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The European Criminal Law Academic Network (ECLAN)
aims to facilitate and strengthen academic research and education in the field of EU Criminal Law

LEGISLATIVE INSTRUMENTS

NEW NEGOTIATIONS

The EU-UK relationship in criminal matters post Brexit

The negotiations on the framework and content of the future relationship between the United Kingdom and the EU started in 2018. One of the main challenges in the negotiations is the partnership agreement between the two in the field of criminal law particularly now that the UK is considered a third country outside of Schengen.

Moreover, the EU needs to ensure that post Brexit the UK will maintain equal standards regarding human rights and data protection. These standards are important for the EU's policy area, and specifically the issues concerning mutual trust, human rights and exchange of personal data.
The details of the future relationship are set out in the Political Declaration, that accompanies the Withdrawal Agreement. The Declaration sets out the framework for the future relationship and it was agreed jointly by the European Union and the United Kingdom in October 2019.

On 3 February 2020, the European Commission put forward the draft recommendation for the future EU-UK partnership. Based on this recommendation, the EU Council of Ministers adopted on 25 February 2020 the negotiating directives for the new partnership. Said directives define the scope and terms of the future partnership, as well as they cover all areas of interest for the negotiations including law enforcement and judicial cooperation in criminal matters. In line with the Political Declaration agreed between the EU and the UK and the negotiating directives approved on 25 February 2020, the European Commission reached a draft text of the Agreement on the New Partnership with the UK. This draft text was transmitted to the UK on 18 March 2020 and it supports the negotiations.

The first round of negotiations between the EU and the UK took place from the 2nd of March to the 5th of March 2020 in Brussels, Belgium.

The ninth round of negotiations on the future partnership was held between 29th of September and 2nd of October 2020. In the statement of this round by Michel Barnier, the respect of fundamental rights and individual freedoms, which are pre-conditions for the EU-UK future police and judicial cooperation in criminal matters, were listed as positive new developments.

On 24 December 2020 the EU and the UK reached an agreement on Trade and Cooperation. After approval by the Council, the EU-UK Trade and Cooperation Agreement was signed on 30 December 2020, and it will be provisionally in force from 1st January 2021 until 28 February 2021 (whithin this period the EP is expected to provide its consent). The Agreement includes under its Part Three a substantial set of provisions on Law Enforcement and Judicial Cooperation in Criminal Matters. These provisions cover, inter alia: Cooperation with Europol (Title V), Cooperation with Eurojust (Title VI), Surrender (Title VII), Mutual assistance, including Joint Investigation Teams (Title VIII), Exchange of criminal record

information (Title IX) and freezing and confiscation (Title XI). With regard to surrender the judicial nature of the EAW procedure is maintained, while the removal of the requirement of double criminality for 32 categories of offences will become subject to the condition of reciprocity (see Article LAW.SURR.79 of the EU-UK Trade and Cooperation Agreement). The grounds for refusal recall those provided under the EAW system, leaving however some margins for the revival, upon notification, of the political offence exception (Article LAW.SURR.82) and the nationality exception (Article LAW.SURR.83). In this regard, the provisions on surrender of the Trade and Cooperation Agreement resemble the corresponding provisions of the EU-IS-NO Surrender Agreement between the EU and Iceland and Norway. Concerning the cooperation with EU JHA Agencies, the Trade and Cooperation Agreement will allow for both the establishment of contact points and for the secondment of UK Liaison officers at Europol (Article LAW.EUROPOL.50) and at Eurojust (Liaison Prosecutor, Article LAW.EUROJUST.66) as well as for the exchange of both personal and non-personal data. The main features of the EU-UK Trade and Cooperation Agreement will be presented in the next issue of the ECLAN Newsletter. Generally the EU-UK agreement includes a Free Trade Agreement (regarding social,economic, environmental and fisheries issues), a close cooperation on citizens' security and a governance framework.

In relation to criminal matters the Agreement creates a new playing field for law enforcement and judicial cooperation. The fight against cross-border crime and terrorism underlines the need for a strong cooperation between competent authorities.

The Agreement takes into account that the UK does not have the same place as before, therefore, it establishes new operational capabilities. However, this cooperation will be halted if or when the UK breaches its commitment for continued adherence to the European Convention of Human Rights.

ON-GOING NEGOTIATIONS

Electronic evidence in criminal matters

Proposal for a Regulation of the European Parliament and of the Council on European Production and Preservation Orders for electronic evidence in criminal matters

and

Proposal for a Directive of the European Parliament and of the Council laying down harmonised rules on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings

In 2015, in the 'European Agenda for a Security Union', the Commission highlighted the issue of access to electronic evidence and a year later, committed to propose solutions to address the problems of obtaining digital evidence in relation to criminal investigations. The Council, for its part, in its 'Conclusions on Improving Criminal Justice in Cyberspace' stressed the importance of electronic evidence in criminal proceedings in all types of crimes and called on the Commission to act.

What followed was extensive consultation with a wide range of stakeholders. In April 2018, two

legislative proposals were published: a Regulation on European Production and Preservation Orders for electronic evidence in criminal matters and a Directive on the appointment of legal representatives for the purpose of gathering evidence in criminal proceedings. Their aim is to facilitate cross-border access to electronic evidence by creating a legal framework for judicial orders addressed directly to legal representatives of service providers - without the intervention of an authority of the Member State where their legal representative is located.

To that end, the two proposals aim to:

1. a) create a European Production Order, which will enable a judicial authority in one Member State to obtain electronic evidence directly from a service provider or its legal representative in another Member State, which will be obliged to respond in a designated timeframe;
2. b) create a European Preservation Order, which will enable a judicial authority in one Member State to request that a service provider or its legal representative in another Member State preserves specific data in view of a subsequent request to produce this data via mutual legal assistance, a European Investigation Order or a European Production Order.
3. c) make mandatory for service providers offering services in the Union to designate a legal representative in the Union to receive, comply with and enforce decisions aimed at gathering evidence by competent national authorities in criminal proceedings.

The first discussions of the proposed Regulation by the Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS) revealed several political issues. In June 2018, the Justice and Home Affairs Council discussed the scope of the proposed Regulation. For a number of delegations, its scope was limited, because it was not covering direct access to electronic evidence or real-time interception of data. The Council agreed on the need to consider expanding the scope of the regulation and called on the Commission to study the matter and report at its October meeting.

Following the information provided by the Commission and on the basis of the deliberation held in the October 2018 Council, the scope was kept as originally proposed by the Commission. At this meeting the Council also held a policy debate on the proposed involvement of another Member State in the procedure via a notification to the judicial authorities of that Member State. Due to the centrality of this issue, the Ministers were invited to discuss whether the approach taken in the proposal (that orders could be addressed directly to service providers without the involvement of any other Member State at the stage of the request) should be kept, or whether it should be modified by introducing a notification procedure. The Presidency noted as an outcome that Member States were willing to continue working towards a compromise on the inclusion of a notification mechanism with not suspensive effect that would be applicable only in limited cases for content data.

The European Economic and Social Committee adopted its opinion on 12 July 2018. In October 2018, the European Data Protection Board shared its opinion on the proposals, and made a long list of recommendations to the co-legislators.

In December 2018, the Council adopted its general approach on the proposal for a Regulation. On 22 February 2019, Eurojust made its contribution on the Annexes to the proposal for a Regulation on European Production and preservation Orders for electronic evidence in criminal matters. In June 2019, the Council supplemented its general approach on the proposal with the annexes to the Regulation.

Regarding the proposal for a Directive, the Council adopted, its general approach in March 2019.

In the European Parliament, the proposals have been assigned to the LIBE Committee. On 2 April 2019, the rapporteur, Birgit Sippel, presented to the LIBE Committee a series of working documents, addressing various issues linked to the proposal for a Regulation (safeguards and remedies, enforcement of European Preservation Order, relation with third country law, etc.).

Since the beginning of the new legislature, the European Parliament made progress on both proposals. The draft report on the Proposal for a Regulation was tabled before the LIBE Committee on 24 October 2019, and further amendments were submitted. The rapporteur reintroduced in its report an automatic notification of the executing State, which should be able to refuse the recognition or the enforcement of an order, on the basis of specific grounds for refusal provided for in the text. Similarly, the draft report on the proposal for a directive was tabled on 11 November 2019, and amendments submitted on 9 December 2019.

On 7 December 2020 the LIBE Committee adopted the decision to open interinstitutional negotiations. The LIBE Committee tabled its reports for plenary regarding the proposed regulation and the proposed directive on 11 December 2020 which was voted on 14 December 2020

On a related issue, after the Commission recommended on 5 February 2019 negotiating international rules for obtaining electronic evidence, the Council adopted on 6 June 2019 two decisions. The first one authorises the Commission to open negotiations with the United States of America with a view to concluding an agreement on cross-border access to electronic evidence for judicial cooperation in criminal matters. The second one authorises it to participate on behalf of the EU in negotiations of a Second Additional Protocol to the Council of Europe Convention on Cybercrime. In that respect, the Commission started negotiations with the US on 25 September 2019, and also participates in the negotiations within the Council of Europe on the protocol which should be completed by the end of this year. After four rounds of negotiations, it appears that progress on the internal EU rules is essential for bringing forward the EU-US negotiations.

Alignment of EU instruments in the field of criminal law with EU rules on the protection of personal data

Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2002/465/JHA, as regards its alignment with EU rules on the protection of personal data

and

Proposal for a Directive of the European Parliament and of the Council amending Directive 2014/41/EU, as regards its alignment with EU rules on the protection of personal data

On 20 January 2021, the European Commission adopted two proposals for Directives amending two European Union instruments in the field of criminal law – Council Framework Decision 2002/465/JHA, on Joint Investigations Teams, and Directive 2014/41/EU of the European Parliament and of the Council of 3 April 2014, regarding the European Investigation Order in

criminal matters – with the aim of ensuring their alignment with the EU's rules on the protection of personal data, namely with principles and provisions laid down in Directive (EU) 2016/680 on the protection of natural persons with regard to the processing of personal data by competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data (the Data Protection Law Enforcement Directive).

Both proposals have been examined at expert level in the COPEN WP since 23 February 2021 and an agreement has been reached. After this preparatory work, COREPER agreed to start negotiations with the European Parliament on the two draft Directives based on the texts set out in documents 8043/21 and 8048/21.

Both files were endorsed in the LIBE Committee meeting of 14 July 2021. On 16 July 2021, the said Committee tabled its two reports concerning the proposed directives amending Directive 2014/41/EU and Framework Decision 2002/465/JHA. The two proposals will go to the plenary of September for referral back to the LIBE Committee, opening the possibility for interinstitutional negotiations.

EU agencies and bodies

Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU, Euratom) No. 883/2013 as regards the establishment of a Controller of procedural guarantees

On 11 June 2014, the European Commission submitted a proposal for a Regulation amending Regulation (EU, Euratom) no. 883/2013 as regards the establishment of a Controller of procedural guarantees (COM(2014) 340 final). This proposal aims at further strengthening the procedural guarantees in place for all persons under investigation by the European Anti-Fraud Office (OLAF) and at taking into account the special way in which members of EU institutions are elected or appointed as well as their special responsibilities. For this purpose, the Regulation 883/2013 on investigations by OLAF will be amended. In this respect, a Controller of procedural guarantees is proposed to first, review complaints lodged by persons under investigation concerning violation of procedural guarantees; and second, authorise OLAF to conduct certain investigative measures with respect to members of EU institutions. The Court of Auditors issued its opinion on 21 November 2014.

