REPORT OF THE WORKING GROUP WAYS TO BRUSSELS

EAJ - PORTO MEETING – APRIL 2022

INTRODUCTION

The "Ways to Brussels" working group was established by the EAJ for the purpose of monitoring legislative initiatives, and implementing actions, by institutions of the European Union that have the potential to impact on the judiciaries of member states, or more widely. This is with a view to making timely representations to the legislators or policy makers concerned in the hope that legitimate concerns of EAJ members would be recognised and considered.

The members of the working group met simultaneously online and in Paris on March 25th.

We went through the work programs of the relevant European institutions, looking for the proposed measures that may impact directly on our work as judges or the work of the courts. There was not a lot to work on. We synthetized in this report the projects which seem to be of potential interest on the European level, as far as the judiciary is concerned. We also provide an overview of the last two years development on the Rule of law inside the EU.

I – FAMILY LAW

BRUSSELS II BIS REGULATION

The recast of the Brussels II bis Regulation, which will come into force on the 1st of August 2022, will bring many innovations for judges.

The main feature of the recast is that it emphasizes **cooperation** and **communication** between courts and other institutions in cross-border child protection proceedings.

To learn more : see Annex 1.

RESOLUTION OF THE EUROPEAN PARLIAMENT ON THE EU'S PROTECTION OF CHILDREN AND YOUNG PEOPLE FLEEING THE WAR IN UKRAINE

On 5 April 2022, the European Parliament adopted an important Resolution on the protection of children and young people fleeing Ukraine.

The Resolution calls on the Member States and the Commission to provide children and young people with all the guarantees that come from European and international instruments and programs in order to protect their best interests and avoid illegal trafficking of children. In the part of placing children under custody, it also concerns the work of judges.

Read more :

https://www.europarl.europa.eu/doceo/document/B-9-2022-0212_EN.html

II – THE DIGITAL SERVICES ACT (DSA)

A EUROPEAN COMMISSION PROPOSAL

The (temporary) suspension of the account of the former president of the United States earned online platforms not only praise but also a lot of criticism. For example, the former Chancellor of Germany, Angela Merkel, believed that not online platforms but an independent judge should decide on such intervention.

The Digital Services Act (DSA) is a legislative proposal by the European Commission to modernise the e-Commerce Directive regarding illegal content, transparent advertising, and disinformation. It was submitted along with the Digital Markets Act (DMA) by the European Commission to the European Parliament and the Council on 15 December 2020.[1]

The DSA is meant to improve content moderation on social media platforms to address concerns about illegal content. The DSA proposal maintains the current rule according to which companies that host other's data are not liable for the content unless they actually know it is illegal, but adds the exception that once illegal content is flagged, companies are required to remove it. The DSA would introduce new obligations on platforms to disclose to regulators how their algorithms work, on how decisions to remove content are taken and on the way advertisers target users. Many of its provisions only apply to platforms which have more than 45 million users in the European Union. Platforms including Facebook, Google's subsidiary YouTube, Twitter and TikTok would meet that threshold and be subjected to the new obligations. Companies that do not comply with the new obligations risk fines of up to 6% on their annual turnover.

With the Covid-19 pandemic, the audience of conspiracy theorists and extremists has bloomed on social media. This ever-expanding dissemination of speech promoting exclusion, hatred and violence has a lasting negative impact on the democratic functioning of our societies, particularly on fundamental rights such as the freedom of expression and of information.

[1] 'Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC', COM(2020) 825 final, 'Proposal for a Regulation of the European Parliament and of the Council on contestable and fair markets in the digital sector (Digital Markets Act), COM(2020) 842 final.

EAJ AND NGO'S APPEAL – 21 SEPTEMBER 2021

EAJ and other NGOs therefor appealed on 21 September 2021[2] to the EU to take the stand:
1. The DSA must clearly protect social media users: what is not allowed offline isn't allowed online either. (…)
3. The DSA must ensure the independence of trusted flaggers NGOs, as well as that of Digital Services Coordinators.
4. The DSA must affirm the responsibility of the platforms in the removal and rapid delisting of illegal content. (…)
7. The DSA must affirm the importance of the monitoring of these provisions by an independent judge.
8. The DSA must allow for an independent judge to prevent the re-publication of identical content and mirror sites declared as illegal. (…)

THE EUROPEAN PARLIAMENT APPROVAL

On 20 January 2022, the European Parliament agreed, after a lot of amendments, with the proposed text of DSA. This will be used for the negotiations with the EU Council. It seems inevitable the new set of rules will give a lot of complaints, conflicts and lawsuits.

It could be important for judges themselves, in the context of the pending discussion about the upcoming CCJE Opinion, No. 25 (2022) on freedom of expression of judges, and the way judges and court decisions are attacked in the media and on social networks.

