their national authorities to enforce the rules to all intermediary services covered by the DSA.

The European Commission informs of the key objectives of the DSA and the main new obligations for online services

and platform on a factpage and provided a summary of the rules in a Q&A memo. On 16 November 2022, the Commission also announced the establishment of the European Centre for Algorithmic Transparency (ECAT). Its role is to support the Commission's supervisory role with in-house and external multidisciplinary knowledge. The Centre will provide support with assessments as to whether the functioning of algorithmic systems is in line with the risk management obligations that the DSA establishes for very large online platforms/search engines to ensure a safe, predictable and trusted online environment. The ECAT is hosted by the Commission's Joint Research Centre (JRC) in close cooperation with the Directorate General Communications Networks, Content and Technology (DG CONNECT).

➤ *Statements*

After the adoption of the DSA/DMA in the EP on 5 July 2022, EP's rapporteur for the DSA *Christel Schaldemose (S&D, DK)* said: "For too long tech giants have benefited from an absence of rules. The digital world has developed into a Wild West, with the biggest and strongest setting the rules. But there is a new sheriff in town – the DSA. Now rules and rights will be strengthened. We are opening up the black box of algorithms so that we can have a proper look at the moneymaking machines behind these social platforms."

Andreas Schwab (EPP, DE), EP's rapporteur for the DMA said: "We no longer accept the 'survival of the financially strongest'. The purpose of the digital single market is that Europe gets the best companies and not just the biggest. This is why we need to focus on the legislation's implementation. We need proper supervision to make sure that the regulatory dialogue works. It is only once we have a dialogue of equals that we will be able to get the respect the EU deserves; and this, we owe to our citizens and businesses".

On behalf of the Czech Council Presidency, *Jozef Síkela*, Czech Minister for Industry and Trade, affirmed after the Council's final approval of the DSA on 4 October 2022: "The Digital Services Act is one of the EU's most groundbreaking horizontal regulations and I am convinced it has the potential to become the 'gold standard' for other regulators in the world. By setting new standards for a safer and more accountable online environment, the DSA marks the beginning of a new relationship between online platforms and users and regulators in the European Union and beyond."

In the wake of the Council's approval of the DMA on 18 July 2022, *Ivan Bartoš*, Czech Deputy Prime Minister for Digitization and Minister of Regional Development, sees the adoption of the DMA as the creation of "large online platforms responsible for their actions. Hereby, the EU will change the online space worldwide. The gatekeepers that the DMA addresses are omnipresent – we all use their services on a daily basis. However, their power is growing to an extent that negatively affects competition. Thanks to the DMA, we will ensure fair competition online, more convenience for consumers and new opportunities for small businesses." (TW/AP)

Legislation to Strengthen Cybersecurity Across the Union: NIS 2 Directive

After approval by the European Parliament on 10 November 2022 and the Council on 28 November 2022, the new Directive (EU) 2022/2555 on „measures for a high common level of cybersecurity across the Union, amending Regulation (EU) No 910/2014 and Directive (EU) 2018/1972 and repealing Directive (EU) 2016/1148 (NIS 2 Directive)" was published in the Official Journal of the European Union on 27 December 2022.

The NIS 2 Directive aims to achieve a common level of cybersecurity across the Union, with a view to improving the functioning of the internal market. The new legislation will impose stricter requirements with regard to risk management, reporting, and information exchange in the area of cybersecurity. It comes in response to the escalating threats brought on by the digital transformation and the rise in cyberattacks. It also comes in response to the Commission's proposal to replace the Network and Information Security (NIS) Directive of 2016, the implementation of which proved challenging and led to fragmentation at various levels throughout the internal market.

The new directive lays down obligations that require Member States to adopt national cybersecurity strategies and to designate or establish competent authorities, cyber crisis management authorities, single points of contact on cybersecurity, and computer security incident response teams (CSIRTs). Essential sectors – the energy, transport, banking, health, digital infrastructure, public administration, and space sectors – will be covered by the new security provisions.

In order to achieve harmonisation, the directive sets out minimum rules for a regulatory framework and lays down mechanisms for effective cooperation among relevant authorities in each Member State. It formally establishes the European cyber crisis liaison organisation network (EU-CyCLONe), which will support the coordinated management of large-scale cybersecurity incidents and crises at the operational level and ensure the regular exchange of relevant information among Member States and Union institutions, bodies, offices, and agencies. The text clarified that NIS2 will not apply to entities carrying out activities in such areas as defence or national security, public security, and law enforcement. The judiciary, parliaments, and central banks are also excluded from its scope.

In order to prevent overreporting and placing an undue burden on the companies covered, the new text considerably simplifies reporting requirements. Member States must implement the provisions into their national law by 17 October 2024. The 2016 NIS Directive will be repealed with effect from 18 October 2024. (AP)

Council's Common Position on Artificial Intelligence Act

On 6 December 2022, the Council adopted its common position (general approach) on the Artificial Intelligence Act. The Commission presented the draft regulation on 21 April 2021 (→eucrim 2/2021, 77), which followed up on the Commission's White Paper on AI from 2020 (→eucrim 1/2020, 8–9). The aim of the Artificial Intelligence Act (AIA) is to turn Europe into a global hub for trustworthy artificial intelligence (AI) and to balance the numerous risks and benefits that the use of AI can provide.

In its common position, the Council narrowed down the definition of an AI system to systems developed through machine learning approaches and logic- and knowledge-based approaches. With this narrowed-down definition, the Council wanted to make the difference between AI and simpler software systems clearer.

Regarding the prohibition of AI practices, the Council decided to extend the prohibition on using AI for social scoring to private actors. Additionally, the provision that prohibits the deployment of AI systems exploiting the weaknesses of a specific group of persons has been expanded to include persons who are vulnerable because of their social or economic situations. As for the use of „real-time" remote biometric identification systems in publicly accessible spaces by law enforcement authorities, the compromise text clarified the objectives according to which such use is considered strictly necessary for law enforcement purposes; law enforcement authorities should therefore be allowed to use such systems as an exception.

In order to prevent AI systems that are not expected to seriously violate fundamental rights or pose other significant hazards from being classified as high risk, the compromise proposal now includes an additional horizontal layer on top of the high-risk classification made in Annex III. In fact, while categorizing AI systems as high risk, it should also be taken into consideration how significant the output of the AI system is in relation to the relevant action or decision to be made. The significance of the output of an AI system is assessed based on whether or not it is purely accessory in respect of the relevant action or decision to be taken.

Many of the requirements involving high-risk AI systems, as provided in Chapter 2 of Title III of the proposal, have been clarified and adjusted in such a way that they are more technically feasible and less burdensome for stakeholders to comply with. In view of the fact that AI systems are developed and distributed through complex value chains, the compromise text includes changes amending the allocation of responsibilities and roles.

The Council also defined the scope of the proposed AI Act and provisions relating to law enforcement authorities in order to exclude national security, defence, and military purposes from its scope. The Council further clarified that the AI Act should not apply to AI systems (and their outputs) used for the sole purpose of research and development or to the obligations of people using AI for non-professional purposes.

A number of amendments have been made to the rules governing the use of AI systems for law enforcement in order to take into account the unique characteristics of law enforcement agencies. Notably, some of the related definitions in Art. 3, such as „remote biometric identification system" and „real-time remote biometric identification system", have been fine-tuned in order to make clear which situations fall under the related prohibition and high-risk use case and which situations do not. The compromise proposal also includes additional changes that, under the right conditions, are intended to guarantee a suitable degree of flexibility in the use of high-risk AI systems by law enforcement authorities and take into account the necessity of maintaining the confidentiality of sensitive operational data in connection with their operations.

In order to simplify the compliance framework for the AI Act, the compromise text contains a number of clarifications and simplifications to the provisions on the conformity assessment procedures. It also substantially modifies the provisions on the AI Board, with the objectives of ensuring its greater autonomy and strengthening its role in the governance architecture for the AIA.

The compromise text further includes a number of changes that increase transparency with regard to the use of high-risk AI systems. It specifies that a natural or legal person who has reason to believe that an infringement of the provisions of the AI Act has occurred may make a complaint to the relevant market surveillance authority and reasonably expect such a complaint to be handled according to the dedicated procedures of that authority.

Next steps: once the EP agreed on its position, trilogue negotiations can start. (AP)

Institutions

Council

Programme of the Swedish Council Presidency

On 1 January 2023, Sweden assumed the Presidency of the Council of the EU for the period from 1 January 2023 to 30 June 2023. Alongside unprecedented support for Ukraine in its defence against the Russian aggression, the Swedish Presidency will focus on security, competitiveness, green and energy transitions, and democratic values and the rule of law. Priorities in the area of Justice and Home Affairs is being given to combating organised crime, terrorism, and violent extremism as well as to the review of the EU's migration and asylum system.

In detail, Sweden plans to intensify

negotiations on the following dossiers:
- The upcoming proposal for a Directive on the transfer of criminal proceedings;
- The proposal for a new Directive on asset recovery and confiscation;
- The revision of the Directive on protection of the environment through criminal law.

Priority will also be given to equipping law enforcement and prosecution authorities in order to effectively combat crimes committed online. The Swedish Council Presidency will continue negotiations on the Prüm II Regulation, focus on implementation of the interoperability programme and move forward with the Directive on information exchange. It will commence negotiations on a new Directive to combat male violence against women as well as intimate partner violence. Lastly, it aims to initiate negotiations on the Commission's proposal to improve possibilities for collecting and using advance passenger information to strengthen border controls and law enforcement. (CR)

Results of the Czech Council Presidency

After France, the Czech Republic held the Presidency of the Council of the European Union from 1 July to 31 December 2022. Sweden is the third Presidency of the current trio of presidencies and commenced its Council Presidency on 1 January 2023 (for the Swedish programme in JHA →separate news item).

While the original programme of the trio of presidencies of the Council of the EU (→eucrim 4/2021, 207) focused on strengthening the Schengen area as well as on money laundering and corruption, the Czech Council Presidency was marked, in particular, by the Russian aggression against Ukraine, especially with regard to energy issues. In the area of of Justice and Home Affairs, the following results could be achieved:

Under the Czech Presidency, the decision to enlarge the Schengen area to include Croatia could be taken (→eucrim news of 14 December 2022). Hence, land border controls between Croatia and neighbouring Schengen countries have been abolished as of 1 January 2023. The Czech Presidency also focused intensively on implementation of the interoperability of large-scale EU information systems in the area of freedom, security and justice.

Progress was achieved in the negotiation of legislation on the following dossiers:
- The proposal for preventing and combating child sexual abuse;
- The proposal for a Directive on protection of the environment through criminal law;
- The proposal for a Directive on the exchange of information between law enforcement authorities of the Member States of the EU.

Finally, political agreement could be reached for the future legal framework on e-evidence (→eucrim news of 7 April 2022). (CR)

European Parliament

70 Years of the European Parliament: Commemoration Celebration

On 22 November 2022, the President of the European Parliament *Roberta Metsola* addressed the Plenary Session in Strasbourg to commemorate the European Parliament's 70 years of existence. 10 September 2022 marked the 70th anniversary of the first meeting of the Common Assembly of the European Coal and Steel Community (ECSC), the European Parliament's forerunner. The ECSC convened in 1952 for the first time and comprised 78 appointed parliamentarians from the national parliaments of each member state. In 1958, following the creation of the European Economic Community and the European Atomic Energy Community, the Common Assembly of the ECSC was enlarged and renamed the ,"European Parliamentary Assembly". In 1962, it adopted the name „European Parliament".

In her opening remarks, President *Metsola* observed that, in the 70 years since the Common Assembly of the European Coal and Steel Community held its inaugural meeting, the „Assembly grew from strength to strength". She added: "The European Parliament has become the only directly elected, multilingual, multi-party transnational parliament in the world. Its 705 directly elected members are the expression of European public opinion (…)".

Her speech was followed by contributions from the prime ministers of the three countries hosting Parliament's seat, namely Belgium's Prime Minister *Alexander de Croo*, Luxembourg's Prime Minister *Xavier Bettel*, and France's Prime Minister *Élisabeth Borne*. All three emphasised the significance of the EP's role and actions.

In line with the prime miniters, most of the seven political group leaders undepinned the credo that only a democratic Europe has a future. While some political group leaders voiced critical and anti-European sentiments, Ms *Metsola* emphasised that this only serves to demonstrate the existence of democracy, pluralism, and pluralistic perspectives in the Parliament. (AP)

European Court of Justice (ECJ)

70th Anniversary of EU Court of Justice

On 4 December 1952, the first members of the Court of Justice took up their duties with the mission of ensuring that „the law is observed", especially „in the interpretation and application" of the Treaties. Based in Luxembourg, the CJEU started as a single court in 1952 called the Court of Justice of the European Coal and Steel Communities. In 1958, it was renamed the Court of Justice of the European Communities (CJEC). The Court of First Instance (which was renamed General Court as from December 2009) was created in 1988, followed by the creation of the Civil Service Tribunal in 2004. In 2009,

with the entry into force of the Treaty of Lisbon, the Court of Justice of the European Union (CJEU) acquired its current name and composition, consisting of two courts: the Court of Justice and the General Court. From 1 September 2016, the Civil Service Tribunal ceased to operate after its jurisdiction was transferred to the General Court. Since its creation in 1952, the CJEU has delivered 42,129 judgments and orders. Today, it has 265 members. A peculiarity of the CJEU is its multilingualism, since each of the official EU languages can be the language of the case and its judgments are translated into the other EU languages.

The 70th anniversary was also at the centre of the special Meeting of Judges that was held from 4–6 December 2022 at the CJEU, bringing together the members of the Court of Justice and of the General Court of the European Union, the presidents of the Constitutional and Supreme Courts of all the Member States, and the presidents of the European Court of Human Rights and of the Court of the European Free Trade Association (EFTA). (CR)

Buildings of CJEU in Luxembourg Renamed

To mark its 70th anniversary (→previous eucrim news), the Court of Justice of the EU decided to give new names to the newest parts of its building complex: *Comenius*, *Montesquieu*, *Rocca*, and *Themis* are now the names of towers which have been designated so far only with the letters A, B, C, and Annex C. Two existing buildings already carry the names *Erasmus* and *Thomas More*.

By bestowing new names to the buildings, the Court continues its approach of appreciating personalities who stood for the values that the CJEU defends. According to the President of the CJEU, Mr *Koen Lenaerts,* the Court wished to "select personalities who were amongst the first defenders of values that the jurisprudence of the Court of Justice and the General Court protects, such as democracy, the rule of law, respect for diversity, including multilingualism, equal access to knowledge and, more broadly, equal opportunities and social justice."

Jan Amos Komenský (1592–1670), known as „Comenius", was a philosopher and pedagogue and the first defender of universal education. *Charles-Louis de Secondat de la Brède, Baron de Montesquieu* (1689–1755), was a lawyer, judge, and writer and one of the first comparativists of law as well as a pioneer of modern sociology. In his work *The Spirit of Law*, he set out the basis for the principle of the separation of powers. *Giustina Rocca* is regarded as the first female lawyer in history. *Themis* is the goddess of justice in Greek mythology. (CR)

Allocation of Fictional Names to CJEU Cases

As of 1 January 2023, in references for preliminary rulings, natural persons are allocated a fictional name suggested by a computerised automatic name generator.

While before July 2018, actual names of the natural persons involved in proceedings before the CJEU had been used to designate the cases, since 1 July 2018, these names have been replaced with initials to better protect the persons' personal data (→eucrim news of 20 October 2018).

Yet, cases for preliminary rulings lodged from 1 January 2023 onwards are allocated fictional names suggested by a computerised automatic name generator in order to make it easier to recall the names of such cases and to cite them both in case law and elsewhere. These fictional names do not correspond to the real name of any party to the proceedings and in principle, do not represent an existing name. The fictional name generator divides words into syllables, which are then randomly combined to produce fictional names. There is a generator for each official language of the EU and additional generators will be developed, where necessary, for languages of third countries.

However, the allocation of fictional names does not affect references for preliminary rulings in which the name of the legal person is sufficiently distinctive. In this case, the name of that legal person is used as the name of the case. Furthermore, it is not applied for direct actions. In direct actions, the CJEU continues to allocate a conventional name, which will appear in brackets after the usual name of the case. The computerised allocation is also not used in requests for opinions and appeals to the CJEU as well as for cases before the General Court. (CR)

CJEU Annual Review 2021

On 17 November 2022, the CJEU published its Annual Review for the year 2021. The Annual Review presents summaries of the most important judgments of 2021 organized by topic. It also includes an overview of the most important developments of the year, featuring images, infographics, and statistics. A selection of judgements is presented that raise legal issues which may be of particular interest to the public. The subject matter of these judgements includes the rule of law, competition, the environment, institutions, taxation, intellectual property, protection of personal data, consumer protection, family law, social security, equal treatment, state aid, social law, and the banking union.

Looking at the figures for 2021, the number of cases brought before the CJEU increased to 1720 cases compared with 1584 in 2020. The rise in cases can be attributed primarily to the significant increase in appeals against decisions of the General Court.

In total, 1723 cases were closed in 2021 and 2541 cases are pending before the two courts. The average duration of proceedings increased slightly to 17.2 months compared to 15.4 months in 2020. This slight increase can be mainly explained by the steps taken to mitigate the effects of the health crisis, including granting parties an additional month to submit their written submissions. The CJEU's budget in 2021 amounted to €444 million.

Looking at the Court of Justice, 838 new cases were brought before the court, including 567 references for preliminary rulings. Most of the references for preliminary rulings came from Germany (106), followed by Bulgaria (58) and Italy (46).

Lastly, the review looks back at the steps taken to ensure closer contact between the CJEU and EU citizens, including a project to provide web streaming of certain hearings before the Grand Chamber. Another project in this regard is the remote visit project: European citizens can visit the Court online under conditions that are as similar as possible to those offered to individuals visiting in person. (CR)

OLAF

Controller of Procedural Guarantees Published Procedure of Handling Complaints

On 28 December 2022, the decision of OLAF's Controller of procedural guarantees on how she will handle complaints was published in the Official Journal (O.J. C 494, 17).

The Controller of procedural guarantees is a new function established by Art. 9a of Regulation 2020/2223 for the purpose of protecting and complying with procedural guarantees and fundamental rights in the context of OLAF's investigations. Persons concerned may lodge complaints with the Controller regarding OLAF's compliance with procedural guarantees as well as on the grounds of an infringement of the rules applicable to investigations by OLAF, in particular infringements of procedural requirements and fundamental rights. The Controller is responsible for issuing recommendations on how to resolve complaints, where necessary suggesting solutions to the issues raised in the complaint. On 4 May 2022, the European Commission appointed *Julia Laffranque*, an Estonian national, as Controller of procedural guarantees for investigations conducted by the European Anti-Fraud Office (OLAF) for a non-renewable mandate of five years.

The Decision at issue includes the implementing provisions for the handling of complaints as provided for in Art. 9b of Regulation 2020/2223. It lays down rules to be followed in relation to the lodging, processing and follow up of complaints submitted to the Controller. The Controller will handle complaints against OLAF in complete independence, including from the Commission, OLAF and the Supervisory Committee. (TW)

Working Arrangement between OLAF and Vietnamese Ministry of Finance

On 14 December 2022, OLAF and the Ministry of Finance of the Socialist Republic of Viet Nam signed a working arrangement, which will facilitate cooperation between OLAF and the Vietnamese customs services. The arrangement also implements the protocol on mutual administrative assistance in customs matters that was concluded between the EU and Viet Nam in the framework of their free trade agreement in 2019.

The arrangement covers the exchange of information between OLAF and Viet Nam Customs in connection with the fight against illicit trade in tobacco products, counterfeit goods, origin fraud, customs valuation fraud, illicit transhipment of waste and endangered species. It also regulates assistance and cooperation in operational activities and training as well as the establishment of contact points on each side. (TW)

Working Arrangement between OLAF and UNHCR

On 2 December 2022, OLAF signed an administrative cooperation working arrangement with the United Nations High Commissioner for Refugees (UNHCR). Even though the arrangement does not establish new obligations under international and EU law, it aims at strengthening and streamlining the existing cooperation between OLAF and the UNHCR, in order to better protect humanitarian aid from fraud. When signing the arrangement, OLAF Director-General *Ville Itälä* and Inspector General of the UNHCR *Anthony Garnett* stressed the importance of the fight against fraud in this area since the EU is the third largest donor to the UNHCR after the United States and Germany, giving €179 million in 2021 to help protect refugees and the forcibly displaced.

The arrangement deals with the exchange of information between the two bodies, cooperation in investigative activities, risk analysis and training.

It is the fourth cooperation arrangement that OLAF signed with UN offices and agencies, the other three being with: the Office of Internal Oversight Services of the United Nations Headquarters; the Office of Audit and Investigations of the United Nations Development Programme (UNDP); the United Nations Office for Project Services (UNOPS). (TW)

Results of Operation Shield III against Illicit Medicine Trafficking and Doping Substances

On 19 December 2022, Europol and OLAF informed of the results of the third edition of the global operation SHIELD. Coordinated by Europol and supported by OLAF, the EU Intellectual Property Office (EUIPO), Frontex, the World Anti-Doping Agency (WADA), and the World Customs Organisation (WCO), police and customs authorities in 28 countries targeted misused or counterfeit medicines, doping substances, illegal food or sport supplements and counterfeit COVID medical supplies.

During the operation, which was carried out between April and October 2022, authorities were able to take medicines and doping substances worth over €40 million off the market. 349 suspects were arrested or reported to judicial authorities. 59 organised crime groups were dismantled, 10 underground labs shut down, and 89 websites taken offline.

The operation revealed that illicit medicine trafficking is seemingly as lucrative as or even more lucrative than narcotics trafficking for organised crime groups. While criminal networks are still exploiting opportunities offered by the COVID-19 pandemic, trafficking with medicines and protective equipment has met a significant decrease. Reasons for this decrease are a closer monitoring of the topic by law enforcement and the offering of vaccines free of charge by states thus creating an unfavourable market for criminals.

OLAF supported operation SHIELD III by leading targeted actions from national customs authorities. Customs authorities of 14 EU Member States intercepted over 430.000 tablets – mainly medicine for erectile dysfunction and hormonal supplements – and some 650 vials of various medicines. For the previous edition of operation SHIELD →eucrim 4/2021, 209. (TW)

OLAF Recommended Recovery of €19.5 Million Fraudulently Acquired in Water Projects

In November 2022, OLAF concluded investigations into fraud and irregularities in relation to several water infrastructure and wastewater modernisation projects. Two cases played in Bulgaria, one in Romania, and one in Hungary. In total, OLAF recommended the recovery of over €19.5 million. Fraud patterns included the following:

- Plant that was constructed but never started operating;
- False documents submitted in public tender procedures;
- Use of unchanged and ineffective treatment technology;
- Implementation of the project by substandard work.

OLAF pointed out that the EU funded projects were meant to supply clean water and protect citizens and the environment from contamination, but instead some projects led to dangers for public health and the environment, including the pollution of local rivers and streams. (TW)

OLAF Revealed Irregularities in Hungarian Waste Management Project

In November 2022, OLAF closed investigations into an EU-funded waste management project in Hungary. OLAF recommended that the European Commission recover almost €11 million spent from the EU's budget. The EU supported the establishment of a plant to produce compostable waste in an efficient and environmental-friendly way. OLAF's investigations revealed that several project targets and objectives were not fulfilled and that even dangers were caused by the operators. In addition, due to regular breakdowns of the waste treatment technology, large quantities of untreated biological waste were disposed of illegally. Consequently, OLAF also issued a so-called administrative recommendation for the improvement of checks on the compliance of certain aspects of EU-funded projects and on the fulfilment of their targets. (TW)

Operation OPSON XI: Almost 15 Million Litres of Illicit Beverages Pulled Off the Shelves

On 17 November 2022, OLAF and Europol informed of the results from the meanwhile eleventh operation OPSON, which was carried out between December 2021 and May 2022. Operation OPSON targets counterfeit and substandard food and beverages, and food fraud in general (for operations in previous years →eucrim 3/2021, 143; eucrim 2/2020, 80 and eucrim 2/2019, 90).

During the operation almost 15 million litres of beverages (including alcohol and wine) and almost 27,000 tonnes of fake food were seized. In total, around 74,000 checks were carried out, 80 arrest warrants issued, and over 175 criminal cases and 2,078 administrative cases opened. Law enforcement authorities in 25 European countries and in the United States were successful in disrupting eight criminal networks.

In its press release, Europol presented some examples of food fraud in countries involved in the operation. Operation OPSON XI was coordinated by OLAF, Europol, the European Commission Directorate-General for Health and Food Safety (DG SANTE), European Commission Directorate-General for Agriculture and Rural Development (DG AGRI), the European Union Intellectual Property Office (EUIPO), and Interpol. (TW)

European Public Prosecutor's Office

European Chief Prosecutor Complained about Ireland's Non-Cooperation

On 23 November 2022, European Chief Prosecutor *Laura Kövesi* addressed a letter to the Commission on Ireland's refusal to cooperate with the EPPO. The information letter is based on Recital 16 of Regulation (EU) 2020/2092 on a general regime of conditionality for the protection of the Union budget. Accordingly, the Commission should take into account EPPO's reports when assessing a breach of the principles of the rule of law by an EU country (which could lead to the interruption, reduction, termination or suspension of payments from the EU budget to the country).

Even though Ireland does not take part in the enhanced cooperation scheme of the EPPO, Ireland is obliged to cooperate on the basis of the existing EU instruments, in particular the 2000 Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and the Framework Decision on the European Arrest Warrant.

Kövesi pointed out that Ireland has persistently refused to execute EPPO's requests for judicial cooperation since it does not recognise the EPPO as a competent authority for the application of existing instruments for judicial cooperation, as notified by the participating Member States. As a result, the EPPO is unable to obtain evidence from Ireland in cross-border cases. Thus, the EPPO's ability to counter criminality affecting the Union budget is systematically hin-

dered, *Kövesi* wrote. The EPPO currently has six ongoing investigations involving Ireland.

Reports by the EPPO under Recital 16 of Regulation 2020/2092 were previously sent to the Commission also in relation to Slovenia and Poland (→eucrim 1/2022, 16–17 and 22). (TW)

EPPO-LEX – New EPPO Website

The new website EPPO-LEX (www.eppo-lex.eu) – the legal research library on the European Public Prosecutor's Office – provides easy access to all types of legal documents concerning the EU's new criminal law enforcement body. The website was initiated by *Dr. Hans-Holger Herrnfeld* (former senior public prosecutor and Head of Division at the German Federal Ministry of Justice) and is supported by numerous practitioners and academics with a wealth of expertise in European criminal law and the workings of the EPPO. The website is designed to help users find their way through the complex legal framework guiding the operation of the EPPO. It is centred around an "Annotated Regulation" containing the text of the EPPO Regulation (Council Regulation (EU) 2017/1939) and enhanced with links to other relevant documents (e.g. other EU legal instruments, EPPO College decisions, CJEU judgments, etc.) and editorial remarks. The website also contains an "EPPO Atlas" with country-specific information, such as the implementing legislation of the Member States, the notifications required under Art. 117 of the EPPO Regulation, and Working Arrangements between the EPPO and individual national authorities.

The website also contains a general introduction to the EPPO. This text is an updated version of the introduction to the Commentary on the European Public Prosecutor's Office, authored by *Herrnfeld/Brodowski/Burchard* and published by Nomos in 2021. Lastly, EPPO-LEX contains a curated bibliography on legal literature regarding the EPPO. The website editors welcome any suggestions for amendments or improvements to the website, which can be sent to editor@eppo-lex.eu.

Dr. Sebastian Trautmann

Laura Kövesi Adresses German Parliamentarians in Speech

On 9 November 2022, European Chief Prosecutor *Laura Kövesi* spoke at the Legal Affairs Committee of the German Bundestag. She reported on the achievements of the EPPO since the start of its operational activity on 1 June 2021, emphasising that the EPPO worked very efficiently when comparing input and output. While the budget for the EPPO was less than €45 million in 2021, the EPPO was able to seize more than a quarter of a billion of Euro in the same year. "By defending the financial interests of the European Union, the EPPO is in reality bringing money back into national budgets", she added.

Kövesi gave examples on how the EPPO has improved the protection of the EU's financial interests, but stressed that it can only do so if the Office is properly equipped. She pointed out that the workload is expected to increase extensively in the next three years, which brings the existing legal framework to its limits. She also said that the full potential of the EPPO has not been deployed yet, considering that the current level of detection of EU fraud is still unsatisfactory. Given that several national authorities failed to report any suspicion of serious VAT and customs fraud, the EPPO has recently engaged in establishing an elite corps of highly qualified financial fraud investigators who can effectively tackle transnational crime with specialised expertise.

She criticised that the EPPO is still treated as a decentralised EU agency, which does not correspond to its status as an independent judicial EU body and which should be corrected by way of a legislative amendment. Further issues of review concern the following:

- Bureaucracy reduction regarding the administration of European Delegated Prosecutors;
- Clarification of modalities of EPPO's cross-border investigations.

Ultimately, she favoured an extension of EPPO's competence to the violation of EU restrictive measures, which needs a dissuasive, effective and uniform EU response. (TW)

EPPO's Operational Activities November–December 2022

Eucrim regularly gives an overview of EPPO's operational activities. The following covers the period from the beginning of November to the end of December 2022 (for previous overviews →eucrim 3/2022, 176–177; eucrim 2/2022, 97–98; eucrim 1/2022, 17–18; and eucrim 4/2021, 210–211) and is an abridged version of the online publication of this news item:

- 29 December 2022: The EPPO in Zagreb, Croatia, indicts four persons and two legal entities for their involvement in a large procurement fraud in 2017/2018.
- 22 December 2022: A tribunal in Palermo, Sicily, issued the first verdict in an EPPO case in Italy. 10 persons were sentenced to imprisonments for having established an organised tobacco smuggling scheme.
- 19 December 2022: Investigations by the EPPO against an organised criminal group that fraudulently obtained EU and national funds and operated in Austria and Romania leads to the indictment of 23 persons before the criminal tribunal in Bucharest, Romania.
- 19 December 2022: EPPO's office in Bucharest, Romania, indicts five persons and four companies for having fraudulently received funds for the development of the Danube Delta.
- 15 December 2022: The EPPO requests the lifting of immunity of the two Greek MEPs *Eva Kaili* and *Maria Spyraki* for "fraud detrimental to the EU budget, in relation to the management of the parliamentary allowance, and in particular concerning the remuneration of Accredited Parliamentary Assistants".
- 14 December 2022: Upon request by the EPPO, Italian customs seizes 28 new electric cars involved in a smuggling scheme.
- 8 December 2022: In the framework of investigations into a major VAT fraud

scheme, led by the EPPO in Munich, Germany, one suspect is arrested in Romania and data, emails, paperwork etc. is seized.

- 7 December 2022: In an investigation on a major VAT fraud scheme led by the EPPO, the Portuguese Tax Authority executes several search warrants in the cities of Aveiro, Porto and Lisbon and arrests three suspects.
- 7 December 2022: The EPPO files an indictment against the mayor of Brăhășești, Romania, for attempted subsidy fraud and forgery of official documents.
- 5 December 2022: The EPPO has the premises of the French National Assembly and premises in Bordeaux searched in an investigation against a former French MEP for misappropriation of funds.
- 30 November 2022: The EPPO conducts searches in several homes and premises in Czechia in a case of suspected subsidy fraud and illegal advantage in public procurement.
- 29 November 2022: The EPPO reports on one of its first and major cross-border operations against VAT fraud – the Operation "Admiral".
- 24 November 2022: The Guardia di Finanza seizes assets worth over €24 million against companies and individuals in Sicily and Southern Italy in EPPO investigations against two criminal groups for VAT evasion.
- 24 November 2022: Following a request by the EPPO and the issuance of a judicial decree, the Guardia di Finanza freezes the bank accounts of an Italian company suspected of fraud involving EU and regional funds of over €70 000.
- 23 November 2022: Dutch authorities seize thousands of computers, mobile phones, perfumes, and banking accounts of a group that allegedly committed VAT fraud.
- 22 November 2022: The Guardia Civil in Valencia, Spain, carries out searches and seizes 14 luxury cars in the framework of an EPPO investigation into VAT fraud.
- 15 November 2022: Under the direction of the EPPO, the French customs authorities carry out several searches in France against an organised criminal group that smuggled fashion items.
- 10 November 2022: Within an investigation led by the EPPO, the Guardia di Finanza seizes banking accounts of an Italian company which allegedly committed aggravated fraud involving EU funds up to €230,000.
- 2 November 2022: An EPPO investigation into the evasion of customs duties leads to the seizure of electronic devices and accounting documents in Slovakia. (TW)

E-Guide on EPPO Proceedings for Defence Practitioners

The Academy for European Law (ERA), together with the European Criminal Bar Association (ECBA) developed an online guideline on EPPO proceedings with special focus on the defence perspective. The guideline aims at giving a short and precise overview of the most important issues in EPPO proceedings for defence practitioners. Next to a general overview of the EPPO, the guideline sets out defence rights in EPPO proceedings, looks at the admissibility of evidence and dismissal of cases, and explains proceedings for judicial review of EPPO cases.

