Newsletter

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Eclan

European Criminal Law Academic Network

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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

Anti-Money Laundering

Proposal for a Regulation of the European Parliament and of the Council establishing the Authority for Anti-Money Laundering and Countering the Financing of Terrorism and amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010

On 20 July 2021, the European Commission presented a proposal for a Regulation establishing the authority for Anti-Money Laundering and Countering the Financing of Terrorism amending Regulations (EU) No 1093/2010, (EU) 1094/2010, (EU) 1095/2010.

This proposal for a regulation is one of the measures announced by the European Commission under the Action Plan for a comprehensive Union policy on preventing money laundering and terrorist financing which was adopted on 7 May 2020.

Based on the proposal the Authority for Anti-money laundering and Countering the financing of Terrorism would have a twofold purpose: first the Anti-Money Laundering and Countering Fincancing of Terrorism supervision, and second, the support of EU Financial Intelligence Units.

The aim is to create a central point that will set a common system of AML/CFT supervision across EU and coordinate national AML/CFT supervisory authorities. The Authority will also directly supervise some of the riskiest financial institutions. Regarding FIUs the Authority would facilitate cooperation and support cooperative operational analyses.

The file was assigned jointly to the Economic and Monetary Affairs Committee and the Civil Liberties, Justice and Home Affairs Committe. On 29 October 2021 RADEV Emil and GARICANO Luis were appointed as rapporteurs for the file.

The file awaits Committee decision.

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Proposal for a Directive of the European Parliament and of the Council on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849

On 20 July 2021, the European Commission presented a proposal for a Directive on the mechanisms to be put in place by the Member States for the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and repealing Directive (EU) 2015/849.

Essentially, this Directive on AML/CFT (6th Anti-Money laundering Directive) will replace the 4th AML directive (as amended by the 5th AML Directive).

The file was assigned jointly to the Economic and Monetary Affairs Committee and the Civil Liberties, Justice and Home Affairs Committe. On 25 November 2021 NIEDERMAYER Ludek and TANG Paul were appointed as rapporteurs for the file.

On 22 September 2021 the European Data Protection Supervisor (EDPS) published an opinion for this proposal. The EDPS, generally welcomes the objectives of the initiative, to

increase the effectiveness of Anti-Money Laundering and Countering the Financing of Terrorism. However, the EDPS underlines that the risk-based approach to the monitoring of the use of the financial system for money laundering needs further specifications and clarifications.

The file awaits Committee decision.

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Proposal for a regulation of the European Parliament and of the Council on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing

On 20 July 2021, the European Commission proposed a Regulation on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing.

This proposal is a part of a legislative package presented by the European Commission to enhance the AML/CFT rules of the EU. The regulation encompasses *inter alia* issues regarding the customer due diligence measures, beneficial ownership transparency, internal policies, and procedures of obliged entities.

The file was assigned jointly to the Economic and Monetary Affairs Committee and the Civil Liberties, Justice and Home Affairs Committe. On 25 November 2021 HEINALUOMA Eero and CAREME Damien were appointed as rapporteurs for the file.

The file awaits Committee decision.

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Proposal for a Regulation of the European Parliament and of the Council on information accompanying transfers of funds and certaincrypto-assets (recast)

On 20 July the European Commission adopted a proposal for a Regulation to update existing rules on information accompanying transfers of funds. This proposal constitutes the fourth initiative of the AML/CFT legislative package put forward by the European Commission.

The proposed regulation – together with the 6th Anti Money Laundering Directive and the Regulation on the prevention of the use of the financial system for the purposes of money laundering and terrorist financing, as presented above – establish the so-called 'single EU rulebook' on AML/CFT that will harmonise the AML/CFT framework across the EU.

Essentially, this Regulation will revise the Regulation (EU) 2015/847 – which currently covers only certain categories of crypto-asset service providers – in order to extend its scope to virtual assets transfers. The aim of this proposal is to ensure full traceability of the entire crypto-asset transfers by extending the obligation of payment service providres to collect and make accessible full information about the sender and beneficiary of the transfers of virtual assets they operate, in order to facilitate the prevention, detection and investigation of their possible use for money laundering and terrorist financing.

The file was assigned jointly to the Economic and Monetary Affairs Committee and the Civil Liberties, Justice and Home Affairs Committe. On 25 November 2021 URTASUN Ernest and KANKO Assita were appointed as rapporteurs for the file.

On 1 December 2021 the Council agreed on a mandate to negotiate on the draft regulation with the European Parliament.

The file awaits Committee decision.

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Proposal for a Directive of the European Parliament and of the Council amending Directive (EU) 2019/1153 of the European Parliament and of the Council, as regards access of competent authorities to centralised

bank account registries through the single access point

On 20 July 2021, the European Commission presented a proposal for a Directive amending Directive (EU) 2019/1153 of the European Parliament and of the Council, as regards access of competent authorities to centralised bank account registries through the single access point.

The European Commission identified that the key for an effective financial investigation and successful tracing and confiscating the proceeds of crime is the fast access to financial information.

The proposal aims to provide law enforcement authorities with the possibility to access and search the bank account registries through a single access point.

The file was assigned to the Civil Liberties, Justice and Home Affairs Committee. On 29 November 2021 RADEV Emil was appointed as rapporteur.

The file awaits Committee decision.

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Digitalisation of Criminal Justice

Proposal for a Regulation of the European Parliament and of the Council establishing a collaboration platform to support the functioning of Joint Investigation Teams and amending Regulation (EU) 2018/1726

On 1st December 2021, the European Commission presented a proposal for a Regulation establishing a collaboration platform to support the functioning of the Joint Investigation Teams and amending Regulation (EU) 2018/1726.