The establishment of the Controller of procedural guarantees has been included in the Regulation 2020/2223 (Art 1 (9) inserting the new art 9a in Regulation 883/2013). The new provisions introduced by Regulation 2020/2223 do not include the prior authorisation of the Controller for certain investigative measures (which was the most controversial part of the 2014 proposal) but only a complaint mechanism. The 2014 proposal, however, has not yet been withdrawn.

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Proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/794, as regards Europol's cooperation with private parties, the processing of personal data by Europol in support of criminal investigations, and Europol

On January 2020, the European Commission Published the new work programme for 2020.

Under the section 'Promoting our European way of Life' the European Commission stated its intention to strengthen the Europol mandate in order to reinforce operational police cooperation. Following this, on May 2020 the Commission published an Inception Impact Assessment on a prospect proposal for the regulation to strengthen the mandate of Europol. The assessment was open for comments until 9 July 2020.
According to the European Commission, the initiative aims to revise the mandate of Europol and it will:

- enable Europol to deal with the evolving nature of internet-based and financial crime;
- align Europol's procedures for cooperating with non-EU countries with those of other EU agencies; and
- bring Europol's data protection rules into line with existing EU rules.

On 21 October 2020, the Home Affairs Ministers of the European Union met informally to discuss the challenges and the operational needs of the agency. To this end, they adopted a Declaration entitled 'Ten Points on the Future of Europol'.

The new proposal for a regulation was presented on 9 December 2020.

According to the proposal, the new regulation will strengthen Europol by:

- enabling Europol to cooperate effectively with private parties, addressing lack of effective cooperation between private parties and law enforcement authorities to counter the use of cross-border services, such as communication, banking, or transport services, by criminals;

- enabling Europol to effectively support Member States and their investigations with the analysis of large and complex datasets, addressing the big data challenge for law enforcement authorities;

- strengthening Europol's role on research and innovation, addressing gaps relevant for law enforcement;

- strengthening Europol's cooperation with third countries in specific situations and on a case-by-case basis for preventing and countering crimes falling within the scope of Europol's objectives;

- clarifying that Europol may request, in specific cases where Europol considers that a criminal investigation should be initiated, the competent authorities of a Member State to initiate, conduct or coordinate an investigation of a crime which affects a common interest covered by a Union policy, without the requirement of a cross-border dimension of the crime concerned;

- strengthening Europol's cooperation with the European Public Prosecutor's Office (EPPO);

- further strengthening the data protection framework applicable to Europol;

- further strengthening parliamentary oversight and accountability of Europol.

The proposal also states that this initiative is linked with the proposal amending Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters to enable Europol to enter data into the SIS.

In the European Parliament, the file is assigned to the Civil Liberties, Justice and Home Affairs

Committee (LIBE). The European Parliament appointed Mr Javier ZARZALEJOS as rapporteur.

On 8 March 2021 the European Data Protection Supervisor (EDPS) issued opinion 4/2021 on the proposed amendments to the Europol Regulation. In general, the EDPS underlines the need to better define certain concepts (e.g. the new processing purpose for research and innovation); and that a stronger mandate for Europol should be accompanied with stronger oversight.

On 2 June 2021 the Committee on Budgets issued an opinion (Rapporteur for the opinion: Niclas Herbst). The opinion calls on the Committee on Civil Liberties, Justice and Home Affairs (LIBE) to take into account certain amendments. On 8 June 2021 and 10 June 2021 the LIBE Committee tabled its amendments.

In the end of June, COREPER granted a Council negotiating mandate and the Council is now in a position to enter into negotiations on the draft regulation with the European Parliament.

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Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters as regards the entry of alerts by Europol

On 9 December 2020, the European Commission presented a proposal for a regulation amending Regulation (EU) 2018/1862 on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters as regards the entry of alerts by Europol.

This proposal is closely linked with and complements other EU legislative instruments, notably on Europol, insofar as this proposal grants Europol additional rights to process and exchange data within its mandate, in SIS.

In the context of on-going EU efforts to facilitate the detection of persons involved in terrorism-related activities, including foreign terrorist fighters, the Commission identifies several gaps in the sharing of third-country sourced information. While Europol holds valuable information on suspects and criminals that it received from third countries and international organisations, it is not able to provide directly and in real-time frontline officers with the information they need. According to the proposal, this is partly due to the rules governing access to Europol's information systems, in addition to the fact that Europol is not able to issue alerts in SIS as the most widely used information-sharing database in the EU that is directly accessible for border guards and police officers.

In order to address this security gap, the proposed regulation aims to establish a new alert category specifically for Europol, in order to provide information directly and in real-time to frontline officers. It is intended to enable Europol to issue 'information alerts' on suspects and criminals as a new alert category in SIS, for exclusive use by Europol in specific and well-defined cases and circumstances. The purpose of the new alert category is that in case of a 'hit', the alert would inform the frontline officer that the person concerned is suspect of being involved in a criminal offence falling within the competence of Europol.

The proposal includes additional amendments to Regulation (EU) 2018/1862 in order to align its provisions concerning data protection, in particular the right of access, rectification of inaccurate data and erasure of unlawfully stored data, remedies and liability with Regulation (EU) 2016/794 and Regulation (EU) 2018/1725 insofar as those alignments are necessary due to the new alert category to be entered by Europol.

In the European Parliament the file is assigned to the Civil Liberties, Justice and Home Affairs Committee and the rapporteur is Mr Javier ZARZALEJOS.

On 10 March 2021 the European Data Protection Supervisor (EDPS) issued a documents containing formal comment on the proposal for amendment of Regulation (EU) 2018/1862. Among others, the EDPS highlights that the proposal needs to encompass specific criteria to guide Europol when carrying out an individual assessment and taking a decision to issue an information alert in SIS. Moreover, the EDPS recommended that there should be clear guidance regarding the measures which competent authorities could take in case of a "hit".

On 16 March 2021 and 7 June 2021 the Committee on Civil Liberties, Justice and Home Affairs issued drafts reports with certain amendments to the proposal. Currently the file is awaiting committee decision.

ADOPTED TEXTS

Prevention of the dissemination of terrorist content online (TCO)

Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online

On 12 September 2018, the Commission tabled a proposal for a Regulation on preventing the dissemination of terrorist content online. The proposed Regulation will apply to online service providers who offer their services within the Union, regardless of their place of establishment or their size. The definition of illegal terrorist content is based on the definition of terrorist offences, as set out in Directive 2017/541. The proposal aims to ensure the removal of terrorist content via the introduction of a "removal order", which can be issued as an administrative or judicial decision by a competent authority in a Member State. The proposal also includes a series of safeguards which aim to guarantee the respect of fundamental rights and protect non-terrorist content from erroneous removal.

The proposed Regulation further obliges Member States to ensure that their competent authorities have the capacity to intervene against terrorist content online. In addition, Member States are placed under a duty to inform and cooperate with each other and they are invited to make use of channels set up by Europol to ensure their co-ordination. It also imposes obligations on online service providers to report to law enforcement authorities when they detect content which poses a threat to life or safety. Finally, online service providers are placed under a duty to preserve the

content they remove - which functions as a safeguard against erroneous removal and ensures potential evidence is not lost for the purpose of the prevention, detection, investigation and prosecution of terrorist offences.

The European Economic and Social Committee adopted its opinion on 18 September 2018.

On 6 December 2018, the Council agreed on a general approach.

On 7 December 2018, three Special Rapporteurs of the United Nations Human Rights Council expressed concerns about the proposal. As a result, the Parliament requested an opinion from the EU Fundamental Rights Agency (FRA) on the key fundamental rights implications of the proposal. The FRA published its opinion on 12 February 2019 and made several recommendations. The following day, the European Data Protection Supervisor sent formal comments on the draft Regulation to the European Parliament, the Commission and the Council.

Among other things, the Agency suggested the modification of the definition of illegal terrorist content considering it too broad. The Agency also suggested that the proposal should protect better journalistic, academic and artistic expression and that, with respect to removal orders, fundamental rights guarantees should be strengthened by increasing the involvement of the judiciary in the process.

In the European Parliament, the proposal has been assigned to the LIBE Committee with CULT (Committee on Culture and Education) as associated. The Committee on the Internal Market and Consumer Protection also gave an opinion. The LIBE Committee tabled its report for plenary on 9 April 2019 and the European Parliament adopted its position at first reading on 17 April, just before the end of its legislature.

On 24 September 2019, the LIBE Committee adopted the decision to open inter-institutional negotiations. The first trilogue took place in October 2019. Under the Croatian presidency of the Council, in office between January and June 2020, trilogues came to a standstill, partly due to COVID-19, partly due to EP reluctance to engage. Four technical meetings, on 23 January, on 3 and 18 February and 3 March, and five JHA Counsellors' meetings, on 17 and 31 January, 13 and 27 February and 5 March, took place. A number of articles have been provisionally agreed. However, due to COVID-19, as for most legislative files, negotiations were suspended. The fourth political trilogue on the proposal, which had been planned for 18 March 2020, had to be postponed and finally took place on 24 September 2020 under the German presidency.

Since the beginning of the German Presidency (1st July 2020), three technical trilogues/meetings on 1 and 13 October and 9 December, and eight JHA Counsellors' meetings on 6 July, 22 and 29 September, 7 and 27 October, 5-6 November and 1 December 2020 have been held. The fifth political trilogue was completed on 29 October 2020, and a sixth and final trilogue took place on 10 December 2020.

After the recent terrorist attacks in Europe, on 13 November 2020, the EU Home Affairs Ministers published a joint statement reiterating their commitment to complete the negotiations on the proposal by the end of the year. On 10th December 2020, the Council presidency and the European Parliament reached a provisional agreement on the draft regulation.

Eventually the Council adopted its position on the text of the regulation on 16 March 2021 and the European Parliament voted in the plenary on 28 April 2021. The Commission considered that, overall, the political agreement reached, as reflected in the Council position, preserves the principal objectives of the Commission proposal and accepted the position taken by the Council. The Regulation is adopted and published in the official Journal.

Follow up to the ETIAS Regulation consequential amendments

Regulation (EU) 2021/1150 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EU) 2018/1862 and (EU) 2019/918 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System (ETIAS)

and

Regulation (EU 2021/1151 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EU) 2019/816 and (EU) 2019/818 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System (ETIAS)

and

Regulation (EU) 2021/1152 of the European Parliament and of the Council of 7 July 2021 amending Regulations (EC) No 767/2008, (EU) 2017/2226, (EU) 2018/1240, (EU) 2018/1860, (EU) 2018/1861 and (EU) 2019/817 as regards the establishment of the conditions for accessing other EU information systems for the purposes of the European Travel Information and Authorisation System (ETIAS)

In September 2018, the Council of the EU and the European Parliament adopted two legislative acts, a Regulation establishing the European Travel Information and Authorisation System ('ETIAS') and an amendment of the Europol Regulation for the purpose of establishing ETIAS.