It has been developed within the framework of the EU-funded project "Training on the EPPO – Working with the EPPO at decentralised level", which has compiled training materials/background information and carried out training seminars for investigators, prosecutors, judges and defence lawyers.

The guideline for defence practitioners is freely accessible and currently available in English. German and French translations are about to follow. (TW)

Europol

EU Member States Froze Closer Ties between Europol and Israel

According to media reports, representatives of EU Member States in the Council JHA working party blocked the approval of an agreement between Europol and Israel, which would allow the exchange of personal data for the purpose of combating serious crime and terrorism. Negotiations on the draft agreement between the Commission and Israel were finalised at the end of September 2022.

It would have been a further step in strengthening operational police cooperation after Europol concluded a working agreement with Israel in 2018 allowing for the exchange of strategic information only (i.e. excluding the exchange of personal data between the law enforcement bodies →eucrim 2/2018, 87).

According to German newspaper reports, 13 out of 27 EU Member States refused to advance with the new agreement in a meeting of the Council working party in November 2022. They particularly disapproved that the agreement would have allowed the use of personal data in the territories occupied by Israel after 1967. Several delegations seemingly warned that this would set "a dangerous precedent with considerable political repercussions" fearing that Israel could use "European data" to increase control over the occupied territories.

Concerns that the agreement would be implemented by the new incoming Israeli government with a new public security minister ranking of the extreme right was another reason for blocking the new agreement between Europol and Israel in the Council. Several MEPs voiced similar concerns. (TW)

Statewatch Report on New Europol Mandate

On 10 November 2022, Statewatch published a report examining the new powers granted to Europol under its amended Regulation that entered into force on 28 June 2022 (→eucrim 2/2022, 98–100). The report is targeted at civil soci-

ety, elected officials, and anyone seeking to better understand the role of Europol under its amended legal framework.

Under the title „Empowering the police, removing protections: the new Europol Regulation", the report sets out the agency's new powers regarding the following:

- Scope of action;
- Purposes and scale of data processing and data categories;
- Sources of data;
- Interoperability;
- Supervision and scrutiny.

Furthermore, Statewatch's report provides a table illustrating the evolution of Europol's tasks from 2016 until today. Lastly, the report offers an overview of personal data processing by Europol (either for cross-checking or for strategic/thematic analysis, operational analysis, or to facilitate the exchange of information). This overview shows which categories of data can be processed by Europol for which category of person, i.e. suspects and convicts, and "likely criminals" as well as contacts and associates, victims, witnesses, and informants.

While the report acknowledges the establishment of new supervisory functions such as the new Fundamental Rights Officer at Europol, the authors underline their concerns over their finding that the agency has garnered greater power while being subject to less independent supervision and scrutiny.

The report has been published alongside an interactive "map" of EU agencies and "interoperable" policing and migration databases, designed to aid understanding and further research on the data architecture in the EU's area of freedom, security and justice. (CR)

Europol Supports EPPO in Breaking up VAT Fraud Scheme

On 29 November 2022, a major VAT fraud scheme worth an estimated €2.2 billion was uncovered by the European Public Prosecutor's Office (EPPO). The bust was supported by Europol and its European Financial and Economic Crime Centre (EFECC) as well as by law enforcement agencies from 14 EU Member States. The investigation, which had already begun in April 2021, revealed a VAT fraud scheme based on the sale of electronic goods through a suspected company in Portugal and close to 9000 other legal entities, involving more than 600 natural persons located in over 30 countries. Europol provided analytical support, helped obtain financial information from Financial Intelligence Units across Europe, and deployed six experts to assist in the investigative measures at the national level during the Action Day. (CR)

Guidelines for First Responders in Child Sexual Abuse and Exploitation Cases

On 18 November 2022, Europol published the public version of a new set of Guidelines for First Responders in Child Sexual Abuse and Exploitation Cases. The guidelines are targeted at persons that, in their professional capacity, are among the first to be informed about a (potential) case of child sexual abuse and are required to (re)act in order to prevent further harm to the child. While such persons may include those working in education and medicine, the guidelines are especially targeted at persons working in law enforcement.

The guidelines start with an overview of the rights of victims, with a special focus on children being particularly vulnerable. They emphasize the need to not generalize a situation, to avoid any discrimination or possible devaluation of the victims' rights, and to have the best interest of the child as a guiding principle and primary concern throughout all activities carried out by the first responder. In a second step, the guidelines provide scenario examples aiming to help first responders understand how to support such victims and what they should keep in mind and pay attention to. Detailed information is given on the so-called "5Fs" in trauma, i.e. five different automatic and instinctive responses to fear and trauma that can be seen in the context of sexual assault: fight, flight, freeze, flop, and friend.

The restricted version of the guidelines has been embedded into the European Cybercrime Training and Education Group's (ECTEG) e-learning tool for first responders (eFIRST). For more information, interested members of law enforcement can reach out to Europol's European Cybercrime Centre (EC3). (CR)

European Data Protection Supervisor

TechSonar Report 2022–2023

In September 2021, the European Data Protection Supervisor (EDPS) launched the foresight-related project called „TechSonar". With TechSonar, the EDPS hopes to be able to better determine which technologies are worth monitoring in order to be better prepared for a more sustainable digital future in which the protection of personal data is efficiently guaranteed (→eucrim news of 3 June 2022). In November 2022, the EDPS published the second edition of its TechSonar Report for the years 2022–2023.

In the first chapter, the 2022–2023 report describes the methods applied to conduct such a foresight-related analysis and which emerging technologies were selected for the report:

- Fake news detection systems;
- The metaverse;
- Synthetic data;
- Federated learning;
- Central Bank Digital Currency (CBDC).

For each of these technologies, possible positive and negative impacts on data protection are outlined.

Regarding fake news detection systems, negative impacts projected by the report are, for instance, error rates in the accuracy of applied algorithms and an increase in automated decision-making. Positive impacts include raised awareness and media literacy at the consumer level, with a corresponding effect on data protection, as well as reduced defa-

mation of individuals through effective fake news detection.

Looking at the metaverse, the report finds a series of negative foreseen impacts for data protection such as deeper profiling and constant monitoring, especially of special categories of personal data like physiological responses, emotions, and biometric data.

For synthetic data – artificial data that is generated from original data and a model that is trained to reproduce the characteristics and structure of the original data – the report finds positive potential technological impacts to enhance privacy and to improve fairness through less bias, depending on the quality of the original data on which the model is based.

Issues identified with regard to federated learning (i.e. the development of machine learning models where only model parameters are shared between the parties instead of entire datasets) concern the efficiency of communication and synchronization between the devices, in order to ensure that training tasks will work within a heterogeneous set of devices and address risks concerning data heterogeneity and privacy leaks.

Lastly, in the field of Central Bank Digital Currency (a new form of money that exists only in digital form), positive future impacts on data protection include expectations for more control over personal data and security as well as enhanced possibilities for anonymity throughout the payment process. Concerns include the fear that the concentration of data in the hands of central banks could lead to increased privacy risks for citizens, that wrong design choices might worsen data protection issues involving digital payments, and that lacking security might turn into severe lack of trust on the part of users.

For all technologies, the report provides dashboards offering figures, statistics, and information on relevant documents, authors, organizations, and projects as well as heatmaps for numerous countries. (CR)

Cooperation between EDPS and ENISA

On 30 November 2022, the European Data Protection Supervisor (EDPS) and the European Union Agency for Cybersecurity (ENISA) signed a Memorandum of Understanding (MoU) to further enhance their strategic cooperation. Under the MoU, both organisations will join efforts in capacity building and awareness-raising activities and cooperate on policy-related matters concerning topics of common interest. Furthermore, a strategic plan will promote the awareness of cyber hygiene, privacy and data protection among EU institutions, bodies, offices, and agencies (EUIBOAs). (CR)

Frontex

Council Gives Green Light for New Frontex Agreements with Western Balkans

On 18 November 2022, the Council of the EU authorised the opening of negotiations with Albania, Bosnia and Herzegovina, Montenegro, and Serbia to broaden agreements on Frontex cooperation. While the already existing agreements between Frontex and Albania, Montenegro, and Serbia allow Frontex to carry out joint operations and deploy teams in the regions of those countries bordering the EU, future new agreements – negotiated under the Agency's new mandate – would allow it to assist these countries in their efforts to manage migratory flows, counter illegal immigration, and tackle cross-border crime throughout their territories. Furthermore, Frontex staff could exercise executive powers, such as border checks and the registration of persons. Following authorization by the Council, the Commission is now able to start negotiations with the four countries. (CR)

Frontex's Annual Implementation Report 2021

On 18 November 2022, Frontex published its Annual Implementation Report for the year 2021. The report provides dashboards, statistics, numbers, and figures on the agency's work with regard to the pool of forced-return monitors, the contribution of statutory staff to the standing corps, Member States' participation in the standing corps through long-term secondment as well as through short-term deployments, the agency's acquisition or leasing of technical equipment, and its technical equipment pool (Arts. 51, 55, 56, 57, 58, 63, and 64 of Regulation (EU) 2019/1896). Furthermore, it gives a summary on the implementation of the Rapid Border Intervention conducted upon the request of Lithuania at its external borders in 2021. The last chapter looks at the development of the agency's own capabilities, where swift changes are needed (i.e. to adapt to an increasing virtual environment), its management of operational capabilities, challenges with regard to the operationalisation of the standing corps and the design and deployment of uniforms, choices to be made regarding equipment with weapons, and how to build a European Equipment Capability. The report describes issues with translation and interpretation, activities undertaken to adapt to future technical needs, and how to „go green" while keeping the agency's performance effective.

In its conclusions, the report underlines that the year 2021 marked the first year of full implementation of Regulation (EU) 2019/1896. Hence, 2021 marks a milestone in the agency's achievements in terms of developing, planning, and deploying human and technical capabilities, especially in view of the extraordinary circumstances brought about by the outbreak of COVID-19.

For the future, the report emphasizes the need for all European border and coast guard stakeholders to remain flexible in order to stay up to date on the various needs arising from operational activities. (CR)

Pilot Project for Self-Registration at Borders

Frontex, together with the French Ministry of the Interior, is currently testing

a website for the impact of self-registration on overall processing times and the potential of a self-serviced mobile application to further improve border control. Test participants are non-EU citizens coming to the EU for a short stay. After completion, the outcome of the tests and the website itself will be made available to the European Commission and Member States, should they wish to use this tool in the future. (CR)

New Officers Join the European Standing Corps

In the second week of December 2022, another 323 standing corps officers graduated from their basic training and are now full-fledged members of the European standing corps. The European Border and Coast Guard standing corps is tasked with helping to make the Schengen Area stronger and more resilient. It includes Frontex personnel and officers from the Member States who are sent to the agency for long- or short-term missions. In addition, a reserve is part of the corps that can be activated in times of crisis. The corps began operating in 2021 and will comprise 10,000 officers by 2027. The new officers will soon join their approximately 2000 colleagues who are currently working in operations along the EU's external borders and in non-EU countries. (CR)

Specific Areas of Crime / Substantive Criminal Law

Protection of Financial Interests

Council Adopted Historic Decision on Budget Protection vis-à-vis Hungary – Conditions also for RRF Payments

spot light

In the dispute between the EU and Hungary over the application of the conditionality mechanism, the Council decided on 16 December 2022 to withhold €6.3 billion of EU funds for Hungary. The conditionality mechanism allows measures to be taken to protect the Union budget and the EU's financial interests if certain breaches of the rule of law by an EU Member State adversely affect the sound financial management of the EU budget (→eucrim 3/2020, 174–176).

The Council decision provides that EU funds amounting to €6.3 billion should not be disbursed to Hungary for the time being until the country has implemented the necessary remedial measures to prevent the risk of misappropriation and embezzlement of the funds through corruption and improper procurement in the country. The Council thus follows a corresponding proposal by the Commission of September 2022 (→eucrim 3/2022, 183). Previously, the European Parliament had also vehemently demanded that the EU must freeze funding to Hungary due to the persistent deficiencies in the areas of rule of law and the fight against corruption in the country.

In its proposal of September 2022, the Commission recommended the freezing of €7.5 billion (equivalent to 65% of the commitments for three operational programmes under cohesion policy). The Council now decided to reduce the amount to said €6.3 billion (equivalent to 55% of the commitments of the programmes concerned) and pay out part of the funds. The Council justified this with Hungary's efforts to remedy the problems and its "degree of cooperation". However, the funds cannot be paid out in full unless the remedial measures initiated by the Hungarian government have been fully implemented.

The Council also stressed that it mainly relied on the facts and circumstances as assessed and substantiated by the Commission. At the end of November 2022, the Commission concluded that Hungary failed to adequately implement central aspects of the 17 remedial measures as committed to. According to the Commission, Hungary has not satisfactorily reacted to identified deficiencies, weaknesses, limits and risks that are widespread and intertwined in the Hungarian public administration system and beyond, in particular reforms in sectoral legislation have not remedied the situation.

The case with Hungary represents the first application of the conditionality mechanism, which is based on Regulation 2020/2092. Proceedings against other states have not yet been initiated.

Hungary is also under pressure to receive money from the EU's Recovery and Resilience Facility (RRF →eucrim 3/2021, 151). Even though the Commission endorsed Hungary's Recovery and Resilience Plan (RRP) on 30 November 2022, payments under the RRF were made subject to the condition that Hungary fully and correctly implements 27 "super milestones". These milestones include the effective implementation of all 17 remedial measures under the general conditionality mechanism (→supra), measures to strengthen judicial independence, and the full implementation of several audit and control measures. (TW)

EP Calls for Revision of Current Multiannual Financial Framework

MEPs pushed for a reform of the EU budget to respond more effectively to evolving needs, address funding gaps, increase flexibility and extend the capacity to respond in a crisis. This demand for revising the current multiannual financial framework (MFF) was made in a resolution entitled "Upscaling the 2021–2027 multiannual financial framework: a resilient EU budget fit for new challenges", which was adopted in plenary on 15 December 2022.

The resolution includes various proposals on how the headings of the current MFF should be revised in order to react to the unprecedented crises followed by the war in Ukraine. It is emphasised that the current MFF has already been "pushed to its limits" less than two years after it was adopted, a situation aggravated by the unforeseeable events of 2022. It is pointed out that the MFF is "simply not equipped, in terms of size,

structure or rules, to respond quickly and effectively to a multitude of crises" and "leaves the Union ill-equipped to respond to any potential future crises and needs".

MEPs call on the Commission to proceed with a legislative proposal for a comprehensive, ambitious revision of the MFF regulation. The MFF must be scaled up "to ensure a stronger and more agile EU budget which meets the highest standards of transparency and democratic accountability". Therefore, an increase in the MFF ceilings, as well as an increase in and redesign of budgetary flexibility is requested.

The resolution includes the main parameters for a revised MFF, including the need for flexibility and crisis response in the EU budget. Ultimately, MEPs underline that the assessment of new features of the MFF must also lay the ground for the post-2027 MFF in support of a more resilient EU budget. (TW)

EU Budget for 2023 Adopted

The Council and the European Parliament (on 22 November 2022 and 23 November 2022, respectively) formally approved the EU budget for 2023. In total, next year's budget amounts to €186.6 billion in commitment appropriations and €168.6 billion in payment appropriations. This represents an increase of +1.1% in commitments and +1% in payments compared to the 2022 budget.

The traditionally largest items in the budget next year are again the cohesion programmes for regional development at €62.9 billion and agricultural policy at €53.6 billion. Most of the increase (about €280 million) is aimed at increasing funding for Ukraine and neighbouring countries such as Moldova. Other funds are dedicated to the energy transition.

In agreeing on the 2023 budget, the EU institutions also agreed to endorse the Commission's proposals to amend the 2022 budget later this year. Once the approval process is completed, the Commission will be able to, among other things, further promote and support Ukraine, help Member States more affected by the influx of migrants and Ukrainian refugees, and address other challenges facing the EU from a broader macroeconomic perspective.

MEPs were particularly satisfied with the negotiations on the 2023 budget, since they secured additional funding compared to the Commission's draft and the Council's position. This particularly concerns the following areas:

- Consequences of the war in Ukraine: *inter alia*, +€120 million for Erasmus+ to support students and teachers from Ukraine, +€150 for humanitarian aid, and +€36.5. million for the Asylum, Migration and Integration Fund;
- Energy and climate: *inter alia*, +€10 million for the Horizon Europe research programme, and +103.5 million for the Connecting Europe Facility, which funds the construction of high-quality and sustainable trans-European transport and energy networks;
- Consequences of the COVID-19 pandemic (health and better preparedness), culture and values: *inter alia*, +€41.4 million for the EU Civil Protection Mechanism (UPCM), and +€3 million for the Rights and Values Programme.

The European Public Prosecutor's Office will receive additional funding of €2.5 million.

Note: The EU budget distinguishes between two appropriations: *Commitments* are the costs of all legal obligations contracted during the current financial year, possibly having consequences in subsequent years; *payments* cover expenditure actually paid out during the current year, possibly to implement commitments entered into in previous years. (TW)

EP Endorses Introduction of New Own Resources

On 23 November 2022, the European Parliament adopted by 440 to 117 votes, with 77 abstentions, a legislative resolution approving the proposal for a Council decision amending Decision (EU, Euratom) 2020/2053 on the system of own resources of the European Union. If the Council adopts the decision (unanimity required) and all EU Member States ratified it, the EU will have three new income sources: revenues from emissions trading (ETS); the resources generated by the proposed EU carbon border adjustment mechanism (CBAM); and a share of the reallocated profits of very large multinational companies (based on Pillar 1 of the OECD/G20 agreement).

MEPs also stressed that the "Commission needs to take further timely actions if the proposed new own resources are not adopted or do not generate the anticipated level of revenue". In addition, the Commission should present a proposal for a second set of new own resources by the end of 2023, which could include a financial transaction tax and a digital levy.

The new own resources will be needed, among other things, to repay debts from borrowing under the NextGenerationEU framework. This is to prevent inappropriate cuts in EU programmes and an excessive increase in Member States' contributions to the EU budget.

On 6 December 2022, the Czech Council Presidency informed about the state of play of the negotiations on the new own resources legal framework in the ECOFIN Council. It clarified that the proposal for a revision of the Own Resources Decision will be tackled after the adoption of the sectoral proposals for instruments, i.e. the ETS and CBAM. (TW)

ECA Gives its Opinion on Recast of Financial Regulation

On 31 October 2022, the European Court of Auditors (ECA) published its opinion on the Commission proposal for a recast of the EU's Financial Regulation (→eucrim 2/2022, 105). The opinion follows up an ECA opinion on the Commission's proposal of July 2022 and ECA's recent report on blacklisting (→eucrim 2/2022, 105–106).

The proposed recast aims, *inter alia*, to make the EU's basic rules governing

the establishment, implementation and control of the EU budget better aligned with the Multiannual Financial Framework (MFF) package, to introduce improvements and simplifications to better respond to crises, and to improve the protection of the EU's financial interests.

In its opinion, the ECA welcomed several of the proposed amendments, such as the further digitalisation in the fight against fraud and the Early Detection and Exclusion System being operated under shared management with Member States. The auditors called to mind, however, that the scope for excluding untrustworthy counterparties will remain greater in direct management.

They also welcomed that programmes and activities will be implemented without compromising the climate and sustainability goals, as recommended in a previous Special Report.

However, the ECA also raises several critical points of the Commission's proposal. For example, the proposed recast of the EU's Financial Regulation does not address the insufficient reporting on the Commission's debt management, which is particularly relevant since there is currently no coherent framework on the achievements of the dept management in relation to the NextGenerationEU and other borrowing programmes.

The ECA also calls for more transparency and accountability in connection with financial instruments and budgetary guarantee. Lastly, the proposals to shorten the time frame for ECA's audit activities on annual accounts should not be pursued at this stage, as the quality and rigour of statements of assurance could suffer as a result. (TW)

Council Conclusions on Cohesion Policy

On 22 November 2022, the Council adopted conclusions on cohesion policy. The conclusions provide a general assessment of the role of cohesion policy in fostering regional development throughout the EU, deal with the main implementation challenges, and give guidance on the way forward.

Considering that expenditure for cohesion is traditionally the biggest part of the EU budget, the Council reminds that cohesion policy is the main policy focused on the socio-economic development of EU regions striving to decrease disparities among them as set out in Art. 174 TFEU.

The Council highlights the added value of cohesion policy, which is, according to the conclusions, agile, modern and long-term**,** and has an important leverage effect**,** generating an estimated €2.7 of additional GDP at the EU level for each €1 spent. The shared management as a key feature for the effective implementation of cohesion policy and its positive impacts are also emphasised. In addition, policy considerations concern the following:

- The 2014–2020 programming period;
- Cohesion policy as tailor-made response to recent crises;
- The 2021–2027 programming period;
- The territorial aspect of cohesion policy;
- Cohesion policy post-2027.

Ultimately, the conclusions stress the importance of protecting the financial interests of the EU. Regarding the current 2021–2027 programming period, the Council stresses the importance of preventing and combating fraud and corruption. It calls on the Member States and the Commission to closely cooperate on these topics and to enhance the efficiency of control systems. Moreover, the Commission is called on to continuously substantiate the impact of cohesion policy, determine the impact of cohesion policy investments, and analyse the multiple results of cohesion policy. (TW)

Corruption

EP Reaction to "Qatargate"

On 15 December 2022, MEPs adopted a resolution calling for the broader need for transparency and accountability in the European institutions. The resolution lays down the consequences that the EP would draw following allegations of bribes paid by the states of Qatar and Morocco to MEPs, former MEPs and EP staff in exchange for influence at the EP. This scandal, which is also dubbed "Qatargate", was revealed after the Belgian police had carried out raids against the suspects on 9 December 2022. They resulted, *inter alia*, in the arrest of Greek MEP *Eva Kaili* who served Vice-President of the EP.

In the resolution, MEPs note "with concern that internal monitoring and alert mechanisms of the EU institutions have dramatically failed to detect ongoing corruption". They denounce the alleged corruption attempts by Qatar, which would constitute serious foreign interference in European democracy. As an immediate measure, MEPs decided to suspend all work on legislative files relating to Qatar, particularly concerning visa liberalisation and the EU aviation agreement with Qatar.

They also call for both a special committee and an inquiry committee. The special committee should be tasked with identifying potential flaws in the EP's rules on transparency, integrity and corruption and making proposals for reforms, building on the work of the Committee on Constitutional Affairs and best practices in other parliaments. Other measures should include the following:

- Putting one EP vice-president in charge of integrity and fighting corruption and foreign interference in Parliament;
- Adopting legislation on an ethics body;
- Introducing a cooling-off period for former MEPs to avoid the negative effects of the so-called phenomenon of revolving doors;
- Establishing a ban at EU level on donations from third countries to MEPs and political parties;
- Strengthening the EU transparency register by increasing the budget and the number of staff and by expanding it to representatives of non-EU countries;

- Strengthened monitoring of friendship groups;
- Aligning the EU staff regulation with the Whistleblowers Directive.

Ultimately, the resolution emphasises the role of the European Public Prosecutor's Office (EPPO), the EU Agency for Criminal Justice Cooperation (Eurojust), Europol and the European Anti-Fraud Office (OLAF) in the fight against corruption. It calls for the capacities of and cooperation between the EPPO and OLAF to be strengthened further as well as for common anti-corruption rules applicable to MEPs and staff of EU bodies. (TW)

Commission Appreciates Romania's Anti-Corruption Efforts and Closes CVM

On 22 November 2022, the Commission announced that it intends to no longer monitor Romania's progress in judicial reforms and the fight against corruption under the Cooperation and Verification Mechanism (CVM).

The CVM was established upon accession of Romania and Bulgaria to the EU in 2007 in order to remedy certain shortcomings that existed in both countries, in the areas of judicial reform and the fight against corruption, and, concerning Bulgaria, the fight against organised crime. These weaknesses were thought to prevent an effective application of EU laws, policies, and programmes. The Commission regularly verified the countries' progress against specific benchmarks, which were included in the CVM.

In its latest 2022 CVM report, the Commission acknowledges Romania's significant efforts to implement the outstanding recommendations through new legislation, policies and tools to develop the judiciary and combat corruption. The Commission concludes that the progress made by Romania is sufficient to meet the CVM commitments made at the time of its accession to the EU. As a consequence, all benchmarks can be satisfactorily closed.

The Commission stressed that monitoring will continue under the annual rule of law cycle which applies to all EU Member States and covers, among other things, the issues of justice systems and anti-corruption frameworks. It also pointed out that the CVM can only be finally closed if reforms are sustainable and irreversible. Therefore, Romania must continue its work on ongoing reforms, such as on the Criminal Codes, and to ensure that all adopted reforms, including the recent justice laws, are implemented effectively and in accordance with EU law and European standards.

Report

New Challenges in Fighting Expenditure Fraud

Report on the Conference in Prague, 23–25 November 2022

The pandemic and its fallout have affected our work and lives in many ways over the last three years. But how are these developments, and the recovery plans that are gradually being implemented, impacting the work of anti-fraud authorities focusing on the expenditure side of the European Union budget?

This question was addressed by delegates at the high-level conference "*Prevent – Detect – Investigate; New Challenges in Fighting Expenditure Fraud and Irregularities*" held by the European Anti-Fraud Office (OLAF) and the Czech Ministry of Finance in Prague in November 2022, with financial support from the Union Anti-Fraud Programme. The event offered an opportunity for key stakeholders to review the strategies available by which to address new patterns of fraud in the post-pandemic world. The conference brought together more than one hundred representatives of the relevant European bodies (European Commission, OLAF, EPPO, European Court of Auditors) and national authorities managing, auditing, or investigating the EU expenditure.

The EU's long-term 2021–2027 budget and the EU's recovery funds total some €2 trillion – a very large amount that needs to be protected from fraud and other irregularities. Transactions have become digital and cross-border schemes have become increasingly frequent and complex. Perpetrators of organised crime are attempting to expand their illicit business endeavours into fraud against EU funds. Anti-fraud authorities need to constantly adapt to the changing anti-fraud landscape in order to stay ahead of the game.

The national authorities of the EU's Member States are in the frontline when it comes to fighting fraud. Delegates explored the entire cycle of the fight against fraud:

- How to prevent fraud from happening in the first place;
- How to detect any attempted fraud;
- How to investigate any suspicions of fraud or irregularity, so that misused funds can be recovered and fraudsters do not go unpunished.

The vital role that existing risk-scoring and blacklisting tools can play in sharing crucial information was also discussed. In addition, the increasing use of artificial intelligence to estimate – and, ideally, to predict – the occurrence of errors or suspicion of fraud will allow for quicker corrective action.

These measures require an effective digitalisation of data on projects, companies, and transactions; the collection of fraud indicators and red flags from various actors; and cross-checks of information with all relevant partners. A common theme that emerged during the discussions was the importance of gathering, reporting, sharing, and analysing data – particularly in a fraud environment that has become increasingly digital, international, and complex.

Participants stressed the need for cooperation at local, national, and EU levels for a strong, effective front against fraudsters. There was also an exchange of views on how to create innovative approaches to assessing the achievements of targets and milestones related to funding from the EU's Recovery and Resilience Facility, which has introduced a new, different spending mode for EU funds. Other areas covered included the role that auditors can play in fraud detection as well as the experiences and best practices of several national and EU actors in fighting fraud.

Georg Roebling, OLAF

ECA Journal

A Jump to a Resilient Europe?

On 13 December 2022, the European Court of Auditors (ECA) published a special issue in its journal series with various articles and interviews on the EU Recovery and Resilience Facility (RRF).

The RRF is a response to the severe financial, economic and social consequences of the COVID-19 pandemic and intends to be a means of strengthening institutional responsibility in EU Member States for their reforms. To receive funding for reforms, countries must meet milestones and targets as a condition for payment. The assessment for this requires a focus that goes beyond efficiency and includes a degree of flexibility.

Several articles in the journal deal with the conditions, the innovative financing of the facility through bonds, the need for a control and audit strategy, and the role of rule of law instruments. For the ECA, the establishment of the RRF raises the challenge of how to investigate potential fraud and double funding risks. The experts provide insights into strategic issues, the impact on regularity and economic audits, training needs, operational consequences and possible scenarios for future expenditure and audit. (TW)

Before reaching a final decision to end the monitoring under the CVM, the Commission will consult the Council and the European Parliament and take into account their observations. The CVM for Bulgaria was already lifted in 2019. (TW)

Money Laundering

CJEU: No Unrestricted Access to Data of Beneficial Owners

spot light

On 22 November 2022, the CJEU, sitting in for the Grand Chamber, declared the current provision of the Anti-Money Laundering Directive invalid by which the general public had nearly unrestricted access to data of beneficial owners.

➤ *Facts of the case and question referred*

The cases at issue (Joined Cases C-37/20 and C-601/20 (*WM and Sovim SA v Luxembourg Business Registers*)) concerned the implementation of Art. 30(5) first subparagraph, point (c) of Directive 2015/849 as amended by Directive 2018/843 (the Fifth Anti-Money Laundering Directive, 5AMLD) into Luxembourgish law. In accordance with the 5AMLD, the law had designed the Luxembourgish Register of Beneficial Ownership (RBO) in such a way that information on the beneficial ownership of registered entities can be retained and made available; access to these data is open to any member of the general public. On a case-by-case basis and in certain exceptional circumstances, a registered entity or a beneficial owner could request the administrator of the register, the Luxembourg Business Registers (LBR), to restrict access to specific authorities or entities.

A beneficial owner and a company proceeded against decisions taken by the LBR, which denied their applications to restrict the general public's access to information concerning them. The referring *tribunal d'arrondissement de Luxembourg* (Luxembourg District Court, Luxembourg) considered the disclosure of such information capable of entailing a disproportionate risk of interference with the fundamental rights of the beneficial owners concerned and asked the CJEU, *inter alia*, to verify the validity of the Union provisions on access to information on beneficial owners.

➤ *The CJEU's ruling and reasoning*

The CJEU first observed that, since the data concerned include information on identified individuals, namely the beneficial owners of companies and other legal entities incorporated within the Member States' territory, the access of any member of the general public to these data affects the fundamental right to respect for private life. In addition, making these data available to the general public involves the processing of personal data. Making personal data available to the general public in such a manner constitutes a serious interference with the fundamental rights enshrined in Arts. 7 and 8 Charter of Fundamental Rights (CFR), irregardless of the subsequent use of the information communicated.

As part of examining the justification of the interference, the CJEU confirmed that the provision on the general public's access to information respects the principle of legality, does not breach the essence of the fundamental rights, pursues an objective of general interest, and can be considered appropriate to attain the objective.

However, the CJEU found that the interference cannot be considered to be limited to what is strictly necessary. In this context, the CJEU compared the amended provisions with the former provision, which required persons or organisations to demonstrate a "legitimate interest" before access to information on beneficial owners could be granted. According to the CJEU, the fact that it may be difficult to provide a detailed definition of the circumstances and conditions under which such a "legitimate interest" exists does not constitute a reason for the EU legislature to provide for access to that information by the general public.

Moreover, the CJEU held that the interference at issue is not proportionate *stricto sensu*. Accordingly, the optional provisions allowing Member States to make information on beneficial ownership available on condition of online registration and to provide, in exceptional circumstances, for an exemption from access to that information by the general public, respectively, are, in themselves, not capable of demonstrating either a proper balance between the objective of general interest pursued and the fundamental rights enshrined in Arts. 7 and 8 CFR or the existence of sufficient safeguards enabling data subjects to protect their personal data effectively against the risks of abuse.