In general the proposal aims to provide technological support to those involved in Joint Investigation Teams (JITs) and to create a more effective environment for the cross-border investigations and prosecutions.

Particularly the objectives are to:

- create a more efficient framework for sharing information and evidence collected during the JIT activities.
- ensure that participants of the JITs can easily and safely communicate with each other during the JIT activities.
- assist the joint daily management of a JIT.

The file is currently being considered by the preparatory bodies in the Council and in the European Parliament.

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Proposal for a Regulation of the European Parliament and of the Council on the digitalisation of Judicial cooperation and access to justice in cross-border civil, commercial and criminal matters, and amending certain acts in the field of judicial cooperation

On 1st December 2021, the European Commission presented a proposal for a regulation on the digitalisation of judicial cooperation and access to justice in cross-border civil, commercial and criminal matters.

The proposal aims to alleviate problems regarding the lack of digital tools supporting the cooperation between legal systems in different EU Member States, and the lack of digital tools facilitating access to justice in cross-border cases, as well as possible issues concerning the recognition of

certain electronic communication means used in judicial proceedings.

In general, the objective of the proposal is to aid access to justice and the efficiency of cross-border judicial cooperation. To do so, the European Commission is proposing the creation of a digital communication channel which will enable the facilitation of digital tools in cross-border judicial cooperation proceedings.

The file is currently being considered by the preparatory bodies in the Council and in the European Parliament.

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Proposal for a Regulation of the European Parliament and of the Council amending Regulation (EU) 2018/1727 of the European Parliament and the Council and Council Decision 2005/671/JHA, as regards the digital information exchange in terrorism cases

and

Proposal for a Directive of the European Parliament and of the Council amending Council Decision 2005/671/JHA, as regards its alignment with Union rules on the protection of personal data

On 1st December 2021, the European Commission adopted two proposals to effectively fight terrorism and other forms of serious cross-border crime: a proposal for a Regulation amending Regulation (EU) 2018/1727 and Council decision 2005/671/JHA, as regards the digital information exchange in terrorism cases, and a proposal for a Directive amending Council Decision 2005/571/JHA, as regards its alignment with Union rules on the protection of personal data.

The new regulation aims to enable Eurojust to recognise links between prior and ongoing cross-border investigations and prosecutions concerning terrorist offences and other forms of serious cross-border crimes by improving the information sharing between Member States and Eurojust. Moreover, it will create a more efficient field for the data exchange between the Member States, Eurojust and third countries through the modernisation of Eurojust case management system and the establishment of secure digital communication channels. Last, the proposal provides for a clear legal basis for the cooperation with third country liaison prosecutors at Eurojust.

With regard to the proposed directive, this aims to align the Council Decision 2005/671 on the exchange of information and cooperation concering terrorist cases with the principles and data protection rules set in Directive (EU) 2016/689 (the Data Protection Enforcement Directive – LED) in order to ensure consistent approach to protection afforded to persons regarding the processing of personal data. This proposal is in consistency with two proposals the Commission had adopted on 20 January 2021 to align Council Framework Decision 2002/465/JHA on JITs and Directive 2014/41 regarding the EIO, with the EU rules on the protection of personal data (see below).

The file for the revision of the Eurojust Regulation is currently being considered by the preparatory bodies in the Council and in the European Parliament; while the proposal for a Directive as regards the alignment of Council Decision 2005/671/JHA with Union rules on the protection of personal data most probably will only be considered under the Czech Presidency.

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Police Cooperation

Proposal for a COUNCIL RECOMMENDATION on operational police cooperation

On 8 December 2021, the European Commission presented a proposal for a Council Recommendation on operational police cooperation.

In general, the aim of the proposal is to:

- clarify and align the rules of engagement in joint operations across national territories;
- enchance the role of the Police Customs Cooperation Centres;
- build a framework to permit the remote access of police officers to their own databases, while providing secure communications;
- use targeted joint patrols and other joint operations;
- create a coordination platform; and
- enhance joint training and exchange programmes for police officers.

The file is currently being considered by the preparatory bodies in the Council.

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Proposal for a Directive of the European Parliament and of the Council on the information exchange between law enforcement authorities of Member States, repealing Council Framework Decision 2006/960/JHA

On 8 December 2021, the European Commission presented a proposal for a Directive of the European Parliament and of the Council on information exchange between law enforcement authorities of Member States, repealing Council Framework Decision 2006/960/JHA.

Based on the summary of the impact assessment the European Commission identified three main issues to be solved:

- National rules do not allow the effective and efficient flow of information;
- In certain circumsances the Member States do not have the appropriate structures to receive information requests from other Member States;
- The different channels used by national authorities to send information requests cause the duplication of these requests.

To address these issues, the initiative of the European Commission aims to:

- enable the access for law enforcement authorities to information held in another Member State;
- ensure that all the Member States have a single point of contact;
- create a mandatory default communication channel.

The file is currently being considered by the preparatory bodies in the Council and in the European Parliament.

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Proposal for a Regulation of the European Parliament and of the Council on automated data exchange for police cooperation ("Prüm II"), amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, 2019/817 and 2019/818 of the European Parliament and of the Council

On 8 December 2021, the European Commission presented a proposal for a Regulation on automated data exchange for police cooperation ("Prüm II"), amending Council Decisions 2008/615/JHA and 2008/616/JHA and Regulations (EU) 2018/1726, 2019/817 and 2019/818 of the European Parliament and of the Council.

The European Commission aims to address four main concerns:

- Law enforcement agencies are not able to identify whether data is available in the national database of another Member State;
- Law enforcement agencies may not be able to access other relevant data stored in national databases of other Member States;
- Law enforcement agencies are not always able to have access to data that are available in Europol's database;
- Law enforcement agencies (once they receive a "hit") do not always have access to the specific data stored in national databases of another Member State.