ETIAS will be a centralised EU information system that will pre-screen visa-exempt third country nationals travelling to the Schengen area to identify

potential risks to security, illegal immigration and public health. To assess those risks, personal data in the ETIAS applications will be compared with data present in records, files or alerts registered in EU information systems or databases (the ETIAS itself, the Schengen Information System ('SIS'), the Visa Information System ('VIS'), the Entry/Exit System ('EES'), Eurodac, and ECRIS-TCN in the Europol databases and in certain Interpol databases.

On 7 January 2019, the Commission published two proposals in order to establish the interoperability of ETIAS and other information systems. The first proposal concerns amendments to the law enforcement branch of SIS Regulation (Regulation 2018/1862) and ECRIS-TCN, whereas the second proposal concerns amendments to the borders branch of SIS, VIS, EES and ETIAS.

The European Data Protection Supervisor (EDPS) published its formal comments on the two proposals on 13 March 2019. The EDPS stressed that using the data stored therein for border management purposes exceeds the purpose of the ECRIS-TCN and it would be difficult to reconcile with the purpose limitation principle.

In the Council, discussions among the preparatory bodies have been taking place since January 2019. The Permanent Representative Committee, on 22 May 2019, agreed on the mandate for negotiations with the European Parliament, with indicated changes to Commission proposals.

In the European Parliament, both files have been assigned to the Committee for Civil Liberties, Justice and Home Affairs (LIBE). Being of the

view that an impact assessment is necessary, on 4 October 2019, the LIBE Committee requested the European Parliamentary Research Service (EPRS) to conduct a targeted substitute impact assessment. The substitute impact assessment was published on 20 December 2019.

On 7 December 2020, the LIBE Committee decided to open interinstitutional negotiations. Under the Portuguese Presidency a first political trilogue took place on 13 January 2021, a second on 11 February 2021 and a third on 25 February 2021. A fourth political trialogue took place on 18 March 2021, at which political agreemen was reached following the completion of a technical-level work.

On 31 March 2021 the Permanent Representatives Committee decided on the final compromise text and transfered the files to the LIBE Committee of the European Parliament.

On 7 July 2021 three regulations establishing the conditions for accessing other EU information systems for the purposes of ETIAS were formally adopted.

CASE LAW

JUDGMENTS

Case C-414/20 PPU, MM, Judgement of 13 January 2021 (Third Chamber)

On 13 January 2021, the Third Chamber of the Court delivered its judgment in case C-414/20 concerning the interpretation of Framework Decision 2002/584 on the European arrest warrant. The facts of the case involved 41 persons accused of having participated in drug-trafficking. Among them were MM who absconded. By two orders of the 8 and 9 of August 2019, MM was targeted by a wanted-person notice and put under investigation for having participated in drug-trafficking. Based on the order of the 9 August 2019, a European Arrest Warrant was issued by the public prosecutor on the 16 January 2020. On 16 April 2020 the public prosecutor requested that all those who have absconded be placed in pre-trial detention. MM was arrested in Spain and surrendered to Bulgarian authorities on 28 July 2020 and on the same day, a request of pre-trial detention was made against him by the public

prosecutor. The next day the referring court ordered that he be placed in detention. On 14 August 2020, the Appeal court upheld the decision to place him in pre-trial without assessing questions that could lead to vitiate the European Arrest Warrant. MM appealed against such order, considering that the European Arrest Warrant issued against him was unlawful and requested to refer the matter to the Court of Justice for preliminary ruling. The Specialized Criminal Court referred three questions to the Court of Justice: whether a national court can review a decision taken by the public prosecutor that served as a basis of a European Arrest Warrant under Article 6(1) of Framework decision 2002/584; whether the basis of a European Arrest warrant is an order addressing only the need to put a person under investigation and not involving any detention is consistent with Article 8(1)(c) of Framework decision 2002/584 and whether, in the case where the two abovementioned questions are answered negatively, the person targeted be granted an effective remedy in the same criminal proceedings as those which that European arrest warrant was issued.

On the first question, the Court assessed that Article 6(1) of Framework Decision 2002/584 and the qualification of "issuing judicial authority" does not necessarily require a judicial review of both the European Arrest Warrant and the national decision under which it is based. On the second question, recalling that the EAW is built upon the principle of mutual recognition, the Court interpreted Directive 2002/584 and especially Article 8(1)(c) as to consider that the EAW is invalid when it is not based on a national arrest warrant or other judicial decision having the same effect. It further clarified that the concept of "national arrest warrant or any other enforceable judicial decision having the same effect" encompasses national measures that are adopted by a judicial authority to search and arrest a person subject to criminal prosecution with a view to bring this person before a court for conducting further criminal proceedings. Regarding the third question, whether the referring court holds jurisdiction to examine the validity of the EAW where no provision in the national legislation enables courts to do so, the Court assessed that Framework Decision 2002/584 along with Article 47 of the Charter of fundamental rights permit national courts to hear an action seeking to challenge the lawfulness of a continued pre-trial detention of a person who has been surrendered pursuant to a EAW issued on a measure that is not regarded as a national arrest warrant or any other enforceable judicial decision having the same effect. Further assessing the third question, the Court also found that, according to the effective judicial protection enshrined in Article 47 of the Charter, it is not required to released the accused person from pre-trial detention following his surrender to the Member State even if the EAW has been issued in breach of Article 8(1)(c) of the Framework Decision; it is up to the national courts to decide according to its laws, whether the absence of such national measure serving as a basis for a EAW may lead to a decision to keep or not the accused person in pre-trial detention.

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Case C-649/19, IR, Judgement of 28 January 2021 (Fifth Chamber)

On 28 January 2021, the Fifth chamber of the European Court of Justice rendered its judgment in Case C-649/19 in the context of a European Arrest Warrant issued against a person that was made aware only partially of her rights during criminal proceedings in Bulgaria. In the present case, IR was arrested for Tax offences charges and was only informed of some of his rights under the criminal proceedings held against him. During the trial stage of the proceedings IR left his home address and could not be found. On 10 April 2017, a pre-trial detention measure that constituted a national arrest warrant was issued in respect of IR who did not take part in the proceedings. On 25

May 2017, a European arrest warrant was issued against IR who had not yet be found.

However, the referring court was uncertain whether the European arrest warrant issued against IR is compatible with EU law, on the ground that IR was only made aware of some of his rights under criminal proceedings. Against this background, the referring court decided to annul that arrest warrant and referred several questions to the Court of Justice. The clarifications sought mostly concern the rights conferred by Directive 2012/13, regarding the right to information in criminal proceedings in the context of a European Arrest Warrant.

The referring court submitted four questions to the Court of Justice following the preliminary ruling procedure. The Bulgarian court asks whether the rights of an accused person under Article 4 (3), Article 6(2) and Article 7(1) of Directive 2012/13 apply in the context of a European Arrest Warrant. In case of an affirmative answer, the referring court seeks to know whether Framework Decision 2002/584 allows for the amendment of the content of an EAW in relation to the rights of the person requested. If the second question is answered in the negative, the referring court asks whether a European arrest warrant issued without informing the requested person about his rights against the issuing judicial authority is compatible with Directive 2012/13, Framework Decision 2002/584 and Article 6 and 47 of the Charter, in the eventuality where the issuing judicial authority informs the accused person of his or her rights and provides her with the relevant documents after that authority becomes aware of the arrest. The referring court further asks the Court of Justice to rule on the validity of Framework Decision 2002/584 in the light of Directive 2012/13 and Articles 6 and 47 of the Charter.

Concerning the first question, the Court recalled that Article 5 of Directive 2012/13 provides expressly for the right of a person arrested for the purpose of a European Arrest Warrant to be promptly given an appropriate Letter of rights containing information of their rights in the executing member state. However, calling upon the objective of Directive 2012/13, it was deemed by the Court that Article 4, 6(2) and 7(1) would not apply in the context of the execution of the European Arrest Warrant. Indeed Article 1 of Directive 2012/13 clearly distinguishes the rights of suspects and accused persons, and the rights of persons subject to a European Arrest Warrant. When the person is effectively surrendered to the issuing member state, she acquires the status of accused person, thus enjoying the rights referred in Article 4, 6 and 7 of this Directive. However, this person would not enjoy such rights before her surrendering. The Court did not respond to the second question since its relevance was dependent on an affirmative answer to the first question

The Court further decided to answer the third and fourth question together, thus examining the validity of Framework Decision 2002/584 under Article 6 and 47 of the Charter. Calling upon its previous cases, the Court recalled that the European Arrest Warrant offers a dual protection of procedural rights and fundamental rights that must be enjoyed by the requested person. It thus offers a comprehensive system relating to effective judicial protection provided forth by EU rules, which contribute to helping a person who is subject to a European Arrest Warrant to exercise his or her rights. In the light of the protection afforded by the European Arrest Warrant system, it was considered that Framework Decision 2002/584 is valid under Article 6 and 47 of the Charter.

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Case C-658/19, European Commission, Judgement of 25 February 2021 (Eighth Chamber)

On 25 February 2021, the Eighth Chamber of the Court delivered its judgment in Case C-658/19 concerning the failure of Spain to transpose

Directive 2016/680 regarding the protection of personal data by law enforcement authorities. The case was brought by the European Commission who asked the Court to declare that the Kingdom of Spain has failed to fulfil its obligations under Article 63(1) of Directive 2016/680. Since the Commission had not received any information concerning transposing measures adopted by the Kingdom of Spain within the transposition deadline, the guardian of the treaties initiated infringement proceedings pursuant to Article 258 TFEU in July 2018 and referred the case to the Court of justice on 25 July 2019. As consequence to this alleged failure, which persisted after a reasoned opinion was sent to Spain on 25 January 2019, the Commission requested the Court to impose on that Member State, first, a penalty payment of 89 548.20 € for each day of delay as from the date of delivery of the judgment in the present case and, second, the payment of a lump sum of approximately 15 500 000 € pursuant to Article 260(3) TFEU.

The Spanish authorities do not dispute that they have failed to fulfill their obligations to adopt and notify measures transposing Directive 2016/680. To justify the alleged non-compliance with the transposition deadline, the Kingdom of Spain explains that a series of very exceptional circumstances delayed the activities of the national government and parliament with regard to the adoption of the transposition measures required. The Kingdom of Spain considered the amount requested by the Commission disproportionate in the light of the institutional circumstances in the present case.

As a first step of its reasoning, the Court acknowledges that the Kingdom of Spain has failed to fulfil its obligations under Article 63 of Directive 2016/680. The Court reaches this conclusion after recalling that the failure of a Member State to fulfill its obligations must be determined by reference to the situation prevailing in that Member State at the end of the period laid down in the reasoned opinion sent by the Commission. In the present case, this period ended on 25 March 2019 without any measures being taken by the Spanish authorities to comply with the opinion within this period.

The Court then moves to the question of the applicability of Article 260(3) TFEU laying down the conditions to impose a lump sum or a penalty payment on the Member State concerned by the infringement proceedings. In this regard, the Court considers that the infringement thus established falls within the scope of that provision while also recognizing that the Commission enjoys a margin of discretion to decide on the imposition of a financial penalty under Article 260(3) TFEU. Nonetheless, the Commission has the obligation to state reasons for the nature and the amount of the financial penalty sought, taking into account the guidelines it has adopted in this regard. In determining the amount of the financial penalties to be imposed in the present case, the Commission considered the importance of the provisions of EU law which have been disregarded, notably the protection of personal data as enshrined in Article 8 of the charter of Fundamental Rights of the European Union and in Article 16 TFEU. The Court has only a limited power to assess the appropriateness of the financial penalty proposed. According to previous case-law, "where it finds that there is an infringement, the Commission's proposals are binding on it as to the nature of the financial penalty which the Court may impose and the maximum amount of the penalty it may set".