Therefore, the amended point c) of the first subparagraph of Art. 30 of the current Anti-Money Laundering Directive, which obliges Member States to ensure that information on the beneficial ownership of companies and other legal entities incorporated within their territory be accessible to any member of the general public in all cases, is invalid.

➤ *Put in focus*

The CJEU emphasised that the EU legislature failed to strike the right balance between the fight against money laundering/terrorist funding and the sufficient protection of personal data. The judgment triggers the need for all national legislatures to re-examine their implementation of the 5AMLD on the point raised by the Luxembourgish case at issue. In Luxembourg and the Netherlands, access to the registers of beneficial owners is to be restricted in the short term. (TW)

CJEU Ruled on Due Diligence Obligations under 4AMLD

On 17 November 2022, the CJEU delivered a judgment that interprets several provisions of Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing (4th Anti-Money Laundering Directive, 4AMLD). The case C-592/20 (SIA "Rodl & Partner") addressed questions as to when enhanced due diligence measures must be taken, how information on the customer's activities is to be obtained, and how information on the sanctions applied to obliged entities is to be published.

➤ *Facts of the case and questions referred*

In the case at issue, Rodl & Partner, a Latvian company that provides services for accounting, bookkeeping, auditing, and tax consultancy, appealed a fine imposed by the Latvian state tax administration. The latter mainly argued that Rodl & Partner had not properly carried out and documented an assessment of the risk of money laundering and terrorist financing in relation to two customers (a foundation and a commercial company) that have links to the Russian Federation.

First, in relation to Art. 18 4AMLD, the referring District Administrative Court, Latvia, had doubts as to whether any non-governmental organisation (NGO) should be regarded as a case of higher risk and, for this reason, be subject to enhanced due diligence criteria. The Court questioned whether it is proportional to be quasi automatically required to categorise a customer as representing a higher degree of risk if the customer is a non-governmental organisation and the person authorised and employed by the customer is a national of a high corruption-risk third country (in the present case, the Russian Federation).

Second, in relation to Art. 13(1) 4AMLD, the referring court sought clarification as to whether a copy of the contract concluded between the customer and a third-country company must be produced by the obliged entity (here the Latvian bookkeeping company) vis-à-vis the competent tax administration.

➤ *The CJEU's reply to the first question*

As regards the first question, the CJEU stated that Art. 18 4AMLD provides for three cases in which enhanced customer due diligence must be applied:

- Specific cases referred to in Arts. 19–24 4AMLD;
- Deals with natural persons or legal entities established in the third countries identified by the Commission as high-risk third countries;
- Other cases of higher risk identified by Member States or obliged entities.

The CJEU further stated that the two first scenarios are not relevant in the present case (Russia is only considered a country with a high risk of corruption but not of money laundering). Regarding the third scenario, the CJEU observed that – in light of Art. 5 4AMLD – Member States have wide discretion to provide for enhanced due diligence obligations and to define both cases of higher money laundering risk and due diligence obligations themselves. This is only limited by the principles of Union law, in particular the principles of proportionality and non-discrimination.

Against this background, the CJEU concluded that the 4AMLD does not require an obliged entity to automatically attribute a high level of risk to a customer solely because that customer is an NGO, because one of the employees of that customer is a national of a third country with a high risk of corruption, or because a business partner of that customer (but not the customer itself) is linked to such a third country. However, a Member State may identify in national law such circumstances as factors indicating a potentially higher risk of money laundering and terrorist financing, which obliged entities must take into account in risk assessment of their customers, provided that these factors are compatible with Union law, in particular with the principles of proportionality and non-discrimination. As a result, it is now up to the Latvian court to decide whether the Latvian legislation provided for such factors.

➤ *The CJEU's reply to the second question*

As regards the second question, the CJEU examined the scope of due diligence measures to be applied by obliged entities under Art. 13(1) 4AMLD, which must be interpreted in the context of several other provisions in the Directive. In conclusion, the CJEU observed that, when exercising customer due diligence, the 4AMLD does not require the obliged entity to obtain from the customer a copy of the contract concluded between the latter and a third party. However, the obliged entity must submit to the competent national authority other appropriate documentation demonstrating, on the one hand, that it has analysed the transaction and established business relationship carried out between that customer and the third party and, on the other hand, that it has duly taken this into account when applying the due diligence required in

view of the identified risks of money laundering and terrorist financing.

Above and beyond these two important issues, the CJEU also took a position on questions of when due diligence obligations should be applied (Art. 14(5) 4AMLD) and how accurate information on an issued decision on a breach of national money laundering rules must be published (Art. 60(1)(2) 4AMLD). (TW)

Council Position on Central Pieces of AML Package

On 7 December 2022, the Council adopted its position on the Anti-Money Laundering Regulation and the new (sixth) Anti-Money Laundering Directive. Once adopted, the acts will form the "AML rulebook", together with a Regulation on information accompanying transfers of funds and certain crypto-assets. They were proposed by the Commission in July 2021 (→eucrim 3/2021, 153 et seq.). The Council agreed on the following major issues:

- Extending the scope of the AML/CFT Regulation to the entire crypto sector. This means that crypto-asset service providers (CASPs) will be obliged to carry out due diligence measures on their customers if they perform transactions amounting to €1000 or more;
- Extending the scope of the AML/CFT Regulation to third-party financing intermediaries, persons trading in precious metals, precious stones and cultural goods;
- Applying the FATF's lists on high-risk third countries with strategic deficiencies in their AML/CFT regime without the Commission having to redo the identification process;
- Harmonising and making more transparent beneficial ownership rules, including clarifications regarding multi-layered ownership and control structures;
- Enabling journalists and civil society organisations that are connected with the prevention and combating of money laundering and terrorist financing to have access to information in beneficial ownership registers.

Furthermore, the Council reached agreement on rules on the powers of supervisors, a minimum set of information to which all financial intelligence units should have access, and improved cooperation among authorities.

Once the European Parliament (EP) adopted its position, trilogue negotiations on the AML/CFT Regulation and the AML/CFT Directive can start. The EP is expected to adopt its position in spring 2023. (TW)

CEO and BEC Fraud Dismantled

At the beginning of December 2022, a Joint Investigation Team made up of authorities from Romania, Italy, and the Ukraine – with the support of Eurojust and Europol – dismantled an organised crime group (OCG) suspected of money laundering and CEO and BEC (Business E-Mail Compromise) fraud. In total, judicial and law enforcement authorities from more than 20 countries inside and outside the EU contributed to the investigation that, on its action day on 9 December 2022, resulted in the arrest of nine suspects and the seizure of €5 million. The amount of the money transferred by the OCG is estimated at over €70 million. (CR)

Tax Evasion

CJEU: Notification Obligation for Lawyer-Intermediaries under DAC 6 Invalid

On 8 December 2022, the CJEU (sitting in for the Grand Chamber) declared a provision of Directive 2011/16 invalid, according to which a lawyer must inform other intermediaries involved in a tax arrangement of his/her duty to report.

The judgment is based on Case C-694/20 (*Orde van Vlaamse Balies & Others*), in which the Belgian Constitutional Court referred the question on the validity of the provision to the CJEU following legal actions brought by Belgian lawyers' associations. The question concerns Art. 8ab(5) of the Directive 2011/16 on administrative cooperation in the field of taxation, which was inserted by Directive 2018/822 (commonly known as DAC 6). According to this provision, Member States may take the necessary measures to give intermediaries the right to a waiver from filing information on a reportable cross-border aggressive tax arrangement where the reporting obligation would breach the legal professional privilege under the national law of that Member State. However, in such circumstances, intermediaries must be required to notify, without delay, any other intermediary or, if there is no such intermediary, the relevant taxpayer of their reporting obligations under paragraph 6 of Art. 8ab of the amended Directive 2011/16.

The judges in Luxembourg held that the obligations for a lawyer-intermediary subject to legal professional privilege to notify without delay other intermediaries of their reporting obligations entails an unjustifiable interference with the right to respect for communications between lawyers and their clients, guaranteed in Art. 7 of the Charter of Fundamental Rights, given that the third-party intermediaries would have to disclose not only the arrangement but also the identity of the lawyer and the client to the tax authorities. According to the CJEU, the notification obligation on a lawyer subject to legal professional privilege is not necessary in order to attain the objective of the Directive, which is to combat potentially aggressive tax practices and to prevent tax evasion and tax fraud, but not to check whether lawyers are justified in relying on their confidentiality. (TW)

Commission Tabled VAT Reform Package

On 8 December 2022, the Commission tabled a comprehensive legislative package for a reform of the EU's value added tax (VAT) system. The aim is to make the EU more resilient to VAT fraud, improve revenue in VAT, and keep pace with technological advances,

the digital economy changes in business models and globalisation. The proposals will entail amendments to three pieces of EU legislation: the VAT Directive (2006/112/EC), Council Implementing Regulation (EU 282/2011) and the Council Regulation on Administrative Cooperation (EU 904/2010).

At the same day, the Commission also released new figures on the so-called "VAT Gap", i.e. the difference between expected VAT revenues and those actually collected. Accordingly, the VAT Gap is estimated at €93 billion in the EU in 2020. This means that €3000 of VAT revenue is lost every second in the EU. Conservative estimates submit that one quarter of this figure can be directly attributed to VAT fraud linked to EU trade. VAT fraud or missing trader fraud/carousel fraud remains a major problem in the EU.

According to the Commission's proposal, the main measure to better combat VAT fraud would be a move to real-time digital reporting based on e-invoicing for businesses that operate cross-border in the EU. This new system would enable Member State authorities to quickly receive the necessary information in order to check cross-border transactions. At the same time, this measure would reduce administrative and compliance costs. The Commission expects that the move to e-invoicing will help reduce VAT fraud by up to €11 million per year.

Further measures of the reform package include adjustments of VAT rules for online platforms in the areas of passenger transport and short-term rental of accommodation. In order to improve the level playing field between online services and conventional accommodation/transport services, the platform operators themselves will be made responsible for the collection and payment of VAT, if this is not done by the individual service providers (e.g, because an individual person as supplier is not aware of his/her VAT liability or a small business is usually not required to register for VAT). The Commission expects that this change can bring in up to €6.6. billion per year in additional VAT revenues for Member States.

The third pillar of the reform is an extension of the "One Stop Shop" model. In the future, traders who operate cross-border can opt to register in only one Member State for their sales to consumers across the EU and for their transfers of goods for storage in other Member States. As a result, the trader would be enabled to fulfil his/her VAT obligations via a single online portal in one single language, even though sales are EU-wide. This will end the current practice that businesses need to register for VAT separately in other Member States. The proposal also makes it mandatory for online platforms to register for the Import One Stop Shop, which will further improve VAT compliance.

Furthermore, the Commission proposed targeted simplifications that would reduce burdens for SMEs and improve exchanges of information between tax and customs authorities.

It is now up to the Council to debate the proposals and to reach agreement. The European Parliament and the Economic and Social Committee are consulted. (TW)

Strengthening of Code of Conduct for Business Taxation

On 8 November 2022, the EU finance ministers agreed on a revised code of conduct (a political commitment with an intergovernmental nature) for business taxation in order to tackle harmful tax competition, tax evasion, and tax avoidance in the EU. When assessing unfair tax practices within the EU, Member States are to examine a wider range of tax measures as a result of the amendment. The EU finance ministers' agreement to strengthen the Code of Conduct on Business Taxation was welcomed by the Council.

The Czech Minister of Finance, *Zbyněk Stanjura*, said on this occasion: "We confirmed today our commitment to a fairer tax environment in the EU by reinforcing the rules we apply when tackling harmful tax practices in an evolving economy. Our experts in taxation constantly look out for harmful tax practices. Since starting its work in 1997, the code of conduct group succeeded in eliminating around 140 harmful tax practices within the EU. The code of conduct of business taxation has not been amended since 1997 and today's agreement further improves its effectiveness also in the light of the recent international tax reform."

The concept of "tax features of general application" is one of the concepts that the updated code of conduct introduces. Previously, only preferential measures (such as special regimes or exemptions from the general taxation system) were considered. Under the new regulations, tax features with a broad range of application will also be included in their scope. Such features will be regarded as harmful if they lead to double non-taxation or the double/multiple use of tax benefits. (AP)

Conclusions on Progress of Code of Conduct Group in 2022

On 6 December 2022, the Council approved the conclusions on the progress achieved by the Code of Conduct Group (CoCG) on Business Taxation during the Czech Presidency.

The Council welcomed the progress achieved by the Code of Conduct Group during the Czech Presidency and reaffirmed the importance of the recent reform and strengthening of the Code of Conduct for business taxation (→previous eucrim news). It further welcomed the progress achieved by the CoCG with regard to the revision of the EU's list of non-cooperative jurisdictions and invited the Group to continue monitoring and keep up an effective dialogue with jurisdictions. The Council asked that the Group carry on its efforts to add beneficial ownership as a fourth transparency criterion. It also took note of further work on the assessment of applications by Member States of defensive measures in the tax area as provided

by the guidance on coordination of national defensive measures.

The CoCG was established in 1998 to assess tax measures that may fall within the scope of the Code of Conduct for business taxation. The Code (a non-binding instrument originally agreed in 1997 and revised in 2022) aims to promote fair tax competition, both within the EU and beyond. The CoCG is composed of high-level representatives of the Member States and the European Commission. It is chaired by a representative of a Member State, serving a mandate of two years. (AP)

Organised Crime

Hit Against Super-Cartel of Drugs Trafficking

Between 8 and 19 November 2022, an operation conducted by law enforcement authorities from Belgium, France, the Netherlands, Spain, the United States, and the United Arab Emirates led to the take-down of a „super-cartel" controlling one third of cocaine trade in Europe. With the support of Europol's intelligence and analysis, the two-year investigation resulted in raids of the cartel's command-and-control centre and its logistical drugs trafficking infrastructure in Europe, the arrests of 49 suspects in both territories (the EU and Dubai), and the seizure of more than 30 tonnes of drugs.

Europol supported the global operation by several measures, *inter alia*, by developing reliable intelligence on the drug trafficking cartel, identifying encrypted communication networks of the cartel, hosting multiple coordination meetings, and facilitating coordination in real time among all the partners involved. (CR)

Hit Against Online Investment Fraud

Supported by Eurojust, authorities in Italy and Albania formed a Joint Investigation Team to take down an online investment fraud scheme involving the use of cryptocurrencies. The Organised Crime Group (OCG) had been operating from a call centre in Tirana. In a first step, victims were contacted by telephone and offered immediate financial gain against a small investment. In a second step, the offenders proposed advantageous investments in cryptocurrencies with zero risk to the victims. In the third step, by using PC remote control software, the perpetrators obtained access to the victims' personal home banking pages and managed to convince them to invest their entire economic capital in the scheme. Lastly, once the victims had uncovered the deception, they were contacted by yet other members of the OCG, who convinced them to make additional payments to recover the lost funds. The scheme has caused a total damage of an estimated €15 million. (CR)

Hit against Poly-Criminal Network

An action day on 22 November 2022 resulted in the arrest of 44 individuals suspected of belonging to a high-risk criminal network. Criminal organisations had been working together to carry out large-scale poly-criminal activities in and outside the EU, including drug trafficking, money laundering, and illegal enrichment among other crimes. Through two Joint Investigation Teams supported and financed by Eurojust and an operational taskforce at Europol, judicial and law enforcement authorities from 11 countries (EU Member States, Norway, and the USA) ran the complex investigation, effectively taking down this criminal network. The criminal network is considered one of the most dangerous in the EU and operated across borders and between continents. (CR)

Counterfeiting & Piracy

Trademarks & Counterfeiting: Eurojust Report on National Legislation and Court Practice

On 13 December 2022, Eurojust published a report on national legislation and court practice with regard to the counterfeiting of goods. It addresses the minimum requirements set out in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) and other international and EU instruments in relation to the criminal offence of trademark counterfeiting.

After an introduction to trademarks and counterfeiting, the report presents national legislation from France, the Netherlands, and Poland. In addition, it explains how goods, including packaging, can be susceptible to the crime of counterfeiting.

The report finds considerable differences in national legislations in their definition of the crime of counterfeiting and its subjective elements. Similar differences are found for the infringement of trademarks. According to the report, prosecution of these cross-border crimes in such a diverse legal landscape is highly challenging for prosecutors. The low level of sanctions for these crimes also further derogates the will to pursue criminals outside of national borders.

The report is an outcome of the Intellectual Property Crime Project, which is carried out by Eurojust with the support of the European Union Intellectual Property Office (EUIPO). The project aims to enhance cooperation and deliver an efficient and coherent response to intellectual property crimes at the EU level. (CR)

Major Hit Against Counterfeiting

A Europol-coordinated operation to take down websites offering counterfeit goods or involved in online piracy resulted in the takedown of 2526 websites, the disconnection of 32 servers used to distribute and host illegal content for 2294 television channels, and the shutdown of 15 online shops selling counterfeit products on social media sites. Furthermore, 127,365 counterfeit products worth €3.8 million were seized. They included clothes, watches, shoes, accessories, perfumes, electronics, and phone cases. The recurring operation "Operation in Our Sites", which is sup-

ported by Eurojust and Interpol, targets, investigates, and seizes websites hosting a variety of illicit content. In this year's 13th execution of the operation „In Our Sites", which took place from 1 May to 14 November 2022, law enforcement agencies from 27 countries all over the world participated, including non-EU countries, such as Brazil, Colombia, the United Kingdom and the United States. (CR)

Trafficking in Human Beings

Commission Proposed Tougher Rules to Combat THB

On 19 December 2022, the Commission proposed strengthening the rules to prevent and combat trafficking in human beings (THB). The Commission pointed out that every year over 7000 people become victims of human trafficking in the EU. However, it can be expected that many victims remain undetected. Most victims are women and girls, but more and more men are also affected – especially in the area of labour exploitation. In addition, the online dimension in exploiting human beings has considerably increased in recent years. These developments call for an update of Directive 2011/36 on preventing and combating trafficking in human beings and protecting its victims. The proposed reform of the Directive aims at:

- Increasing security and legal certainty;
- Strengthening the protection of victims;
- Establishing stronger sanctions against companies involved in crimes of human trafficking.

Among other things, the updated Directive would provide that forced marriages and illegal adoptions also fall under the concept of exploitation, which means that Member States will have to criminalise such conduct. Member States must also ensure that the defined criminal offences of human trafficking and exploitation make reference to acts committed by means of information and communication technologies. This modification aims at enabling national authorities to better investigate and prosecute offences committed in whole or in part online, reaffirming the EU's focus on the digital aspects of THB. Another change in substantive criminal law relates to the obligation to criminalise the knowing use of services provided by victims of THB.

Legal persons held responsible for offences related to THB are also to be sanctioned. These sanctions include, for example, exclusion from public benefits, aid or subsidies, or the temporary or permanent closure of establishments where the offence was committed. In the most serious cases, the companies may be disqualified from commercial activities, be placed under judicial supervision or be subject to judicial winding-up.

In addition, the early identification of victims is to be improved through the creation of formal national referral mechanisms. Lastly, the Commission wishes to formalise an annual EU-wide data collection on THB, conducted and published by Eurostat. The aim is to improve the collection of reliable and comparable data in order to map criminal trends and law enforcement challenges. The European Parliament and the Council must now examine the proposal.

The evaluation and possible review of the 2011 Anti-Trafficking Directive is one of the key priorities for the Commission, as laid down in the EU Strategy on Combatting Trafficking in Human Beings in the period of 2021–2025 (→eucrim 2/2021, 92). In parallel to the legislative proposal for an amendment of the 2011 Anti-Trafficking Directive, the Commission published its fourth report on progress made by the EU in preventing and combating THB. The report describes key patterns and challenges in addressing THB, outlines the main anti-trafficking actions from 2019 to 2022, and provides an analysis of statistics on THB in the EU for the period of 2019–2020. (TW)

Cybercrime

Takedown of Spoofing Website

In November 2022, a coordinated action between judicial and law enforcement authorities from ten countries (including several EU Member States and third countries, such as Australia, Canada, Ukraine, the United Kingdom and the United States), supported by Eurojust and Europol, led to the takedown of a major spoofing website. The website had enabled fraudsters impersonating trusted corporations or contacts to access sensitive information, in effect causing an estimated worldwide loss in excess of €115 million (while earning over €3.7 million in 16 months). Through the coordinated action, 142 users and administrators of the website were able to be arrested across the world and the website and server be taken offline by US and Ukrainian authorities. (CR)

Environmental Crime

EP Demands Reinforced Protection of Wildlife

On 5 October 2022, the European Parliament (EP) adopted a resolution on the fight against illegal trade in wildlife fauna and flora. It lays down the EP's position on the EU's strategic objectives for the 19th meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in Panama from 14 to 25 November 2022.

The EP stressed that, despite the fact that human activity is directly responsible for the unprecedented global decline in biodiversity, it is still possible to stop and reverse current trends in biodiversity loss. Concerns were voiced over the growth of the market for exotic pets and over the range of affected species, both within the EU and internationally. MEPs wished to go further than reducing illegal trade in CITES-listed wildlife species and eliminate it altogether, so that there would only be legal and sus-

tainable trade in wild fauna and flora by 2025.

The MEPs also emphasised that the 2019 global assessment report of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES) identified a series of weaknesses in CITES, such as compliance and the enforcement of bans and restrictions on trade in protected species, due to a lack of capacity and resources dedicated by the parties. There is a need for science-based quotas combating corruption and demanding reduction. MEPs also called the EU and its Member States to adopt strict measures, including dissuasive sanctions, if countries do not comply with CITES, namely when it is found that a party is undermining the effectiveness of the Convention and not effectively stopping illegal or unsustainable exploitation and trade.

Moreover, efforts are needed to stop the involvement of organised crime groups. As a result, transnational wildlife crime should be recognised as serious organised crime under the UN Convention against Transnational Organized Crime (UNTOC). Additionally, the EU Member States must strengthen cross-border cooperation and coordination with various relevant international authorities and institutions. Lastly, the EP encouraged the revision and continuation of the EU action plan against wildlife trafficking. (AP)

Revised EU Action Plan to End Wildlife Trafficking

As announced in the Biodiversity Strategy for 2030, the Commission adopted a revised EU Action Plan on 10 November 2022 in order to put an end to wildlife trafficking. The revised plan, which builds on the original Action Plan adopted six years ago, will direct EU efforts in combating wildlife trafficking (until 2027) and follows on the European Parliament's recently adopted resolution on the fight against illegal trade in wildlife fauna and flora (→previous eucrim news).

In the updated Action Plan, four primary priorities stand out:

- Preventing wildlife trafficking and addressing its underlying causes by lowering consumer demand for wildlife that is being trafficked illegally, promoting sustainable livelihoods in the source nations, and combating corruption on all levels;
- Strengthening the legal and policy framework against wildlife trafficking through engagement with corporate sectors active in the wildlife trade, aligning EU and national policies with international commitments, and referring to the most recent research in this field;
- Effectively enforcing laws and policies to combat wildlife trafficking by increasing the rate of illegal activity detection within the EU, putting an emphasis on capacity-building along the entire enforcement chain, promoting coordination and cooperation within and between Member States, and stepping up efforts to address the online aspects of wildlife trafficking;
- Strengthening the global partnership for source, consumer, and transit countries in the fight against wildlife trafficking by boosting the capacity and coordination between the Member States, EU enforcement actors, and important non-EU nations.

The EP's resolution of October 2022 and the Commission's revised Action Plan mark the EU's viewpoint ahead of two major international conferences: the 19th meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in Panama (14 to 25 November 2022) and the UN Biodiversity Conference COP15 in Montreal (7–19 December 2022).

It was emphasised that the EU is a major hub for global wildlife trafficking. The reported value of the illegal wildlife trade in the EU was a minimum of €4.7 million in 2019. EU Member State authorities consistently seize wildlife in various commodity types ranging from medicinal, corals, reptiles, birds, plants, and mammals. (AP)

Procedural Criminal Law

Procedural Safeguards

Commission Recommendation on Detention Conditions in the EU

spot light

On 8 December 2022, the European Commission presented a recommendation on detention conditions.

It responds to the JHA Council's demand of October 2021 to improve detention conditions in the EU countries and to enhance the use of alternative measures instead of EU legislation (→eucrim 2021, 158–159). This demand particularly came in the context of the negative impact of differences in detention conditions between the EU Member States on mutual trust and judicial cooperation in criminal matters. Especially with regard to mutual recognition and the operation of the European Arrest Warrant (EAW), the differences sparked a hot debate. Since 2016, several courts in EU Member States delayed or refused the execution of EAWs on grounds of real risk of breach of fundamental rights (nearly 300 cases) after the CJEU's landmark judgment in the *Aranyosi/Căldăraru* case of April 2016 (→eucrim 1/2016, 16).

The recommendation now tabled also builds on preparatory work done by the Commission, in particular its non-paper of September 2021 that identified relevant aspects on material detention conditions and procedural rights in pre-trial detention resulting from existing international standards (→eucrim 2021, 158–159).

Next to general principles, the recommendation provides guidance on minimum standards for procedural rights of suspects and accused persons subject to pre-trial detention as well as minimum standards for material detention conditions. The Commission recommends, for instance, minimum standards for cell size, outdoor time, nutritional and health conditions, and reintegration initiatives. Pre-trial detention should be a last resort and regularly reviewed.

The recommendation also tackles the issue of preventing radicalisation in prisons. Authorities could take measures to prevent terror suspects from having direct contact with vulnerable detainees. Other specific measures are suggested with regard to women and girls, LGBTIQ, foreign nationals, persons with disabilities and other vulnerable detainees, such as adequate access to professional interpretation services.

The recommendation was accompanied by a statistical overview of the different detention situations in the Member States. The overview shows substantial divergences among Member States in relation to important aspects of pre-trial detention and material detention conditions, such as:

- The maximum time limit for pre-trial detention as laid down in the national laws of different Member States ranges from less than 1 year to more than 5 years; six Member States do not provide for a maximum time-limit in their national law;
- The average length of pre-trial detention in 2020 was between 2.4 and 12.9 months;
- Eight Member States had a prison population density of more than 100 inmates per 100 places;
- The costs of imprisonment vary between €6.50 and €332.63 per day per detainee.

The recommendation came into effect immediately and is not binding to the Member States. The Commission encouraged the Member States, however, to take the necessary steps at national level to align practices with the recommendation. (TW)

Data Protection

CJEU Ruled on Scope and Concepts of Law Enforcement Data Protection Directive

spot light

On 8 December 2022, the CJEU delivered one of the first comprehensive judgments on the interpretation of Directive 2016/680 which protects personal data in law enforcement activities ("LED"). It also gave important hints on the delineation between the LED and the General Data Protection Regulation (GDPR – Regulation 2016/679).

The judgment is based on a reference for preliminary ruling by a Bulgarian court, which has to decide on a legal action brought by VS. VS complained about the processing of his personal data by the public prosecutor (Case C-180/21, *VS v Inspektor v Inspektorata kam Visshia sadeben savet*).

The first question related to the interpretation of the purpose limitation principle in the LED. In essence, the Bulgarian court wanted to know whether there is a "processing for any of the purposes set out in Art. 1(1) LED other than that for which the personal data are collected" (Art. 4(2) LED) if the public prosecutor initially collected data on the data subject (here: VS) for the purposes of the detection and investigation of a criminal offence where the data subject was considered to be a victim but later used the data for the purpose of prosecuting that person.

According to the judges in Luxembourg, it can already be inferred from the wording of Art. 1(1) LED, read in conjunction with Article 4(2) LED, that, where personal data have been collected for the purposes of the "*detection*" and "*investigation*" of a criminal offence and have subsequently been processed for the purposes of "*prosecution*", that collection and processing serve different purposes. Context and objectives pursued by the LED's rules confirm this conclusion. As a result, the conditions of Art. 4(2) LED for the processing of "other purposes" must be fulfilled. It is up to the referring court to assess these conditions, i.e., first, the controller must be authorised to process such personal data for such a purpose in accordance with EU or Member State law; second, processing must be necessary and proportionate to that other purpose.

The second set of questions related to the scope of the GDPR and LED. The Bulgarian court wanted to know whether the GDPR (and not the LED) is applicable if the public prosecutor used the investigation file (with the collected personal data in relation to VS) in civil proceedings, in which the prosecutor defended himself against claims of damages (put forward by VS) resulting from the excessive duration of pre-trial proceedings against him. In the affirmative, the next question was on the lawfulness of the processing, i.e. whether one of the exemptions of Art. 6 GDPR applied, which excludes the data subject's consent to the processing of his personal data.

Regarding the delineation of scope between the GDPR and the LED, the CJEU referred to Art. 9 LED and concludes that the GDPR is applicable in the situation at issue. The CJEU argued that "even where the bringing of an action for damages against the State arises from alleged misconduct on the part of the public prosecutor's office in the course of criminal proceedings, such as, as in the present case, alleged infringements of the right to be tried within a reasonable time, the aim of the State's defence in such an action is not to perform, as such, that public prosecutor office's tasks for the purposes set out in Article 1(1) of Directive 2016/680."

In addition, the CJEU stated that the processing of personal data by means of defending the legal and financial interest of the State in civil proceedings can be regarded as lawful if it is necessary for the performance of a task carried out in the public interest, within the meaning of Art.6(1)(e) GDPR. It must be ensured, however, that this processing of personal data complies with all the applicable requirements provided for by that regulation. (TW)

European Declaration on Digital Rights and Principles Signed

On 15 December 2022, the Presidents of the Council of the EU, the European

Parliament, and the Commission signed the European declaration on digital rights and principles for the digital decade. The goal is to ensure that the European Union (EU) reaches its objectives for a digital transformation in line with its values and with the Commission's communication „Digital compass 2030: a European way forward for the digital decade" from 9 March 2021. The latter presented the vision for a digitally transformed Europe by 2030 according to European values (→eucrim 1/2021, 8–9). The European declaration on digital rights and principles for the digital decade follows up to this communication of 9 March 2021 and was proposed by the Commission on 26 January 2022 (→eucrim 1/2022, 10–11).

It includes, *inter alia*, references to digital sovereignty in an open manner, respect for fundamental rights, the rule of law and democracy, inclusion, accessibility, equality, sustainability, resilience, security, improving the quality of life, the availability of services, and respect for everyone's rights and aspirations.

The aims of this declaration are:

- To put people at the centre of digital transformation. Technology should serve and benefit all people living in the EU;
- To use technology to unite people. Digital transformation should contribute to a fair and inclusive society and economy in the EU. This can be achieved through affordable and high-speed digital connectivity, education, training and lifelong learning of digital skills, fair and just working conditions in the digital environment, and access by everyone to key public services in the EU;
- To reaffirm the freedom of choice in interactions with algorithms and artificial intelligence systems and in a fair digital environment.
- To foster participation in the digital public space;
- To ensure that everyone has access to digital technologies and products;
- To ensure the right to privacy and to the protection of personal data;
- To achieve sustainability in order to avoid significant harm to the environment and to promote a circular economy.

Petr Fiala, the Czech Prime Minister, stated at the signing ceremony: "Today, we commit to an inclusive, fair, safe and sustainable digital transformation that puts people in the centre. Preserving the core EU values online is as important as in the real world. The declaration will serve as a reference point for policy makers, businesses and other relevant actors when developing and deploying new technologies."

The declaration will guide the EU's policy for the digital transformation, including the work on the Digital Decade Policy Programme and the EU's actions at the global level. The Commission will monitor progress on the implementation of the objectives of the declaration and provide recommendations through an annual „State of the Digital Decade" report. (AP)

Cooperation

Customs Cooperation

Final Evaluation of Customs 2020 Programme

On 18 November 2022, the Commission presented the final evaluation of the Customs 2020 programme. The Customs 2020 programme was a multiannual action programme for customs in the EU, which provided the necessary resources to the functioning of the information systems in the Customs Union and to the facilitation of cooperation between national customs administrations. It was launched on 1 January 2014 and ended on 31 December 2020.

The results of the final evaluation provide information on the following:

- The progress made in the achievement of the programme's objectives;
- The cost-efficiency of the different activities funded;
- The coherence of the programme and its contribution to the EU's broader policies and priorities;
- The continued relevance of the programme;
- The added value of acting at EU level.

The Commission concluded that the programme has been effective in achieving its objectives and has contributed significantly to the improvement of the functioning and modernisation of the Customs Union. The Commission also drew a positive conclusion as regards the coherence of the Customs 2020 programme with the general EU policy, in particular, but not only, with regard to prohibitions and restrictions to be enforced by customs authorities at the border.