The objectives of the Proposal are to:

- find a solution for efficient automated exchange of data between EU law enforcement agencies;
- ensure that all EU law enforcement authorities have access to relevant data;
- ensure that the relevant data in the Europol's database is available to EU law enforcement authorities;
- provide access to the actual data regarding a 'hit'.

The file is currently being considered by the preparatory bodies in the Council and in the European Parliament.

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Substantive Criminal Law

Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC

On 15 December 2021, the European Commission presented a proposal for a Directive on the protection of the environment through criminal law replacing Directive 2008/99/EC.

In addition, together with the proposal for a directive the European Commission adopted a Communication on stepping up the fight against environmental crime in order to explain the policy objectives of the proposal.

The overall aim of the proposal is to achieve a better protection of the environment through criminal law. Particularly, the proposal seeks to:

- remove the annexes currently attached to the Directive, and instead update the existing criminal offences covered by the Directive and add new offences, such as illegal timber trade, illegal ship recycling and illegal abstraction of water;
- clarify undefined legal terms used to describe environmental crime such as 'substantial damage';
- ensure effective, dissuasive and proportionate sanction types and levels for environmental crime for both natural and legal persons;
- improve the cross-border cooperation on environmental crime;
- improve the effectiveness of national enforcement chain through training, investigative tools, mechanisms for cooperation between national authorities and better data collection and statistics;
- recognise and stregthen the role of citizens and civil society.

The file is currently being considered by the preparatory bodies in the Council and in the European Parliament.

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Communication from the Commission to the European Parliament and the Council on a more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime

On 9 December 2021 the European Commission presented a Communication to extend the list of EU crimes laid down in Article 83(1) TFEU to hate speech and hate crime.

In accordance with Article 83(1) TFEU the EU has the competence to establish minimum rules on the definition of criminal offences and sanctions in areas of particularly serious crimes with a cross-border dimension, which are listed in paragraph 2 of the same Article. Nevertheless, Article 83(1) TFEU enables the Council to adopt a decision extending the EU competence to other areas of crime that meet the afore-mentioned criteria.

Through the communication the European Commission invites the Council, with the consent of the European Parliament, to take this initiative forward and decide on the extension of the list of EU crimes to hate speech and hate crime, as according to its assessment – presented in the Communication – the latter meet the criteria to be identified as a new area of crime under Article 83(1), and in particular:

- Hate speech and hate crime share an intrinsic special feature, that is, 'hatred' targeting persons or groups of persons sharing the same protected characteristics;
- Online hate speech and hate crime spreads fast and is accessible to everybody anywhere (cross-border dimension);
- Hate speech and hate crime are particularly serious crime as these undermine the EU common values and fundamental rights;
- There has been a sharp rise in the two phenomena due to multiple social, economic and technological changes over the past years.

In addition, in September 2021 the European Palriament adopted a legislative resolution calling on the Commission to submit a legislative proposal to include all forms of gender-based violence as a new area of crime under Article 83(1) TFEU. Hate speech and hate crime are characterised by an underlying hate against a group of persons including significant gender-bias and hatred of women; hence the initiative at hand aims to address partially the European Parliament's request, as it covers *inter alia* specific forms of serious violence against women and girls that can also be defined as misogynous hate speech or hate crime with an objectively identifiable gendered bias motive.

Against this backdrop, President Von der Leyen in her 2021 state of the union announced that the European Commission would present a directive to combat violence against women and domestic violence. In November 2021, the Commissioner for Equality stated that the upcoming directive will lay down among others standards for criminalisation of specific forms of violence against women, to the extent of EU competence. Therefore, the forthcoming directive will criminalise, certain specific forms of violence which do not necessitate an element of hatred.

The proposal is expected to be adopted in early 2022.

ON-GOING 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 the 29th of September and the 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 was provisionally applied from 1st January 2021 until 30 April 2021[1](whithin this period the European Parliament was expected to provide its consent). Finally, the European Parlaiment gave its consent on 27 April 2021 and thus the EU-UK Trade and Cooperation Agreement entered into force on 1 May 2021, afther the Council adopted its Decision (EU) 2021/689 on 29 April 2021.

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 599(4) 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 602 of the EU-UK TCA) and the nationality exception (Article 603 of the EU-UK TCA). In this regard, the provisions on surrender of the Trade and Cooperation

[1] The Agreement provided initially for a time-limited provisional application until the end of February 2021, however on 23 February, the EU-UK Partnership Council decided, at the EU's request, to extend the provisional application until 30 April 2021.

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 the secondment of UK Liaison officers at Europol (Article 568 of the EU-UK TCA) and at Eurojust (Article 584 on Contact points and 585 on Liaison Prosecutor of the EU-UK TCA) 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.

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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:

- 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;

- 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;
- 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. Regarding the regulation, the Council issued a progress report on 29 November 2021 outlining the conclusions from the fourth political trilogue on this file (9 July 2021). Exchanges during the Slovenian Presidency have taken place at technical level and have focused on the notification regime. The main difference between the legislators as regards the notification obligations concerns the respective role of the states involved in the preservation or production order procedures. The Presidency noted that the Council has offered to make substantial concessions to the Parliament with a view to reaching an agreement. These concessions have so far not been considered sufficient by the Parliament.