III – CRIMINAL MATTERS

PROPOSAL FOR A DIRECTIVE LAYING DOWN HARMONISED RULES ON THE APPOINTMENT OF LEGAL REPRESENTATIVES FOR THE PURPOSE OF GATHERING EVIDENCE IN CRIMINAL PROCEEDINGS (COM[2018] 226 FINAL)

The Parliament's Civil Liberties, Justice and Home Affairs Committee (LIBE) proposed to reject the proposal but to open interinstitutional negotiations on changes and modifications.

Following this proposal, the plenary of the Parliament decided on 16 December 2020 to reject the Proposal for the Directive in its initial version, but to open interinstitutional negotiations on changes and modifications. These negotiations are currently under way. The project is part of the common legislative priorities for 2021 established by the three EU institutions[3], to which they want to ensure substantial progress.

[2] See e-mail IAJ secretariat 27-9-2021.
[3] https://oeil.secure.europarl.europa.eu/oeil/popups/thematicnote.do?id=2066000&l=en

THE EUROPEAN PUBLIC PROSECUTOR'S OFFICE (EPPO)

22 European Prosecutors and the European Chief Prosecutor based in Luxembourg oversee investigations initiated by the European Delegated Prosecutors in the participating Member States.

The European Public Prosecutor's Office is based on a dual structure:
-The central office has its seat in Luxembourg. The head of the public prosecutor's office is appointed for a non-renewable 7-year term. The 22 European Public Prosecutors, one per participating State, are appointed for a non-renewable term of 6 years.
The European prosecutors form a college for strategic matters. Responsible for the general monitoring of the activities of the European Public Prosecutor's Office, the college adopts strategic decisions and ensures the coherence and effectiveness of the European Public Prosecutor's policy in all the Member States. On the other hand, it does not take operational decisions in specific cases.
For operational matters, the European Public Prosecutors are organized in fifteen permanent chambers of three members, chaired by the head of the EPPO or one of his deputies, or, failing that, by another European Public Prosecutor.
-Each of the 22 participating Member States has a decentralized level with European Delegated Prosecutors, responsible for the operational follow-up of investigations and prosecutions. The appointment of these prosecutors must be validated by the College. 94 European Delegated Prosecutors were active in 2021 and 7 have already been appointed in 2022.

The EPPO has concurrent jurisdiction with the national prosecutors' offices: informed by them of infringements of the Union's financial interests, it will decide whether to investigate or to leave the case in the hands of the national authority. Permanent chambers supervise and direct the investigations and prosecutions conducted by the European Delegated Prosecutors.

European Delegated Prosecutors initiate investigations and decide on the investigative actions to be taken directly or entrusted to the competent authorities of their State. They follow the instructions given by the permanent chambers and by the European prosecutor in charge of the supervision of their investigations and report any important event to them.

The European arrest warrant can be used by the European Delegated Prosecutors.

Suspects and accused persons benefit from the procedural rights granted by Union law and by national law.

Procedural acts are subject to judicial review under national law. However, the Court of Justice of the EU has jurisdiction to give preliminary rulings in some situations.

The judgment will normally take place in the State of the DPE in charge of the investigation. However, in cases involving more than one Member State, the permanent chamber in charge of the case may decide otherwise.

The competent national court is free to assess the evidence presented, which cannot be admissible on the sole ground that it was collected in another Member State or according to the law applicable in another Member State. It is therefore the rules of national law that will prevail as regards the admissibility of evidence, as this aspect has not been the subject of any particular harmonisation.

According to the 2021 annual report, by 31 December 2021 there were 515 active investigations:
• 17.6% of them were into VAT fraud, for estimated damages of €2.5 billion
• 27.5% of them had a cross-border dimension.

In this report, the EPPO points out that the level of detection of fraud varies significantly form Member State to Member State. The EPPO intervention brings a "decisive advantage to law enforcement in cross-border investigations".

To learn more:

- https://www.eppo.europa.eu/en/news?keywords=&date_after=&date_before=&page=0
- Annex 2 : *Le parquet européen, un organe particulièrement novateur* (published in Le Nouveau Pouvoir Judiciaire n°434, USM, France, March 2021)

IV –THE RULE OF LAW WITHIN THE EU

On the 3rd of April 2019, the European Commission launched a reflection process on the rule of law in the European Union. Here is an overview of the last two years developments on this subject.

THE MANAGEMENT OF COVID-19 PANDEMIC CRISIS REGARDING THE RULE OF LAW

Since the beginning of the COVID-19 pandemic in early spring 2020, EU States have taken exceptional **emergency measures** in order to protect public health (declared public emergency, or granted special emergency powers, under constitutional provisions or public health protection laws). Challenges emerged of widespread use of accelerated legislative procedures, lack of impact assessment and consultations and reduced parliamentary oversight. The EU Commission has been monitoring the measures which have an impact on the rule of law, democracy and fundamental rights and recalled that these exceptional measures should be necessary, proportionate, limited in time and subject to scrutiny.