Despite the progress made, some improvements are nonetheless needed. For example, the existing risk management framework for customs controls should be revised, in order to mitigate differences between the Member States. Furthermore, it may be useful for the Commission and Member States to share more customs data. The evaluation also found that additional synergies could be explored with the successor of the Hercule III programme, for example on the development of data repositories or on joint data analysis. (TW)

Police Cooperation

Provisional Agreement on Law Enforcement Information Exchange Directive

On 29 November 2022, the Czech Council Presidency and the European Parliament reached a provisional agreement on the proposal for a Directive on information exchange between law enforcement authorities of Member States. The proposal was presented by the Commission in December 2021 as part of the EU police cooperation code (→eucrim 4/2021, 225–226).

The text, as agreed on, provides for equivalent access for national law en-

forcement authorities to information available in other Member States. It seeks to improve the functioning of "Single Points of Contact" (SPOC) for the exchange of information, which will be operational 24 hours a day and 7 days a week. In urgent cases, the information should be made available within eight hours if it is contained in a database that is directly accessible to the SPOC or law enforcement authorities, and within three days if it can be obtained from other public authorities or private parties. Any other request would need to be answered within seven calendar days. The Secure Information Exchange Network Application (SIENA), managed by Europol, would become the default channel of communication.

The general organisational and procedural rules on the information exchange between law enforcement authorities is regulated to date by Council Framework Decision 2006/960/JHA, known as "Swedish Framework Decision" or "Swedish initiative". The Directive would repeal this legal framework. The Directive aims that information exchange between law enforcement authorities is increasing under the new rules, the legal framework will be clearer and exchange of information will become faster. The text needs to be formally approved by the Council and the European Parliament. (TW)

Judicial Cooperation

CJEU Clarifies Possible Extradition of Union Citizen to Third Country for Purpose of Serving Custodial Sentence

On 22 December 2022, the CJEU clarified its case-law on the extradition of Union citizens to a third state for the purpose of enforcing a custodial sentence.

The reference for a preliminary ruling by the Higher Regional Court of Munich concerned the extradition of a Croatian citizen to Bosnia and Herzegovina under the European Convention on Extradition (Case C-237/21, *S.M./Generalstaatsanwaltschaft München*). The question here was whether extradition constituted inadmissible unequal treatment on grounds of nationality, since the Basic Law of Germany prohibits the extradition of German nationals. It had to be clarified whether it follows from the previous CJEU case-law in *Raugevicius* (Case C-247/17 →eucrim 4/2018, 203–204) that the protection against extradition must also apply to Union citizens other than its own nationals if the requested EU Member State (here: Germany) is obliged to extradite under the European Convention on Extradition, since it has defined the term "nationals" under Art. 6 No. 1 b) of the Convention in such a way that only its own nationals are covered by it and are thus not extradited.

The judges in Luxembourg now ruled that the requested Member State must actively seek the third state's consent to serve the prison sentence in the requested Member State if this is possible under its national law. Should the consent not be obtained, Art. 18 and 21 TFEU would not prevent the extradition of the Union citizen pursuant to an international convention. Extradition would be justified in such circumstances because the individual concerned should not remain unpunished. It must, however, be ensured that extradition would not impair the fundamental rights of the Charter of the European Union, in particular under its Art. 19. (TW)

European Arrest Warrant

AG: Postponement of Surrender in Case of Serious Health Risk

On 1 December 2023, Advocate General (AG) *Campos Sánchez-Bordona* presented his opinion on the question under which conditions the execution of a European Arrest Warrant can be refused if the requested person concerned is exposed to serious health risks in the issuing Member State.

The case (C-699/21, *E.D.L.*) was referred by the Italian Constitutional Court and brings in an additional aspect to the interpretation of Art. 1(3) [protection of fundamental rights] of Framework Decision 2002/584 on the European Arrest Warrant (FD EAW). In the case at issue, E.D.L. is to be surrendered from Italy to Croatia for the offence of possession of drugs. According to an expert report, E.D.L. suffers from a psychotic disorder requiring treatment and is at high risk of suicide associated with the possibility of his imprisonment. The judicial authorities in Italy had doubts on whether E.D.L.'s health treatment in Croatia is sufficient and have not obtained assurances to that effect within a reasonable period of time. The Constitutional Court believed that surrender would result in an infringement of Art. 3 (right to integrity) and Art. 4 (prohibition of inhuman/degrading treatment or punishment) of the Charter and wondered whether the CJEU's case law on the protection of fundamental rights within the EAW system as established in *Aranyosi and Căldăraru* (→eucrim 1/2016, 16) also applies here.

According to AG Sánchez-Bordona, the two-step examination as established in *Aranyosi and Căldăraru* cannot be transferred to the kind of cases at issue. It suffices to examine whether the requested person will be guaranteed any medical treatment that he/she may require in the issuing Member State. The AG pointed out that the solution can be found in Art. 23(4) FD EAW, which stipulates that the surrender may exceptionally be temporarily postponed for serious humanitarian reasons. The AG additionally stressed that the provision provides for a communication channel between the executing and issuing judicial authorities. As a result, the executing authority must request the issuing authority to provide information allowing the existence of a serious health risk to be ruled out. If necessary, the executing authority can postpone the surrender of the requested person for as

long as that serious risk remains. Postponement, i.e. the halt of surrender on a temporary basis, must remain the rule. A non-execution of the EAW can only be considered if, in the light of all the circumstances, the postponement of surrender has to be extended beyond a reasonable period of time, and a dialogue with the issuing judicial authority has been maintained. (TW)

Law Enforcement Cooperation

Co-Legislators Found Political Agreement on EU E-evidence Legislation

In a press release of 29 November 2022, the Commission informed that the European Parliament (EP) and the Council reached a provisional political agreement on the future EU legislation on obtaining e-evidence across the bloc. The latest compromise text has not been made public yet. The legislative package, which consists of a Regulation on European Production and Preservation Orders and a Directive on the appointment of legal representatives for the gathering of electronic evidence, needs formal approval by the co-legislators. The package was proposed by the Commission in April 2018 (→eucrim 1/2018, 35–38)

By means of the new rules, judicial authorities of the EU Member States will be empowered to directly request electronic evidence from service providers via a decentral IT system. Notification of the national authority where the service provider is located will not be mandatory in all cases as initially requested by the EP's rapporteurs. The authority of another Member State (issuing authority) must notify the authorities where the service provider is located only if a person does not reside in the issuing State or the offense has not been committed there, and if traffic and content data are sought. The notified authority will be allowed to invoke several grounds to refuse the order, such as the protection of fundamental rights or of immunities and privileges (→eucrim 2/2022, 124).

The legislative proposals for the Regulation on a European Production and Preservation Order and the accompanying Directive are now in its fourth year of discussion. The European Production and Preservation Order has faced fierce criticism from the part of civil society organisations (→eucrim 1/2022, 34–35 with further references). In an open letter of 22 November 2022, a coalition of 24 civil society groups, associations of media and journalists and of internet service providers and professional associations urged the EP's and Council's negotiators to revise the new rules on e-evidence. The coalition regretted that most of previous recommendations made by stakeholder were not taken into account and called for making substantial improvements to the protection of fundamental rights, including press and media freedom, the rights of the defence, the right to privacy and medical patients' rights. (TW)

Green Light for Ratification of CoE's E-Evidence Treaty

The European Parliament gave green light for EU Member States to ratify the Second Additional Protocol to the Convention on Cybercrime. The Additional Protocol builds on the 2001 Budapest Convention on Cybercrime and regulates the cross-border exchange of electronic evidence in criminal proceedings. On 17 January 2023, the European Parliament decided to give its consent to the draft Council Decision. Previously, the Committee on Civil Liberties, Justice and Home Affairs (LIBE) had issued a recommendation to this effect. An opposite motion by MEP *Birgit Sippel* (S&D, Germany) to refuse the approval of the draft Council Decision due to concerns about fundamental rights and data protection violations was rejected by the majority of MEPs in LIBE.

After the EP's consent (as required by Art. 218(6) TFEU), the Council can now adopt the act. Since the EU cannot become a party to the Protocol, the Council's decision will enable Member States to act jointly in the interest of the EU and ratify the CoE treaty. The Second Additional Protocol will enter into force when it has been ratified by five State Parties. It was opened for signature on 12 May 2022 (→eucrim 2/2022, 128). (TW)

Fourth Edition of SIRIUS EU Digital Evidence Situation Report

On 22 December 2022, Eurojust, Europol, and the European Judicial Network published their fourth SIRIUS report. The SIRIUS project aims to contribute to the faster and more effective cross-border access of EU law enforcement and judicial authorities to electronic evidence stored by Online Service Providers (OSPs) within the context of criminal investigations. In its annual SIRIUS EU Digital Evidence Situation Report, the project leaders provide an analysis of the access that law enforcement and judicial authorities in the EU Member States currently have to electronic evidence held by OSPs as well as the perspective of OSPs on the process of engaging with EU competent authorities in the context of criminal investigations. The fourth edition of the report includes the results of SIRIUS' large-scale research in 2021.

Regarding the key findings, the report notes a growing concern among law enforcement authorities that the rapid advancement of Artificial Intelligence (AI), Augmented Reality (AR), and Virtual Reality (VR) will require major transformations in the investigation of crimes. For EU judicial authorities, the lack of an EU-wide data retention framework for the purpose of criminal investigations and prosecutions remains a core issue when requesting digital data from other EU Member States. According to the report, in 2021, the SIRIUS platform remained the highest ranked source of information for law enforcement representatives seeking assistance to prepare direct requests. Another observation is

that, in the majority of investigations in 2021, non-content data continued to be more important than content data. Lastly, the report underlines the need for regular training for judicial authorities on the different modalities for requesting and obtaining cross-border data disclosure.

The report makes a number of recommendations:

- EU law enforcement agencies are advised to create or expand the capacity of units acting as Single Point(s) of Contact (SPoCs) for cross-border data disclosure requests under voluntary cooperation. In addition, they should include training on cross-border access to electronic evidence in routine training programmes for investigators and first responders. They should also ensure the security of e-mail systems, including the obligatory use of strong passwords and two-factor authentication for all law enforcement officers.
- EU judicial authorities are urged to strengthen their capacity as regards the different modalities and specific procedures for requesting and obtaining electronic data. Furthermore, they should make efforts to enhance mutual trust as well as the exchange of expertise and best practices among EU judicial practitioners on cross-border access to electronic evidence.
- OSPs are called on to take measures to identify and prevent fake requests for data disclosure from unauthorised persons. They should engage in international events organised by SIRIUS and share policy updates with the SIRIUS team. Furthermore, when launching new products and services, especially in relation to AI, AR, and VR, OSPs should consider their impact on electronic evidence. (CR)

JHA Agencies Network Meeting

On 29 November 2022, the representatives of the EU Justice and Home Affairs (JHA) Agencies' Network met to reflect on their main achievements in 2022, especially with regard to the ongoing efforts to support EU Member States and institutions in responding to Russia's military aggression against Ukraine. Additional topics on the agenda included presentations on the extended mandate of Eurojust to help Ukrainian authorities investigate war crimes, an update on the EU Innovation Hub for Internal Security by Europol, an overview by Frontex on border management under crisis and its impact on security architecture, and CEPOL's new strategy for the period 2023–2027. The EU Agency for Asylum (EUAA) presented the work programme for its incoming network presidency in 2023.

The JHA Agencies' Network (JHAAN) includes the following nine EU Agencies:

- The European Institute for Gender Equality (EIGE);
- The European Union Agency for Asylum (EUAA);
- The EU Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA);
- The EU Agency for Criminal Justice Cooperation (Eurojust);
- The EU's Law Enforcement Agency (Europol);
- The EU Agency for Fundamental Rights (FRA);
- The European Border and Coast Guard Agency (Frontex);
- The EU Agency for Law Enforcement Training (CEPOL);
- The European Monitoring Centre for Drugs and Drug Addiction (EMCDDA).

The JHAAN was initiated in 2010. It is an important cooperation tool protecting the Area of Freedom, Security and Justice. Together, the JHA agencies contribute to the implementation of EU's objectives in the fields of migration, asylum and external border management, the fight against organised crime, drug trafficking and terrorism, gender equality and respect for fundamental rights. They also facilitate the functioning of relevant EU IT systems and law-enforcement training. (CR)

EU-Western Balkans Ministerial Forum on Justice and Home Affairs

The annual EU-Western Balkans Ministerial Forum on Justice and Home Affairs took place in Tirana from 3 to 4 November 2022. In the area of home affairs, the representatives discussed cooperation possibilities in addressing the security impact stemming from Russia's war of aggression against Ukraine. Next to an agreement to further invest in strategic analysis, the ministers agreed to intensify the exchange of information, i.e. through Europol, and to make use of the possibilities for operational cooperation under the European Multidisciplinary Platform Against Criminal Threats (EMPACT). Stronger efforts should be taken to combat trafficking in human beings and to protect vulnerable people against this threat. Efforts to combat radicalisation and violent extremism, to prevent and monitor the spread of Russian disinformation, and to protect critical infrastructure in the Western Balkans should be upheld.

Measures were discussed to strengthen the following:

- Migration, asylum, and border management, including the monitoring of trends along the Western Balkans migratory route;
- The reinforcement of border management capacities;
- Cooperation on return and readmission;
- Fight against migrant smuggling.
- The latter includes the launch of a regional Anti-Smuggling Operational Partnership to strengthen law enforcement and judicial cooperation against criminal smuggling networks.

In the area of justice, the importance of strengthening judicial independence and respect for the rule of law was emphasized. Lastly, measures to develop a more strategic approach towards tackling organised crime, high-level corruption, and money laundering were discussed. This included improvements in the collection of statistical data designed for the new track records e-platform. (CR)

Council of Europe

Reported by Dr. András Csúri

Foundations

Human Rights Issues

Human Rights Commissioner: Report on State of Human Rights in the UK

On 9 December 2022, *Dunja Mijatović*, Commissioner for Human Rights of the Council of Europe, published a report on the state of human rights in the UK. The report is based on her visit to the UK from 27 June to 1 July 2022. The focus was particularly on the overall human rights landscape in the UK, children's rights, and specific human rights issues relating to Northern Ireland.

Regarding the overall human rights landscape, the Commissioner focused especially on recent and proposed changes to laws and policies, in particular on the proposal to repeal the 1998 Human Rights Act (HRA) and replace it with a Bill of Rights. The Commissioner found that the legislative proposal would weaken human rights protection by encouraging a divergence in interpretations by UK courts and the ECtHR regarding rights set out in the ECHR and by limiting the possibilities to bring human rights cases before UK courts.

In addition, the Police, Crime, Sentencing and Courts Act (PCSC Act) has introduced extensive restrictions on peaceful assembly, which may be subject to arbitrary application and should be reviewed. The provisions of the PCSC Act *de facto* criminalise Gypsy, Roma and traveller communities who lead nomadic lifestyles. The Commissioner believes that this situation will be further exacerbated by additional restrictions stemming from the Public Order Bill and calls on the UK Parliament not to pass it.

Mijatović also underlines that the UK has fallen significantly behind in meeting its international obligations to respect the human rights of refugees, asylum seekers, and migrants and also calls for countering the toxic public discourse towards trans persons – a discourse that risks reversing the UK's progress in combating discrimination against LGBTI persons.

Regarding children's rights, the Commissioner stresses the need to fight child poverty and homelessness, including ensuring free school meals for all and realising children's right to adequate housing. To better protect and enhance children's rights, the Commissioner calls for the following:

- Reviewing police and judicial issues, such as the use of stop and search powers over children, including strip searches;
- Raising the age of criminal responsibility and ensuring that 16- and 17-year olds can fully benefit from child-friendly justice, including time spent in custody.
- Promoting children's participation in decision-making, including lowering the voting age where possible.

As far as Northern Ireland is concerned, the UK Government should consider withdrawing the Northern Ireland Troubles (Legacy and Reconciliation) Bill, which the UK government introduced to Parliament on 17 May 2022. This Bill addresses the legacy of the Northern Ireland Troubles and aims to promote reconciliation by establishing an Independent Commission for Reconciliation and Information Recovery, limiting criminal investigations, legal proceedings, inquests and police complaints, extending the prisoner release scheme in the Northern Ireland (Sentences) Act 1998, and providing for experiences to be recorded and preserved and for events to be studied and memorialised.

The Commissioner recently published her submission on the matter under Rule 9.4 of the Rules of the Committee of Ministers. Accordingly, the Bill could potentially have far-reaching implications for the handling of so-called "legacy cases" in the context of the supervision of the execution of the *McKerr* group of judgments of the ECtHR. This group of judgments relates to various shortcomings in the investigation of deaths during the Troubles in Northern Ireland, leading to violations of Art. 2 ECHR.

Mijatović also calls for adequate resources to be provided to the Northern Ireland Human Rights Commission in order to enable it to fully carry out its functions. In addition, she calls for better protection of journalists in the country and for adequate and sustained funding of abortion services in Northern Ireland.

Specific Areas of Crime

Corruption

GRECO: Fifth Round Evaluation Report on Montenegro

On 25 October 2022, GRECO published its fifth round evaluation report on Montenegro. The focus of this evaluation round is on preventing corruption and promoting integrity in central governments, in particular with regard to persons with top executive functions (PTEFs) and law enforcement agencies.

The evaluation particularly tackles issues of conflicts of interest, the declaration of assets, and accountability mechanisms. Montenegro has been a member of GRECO since June 2006 and has fully implemented 86% of the recommendations of the first four evaluation rounds.

The perceived level of corruption in the country is high; according to the Corruption Perception Index published by Transparency International, Montenegro was ranked 64th out of 180 countries in 2021. Despite numerous reforms, corruption remains a serious problem in the public, private, and business sectors, challenging the trust in public institutions and political life.

The political transition since the general elections in August 2020 has had a direct impact on the functioning of the anti-corruption system, as newly appointed officials have to approve the actions and decisions of former members of such bodies. The change in government has also had an impact on the civil service, as amendments to the Law on Civil Servants and State Employees have reduced the requirements applying to the competence, independence, and merit-based recruitment of civil servants. Judicial reform is also stagnating, as key posts in the judiciary remain vacant and anti-corruption laws have not yet been adopted.

In 2022, a new Montenegrin government was elected by parliament, but the political situation remains tense, with deep-seated polarisation between the new government majority and the opposition, between the presidential administration and the current government, and even within the government itself. These tensions are slowing down the reform process.

Overall, the policy to prevent and combat corruption in the PTEFs and the Montenegrin police is being implemented during this changing political scenario. Public confidence in institutions in preventing and fighting corruption should be strengthened, but a comprehensive national strategy in this area is lacking.

The "Law on Preventing of Corruption" enables conflicts of interest to be addressed, the assets of PTEFs and police officers to be monitored, and a certain degree of transparency in their activities to be achieved. There are gaps in its effective implementation, however, and strong political will is needed to adopt a more proactive approach. Indeed, anti-corruption policy cannot be left solely to the Anti-Corruption Agency (ASK), even if the agency's performance has improved under new management.

GRECO recommends that the focus should now be on the overall coherence of the system and coordination between the different authorities. The role of the newly established National Council for the Fight Against High-Level Corruption needs to be clarified, and effective integrity plans needs to be implemented and proactively applied in ministries. In addition, lacking legislation and ethical rules aimed at PTEFs should be developed and the legal framework accompanied by strengthened enforcement mechanisms, practical guidance, and the possibility to take advantage of confidential counselling. The integrity of PTEFs and their declarations should be checked prior to any appointment, and transparency in this regard should be further enhanced.

As far as the police are concerned, their operational independence must be a priority. The police directorate has been comprehensively re-organised by the recently adopted Law on the Internal Affairs. Provisions are in place to prevent conflicts of interest and to monitor the police. Although internal bodies have been established to enhance police integrity and prevent corruption, their role needs to be clarified. A new Code of Police Ethics has been adopted but also needs to be supplemented with further provisions and guidelines for its practical implementation. In addition, a mechanism for lodging complaints about misconduct and corruption within the police, which is independent of the police and the Ministry of Interior, would be needed to gain public confidence.

Regarding central governments (top executive functions), GRECO recommends the following:

- Laying down rules requiring integrity checks prior to the appointment of ministers, state secretaries, and advisers to the Prime Minister and Deputy Prime Ministers in order to identify and manage possible risks of conflicts of interest;
- Clarifying the role and missions of the National Council for the Fight Against High-Level Corruption so as to ensure the consistency of the overall strategy when preventing and fighting corruption;
- Adopting a coordinated strategy for preventing corruption among PTEFs through the preparation and publication of risk assessments;
- Carrying out a review on the overall coherence and effectiveness of the legal framework for preventing and fighting corruption in order to ensure consistency between existing laws and bylaws;
- Establishing and publishing a code of ethics aimed at PTEFs, covering relevant integrity matters (e.g. preventing and managing conflicts of interest, contacts with lobbyists and other third parties, the handling of confidential information, post-employment restrictions, etc.);
- Strengthening the administrative capacities' independence and the efficiency of the ASK by ensuring independent, merit-based recruitment procedures, which require integrity checks for new staff, to ensure full operational independence;
- Providing systematic briefing and/or training on legal and ethical integrity standards to PTEFs, both upon taking office and at regular intervals while in office;
- Simplifying the legal framework governing access to information and the mechanism of appeal against such access decisions in order to ensure effective access to government information in practice;

- Broadening the definition of lobbying to cover all contacts with PTEFs, disclosing contacts between lobbyists and PTEFs in respect of the identity of the persons involved as well as the subject matters discussed, and enabling the ASK to investigate misgivings in respect of lobbying *ex officio*;
- Subjecting asset and income declarations of all PTEFs to the various levels of substantive control by the ASK;
- Excluding corruption-related offences from the immunity protection provided to members of the government.

With regard to law enforcement agencies, GRECO's recommendations are as follows:

- Providing for an assessment on risks of undue influence on the police, with a view to identifying measures that strengthen the operational independence of the police in practice;
- Supplementing existing rules for the appointment of the Integrity Manager within the Ministry of the Interior, who is also responsible for the Police Directorate, by means of strengthening integrity checks prior to appointments to this function;
- Revising the Code of Police Ethics, with the active participation of the police, to cover all relevant integrity matters (including various situations involving conflicts of interest, secondary activities, gifts, contacts with third parties, confidential information, etc.) and supplemented by practical guidance containing concrete examples that illustrate tricky issues and risk areas;
- Updating the initial and in-service training on relevant corruption prevention matters as well as ethical norms and conduct, by means of an institutionalized mechanism of confidential counseling on these issues;
- Subjecting police officers to integrity checks prior to their appointments and promotions, as well as at regular interval throughout their career, according to a clear procedure that is made known to the candidates and the public;
- Using sufficient and properly implemented policy and/or legal measures to ensure that the appointments of police officials are merit-based and free from undue political influence, including at the top level;
- Establishing a solid external mechanism for complaints against the police, independent of the police and the Ministry of the Interior, and an appropriate level of knowledge to deal with such matters;
- Strengthening existing measures on whistleblowing within the police by means of awareness raising and by developing training on whistleblowing procedures.

Procedural Criminal Law

European Commission for the efficiency of justice (CEPEJ)

CEPEJ: Publication of Data Collection on Western Balkans

On 28 October 2022 the European Commission for the efficiency of justice (CEPEJ) published the results of the third cycle of the Action "Dashboard for the Western Balkans: towards a better evaluation of the results of judicial reform efforts in the Western Balkans" with data from 2021. The action is part of the second phase of the "Horizontal Facility for the Western Balkans and Türkiye" programme, funded by the EU and the CoE and implemented by the CoE. The overall objective is to better measure the progress of judicial reforms in Albania, Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia, and Kosovo (in line with UN Security Council Resolution 1244 and the International Court of Justice Opinion on the Kosovo Declaration of Independence).

The evaluation is directed at helping these countries base their future policies and budget allocations on the CEPEJ findings, in order to take steps necessary to complete reforms and improve the quality, efficiency, and/or accountability of their justice systems – in line with European standards.

The report consists of two parts. The first, comparative part presents regional trends using tables and graphs involving 12 indicators on the efficiency and quality of justice systems. The data included refer to 2020, 2019 and, where available, 2018 from previous cycles. An overview of key regional trends introduces each of the 12 indicators. The second part presents an in-depth analysis of the relevant judicial systems using infographics, tables, graphs, and narrative explanations.

Articles

Articles / Aufsätze

Fil Rouge

This eucrim issue marks the second part of the thematic focus on the relationship between criminal law and administrative law, which has experienced considerable dynamics in recent times. Having focused on the institutional cooperation between administrative and law enforcement bodies in the previous issue (eucrim no 3/2022), the present issue deals with the linkage of different legal disciplines in procedural and substantive law.

In his guest editorial, *Luc Lavrysen* outlined the relevance of administrative law for criminal prosecution involving essential human interests. He points out that strengthening the criminal law framework to combat environmental crimes necessitates an in-depth consideration of administrative law, be it in the definition of (un)prohibited conduct or in the sanctioning of unlawful behaviour by means of administrative law.

When should standards developed for criminal procedure be applied in administrative proceedings? In the first article, *Lorena Bachmaier* addresses this question with an exemplary analysis of disciplinary proceedings against judges. By examining the arguments put forward by the European Court of Human Rights in its recent case law to classify such proceedings as "punitive" but "non-criminal", she argues that the Court leaves unclear which procedural safeguards are applicable in administrative sanctioning proceedings with a punitive nature. Since disciplinary sanctions can entail serious consequences, she calls for a revision of the Court's approach in light of the importance of the protection of judicial independence in our democratic societies.

The admissibility of evidence from other proceedings in criminal proceedings is the subject of the next article by *Daniel Gilhofer*. He analyses the legal situation in Austria with regard to how administrative evidence is dealt with in criminal proceedings. He points out that the Austrian Code of Criminal Procedure hardly regulates this issue, and he examines different scenarios in which the use of "administrative evidence" can be restricted or prohibited.

In the third article, *Stefan D. Cassella* offers another interesting perspective on the dynamic linkage between civil and criminal law. The former federal prosecutor in the U.S. Department of Justice analyses the procedures and legal theories used by US law enforcement in civil forfeiture actions against Russian oligarchs who have become subject to international economic sanctions. By means of two concrete cases, he explains the challenges of permanently taking title to property, e.g. that law enforcement needs to demonstrate a nexus between the property and a crime under the USA's "hybrid approach".

The last three articles deal with the challenges ensuing from the new security architecture to protect the EU's financial interests after the European Public Prosecutor's Office (EPPO) entered the field. When the EU created its first own law enforcement body to prosecute crimes affecting the EU budget, it became glaringly apparent that the lines between administrative and criminal procedures are oftentimes defined but sometimes also blurred. *Gianluca Dianese* and *Dimo Grozdev* share their views on the interplay between administrative investigative proceedings conducted by OLAF and criminal proceedings conducted by the EPPO. They stress that the EU created a new "end-to-end prosecution cycle" and spotlight the "new joint investigation mechanism" practised by the two offices.

Andrea Venegoni reflects on the first reference for a preliminary ruling dealing with the interpretation of EPPO Regulation 2017/1939. The *Oberlandesgericht Wien*, Austria is seeking clarification as to the extent of judicial review when it comes to cross-border investigations within the EPPO's Regulation own assistance regime. The author highlights the relevance of the case for shaping the common area of justice.

Lastly, *Balázs Márton* describes other procedural flaws in the EPPO Regulation in his examination of the recent conflict of competence between the EPPO and Spanish prosecutors in the *Ayuso* case. He argues that the roots of the conflict go deeper than any flawed EU regulation, thus testing the limits of the principle of the primacy of EU law.

Thomas Wahl, Managing Editor of eucrim

Disciplinary Sanctions against Judges: Punitive but not Criminal for the Strasbourg Court

Pragmatism or another Twist towards Further Confusion in Applying the *Engel* Criteria?

Lorena Bachmaier Winter

The European Court of Human Rights (ECtHR) sought to extend the guarantees for criminal procedure enshrined in Art. 6 of the European Convention on Human Rights (ECHR) to administrative offences which are criminal in nature when it established the *Engel* criteria. It aimed to prevent that the states circumvent criminal procedure safeguards by simply labelling such offences as administrative. However, the ECtHR went back on this initial approach in subsequent judgments, denying that sanctions in disciplinary proceedings against judges fall under the criminal limb of Art. 6 ECHR. Hence, further exploration is required to clear the blurring lines between administrative and criminal sanctions with the aim of establishing which procedural safeguards are applicable.

This article outlines and reflects on the reasons set out in ECtHR case law for no longer considering disciplinary sanctions against judges as "criminal in nature." It is argued that the ECtHR's current approach leaves it unclear which procedural safeguards are applicable in administrative sanctioning proceedings with a punitive nature. What is more, excluding disciplinary proceedings against judges from the guarantees for criminal procedure enshrined in the ECHR lacks a clear legal logic if such sanctions are undoubtedly punitive and could have severe consequences. Moreover, it is stressed that the Court of Justice of the European Union (CJEU) might eventually be called upon to define what should be considered "criminal in nature" when it comes to disciplinary proceedings against judges. Given the relevance of disciplinary proceedings and sanctions for the protection of judicial independence and given the competence established by the Luxembourg Court to decide on this protection, it is of utmost relevance that the approach taken by the Strasbourg Court be revisited.

I. Introduction

Criminal and administrative sanctioning systems have been running on parallel tracks in the European continental legal tradition for centuries. In many cases, criminal policy aspects distinguish criminal offences from administrative offences, rather than features or elements of each regulatory system. This is not new.[1] The lines have always been blurred, and the case law of the ECtHR has further obscured the boundaries between the two categories.[2] This difficulty of differentiating between administrative punitive sanctions and criminal sanctions and the overlap between them has been the subject of numerous scholarly studies, which have also highlighted a growing confusion reflected at the level of EU law.[3]

Identifying which administrative offences are to be considered "criminal in nature" is relevant from the point of view of the theory of criminal law, where it has been stressed that there is an unacceptable expansion of criminal law that runs against the principle of *ultima ratio*. Even more importantly, such a clarification would help identify which of the safeguards of the criminal procedure should also apply to the administrative sanctioning proceedings with a punitive nature. The latter also holds true for the *ne bis in idem* principle.[4]

The debate and the case law have mainly revolved around competition law, environmental law, and crime prevention.[5] In turn, disciplinary proceedings – in particular those against judges – represent an area that has often been neglected but where the above-mentioned questions are of great relevance. Although the ECtHR initially considered certain disciplinary proceedings as criminal in nature, it has long abandoned this stance and repeatedly declared that judicial disciplinary proceedings fall within the civil limb of Art. 6 of the ECHR. In this context, the question arises whether disciplinary proceedings and sanctions against judges are purely administrative, "quasi-criminal," or "criminal in nature." Why are disciplinary sanctions against judges, which seem to have a clear punitive character and can entail severe penalties, not considered "criminal" by the Strasbourg Court? Do they have specific features that justify not including them in the concept of "criminal charge"? Are the boundaries between criminal and administrative offences even more blurred in this area?

While it would exceed the scope of this article to review the numerous discussions and case law in connection with the blurred lines between administrative and criminal sanctions and the difficulties of identifying proceedings and sanctions which are "criminal in nature," the aim is to map out the

arguments put forward in ECtHR case law on disciplinary sanctions against judges. To that end, I will first describe the safeguards established for disciplinary proceedings against judges. Second, I will briefly call to mind the scope and meaning of the so-called *Engel* criteria, and reflect on the arguments invoked by the Court when framing the disciplinary sanctions against judges within the civil limb of Art. 6 ECHR. I will argue that such an approach does not aid in providing clarity regarding the safeguards of the criminal procedure that are applicable in administrative sanctioning proceedings with a punitive nature. In my conclusions, I will argue that the CJEU might be called upon in the future to define what should be considered as "criminal in nature" in disciplinary proceedings against judges.[6] The issue is not irrelevant as such sanctions are a weak link when it comes to protecting judicial independence – the latter falling within the competence of the Luxembourg Court.