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. In that respect, the Commission started negotiations with the US on 25 September 2019. After four rounds of negotiations, it appears that progress on the internal EU rules is essential for bringing forward the EU-US negotiations. The second one authorised the Commission to participate on behalf of the EU in negotiations of a Second Additional Protocol to the Council of Europe Convention on Cybercrime on enhanced cooperation and the disclosure of electronic evidence. On 17 November 2021 the Committee of Ministers of the Council of Europe adopted the Second Additional Protocol, which should be opened for signature in May 2022.

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Proposal for a regulation of the European Parliament and of the Council on a computerised system for communication in cross-border civil and criminal proceedings (e-CODEX system), and amending Regulation (EU) 2018/1726

On 2 December 2020, the Commission presented its proposal for a regulation on the e-CODEX system (e-Justice Communication via On-line Data Exchange). The main purpose of the e-CODEX system is to enable the digitalisation of judicial communication, including communication between courts, as well as between citizens and courts, and the secure exchange of judicial documents. E-CODEX was launched under the multinannual e-Justice action plan 2009-2013 and until now it has been developed by 21 Member States. It is managed by a consortium of Member States and other organisations, financed by an EU grant. However, this temporary management solution does not provide for the system's long-term operational management. To remedy this situation, this proposal aims to provide a sustainable and long-term legal framework for the system, by handing over its management to eu-LISA.

The proposal was one of the priority dossiers of the Slovenian Presidency. It was thoroughly examined at expert level in the Ad hoc Working party and a general approach was reached in the Council on 7 June 2021. An amendment to this general approach was approved on 22 July 2021,

with an agreement to develop and manage the operation of e-CODEX in Tallinn, Estonia.

The report of the European Parliament on the proposal was discussed in the JURI and LIBE Committes. On 14 October 2021, the European Parliament adopted its report and then decided to open interinstitutional negotiations. The decision was later approved in plenary on 20 October 2021.

The first political trilogue was held on 9 November 2021 and the second on 8 December 2021. At the second trilogue, the European Parliament and the Council representatives provisionally agreed on a compromised text that still must be approved by the Council and the European Parliament before going through the formal adoption procedure. The provisional text introduces provisions protecting independence of the judiciary, details on the governance and management structure within eu-LISA and possibilities for Member States to contribute to further development of the e-CODEX system.

Timing is of particular importance as there needs to be sufficient time between the adoption of the Regulation and the actual transfer to eu-LISA, in order to allow eu-LISA to secure funding and staffing.

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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 were discussed

in the plenary of 15 September 2021, where the European Parliament decided not to propose any amendmends to the proposals, according to the simplified procedure, and to open interinstitutional negotioations. Later on 21 September and 13 October 2021 during the technical meetings, the Commission, the European Parliament and the Presidency of the Council reached a provisional agreement on the draft amendments that the European Parliament would present as regards the Commission Proposal.

On 11 November 2021, during a trilogue the co-legislators agreed provisionally on the final compromise texts. During the vote on 14 December 2021, the plenary of the European Parliament adopted the amendments for the two proposals (Parliament's position in first reading). Both files await Council's first reading position, and are expected to be adopted in February.

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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 *inter alia*:

- 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;
- 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 so that the Council was in a position to enter into negotiations on the draft regulation with the European Parliament.

On 12 October 2021, the LIBE Committee adopted its report and decided to open interinstitutional negotiations. The decision was later approved in plenary on 21 October 2021.

The first political trilogue took place on 27 October 2021. On 1 February 2022, the Council Presidency and the European Parliament reached a provisional agreement on a compromised text that is subject to approval by the Council and the European Parliament before going through the formal adoption procedure.

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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 document 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.

On 13 October 2021 the Council adopted its position for the negotiations with the European Parliament.

Similarly as the proposal above, on 12 October 2021, the LIBE Committee adopted its report and decided to open interinstitutional negotiations. The decision was later approved in plenary on 21 October 2021.

The first political trilogue took place on 27 October 2021.

CASE LAW

JUDGMENTS

Case C-66/20, XK, Judgement of 2 September 2021 (Fourth Chamber)

On 2 September 2021, the Fourth Chamber of the Court of Justice of the European Union rendered a preliminary ruling regarding the definition of a 'Court or tribunal' of a Member State within the meaning of Article 267 TFEU.

In this case, the Public Prosecutor's Office in Trento (Italy) received a European Investigative Order (EIO) issued on the same day by the Münster Tax Office for Criminal Tax Matters in order to search XK business premises as part of an investigation for tax evasion. The Münster Tax Office is an administrative authority and argues that it can issue an EIO without the decision being validated by a judge or public prosecutor on the ground that under German Law, it exercises the same rights and responsibilities asa public prosecutor. It would thus fall in the framework of 'Issuing Judicial Authority' under Article 2(c) of Directive 2014/41, under which the EIO is taken. The Public Prosecutor Office in Trento inquired whether such provision of the Directive would allow a Member State to transmit an EIO issued by an administrative authority without such decision being validated by a judicial authority.

Before addressing the main issue, the CJEU assessed whether the Public Prosecutor's Office, Trento, has the status of a 'court or tribunal' within the meaning of Article 267 TFEU, in order to decide on its competence to request the Court to issue a preliminary ruling and therefore on the admissibility of the request.

In order to answer such a question, the Court of Justice recalled its settled case-law on how to determine whether a body is a 'court or tribunal' within the meaning of article 267 TFEU. In this regard, the CJEU considered the following criteria: whether such body is established by law, whether it is permanent, whether the jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law and whether it is independent. Furthermore, the CJEU pointed out that a national court may request the Court to issue a preliminary ruling only if it is acting in the exercise of a judicial function. However, in the present case, the Public Prosecutor's Office, Trento, acting as an authority for the execution of an EIO within the meaning of Article 2(d) of Directive 2014/41, is not called upon to rule on a dispute and to give judgment in proceedings intended to lead to a decision of a judicial nature; hence it could not be regarded as exercising a judicial function. Therefore, it was held that the case was inadmissible pursuant to Article 267 TFEU.