Scrutiny of the legality, justification and proportionality of COVID-19 measures by the courts has been an essential counterweight to government's powers to take decisions which could disproportionately affect citizen's fundamental rights. **Supreme Courts and Constitutional Courts** played a key role in the system of checks and balances, along with parliaments, ombudsmen and other independent authorities. However, developments in some states raise concerns. Weakened democratic checks and balances in pandemic period are a potential threat to the Rule of law framework and human rights protection – especially where more generalized deficiencies exist.

The European Parliament has played an increasingly important role in setting the debate on the Rule of Law situation. In October 2020, it adopted a resolution inviting the EU Commission and the Council to enter into negotiations on an inter-institutional agreement on reinforcing union values, with Commission welcoming the resolution. As regard the situation in specific countries, the Parliament adopted resolutions on situation of rule of law in Bulgaria, Malta and Poland.

The pandemic has affected the **functioning** of the national justice systems and activity of the courts. There were interruptions or delays in the handling of cases and court proceedings leading to significant backlogs in many states. Many of those states have taken measures to reduce the impact of the pandemic and were able to re-start hearings applying distancing rules or videoconferencing techniques.

While government **expenditure** on the justice system has generally increased, numbers of judiciaries still cope with limited resources. The economic and social effects of the COVID-19 crisis has underlined the need to strengthen the resilience of the justice system, namely because caseload can be expected to increase.

During the coronavirus pandemic, **media** have proven essential in fighting disinformation. Nevertheless, concerns are raised about effectiveness and adequate resources, as well as risks of politicisation of media authorities in some Member States. Lastly, journalists and other media actors face threats and attacks in relation to their work in several Member States, although some countries have also developed practices and set up legal frameworks to support and protect journalists and media freedom and pluralism, as core values of democratic society.

PRIMACY OF UE LAW AND AUTHORITY OF EUROPEAN COURTS

The pandemic period was marked by an alarming trend of constitutional courts of EU Member States challenging the authority of the two European Courts – the **EU's Court of Justice (CJEU)** and the **European Court of Human Rights (ECtHR)**. In Poland, the government employed a politically compromised Constitutional Tribunal to directly challenge both courts. In Romania, the Constitutional Court set out on its own to challenge the authority of CJEU. At the same time, there has also been an increasing lack of implementation ECtHR judgments across the EU, even though they are legally binding for the Member States. Some countries, such as Hungary and Poland, have shown particularly little willingness to revert the trend.

However, CJEU continued to develop its case law on the Rule of law. Through the preliminary ruling mechanism, national courts continued to bring rule of law relevant questions to the attention of this court. These rulings were related to judicial appointment procedures, the execution of European arrest warrants in case of persistent deficiencies as regards judicial independence in a member state, the disciplinary regime for judges, the personal liability of judges, the creation of a special prosecution section dealing with judges and the principle of primacy of EU law.

The EU Commission has requested the CJEU to order interim measures to prevent a serious breach of the values referred in article 2 Treaty on the UE (TUE). Besides infringement proceedings, which aim to address specific breaches of article 7 of the TUE, provides the more general procedure for upholding the common values of the Union, including the rule of law. The **Council** remains seized in two procedures, brought by the Commission against Poland (2017) and by the European Parliament against Hungary (2018). In June 2021, the Council held hearings for both Hungary and Poland.

IMPROVING THE RULE OF LAW: THE ROLE OF THE EU COMMISSION

The **European Rule of Law Mechanism**, an EU regulation of the European Parliament and of the Council, aims more specifically to protect the financial interests of the EU against the breach of the rule of law. The regulation was adopted on 16 December 2020 and was applied as of 1 January 2021. The mechanism is designed as a yearly cycle to promote the Rule of Law and to prevent problems from emerging or deepening. A core objective of the European rule of law mechanism is to stimulate inter-institutional cooperation and encourage all EU institutions to contribute in accordance with their respective institutional roles.

The EU Justice Scoreboard presents an annual overview of indicators on the efficiency, quality and independence of justice systems. Its purpose is to assist the Member States improve the effectiveness if their national justice systems by providing objective, reliable and comparable data. It is one of the sources of information for the annual **Rule of Law Report** of the EU Commission.

The **Rule of Law** is a precondition for the proper management of EU funds and in May 2018 the Commission proposed to accompany its proposals for the new budgetary framework with a legislative proposal for a dedicated mechanism to protect EU funds against risks arising due to rule of law breaches in individual states. The resulting **Regulation** (Multiannual Financial Framework 2021-2027, the EU Recovery Instrument and the Rule of Law Regulation) was adopted in December 2020.

INDEPENDENCE OF MEMBER STATES JUSTICE SYSTEMS

Several member states are undertaking **reforms** to strengthen judicial independence and are reducing the influence of the executive or legislative power over the judiciary.

All member states have continued their efforts to reform their justice systems, but objectives, scope, form and state of implementation of these reforms vary. The areas of reform range from structural constitutional changes, such as establishing a council for the judiciary or new courts, to concrete operational measures. The new Councils for the judiciary established in Ireland and Finland are now operational. Judicial independence is strengthened through the Councils, reforms on the method of appointing judges and reforms regarding the autonomy and independence of the prosecution services. However, in a few member states, the direction of reform efforts has been towards lowering safeguards for judicial independence.