The Court starts its assessment by recalling the objective of the system established under Article 260(3) TFEU. This mechanism does not only aim to induce Member States to put an end as soon as possible to a breach of obligations. It is also intended to simplify and speed up the procedure for imposing financial penalties for failures to transpose a directive. In order to achieve the abovementioned objective, two types of financial penalties, namely a lump sum and a penalty payment, are provide for. According to the Court's case-law, the appropriateness of each of these

measures must be determined on a case-by-case basis taking into account the relevance of the objective pursued and the circumstances of the case. In the present case, the Court considers that the imposition of a penalty payment on the Kingdom of Spain, as requested by the Commission, "is an appropriate financial means by which to ensure that that Member States puts a prompt end to the infringement established and complies with its obligations under Directive 2016/680". However, the Court states that that penalty payment should be imposed only in so far as the infringement persists at the date of delivery of the judgment. In addition, the Court founds the imposition of a lump sum payment an appropriate dissuasive measure in this case to effectively prevent future repetition of similar infringements of EU law.

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Case C-648/20 PPU, PI, Judgement of 10 March 2021 (First Chamber)

On 10 March 2021, the First Chamber rendered its decision in case C-648/20 regarding the application of a European Arrest Warrant adopted on the basis of a detention order issued by a public prosecutor office without judicial review prior to surrender of the requested person. In the present case, a European arrest warrant was issued against PI, for money and jewelry theft punishable by a term of imprisonment of between one and ten years. The European Arrest warrant was issued on the basis of a decision from the prosecutor on 12 December 2019 ordering PI to be detained for a maximum of 72 hours. He was arrested on the 11 March 2020 in the United Kingdom.

PI challenged the validity of the European Arrest warrant on the grounds that the Bulgarian judicial system does not satisfy the requirements of EU law, under the Framework Decision 2002/584 as interpreted by the Court of Justice case-law. It was assessed that no Bulgarian Court could have reviewed the national arrest warrant prior to the surrender of PI. The referring court thus asked whether a person receive a dual level of protection, as interpreted in the *Bob-Dogi* case, if the national arrest warrant is limited to only detaining the individual for a maximum of 72 hours for the purpose of bringing him before a Court and if on surrender it is solely a matter for the court whether to order release or continue detention in the light of the facts of the case.

Firstly, the Court approached the case by assessing that the public prosecutor, as held in its settled case-law, is an "Issuing judicial authority" according to Framework Decision 2002/584. In this regard, the Court recalled its settled case-law by declaring that the status of such authority is not conditional on there being a review by a Court of both the decision to issue the European Arrest Warrant and the national decision on which such warrant is based. The Court further accepted the Opinion of the advocate general that such decision of imprisonment of PI for 72 hours was an enforceable judicial decision. Hence, the Court further continued by assessing whether a dual level of protection was afforded by these decisions and if a judicial review by a court was available before the surrender of the requested person. Calling upon its previous case-law, and assessing the fact that judicial review was only available *ex post* to the surrender of the person, the Court decided to interpret Article 8(1)(c) of the Framework decision 2002/584 in the light of the case by assessing that when both the European Arrest Warrant and the judicial decision on which that warrant is based cannot be reviewed by a court before the surrender of the targeted person, this does not meet the requirement of the dual protection necessity. Hence the Court ruled that in the present case the requirements inherent to the effective judicial protection are not guaranteed when there is no judicial review of both the European arrest warrant and the national decision upon which it is based before the surrender of the person.

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Case C-488/19, JR, Judgement of 17 March 2021 (First Chamber)

On 17 March 2021, the First Chamber rendered a decision in the case C-488/19 following a preliminary ruling procedure, regarding the execution of a European Arrest Warrant in the context where the acts that served as a basis for its adoption occurred in a third state. In this case, JR a Lithuanian national was arrested in Norway and charged under the unlawful delivery of very large quantity of narcotic substances charge which he had undertaken to supply from Lithuania in return for money. The judgement became final in Norway, whereas in Lithuania, on the 18 June 2015 the District Court of Jurbarkas recognized the sentence by virtue of the Bilateral Agreement of 5 April 2011, and on 7 April 2016, JR was surrendered to Lithuanian authorities. After releasing JR on parole and being accompanied by intensive supervision measures, he nevertheless absconded and went to Ireland. On 24 May 2018 a European Arrest Warrant was issued with a view to his surrender. He was arrested in Ireland and sentenced for offences of possession of narcotic drugs. At the same time, the procedure for the execution of the EAW was implemented but JR contested the surrendering to Lithuanian authorities. He contested it on the basis that, firstly, only Norway could ask his extradition and, second, that since the acts within the EAW have happened outside Lithuania, Ireland must refuse to execute the warrant. Thus the High Court (Ireland) issued a preliminary ruling on such issues, asking the Court whether Framework decision 2002/584 applies where the requested person is convicted and sentenced in a third state but by virtue of bilateral agreement between this state and the issuing state while the judgement is enforced and recognized in this latter; and whether the non-execution of the EAW apply in the context of an offence committed in a third state but where the preparatory acts took place in the issuing State.

Regarding the first question, the Court firsthand recalled that the essence of the EAW must contain evidence of an enforceable judgement and as enshrined in the case-law of the Court, it must be a separate of from the decision issuing the EAW. The court thus continued on establishing that an act of recognition of enforcement of judicial decision constitutes a judicial decision for the purpose of Framework Decision 2002/584 where they have been adopted by a judicial authority for the purpose of executing a custodial sentence, thus qualifying it as "enforceable judgement" or an "enforceable decision". Nevertheless, the particularities of such judgement being taken by a third state court, must also give extra guarantees to the Member state recognizing and enforcing the Judgement as to the respect under which such decision was taken, specially considering Article 47 and 48 of the Charter. Thus, for the Court, the EAW can be based upon a judicial decision ordering the execution of a sentence imposed by a Court of a third state pursuant to a bilateral agreement, providing that the custodial sentence lasts four months at least and that the procedure of adoption complied with the Fundamental rights of the Charter.

On the second question, the Court had to take into consideration the fact that the preparatory acts took place in the issuing state while the actual offence occurred in a third state. The Court recalled the grounds for non-execution of the EAW as provided under Article 4(7)(b) of the Framework Decision 2002/584 under which the surrender is to be refused if the act constituting the offence was not committed in the issuing member state or if the act does not constitute an offence under Irish law. The Court focused on the first criterion, lying at the core of the facts of this case, and stated that to refuse the surrender of a requested person, where the courts of the Member State agreed to enforce the judgement of a third state where the acts occurred in this state, would not only constitute a delay in the execution of the sentence but could also lead to the impunity of the requested person and could also undermine the functioning of the judicial cooperation under EU

Law. However, the Court did not consider the fact that the preparatory acts took place in the territory of the Member States. Thus, giving priority to the Criminal territorial jurisdiction, the Court assessed that the execution of the EAW in the case where the acts occurred in the territory of a third state must be resolved by considering the third State criminal jurisdiction and not the one of the Member State.

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Case C-221/19, AV, Judgement of 13 April 2021 (Fourth Chamber)

On 13 April 2021, the Fourth Chamber of the Court rendered a decision in Case C-221/19 in the context of an aggregate sentence composed of two criminal decisions from two different member states. AV, a polish national brought an application before the Regional Court of Gdansk, seeking an aggregating sentence between two prison sentences imposed on him by this Court and the Lüneberg Court in Germany, the latter being recognized for the purpose of enforcement in Poland. AV was required to serve from 1 September 2016 to 29 November 2021 by the German Court and from 29 November 2021 to 30 March 2030. AV argued that since the judgement delivered by the German Court was recognized for purposes of enforcement in Poland, the conditions for delivering an aggregate sentence are satisfied under Polish law. However, according to Polish law Article 85(4) of the Criminal code, read in conjunction with Article 114a of that code, the aggregation of sentences covering convictions handed down in Poland and in another Member State recognized for the purpose of enforcement in Poland is prohibited. In accordance with Framework Decision 2008/909 the delivery of an aggregate sentence with convictions handed down in another Member State would ensure equal treatment of persons and strengthen mutual trust between States. Thus the regional court of Gdansk decided to refer two questions to the Court as part of the preliminary ruling procedures: whether the meaning of interference found in Article 3(3) of the Framework decision 2008/675 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings encompasses not only the inclusion of a judgement delivered in a Member State but also the inclusion of a conviction taken over for execution on another Member State, together with a conviction handed down in the latter State in the framework of aggregate sentence; and whether according to Framework decision 2008/909, is it possible to pass an aggregate sentence that would include a sentence imposed by a Member State that was taken over for execution in another Member State, together with a conviction handed down in the latter State?

First hand, the Court recalled the principle under which, even though criminal law and procedures fall within the competence of Member States, such exercise must be done according to EU law. The Court thus further clarified the notion of aggregate sentence and distinguished it from the methods of executing custodial sentence by assessing that such procedure aims at commuting several sentences into one leading to a more favourable outcome for the person concerned.

The Court decided to address the second question first, since the recognition of the judgement is governed by Framework Decision 2008/909. The Court explained that the said Framework Decision must be interpreted as permitting the issue of such an aggregate sentence when the decisions creating such sentence are covering decisions taken in the Member State where such aggregation take place, but also one or more sentences handed down against the person in another Member State. Nevertheless, the Court set limit to such aggregation, stating that such sentence may not: lead to an adaptation of the duration or nature of those sentences that would go beyond the limit of Article 8(2) to (4) of Framework Decision 2008/909; may not lead to a breach of the obligation as found in Article 17(2) of the same Framework Decision meaning to deduct the full

period of deprivation of liberty already served; and may not lead to a review of the sentences imposed on him in another Member State according to Article 19(2) of the same document.

Then, regarding the first question, the Court decided that Framework Decision 2008/675 read in the light of recital 14 must be interpreted as authorizing the delivery of an aggregate sentence based upon previous convictions handed down against the person in the Member State where such sentence is deemed to be served, but also on or more convictions rendered in another Member State as long as such aggregation observes the limits arising from the above-mentioned provisions of Framework decision 2008/909.

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Case C-665/20 PPU, X, Judgement of 29 April 2021 (Fifth Chamber)

On 29 April 2021, the Fifth Chamber of the Court rendered a decision in Case C-665/20, concerning the application of the *ne bis in idem* principle in the context of a European Arrest Warrant (EAW). A EAW was issued against X by the Berlin-Tiergarten Local Court, in the context of attempted murder, rape and deprivation of his partner and her daughter (except the rape) that occurred in Berlin. X was arrested in the Netherlands and brought before the District Court of Amsterdam on 18 March 2020. In opposition to his surrender to German authorities, he informed the Court that he had already been trialed for the same acts, save deprivation of the daughter liberty, in Iran. He was partly convicted and partly acquitted on the above-mentioned charges. He claimed that according the Dutch Law, his surrendering to German authorities should be refused since the latter law does not draw distinction between Member State judgement and third state judgements; whereas the public prosecutor office in Netherlands argued that the significant differences between Member States of the EU and the Republic of Iran point at a distrust in the latter legal system and thus cannot constitute a valid ground for non-execution of the EAW against X. The Amsterdam Court thus requested a preliminary ruling and asked the Court whether member states enjoy a discretion when transposing the Framework Decision 2002/584 into national law when it is appropriate to refuse to execute the EAW; whether the concept of "same acts" must be interpreted the same way in Article 4(5) as in Article 3(2) of Framework Decision 2002/584 and, if not, how should it be. The reffering court also seeks clarification concerning the interpretation of the condition laid down in Article 4(5) of the said Framework Decision, namely that the "sentence has been served…or may no longer be ewexuted under the law oth sentencing country".