II. Principles for Disciplinary Proceedings against Judges in European Law

Before looking in detail at the CoE legal framework in disciplinary proceedings (including the ECtHR case law on this matter), it makes sense to discuss the legal situation in the EU. To date, the CJEU has yet to conclusively answer the question of whether or not disciplinary sanctions against judges ought to be classified as "criminal" or "quasi-criminal". By its judgment in *Associação Sindical dos Juízes Portugueses v Tribunal de Contas*,[7] the CJEU linked the disciplinary liability of judges to judicial independence as defined in Art. 19(1) TEU and thus extended the EU's competence to rule on these issues by a broad interpretation of Art. 51(1) of the Charter. This enabled the CJEU to rule on the safeguards of judicial independence in the Member States and resulted in the definition of some guarantees that disciplinary proceedings should include in order to respect said principle of independence. Thus, when it comes to judicial independence and its effective protection, the EU has extended the traditional limits posed by the material criteria which define the spheres of EU and national law. Since that judgment, the CJEU has had the opportunity to rule on the safeguards of judicial independence in the Member States.[8]

The CJEU case law, following some of the standards set out by the ECtHR, defines the guarantees that disciplinary proceedings should include in order to respect the principle of independence:[9]

- A procedure before an independent body that respects the rights of the defence and the right of appeal;
- The precise regulation of disciplinary offences and sanctions.

Yet, what preliminary ruling would the CJEU give on the disciplinary responsibility of a judge? What safeguards would it require to be respected when it comes to disciplinary proceedings against judges? Would it echo the ECtHR and deny the punitive character of such disciplinary sanctions, i.e., the applicability of criminal safeguards? Or would it only limit the concept of "criminal in nature" to cases in which the dismissal of a judge is at stake? Or not even to such cases?

Let us look at the standards on disciplinary proceedings against judges in the framework of the Council of Europe (CoE) and the ECtHR case law interpreting the ECHR guarantees in this field.

With regard to disciplinary liability, COE Recommendation 94(12) on the independence, efficiency and role of the judges already includes principles on the accountability of judges.[10] These principles were updated by CoE Recommendation 2010(12) on the independence, efficiency and responsibilities of judges.[11] CoE Recommendation (2010)12 requires that disciplinary proceedings against judges are conducted by independent bodies or the courts, ensuring full observance of the guarantees of a fair trial. In addition, judges must be granted the right to appeal the decision of the disciplinary body.[12]

Accordingly, the European Charter on the Statute for Judges provides for the possibility of disciplinary proceedings before a competent authority and the imposition of a disciplinary sanction against a judge

> following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation.[13]

What are the standards provided by the ECHR as interpreted by the ECtHR? This will be outlined in the following three sections – starting with the principles for an independent and impartial tribunal, followed by the right to a fair trial, and finally the right to judicial remedy.

1. Independent and impartial tribunal

The ECtHR does not stipulate that the disciplinary liability against judges be decided by a court. In this regard, the ECtHR has been consistent in its stance that conferring competence to a professional disciplinary body – and not a court – to decide on disciplinary offences and eventually impose the corresponding sanction is not in itself inconsistent with the requirements of Art. 6(1) ECHR. However, when CoE member states opt for this approach, the disciplinary body must either comply with the requirements of Art. 6(1) ECHR (i.e., be an

"independent and impartial tribunal established by the law"),[14] or its decisions must be subject to a "sufficient" judicial review by a body complying with the requirements of independence and impartiality.[15] When assessing the sufficiency of the review, two elements are thus taken into account: the scope of the appeal, but also whether the competent court complies with the requirements of independence, as seen in the case of *Denisov v. Ukraine*.[16] In this case, the applicant – a judge who had been dismissed from his position as president of the Kyiv High Administrative Court of Appeal – complained that the proceedings before the judicial council and the appeal before the High Administrative Court (HAC) concerning his removal had not been compatible with the requirements of independence and impartiality. He also complained that the HAC had not provided a sufficient review of his case, thereby impairing his right of access to a court.[17]

2. Right to a fair trial in disciplinary proceedings

It has been established that disciplinary proceedings against judges must meet the fair trial safeguard requirements as provided under Art. 6(1) ECHR. It is settled ECtHR case law that the disciplinary proceedings in which the right to continue to exercise a profession is at stake are classified as "disputes" over *civil rights* within the first alternative of Art. 6(1) ECHR.[18] This approach has been applied to proceedings before various professional disciplinary bodies; in *Baka v. Hungary*, the Court confirmed its applicability to disciplinary proceedings against judges.[19]

The ECtHR has analysed the violation of fair trial standards against four criteria: lack of impartiality of tribunals, the violation of the principle of equality of arms, secrecy, and excessive length of proceedings.[20] The relevant criteria for satisfying the requirements of Art. 6(1) ECHR concern both the disciplinary proceedings at first instance and the judicial proceedings on appeal. As stated in the Grand Chamber judgment in *Ramos Nunes de Carvalho e Sá v. Portugal* of 2018,[21] this implies that the proceedings before a disciplinary body not only entail procedural safeguards (para. 197) but also measures to adequately establish the facts when an applicant is liable to incur very severe penalties (paras. 198 et seq.).

The disciplinary proceedings in *Ramos Nunes de Carvahlo* concerned a judge who had called another judge a "liar" on the telephone, later persuaded yet another judge to testify in her favour by giving a false statement, and finally asked the judicial inspection service to refrain from instituting proceedings against this last judge for false testimony. In finding whether the proceedings as a whole had been fair, the judges in Strasbourg paid particular attention to the fact that the sanctioned judge had not had the chance to be heard – neither before the disciplinary body nor before the Supreme Court, which was the competent court for the review of the decision of the judicial council. They concluded that there was a violation of Art. 6 ECHR, whereby they did not only take into account the gravity of the sanction,[22] but also the relevance of the witness evidence in determining the facts that led to the disciplinary sanction, and the limited scope of appeal.

3. Judicial remedy

Another requirement consistently upheld by the ECtHR is that the judicial body reviewing the ruling of the disciplinary body must either have full jurisdiction or the scope of the review must be broad enough to revise the findings of the disciplinary body.[23] The ECtHR discussed issues of the scope and the sufficiency of the judicial review in appeal in *Ramos Nunes de Carvalho E Sá v. Portugal*. According to the ECtHR "the review of a decision imposing a disciplinary penalty differs from that of an administrative decision that does not entail such a punitive element" (para. 196), as the sanctions can have serious consequences. All this needs to be taken into account when considering the sufficiency of the review on judicial appeal.[24] The Court concluded in *Ramos Nunes de Carvalho* that a judicial body cannot be said to have full jurisdiction unless it has the power to assess whether the penalty was proportionate to the misconduct (para. 202).[25]

III. *Engel* Criteria and the Case Law of the ECtHR on Classification of Disciplinary Sanctions against Judges

In its second alternative, Art. 6 ECHR sets out specific procedural safeguards for a "criminal charge." These are commonly referred to as the three *Engel* criteria and serve as the yardstick for establishing the applicability of these criminal procedural safeguards under Art. 6 ECHR, i.e., the applicability of the criminal limb:

- The legal classification of the offence under national law;
- The very nature of the offence;
- The degree of severity of the penalty that the person concerned risks incurring.

In applying the criterion of the "criminal nature," both the Strasbourg Court and the Luxembourg Court have previously focused on the aims of a sanction, i.e., whether it has a punitive or a deterrent effect. However, this assessment can be complex[26] as punishment in itself is also seen as a deterrent.[27] The ECtHR has also considered the nature of the penalty in respect of the third criterion.[28] In order to avoid that low administrative fines with a punitive character end up falling under

the criminal limb – something the legislators precisely sought to avoid –, the ECtHR established in *Jussila* that a comprehensive assessment of both criteria (nature of the sanction/aim and seriousness of the penalty) should be conducted in cases where the hard core of criminal law was not at stake.[29]

Regarding the classification of the subject matter as disciplinary or criminal offence at the national level, the court was also very clear in its leading case of *Engel and Others v. The Netherlands*:[30]

> […] The Convention without any doubt allows the States, in the performance of their function as guardians of the public interest, to maintain or establish a distinction between criminal law and disciplinary law, and to draw the dividing line, but only subject to certain conditions. The Convention leaves the States free to designate as a criminal offence an act or omission not constituting the normal exercise of one of the rights that it protects. This is made especially clear by Article 7 (art. 7). Such a choice, which has the effect of rendering applicable Articles 6 and 7 (art. 6, art. 7), in principle escapes supervision by the Court.
>
> The converse choice, for its part, is subject to stricter rules. If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal, or to prosecute the author of a "mixed" offence on the disciplinary rather than on the criminal plane, the operation of the fundamental clauses of Articles 6 and 7 (art. 6, art. 7) would be subordinated to their sovereign will. A latitude extending thus far might lead to results incompatible with the purpose and object of the Convention. The Court therefore has jurisdiction, under Article 6 (art. 6) and even without reference to Articles 17 and 18 (art. 17, art. 18), to satisfy itself that the disciplinary does not improperly encroach upon the criminal.[31]

Thus – as set out in *Engel and Others* –, the ECtHR initially established that disciplinary proceedings fall within the criminal limb as long as the sanction is severe. However, the court has subsequently repeatedly classified disciplinary proceedings against judges as not criminal and thus falling within the civil limb of Art. 6 ECHR (cf. supra). As clarified in the landmark case of *Oleksandr Volkov v. Ukraine*,[32] this approach is even followed if the dismissal of a judge is at stake, and despite the fact that such a dismissal would see a judge permanently barred from the judicial service. Similarly, disciplinary proceedings against a judge in which the suspension from service and the imposition of a substantial fine were at stake did not amount to a "criminal charge," as recognised in *Ramos Nunes de Carvalho*.[33] This is even more striking as the court stressed in this judgment that such sanctions have a punitive character and that "even if they do not come within the scope of Article 6 of the Convention under its criminal head, disciplinary penalties may nevertheless entail *serious consequences* for the lives and careers of judges".[34]

In light of the *Engel* criteria, and acknowledging both that the nature of disciplinary sanctions against judges is punitive and that certain sanctions are of a serious nature (especially when they entail dismissal), it is not easy to understand why the court decided to deviate from the criteria established in its *Engel* judgment when it comes to disciplinary sanctions against judges. Moreover, it is hard to grasp the reasons behind making an exception to this type of sanction considering the ethical disapproval disciplinary infringements by judges are met with and taking into account that enhancing the safeguards in such proceedings serves to protect judicial independence.

Against this background, we cannot but agree with the words of Judge *Pinto de Albuquerque* in his concurring separate opinion in *Ramos Nunes de Carvalho*:

> […] the subject-matter of these proceedings was intrinsically criminal in nature (defamation, use of false testimony and obstruction of justice). Although no criminal prosecution was brought against the applicant on the basis of the facts investigated in the three sets of disciplinary proceedings, these facts were typical of the "mixed" offences to which the *Engel* judgment referred. These were offences with a high degree of social offensiveness and stigma. The downgrading of these offences by the Grand Chamber, in paragraph 125 of the judgment, as "purely disciplinary" deprives the defendant judge of basic procedural guarantees. This is precisely what the Convention is meant to prevent, especially in the case of the "mixed" offences to which the *Engel* judgment made reference" (para. 23 of the concurring opinion).

The ECtHR has resorted to the requirement that the rule providing for the sanction to qualify as criminal needs to be of a general scope. Since disciplinary sanctions "only" aim at regulating a profession and are applicable only to certain individuals exercising such profession, they are not criminal "in nature." *Caeiro* rightly stressed that this requirement was introduced by the court with the aim of excluding disciplinary sanctions from the application of the criminal procedure safeguards because there are no logic arguments to establish why the scope of application of the *Engel* criteria should not apply to individuals acting in a certain capacity.[35]

In sum, there are no convincing reasons for sanctions, such as a suspension or dismissal from the exercise of the judicial profession, to be found "non-criminal" in nature. This argument of the Court does not only lead to unclarity, and thus opens the door to arbitrariness and inconsistencies, but also ignores the fact that there are many criminal offences with a limited personal scope, applicable only to people distinguished by certain personal or professional features.[36]

IV. Concluding Remarks

As indicated, scholars and legal practitioners have criticised the arguments used by the ECtHR when categorising disciplinary sanctions as non-criminal, in particular severe ones imposed on judges. Such developments, initiated in the *Oztürk* case and reinforced in the *Volkov* case, are not based on any legal categories applicable to the concept of criminal law. Requiring a rule that is of "general scope" for considering a sanc-

tion as criminal in nature to the aim of applying the criminal procedural safeguards of Arts. 6 and 7 ECHR does not appear to respond to a legal logic. How broad should the category of persons addressed by the rule be in order to fall within the concept of "criminal charge" under Art. 6 of the Convention? Would the category of "employees in public office" be broad enough?

I do not have the answer to these questions. However, I believe that the issue of a more limited or more extensive scope of application of Art. 6 ECHR does not constitute reasonable grounds for determining the safeguards to be applied to certain administrative sanctioning proceedings that clearly have a punitive character. The nature of disciplinary proceedings against judges is clearly criminal and resorting to the scope of the rule to avoid providing the "top" guarantees of criminal procedure, is not convincing.

The ECtHR's approach in disciplinary proceedings against judges is even more noteworthy as the Court departs from its previous case law, where the punitive nature and the severe penalty were deemed sufficient to trigger the criminal procedural safeguards. However, as seen in *Volkov*, dismissal has not been considered as a sanction serious enough as to warrant the application of the notion of "criminal charge," using the argument that the rules on disciplinary liability of judges do not have a general scope.

Ultimately, it must be stressed that excluding disciplinary proceedings against judges which undoubtedly have severe consequences – not only for the individual sanctioned but also for the whole understanding of the rule of law principles –, is incompatible with the importance of disciplinary proceedings for judicial independence. These disciplinary proceedings should provide for the highest standards of procedural guarantees because there is always the risk that they are arbitrarily used – or even abused – to exert undue pressure upon judges.

In sum, the arguments to exclude disciplinary proceedings against judges from the application of the criminal procedural safeguards under Art. 6 ECHR is not only inadequately justified but needs to be revised in light of the importance of the protection of judicial independence in our democratic societies.

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1 See generally, D. Ohana, "Regulatory Offences and Administrative Sanctions: Between Criminal and Administrative Law", in: M. D. Dubber and T. Hörnle (eds.), *The Oxford Handbook of Criminal Law*, OUP, Oxford, 1064–1086.

2 P. Caeiro, "The influence of the EU on the 'blurring' between administrative and criminal law", in: F. Galli and A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU*, 2014, 172–190, at 174–175.

3 There is a vast amount of literature on the various aspects of the relationship between administrative and criminal sanctions, which is impossible to cite here. On a more general level, see *inter alia* A. Weyembergh and N. Joncheray, "Punitive administrative sanctions and procedural safeguards. A blurred picture that needs to be addressed", (2016) 7 (2) *New Journal of European Criminal Law*, 190–209; M. Luchtman, "Inter-state cooperation at the interface of administrative and criminal law", in: F. Galli and A. Weyembergh (eds.), *Do labels still matter? Blurring boundaries between administrative and criminal law. The influence of the EU,* 2014, 191–212; O. Jansen (ed.), *Administrative Sanctions in the European Union*, 2013; and more recently, M. Kärner, "Punitive Administrative Sanctions After the Treaty of Lisbon: Does Administrative Really Mean Administrative?", (2021) 11 (2), *EuCLR*, 156–176; and recently, M. Luchtman, K. Ligeti and J.A.E. Vervaele (eds.), *EU enforcement authorities: punitive law enforcement in a composite legal order*, Hart Studies in European Criminal Law 2023.

4 On the *ne bis in idem* principle and its application when administrative and criminal decisions were made in the same case, see e.g., S. Mirandola and G. Lasagni, "The European ne bis in idem at the Crossroads of Administrative and Criminal Law", (2019) *eucrim*, 126–135; H. Satzger (2020), "Application Problems Relating to 'Ne bis in idem' as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR", (2020) *eucrim*, 213–217.

5 Although the CJEU has avoided to establish a clear definition of criminal sanctions and criminal proceedings. See A. Klip, *European Criminal Law. An Integrative Approach,* 3rd ed. 2016, pp. 190–194.

6 As for the CJEU case law on administrative punitive sanctions and its categorisation, see: CJEU, 20 June 2018, Case C-524/15, *Luca Menci*; CJEU, 26 February 2013, Case C-617/10, *Åklagaren v. Hans Åkerberg Fransson,*; CJEU, 5 June 2012, Case C-489/10, *Lukasz Marcin Bonda.*

7 CJEU (GC), 27 February 2018, Case C-64/16, *Associação Sindical dos Juízes Portugueses v. Tribunal de Contas.*

8 CJEU, 25 July 2018, Case C-216/18 PPU, *Minister for Justice and Equality v. LM* (Deficiencies in the system of justice); CJEU, 2 March 2021, Case C-824/18, *AB et al v. CNPJ* (*Krajowa Rada Sądownictwa*); CJEU, 20 April 2021, Case C-896/19, *Repubblika v. Il-Prim Ministru*; CJEU, 18 May 2021, Case C-83/19, *Asociaţia 'Forumul Judecătorilor Din România'* and Others,; CJEU, 15 July 2021, Case C-791/19, *Commission v. Poland*; CJEU, 6 October 2021, Case C-487/19, *W. Ż*; CJEU, 16 November 2021, Case C748/19, *WB & XA v. Prokuratura Krajowa* and Others; CJEU, 16 February 2022, Cases C-156/21, *Hungary v. European Parliament and Council of the European Union,* and C- 157/21 *Poland v. European Parliament and Council of the European Union*; CJEU, 22 February 2022, Case C-430/21, *RS.*

9 CJEU, *Minister for Justice and Equality v. LM*, *op. cit.* (n. 8), para. 67.
10 Council of Europe Committee of Ministers, Recommendation No. R (94) 12 s on the Independence, Efficiency and Role of Judges, 13 October 1994.
11 Council of Europe Committee of Ministers, Recommendation No. R (2010)12 on the Independence, Efficiency and Responsibilities of Judges, 17 November 2010.
12 Point 69 of Rec. (2010)12, *op. cit.* (n. 12).
13 Para. 5.1 of the European Charter on the statute for judges, Strasbourg, 8–10 July 1998. The Charter is available at: <https://rm.coe.int/16807473ef> accessed 31 January 2023.
14 The elements that the ECtHR has taken into account when examining whether the disciplinary body of a judicial council complied with the requirements of independence and impartiality are listed in the landmark case ECtHR, 9 January 2013, *Olexander Volkov v. Ukraine,* Appl. no. 21722/11, paras. 112–115. See also ECtHR, 21 June 2016, *Ramos Nunes de Carvalho E Sá v. Portugal*, Appl. no. 55391/13; ECtHR, 31 October 2017, *Kamenos v. Cyprus*, Appl. no. 147/07, paras. 82–88; ECtHR [GC], 25 September 2018, *Denisov v. Ukraine*, Appl. no. 76639/11, para. 67.
15 See e.g., ECtHR, 26 October 2021, *Donev v. Bulgaria,* Appl. no. 72437/11; ECtHR, *Denisov v. Ukraine*, *op. cit.* (n. 14), para. 65; ECtHR, 14 November 2006, *Tsfayo v. the United Kingdom*, Appl. no. 60860/00, para. 42.
16 *Op. cit.* (n. 14).
17 It is assumed that the reader is familiar with the notion of a "tribunal established by law" and it is not necessary to explain it here in detail. In this context, see for example, ECtHR, 12 March 2019, *Guðmundur Andri Ástráðsson v.* Iceland, Appl. no. 26374/18; ECtHR, 22 July 2021, *Reczkowicz v. Poland,* Appl. no. 43447/19; ECtHR, 6 October 2022, *Juszczyszyn v. Poland,* Appl. no. 35599/20.
18 ECtHR, 27 June 1997, *Philis v. Greece (no. 2)*, § 45, *Reports of Judgments and Decisions* 1997–IV, and ECtHR, 19 April 2007, *Vilho Eskelinen and Others v. Finland* [GC], Appl. no. 63235/00, para. 62.
19 ECtHR [GC], 23 June 2016, *Baka v. Hungary*, Appl. no. 20261/12, paras. 104–105. Although this is the reiterated stance of the Court, there was a concurring opinion of Judge Pinto de Albuquerque to the Grand Chamber judgment of 6 November 2018 in *Ramos Nunes de Carvalho e Sá v. Portugal*, Appl. nos. 55391/13, 57728/13 and 74041/13, who dissents with the qualification of the disciplinary sanction system as falling within the civil limb. The arguments put forward in this concurring opinion will be analysed in Section III.
20 ECtHR, 5 February 2009, *Olujić v. Croatia*, Appl. no. 22330/05.
21 ECtHR [GC], *Ramos Nunes de Carvalho e Sá v. Portugal, op. cit.* (n. 19).
22 The judge concerned was sanctioned to 120 days of suspension from judicial duty for calling the other judge "a liar" on the phone; however, this was not the only sanction against her as two other subsequent disciplinary proceedings followed related to the witness evidence.
23 ECtHR, 9 March 2021, *Bilgen v. Turkey,* Appl. no. 1571/07.
24 In assessing the sufficiency of the judicial review, the ECtHR stated in *Ramos Nunes de Carvalho e Sá v. Portugal*, *op. cit.* (n. 19), para. 199 that it must take into account the following three elements:
1) The issues covered by the review carried out by the competent domestic court;
2) The method of review adopted by the domestic court in reviewing the decision adopted by the disciplinary body, while addressing the question of the right to a hearing;
3) The decision-making powers of the court in question for the purposes of concluding its review of the case before it, and to the reasoning of the decisions adopted.
25 However, this conclusion was subject to a separate concurring opinion, which considered that the review carried out by the Supreme Court of Portugal satisfied the requirements of Art. 6(1) ECHR. The separate concurring opinion was in favour of keeping the distinction between "scrutiny and review" and "re-examination" and disapproved of an approach leading to the creation of a "*lex specialis*" on the scope of judicial review for disciplinary proceedings against judges which would require a re-examination of the facts (paras. 21–28 of the Joint partly dissenting opinion of Judges Yudkivska, Vucinic, Pinto de Albuquerque, Turkovic, Dedov, and Hüseynov).
26 As pointed out by P. Caeiro, *op. cit.* (n. 2), p. 185, such a distinction cannot be made without a general definition of the purpose of the criminal punishment, and it does not take into account the socio-ethical relevance of the acts and the interests protected by the sanctioning system.
27 See, e.g. ECtHR, 23 March 2016, *Blokhin v. Russia*, Appl. no. 47152/06, paras. 179–180.
28 See e.g., ECtHR, 21 February 1984, *Öztürk v. Germany*, Appl. no. 8544/79, para. 50; ECtHR, 29 June 2006, *Weber and Saravia v. Germany*, Appl. no. 54934/00, para. 34.
29 ECtHR, 23 November 2006, *Jussila v. Finalnd,* Appl. no.73053/01, para. 43, establishing that tax-surcharges differ from the hard core of the criminal law.
30 ECtHR, 8 June 1976, *Engel and Others v. The Netherlands,* Appl. nos. 5100/71 et al. See, M. Arslan, "Principal questions about administrative criminal sanctioning regimes in the European Convention on Human Rights", in: U. Sieber (ed.), *Prevention, Investigation, and Sanctioning of Economic Crime*, (2019) 90 (2) *Rev. International Droit Penal*, 281–298; and in the same volume, L. Bachmaier, "New crime control scenarios and the guarantees in non-criminal sanctions: presumption of innocence, fair trial rights and the protection of property", 299–334.
31 Para. 81.
32 See ECtHR, *Oleksandr Volkov v. Ukraine, op. cit.* (n. 14), paras. 93–95; ECtHR, *Kamenos v. Cyprus*, *op. cit.* (n. 14), paras. 51–53; and more recently ECtHR, 9 February 2021, *Xhoxhaj v. Albania*, Appl. no. 15227/19.
33 See ECtHR [GC], *Ramos Nunes de Carvalho e Sá v. Portugal*, *op. cit.* (n. 19), paras. 124–128.
34 *Ibid*, para. 196. The arguments are even more questionable since in the instant case the subsidiary law applicable to the disciplinary proceedings against judges was the Criminal Code of Procedure of Portugal, which reinforces the idea that the sanctions applied in this case have a clear punitive effect.
35 P. Caeiro, *op. cit.* (n. 2), p. 187 et seq.
36 *Delicta propria*, or *Sonderdelikte*. See the dissenting opinion by judge Pinto de Albuquerque in ECtHR [GC], 15 November 2016, *A and B v. Norway*, Appl. nos. 24130/11 and 29758/11, para. 16. In the same regard, P. Caeiro, *op. cit.* (n. 2), p. 187; and Judge Pinto de Albuquerque in the concurring opinion in *Ramos Nunes de Carvalho e Sá v. Portugal, op. cit.* (n. 9), para 30.

Use of Administrative Evidence in Criminal Proceedings in Austria

Daniel Gilhofer

The admissibility of evidence from other proceedings in criminal proceedings is a challenge for the Austrian Code of Criminal Procedure. This is due to the fact that existing provisions first deal with the admissibility of evidence obtained according to the rules of the Austrian Code of Criminal Procedure but hardly regulate the admissibility of evidence collected in accordance with other procedural rules. This raises the question of whether evidence from administrative proceedings can be used in criminal proceedings. In this context, restrictions on the use of evidence could result from the concept of evidence in the Austrian Code of Criminal Procedure, from the prohibitions on the use of evidence in administrative and criminal proceedings, from fundamental rights, and from regulations on the transfer of evidence. This article examines different scenarios and analyses the legal situation in Austria on how administrative evidence is dealt with in criminal proceedings.

I. Use of Lawfully Obtained Administrative Evidence in Criminal Proceedings

The Austrian Code of Criminal Procedure (*österreichische Strafprozessordnung*, öStPO) does not contain any regulations that explicitly deal with administrative evidence. Therefore, it needs to be examined whether administrative evidence is evidence in the sense of the Austrian Code of Criminal Procedure, even if it was lawfully obtained. If administrative evidence already fails to fulfil the concept of evidence under the Austrian Code of Criminal Procedure, then any such evidence would not be usable.

The concept of evidence must be derived from the Austrian Code of Criminal Procedure as there is no legal definition of evidence.[1] Different types of evidence are scattered throughout the law: statement of the accused (Sec. 164 öStPO) and witness (Sec. 160 öStPO), documentary evidence (Sec. 252 öStPO), expert evidence (Sec. 125 et seq. öStPO), and visual inspection (Sec. 149 öStPO). However, case law[2] und legal doctrine[3] assume that the types of evidence are not exhaustively listed in the law. Rather, in criminal proceedings, in principle, everything that is suitable according to logical rules of providing evidence and of investigating the truth can be used as evidence.[4] On the basis of the *ex officio* principle (Sec. 2 öStPO) and the principle of objectivity and exploration of truth (Sec. 3 öStPO), criminal investigation authorities, prosecution authorities, and criminal courts are obliged to acknowledge evidence that may be helpful in determining the truth in essential points.[5] For administrative evidence, it follows that it falls under the concept of evidence in the Austrian Code of Criminal Procedure and must therefore be used if it can assist in the search for the substantive truth.

II. Use of Unlawfully Obtained Administrative Evidence in Criminal Proceedings

1. Distinction between prohibition to collect evidence and prohibition to use evidence in Austria

In order to be able to assess whether illegally obtained administrative evidence may be used in criminal proceedings, it is first necessary to address the relationship between the collection and use of evidence and its prohibition in general. The collection of evidence refers to the gathering of information relevant to the proceedings. Conversely, prohibitions on collecting evidence ban authorities from collecting certain evidence. The Austrian law uses various regulatory techniques for this purpose. In some cases, explicit prohibitions are stipulated by the law and are intended to prevent the collection of certain evidence.[6] Much more often, however, the legislator has not chosen the path of explicit prohibitions but instead linked the taking of evidence to certain requirements that the authorities must comply with in their investigative activities. If the authorities wish to carry out a certain investigative measure, they must check in advance which formal and substantive requirements must be fulfilled so that the collection of evidence is lawful.[7]

The use of evidence is logically downstream from the collection of evidence. After the authorities have collected evidence that is important for the assessment of the facts, a decision must be made based on the evidence obtained. This decision-making process is referred to as utilisation of the evidence.[8] A prohibition on the use of evidence obliges the decision-making body to disregard the evidence in its decision. This can pose a significant problem for the decision-making body: Prohibi-

tions on the use of evidence are merely legal constructs that prohibit the decision-making body from using the information obtained as evidence in the proceedings.[9] In fact, however, the evidence is usually still part of the file. The decision-making body will therefore also have knowledge of the information contained in the prohibited evidence. Nonetheless, it must then mentally block it out in the decision-making process and act as if it did not exist at all.[10]

The collection and use of evidence describe different procedural steps and must be considered separately from each other. Nevertheless, they are not unrelated to each other. The collection of evidence forms the basis for the use of evidence, because only evidence that has been collected can be taken into account in subsequent proceedings. In this respect, there is a close relationship between the gathering of evidence and the use of evidence, which naturally also extends to the relationship between the prohibition on gathering evidence and the prohibition on using evidence.[11] Therefore, on the one hand, errors in the collection of evidence can, under certain conditions, also lead to prohibition on subsequently using the evidence. These cases are called dependent prohibitions on the use of evidence.[12] On the other hand, however, there are also prohibitions on the use of evidence that exist independently of whether evidence has been collected in conformity with the law. These are called independent prohibitions on the use of evidence.[13]

2. Prohibitions on the use of evidence in administrative proceedings and their relevance for criminal proceedings

The fact that administrative evidence is also generally admissible as evidence in criminal proceedings does not necessarily mean that such evidence can be used in criminal proceedings in every individual case. The reason for this is because restrictions could arise from administrative procedural law that may render evidence inadmissible if its rules on the collection of evidence have not been complied with. In Austria, administrative procedural law is not uniformly regulated but different procedural laws are instead applied, which makes it difficult to make general statements about which prohibitions on the use of evidence exist.[14] Prohibitions on the use of evidence are structured very differently in the specific procedural laws. For tax procedures, for example, the Austrian Federal Fiscal Code (öBAO) applies, which does not contain any explicit prohibitions on the use of evidence. Anything that is suitable for establishing the relevant facts and is useful in the individual case may be considered as evidence in tax proceedings. Accordingly, the Supreme Administrative Court[15] has consistently ruled that the usability of evidence is not excluded by the fact that it came under the possession of the tax authority as a result of a violation of the law. The situation is different for proceedings in which the provisions of the Austrian General Administrative Procedures Act (öAVG) are applied, because prohibitions on the use of evidence exist for this type of procedure.[16] It is, e.g., argued that evidence must not be used in administrative proceedings if witnesses are questioned about circumstances that are subject to official confidentiality but they have not been released from this obligation.[17]

Notwithstanding, the existence of the prohibition on the use of evidence in the respective administrative procedural law does not indicate whether this evidence can also be used in criminal proceedings. Especially in the case of dependent prohibitions on the utilisation of evidence, it is inferred from the prohibition on collection to the prohibition on utilisation. This connection generally only exists for those cases in which the use of evidence also takes place under the procedural laws pursuant to which the evidence was collected. Normally, a prohibition on the use of evidence only states that the evidence must not be used in the respective proceedings and not that the prohibition on the use of evidence also applies to other proceedings. If evidence is unlawfully collected in administrative proceedings and then used in criminal proceedings, this probably means that existing, dependent prohibitions on the use of evidence in administrative procedural law will often no longer apply. Accordingly, explicit regulations that only prohibit the usability of evidence in administrative proceedings have no influence on criminal proceedings. The prohibition to be interrogated on matters protected by official confidentiality in the öAVG cannot therefore prevent the utilisation of evidence in criminal proceedings, because it only refers to the utilisation process in administrative proceedings.[18]

3. Prohibitions on the use of evidence in criminal proceedings and their relevance for administrative evidence

a) Prohibitions on the use of evidence in criminal proceedings in general

In Austria, dependent prohibitions on the use of evidence are accepted very restrictively in criminal procedure.[19] A prohibition on the use of evidence does not necessarily follow from every violation of a collection rule.[20] If it were assumed that prohibitions on the collection and use of evidence fully overlapped, the principle of substantive truth would be significantly limited, because every procedural error, no matter how small, would have an impact on the facts to be established by the court. Rather, the principle of substantive truth, which requires the actual historical facts to be established, must be carefully weighed and balanced with other procedural prin-

ciples.[21] Tensions can arise in particular with principles that guarantee the fairness of criminal proceedings.[22] On the one hand, it would probably be difficult for a state under the rule of law to accept that a defendant is convicted solely based on evidence obtained unlawfully by law enforcement agencies. On the other hand, it is equally problematic if a defendant who is guilty in reality cannot be convicted only because prohibitions on the use of evidence are overly generously embodied in the law.[23] This conflict of interest is solved by limiting dependent prohibitions on the use of evidence so that only certain violations of the law in the collection of evidence result in a prohibition on the use of evidence.[24]

Past case law[25] and legal doctrine[26] largely agreed that prohibitions on the use of evidence are an evaluative decision by the legislature. They were only allowed to restrict the judge's independent evaluation of evidence to the extent that the legislature's intention to exclude individual pieces of evidence was clearly manifested in the law. The judge should be able to form his or her own comprehensive opinion on the evidence presented and subsequently also be able to decide on the basis of his or her conviction gained in the proceedings when passing sentence. Consequently, prohibitions on the use of evidence would only exist in Austrian criminal proceedings if the law explicitly provided them.[27] In the Austrian Code of Criminal Procedure, dependent prohibitions on the use of evidence are explicitly mentioned wherever evidence is declared "void"[28] due to a lack of lawful action by the prosecuting authorities. Declaring evidence void is not only the decisive factor for a dependent prohibition on the use of evidence but also enables the defendant to assert the violation by means of an appeal for nullity.[29]

A few years ago, the Austrian Supreme Court[30] changed its case law and considered the enumeration of the prohibitions on the use of evidence in the Austrian Code of Criminal Procedure not to be exhaustive. Today, in Austria, the protective purpose of the norm is the decisive criterion as to whether the prohibitions to collect and use evidence are linked.[31] Certain prohibitions on the collection of evidence pursue the purpose of reducing or completely avoiding the detriment associated with the collection process. In these cases, there is no connection between the prohibition on the collection of evidence and the prohibition on the use of evidence, because the protective purpose of the provision on the collection of evidence does not extend into the sphere of the use of the evidence.[32] A mere prohibition on the collection of evidence therefore exists, for example, in the case of searches of persons (Sec. 121 öStPO). If the naked body of a person is to be inspected, a person of the same sex or a doctor must perform this act. The purpose of this provision is to protect the sense of shame of the unclothed person.[33] If a person of a different sex searches this person, this is a violation of the collection provision. However, the resulting detriment has already occurred and can no longer be eliminated by prohibiting the use of evidence in subsequent proceedings.[34]

If the protective purpose of the prohibition on the collection of evidence is that certain evidence should not be presented in criminal proceedings, then the prohibition to collect and use evidence regularly go hand in hand. The violation of the collection rule has an effect beyond the mere evidence collection process, because the utilisation of the unlawfully obtained evidence would lead to a further violation of the protective purpose of the norm.[35] Prohibitions on obtaining evidence, which were included in the law to protect a certain area of secrecy, are therefore usually linked to a prohibition on using the evidence.[36] The area of secrecy would not only be disclosed when the law enforcement agencies collect the evidence but also when these secret facts are used in the judgement.[37]

The protective purpose of the provision on the collection of evidence is of particular importance if the connection between the prohibition on the collection of evidence and the prohibition on the use of evidence is not stated in the law. In other words, evidence that stems from unlawful acts on the part of the investigating authorities is not explicitly declared void by the law. In these cases, the protective purpose of the collection provision must be interpreted to determine whether there is a corresponding prohibition on the use of evidence. When assessing which interests appear to be so worthy of protection in individual cases that they must be protected by a prohibition on the use of evidence, the Austrian Supreme Court avails itself of a comparison with prohibitions on the use of evidence explicitly stated in the law. The Austrian Supreme Court therefore only recognises prohibitions on the use of evidence not mentioned by law if they are approximately equivalent to those that have been expressly laid down.[38]

b) Applicability of prohibitions on the use of evidence in criminal proceedings to administrative evidence

In order to apply dependent prohibitions on the use of evidence in the Austrian Code of Criminal Procedure to evidence from administrative proceedings, similar hurdles arise as those in the application of prohibitions on the use of evidence from administrative proceedings. Due to the interdependence of the prohibition on the collection of evidence and the prohibition on the utilisation of evidence, it follows that existing prohibitions on the utilisation of evidence can only be applied in a limited manner if the procedural rules in the collection and utilisation process diverge. Particularly explicit prohibitions on the use of evidence in criminal proceedings refer to the fact that the collection of evidence is declared void.[39] However,

evidence that is subject to nullity is usually only found in the Austrian Code of Criminal Procedure and not in other types of proceedings such as administrative proceedings. According to case law,[40] analogous application is also ruled out because the list of void evidence in the Austrian Code of Criminal Procedure is to be seen as strictly exhaustive.