Some serious concerns remain, however, in several states – especially pertaining to the independence of the judiciary, the freedom and pluralism of media, the quality and efficiency of justice systems, including delays in delivering justice, appointment of judges, obstacles to the enforcement of the judgments and inadequate legal aid systems, affecting the right to access to a court and to a fair trial.

Concerns also affect the capacity of Councils for the judiciary to exercise their functions and increasing influence of the executive and legislative branch over the functioning of the justice systems, including constitutional courts or Supreme Courts. Some of these developments have led the EU Commission to launch infringement proceedings under Article 7.

Several member states have strengthened the integrity framework for judges and prosecutors. Significant steps have been taken to address allegations of breaches of judicial ethics, disciplinary misconduct or corruption within the judiciary. Reforms to strengthen safeguards for judicial independence in disciplinary proceedings are ongoing in a few member states.

Concerns remain about the continued political attacks against the judiciary and repeated attempts to undermine the reputation of judges in some member states. Measures, including disciplinary ones, have also been taken, affecting the freedom of judges to submit **preliminary references** to the Court of Justice of the EU.

Despite all, the general public's **perception of independence** has improved in more than two-third of the member states.

Céline Parisot

President of the working group

ANNEX 1

REGULATION BRUSSELS II BIS RECAST

Significant changes:

Regulation Brussels IIa	**Brussels IIa recast Regulation**
2 track system oGeneral decisions oRecognition oExequatur oPrivileged decisions oSpecial certificate oRemedies in member state (MS) of origin + irreconcilability Few rules on enforcement No rules on circulation of provisional, including protective measures and Hague return decisions	2 track system oGeneral decisions oRecognition o**Abolition of exequatur** BUT safeguards oPrivileged decisions oSpecial certificate o**More remedies in MS** of origin +**Remedies in the MS of enforcement**+ irreconcilability **More rules** on enforcement, including grounds for suspension and refusal **Rules on** circulation of some provisional, including protective measures and Hague return decisions

Decisions:

Ø**All but the 2 privileged decisions, including**:

•**return decision** under the 1980 HC which has to be enforced in a MS other than the MS where the decision was given

•**provisional, including protective, measures** ordered by a court which by virtue of this Regulation has jurisdiction **as to the substance of the matter**

•provisional, including protective, measures **ordered in accordance with Article 27(5)** accompanying a return decision under the HC

Ø**Phase of the procedure in the MS of origin**

•matrimonial matters – no further appeal in the MS of origin

•parental responsibility – executable in the MS of origin

Recognition:

Ø**Types of recognition:**

◦***ipso jure*** (Art 30, par. 1)

◦**by a decision** that there are no grounds for refusal of recognition

◦or by a decision that the recognition is to be refused on the basis of one of those grounds

(Art 33, “b”)?

◦local jurisdiction– up to the national law of the MS of the recognition (Art 30, par. 4)

◦**incidental** recognition or non-recognition (Art 30, par. 5)

Ø**Documents to be produced – Art 31:**

•a copy of the **decision** which satisfies the conditions necessary to establish its authenticity;

•appropriate **certificate**

But: absence of documents – Article 32

•translation/transliteration:

•upon request of the court or competent authority

•of the translatable content of the free text fields of the certificate

•of the decision in addition to a translation or transliteration of the translatable content of the free text fields of the certificate if it is unable to proceed without such a translation or transliteration.

Ø**Stay of proceedings – Art 33**

Enforceability:

ØA decision in matters of parental responsibility given in a Member State which is enforceable in that Member State shall be enforceable in the other Member States **without any declaration of enforceability** being required - Art 34 (1)

ØFor the purposes of enforcement in another Member State of a decision granting **rights of access,** the court of origin may declare the decision provisionally enforceable notwithstanding any appeal Art 34 (2)

Enforcement:

Ø**By a party seeking enforcement**

Ø**Authority competent for enforcement**

Ø**Documents**

oa copy of the **decision**, which satisfies the conditions necessary to establish its authenticity – Art 35 (1) a);

othe appropriate **certificate** – Art 35 (1) b) and 36

-detailed standard forms

-upon application by the party

-in the language of the decision + in another language but no translation of the free fields

-translation/transliteration upon request of the court/competent authority

-no challenge against the issuance of the certificate

-rectification in the MS of origin - Art 37

o**for provisional, including protective measures** – Art 35 (2) b) and c):

-additional information in the certificate that **the court of origin has jurisdiction as to the substance of the matter** or has ordered the **measure in accordance with Art 27(5)** in conjunction with Art 15

-where the measure was ordered without the respondent being summoned to appear, **proof of service of the decision**

Grounds for refusal of recognition and enforcement:

Ø**Grounds for refusal in matrimonial matters – Art 38 ≡ RBIIA**
Ø**Grounds for refusal in matters of parental responsibility:**
oArt 39 ≡ RBIA but hearing of the child
for enforcement only:
oArt 56(6) – lasting grave risk
oArt 57 - under the law of the Member State of enforcement in so far as they are not incompatible with the application of Art 41, 50 and 56
oNB! Art 56(6) and Art 57 applicable to general and privileged decisions
Ø**It is left to national law** whether the grounds for refusal may be raised **by a party or *ex officio*** as provided by national law (Recital 54)

Hearing of the child - Art 39(2):
ØThe recognition of a decision in matters of parental responsibility may be refused if it was given without the child who is capable of forming his or her own views having been given an opportunity to express his or her views in accordance with Art 21, except where:
a)the proceedings only concerned **the property** of the child **and** provided that giving such an opportunity was not required in light of the subject matter of the proceedings; or
b)there were **serious grounds** taking into account, in particular, the urgency of the case
Ø NB! A different method to hear the child not a ground for refusal.

Privileged decisions:
Ø**Enforcement without any declaration of enforceability ≡ RBIIA**

Ø**Refusal** of recognition and enforcement
oirreconcilable decisions – Art 50 # Po*vse* C-211/10
ofurther grounds for enforcement – lasting grave risk and under the national law (Art 56 (6) and 57)

Ø**Documents**
ocopy of the decision, which satisfies the conditions necessary to establish its authenticity
oan appropriate certificate issued pursuant to Art 47
otranslation/transliteration

Ø**Certificates**
Ø**Upon application** by a party **by the court** that has given a decision

ØOn the language of the decision and **also in the language of another MS** save the free fields

ØConditions for issuance ≡ RBIIA but **reference to the hearing of the child pursuant to Article 21**;

ØEffect only within the limits of the enforceability of the decision

ØRemedies against the issued certificate:
oRectification –due to a material error or omission discrepancy between the decision and the certificate - Art 48(1)

- **Withdrawal** –wrongly granted, having regard to the requirements laid down in Art 47 - Art 48(2)
- **Certificate on lack or limitation of enforceability** – Art 49

Enforcement procedure:

- Governed **by the law of the MS of enforcement** as a decision given in that MS but the Regulation

- **Authorities competent for enforcement**

- **Service** of certificate and decision prior to the first enforcement measure – Art 55

- **Suspension** of enforcement – Art 56(1) – 56(5)
  - new reasons for suspension – Art 56(2) d) and Art 56(4) and (5)

- **Refusal** of enforcement as per **Art 41(39), 50, 56(6) and 57**
  - depending on the ground
  - Article 39/41 – court
  - other grounds – authority or court
  - provision of decision, certificate, translation, transliteration

- **Expeditious** procedures

- **Challenge** or appeal and further challenge or appeal

- **Stay of proceedings** after application for refusal of enforcement

- **Lasting grave risk - Art 56(6)**

- **How:**
  - upon application of the person against whom enforcement is sought or, where applicable under national law, of the child concerned or of any interested party acting in the best interests of the child
  - by the authority competent for enforcement or the court

- **When:**
  - where the **grave risk** referred to in paragraph 4 is of a lasting nature
  - paragraph 4: enforcement would expose the child to a **grave risk** of physical or psychological harm due to temporary impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances
  - In exceptional cases
  - first suspension or directly refusal

- **Why:** the best interests of the child
  - In exceptional situations a change in the relevant facts may justify the non-enforcement of final return order. (ECtHR Sylvester v. Austria)

Kranj, 22th April 2022

Janja Roblek

ANNEX 2

LE PARQUET EUROPEEN : UN ORGANE EUROPEEN PARTICULIEREMENT NOVATEUR

Partant du constat que les atteintes aux intérêts financiers de l'Union Européenne étaient inégalement poursuivies selon les Etats membres, il est apparu nécessaire de créer une structure au niveau européen, qui mènerait l'enquête jusqu'au jugement par une juridiction nationale.

Le parquet européen a été institué par un règlement du 12 octobre 2017.

22 Etats membres de l'UE vont ainsi coopérer de manière renforcée au sein d'un parquet supranational, à la fois unique et décentralisé. Structure indépendante des Etats membres et des institutions européennes, ne pouvant recevoir d'instructions ni des uns, ni des autres, ce parquet européen est un organe de l'UE, doté de la personnalité juridique. Il aura le pouvoir d'enquêter et de poursuivre les infractions portant atteinte au budget de l'UE.

Ce projet particulièrement novateur est absolument unique dans le paysage judiciaire européen. Il complète la structure européenne de lutte contre la fraude et coopèrera étroitement avec l'OLAF, Eurojust, Europol et, bien entendu, les parquets nationaux. Pour faciliter la coopération, des accords de travail ont d'ailleurs été passés par le parquet européen avec Europol en janvier 2021, puis avec Eurojust en février.