On the first question, the Court assessed that Member States do enjoy a margin of appreciation when transposing the Framework Decision 2002/584, especially regarding Article 4 and the optional non-execution list. Member States can limit the situations for the executing judicial authority to decide to refuse to execute a EAW (Judgement of 6 October 2009, *Wolzenburg*, C-123/08). It recalled first that the Framework Decision does not have a direct effect, thus Member States are not required on basis of EU law to cast aside national provisions that would be contrary to the latter, nevertheless it cannot serve as a basis for an interpretation of national law *contra legem* to the Framework Decision. The Court thus declared that the margin of appreciation must be enjoyed to Member states to decide whether it is appropriate or not to execute an EAW.

On the second question, drawing upon the uniform application of EU law and on its settled case-law in this matter especially regarding the principle of Legal certainty and since both provisions use the exact same terms and objectives, the Court held that the concept of 'same acts' must be interpreted in the same way in both Article 4(5) and 3(2) of the Framework decisions. The Court thus affirmed that the difference between judgement rendered within the EU and those

delivered in third state cannot justify a different interpretation of the concept of "same acts".

On the third question, the Court ruled that Article 4(5) of Framework Decision 2002/584 must be interpreted as meaning that the condition where the sentence has been served, is currently being served or may no longer be executed under the law of the sentencing country is satisfied when, for the same acts under which a EAW has been issued, the requested person has been sentenced which part has been served in this third state whilst the remainder has been remitted by a non-judicial authority as part of a general policy of leniency applying to persons convicted of serious acts. Nevertheless, in order to guarantee an Area of Freedom, security and Justice, the executing judicial authority must strike a balance between the impunity and combating crime and on the other guaranteeing legal certainty for the person concerned.

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Case C-505/19, WS, Judgement of 12 May 2021 (Grand Chamber)

On the 12 May 2021, the Grand Chamber of the Court delivered its judgement in case C-505/19 regarding the application of the *ne bis in idem* principle, enshrined in Article 50 of the Charter of Fundamental Rights of the European Union, in a context of the application of a red notice published by Interpol requested by a third state. The case concerns WS, who was targeted by a red notice published by Interpol under the request of the U.S.A authorities for accusations of corruptions. Before the notice was published, the Public prosecutor office of Munich discontinued criminal proceedings regarding WS for the same facts after he had paid a sum of money in accordance with German Law. WS thus requested the Federal Republic of Germany to take all necessary measures to arrange for the red notice to be withdrawn. Because of this red notice, WS was forbidden to travel among the Member States of the Schengen area without risking arrest. He further claimed in front of the German Administrative Courts that this constituted a violation of Article 54 CISA and Article 21 TFEU and that the processing of his personal data appearing in the red notice constituted an infringement of the provisions contained in Directive 2016/680. In this regard, the Verwaltungsgericht Wiesbaden (Administrative Court, Wiesbaden) referred to the Grand Chamber a preliminary ruling on the interpretation of Article 54 CISA, Article 50 of the Charter, Article 21 (1) TFEU and Directive 2016/80 regarding the red notice published by Interpol in as requested by a third state.

The Grand Chamber decided to approach this case with two main considerations. Firstly whether Article 54 CISA and Article 21(1) TFEU, read in the light of Article 50 of the Charter would preclude the arrest of a person targeted by a red notice published by Interpol, where the facts under which the red notice was published led to criminal proceedings at the national level of a Member State and ultimately discontinued by the Public Prosecutor office and where the same State have informed Interpol that the proceedings relate to the same facts targeted by the red notice. Secondly, whether the provisions of Directive 2016/680 read in light of Article 54 CISA and Article 50 of the Charter should be read as precluding the processing of data of a person appearing in a red notice, where this notice was built on acts that where previously discontinued by a Member State and whether the *ne bis in Idem* principle should apply.

The Grand Chamber answered the first question by assessing that the application of Article 54 CISA and Article 21(1) TFEU as read in the light of Article 50 of the Charter should not preclude the provisional arrest of a person by the authorities of a contracting State under the scope of a red notice published by Interpol and requested by a Third State; unless it can be demonstrated that, under a final judicial decision taken in a Contracting State,

the acts on which the red notice is based have been finally disposed. Regarding the second question, the Grand Chamber interpreted the provisions of Directive 2016/680 in the light of Article 54 CISA and Article 50 of the Charter as not precluding the processing of personal data appearing in a red notice published in the case where it has not been established through a final judicial decision taken in member states that the principle of *ne bis in idem* would apply to the same acts on which the notice is based.

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AG's Opinions

Ministerul Public (Joined Cases C-811/19 and C-840/19) – Opinion delivered on 4 March 2021(AG Bobek)

On 4 March 2021, Advocate General Bobek delivered his Opinion in joined cases C-811/19 and C-840/19, which concern cases referred by Romanian courts, in which doubts were voiced over the compatibility of decisions rendered by the Romanian Constitutional Court in conjunction with EU law, including Article 325(1) TFEU, Article 19(1) TEU, Article 47 of the Charter of Fundamental Rights of the European Union and the PIF Convention. A number of the issues raised in the present cases overlap with those already addressed in parallel Joined Cases C-357/19 and C-547/19 (*Euro Box Promotion and Others*).

The present cases concern proceedings initiated in Romania for corruption offences with respect to which the Romanian Constitutional Court declared the existence of a legal conflict due to the failure of the Romanian High Court of cassation and Justice (HCCJ) to establish specialized panels to deal with corruption offences in breach of Romanian legislation. It follows that in the absence of properly composed panels, proceedings would be declared absolutely null and cases before the HCCJ would have to be re-examined at first instance by specialist panels. Against this background, the Romanian High Court of Cassation and justice (the referring court) decided to stay proceedings and refer several questions to the Court of Justice about the compatibility of the decision adopted by the Romanian Constitutional Court with several provisions of EU law.

After declaring that the questions referred in the present cases are admissible in the light of the requirements of Article 267 TFEU, the AG identifies several EU law provisions that are relevant for both cases C-811/19 and C-840/19, in particular Article 325(1) TFEU, together with the second paragraph of Article 47 of the Charter, as well as the PIF Convention and its Protocol. With these preliminaries, the AG Bobek turns to one of the crucial question referred in case C-811/19, namely whether Article 47 of the Charter encompasses a requirement as to the specialization of judges and the establishment of specialist panels in a supreme court, such as the HCCJ. In this regard, the AG takes the view that Article 47 of the Charter is to be interpreted as not ecompassing the requirement of the specialisation of judicial panels, whether it be in cases of corruption, in relation to the protection of the financial interests of the Union, or in other fields of EU law for that matter. However, the autonomous standard of Article 47 of the Charter does not preclude a national constitutional court from finding that the constitutional right to a fair trial has been infringed under a different, higher national standard.

Moving to the interpretation of Article 325(1) TFEU, the AG then addresses the more specific problems posed by the possible impact of the

constitutional decision at issue on the protection of the financial interests of the Union. After recalling the requirements of Article 325(1) TFEU on the basis of Court's case-law, AG Bobek considers that the national decision in dispute does not meet those requirements given its disproportionate impact on the protected interests of the Union. Indeed, the Romanian Constitutional Court's ruling at issue is expected to have important consequences on corruption cases since it would lead to the re-examination of a large number of cases. In the view of the AG, it is the balancing between the interests of the Union and those national interests at stake, as well as the (dis)proportionate outcome in terms of the procedural consequences of that balancing act, which are decisive in the present cases. In this regard, the AG expressed doubts over the essential nature of the national standard of specialisation of judges since this requirement appears to be entirely formal while its contribution to a higher level of (effective) judicial protection is not demonstrated. Hence, AG Bobek suggests that Article 325(1) TFEU should be interpreted as "precluding a decision by a national constitutional court declaring unlawful the composition of the judicial panels of the national supreme court adjudicating at first instance on corruption offences, on the ground that those panels are not specialised in corruption, even tough the judges sitting on those panels have been recognized as having the requisite specialisation, where such a finding is liable to give rise to a systemic risk of impunity regarding offences affecting the financial interests of the Union".

With regard to the last two questions, the AG finds it not necessary to consider the questions reffered in the present cases in the light of the principle of judicial independence. He therefore moves to the the last question as to whether the principle of primacy of EU law allows a national court to disapply the decision of the Constitutional Court at issue. In this regard, the AG concludes in the affirmative by stating that "the principe of primacy must be interpreted as allowing a national court to disapply a decision of a national constitutional court, which is binding under national law, if the referring court finds it necessary in order to comply with the obligations deriving from directly effective provisions of EU law".

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XK (Case C-66/20) – Opinion delivered on 11 March 2021 (AG Campos Sánchez-Bordona)

On 11 March 2021, Advocate General Campos Sánchez-Bordona delivered his Opinion in case C-66/20, concerning the conditions under which an administrative authority is entiled to issue a European Investigation Order (EIO) in compliance with Article 2(c)(ii) of Directive 2014/41.

On 14 November 2019, the Public Prosecutor's Office of Trento received an EIO issued by the German administrative authority ("Finanzamt, Münster") requesting a search of business premises as part of an investigation into tax evasion. The EIO was signed by the director general of the Finanzamt and had not been judicially validated. The Public Prosecutor's Office of Trento (executing authority) considered that validation by a judicial authority was necessary because of the administrative nature of the issuing authority. To justify the absence of a judicial validation, the German authorities explain that, in accordance with German tax law, the Finanzamt acts as public prosecutor in cases involving tax offences and should therefore classified as a judicial authority within the meaning of Article 2 Directive 2014/41. However, the Italian prosecutor expressed doubts as to whether such exemption can be compatible with the obligation to have the EIO validated by a "judicial authority" as required by Article 2 of the Directive 2014/41. The Italian prosecutor therefore decided to refer a question to the Court of Justice in this regard.