Since explicit prohibitions on the use of evidence in criminal proceedings regularly have no effect on evidence from administrative proceedings, the question emerges as to whether non-explicit prohibitions on the use of evidence can be applied because the protective purpose of the violated collection provision is roughly equivalent to an explicit prohibition on the use of evidence in the Austrian Code of Criminal Procedure. In particular, those dependent prohibitions on the use of evidence that are linked to the violation of human rights could be of interest here. The legislator has so far expressly recognised this protective purpose in criminal proceedings in the case of torture and other inadmissible methods of interrogation.[41] In this context, the severity of the interrogation misconduct determines whether it results in a prohibition on the use of evidence.[42] If, for example, law enforcement agencies torture the accused in the course of an interrogation, the results of the evidence obtained are in any case void.[43] This legal view is also in line with the case law of the ECtHR,[44] according to which a prohibition on the use of evidence exists if that evidence was obtained in violation of the prohibition of torture (Art. 3 ECHR). The violation of Art. 3 ECHR when collecting evidence in administrative proceedings arguably implies for criminal proceedings that the use of this evidence makes the criminal proceedings appear unfair as a whole and thus violates the right to a fair trial (Art. 6 ECHR).[45]

In the case of violations of human rights, however, it will often not be possible to make generally valid statements as to whether a prohibition on the use of evidence results from such a violation. This can be explained by the fact that the ECtHR[46] derives prohibitions on the use of evidence exclusively from the violation of the right to a fair trial and always examines the criminal proceedings as a whole. The Court determines the fairness of criminal proceedings on the basis of several criteria in an overall assessment of each individual case, which includes, among other criteria, the unlawfulness of the collection of evidence, the protection of the accused's rights of defence, and the significance of the evidence for the outcome of the proceedings.[47] The possibility of deriving prohibitions on the use of evidence beyond the individual case is rendered particularly difficult by the fact that the ECtHR usually answers the question of the existence of prohibitions on the use of evidence on an individual basis and always allows for the compensation of procedural violations in its overall assessment.[48]

Particularly relevant in this context is the problem of how to deal with evidence that was obtained under firm obligations to cooperate in administrative proceedings but that is subsequently used in criminal proceedings. In contrast to criminal proceedings, where the accused can, but does not have to, cooperate in obtaining evidence, the parties to administrative proceedings are partially obliged to cooperate.[49] Obligations to cooperate can have different reasons: In tax proceedings, for example, the state can only achieve equal taxation if the taxpayer is obligated to cooperate through notification and disclosure obligations.[50] In asylum proceedings, obligations to cooperate are intended to accelerate the proceedings.[51] It seems questionable whether these obligations to cooperate are compatible with the principle of *nemo tenetur*, especially since it prohibits the accused from being forced to incriminate himself. If evidence obtained in this way is not in accordance with the *nemo tenetur* principle, it could be subject to a prohibition on the use of evidence.[52]

In Austria, the *nemo tenetur* principle is based on Art. 6 ECHR as well as Art. 90 para. 2 of the Federal Constitutional Law (*Bundes-Verfassungsgesetz*, öB-VG), both of which are applied in parallel.[53] Art. 6 ECHR often does not apply to administrative proceedings because the so-called *Engel* criteria[54] developed in ECtHR case law will not be fulfilled.[55] It is true that a violation of the *nemo tenetur* principle can also occur if the evidence was obtained in proceedings to which Art. 6 ECHR does not apply but the use of evidence subsequently takes place in criminal proceedings.[56] However, the ECtHR[57] considers obligations to cooperate to be compatible with the *nemo tenetur* principle, provided that they are proportionate to the purpose pursued and do not eliminate the essence of the right. The scope of application of the *nemo tenetur* principle, which is derived from Art. 90 para. 2 öB-VG is broader, however, because it also covers proceedings that precede criminal proceedings, provided that, in these proceedings, the party concerned can be forced by legal sanctions to provide evidence against himself.[58] Yet, the Austrian Constitutional Court[59] also considers these duties to cooperate to be basically compatible with the *nemo tenetur* principle, insofar as they do not serve the purpose of criminal prosecution.

c) Mitigation through principles of criminal procedure?

Although prohibitions on the use of evidence from administrative proceedings apply only to a very limited extent, principles of criminal procedure could partially offset the lack of applicability of the prohibitions on the use of evidence. First and foremost, the principle of immediacy (Sec. 13 öStPO) and the principle of independent evaluation of evidence (Sec. 14 öStPO) should be considered.

The principle of immediacy is divided into a formal and a substantive component.[60] Formal immediacy refers to the fact that the court itself must take all evidence in the main proceedings that it needs for its decision. Therefore, only such evidence may be considered in the judgement that was featured in the main trial.[61] If, for example, evidence from an unlawful examination of a witness from administrative proceedings is to be introduced into criminal proceedings, this could basically be done in two different ways: The judge could either question the witness again in the main hearing or have the unlawfully obtained transcript from the administrative proceedings read out loud. This decision is influenced by the substantive component of the principle of immediacy. Substantive immediacy regulates how the court must take evidence. The court must always try to reach its decision from evidence that is as original as possible. If a piece of evidence can be obtained from several sources, the one that allows the most direct inference to the historical facts must be used.[62] This is also apparent from the provisions on the reading out loud of transcripts and protocols in Sec. 252 öStPO. The reading out loud of transcripts of the questioning of witnesses instead of their direct examination may only be carried out under very limited circumstances.[63]

It is unclear whether this restrictive requirement to read out loud the transcripts of the questioning of witnesses only applies to those examinations of witnesses that took place according to the rules of the Austrian Code of Criminal Procedure or whether it also applies to examinations of witnesses in administrative proceedings. Whether the testimony is to be read out loud or whether the witness is to be questioned directly makes a significant difference: If the court can read out loud the unlawful transcript of the questioning of the witness, it is included in the main hearing and – in the absence of applicable prohibitions on the use of evidence – it must also be evaluated.[64]

If the court has to re-interrogate the witness in the main hearing, it must inform him or her about the rights granted to witnesses. If the witness has the right, for example, to be exempted from the duty to testify against the accused because of his/her status as a relative and decides not to testify, the unlawful transcript of the questioning of the witness cannot be read out loud in the main hearing as none of the exceptions foreseen by law regularly apply. The unlawful transcript of the questioning of the witness is therefore not taken into account in the decision.[65] Further, if the court has not properly informed the witness about the right to be exempted from the duty to answer questions and the witness therefore does not expressly relinquish this duty, the entirety of his or her answers is void.[66]

The decision as to whether or not unlawful transcripts of the questioning of witnesses in administrative proceedings may be read out loud in criminal proceedings is to be determined by how these transcripts are qualified according to the provisions of the Austrian Code of Criminal Procedure. If they are classified as official documents, there is a general prohibition to read them out loud.[67] If they are classified as documents of another type, there is a general requirement that they be read out loud.[68] Since official documents require that statements of witnesses are made in the presence and under the direction of a judge or another official authority, transcripts of the questioning of witnesses in administrative proceedings are to be qualified as such.[69] As a result, the witnesses must be heard again and the prohibitions on the use of evidence of the Austrian Code of Criminal Procedure apply to this hearing.

Nevertheless, evidence obtained unlawfully in administrative proceedings may be used in criminal proceedings. An example of this would be if an accused person has made a statement in administrative proceedings, which is then to be used in criminal proceedings. These statements are qualified by the Austrian Supreme Court as documents of another type, which is why the statement – regardless of whether it was produced unlawfully in the administrative proceedings or not – must be read out loud.[70] The evidence can then be used, but this does not mean that a decision has been taken on how it will affect the criminal proceedings. The reason for this is because criminal proceedings are based on the principle of the independent evaluation of evidence. This requires the court to assess the credibility and probative value of evidence, not according to statutory rules of evidence but on the basis of the free and firm opinions of the judges. In doing so, the court must test the evidence thoroughly and diligently, both individually and in the intrinsic context.[71] Especially in cases in which inadmissible methods of questioning other than torture have been used in administrative proceedings, the evidence may be admissible, but the probative value of the evidence obtained will probably be diminished, if not lost.[72]

IV. Prohibitions on the Use of Evidence through Evidence Transfer Regulations

Further restrictions on the usability of administrative evidence in criminal proceedings may arise in connection with regulations regarding the transfer of evidence. In the aforementioned scenarios, it was examined whether prohibitions on the use of evidence in administrative or criminal proceedings can be applied to evidence that is collected in administrative proceedings but subsequently used in criminal proceedings, even though these prohibitions on the use of evidence are generally aimed at collecting and using evidence according to the same procedural provisions. In addition, there could also exist provisions in administrative or criminal proceedings that ex-

plicitly limit the cross-procedural use of evidence. Such restrictions are linked to different criteria and may apply, regardless of whether the collection of evidence in the administrative proceedings was lawful or unlawful. Basically, two types of restrictions are conceivable in evidence transfer regulations:

On the one hand, evidence export restrictions could be stipulated in one procedure. In this instance, provisions of administrative procedural law would stipulate that administrative evidence may only be used in another proceeding under certain conditions. However, these cases are largely restricted by provisions in the Austrian Code of Criminal Procedure. In order to exercise their functions under this Code, investigation authorities, prosecution authorities, and the courts are entitled to draw on the support of all authorities.[73] These requests may only be refused with reference to existing legal obligations of secrecy if either the obligation of secrecy expressly extends to criminal courts or if predominant public interests bar the reply. These predominant public interests, however, are to be stated in detail and with reasons.[74] As a result, restrictions on the export of evidence have only a very limited significance in Austrian criminal proceedings, especially since the legislator gives priority to the public interest of solving a criminal offence over other obligations to maintain secrecy.[75]

On the other hand, restrictions on the import of evidence may also be stipulated. In these cases, the use of evidence from other proceedings is prohibited by provisions of the Austrian Code of Criminal Procedure. Such prohibitions are rarely stipulated in the Austrian Code of Criminal Procedure and exist, as an example, for the results of a physical examination. Results of physical examinations carried out for reasons other than criminal procedure may only be used as evidence in criminal proceedings if this is necessary to prove a criminal offence for which orders for a physical examination could have been given.[76] An example of this is the taking of a blood sample from a drunk driver. If blood is taken from this person in accordance with the provisions of the Road Traffic Act (öStVO), then the obtained results may only be used in criminal proceedings to investigate offences that would also have been covered by the physical examination. Therefore, they may be used, for example, for the investigation of assaults but not for damage to property.[77]

V. Conclusion

In principle, evidence from administrative proceedings may also be used in criminal proceedings in Austria, because criminal proceedings follow a procedural concept of evidence, meaning that everything that is suitable according to logical rules to provide evidence and to investigate the truth can be used as evidence. Unlawfully obtained evidence from administrative proceedings is often not affected by existing prohibitions on the utilisation of evidence in administrative or criminal proceedings, because these prohibitions generally only apply if the collection and utilisation of evidence are carried out according to one type of procedure. It appears difficult to derive general conclusions from ECtHR case law on the prohibition on the use of evidence, due to its premise of the overall assessment and consideration of individual cases. For example, the firm obligation to cooperate, which regularly occurs in administrative proceedings, does not *per se* lead to a violation of the principle of *nemo tenetur*. The lack of applicability of prohibitions on the use of evidence from administrative proceedings can, however, be partially compensated for by criminal procedure principles, in particular the principles of immediacy and the principle of independent evaluation of evidence. Explicit restrictions on the transfer of evidence from administrative proceedings to criminal proceedings are rare and limited to certain investigative measures.

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2 Oberster Gerichtshof (OGH) [Austrian Supreme Court] 9 Os 153/85 RS0097206.
3 H. Hinterhofer and B. Oshidari, *System des österreichischen Strafverfahrens*, 2017, mn. 1.138; K. Kirchbacher and A. Sadoghi, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2020, Art. 246, mn. 10.
4 Oberster Gerichtshof (OGH) [Austrian Supreme Court] 11 Os 62/92 RS0097206.
5 Oberster Gerichtshof (OGH) [Austrian Supreme Court] 9 Os 118/78 RS0096368; R. Nimmervoll, *Das Strafverfahren*, 2nd ed., 2017, p. 531.
6 J. Hengstschläger and D. Leeb, *Kommentar zum Allgemeinen Verwaltungsverfahrengesetz*, 2005, Art. 46, mn. 13; K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2016, Art. 3, mn. 62.
7 J. Hengstschläger and D. Leeb, *Kommentar zum Allgemeinen Verwaltungsverfahrengesetz*, 2005, Art. 46, mn. 13; K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2016, Art. 3, mn. 62.
8 J. Frieberger, *Beweisverbote im Verwaltungsverfahren*, 1997, p. 35; P. Madl, *Die Verwertung unternehmensinterner Mitarbeiterbefragungen im Strafverfahren*, 2018, p. 56; K. Schmoller, "Beweise, die hypothetisch nicht existieren", (2002) *Journal für Rechtspolitik (JRP)*, 251, 252.
9 R. Kier, "Die Geltendmachung von Beweisverboten durch die Verteidigung im österreichischen Strafverfahren", in: R. Soyer and A. Stuefer

(eds.), *Effektive Strafverteidigung*, 2011, p. 67, 68; P. Madl, *op. cit.* (n. 8), pp. 56; R. Soyer, "Beweisverwertungsverbote im künftigen strafprozessualen Vorverfahren", (1999) *Österreichische Juristen-Zeitung (ÖJZ)*, 829, 830.

10 K. Schmoller, (2002) *JRP*, *op. cit.* (n. 8), 251, 251 et seq.

11 K. Schmoller, "Unverwertbares Beweismaterial im Strafprozeß. Die österreichische Rechtslage und Reformüberlegungen", in: Bundesministerium für Justiz (ed.), *Strafprozeß- und Strafvollzugsreform – Justiz und Medien*, 1989, p. 105, 115.

12 M. Jahn, *Beweiserhebungs- und Beweisverwertungsverbote im Spannungsfeld zwischen den Garantien des Rechtsstaates und der effektiven Bekämpfung von Kriminalität und Terrorismus*, 2008, p. 32; C. Kroschl, in: G. Schmölzer and T. Mühlbacher (eds.), *StPO Strafprozessordnung – Kommentar*, 2nd ed., 2021, Art. 3, mn. 10.

13 W. Platzgummer, "Gesetzliche Beweisverbote im österreichischen Strafverfahren", in: H. Haller et al. (eds.), *Staat und Recht: Festschrift für Günther Winkler*, 1997, p. 797, 798; K. Schmoller, (2002) *JRP*, *op. cit.* (n. 8), 251, 259.

14 See Art 1 öEGVG; C. Grabenwarter and M. Fister, *Verwaltungsverfahrensrecht und Verwaltungsgerichtsbarkeit*, 6th ed., 2019, 9 et seq; J. Hengstschläger and D. Leeb, *Kommentar zum Allgemeinen Verwaltungsverfahrengesetz*, 2005, Art. 1, mn. 5 et seq.

15 Verwaltungsgerichtshof (VwGH) [Austrian Supreme Administrative Court] 2005/15/0161 VwSlg 8309 F/2008; Verwaltungsgerichtshof (VwGH) [Austrian Supreme Administrative Court] 16 March 1993, 89/14/0281.

16 Verwaltungsgerichtshof (VwGH) [Austrian Supreme Administrative Court] 84/10/0191 VwSlg 11540 A/1984; J. Hengstschläger and D. Leeb, *Kommentar zum Allgemeinen Verwaltungsverfahrengesetz*, 2005, Art. 46, mn. 13.

17 J. Frieberger, *op. cit.* (n. 8), p. 161; J. Hengstschläger and D. Leeb, *Kommentar zum Allgemeinen Verwaltungsverfahrengesetz*, 2005, Art. 46, mn. 14.

18 Nevertheless, official confidentiality could be protected in other ways. See II.3.b) and II.3.c).

19 Oberster Gerichtshof (OGH) [Austrian Supreme Court] 15 Os 57/07g RS0122829; K. Kirchbacher and A. Sadoghi, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2020, Art. 246, mn. 60; G. Ruhri, "Grenzen der Verwendung und Verwertung von Verfahrensergebnissen in Strafverfahren und Urteil in Österreich", (2020) *Österreichische Anwaltsblatt (AnwBl)*, 23, 26; K. Schmoller, (2002) *JRP*, *op. cit.* (n. 8), 251, 251.

20 M. Eder-Rieder, (1984) *ÖJZ*, *op. cit.* (n. 1) 645, 650; E. Ratz, "Beweisverbote und deren Garantie durch die Rechtsprechung des Obersten Gerichtshofes in Strafsachen (Teil 1)", (2005) *Österreichische Richterzeitung (RZ)*, 74, 76; K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2016, Art. 3, mn. 64.

21 K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2016, Art. 3, mn. 59.

22 F. Höpfel, "Zur Bedeutung des Zeugnisverweigerungsrechtes nach § 152 Abs. 1 Z 1 StPO", in: H. Fuchs and W. Brandstetter (eds.), *Festschrift für Winfried Platzgummer*, 1997, p. 253, 257; K. Kirchbacher and A. Sadoghi, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2020, Art. 246, mn. 59.

23 M. Burgstaller, "Wohin geht unser Strafprozess?", (2002) *Juristische Blätter (JBl)*, 273, 280.

24 A list of grounds for exclusion of evidence can be found in K. Schmoller, (2002) *JRP*, *op. cit.* (n. 8), 251, 260 et seq.

25 Oberster Gerichtshof (OGH) [Austrian Supreme Court] 15 Os 3/92 RS0093532.

26 W. Platzgummer, *Grundzüge des österreichischen Strafverfahrens*, 8th ed., 1997, p. 20; P. Schick, "Opferschutzrechte als Schutzrechte des Beschuldigten (Teil I)", (1994) *Österreichische Richterzeitung (RZ)*, 208, 212; contrary to V. Murschetz, *Verwertungsverbote bei Zwangsmassnahmen gegen den Beschuldigten*, 1999, p. 121.

27 K. Schmoller, "Heimliche Tonbandaufnahmen als Beweismittel im Strafprozeß?", (1994) *Juristische Blätter (JBl)*, 153, 153.

28 E.g. Sec. 166 para. 2 öStPO.

29 W. Platzgummer, *op. cit.* (n. 13), p. 797, 799; K. Schmoller, "Beweisverwertungsverbote im Diskussionsentwurf zur Reform des strafprozessualen Vorverfahrens", (2000) *Österreichische Richterzeitung (RZ)*, 154, 154 et seq.

30 Oberster Gerichtshof (OGH) [Austrian Supreme Court] 14 Os 26/12y RS0124168 = EvBl 2012, 518.

31 K. Dangl, *Unternehmensinterne Untersuchungen*, 2019, p. 193.

32 K. Schmoller, (2002) *JRP*, *op. cit.* (n. 8), 251, 258; K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2016, Art. 3, mn. 64.

33 K. Schmoller, (2002) *JRP*, *op. cit.* (n. 8), 251, 258 et seq.

34 K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2016, Art. 3, mn. 64.

35 K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2016, Art. 3, mn. Rz 71/1.

36 These include, inter alia, the secrecy of confessions (Sec. 155 para. 1 fig. 1 öStPO), official confidentiality (Sec. 155 para. 1 fig. 2, 3 öStPO), certain professional secrets (Sec. 157 para. 1 fig. 2–4 öStPO) and election secrecy (Sec. 157 para. 1 fig. 5 öStPO).

37 K. Schmoller, *op. cit.* (n. 11), p. 105, 141.

38 Oberster Gerichtshof (OGH) [Austrian Supreme Court] 14 Os 26/12y RS0124168 = EvBl 2012, 518.

39 H. Hinterhofer and B. Oshidari, *op. cit.* (n. 3), mn 9.69 et seq, 9.79.

40 Oberster Gerichtshof (OGH) [Austrian Supreme Court] 11 Os 14/89 RS0099118; Oberster Gerichtshof (OGH) [Austrian Supreme Court] 9 Os 79/80 RS0099088.

41 Bericht des Justizausschusses (JAB) [Report of the Committee on Justice], 406 BlgNR 22. GP, p. 20.

42 JAB, 406 BlgNR 22. GP, *op. cit.* (n. 41), p. 20.

43 See Sec. 166 para. 1 fig. 1, para. 2 öStPO.

44 ECtHR, 11 July 2006, *Jalloh v Germany*, Appl. no. 54810/00, para. 99; ECtHR, 28 June 2007, *Harutyunyan v Armenia*, Appl. no. 36549/03, para. 66.

45 This connection is confirmed if evidence is collected and used in criminal proceedings; V. Warnking, *Strafprozessuale Beweisverbote in der Rechtsprechung des Europäischen Gerichtshofs für Menschenrechte und ihre Auswirkungen auf das deutsche Recht*, 2009, p. 60. Nothing else can apply to evidence obtained under torture in administrative proceedings, since Art 3 ECHR is also applicable to this type of proceedings; C. Grabenwarter and K. Pabel, *Europäische Menschenrechtskonvention*, 7th ed., 2021, p. 200.

46 ECtHR, 5 November 2002, *Allan v United Kingdom*, Appl. no. 48539/99, para. 42; R. Esser, "Mindestanforderungen der Europäischen Menschenrechtskonvoention (EMRK) an den strafprozessualen Beweis", in: T. Marauhn (ed.), *Bausteine eines europäischen Beweisrechts*, 2007, p. 39, 50 et seq.

47 ECtHR, *Allan v United Kingdom*, *op. cit.* (n. 46), para. 43; ECtHR, 12 May 2000, *Khan v United Kingdom*, Appl. no. 35394/97, para. 35; see also V. Warnking, *op. cit.* (n. 45), p. 51 et seq.

48 ECtHR, 15 June 1992, *Lüdi v Switzerland,* Appl. no. 12433/86, para. 49; R. Esser, *op. cit.* (n. 46), p. 39, 59.

49 On the freedom to cooperate in criminal proceedings, see T. Haslwanter, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2022, Art. 7, mn. 35 et seq.

50 H. Ebenthaler, "Strafbare Handlungen und der Nemo-tenetur-Grundsatz", (2018) *Journal für Strafrecht (JSt)*, 209, 209.

51 Erläuterungen zur Regierungsvorlage (ErlRV) [Explanatory Remarks to the Government Bill], 952 BlgNr 22. GP, p. 5; H. Grill, "Der Zugang zu Information im Asylverfahren – aktuelle Entwicklungen", (2019) *Zeitschrift für Fremden- und Minderheitenrecht (migraLex)*, 34, 37 et seq.

52 Violations of the *nemo tenetur* principle have already resulted in prohibitions on the use of evidence in case law; see e.g. ECtHR, 17 December 1996, *Saunders v United Kingdom*, Appl. no. 19187/91, para. 68 et seq.

53 C. Grabenwarter, in: K. Korinek, M. Holoubek et al. (eds.), *Österreichisches Bundesverfassungsrecht Kommentar*, 2003, Art 6 ECHR, mn. 225.

54 ECtHR, 23 November 1976, *Engel and others v Netherlands*, Appl. no. 5100/71 et al., para. 80 et seq. The ECtHR looks at the classification of the provision in national law, the nature of the offence, and the nature and severity of the sanction.

55 E.g., for the tax procedure, H. Ebenthaler, (2018) *JSt*, *op. cit.* (n. 50), 209, 210.
56 ECtHR, *Saunders v United Kingdom*, *op. cit.* (n. 52), para. 67; see also V. Warnking, *op. cit.* (n. 45), p. 90.
57 ECtHR, 21 April 2009, *Marttinen v Finland*, Appl. no. 19235/03, para. 75; see also C. Grabenwarter and K. Pabel, *op. cit.* (n. 45), p. 571.
58 Verfassungsgerichtshof (VfGH) [Austrian Constitutional Court] VfGH B 795/90 VfSlg 12454.
59 Verfassungsgerichtshof (VfGH) [Austrian Constitutional Court] VfGH B 367/87 VfSlg 11549; see also C. Grabenwarter, "Grundrechtsfragen des Finanzstrafrechts", in: R. Leitner (ed.), *Finanzstrafrecht 1996–2002*, 2006, p. 583, 593.
60 K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2012, Art. 13, mn. 5.
61 Sec. 258 para. 1 öStPO.
62 E. Fabrizy and K. Kirchbacher, *StPO Kurzkommentar*, 14th ed., 2020, Art. 13, mn. 2; K. Schmoller, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2012, Art. 13, mn. 5.
63 Transcripts of the questioning of witnesses may be read out loud, for example, if the witness has passed away in the meantime, if he or she deviates from the prior testimony in essential points, or if the plaintiff and the defendant agree on the reading out loud, see Sec. 252 para. 1 fig. 1–4 öStPO.
64 Secs. 14, 258 para. 1 öStPO.
65 The only exception to be considered is Sec. 252 para. 1 fig. 4 öStPO, which allows the reading out loud of the unlawful transcript of the questioning of witnesses from the administrative proceedings if the plaintiff and the defendant agree on this matter.
66 K. Kirchbacher and K. Keglevic, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2021, Art. 159, mn. 16.
67 Sec. 252 para. 1 öStPO.
68 Sec. 252 para. 2 öStPO.
69 Oberster Gerichtshof (OGH) [Austrian Supreme Court] 6 December 2001, 12 Os 88/01; E. Ratz, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2020, Art. 281, mn. 228.
70 Oberster Gerichtshof (OGH) [Austrian Supreme Court] 14 Os 65/18t RS0132342 = EvBl 2019, 326 = SSt 2018/72 = JBl 2019,463 (*Venier*).
71 Sec. 258 para. 2 öStPO.
72 Oberster Gerichtshof (OGH) [Austrian Supreme Court] 14 Os 65/18t RS0132343 = EvBl 2019, 326 = SSt 2018/72 = JBl 2019,463 (*Venier*); K. Kirchbacher and A. Sadoghi, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2020, Art. 246, mn. 10.
73 Sec. 76 para. 1 öStPO.
74 Sec. 76 para. 2 öStPO.
75 F. Lendl, in: H. Fuchs and E. Ratz (eds.), *Wiener Kommentar zur StPO*, 2022, Art. 76, mn. 30.
76 Sec. 123 para. 7 öStPO.
77 G. Muzak, "Die Blutabnahme nach Verkehrsunfällen zwischen der StPO und Verfassungsbestimmungen in der StVO", in: Bernat et al. (eds.), *Festschrift Christian Kopetzki*, 2019, p. 399, 407. In criminal proceedings, a blood sample may only be taken without the consent of the person concerned if the person is suspected of having committed certain criminal offences (Sec. 123 para. 4 öStPO). These include offences against life and limb by engaging in dangerous conduct in an intoxicated state (Sec. 123 para. 4 fig. 1 lit. b öStPO) as well as offences punishable by more than five years of imprisonment (Sec. 123 para. 4 fig. 2 öStPO). Because even serious property damage has a maximum penalty of six months to five years (Sec. 126 para. 2 öStGB), this offence does not meet the substantive requirements for a blood draw.

Yachts and Airplanes

What Procedures and Legal Theories Are Being Used to Forfeit Russian Assets in the United States?

Stefan D. Cassella*

For the past year – since the Russian invasion of Ukraine – there has been a great deal of interest in the seizure and forfeiture of the assets of the Russian oligarchs who have become subject to international economic sanctions. Different countries have taken different approaches: Some have merely been freezing the assets of sanctioned persons based on statutory authority to restrain their movement. Others have found ways to confiscate – or permanently take title to – these assets, invoking a variety of legal theories and instruments to do so.
In the United States, the approach has been to obtain a seizure warrant based on probable cause to believe that a yacht, airplane, or other asset of a sanctioned Russian individual or entity is subject to forfeiture because of its nexus to a criminal offence; then to seek the assistance of the courts in the jurisdiction where the asset is located to serve the warrant and take custody of the asset; and ultimately to file a civil ("non-conviction-based") forfeiture action against it, with a view to permanently depriving the owner of the property or title to it. To date, the United States has obtained seizure warrants for several yachts and airplanes. While it has been able to seize two of them with the assistance of foreign governments, it has yet to file a civil forfeiture action against any property. This article describes the procedure that the law enforcement authorities in the United States have been using to obtain seizure warrants and take custody of Russian assets. It also discusses the legal theories that the Government has used to obtain those warrants and is likely to use when it files formal civil forfeiture actions in the federal courts.