Le parquet européen n'est cependant pas encore opérationnel en raison du retard pris dans la transposition de la directive « PIF » dans tous les Etats, dans l'adoption, selon l'état de chaque droit national, des outils procéduraux nécessaires à sa mise en œuvre, et de la nomination non encore effective de nombreux procureurs européens délégués (PED).

Laura Codruta Kövesi, première cheffe du parquet européen, est une procureure roumaine, figure de la lutte anti-corruption dans son pays. Elle a été nommée à ce poste malgré l'opposition de son propre gouvernement. Elle mène un lobbying intense pour que le parquet européen se voit doter d'un budget suffisant, arguant du manque de personnel, notamment des analystes et enquêteurs financiers. Elle se fixe pour objectif de veiller à ce que tous les procureurs placés sous son autorité soient indépendants et travaillent de manière impartiale, sans recevoir de consigne de leurs gouvernements respectifs.

COMPETENCE

Ses missions sont clairement définies par l'article 4 du règlement (UE) 2017/1939 mettant en œuvre une coopération renforcée concernant la création du Parquet européen. : *Le Parquet européen est compétent pour rechercher, poursuivre et renvoyer en jugement les auteurs et complices des infractions pénales portant atteinte aux intérêts financiers de l'Union qui sont prévues par la directive (UE) 2017/1371 et déterminées par le présent règlement. À cet égard, le Parquet européen diligente des enquêtes, effectue des actes de poursuite et exerce l'action publique devant les juridictions compétentes des États membres jusqu'à ce que l'affaire ait été définitivement jugée*.

Son champ de compétence a été fixé par la directive (UE) 2017/1371 relative à la lutte contre la fraude portant atteinte aux intérêts financiers de l'Union au moyen du droit pénal (dite « directive PIF »). Elle définit des règles minimales relatives à la définition des infractions pénales et des sanctions en matière de lutte contre la fraude et les autres activités illégales portant atteinte aux intérêts financiers de l'Union. La fraude supérieure à 100000 euros commise dans le cadre de marchés publics ou hors passation de tels marchés, la fraude transnationale à la TVA portant sur plus de 10 millions d'euros, le blanchiment de capitaux, la corruption active ou passive, le détournement de fonds seront de la compétence du parquet européen, dès lors que les recettes, dépenses ou avoirs concernés relèvent du budget de l'Union ou du budget géré par les institutions et organes de l'Union institués par les traités, voire même des budgets contrôlés par ces derniers, ce qui élargit singulièrement son champ d'intervention. Les seuils financiers prévus pour déclencher l'intervention du parquet européen démontrent à eux seuls l'ampleur des infractions concernées. Le nombre de dossiers en cours dans les Etats membres et correspondant à la compétence du parquet européen est estimé à environ 3000.

La directive poursuit également le rapprochement des législations pénales des Etats membres en définissant certaines notions (responsabilité des personnes morales, complicité, tentative…) et en établissant des règles minimales communes concernant les délais de prescription et les peines.

La directive, entrée en vigueur le 25 juillet 2017, devait être transposée dans les Etats membres et les outils procéduraux devaient être adoptés au niveau national au plus tard le 6 juillet 2019. (…)

Le statut du parquet français étant incompatible avec les dispositions européennes imposant la plus grande indépendance des PED, ils appliqueront la procédure pénale française applicable aux enquêtes mais également celle de l'instruction s'agissant des mesures de contrainte et des actes d'investigation les plus intrusifs. Leur compétence est nationale et le tribunal judiciaire ainsi que la cour d'appel de Paris ont été désignées comme juridictions de jugement.

ORGANISATION

Le parquet européen repose sur une double structure.

Le **bureau central** a son siège à Luxembourg. Le chef du parquet est désigné pour 7 ans non renouvelables. Les 22 procureurs européens, un par Etat participant, sont désignés pour un mandat non renouvelable de 6 ans. Deux d'entre eux sont désignés adjoints au chef du parquet.

Chaque Etat devait présenter à un comité de sélection trois candidats aux fonctions de procureur européen qui soient des membres actifs du ministère public ou du corps judiciaire, disposent des qualifications requises pour y exercer de hautes fonctions, offrent toutes les garanties d'indépendance et détiennent une expérience pertinente dans les matières traitées par le parquet européen.

Une rotation par tiers doit avoir lieu tous les trois ans. En conséquence, les procureurs européens de huit Etats désignés par le tirage au sort devront être renouvelés dans trois ans.

Les **procureurs européens** forment, pour les aspects stratégiques, un collège. Chargé du suivi général des activités du parquet européen, le **collège** adopte les décisions stratégiques et veille à la

cohérence et l'efficacité, dans l'ensemble des Etats membres, de la politique du parquet européen. En revanche, il ne prend pas de décision opérationnelle dans des dossiers particuliers.

Pour les aspects opérationnels, les procureurs européens sont organisés en quinze **chambres permanentes** de trois membres, présidées par le chef de parquet ou l'un de ses adjoints, ou, à défaut, par un autre procureur européen.