Before adressing the key problem raised in the present case, the AG starts by assesing whether the Public Prosecutor's Office of Trento has the capacity to refer the present question to the Court of justice for a preliminary ruling. According to Article 267 TFEU, "only 'a court or tribunal' may – or must – seek a 'preliminary' ruling from the Court of Justice on a question concerning 'the interpretation of the Treaties' or 'the validity and interpretation' of secondary EU law". The debate therefore lies around the criteria to be satified to qualify as a court or a tribunal within the meaning of Article 267 TFEU. In this regards, the AG notes that the Court adopts a relatively flexible approach by interpreting broadly such notions. For instance, the Court has recognized that institutions that are not part of the judicial system can qualify as such, thus permitting to bodies that cannot be considered as court in a strict sense to access the Court of justice. In determining whether an authority satisfies the criteria to request a preliminary ruling, the Court takes account of the underlying reason on which the judicial cooperation mechanism laid down in Article 267 TFEU is based, namely "to ensure that the specific charateristics and the autonomy of [the EU] legal order are preserved" and to safeguard the "uniform interpretation of EU law". As explained by the AG, the reason why the mechanism laid down in Article 267 TFEU is based on a "dialogue between one court and another" is that it is the courts which generally give the final decision in the Member States' legal systems. That explains the importance that national courts can refer to the Court of Justice in case they have questions in relation to the correct interpretation of EU provisions which they have to apply in a given dispute before them. When deciding on the admission of preliminary references from institutions that are not strictly speaking judicial, the Court pays attention to the fact there is no judicial remedy against the decisions of such institutions under national law. This derives logically from the fact that there is a risk that final interpretation of EU law become settled without the Court's involvement. As pointed out by the AG, what matters in the context of Article 267 TFEU "is that those who give the final decision under national law are permitted to access the Court where the interpretation of EU provisions is involved". In the light of the above considerations, the AG takes the view that the Public Prosecutor's Office of Trento fulfils the criteria to refer the present question to the Court of Justice for a preliminary ruling.

This question of admissibility being solved, the AG now turns to the crucial question relating to the validity of an EIO issued by an administrative authority without having this decision reviewed by a judicial authority within the meaning of Article 2(c)(ii) of Directive 2014/41. As stated by the AG, an administrative body such as in the present case is not authorised to "transmit" an EIO to the executing authority witout first having the EIO validated by a judicial authority, which, in accordance with Article 2(c)(ii) of Directive 2014/41, means a court, a judge or a public prosecutor. In view of the AG, the fact that the Finanzamt is tasked to carry out typical duties of a public prosecutor's office does not make this body a "public prosecutor" for the purposes of Directive 2014/41. Furthermore, this administrative body lacks some important prerogatives that are performed by judicial authorities in the strict sense with regard to EIO's. This is particularly true since an issuing authority of an EIO is required to pay particular attention to guaranteeing fundamental rights while ensuring a proper balancing of the general interest and any fundamental rights which may be affected by such decision. In light of the foregoing, the AG concludes that "Article 2(c)(ii) of Directive 2014/41 […] must be interpreted as meaning that it does not allow a Member State to exempt national administrative authorities with competence in matters of taxation, including where those authorities are authorised to conduct investigations in certain criminal proceedings, from the obligation to require, before transmission of a European Investigation order to the executing authority, validation of that order by a judge, a

court, a public prosecutor or an investigative judge of the issuing State".

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Spetsializirana prokuratura (Case C-852/19) – Opinion delivered on 29 April 2021 (AG Bobek)

On 29 April 2021, AG Bobek delivered his opinion on Case C-505/19 (Gavanozov II). This opinion follows previous judgement in Case C-324/17 (Gavanozov) where the Court was called to interpret for the first time the Directive on the European Investigation Order (EIO). In both cases, the request for preliminary ruling was lodged by the Specialised Criminal Court in Bulgaria and concerns the compatibility between Bulgarian law and the EIO Directive, notably Article 14 on legal remedies. However, in *Gavanozov*, the answer provided by the Court focused on the way the issuing authority should complete the EIO form, not on the exact implications of Article 14 of Directive 2014/41.

Mr. Gavanozov is accused of running an organized criminal group for the purpose of avoiding the assessment and payment of VAT on a particularly large scale. It appears from the facts of the case that the activities of the accused are supported by a Czech company. The referring court thus considered necessary to obtain new evidence on the actual relationship between Mr. Gavanozov and the witness, who is the representative of the said company. For that purpose, the referring court ordered several investigative measures (including search and seizure) for the execution of which the issuance of an EIO is deemed necessary since the investigative measures have to be carried out by the Czech authorities. However, the referring court expressed doubts about the compatibility of the Bulgarian legislation with EU law since the Bulgarian law does not provide for any remedies against the issuance of an EIO.

The AG follows a three-step reasoning to address the question referred by the Bulgarian court. Before addressing the genuine problem of the present case, AG Bobek deems necessary to clarify the scope of application of Article 14(1) of Directive 2014/41 and the minimum standards applicable to the issuance of an EIO in terms of protection of the fundamental rights of the person concerned.

With regard to the scope of Article 14(1) of Directive 2014/41, which provides that "Member States shall ensure that legal remedies equivalent to those available in a similar domestic case, are applicable to the investigative measures indicated in the EIO", the AG more particularly addresses the question whether that provision is applicable to both the executing and the issuing Member States. Despite the ambiguity created by the language used in the said Directive, the AG finds that Article 14(1) is to be read as applicable also to the issuing Member State (in the present case Bulgaria). The AG came to this conclusion after a detailed analysis of the general economy of the Directive 2014/41 while also considering its overarching purpose.

As a second step, the AG clarifies the obligation imposed under Article 14(1) of Directive 2014/41 in the light of the standards with respect to which legal remedies are considered valid under the said Directive. In this regard, the AG underlines that the obligation imposed on Member States to provide legal remedies is limited to the requirement of *equivalence*. This means that legal remedies that already exist in a similar domestic case are considered valid for the purpose of Article 14(1) of Directive 2014/41. As explained by the AG, the requirement of *equivalence* derived from the necessity to respect the variety of systems of legal remedies existing at national level for the different investigative measures that are covered under Directive 2014/41.

While recognizing that investigative measures do not necessarily have the same level of intrusiveness, the AG points out that the issuance and the execution of an EIO is subject to minimum standards enshrined in the Charter of fundamental rights as well as in the European Convention on

Human Rights (ECHR). The Directive 2014/41 also contains safeguards with which the issuance of an EIO must comply, namely the requirement to ensure that the investigative measure required is necessary and proportionate for the purpose of the proceedings. The respect of these safeguards is considered even more important for a third party in national criminal proceedings, as in the present case. In relation to the abovementioned requirement of *equivalence*, the AG points out that equivalence is acceptable only as long as the situation in the issuing State complies with the minimum standards for the protection of fundamental rights, as required by the Charter and the ECHR. This follows from the fact that Directive 2014/41 relies on the presumption that the Member States respect fundamental rights.

Given that Article 47 of the Charter must provide a level of protection at least equivalent to that provided for Article 13 ECHR, the AG then clarifies the concept of legal remedy in the light of the requirements laid down in the case-law of the ECtHR. In the course of this analysis several points applying to the context of investigatory measures retained his attention; first, it results from the court's case-law that it "must be possible to challenge the legality of the search and seizure at *some stage*, but not necessarily (rather logically) before that measure has been executed"; second, "that review and its initiation must clearly pertain to *the person concerned*". Third, "both aspects of a search and seizure must be open to review: not only concerning potential excesses in the manner in which the measure was carried out, but also the lawfulness of the actual ordering of that measure in the first place".

With these clarifications in minds, the AG turns to the crucial question of the present case which is formulated as follow: "is a Member State able to issue EIOs even though it is aware that those acts breach the minimum standards of the ECHR and, therefore, the minimum level of protection required under EU law? Not surprisingly, the answer is "no, it cannot". In the words of AG Bobek "As long as the issuing member State has not ensured compliance with the minimum standards required by the ECHR and set out in the previous section of this Opinion, the authorities of that State are precluded from participating in the system established by Directive 2014/41". This conclusion is based on a long reasoning stressing, notably, the importance of 'mutual trust' on which Directive 2014/41 is based. For AG Bobek, "there could be any 'mutual trust' in a system where the issuing Member State are able to issue acts that (…) are in breach of the minimum standards to which the entire system subscribes (…)".

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Okrazhna prokuratura – Varna (Joined Cases C-845/19 and C-863/19) – Opinion delivered on 24 March 2021 (AG Pikmäe)

On 24 March 2021, Advocate General Pikmäe delivered his Opinion in Joined Cases C-845/19 and C-863/19, which concern the interpretation of Directive 2014/42 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union.

DR and TS were found guilty of having committed, on 21 February 2019, in the city of Varna (Bulgaria), a criminal offence under the Bulgarian criminal code, namely that of possessing, without authorization and for the purpose of resale, highly dangerous narcotics. Following to the criminal judgment delivered on 28 June 2019, they were both sentenced to a term of imprisonment in addition to the payment of a fine. Following to a search of the premises where DR and TS respectively lived, the competent authorities have discovered a certain sum of money in respect of which the Public prosecutor's Office requested the confiscation. The regional Court of Varna refused to authorize confiscation of the sums of money in question, considering that the criminal offence which DR and TD had been convicted was not such as to generate economic advantage. The Regional Public Prosecutor's Office brought an

appeal against this decision taking the view that the conditions permitting confiscation under the Bulgarian criminal code should be interpreted in the light of Directive 2014/42 which applies to "any economic advantage derived directly or indirectly from a criminal offence".

The referring court (Court of Appeal of Varna) decided to stay the proceedings and to refer four questions to the Court of Justice for a preliminary ruling. In the first place, the referring court seeks, in substance, to know whether Directive 2014/42 and the Charter of Fundamental Rights of the European Union are applicable in the present case since all the elements inherent in the commission of the offence are confined within a single member State. If applicable, the referring court asks the Court of justice to interpret the concept of "economic advantage derived…indirectly from a criminal offence" within the meaning of Article 2(1) of Directive 2014/42. Third, the referring court raises doubts concerning the compatibility of Article 2 of Directive 2014/42 with the Bulgarian legislation concerning confiscation. As a fourth question, the referring court asks whether Article 47 of the Charter of Fundamental Right of the European Union can be interpreted as compatible with the Bulgarian code of criminal procedure since the latter "allows for the confiscation in favour of the State of a sum of money which is claimed to belong to a person other than the person who committed the criminal offence, without that third party being able to appear as party in those proceedings or having direct access to the courts".

On the first question, AG Pikmäe starts its reasoning by resolving ambiguities on the necessity to establish a cross-border dimension to apply Directive 2014/42. The AG takes the view that Directive 2014/42 cannot apply if the criminal offence has no cross-border dimension, as supported by several interpretative elements. In this regard, the AG rejects the application of the Court's reasoning in the judgement *Moro*, where the Court held that the application of Directive 2012/13 on the right to information in criminal proceedings "is independent of the existence of any cross-border situation in the context of a dispute arising in that Member State". According to the AG, neither the literal interpretation nor the teleological interpretation considered in the judgment *Moro* concerning Directive 2012/13 can be applied by analogy to the Directive 2014/42. In support of that interpretation, the AG notes several important differences of wording between the two directives in addition to the fact that the legal basis for both instruments does not fully correspond. In particular, Article 83(1) TFEU, on which Directive 2014/42 is based, expressly provides that, "in addition to the particularly serious nature of the areas of crimes considered, such harmonization is strictly conditional on the crimes in question having a cross-border dimension (…)".

The AG also clarifies the conditions under which the characterisation of the existence of a cross-border situation is deemed established. In the view of the AG, the choice of wording "cross-border dimension" should be interpreted as meaning that this condition "is not dependent on any assessment of the factual circumstances of a given case". Under this interpretation, whether one or other of the elements inherent in the commission of the offence in question, such as the nationality of the perpetrator, the place where the offence was committed or the location of the proceeds of the crime, is of a cross-border nature, is entirely irrelevant. The fulfilment of that condition rather implies "that the criminal offence under consideration comes within one of the areas of crime amenable under the second subparagraph of Article 83(1) TFEU, and that it comes within the scope of the secondary legislation adopted on the basis of Article 83(1) TFEU and governing such area". In light of the above, the AG concludes that "Directive 2014/42 and the Charter are applicable in the case of a criminal offence coming within one of the areas of crime listed in the subparagraph of Article 83(1) TFEU, such as the possession of

narcotics for the purpose of their distribution, even when all the elements inherent in the commission of that offence are confined within a single Member State".