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Case C-136/20, LU, Judgement of 6th October 2021 (First Chamber)

On 6 October 2021, the First Chamber of the Court rendered a judgement in the context of mutual recognition of pecuniary sanctions. In this case, LU was fined 80 euros for traffic infraction in Austria. The administrative body in Weiz (Austria) transmitted the decision to the District tribunal of Zalaegerszeg in Hungary in order to execute the sanction as framed by Article 5 of the Framework decision 2005/214. Nevertheless, the district tribunal in Hungary had doubts about whether such an infraction fell within the scope of Article 5 paragraph 1, thirty third passage of the framework decision (offences for which the verification of the double criminality is not necessary). In this context, the district tribunal filed a request for a preliminary ruling to the Court of Justice in order to ask whether Article 5 paragraphe 1 of Framework Decision 2005/214 should be interpreted as not giving any margin of appreciation to the executing State to deny the execution of the decision, when the issuing State has qualified the conduct under this provision; and if the first question is answered in the negative, whether the executing State can consider that the issuing State has erred in its assessment about the qualification of the offence referred to in Article 5.

Concerning the admissibility matter, the Austrian government claimed that the request for a preliminary ruling was inadmissible as it was not clear whether this would be relevant for the resolution of the dispute in the main proceedings. The Court recalls that questions submitted in relation to the interpretation of EU Law are presumed to be relevant. Thus, in the present case since the interpretation of EU Law is at stake, the Court should answer the questions raised by the referring court.

The Court of Justice assessed jointly the two questions. It started its assessment by recalling that the Framework decision 2005/214 hinges upon the principles of mutual trust and mutual recognition. Against this backdrop, the competent authority of the executing State should, in principle, recognise and execute the decision and cannot refuse to do so unless it invokes one of the grounds for non-recognition or non-execution referred to in the Framework Decision itself.

Furthermore, as regards the offences for which the verification of the double criminality is not needed, the CJEU undelines that the executing State is bound by the legal qualification given to the facts by the issuing State. Therefore, the executing State cannot deny, in principle, the execution of the decision requiring a financial penalty due to a different assessment in the qualification of the facts, otherwise this would be contrary to the principle of mutual recognition. Nevertheless, calling upon Article 20(3) of the Framework Decision the Court recalls that the executing State may oppose the recognition and the execution of

decisions – apart for the grounds laid down in Article 7 – where the certificate referred to in Article 4 gives rise to an issue that fundamental rights or fundamental legal principles as enshrined in Article 6 TEU may have been infringed.

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Case C-338/20, D.P., Judgement of 6th October 2021 (First Chamber)

On 6 October the 2021, the First Chamber of the Court rendered a judgement regarding the mutual recognition of pecuniary sanctions as provided by Framework decision 2005/214. On 21 January 2020, the central administrative authority for the collection and recovery of fines in the Netherlands (CJIB), brought an action before the district court for Lodz in Poland in order to recognise and execute its decision imposing on DP – who resides in Poland – a fine of EUR 210 for a road traffic offence. At a hearing before the referring court, DP claimed that the relevant decision had been notified to him without it being translated in Polish and therefore he could not understand its content. In this sense, the District Court for Lodz questioned the Court of Justice whether the notification of a sentenced person of a decision imposing a pecuniary sentence without being accompanied by a translation into a language which he understands, should entitle an authority of the executing State to refuse to enforce the decision on the basis of the provisions implementing Article 20(3) of the Framework Decision 2005/214 and on the basis of the right to a fair trial.

The Court recalls that the Framework Decision 2005/214 aims to ensure an effective mechanism for cross-border recognition and execution of final decisions requiring a financial penalty to be paid by virtue of the principle of mutual recognition. Therefore, the Member States should in principle recognise such a decision without any further formality being required. Furthermore, the CJEU undelines that the executing State may refuse to recognise and execute such a decision not only where one of the grounds for non-recognition and non-execution come to the fore, but also where fundamental rights may have been infringed. These fundamental rights comprise the right to effective judicial protection, including the right to a fair hearing and the defence rights, envisaged in Articles 47 and 48(2) of the Charter respectively.

Calling upon the case-law of the European Court of Human Rights (ECtHR), the CJEU ascertaines that a road traffic offence constitutes a 'criminal offence' and thus proceedings regarding a pecuniary sanction imposed for such an offence fall in the ambit of the right to a fair trial as enshrined in Article 6 ECHR, including *inter alia* the right of the person concerned to be informed 'in a language which he understands' and in detail, of the nature and cause of the accusation against him.

In that context, reiterating the relevant case-law of the ECtHR, the Court of Justice concludes that the issuing State should ensure that the sentenced person is informed, in a language which he or she understands, of the elements of that decision which are essential for him or her to understand what he or she is accused of, and to be able fully to exercise his or her rights of defence or, if needed, to obtain a full translation of those elements.Thus, the Court stated that an executing State may oppose to execute a decision imposing a financial sanction if such a decision notified to the senctioned person or at least the essential elements thereof enabling him or her to exercise his or her rights of the defence, are not translated in a language that is understandable to that person.

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Joined Cases C-845/19 and C-863/19, DR and TS, Judgement of 21 October 2021, (Third Chamber)

On 21 October 2021, the Third Chamber of the Court of Justice of the European Union rendered

a judgement concerning the confiscation of property in the context of criminal proceedings.