I. What is the Approach behind the Seizure/ Confiscation of Assets?

Law enforcement officials and policymakers in different countries have suggested a number of approaches to underpin the seizure and confiscation of the assets of sanctioned individuals and entities. Some have argued that law enforcement should make use of so-called "unexplained wealth orders;" but this approach is problematic for two reasons: Firstly, most countries (including the United States) do not have legislation authorizing the seizure – never mind the ultimate forfeiture – of an asset based solely on a property owner's inability (or unwillingness) to explain the source of his or her wealth. Secondly and more fundamentally, the wealth of Russian oligarchs is rarely "unexplained." A property owner can easily point to the revenue stream from his or her control of, for example, the oil and gas industry in his or her part of the world as an explanation for being able to purchase and derive pleasure from luxury yachts or airplanes.

Other countries have taken a more direct approach, authorizing not only the seizure but the permanent forfeiture of assets solely on the grounds that they are owned by a sanctioned individual. In Canada, for example, new legislation has been enacted to allow the government "to directly issue an Order seeking permanent asset forfeiture based on individuals who risk a 'grave breach of international security.'"[1]

Yet other commentators have suggested that the only way to confiscate assets permanently in a way that complies with the rule of law, and that recognizes that the source of the assets is likely to be serious criminal conduct – including embezzlement, public corruption, or other types of kleptocracy – is to return to first principles: *i.e.,* to bring criminal or non-conviction-based asset forfeiture actions based on the nexus between the property and the underlying crime, rather than the sanctioned status of the property owner. It also involves expanding the reach of the statutes that authorize such action, where required, to make them effective.[2]

The United States has taken what amounts to a hybrid approach. It does not use unexplained wealth orders; and while it may freeze assets based solely on the status of the property owner as a sanctioned individual or entity, it may not permanently take title to them for that reason alone. To the contrary, under federal law in the United States, property may only be permanently forfeited if the government – on a balance of the probabilities – can prove that the property was derived from or otherwise involved in a criminal offence.[3]

The crime that gives rise to forfeiture under federal law, however, does not have to be the "original sin" that occurred when a kleptocrat stole or extorted the funds used to purchase his or her fleet of yachts or airplanes. Indeed, those crimes – or in the case of money laundering, the predicate crime – almost always will have occurred in a foreign country, which means that any cases decided on a balance of the probabilities would require the government's being granted full access to foreign evidence, not to mention the cooperation of the foreign state where the crime took place. It is hard to imagine Russia, for example, being particularly forthcoming with the evidence needed to prove that a given oligarch's assets were derived from crimes committed in Russia.

In the cases brought in the United States to date, the alleged crime invoked as the basis for the forfeiture of a sanctioned oligarch's assets was not a crime that occurred in some foreign country where the oligarch obtained his or her wealth. Instead, the cases centred on crimes that occurred in the United States when sanctions imposed under US law were violated. That is, it is the violation *of the sanctions* in the United States that is the crime giving rise to the forfeiture, not the crime that generated the oligarch's wealth in the first place.

Sidestepping the issues inherent in basing a forfeiture action on conduct that occurred in violation of foreign law, this approach allows cases to proceed on evidence of criminal conduct that is readily available to law enforcement, such as access to bank records, and other indicia of conduct that occurred much closer to home.

II. What is the Procedure?

Before discussing the legal theories that the United States has been employing to establish the nexus between oligarchs' yachts and airplanes and a sanctions-related crime, I will explain the procedure that law enforcement in the United States is required to follow.

Under federal law, the government of the United States is able to forfeit – or permanently take title to – criminally-tainted property in two ways: as part of the defendant's sentence in a criminal case ("criminal forfeiture"), or in a separate civil action against the property ("civil or non-conviction-based forfeiture"). The former requires a conviction in a criminal case, which is hard to obtain when dealing with a foreign person not likely to consent to extradition or being extradited to the United States. Accordingly, most forfeiture actions against oligarchs' assets need to be brought as civil forfeiture actions.[4]

While civil forfeitures do not require the criminal conviction of any person or entity, they do require the government to prove – on a balance of the probabilities – that a crime was

committed and that the property in question was derived from or otherwise involved in that crime.

Most civil forfeiture cases begin with the seizure of the property, generally with a warrant issued by a judicial officer. The seizure of the property, however, is not the end of the process; it is only the beginning. It gives the government the ability to take custody of, or immobilize, the property temporarily while a formal forfeiture action is commenced and litigated in a federal court. As discussed in more detail below, the government has thus far obtained seizure warrants for a number of yachts and airplanes in contemplation of commencing formal forfeiture action, the successful outcome of which would be to permanently divest the owner of the property or title to it.

If the property in question is located within the jurisdiction of the United States, taking possession of an asset pursuant to a seizure warrant is a relatively simple matter. If the property is located elsewhere, however, the government must seek the assistance of a foreign court. As we will see later on, the United States invoked this procedure when it sought the assistance of the courts in Fiji to seize the *Amadea,* a yacht that was found in Fijian waters.

Once the property has been seized, the government must file a formal complaint setting forth the facts and legal theories giving rise to the forfeiture, and must send notice of the seizure and its intent to forfeit the property to all persons who appear to have a legal interest in it. Such persons then have a period of time in which to answer the complaint, to file motions challenging the forfeiture action, and to request (and respond to requests) for evidence relating to the forfeiture action. All of this is laid out in detail in the Civil Forfeiture Reform Act (CAFRA) and the case law that has applied it over the last quarter-century.[5]

Ultimately, if the facts of the case are undisputed, the parties may file competing motions for summary judgement, asking for judgement in their favour as a matter of law. Otherwise, where material facts are disputed, the person contesting the forfeiture – known as the "claimant" – has the right to have the case tried to a jury. Finally, even if the jury finds in the government's favor, the claimant is entitled to ask the court to set aside or mitigate the forfeiture on the grounds that it would be "grossly disproportional" to the gravity of the underlying offence.

Obviously, this is a lengthy process. Indeed, virtually every article written on the seizure of Russian yachts and airplanes over the past year has noted that given all of the due process protections in CAFRA and elsewhere in federal law, the litigation in these cases – once they have been commenced – may take ten years or more.[6] This was certainly the case with respect to other celebrated cases involving the forfeiture of foreign assets in the past.[7] So, commencing a civil forfeiture action against the assets of sanctioned Russian oligarchs is no short term undertaking likely to result in the early disposition of assets that may be used to reimburse Ukraine for military and humanitarian losses caused by the Russian invasion, at least not if an action is contested. Rather, those who commence such actions are aware that they are in for the long haul, which may explain the caution being exercised before initiating formal action, even in cases where seizures have been effected.

Nevertheless, commencing a civil forfeiture action against a seized asset serves to justify the continued, if temporary, deprivation of an owner's property. What is more, it demonstrates that any violation of US-imposed sanctions has consequences, even if the perpetrator eludes the jurisdiction of the criminal courts of the United States.

III. What are the Government's Legal Theories?

1. The *Tango motor yacht* case

Several pending cases illustrate the range of legal theories the United States Department of Justice has employed so far in seeking the seizure – and presumably, the eventual forfeiture – of Russian assets involved in the violation of sanctions. One of the first cases entailed the seizure of a motor yacht called *Tango.*[8]

In 2018, the Office of Foreign Assets Control (OFAC) named *Viktor Vekselberg*, a Russian national, as a person subject to sanctions under the International Emergency Economic Powers Act (IEEPA).[9] Vekselberg is the chairman of the board of a group of asset management companies controlling assets in the energy sector in Russia. He is also a "Specially Designated National" targeted by the sanctions imposed on Russian oligarchs after the 2014 invasion of Crimea. In essence, these sanctions bar the sanctioned individual from using the US financial system to conduct any financial transactions.

Following the invasion of Ukraine in February 2022, the FBI applied for a warrant to seize the yacht *Tango*, which at the time was moored in a marina in Mallorca, Spain. The probable cause affidavit stated that Vekselberg had conspired to evade the 2018 sanctions by concealing his ownership of the yacht. Among other things, he owned the yacht through a shell company established in the British Virgin Islands and registered it in the Cook Islands in the South Pacific.

So, what crimes had Vekselberg committed and how was the yacht connected to those crimes? The US government alleged

that to pay for maintenance on the yacht, Vekselberg sent sums of money through correspondent bank accounts in the United States to various entities overseas, always conducting the transactions in the names of the shell companies. In granting the application for the seizure warrant, the court found that if that was true, it constituted three crimes under U.S. law.

First, it constituted bank fraud. How so? Banks in the United States are not allowed to conduct financial transactions on behalf of sanctioned persons. They are also required to file Suspicious Activity Reports (SARs) alerting law enforcement to suspicious transactions. By concealing his role in the transactions, Vekselberg deprived the banks of information they would have needed to comply with the law. In other words, if the banks had known that it was Vekselberg who was conducting the transactions, they would have found his name on the sanctioned-persons list and would not have conducted the transactions and they would have filed SARs. So, by concealing his identity from the banks, Vekselberg deprived the banks of their ability to determine with whom they were doing business and to comply with the law. In so doing, he committed bank fraud.[10]

Second, by routing – or causing someone to route – money through the US financial system, Vekselberg himself was violating IEEPA provisions, which make it a crime for a sanctioned person to use the US financial system for any purpose.

Third, the Government alleged and the court found that paying for the maintenance constituted an international money laundering offense. Under the federal money laundering statute, sending money – *any* money, clean or dirty – from the United States to a foreign country with the intent to commit a "specified unlawful activity" is a money laundering offense. Violation of IEEPA is one of the 250 or so state, federal, and foreign crimes designated as a "specified unlawful activity."[11] So, sending money from the US to a foreign country with the intent to violate the sanctions constitutes a money laundering offence.[12]

Proving that a crime has occurred, however, is only the first half of the Government's burden in a civil forfeiture case. In addition, it must demonstrate that the property it is attempting to seize and eventually forfeit had the required nexus to that crime. In the case of the bank fraud and IEEPA violations, that meant that the Government had to show that the property – in this case, the *Tango* – was the "proceeds" of the crime giving rise to the forfeiture.[13] And with respect to the money laundering violation, it had to show that it was "property involved" in the money laundering offense.[14]

Proving that the yacht was involved in money laundering was easy: The money laundering offenses were the maintenance payments, and the yacht was the property being maintained; it was the *subject* of the money laundering offense, and the subject of the money laundering offense is obviously "property involved in" that offense.[15]

Showing that the yacht was the "proceeds" of the bank fraud and IEEPA offenses required more of a stretch. The government argued, however, that *but for* the maintenance payments, Vekselberg would not have been able to maintain ownership of the yacht. If you fail to maintain a $90 million yacht, the government reasoned, its worth will soon depreciate; indeed, it may sink and be worth nothing at all.[16]

Property that one would not have but for committing a crime, is one definition of the "proceeds" of a crime.[17] In issuing the seizure warrant, the court agreed with the government that, but for the payments made in the names of shell companies – which constituted bank fraud and IEEPA violations – Vekselberg would not have been able to maintain and enjoy the yacht; consequently, the yacht represented the "proceeds" of the bank fraud and IEEPA violations[18].[19]

2. The *Boeing Dreamliner* case

A later case involving a Boeing Dreamliner and a Gulfstream jet illustrates an entirely different but equally creative argument for the seizure and forfeiture of a Russian asset.

The Export Control Reform Act (hereinafter: "the Act") makes it illegal to export certain things from the United States, or to re-export those things from another country, if they were originally manufactured in the United States. Specifically, the prohibition applies to things that "could make a significant contribution to the military potential of other nations or that could be detrimental to the foreign policy or national security of the United States."[20]

While the items to which the Act applies are described in detail in federal regulations, the underlying premise is that the United States does not want weapons or aircraft manufactured in the United States to be exported either directly from the USA or from another country to a hostile country.

On February 22, 2022, following Russia's invasion of Ukraine, the list of items covered by the Act was amended to prohibit the export or re-export of any US-manufactured aircraft to Russia.

Roman Abramovich, a Russian oligarch, is the owner of two US-manufactured aircraft: a Boeing 787-8 Dreamliner valued at $350 million, and a Gulfstream G650ER valued at $60 million. Both aircraft were purchased before the amendment to

the export control regulations took effect, and have been outside of the United States for several years. International flight records show, however, that between March 12 and 15, 2022, the Gulfstream was flown from Istanbul to Moscow, from Moscow to Tel Aviv, from Tel Aviv to Istanbul, and then back to Moscow, where it remains. Similarly, flight records show that the 787 Dreamliner was flown on March 4, 2022, from Dubai to Moscow and back to Dubai, where it remains.[21]

In the government's view, the movement of the two airplanes to Russia after February 22, 2022, constituted an illegal re-export of US-manufactured aircraft in violation of the Act. Having been manufactured in the US, it was illegal to export the planes to Russia, either directly from the United States *or from a third country*. One plane had been flown from Istanbul to Russia, and the other from Dubai to Russia

Accordingly, the FBI applied for a warrant to seize the two aircraft under the civil forfeiture provisions of the Act, which authorize the seizure and forfeiture of property that has been illegally exported,[22] and the court concurred and issued the warrant.[23]

IV. Seizing Property in a Foreign Jurisdiction

Obtaining a warrant to seize property subject to forfeiture is the first step in the civil forfeiture process, but before the Government can move on to the filing of a formal complaint for forfeiture – which commences the litigation phase of the case – it must execute the warrant and take physical or constructive possession of the property. If the property is located in the United States, that is not a problem; but if it is located overseas, the execution of the seizure warrant will generally require the cooperation of a foreign Government, and if the seizure is contested, of its courts.

A good illustration of that process is the seizure of the yacht *Amadea* in Fiji in the summer of 2022 (see also Section II above). In this case, a magistrate judge in the District of Columbia issued a seizure warrant for the *Amadea* based on probable cause to believe that it was the proceeds of a violation of IEEPA and property involved in an international money laundering offense. According to the warrant application, the yacht was owned by a Russian oligarch, Suleiman Kerimov, a sanctioned individual who allegedly financed maintenance payments for the yacht through the U.S. financial system – *viz.,* correspondent bank accounts – without obtaining a licence to do so from OFAC.[24] The Justice Department thereafter requested that the government of Fiji, where the yacht was then located, register, and enforce the seizure warrant and turn the *Amadea* over to U.S. authorities.

The nominal owner of the yacht objected to the enforcement of the seizure warrant, however, arguing that Fiji's obligation to enforce a foreign order of this nature was limited to foreign *restraining orders* and did not extend to foreign *seizure warrants.* The Supreme Court held, however, that a seizure warrant and a restraining order are functionally equivalent for purposes of the UNTOC, to which Fiji is a party.[25] The court argued:

> The Convention was adopted by member States to assist each other in [the] fight against serious organized crimes. Fiji […] is obliged to carry out its obligations under the UNTOC efficiently and expeditiously and without being hampered by mere technicalities in the domestic legislation. […] [N]ot to comply with the provisions of UNTOC due to technicalities would certainly put Fiji's international reputation in dealing with international crimes and its membership of International Conventions at risk.

Accordingly, the court held that the Fiji Attorney General's decision to register the foreign order was all that was required for the court to order its enforcement, that the nominal owner's objections were overruled, and that the United States could take immediate possession of the yacht and sail it out of Fijian waters. Indeed, the court seems to have insisted that this be so because Fiji did not want to risk being held liable for the costs of maintaining the yacht while it was moored in Fijian waters. As a consequence, the yacht was immediately sailed from Fiji to San Diego.

With the assistance of authorities in Spain, the United States has also been able to effect the seizure of the *Tango* in Mallorca in the above-mentioned yacht case. In other cases, however, the US Department of Justice has apparently been less successful in obtaining the cooperation of the government of the country where the property named in a seizure warrant was located. For example, to date, the United States has not obtained the cooperation of the authorities in Dubai, where Mr Abramovich's Boeing Dreamliner is located.

V. Conclusion

While it is relatively easy to freeze the assets of a sanctioned Russian oligarch, permanently taking title to the property in accordance with the rule of law is more difficult and takes time. That said, the United States has found ways of at least initiating the process of forfeiting such assets as property derived from or involved in a criminal offence.

It remains to be seen, however, how long it will take to complete the forfeiture of the assets that the US has targeted, and what obstacles the beneficial or nominal owners of the assets will attempt to place in the government's way once formal civil forfeiture complaints have been filed and the issues are joined in the federal courts.

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1 Maria Nizzero, "From Freeze to Seize: How the UK Can Break the Deadlock on Asset Recovery," *Royal United Services Institute (RUSI)* <https://rusi.org/explore-our-research/publications/commentary/freeze-seize-how-uk-can-break-deadlock-asset-recovery> accessed 26 December 2022, citing "Canada's Senate passes budget, greenlighting measures on housing, Russian assets," <https://www.reuters.com/world/americas/canadas-senate-passes-budget-greenlighting-measures-housing-russian-assets-2022-06-23/>.

2 Nizzero, *op. cit.* (n. 1). See also Maria Nizzero, "From Freeze to Seize: Dealing With Oligarchs' Assets in the UK," *Royal United Services Institute (RUSI)* <https://rusi.org/explore-our-research/publications/commentary/freeze-seize-dealing-oligarchs-assets-uk> accessed 26 December 2022.

3 An exception to the rule barring forfeiture based solely on the status of the property owner applies to the assets of person or entities engaged in terrorism. Under 18 U.S.C. § 981(a)(1)(G), all assets of such a person are subject to forfeiture regardless of their connection to any act of terrorism or other criminal offense.

4 While criminal cases resulting in the forfeiture of assets are rare, the US has brought criminal charges against some Russian persons and given notice that if the case results in a conviction, the government will be seeking the forfeiture of the assets involved in the offence. See *United States v. Oleg V. Deripaska,* No. 22Cr518 (S.D.N.Y. 9/28/22).

5 CAFRA is codified at Title 18, United States Code, Section 983 and in Rule G of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions. See S. Cassella, *Asset Forfeiture Law in the United States,* 3d ed. 2022, at Ch. 1.

6 See, e.g., Janaki Chadha, "Confiscating a Russian Oligarch's Luxury Condo Requires Much More Than Political Bluster;" *Politico,* 3/15/22, <https://www.politico.com/news/2022/03/15/seizing-russian-oligarchs-real-estate-00017158>; Nick Kostov , Alistair MacDonald and Betsy McKay, "A Global Hunt for Russian Oligarchs' Yachts Has Begun," *Wall Street Journal,* 3/3/2022, <https://www.wsj.com/articles/russian-oligarch-igor-sechins-yacht-is-seized-in-france-as-it-prepares-to-depart-11646313685> accessed 26 December 2022.

7 See, e.g., *United States v. All Assets Held at Bank Julius Baer & Co.,* 251 F. Supp.3d 82 (D.D.C. 2017) (one of many cases dealing with the decades-long civil forfeiture action to recover the assets of Pavel Lazarenko, former Prime Minister of Ukraine); *In Re: 650 Fifth Avenue Company,* 991 F.3d 74 (2nd Cir. 2021) (one of many cases dealing with the long-running civil forfeiture action against property in New York controlled by Iran in violation of sanctions).

8 *In the Matter of the Seizure and Search of the Motor Yacht Tango*, 597 F. Supp.3d 149 (D.D.C. 2022).

9 50 U.S.C. § 1701, et seq.

10 See *United States v. Zarrab*, 2016 WL 6820737, at *11–12 (S.D.N.Y. Oct. 17, 2016) (holding that the government sufficiently alleged bank fraud when it submitted that the defendant and co-conspirators deceived US banks into processing transfers on behalf of sanctioned entities by layering transactions through intermediary shell companies in third countries, and by stripping Iran-revealing information from payment instructions that would be provided to US banks). See also *In the Matter of the Search of Multiple Email Accounts,* 585 F. Supp.3d 1 (D.D.C. 2022).

11 See 18 U.S.C. § 1956(c)(7) (listing the specified unlawful activities).

12 See 18 U.S.C. § 1956(a)(2)(A) (defining international promotional money laundering); *United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020) (finding that promoting an IEEPA violation by sending money through US correspondent accounts constituted international promotional money laundering).

13 See 18 U.S.C. § 981(a)(1)(C) (authorising the forfeiture of the proceeds of any "specified unlawful activity," including bank fraud and IEEPA offences).

14 See 18 U.S.C. § 981(a)(1)(A) (authorising the forfeiture of any "property involved in" a money laundering offence).

15 See *United States v. Miller,* 911 F.3d 229 (4th Cir. 2018) (discussing the forfeiture of the subject of the money laundering transaction as "property involved in" the violation). As noted later in the text, the US also relied on the "involved in" money laundering theory, as well as the proceeds of IEEPA theory, to seize the yacht *Amadea* in Fiji.

16 *In the Matter of the Seizure and Search of the Motor Yacht Tango*, 597 F. Supp.3d 149 (D.D.C. 2022) (probable cause affidavit appended to the court's opinion).

17 *See United States v. Clark,* 2016 WL 361560, *4 (S.D. Fla. Jan. 27, 2016) (in addition to ordering defendant to pay money judgements, court orders forfeiture of specific assets defendant would not have been able to "obtain, maintain or retain" but for the fraud scheme and his obstruction of the investigation).

18 *Motor Yacht Tango*, supra.

19 The government is also seeking the forfeiture of the property of sanctioned oligarch Oleg Deripaska under the "proceeds of IEEPA" theory in a criminal case. See *United States v. Oleg V. Deripaska,* No. 22cr518 (S.D.N.Y.).

20 50 U.S.C. § 4801, et seq.

21 United States v. A Boeing 787-8 Dreamliner, 22 Mag. 4860 (S.D.N.Y. Jun. 6, 2022) (unpublished document available on pacer.gov).

22 50 U.S.C. § 4820(j).

23 *Boeing 787-8 Dreamliner,* supra (affidavit in support of seizure warrant *in rem* pursuant to 18 U.S.C. § 981).

24 *In the Matter of the Seizure of the Motor Yacht Amadea*, No. 22-sz-9 (D.D.C. Apr. 27, 2022).

25 *Millemarin Investments Ltd. v. Director of Public Prosecutions*, Civ. App. No. CBV 06 of 2022 (Supreme Court of Fiji, Jun. 7, 2022).

Criminal and Administrative Procedures in Protecting the Financial Interests of the EU

EPPO and OLAF – Cooperation by Design

Dimo Grozdev and Gianluca Dianese*

This article argues that, with the establishment of the EPPO, the European Union intended to pursue, through the integration of procedural powers vested within the EPPO and OLAF, the creation of an "end-to-end" prosecution cycle that is able to seek both criminal penalties and administrative/financial sanctions, such as asset forfeiture and the restoration of damages caused by violations and misuse of EU funds. The authors reach the conclusion that this newly established holistic approach for the prosecution of administrative violations and criminal activities increases the effectiveness of the work of all EU bodies in tackling crime, securing punishments for the criminal perpetrators, and increasing the possibility for the misappropriated funds to be recovered.

The article further stresses that, for the purposes of a proper investigation, administrative and criminal investigative work can often overlap. Therefore, it is of utmost importance to ensure coordination between all investigative bodies. In this context, the article also underlines the mechanism of "complimentary investigation", which was introduced by the Working Arrangement between the EPPO and OLAF. It ensures the ability of both institutions to address fundamental parts of the process in order to effectively protect the EU's financial interests.

I. Introduction

Art. 86 of the Treaty on the Functioning of the European Union (TFEU)[1] introduced the possibility to establish a European Public Prosecutor's Office (EPPO), with the task of investigating, prosecuting, and bringing to judgement "the perpetrators of, and accomplices in, offences against the Union's financial interests". Leveraging on this article, 22 Member States notified the European Parliament, the European Council, and the European Commission of their decision to establish the EPPO via enhanced cooperation. As a result, Council Regulation (EU) 2017/1939 on the establishment of the European Public Prosecutor's Office ("the EPPO") was adopted and entered into force on 20 November 2017.[2]

Until that moment, the protection of the EU's financial interests had been ensured by the vigilance of the judiciary of the EU Member States and on the basis of the investigations of the European Anti-Fraud Office (OLAF). OLAF had the competence to conduct administrative investigations against fraud and any other illegal activity affecting the EU's financial interests. The establishment of the EPPO as a single, independent, and transnational prosecution office drastically and effectively changed the jurisdictional landscape with regard to protecting the EU budget. The EPPO gained the material competence[3] for investigating criminal offences listed in the so-called PIF Directive,[4] namely:

- Fraud, including cross-border value added tax (VAT) fraud involving a total damage of at least €10 million;
- Active and passive corruption;
- Money laundering;
- Misappropriation of funds and assets.

II. Mandates and Powers

The introduction of a newly designated transnational judicial body in addition to the administrative body of OLAF resulted in the creation of a twofold system of protection: By applying both criminal law and administrative mechanisms, an even more effective system has been achieved that enables the fight against fraud and against the misappropriation of EU funds.

Despite having a common goal, however, the EPPO and OLAF have separate jurisdictions, with clear boundaries and limitations. Nonetheless, their operations are significantly intertwined, as criminal investigations are often opened by the EPPO on the basis of information obtained during an administrative investigation conducted by OLAF. Moreover, in several instances, the EPPO has sought assistance from OLAF during the course of its criminal investigations in order to execute administrative measures or complimentary administrative investigations. Before taking a closer inspection of the concrete cooperation between the EPPO and OLAF on the basis of their Working Arrangement, the main aspects differentiating the criminal and administrative procedures for handling investigations aimed at protecting the EU's financial interests will be defined.

1. OLAF's competence

OLAF has the mandate to investigate fraud and corruption involving EU funds, to investigate serious misconduct within the European institutions, and to develop a sound anti-fraud policy for the European Commission. According to Art. 8(1) of the OLAF Regulation,[5] the institutions, bodies, offices, and agencies of the Union must "transmit to the Office without delay any information relating to possible cases of fraud, corruption or any other illegal activity affecting the financial interests of the Union".

OLAF exercises its powers by conducting both internal administrative investigations involving staff of EU institutions and external administrative investigations involving beneficiaries of EU grants, subsidies, and other forms of EU financing. At the conclusion of its investigations, OLAF can issue "recommendations" to competent administrative authorities (either to EU institutions or to authorities in the Member State(s) concerned) for the adoption of disciplinary/administrative/financial measures and/or the opening of judicial proceedings against perpetrators who have violated the rules protecting the EU's financial interests.[6] This approach is characterised by the fact that OLAF has no mandate to directly prosecute or impose any sanctions on the investigated persons or legal entities. Therefore, the Office must rely on EU institutions or the national authorities of the Member States to agree with the recommendations and subsequently proceed with the imposition of sanctions or the opening of criminal proceedings.

The recommendations issued by OLAF may include:

- Disciplinary measures, such as a reprimand, demotion, or dismissal;
- Administrative measures, such as amendments to contracts, changes in rules, and improvements to recruitment procedures;
- Financial measures, such as the recovery of disbursed funds, the imposition of financial penalties, and exclusion from procurement procedures;
- Judicial measures, such as a report to administrative judges or the competent national public prosecutor's office.

2. EPPO's competence

By contrast, the EPPO has the mandate to undertake investigations independently and carry out prosecutions before the competent national courts of the participating Member States until the case is finally adjudicated. Although the EPPO's competence is regulated by Council Regulation 2017/1939, which effectively establishes the Office as a transnational judicial body, EPPO's powers are regulated by the criminal law of the "participating" Member States, because it brings prosecutions before national courts and follows the national criminal procedures.

The internal criminal procedural architecture designed by the EPPO Regulation is centred around its three "organs": the monitoring Permanent Chambers, the supervising European Prosecutors, and the European Delegated Prosecutors (EDPs). The EPPO Regulation sets out their interactions and introduces a mechanism of checks and balances within this system. While the Permanent Chambers guarantee a consistent application of the law across the 22 participating EU Member States, the supervising European Prosecutors coordinate and oversee the work of the EDPs during their investigations on the ground. Both the Permanent Chambers and the supervising European Prosecutors are based and operate out of the EPPO's central office in Luxembourg.

EDPs are based in EPPO's local (i.e. national) offices and have the same powers as national prosecutors with respect to the handling of criminal investigations. In compliance with Art. 13(1) of Regulation 2017/1939, and with exceptions limited to specific national procedural principles related to specific investigative measures (e.g. interception of communications and controlled deliveries of goods), all the investigative measures enumerated in Art. 30(1) of Regulation 2017/1939 should be made available to the EDPs in all the 22 participating Member States via national criminal procedural legislation.

3. The "end-to-end prosecution cycle" and the new "joint investigation mechanism"

The goal pursued by the EU legislator was to create an "end-to-end" prosecution cycle by means of procedural integration of the powers vested with the EPPO and OLAF. This enables both criminal penalties, such as imprisonment, and administrative and financial sanctions, such as asset forfeiture and the restoration of damages caused by the violations. Thus, this newly established holistic approach to the prosecution of crimes against and to administrative violations of the financial interests of the EU increases the ability of EU bodies to effectively tackle crime, to secure punishment of the criminal perpetrators and, lastly yet importantly, to provide an effective mechanism for recovery of misused funds.

However, for the sake of a proper investigation, administrative and criminal investigative work may overlap. We must also bear in mind that the territorial competence of the EPPO limits the collection of evidence to the 22 participating Member States, while OLAF's territorial competence covers the territory of all EU Member States. The EPPO's limited territo-

rial competence creates an additional gap that is only partially solved through the implementation of measures deriving from the general principle of sincere cooperation in respect to non-participating Member States and the mechanisms of mutual legal assistance in respect to third countries, respectively.

The apparent overlapping of mandates requires sound cooperation between the two institutions, which is highlighted by Art. 101 of Regulation 2017/1939, according to which the "EPPO shall establish and maintain a close relationship with OLAF based on mutual cooperation within their respective mandates and on information exchange". This article led to the conclusion of a Working Agreement between the two institutions in order to facilitate their investigative and prosecutorial mandates, with a special focus on coordination, information exchange, and mutual support.[7]

Coordination is vital in view of respecting the principle of non-duplication in investigations. The discontinuity of OLAF's investigations must be guaranteed if the EPPO is conducting an investigation into the same facts, especially against the background of the *ne bis in idem* principle (as enshrined in Art. 50 CFR, Art. 54 CISA, and Art. 4 Prot. No. 7 ECHR). The *ne bis in idem* principle also applies to "administrative sanctions" if the so-called "Engel criteria" as established by ECtHR case law are met for an act. This requires an examination of "the legal classification of the offence under national law, the [...] very nature of the offence, and […] the degree of severity of the penalty that the person concerned risks incurring".[8] If the criminal nature of the sanction is confirmed accordingly, administrative sanctions, which might be applied on the basis of OLAF's recommendations, can preclude the possibility of conducting a criminal investigation at a later stage and exclude the opportunity of issuing and enforcing genuine criminal sanctions. In order to limit the risks of incurring in such violations of the *ne bis in idem* principle, Art. 101(2) of the EPPO Regulation stipulates that, if the EPPO is conducting a criminal investigation, "OLAF shall not open any parallel administrative investigation into the same facts".

In order to mitigate the risks of violating the *ne bis in idem* principle, the Working Arrangement between OLAF and the EPPO has introduced a measure facilitating complementary investigation on the part of OLAF. The EPPO can request that OLAF conduct a "complementary" investigation in parallel to its own criminal investigation. At the same time, OLAF can itself propose the initiation of complementary action to the EPPO. Such complementary action grants OLAF the possibility to address fundamental elements of the administrative process in order to effectively ensure the protection of the EU's financial interests, in particular in terms of speedy recovery, the adoption of administrative precautionary and conservative measures, and the drafting of structural recommendations to improve internal control and fraud detection processes. This strategy can be applied to all cases in which weaknesses during OLAF's administrative investigations are identified, e.g. the disbursement of funds and procurement procedures.