With regard to the second and third questions concerning the interpretation of Directive 2014/42, the AG first considers that Article 2(1) of that Directive has been correctly transposed into the Bulgarian legislation since the Bulgarian criminal code covers the confiscation of 'the direct or indirect proceeds of a criminal offence' in line with the broad approach taken by the Directive 2014/42. This being said, the AG rephrases the questions of the referring court in order to provide an answer that will be useful for the resolution of the case at hand. The reformulated questions led the AG to the examination of whether the confiscation at issue falls within the material scope of Directive 2014/42 which covers different types of confiscation. After excluding the application of Article 6 ('confiscation from a third party') and that of Article 4 ('ordinary confiscation'), the AG examines whether the situation at issue comes within the scope of Article 5 ('Extended confiscation'). The application of the latter is dependent on the fulfillment of several conditions, amongst which the condition that the criminal offence must be 'liable to give rise, directly or indirectly, to economic benefit'. In the view of the AG, it is no way established that the criminal offence of possessing narcotics for the purpose of resale is liable to give rise, directly or indirectly, to an economic benefit in the present cases. To assess whether this condition is met, the national court may take into consideration the modus operandi of the offence and must determine whether the property for which the confiscation has been requested is derived from criminal conduct. In light of the above, the AG considers that "Directive 2014/42 must be interpreted as meaning that confiscation does not necessarily presuppose that the economic advantage results from the criminal offence for which an individual has been convicted, but may relate to property which, on the basis of the facts of the case, the court is satisfied is derived from other criminal conduct, provided that the criminal offence of which the individual has been found guilty is among those listed in Article 5(2) of that directive and is liable, directly or indirectly, to give rise to economic benefit".

Concerning the fourth question, the AG concludes that "Article 8 of Directive 2014/42, read in the light of Article 47 of the Charter, must be interpreted as not precluding national legislation, such as that at issue in the present cases, which allows for the confiscation of the State property which is claimed to belong to a person other that the perpetrator of the criminal offence, without that third party having the possibility to appear as a party in the confiscation proceedings". This conclusion is however dependent on the condition that remedies exist to rectify this situation and that the procedural rules applicable to that remedy do not render it excessively difficult for third parties to exercise their property rights. In the present case, AG notes that "the third party is afforded a remedy under national law, before a civil court, which enables him or her to recover the confiscated property", thus meeting the requirement of the right to an effective remedy within the meaning of Article 47 of the Charter. The assessment of whether the national law at issue provides sufficient guarantee to ensure that such remedy is not rendered excessively difficult is left to the referring court.

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Spetsializirana (Case C-724/19) – Opinion delivered on 20 May 2021 (AG Compos Sánchez-Bordona)

On 20 May 2021, the advocate general Manuel Campos Sánchez-Bordona delivered his Opinion on case C-724/19 concerning the interpretation of Directive 2014/41 regarding the EIO in criminal matters, notably Article 2(c)(i) of that Directive

read in conjunction with Article 6(1)(b) of the same instrument.

In the present case, HP was under criminal proceedings for financing terrorist activities in Bulgaria. The prosecutor issued four identical European investigation orders in order to obtain localization and traveling data contained in electronic communications. These orders were transmitted without any intervention from a Judge to Germany, Austria, Belgium and Sweden. Anywhere but in Belgium, the prosecutors of the member states executed the orders without a Judge intervention. With the evidences gathered thanks to the Orders, HP and five other persons were charged with financing of terrorist activities. However, the specialized criminal tribunal in Bulgaria was called to assess the evidences obtained with the orders and challenge their legality for, by virtue of national law, these evidences would have needed to be obtained only after a judicial decision.

Thus, it referred two questions to the Court; whether a national law that designate a prosecutor as a competent authority for issuing a European investigation order targeting localization data and personal communication is compatible with Article 2 c) i) of Directive 2014/41, even so in the national framework, the competent authority is the Judge; and whether the recognition of this order by the competent authority of the executing state may replace the approval of a judge in the issuing state.

The AG assessed that under directive 2014/41, and under Bulgarian law the prosecutor was not entitled to issue such an order without the authorization of a Judge. Indeed, calling upon the qualification of the competent authority, the AG distinguished the European Arrest Warrant and the European investigation order, and assessed that such order could not authorize the prosecutor to do on a transnational framework what would be forbidden to him in a national perspective, meaning the order to transmit data in the personal communications of HP. Thus, under Article 2, c) i) read together with Article 6 paragraph 1, b) of Directive 2014/41/UE, a prosecutor of a member state cannot issue a European investigation order in order to obtain localization and traveling data found in electronic communications when, according to national law and in similar cases at the national level, a Judge or judicial authority has exclusive competence to authorize the obtention of this evidence.

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Prokuratura Rejonowa w Mińsku Mazowieckim and Others (Joined Cases C-748/19 to C-754/19) – Opinion delivered on 20 May 2021 (AG Bobek)

On 20 May 2021, the Advocate General Bobek delivered his Opinion regarding the joined cases C-748/19 to C-754/19, in the context of issues regarding the judicial independence of the Polish judiciary system. These cases regarded seven criminal proceedings covered by the Criminal Code and Criminal Tax Code of Poland. However, the referring court considered that the proceedings were covered by EU law, especially Article 3 and 6 of Directive 2016/343 providing for the presumption of innocence, the appropriate standards as regard to the burden of proof and the independence of the judiciary. Among the judicial panels deciding these criminal cases, are judges seconded from a lower court by decision of the Minister for Justice/General Prosecutor according to Polish law on the organization of ordinary courts, whereas other judges are "discriplinary agents" attached to the Disciplinary officer for ordinary court judges.

The referring court (Regional Court, Warsaw), thus decided to refer four questions to the Court of Justice for a preliminary ruling: whether the independence of the judiciary and the requirements of the presumption of innocence are breached when the composition of the Court includes a judge named by the Minister of Justice when the criteria are unknown and no judicial review of this decision exist while the Minister can terminate the judge secondment at any time; whether the

requirements of independence and the presumption of innocence are breached when the only remedy available is an extraordinary appeal lodged to the Supreme Court of Poland, where no appeal can be made and national law imposes that one of the Judge allocated to the case is appointed by the National Council of the Judiciary composed of judges elected by Parliament and that can submit motion for appointment to judicial positions as well as other binding decisions under national law. From an EU law point of view, what is the effect of a judgement handed down in court proceedings such as described in the first question and the effect of a judgement in front of the supreme Court? And does EU law make the effects of these judgements condition upon whether the courts in question has rules in favor or against the accused person?

First of all, the AG assessed that questions 2, 3 and 4 would be inadmissible, for the main reason that these questions do not relate to past circumstances having an impact on the present or present events, but relate to future events that may never materialize. Hence, it is the opinion of the AG that the main point of the preliminary ruling is to guide a decision that the referring court will deliver and not regarding future events that may never come to pass. Regarding the first question, the AG assessed that, under EU law, the fact that the Minister of Justice who is at the same time the General Prosecutor may, on basis of criteria that are not public, name second judges to higher courts for an indefinite period at any time and terminating their mandate at his own discretion breaches the principle of the principle of the independence of the judiciary under EU law.

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LU (Case C-136/20) – Opinion delivered on 20 May 2021(AG de La Tour)

On 20 May 2021, the Advocate General Jean Richard de la Tour delivered its conclusions regarding Case C-136/20, in the context of mutual recognition of pecuniary sanctions between Member States under Framework Decision 2005/214/JHA, when the sanction is not part of the list as found in Article 5 of the Framework Decision 2005/214.

LU, a Hungarian national, was the owner of a vehicle that was involved in a traffic violation. He was punished under Austrian law for there is an obligation of identifying the main suspect of the main traffic violation that LU did not comply with. Whereas the competent authority in Austria found that such violation fell under "conduct which infringes road traffic regulations" under Framework Decision 2005/214, the Hungarian authority disputed such claim. The referring court (District Tribunal of Zalaegerszeg) asked two questions to the Court of Justice: whether, Article 5 paragraph 1 of framework decision 2005/214 can be interpreted as when the issuing States has qualified the violation under this disposition, the other State does enjoy a margin of appreciation so as to refuse to execute the said violation. Secondly, whether in case of negative answer from the last question, can the executing State considers that the qualification of the issuing State does not correspond with the provisions of Article 5.

In order to give its conclusions, the AG recalled the main purpose of the Framework Decision 2005/214, which is to allow a more effective repression of offences, mainly road ones, by allowing a mechanism of cooperation between competent national authorities. He recalled that, even if the facts at hand deal with a minor offence with no human or material damages, the cumulated effects of not recognising it under this Framework Decision on the territory of the Union is of a major importance in order to guarantee the road traffic rules where no internal borders exist anymore. Thus, calling upon the will of the legislator in drafting the Framework Decision, the AG assessed that to deprive the issuing State of means to pursue and sanction such offences because the vehicle is licenced in another member state would not be compatible with EU law, especially regarding the

area of freedom, security and Justice between Member States.

Thus, he assessed that, Framework Decision 2005/214/JAI must be interpreted as giving the right to the executing State to refuse to recognise and execute a decision when the offence, as defined in the issuing State, is not covered under Article 5 of the said Framework Decision. However, regarding the main facts of the case, it was found by the AG that the offence in question, meaning the obligation to identify the main responsible of a traffic violation, would fall under the qualification of "conduct which infringes road traffic regulations" of Article 5.

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Generálna prokuratura Slovenskej republiky (Case C-919/19) – Opinion delivered on 3 June 2021 (AG Bobek)

On 3 June 2021, AG Bobek delivered his opinion on Case C-505/19, which concerns the interpretation of Framework Decision 2008/909 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

The request for a preliminary ruling comes from the Supreme Court of the Slovak Republic that is required to recognize and execute a judgment rendered by a Czech jurisdiction against a Slovak national. The appellant in the main proceedings was convicted in the Czech Republic for the aggravated crime of robbery and sentenced to an eight-year custodial sentence. The Czech competent jurisdiction is of the view that the enforcement of the custodial sentence should be served in Slovakia since the appellant is a Slovak national while his place of permanent residence is registered in Slovakia. For that purpose, the Czech authorities (the issuing State) issued the Annex I certificate together with the judgements concerning the appellant as requested under Article 4(1) of Framework Decision 2008/909 to the Regional Court of Slovakia (the executing State). By judgement of 17 May 2018, the Regional Court of Slovakia decided to recognize and enforce the judgment. The appellant brought an appeal against that decision, arguing that he would lose contact which his family if he were to be transferred to Slovakia. He expressed the wish to serve his sentence in the Czech Republic where the members of his family live. The Supreme Court of the Slovak Republic expressed doubts regarding the interpretation of Framework Decision 2008/909, notably with regard Article 4(1)(a) setting out the criteria to be satisfied to recognize and enforce a judgment in another Member State. Against this background, the Slovak referring court stayed the proceedings and referred three questions to the Court of Justice for a preliminary ruling.