On 21 February 2019, in the city of Varna (Bulgaria), DR and TS were in possession, without authorisation and with a view to their distribution, of highly dangerous narcotics. They were convicted of that offence and sentenced to imprisonment. In the frame of pre-trial proceedings, national authorities carried out searches in their premises, where both were living with their family, and discovered a sum of money in both premises. Following the criminal conviction of the persons concerned, the Regional Public Prosecutor's Office asked the Regioanl Court to confiscate the sum of money at issue. Before the court, DR stated that the sum of money found in his premise belonged to his grandmother and that the latter had obtained it under a bank loan. DR's grandmother did not take part in the proceedings before the first instance court, since Bulgarian law does not permit her, as a party distinct from the perpetrator of the offence concerned, to take part in those proceedings. Nor was she heard as a witness. TS claimed that the money belonged to his sister and mother; the latter was heard as a witness concerning the sum of money at issue. The regional court of Varna refused to authorise the confiscation as the charge for which both DR and TS were convicted for, did not 'generate an economic benefit'. It held that, although there is evidence, namely witness statements, that the persons concerned had been selling narcotics, the conditions laid down in law for confiscation in favour of the State were not met though.

The Public Prosecutor's Office of Varna brought an appeal against this judgement before the referring Court, arguing that the first instance court had not applied Article 53(2) of the Criminal code in the light of Directive 2014/42. The persons concerned do not share the Public Prosecutor Office's view and argue that only material property which is directly derived from the offence of which the concerned persons have been convicted may be confiscated.

The Court of Appeal of Varna thus asked the Court four preliminary questions; namely: whether Directive 2014/42 is applicable to possession of narcotics for the purpose of distribution in Bulgaria and where the potential economic proceeds are also realised and located in Bulgaria; if the first question is answered positively, what would be the interpretationof the concept of 'economic advantaged derived from a criminal offence'; whether the directive should be understood as precluding a legal provision which does not provide for the confiscation of an 'economic advantage derived … indirectly from a criminal offence'; and whether Article 47 of the Charter of Fundamental Rights of European Union should be interpreted as precluding a national legal provision which allows for the confiscation for the benefit of the State of a sum of money in respect of which it is claimed that it belongs to a person other than the person who committed the criminal offence, without that third party being able to take part in those proceedings in his or her own right and having direct access to the courts.

Regarding the first question, the Court ruled that Directive 2014/42 must be interpreted as meaning that the possession of narcotics for the purposes of their distribution comes within its scope, even though all the elements inherent in the commission of that offence are confined within a single Member State.

The Court, assessing jointly the second and third question, further held that Directive 2014/42 must be interpreted as meaning that it not only provides for the confiscation of property constituting an economic benefit derived from the criminal offence in respect of which the perpetrator has been convicted, but also provides for the confiscation of property belonging to that perpetrator in respect of which the national court hearing the case is satisfied that it derives from

other criminal conduct. In the latter case, the offence in respect of which its perpetrator has been convicted should be among those listed in Article 5(2) of that directive and should be liable to give rise, directly or indirectly, to economic benefit within the meaning of the same directive. In addition, the person concerned must have an effective possibility to challenge the circmstances of the case including specific facts and available evidence on the basis of which the property concerned is considered to be property that is derived from criminal conduct.

The Court then moved to the last question on the compatibility of national law with the Charter. In this regards, the Court ruled that Article 8(1), (7) and (9) of Directive 2014/42, read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, must be interpreted as precluding national legislation which allows for the confiscation, in favour of the State, of property which is claimed to belong to a person other than the perpetrator of the criminal offence, without that person having the right to appear as a party in the confiscation proceedings.

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Case C-282/20, ZX, Judgement of 21 October 2021, (Tenth Chamber)

On 21 October 2021, the Tenth Chamber of the Court rendered a judgement concerning procedural remedies for errors and omissions in the content of the indictment . ZX was subject to criminal proceedings in Bulgaria for possession of fake money knowing that it was counterfeit. However, during the criminal proceedings, the court identified some errors and omissions in the indictment, namely some evidence was not accurately recorded, the legal characteristics of the act were not fully described, and there were errors in the statement of the provisions of Bulgarian criminal law that were allegedly infringed. The referring court pointed that these errors had to be remedied either by amending immediately the charges or by referring the case back to the prosecutor. However, no basis under Bulgarian Criminal Law allowed to do so.

The referring court thus asked the Court whether Bulgarian law which does not provide for any procedural remedy for errors and omissions in the content of the indictment which prejudice the right of the accused person to know what he or she is accused of, after the end of the first hearing in a criminal case (pre-trial hearing), is compatible with Article 6(3) of Directive 2012/13 and Article 47 of the Charter. Secondly, in case of a negative answer, whether Directive 2012/13 and Article 47 of the Charter are to be interpreted as requiring an interpretation of national law that allows the prosecution service to remedy errors and omissions in the indictment at the hearing, or instead whether those provisions require that the prohibition in law on referring the case back to the public prosecution service to draft a new indictment be disapplied.

Regarding the first question, such legislation was deemed as not complying with Article 6(3) of Directive 2012/13 or Article 47 of the Charter since, after that hearing, the absence of a procedural mechanism for remedying the defects in the indictment prevents the accused person from knowing, in sufficient detail, the charges brought against him or her, which may impede the effective exercise of the rights of defence.

On the second question, the Court of Justice – after calling upon the principle of proecedural authonomy of the Member States – explained that the principle of the primacy of EU law requires the national courts to interpret, as far as possible, their domestic law in a manner consistent with EU law; and only where it is impossible to give a consistent interpretation, they should disapply any national provision which is contrary to a provision of EU law with direct effect.