The synchronization of activities between the two investigative EU bodies represents a fundamental added value for the comprehensive approach towards protecting the EU budget, introducing what could be described as a new EU "joint investigation mechanism" in the field of the protection of the European taxpayers' money. From a more practical perspective, the coordination between the two bodies is indispensable in order to plan investigative actions. This is necessary to ensure that the evidence gathered may be fully admissible in criminal proceedings before the national courts of the Member States. It entails the need to respect high standards of data protection, to respect the rights of the individual (in particular his/her right to legal assistance and representation), and to comply with the limitations imposed by the holders of information (e.g. the Member States) that is shared in the course of such investigations.

III. Conclusion

Art. 101(3) of the EPPO Regulation stipulates the following:

> The EPPO may request OLAF […] to support or complement EPPO's activities, in particular by: (a) providing information, analyses (including forensic analyses), expertise and operational support; (b) facilitating coordination of specific actions of the competent national administrative authorities and bodies of the Union; (c) conducting administrative investigations.

This provision is possibly the most remarkable example of the EU legislator's intention to create a combined system through which the two bodies of the EU responsible for investigating fraud and other offences damaging the EU budget (i.e. the EPPO and OLAF) are enabled to improve the effectiveness of prosecution and conviction of suspects. It also effectively enhances the concrete recovery of defrauded funds and damages caused by the criminal conduct.

The fact that the EPPO may request OLAF to conduct specific conservative actions and support the criminal investigation by making available its technical and analytical expertise as well as by carrying out activities, such as on-the-spot checks and inspections and applying further coercive measures (within the limits of its administrative mandate), illustrates the vast potential and interlinked nature of the architecture of this new criminal and administrative "EU joint investigation mechanism".

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* The article reflects the personal views of the authors and not necessarily those of the Office they are affiliated with.

1 Consolidated version of the Treaty on the Functioning of the European, *O.J.* C 202, 7.6.2016, 82–83.

2 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.

3 Art. 22 of Council Regulation (EU) 2017/1939.

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

5 Regulation (EU, Euratom) No 883/2013 of the European Parliament and of the Council of 11 September 2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) and repealing Regulation (EC) No 1073/1999 of the European Parliament and of the Council and Council Regulation (Euratom) No 1074/1999, *O.J.* L 248, 18.9.2013, 1.

6 Art. 11 of Regulation (EU, Euratom) No 883/2013, *op. cit.* (n. 5) as amended by Regulation (EU, Euratom) 2020/2223 of the European Parliament and of the Council of 23 December 2020 amending Regulation (EU, Euratom) No 883/2013 as regards cooperation with the European Public Prosecutor's Office and the effectiveness of the European Anti-Fraud Office investigations, *O.J.* L 437, 28.12.2020, 49. A consolidated version of Regulation 883/2013 is available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02013R0883-20210117> accessed 6 February 2022.

7 The Working Arrangement between OLAF and the EPPO was signed on 5 July 2021 and applied as of 6 July 2021. It is available at: <https://anti-fraud.ec.europa.eu/system/files/2021-09/working_arrangement_olaf_eppo_en_9cb679e4cb.pdf> accessed 6 February 2022. For the Arrangement, see also: N. Kolloczek and J. Echanove Gonzalez de Anleo, "The European Anti-Fraud Office and the European Public Prosecutor's Office: A Work in Progress", (2021) *eucrim,* 187–190.

8 ECtHR (GC), 10 February 2009, *Sergey Zolotukhin v. Russia*, Appl. no. 14939/03, paras. 52–53; see also H. Satzger, "Application Problems Relating to "Ne bis in idem" as Guaranteed under Art. 50 CFR/Art. 54 CISA and Art. 4 Prot. No. 7 ECHR", (2020) *eucrim,* 213–217; G. Lasagni and S. Mirandola, "The European ne bis in idem at the Crossroads of Administrative and Criminal Law", (2019) *eucrim,* 126–135. For the "Engel criteria", see also the article by L. Bachmaier, "Disciplinary Sanctions against Judges: Punitive but not Criminal for the Strasbourg Court", in this issue.

The EPPO Faces Its First Important Test

A Brief Analysis of the Request for a Preliminary Ruling in *G. K. and Others*

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The article analyses the first question referred to the Court of Justice of the European Union for a preliminary ruling in a case concerning the European Public Prosecutor's Office (EPPO). It involves the interpretation of a key provision regarding the investigations of this new office, i.e. Art. 31 of Council Regulation EU 2017/1939. This provision governs investigative measures that need to be undertaken in a Member State other than the Member State of the handling European Delegated Prosecutor. In the case at issue, the Oberlandesgericht Wien, Austria is seeking clarification as to the extent of judicial review if it comes to cross-border investigations within this regime. The author argues that the case raises a number of key issues for the functioning of the EPPO regarding its structure and operation, not to mention the EPPO's relevance in the creation of a common area of justice in the European Union.

I. Facts of the Case and Reference for a Preliminary Ruling

A little more than a year after the start of operation of the European Public Prosecutor's Office (EPPO), a number of important elements of its operational activities and important legal issues that determine its operation are beginning to emerge.[1] One of the most interesting, but also most critical, issues of EPPO investigations, as was realised even before it started operating, is certainly that of transnational investigations, which are regulated by Art. 31 of Regulation 2017/1939

(the "EPPO Regulation"). Events are bearing this out, and now we have the first request for a preliminary ruling before the Court of Justice of the European Union (CJEU) precisely on the interpretation of this provision. The Court will have to interpret the validity of procedural acts of the EPPO in accordance with Art. 42(2)(a) of the EPPO Regulation – a fundamental provision in the European legislation for the functioning of the EPPO. What is the case about?[2]

A European Delegated Prosecutor (EDP) in Germany investigated a case on the circumvention of customs provisions and needed to undertake searches in Austria. According to the documents relating to the reference for a preliminary ruling, the search warrant was approved by the competent German judge at the request of the public prosecutor, as required under German law of criminal procedure. Having obtained the judge's approval for the search warrant in accordance with German law and as provided for in the EPPO Regulation, the German EDP activated the mechanism set out in Art. 31 of said Regulation.

For transnational investigations, the EPPO Regulation introduced a system that goes beyond the traditional mechanisms of judicial cooperation: the EPPO does not use the European Investigation Order to obtain evidence in the territory of another State; instead it is sufficient to involve the EDP of the State where the investigation is to be carried out (the assisting EDP) and to provide him/her with the electronic file for purposes of the execution of the investigations, once the measure has been ordered under the national law of the State in whose territory the EDP conducting the investigation operates (here: Germany). Therefore, in the case at issue, the EDP located in Austria was contacted by the German counterpart. According to Austrian law, a search ordered by the prosecutor must be approved by the competent judge. However, although the search warrant had already been authorised by the competent judge in the State of the EDP conducting the main investigation in Germany, the Austrian EDP also proceeded in accordance with the domestic law of his country and asked the Austrian judge to approve the search warrant, who did so. The persons under investigation appealed against the court approvals of the search warrants, putting forth above all a lack of serious evidence that the offence had been committed; this is a question of substance and not a question strictly related to the execution of the search warrant. The appeals court, the *Oberlandesgericht Wien*, Austria, had doubts as to which extent Austrian courts can verify the search measure under their national law and initiated a reference for a preliminary ruling to the CJEU (the case is registered as C-281/22).[3] The Austrian court in essence argued as follows:

> The EPPO is one single office and a measure to be executed in a State other than that of the EDP handling the case must normally be executed in accordance with the law of the State where the assisting EDP operates; if the latter law provides, then, for the measure to be examined by a judge, either for the purposes of prior authorisation or for subsequent approval, the judge of this State must be in a position to examine the entire file.

The referring court called to mind, however, that this would result in an even more complicated system than the one in use today in non-EPPO transnational investigations in which the European Investigation Order (EIO) comes to the fore: under the so-called EIO mechanism, the judge of the State of the execution does not have access to the entire file but examines only the certificate sent by the judicial authority requesting the measure, as the system is based on the principle of mutual recognition.

Must the consequence in transnational EPPO investigations therefore also be drawn that, like under the EIO mechanism, the examination of the judge of the State of the assisting EDP, who has been requested to carry out the measure, is limited to a formal control or that his/her control power does not extend to a complete examination of the previous criminal investigative proceedings? The referring court in Vienna questioned, however, whether this is in line with the EPPO Regulation, in which Art. 31(6) expressly stipulates that systems based on mutual recognition, such as the EIO mechanism, are merely subsidiary in EPPO investigations and would thus seem to be intended to mark a difference between the two systems of transnational assistance. As a result, the *Oberlandesgericht Wien* primarily posed the following question to the CJEU:[4]

> Must EU law, in particular the first subparagraph of Article 31(3) and Article 32 of Council Regulation (EU) 2017/1939 of 12 October 2017 concerning the implementation of enhanced cooperation with a view to the establishment of a European Public Prosecutor's Office (EPPO), be interpreted as meaning that, in the case of cross-border investigations in the event that a court must approve a measure to be carried out in the Member State of the supporting European Delegated Prosecutor, all material aspects, such as criminal liability, suspicion of a criminal offence, necessity and proportionality, must be examined?

II. Reflections on the Case

When analysing the arguments put forward by the Viennese court, my first and immediate reflection was on the effects that would descend if the Viennese court's question were to be answered in the affirmative. Indeed, the EPPO Regulation established a rule to mark a difference between the EPPO system and the mechanism of the EIO, but this may only be meant in the sense of facilitating transnational EPPO investigations. Another interpretation would end up creating a much more cumbersome framework within which the new office would need to operate.

Beyond this consideration, the case enables us to reflect on several issues underlying the EPPO system, which should be briefly recapitulated: The underlying principle is that the EPPO is defined as a "single office", but it does not operate within a

"single legal system", that is to say, a unitary legal and judicial system.[5] The question of the law applicable to the EPPO has already been the subject of numerous legal studies, and the EPPO Regulation obviously does not provide for a single European "rulebook" that the EPPO can use in its investigations.[6] On the contrary, the EPPO Regulation does not even achieve a high level of harmonisation of legislation on the investigative rules, for instance on the definitions of the investigative measures available in the EPPO investigation. Instead, it establishes the principle that each EDP applies the national law of the State in which he or she operates. Indeed, not all EPPO investigations are cross-border cases. Many of them are purely national investigations in which no problem arises as to which law is applicable: the applicable law is that of the State where the EDP conducting the investigation operates.

However, the EPPO framework must specifically deal with organizing transnational investigations, the system provided for in Art. 31 of the EPPO Regulation. Art. 31 does not solve the classic and major problem of applicable law in cases of judicial cooperation, namely the relationship between the *lex fori* (in EPPO cases: that of the handling EDP) and the *lex loci* (in EPPO cases: that of the assisting EDP).

This issue has been debated for a long time, and the EPPO Regulation seeks to resolve the question by striking a balance between the two applicable laws: in essence, the *lex loci* applies, but the *lex fori* may apply where it does not conflict with fundamental principles of the law of the State where the handling EDP operates. In addition, the rule has been established that the execution of a measure in accordance with the *lex loci*, even if it is different from the *lex fori*, cannot justify evidence being inadmissible in a trial that will take place in the State of the *lex fori* (Art. 37 of the EPPO Regulation).

On the other side of the coin, the EPPO Regulation provides that the standard for the protection of the rights of the defence should be at the highest level, which is underpinned by the rule requiring court authorisations for investigative acts.[7] According to this principle (rights of the defence), the highest standard of judicial protection with regard to the authorisation or approval of the judge should always apply, so that, whenever the law of the State of the handling EDP or the law of the State of the assisting EDP requires a judicial authorisation for carrying out a measure, that must be requested and obtained, even though it is not necessary in the State where the trial will take place. In this context, we should recall the wording of Art. 31(3) of the EPPO Regulation:

> If judicial authorisation for the measure is required under the law of the Member State of the assisting European Delegated Prosecutor, the assisting European Delegated Prosecutor shall obtain that authorisation in accordance with the law of that Member State. […] However, where the law of the Member State of the assisting European Delegated Prosecutor does not require such a judicial authorisation, but the law of the Member State of the handling European Delegated Prosecutor requires it, the authorisation shall be obtained by the latter European Delegated Prosecutor and submitted together with the assignment.

In sum, this regulation may lead to the following situations:

- If the law of the requesting (handling) EDP's State requires court authorisation, that EDP must obtain it. The reason for this, as will be seen below, is that the conditions for the measure and the manner in which it is to be adopted are governed by the law of the State where the prosecutor conducting the investigation operates. In this situation, this law applies to the measure (*lex fori*);
- If authorisation is required under the law of the State of the EDP requested to assist with the execution of the investigative measure (*lex loci*), that EDP will have to obtain such authorisation in his or her own State. The first "requesting" EDP will be unable to complain that the rights of the defence have been compromised, since the certainty is given that no such risk has been involved;
- If authorisation is required in both States (a situation that the EPPO Regulation does not expressly foresee), both EDPs (the handling and the assisting EDP) will have to obtain authorisation, because each proceeding is conducted in accordance with the law of the State in which the prosecutor operates. This will definitely not impair the rights of the defence but rather, if anything, enhance them, and the person under investigation will surely not complain about this approach.

III. Procedural Challenges

On closer inspection, however, the issue addressed by the Viennese court does not so much concern the problem of the judge's authorisation of the measure but an equally relevant and related issue, namely challenges to the measure.[8] The question arises: before which court can the alleged lack of proof or evidence of the offence in relation to the ongoing EPPO criminal investigations be invoked – only before the court of the State of the EDP conducting the investigation, where the measure was ordered (State of the handling EDP), or also before the court of the State of the EDP requested for assistance, where the measure had to be executed (State of the assisting EDP)?

As a general rule, Art. 42(1) of the EPPO Regulation (only) provides that procedural acts of the EPPO may be challenged before the national courts, naturally in accordance with applicable law. As a result, no court at the European level is competent to review procedural acts of the EPPO, except in the specific case of decisions of the EPPO dismissing a case, where

the CJEU has jurisdiction to review the decision pursuant to Art. 42(3) of the EPPO Regulation.

If one again takes recourse to the EIO, Art. 14(2) of Directive 2014/41/EU expressly provides that "the substantive review for issuing an EIO may be challenged only in an action brought in the issuing State, without prejudice to the guarantees of fundamental rights in the executing State." For its part, Art. 31(2) of the EPPO Regulation provides that "the justification and adoption of such measures shall be governed by the law of the Member State of the handling European Delegated Prosecutor." On the one hand, Art. 31(2) can be interpreted as not solely governing the division between the *lex loci* and the *lex fori* in the transnational execution of an investigative measure; the argument can be put forth that the provision precisely concerns the criminal investigative proceedings, as a consequence of which the measure must be challenged in the State where the proceedings are being conducted.

On the other hand, we should bear in mind that the EPPO is a single office, meaning that the handling EDP and the assisting EPD are not judicial officers of different States but belong to the same office. Moreover, each of them has easy access to the electronic file and, therefore, theoretically, it should not be difficult for the EDPs to make the file available to the respective judges. This would be an argument in favour of the possibility to also challenge the investigative measure in the Member State in which the measure is executed. However, if the judge of the executing State also has access to the entire file in order to assess the merits of the appeal on the grounds for the measure, the negative effect would of course be that two judges from different States would assess whether serious evidence existed for an offence; thus, risks of conflicting decisions could occur and certainly complicate the course of the investigation.

This brief analysis of the first reference for a preliminary ruling to the CJEU on a case involving the interpretation of the EPPO Regulation demonstrates that the decision of the CJEU is being expected with great interest. Considering the role that the Court has often played in the process of shaping European criminal law and a common area of justice, including criminal justice, the present case certainly affords a further fundamental opportunity in this regard.

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* The views expressed in this article are solely those of the author and are not an expression of the views of the institution he is affiliated with. The Italian version of this article has been published as follows: "Il rinvio pregiudiziale davanti alla Corte di Giustizia (caso C-281/22): l'EPPO alla sua prima, importante, prova" in: *Giurisprudenza Penale Web*, 2022, 12.

1 Cf. L. Salazar, "Habemus EPPO! La lunga marcia della Procura Europea," (2017) 3 Arch. Pen.; J.A.E Vervaele, "The European Public Prosecutor's Office (EPPO): Introductory Remarks", in W. Geelhoed, L.H. Erkelens & A.W.H. Meij (eds.), Shifting Perspectives on the European Public Prosecutor's Office, Springer, 2018; G. De Amicis, "Competenza" e funzionamento della procura europea nella cognizione del Giudice", La legislazione penale, 31.1.2022; R. Sicurella, "Spazio europeo e giustizia penale," (2018) DirPenProc; G. Guagliardi, "Procura Europea. Siamo davvero pronti in assenza di un codice di procedura penale europeo? Una nuova sfida per l'avvocatura e la magistratura", Giurisprudenza Penale Web, 2021, 2.

2 A summary of the request for the preliminary ruling is published in the following working document: <https://curia.europa.eu/juris/showPdf.jsf?text=&docid=261521&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=265595> accessed 27 January 2023.

3 The questions referred to have been published here: <https://curia.europa.eu/juris/document/document.jsf?text=&docid=264514&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=13684> accessed 27 January 2023.

4 The analysis of this question shall be in the focus of this article. In total, the Oberlandesgericht Wien formulated three questions. Question (2) is as follows: "Should the examination take into account whether the admissibility of the measure has already been examined by a court in the Member State of the European Delegated Prosecutor handling the case on the basis of the law of that Member State?" Question (3) is: "In the event that the first question is answered in the negative and/or the second question in the affirmative, to what extent must a judicial review take place in the Member State of the supporting European Delegated Prosecutor?"

5 H.H. Herrnfeld, in: Herrnfeld, Brodowski & Burchard (eds.), European Public Prosecutor's Office, Article-by-Article Commentary, London, Oxford, 2020 (comment on Art. 31 also highlights this aspect); see also: L. Bachmaier Winter, "Cross-Border Investigation under the EPPO Proceedings and the Quest for Balance", in L. Bachmaier Winter (ed.), The European Public Prosecutor's Office. The Challenges Ahead, Springer, 2018.

6 For an overview, also with respect to the proposal for the EPPO regulation, see A. Venegoni, "Considerazioni sulla normativa applicabile alle misure investigative intraprese dal pubblico ministero europeo nella proposta di regolamento COM(2013)534", Dir. Pen. cont., 20.11.2013.

7 In addition, the EPPO must also comply with the principle of proportionality: F.S. Cassibba, "Misure investigative del pubblico ministero europeo e principio di proporzionalità", Sistema Penale, 22.9.2022.

8 On this point, see Z. Durdevic, "Controllo giudiziario, ammissibilità delle prove e dei diritti procedurali nei procedimenti dinanzi all'EPPO", Europeanrights eu <http://www.europeanrights.eu/olaf/pdf_ita/4-Controllo%20giudiziario-zd.pdf> accessed 27 January 2023.

The Conflict of Competence between the EPPO and Spanish Prosecutors

Lessons Learned

Balázs Márton

The rules on the exercise of competence by the European Public Prosecutor's Office have been discussed by several authors. It has been put forward that the way in which material competence is regulated is highly complex; as is the division of competences between the European Public Prosecutor's Office and national authorities. In addition to jeopardising legal certainty, this poses a major challenge to the practical application of the law. Such challenges recently came to light in a case of positive conflict of competence involving the Spanish Prosecutor's Office and the European Public Prosecutor's Office. This article recapitulates the case and argues that while the conflict has been temporarily resolved, the parties' statements indicate that its roots go deeper than flawed EU regulation, testing the limits of the principle of the primacy of EU law.

I. Introduction: Rules on the Division of Competences between the European Public Prosecutor's Office and National Authorities

The European Public Prosecutor's Office (EPPO) became operational in the 22 EU Member States that have joined the effort via enhanced cooperation on 1 June 2021. The organisational setup and functioning of the EPPO is governed by Council Regulation (EU) 2017/1939.[1] A source of EU law containing normative orders which is directly applicable in the Member States, this regulation forms an integral part of the national law of the EU Member States without – in principle – necessitating a separate legal implementation act.[2]

Regulation 2017/1939 provides for a system of shared competence between the EPPO and national authorities in combating crimes affecting the financial interests of the European Union.[3] One way of exercising its competence is the EPPO's right of evocation, which will see the EPPO "take over" a case that has been initiated by a national authority of the participating Member States. However, an informed decision on whether or not to exercise this right of evocation requires the national authorities to submit the necessary information. When a judicial or law enforcement authority of a Member State initiates an investigation in respect of a criminal offence for which the EPPO could exercise its competence, that authority must without undue delay inform the EPPO. The same applies when, at any time after the initiation of an investigation, it appears to the competent judicial or law enforcement authority of a Member State that an investigation concerns such an offence.[4] While it goes without saying that the EPPO is also under an obligation to provide information to the Member State in accordance with the principle of loyal cooperation, this is of no further relevance to the topic at hand and will thus be disregarded.

Next to taking over an investigation, the EPPO may also exercise its competence by initiating its own proceedings where it has reasonable grounds to suspect a criminal offence that falls under its competence. In such instances, a European Delegated Prosecutor (EDP) in the Member State that has jurisdiction in accordance with its national legislation initiates an investigation and registers the case in the case management system, flagging it as a potential EPPO matter.[5] The EPPO must inform the national authorities of its decision to open an investigation without undue delay.[6]

In the event of a conflict of competence between the EPPO and the Member State authority, Regulation 2017/1939 also contains provisions that should be followed by both the EPPO and the Member State authority concerned. Drawing an analogy to the theory of public administration, a conflict of competence can be described as a situation in which the question of which authority is responsible for the administration of a case is contested. A distinction needs to be made between positive and negative conflicts of competence. In a positive conflict of competence, several authorities may wish to act on the same case. However, such situations are relatively rare compared to negative conflicts of competence, which occur when neither authority considers itself responsible. It needs to be noted that any conflict of competence between the EPPO and a national authority represents a dispute between a Member State and a supranational EU body.

A number of legal experts have previously pointed out inaccuracies and difficulties of interpretation of Art. 24 of Regulation 2017/1939, which regulates the exercise of the EPPO's material competence.[7] The premise of the Regulation is that in the event of the EPPO deciding to exercise its competence, the authorities of the Member States may no longer exercise their

own competence in respect of the same criminal conduct.[8] Consequently, the EPPO's competence has priority. However, a seemingly unambiguous legal situation is complicated by several exceptions stipulated by the Union legislator with regard to the exercise of competence in Art. 25 of Regulation 2017/1939, turning the issue into a Gordian knot. The most obvious of these exceptions concerns offences not classified as "pure" PIF offences, with the EPPO entitled to exercise its competence over a number of offences which are only related to the "pure" PIF offences under Art. 22(1) of Regulation 2017/1939, such as the "inextricably linked offences" as defined in Art. 22(3). In this case, Art. 22(3) refers to Art. 25(3), according to which the EPPO must refrain from exercising its competence and refer the case to the national authority if the sanction for the PIF offence under the relevant national law is not sufficiently severe compared to the inextricably linked offence, unless the latter offence has been instrumental to commit the PIF offence.[9] Likewise, the EPPO should refrain from exercising its competence if the damage caused to the financial interests of the Union by the offence giving rise to the EPPO's material competence does not exceed the damage caused to another victim by the same offence (except for some offences defined in the PIF Directive).[10] In addition, Art. 25 of Regulation 2017/1939 states that for offences that cause less than €10,000 in damages, the EPPO may only exercise its competence if certain conditions are met (for example if EU officials are involved) – even if a criminal offence generally falls within the EPPO's competence.[11]

A particularly controversial point is that in disputes arising from these special rules, the Union legislator no longer upholds the above-mentioned priority of the EPPO's competence. Instead, it stipulates that in case of disagreement between the EPPO and the national prosecution authorities over whether criminal conduct falls within the EPPO's competence, the national authorities who are responsible for determining the competent body for prosecution at national level also decide who may exercise their competence in this case.[12] As interpretation of EU law is required, Regulation 2017/1939 specifies that the Court of Justice of the European Union, in accordance with Art. 267 TFEU, has jurisdiction to give a preliminary ruling on the interpretation of this article of the regulation, i.e. on any conflict of competence between the EPPO and national authorities.[13]

In a conflict of competence between the EPPO as an EU body and a national prosecution/law enforcement authority, this might ultimately result in the national authority competent to decide on the attribution of competences coming to an independent conclusion – rather than requesting a preliminary ruling – when interpreting the relevant paragraphs. In turn, this could give rise to a conundrum from an EU law perspective, as the national decision is binding for the EU body. Moreover, the legislator defines in a very complex and sometimes confusing way when exactly the national authorities have to make such a decision.

It would exceed the scope of this article to explore the EPPO's material competence and the exercise of its competence in detail. What can be established is that Regulation 2017/1939 lacks normative clarity, impinging on the principle of legal certainty.

II. The Spanish Criminal Case and the Positive Conflict of Competence

The abstract shortcomings of this legislation are reflected in the concrete practice of the judiciary. This was illustrated by a recent criminal case in Spain (commonly referred to as the *Ayuso* case) resulting in a positive conflict of competence between the Spanish Public Prosecutor's Office and the EPPO. The facts of this case could only be garnered from the press, preventing a detailed account. According to these reports, the subject of the prosecution was a close relative of one of Spain's regional presidents. This person was suspected of having received a payment of around €55,000 for his participation in a transaction with a company owned by a family friend. This company was involved in the procurement of medical masks from China worth around €1.5 million during the COVID-19 pandemic. The defence put forward was that the payment represented compensation for efforts made to obtain masks below the market price.[14]

The Spanish prosecution service tasked with investigating corruption offences (*Fiscalía Especial contra la Corrupción*, FEC) opened criminal proceedings to investigate the allegations. The EPPO asserted its right of evocation as – according to it – the alleged offence involved EU financial resources (the paid compensation having been taken from EU funds). However, in the absence of any facts proving that the mask purchase was financed by EU funds, the prosecutor of the national prosecuting body, the FEC, disagreed with this interpretation. It maintained that the issue at stake represented a simple, common offence, thus in itself not justifying the exercise of competence by the EPPO. The FEC's lead prosecutor referred the conflict of competence to the Spanish Prosecutor General since the FEC was not in a position to prevent the EPPO from initiating proceedings to investigate whether EU funds were used for the procurement.[15] In turn, the EPPO suggested that – given the unusual nature of the case and the complexity of the relationship between national and EU law on the issue – the Spanish Prosecutor General should consider referring the case to the Court of Justice of the European Union (CJEU) for a preliminary ruling.[16] This coincided with a proposal by the Spanish prosecution service to separate the cases. While the

misappropriation of EU funds was to be investigated by the EPPO, the related offences were to be judged by the national prosecution service.[17]

Seeing direct and substantial national interests at stake and not convinced of an inextricable link to a criminal offence against the EU's financial interests, the Spanish Prosecutor General held that the national prosecutor's office was authorised to determine the prosecuting body and decided to separate the cases. Conversely, the EPPO took the view that a division of competence would be contrary to EU law and decided to continue the investigation. In addition, the European Chief Prosecutor criticised the procedure that led to the decision of the Spanish Prosecutor General. According to her, it was problematic for a conflict of competence between an EU body and a Member State body to be decided by that Member State's prosecutor general despite him or her being in a direct hierarchy with the authority investigating the case – this dual role preventing impartiality. Moreover, the EPPO – as the opposing party in the dispute – was not heard in the decision. The Spanish procedural rules concerning the interpretation of EU law do not explicitly provide for a right of remedy. According to the European Chief Prosecutor, these aspects prevented the Court of Justice of the European Union from exercising its exclusive power to interpret EU law, and thus jeopardised the supremacy of EU law.[18]

The FEC later terminated criminal proceedings in the absence of a criminal offence,[19] while the status of the EPPO investigation remains unknown at the time of writing (December 2022).

III. Conclusions

This article neither intended to lend support to one or the other party involved in this specific dispute nor to draw general conclusions about the functioning of the EPPO in terms of issues that might arise in the future. Nevertheless, the highlighted case of a positive conflict of competence between Spanish authorities and the EPPO represents the first in a series of disagreements between national authorities and the EPPO.[20] It is a practical example of the difficulties in defining the EPPO's material competence on the one hand, and the exercise of said competence on the other. While this is only one aspect of the complexity of Regulation (EU) 2017/1939, it is undoubtedly a very relevant one. From the point of view of EU legal interests, the more favourable outcome might have been for the Court of Justice of the European Union to have had the final say in the case in question (as has been pointed out by the European Commission).[21] However, interpretations of EU law by the Court of Justice can only provide short-term fixes for legislative shortcomings on the basis of specific, case-related facts. This makes relying on such a solution very risky from the point of view of the enforcement of defendants' rights. Given the time frame for obtaining such a judgement, it cannot be ruled out that a defendant might be subject to coercive measures in the meantime. What is more, official statements in the case discussed in this article suggest that more is considered to be at stake than a mere conflict of competence, echoing the long-standing and deep-rooted tension between national law and the primacy of EU law.

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2 Art. 288 of the Treaty on the Functioning of the European Union (TFEU).
3 Recital 13 of Council Regulation (EU) 2017/1939.
4 Art. 24(2) of Council Regulation (EU) 2017/1939.
5 Art. 26(1) of Council Regulation (EU) 2017/1939.
6 Art. 26(7) of Council Regulation (EU) 2017/1939.
7 G. Grasso, R. Sicurella and F. Giuffrida, "EPPO material competence: analysis of the PIF directive and regulation", in: K. Ligeti, M. João Antuntes, F. Giuffrida (eds.), The European Public Prosecutor's Office at launch – Adapting National Systems, Transforming EU Criminal Law, Milano, Wolters Kluwer Italia S.r.l., 2020, pp. 55 et seq.
8 Art. 25(1) of Council Regulation (EU) 2017/1939.
9 Art. 25(3)(a) of Council Regulation (EU) 2017/1939.
10 Art. 25(3)(b) of Council Regulation (EU) 2017/1939.
11 Art. 25(2) of Council Regulation (EU) 2017/1939.
12 Art. 25(6) of Council Regulation (EU) 2017/1939. Member States must specify the national authority that will decide on the attribution of competence.
13 Art. 42(2)(c) of Council Regulation (EU) 2017/1939.
14 <https://www.lainformacion.com/espana/anticorrupcion-abre-una-investigacion-por-el-contrato-del-hermano-de-ayuso/2860464/>. All references to the internet in this article were last accessed on 6 February 2023.
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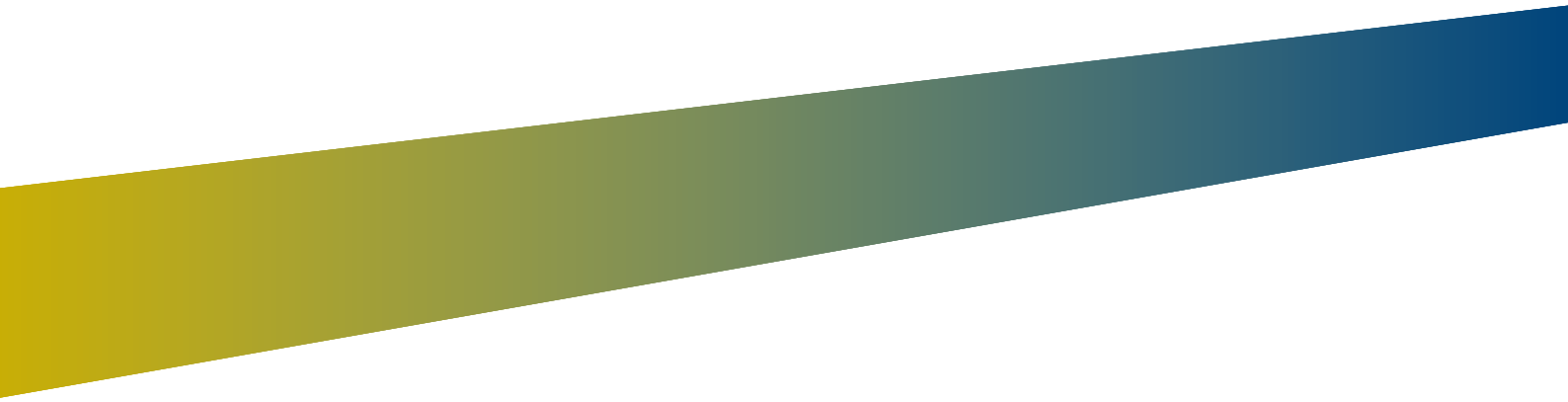

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