The first two questions refer to the interpretation of Article 4(1)(a) of Framework Decision 2008/909, notably the condition of the sentenced person "living" in the executing State. In substance, the referring court wants to know whether the fact that the sentenced person has its habitual residence in the executing State is sufficient to enforce the sentence in that State. The referring court also seeks clarifications concerning the obligations incumbent on the issuing State to demonstrate that the enforcement of the sentence by that State would serve the purpose of facilitating the social rehabilitation of the sentenced person. The third question concerns the potential ground for refusing to recognize and enforce the judgment in case where the executing State is not convinced that the enforcement in that State may facilitate the social rehabilitation of the sentenced person.

Concerning the first question, the AG clearly considers that allowing the recognition of the judgment and the transfer of the sentenced person based on the *mere* recorded permanent or temporary address does not meet the requirement of Article 4(1)(a) of Framework Decision 2008/909. This first consideration raises the question of the intensity of the link required

between the sentence person and the executing State to trigger the mechanism of transfer established under Article 4(1)(a). In this regard, the AG provides several general guidance to assess whether the sentenced person actually "lives" in the executing State and whether that person can be considered to have sufficient link with that State. Having regard to recital 17, the AG considers that were a sentenced person 'lives' for the purpose of Framework Decision 2008/909 is "the place to which that person is attached based on habitual residence and on elements such as family, social or professional ties". This requirement therefore relies on cumulative factual elements that should be assessed on a case-by-case basis. The AG also stressed that the abovementioned elements should be considered in the light of the objective of social rehabilitation pursued by Framework Decision 2008/909, as expressed in particular in its Article 3(1). Furthermore, the examination of the ties a person may have in a given State should not be considered solely against the immediate period preceding the criminal conviction. A broader perspective of the sentenced person's life should be adopted according to the AG. In any case, a single factor such as the residence of the person concerned cannot be conclusive in itself. Taking a more concrete approach, the AG identifies several other points contributing to assessing whether the factual conditions of Article 4(1)(a) are satisfied. Having regard to the general economy of the Framework Decision 2008/909, the AG points out that this instrument "is drafted in a manner that clearly pursues the interests of the sentenced person". It follows that the transfers of sentenced persons are only possible when it can be assumed that their chances of social rehabilitation will be enhanced by that transfer. In the light of the foregoing, the AG suggests that Article 4(1)(a) should be interpreted "as meaning that a sentenced person lives in a given Member State when that person had been or is habitually resident in that State and when that person has established family, social or professional ties in that State so as to make it reasonable to assume that that person has formed an attachment that State which will facilitate their capacity to reintegrate into society after carrying out their sentence".

Coming to the second question, the AG clearly considers that the authority of the issuing State has an obligation to reach a positive conclusion on the possibility of social rehabilitation in the executing Member State, based on a reasonable assumption. In addition, the issuing authority is required to provide the information gathered for that purpose in section (d), point 4, of the Annex I Certificate to the executing authority. The AG takes the view that this obligation applies, irrespective of whether the sentenced person stated his or her opinion on that matter within the meaning of Article 6(3) of Framework Decision 2008/909.

Concerning the third question, AG Bobek notes that under Article 9(1)(b) of Framework Decision 2008/909, the executing authority may refuse to recognize the judgment and enforce the sentence if the criteria laid down in Article 4(1) are not met. While recognizing that the executing authority has the power to make its own assessment of the criteria conditioning the transfer of the sentenced person under Article 4(1)(a), her assessment power is nevertheless limited in its scope. The executing authority can independently verify the conditions of Article 4(1)(a) of Framework Decision 2008/909. However, the review by the executing authority shall rely primarily on the information gathered and forwarded by the issuing authority and its assessment. Furthermore, the assessment of the executing authority may not consist in verifying every single element of the information provided by the issuing authority, which would go against the principle of sincere cooperation notably. Hence, the AG suggests that Article 9(1)(b) of Framework Decision 2008/909 should be interpreted "as entitling the authority of the executing State to refuse to recognize and enforce the judgment where it concludes that the criteria under Article 4(1)(a) of that Framework Decision are not satisfied. That includes the possibility for the executing authority to refuse to recognize and

execute a judgment when that authority considers that there are no family, social, professional or other relevant links in that State that would make reasonable to assume that the enforcement of the sentence in that State may facilitate the sentenced person's social rehabilitation".

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AB and Others (Case C-203/20) – Opinion delivered on 17 June 2021 (AG Kokott)

On 17 June 2021, the Advocate General Kokott gave her Opinion regarding case C-203/20 regarding the application of the *ne bis in idem* principle in the context of a European Arrest Warrant. In this case, the defendants were charged with offences they allegedly committed as Slovak security authorities in 1995, the charges were abduction of a person to a foreign country, robbery and extortion. The Prime Minister of Slovakia from 1998 issued an amnesty for these allegations. However, the Regional Prosecutor Office of Bratislava issued proceedings for these allegations on 27 November 2000. By order of 29 June 2001, the District Court of Bratislava ordered the suspension of the prosecution based on the amnesty of 1998, further upheld by the Regional Court of Bratislava on 5 June 2002 and acquired the force of *Res Judicata* which is, according to Slovak Law, the final decision. On 5 April 2017, the National Council of the Slovak Republic repealed the amnesty by Resolution N°570 of April 2017 that was validated by the Constitutional Court on 31 May 2017. Hence, the President of the District Court of Bratislava is referring whether an issuance of a European Arrest Warrant for one of the accused persons is compatible with EU law through three questions.

Firstly, whether the *ne bis in idem* would preclude the issuance of a EAW in the context of Framework Decision 2002/584 read in light of Article 50 of the Charter, especially when a judicial decision decided to discontinue the case on the basis of an amnesty, but this amnesty was revoked by the legislature after this decision became final and where the domestic legal order provides that such revocation entails annulment of all public authorities decisions. Secondly, whether provisions of national law providing for the annulment a decision of a national court, without another decision of a national court, discontinuing criminal proceedings which is, under national law, a final decision entailing acquittal and on the basis of which criminal proceedings have already been discontinued following the amnesty granted in accordance with a national law comply with the right to fair trial and the *ne bis in idem* principle? Thirdly, whether a provision of national law that limits constitutional review to an assessment of the constitutionality of a resolution revoking an amnesty or individual pardon without considering EU law, especially the Charter and the TEU complies with the principle of sincere cooperation within the meaning of Article 4(3) TEU, Article 267 TEU and Article 82 TFEU, the right to a fair trial and the *ne bis in idem* principle.

On the first question, the AG assessed first whether the decision in question has definitely barred further prosecution and whether the decision was based on a determination as to the merits of the case. On the first criterion, the AG determined that the final discontinuance of the proceedings due to the amnesty was considered to be qualified as definitely barring further prosecution, considering the application of Article 50 of the Charter in order to ensure legal certainty within the EU. On the second criterion, the Advocate general determined that a decision discontinuing prosecution on account of an amnesty is not based on the criminal responsibility of that person, but only on the implementation of the amnesty, therefore the AG invited the Court to assess that an order discontinuing prosecution on account of amnesty does not generally involve a determination as to the merits of the case in the meaning of Article 50 of the Charter. Therefore, the Advocate general concludes that Article 50 of the Charter does not preclude the issuance of a

EAW where the criminal proceedings have been discontinued on account of amnesty without an examination of criminal responsibility of this person, but where the decision to discontinue ceased to have effect when the amnesty was revoked.

On the second question, meaning the revocation of the amnesty, the AG first recalled that the purpose of Directive 2012/13 relates to the rights of persons in criminal proceedings and allegations made against them, especially the right to information of persons subject to a EAW and their related rights. The AG also recalled that this directive applies only to judicial proceedings that may be brought to review a sanction given by an authority. Thus, the AG concludes that the revocation of an amnesty or constitutional proceedings as a whole would not be covered by this Directive. Hence, the Directive would not justify the application of the Charter in these proceedings.

On the third question, the AG assessed that the revocation of the amnesty is not to be regarded as an implementation of EU Law, thus not obliging the Slovak Court to examine the compliance of fundamental rights with the revocation of the amnesty and additionally assessed that the Court does not have jurisdiction in this case.

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ACADEMIC ACTIVITIES

PUBLICATIONS

Books

G.-L. Gatta, V. Mitsilegas, S. Zirulia (eds.), *Controlling Immigration Through Criminal Law. European and Comparative Perspectives on "Crimmigration"*, Hart Publishing, 2021, 280p.

A. Weyembergh and C. Chevallier-Govers (dir.), *La création du parquet européen : simple évolution ou révolution au sein de l'espace judiciaire européen* ?, Larcier, 2021, 442p.

C. Brière, *The External Dimension of the EU's Policy against Trafficking in Human Beings*, Hart Publishing, 2021, 288p.

V. Mitsilegas and N. Vavoula (eds.), *Surveillance and Privacy in the Digital Age: European, Transatlantic and Global Perspectives*, Hart Publishing, 2021, 328p.

C. Arangüena Fanego, M. de Hoyos Sancho and A. Hernández López, *Procedural Safeguards for Suspects and Accused Persons in Criminal Proceedings. Good Practices Throughout the European Union*, Springer, 2021, 84p.

A. Weyembergh, C. Höhn and I. Saavedra (eds), *La lutte contre le terrorisme - ses acquis et ses défis/The fight against terrorism - Achievements and challenges. Liber Amicorum dédié à Gilles de Kerchove*, Bruylant, Bruxelles, 2021, 1082 p.

V. Franssen and C. Harding (eds.), *Criminal and Quasi-criminal Enforcement Mechanisms in Europe. Origins, Concepts, Future*, Hart Publishing, 2022, (forthcoming), 384p.

V. Mitsilegas, *EU Criminal Law*, 2nd ed., Hart Publishing, 2022, (forthcoming), 400p.

UPCOMING EVENTS

Please note that the uncertainty caused by the pandemic context may have had an impact on events that are expected to take place in the coming period. Events that are planned to be held in person may be switched online. We invite you to regularly check the status of upcoming events which are listed below using the links provided.

Seminar (online), *Reducing Radicalisation in Prisons with Alternatives to Imprisonment*, ERA, 15-17 September 2021 → Link

Annual Forum on Combatting Fraud in the EU 2021, *Towards a Multi-Tiered System to Protect EU Financial Interests*, ERA, 4-5 October 2021→ Link

Conference, *The new anti-fraud institutional and legislative landscape of the European Union*, Fondazione Basso, 7-8 October 2021→ Link

Annual Conference (online) on *Countering Terrorism in the EU 2021*, ERA, 6-8 October 2021→ Link

Conference, *Human After All: Data Protection in Policing*, ERA, 18-19 October → Link

Seminar, *Obtaining e-Evidence when Investigating and Prosecuting Crimes*, ERA, 18-19 October 2021→ Link

Seminar, *Preventing Child Sexual Abuse. Role of law enforcement agencies and the internet industry*, ERA, 21-22 October 2021→ Link

Annual Conference on *EU Criminal Justice 2021*, ERA, 11-12 November 2021→ Link

Conference, *20th anniversary of the Framework Decision on the European Arrest Warrant*, University of Westminster, December 2021.

ECLAN Annual Conference on EPPO, University of Luxembourg, May 2022.