Chacun des 22 Etats membres comprend ensuite un échelon déconcentré composé de **procureurs européens délégués (PED)**, en charge du suivi opérationnel des enquêtes et de l'exercice des poursuites. La nomination de ces procureurs doit être validée par le collège.

L'organisation du parquet européen :

1. ***Niveau stratégique central***

- Chef du parquet européen et deux procureurs européens adjoints

Mission : diriger le parquet, relations avec l'UE, les Etats membres et les tiers

- Le collège : le chef du parquet et les 22 procureurs européens

Missions : superviser et assurer la cohérence, la pertinence et l'efficacité de l'action du parquet. Elaborer les règles de procédure et de fonctionnement interne.

2. ***Niveau opérationnel***

- *Niveau opérationnel central* :

les chambres permanentes, émanations du collège, composées de 3 procureurs européens.

Missions : contrôle et direction des enquêtes et des poursuites mise en œuvre par les PED, décision de poursuite, désistement, recours à la procédure simplifiée, transfert d'une affaire aux autorités nationales, instructions aux PED aux fins d'ouverture d'enquête ou d'exercice du droit d'évocation d'une affaire.

- *Niveau opérationnel déconcentré :*

les procureurs européens délégués (PED) (au moins 2 par Etat participant)

Missions : mener les enquêtes, poursuivre, soutenir l'accusation devant les juridictions nationales.

LES PREMIERES DECISIONS DU COLLEGE DES PROCUREURS

Le collège des 22 procureurs européens, présidé par la cheffe de parquet, a adopté un ensemble de règles internes entre septembre et novembre 2020 et notamment le règlement intérieur du parquet européen le 12 octobre. Ces règles sont relativement complexes, eu égard à la complexité inhérente à l'organisation structurelle d'un parquet européen unique mais impliquant 22 Etats. La procédure

interne doit être compatible avec 22 procédures nationales différentes, lesquelles vont cohabiter, se côtoyer voire être alternativement appliquées au cours d'une même enquête.

Après de longs débats, la langue de travail finalement choisie est l'anglais, bien qu'elle ne soit la langue officielle que d'un seul des Etats participants : Malte. Le français sera également utilisé pour communiquer avec la Cour de Justice de l'UE. Selon le règlement intérieur du parquet européen, la communication avec les personnes concernées par les procédures pénales s'effectue selon les règles du droit national et, si nécessaire, est accompagnée d'une traduction dans une langue comprise par le destinataire. De plus, les procureurs européens délégués veillent à ce que les actes essentiels de la procédure soient traduits en anglais afin de permettre leur bonne compréhension par le bureau central.

Les procureurs européens italien et allemand ont été choisis par le collège comme adjoints de Laura Codruta Kövesi.

Le collège a défini les conditions d'emploi des PED et la procédure applicable à leur désignation, ainsi que le nombre de chambres permanentes et la procédure interne à ces chambres.

Dans le règlement 2017/1371, de très nombreuses dispositions encadrent le recueil, le traitement, la conservation et le droit d'accès aux données personnelles. Les 21 et 28 octobre, le collège a adopté des règles complémentaires concernant la protection et le traitement des données personnelles, l'accès du public aux documents du parquet européen, ou encore la désignation d'un délégué à la protection des données personnelles.

PROCEDURE

Le parquet européen détient une **compétence concurrente** avec celle des parquets nationaux : informé par eux des infractions aux intérêts financiers de l'Union, il décidera d'enquêter ou de laisser l'affaire entre les mains de l'autorité nationale. Toutes les décisions sont encadrées par des délais particulièrement courts, globalement entre trois et vingt jours. Par exemple, le parquet européen peut exercer son **droit d'évocation** dans les cinq jours de la transmission des informations concernant une infraction par les autorités nationales ou de la connaissance de l'ouverture d'une enquête dans un Etat membre.

Un système interne de gestion des dossiers doit notamment offrir un accès sécurisé aux informations relatives aux enquêtes et aux poursuites tant au niveau central que pour les PED et permettre le recoupement d'informations et l'extraction de données à des fins d'analyse opérationnelle ou statistique.

Les **chambres permanentes** supervisent et dirigent les enquêtes et les poursuites menées par les procureurs européens délégués, tout en veillant à la cohérence de l'action du Parquet européen en assurant la coordination dans les dossiers transfrontières. Chaque procureur européen est membre permanent d'au moins une chambre permanente. Le président de la chambre fixe l'ordre du jour des réunions de sa chambre et présente au collège un rapport d'activité écrit annuel.

Le système d'attribution des affaires aux chambres permanentes est, selon le règlement intérieur, « aléatoire, automatique et alterné » en fonction de l'ordre d'enregistrement des affaires, afin d'assurer la répartition équitable de la charge de travail. La chambre désignée suit alors l'enquête jusqu'au jugement définitif, sauf réattribution de l'affaire.