Therefore, in the case at hand the Court decided that Article 6(3) of Directive 2012/13 and

Article 47 of the Charter must be interpreted as requiring the referring court to give an interpretation of the national rules on the amendment of the indictment, as far as possible in a manner consistent with that law, so as to enable the prosecutor to remedy errors and omissions in the content of the indictment at the trial, while at the same time actively and genuinely safeguarding the rights of defence of the accused person. On the contraryonly if the referring court considers that such an interpretation is not possible, it should disregard the national provision prohibiting the suspension of court proceedings and refer the case back to the public prosecutor in order for the latter to draw up a new indictment

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Joined Cases C-428/21 PPU and C-429/21 PPU, HM and TZ, Judgement of 26 October 2021 (First Chamber)

On 26 of October 2021, the First Chamber of the Court rendered a judgement in the context of a European Arrest Warrant regarding the application of the right of the surrendered person to be heard.

In case C-428/21, the Dutch authorities decided HM to be surrendered to Hungary for the purposes of criminal prosecution for money laundering. Afterwards the Hungarian judicial authority asked the Dutch authorities to consent to the prosecution of HM for other offences committed prior to his surrender under the procedure of Article 27 § 3 of Framework decision 2002/584. However, HM could not exercise effectively his rights of defence before the executing authority as he was detained in Hungary and the Framework Decision does not include any provision regulating the right to be heard of the person surrendered in the frame of Article 27.

Likeweise, in case C-429/21, a Belgium judicial authority asked the referring court (the Tribunal of Amsterdam) to give its consent for the surrender of TZ to the Federal Republic of Germnay in accordance with Article 28(3) of the Framework Decision in view of prosecuting TZ for offences other than those for which he was surrendered. Since TZ was in detention in Belgium, he could not exercise his rights of defence before the executing authority in the course of the examination of the request issued by the Belgium judicial authority.

Therefore, the referring court asked the Court of Justice to clarify before which Member State the surrendered person must exercise his or her right to be heard in the context of the consenting procedure as provided for in Article 27(3)(g) and (4) and Article 28(3) of the Framework Decision respectively.

The Court of Justice started its assessment by recalling the *ratio legis* of the Framework Decision on the European Arrest Warrant, which consists in contributing to the creation of an area without internal borders, and it is established in the principles of mutual trust and mutual recognition between Member States.

In the first place, the Court stated that the decision of the executing authority in the context of Articles 27 and 28 of the Framework Decision to consent or not to the prosecution for other offences or to the subsequent surrender to another Member State, may adversely affect the surrendered person, and therefore he or she should have the right to be heard in such cases. Then, the Court concluded that the executing authority is the one that should hear the surrendered person. Nevertheless it pointed out that the Framework Decision does not include any provisions in this regard, and therefore the Member States may lay down their own rules in accordance with the principle of procedural authonomy, provided that the latter would not be contrary to the underlying logic of the Framework Decision and its objectives of accelerating surrender procedures, and would ensure the surrendered person may exercise effectively his or her right to be heard. In that regard, Article 47 of the Charter requires the surrendered person to have a real opportunity to express his or her views and objections before the executing authority,

while it does not imply his or her right to appear in person before the latter authority.

Thus, the Court of Justice ruled that this hearing can take place in the issuing State and the judicial authorities of the latter are responsible for ensuring that the person is heard effectively without the direct participation of the executing State. The executing judicial authority should in principle consider the procedure in the issuing State to be complying with EU law; but in case of lack of sufficient evidence – notably regarding the opinion of the surrendered persosn – it may request that supplementary information be provided by the issuing judicial authority.

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Case C-319/19, ZV, Judgement of 28 October 2021 (Third Chamber)

On 28 October 2021, the Third Chamber of the Court rendered a judgment in the context of judicial cooperation in criminal matters concerning the confiscation of assets obtained illegally in the absence of a criminal conviction.

ZV was charged with having, as a public official of Bulgaria, acted beyond the scope of her powers in the context of her studies in order to obtain economic benefits for herself or for a company in which she was a majority shareholder at the time of the charges. The criminal proceedings are pending in front of a military jurisdiction in Sofia. The Commission for the confiscation of assets opened an investigation concerning ZV, in accordance with Article 22 of the 2012 Law on the confiscation of assets. The said Commission found that there was a 'significant discrepancy' between the assets of ZV and her husband and their income. Consequently, on 18 January 2017, it lodged a request before the referring court seeking confiscation in favour of the State of assets illegally obtained by ZV and by natural and legal persons considered to be associated with ZV or being under her control.

The defendant argues that such request was not compatible with Directive 2014/42 claiming that it also applies to non-criminal matters and was badly transposed in Bulgaria, especially considering the fact that the national law at issue does not provide for procedural safeguards in the context of the confiscation of assets obtained illegally. First, the referring court states that the 2012 Law on the confiscation of assets provided expressly in its Article 2 that confiscation proceedings brought before a civil court do not depend on criminal proceedings launched against the person concerned by the investigation or persons associated or controlled by that person. Under national case law, the mere fact that a person is under criminal charges is enough to open an investigation against that person.

The referring court in Sofia thus requested the Court of Justice , first, whether the confiscation of illegally obtained assets constitutes a punitive measure for the purposes of Directive 2014/42 or a measure under civil law; and secondly, whether national law is compatible with the rights enshrined in Articles 48 and 17 of the Charter. The referring court also put questions regarding the interpretation of several provisions of this Directive provided, though, that this applies to confiscation of non-crime related intrumentalities and proceeds.