Ces chambres décident du renvoi de l'affaire aux autorités nationales lorsque l'affaire n'est pas de la compétence du parquet européen. Elles prennent également les décisions d'attribution ou réattribution des enquêtes, de classement sans suite, de jonction de plusieurs affaires, de poursuite aux fins de jugement ou encore de recours contre une décision judiciaire.

Les chambres permanentes ont accès à toutes les pièces du dossier.

Les décisions sont adoptées à la majorité simple, sur la base du rapport transmis par le PED et le procureur européen chargé de la surveillance de l'affaire (voir ci-dessous : *La surveillance*).

Elles ne peuvent pas décider d'un classement sans suite si le rapport comporte un projet de décision proposant de porter l'affaire en jugement.

Lorsque le droit national le prévoit, le PED peut proposer à la chambre permanente de recourir à une procédure simplifiée de poursuite (une CJIP pourrait ainsi être mise en œuvre pour la France).

Les **procureurs européens délégués** (PED) ouvrent les enquêtes et décident des actes d'investigation ou en charge les autorités compétentes de son Etat. Ils suivent les instructions données par les chambres permanentes et par le procureur chargé de la surveillance de leurs enquêtes et leur signalent tout évènement important.

La surveillance est exercée par le procureur européen de l'Etat dans lequel la majorité des infractions a été commise. Ce procureur remet à la chambre permanente en charge de l'affaire le rapport transmis par le PED, le cas échéant accompagné de sa propre analyse, et la chambre prend sa décision sur la base de ce rapport. Le procureur chargé de la surveillance n'appartient pas à la chambre en charge de la même affaire, ce qui rend le système d'attribution des affaires particulièrement complexe.

Dans certains cas très sensibles et avec l'accord de la chambre permanente compétente, le procureur européen chargé de la surveillance peut exceptionnellement conduire une enquête lui-même, dans son Etat membre, avec les mêmes pouvoirs qu'un PED (par exemple : l'enquête concerne des fonctionnaires ou agents de l'UE).

Dans le cas des enquêtes transfrontières, les PED coopèrent et se prêtent mutuellement assistance. De manière tout à fait originale, le PED chargé de l'affaire peut déléguer les mesures d'enquête à un PED situé dans l'État membre dans lequel la mesure doit être exécutée. Si son droit national le requiert, ce PED assistant se charge alors d'obtenir l'autorisation nécessaire à l'acte d'enquête. Ce système est particulièrement simple et efficace.

Le mandat d'arrêt européen peut être utilisé par les PED.

Les suspects et personnes poursuivies bénéficient des droits procéduraux accordés par le droit de l'Union et par le droit interne.

Les actes de procédure sont soumis au contrôle juridictionnel prévus par le droit national. La Cour de Justice de l'UE est cependant compétente pour statuer, à titre préjudiciel :
- sur la validité des actes lorsqu'elle est contestée directement sur la base du droit de l'Union ;
- sur l'interprétation ou la validité de dispositions du droit de l'Union ;
- pour trancher les conflits de compétence entre le parquet européen et les autorités nationales compétentes.

Le jugement aura normalement lieu dans l'Etat du PED chargé de l'enquête. Dans les affaires qui concernent plus d'un Etat membre, la chambre permanente chargée du suivi de l'affaire peut cependant en décider autrement.

La juridiction nationale compétente est ensuite déterminée selon les règles du droit national de l'Etat désigné. Elle apprécie librement les éléments de preuve présentés, lesquels ne peuvent être admissibles au seul motif qu'ils ont été recueillis dans un autre Etat membre ou selon le droit applicable dans un autre Etat membre. Ce sont donc les règles de droit national qui vont prévaloir en matière de recevabilité des preuves, cet aspect n'ayant pas fait l'objet d'une harmonisation particulière.

CHRONOLOGIE:

5 juillet 2017 : adoption de la directive (UE) 2017/1371 du parlement européen et du conseil du relative à la lutte contre la fraude portant atteinte aux intérêts financiers de l'Union au moyen du droit pénal, dite « directive PIF »

12 octobre 2017 : adoption du règlement (UE) 2017/1939 du Conseil mettant en œuvre une coopération renforcée concernant la création du Parquet européen.

20 novembre 2017 : le règlement entre en vigueur pour les 20 Etats membres participants.

2018 : les Pays-Bas et Malte rejoignent la coopération renforcée.

14 octobre 2019 : le Conseil confirme la nomination de Laura Codruta Kövesi en qualité de chef du parquet européen. De nationalité roumaine, elle était alors procureur au sein du parquet près la Haute Cour de cassation et de justice de Roumanie.

27 juillet 2020 : le Conseil nomme les 22 procureurs européens (un par Etat participant)

ETATS PARTICIPANTS

L'Allemagne, l'Autriche, la Belgique, la Bulgarie, Chypre, la Croatie, l'Espagne, l'Estonie, la Finlande, la France, la Grèce, l'Italie, la Lettonie, la Lituanie, le Luxembourg, Malte, les Pays-Bas, le Portugal, la République tchèque, la Roumanie, la Slovaquie et la Slovénie.