Regarding the first question, the Court of Justice calling upon the legal bases of Directive 2014/42, which are both Articles 82(2) and 83(1) TFEU – that confers on the EU the competence to establish minimum rules on criminal matters – held that this Directive aims at obliging Member States to establish minimum rules for confiscation of crime-related intrumentalities and proceeds, in order to facilitate the mutual recognition of judicial confiscation decisions adopted in criminal proceedings. Therefore, Directive 2014/42 must be interpreted as not applying to legislation of a Member State which provides that confiscation of illegally obtained assets is to be ordered by a national court in the context of or following

proceedings which do not relate to a finding of one or more criminal offences.

The Court further decided to decline answering the second, third, fifth and seventh questions concerning the interpretation of certain provisions of the Directive at hand in view of the answer given to the first question.

Last, with regards to the fourth and the sixth question, the Court of Justice ruled that the Charter did not apply to the dispute, as the confiscation procedure at issue does not fall within the scope of Directive 2014/42, with the result that the national law governing that procedure cannot be regarded as implementing EU law, and thus the Court did not have jurisdiction to reply to these questions.

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Case C-852/19, Gavanozov II, Judgement of 11 November 2021 (First Chamber)

On 11 November 2021, the First Chamber of the Court rendered a decision in the context of Directive 2014/41, regarding the European Investigation Order.

In the present case, Mr Gavanozov was under investigation in Bulgaria for participation in a criminal organisation for committing tax offences. More specifically, he was suspected of importing sugar from other Member States, obtaining supplies from a company established in the Czech Republic, and selling that sugar on the Bulgarian market without paying any taxes, by submitting incorrect documents according to which that sugar had been exported to Romania. The special criminal tribunal of Bulgaria decided to issue a European investigation order requesting the Czech authorities to conduct searches and seizures at premises of the company established in the Czech Republic and its representative, as well as to hear a witness by videoconference. However, in the light of the former case of Gavanozov C-324/17 where the Court of Justice assessed that the judicial authority of a Member State must not, when issuing a EIO, describe in section J the available remedies in its State against the issuance of such a decision, the referring court was concerned about the compatibility of national law with the Directive at issue considering that no remedies are available in national law against decisions ordering the execution of searches and seizures or the hearing of witnesses nor against the issuing of an EIO. Therefore, the referring court referred two preliminary questions to the Court of Justice as to whether Bulgarian law is contrary to EU Law given the absence of such safeguards and subsequently whether it is possible to issue a EIO in this context.

Regarding the first question, the Court of Justice pointed out that both search and seizure, and the hearing of witnesses by videoconference, may adversely affect the person concerned; hence that person should be accorded the right to an effective legal remedy guaranteed by Article 47 of the Charter, *inter alia* against a decision ordering such measures in order to contest the need for, and lawfulness of, those measures. The Court calling upon the provision of Article 14(2) of the Directive as well as the principle of mutual recognition – which governs the mechanism of the EIO and requires the executing authority to recognise, in principle, an EIO – ruled that the issuing Member State is the one that should ensure that the persons concerned by the EIO have such a remedy available before a court of the same Member State. Therefore, Article 14 of the Directive 2014/41 must be interpreted as opposing any laws of a Member State having issued an EIO, that would not include remedies against the issuing of an EIO whose purpose is to conduct searches, seizures and the hearing of witnesses by videoconference.

Moreover, the Court held that Article 6 of the Directive 2014/41 read together with Article 47 of the Charter of fundamental Rights and Article 4 of the TEU, must be interpreted as forbidding the issuance of an EIO from a competent authority of a Member State, whose purpose is to carry out the aforementioned investigative acts if no remedies against such an order are available to the person

concerned. Otherwise - the Court notices - this would infringe Article 47 of the Charter, and thus the execution of such an EIO would be refused authomatically by the executing Member State pursuant to Article 11(1)(f) of this Directive. However, such a consequence would be contrary to the principles of mutual trust and mutual recognition, and sincere cooperation.

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Case C-479/21 PPU, SD and SN, Judgement of 16 November 2021 (Grand Chamber)

On 16 November 2021, the Grand Chamber of the Court of Justice delivered its judgment in a case concerning the interpretation of the provisions of the EU-UK Withdrawal Agreement (WA) on the European Arrest Warrant and the provision of the Trade and Cooperation Agreement (TCA) on the newly established surrender regime. In substance, the Court was asked to determine whether those provisions are binding upon Ireland.

On 9 September 2020, SD was arrested in Ireland pursuant to a European arrest warrant issued by the United Kingdom judicial authorities on 20 March 2020, seeking his surrender to serve a prison sentence of eight years. SN was arrested in Ireland on 25 February pursuant to a European arrest warrant issued by the same authorities on 5 October 2020, seeking his surrender for the purposes of conducting criminal prosecution. Both were arrested in Ireland and were remanded in custody pending a decision on their surrender to the United Kingdom judicial authorities. However, SD and SN disputed the legality of their detention before the High Court of Ireland, arguing that Ireland could no longer apply the European arrest warrant regime in respect of the United Kingdom. The High Court determined that the detention of SD and SN was lawful and therefore refused to order their release; the two defendants appealed this decision. According to the Court of Appeal, the European Arrest Warrant Act 2003, which transposes Framework decision 2002/584 into Irish law, may apply in relation to a third country provided that there is an agreement in force between that third country and the European Union and that the agreement in questions is binding on Ireland.

According to this interpretation, the lawfulness of their detention depends on whether the Withdrawal Agreement and the TCA (the EU-UK Trade and Cooperation Agreement) are validly binding on Ireland, which may not be the case since the two agreements contain measures falling within the Area of Freedom, Security and Justice, from which Ireland is exempt under Protocol No 21. In this context, the Supreme court of Ireland stayed the proceedings and referred two preliminary questions to the Court of Justice in order to assess the legality of such a EAW.

Clarifications were sought as to whether the provisions of the Withdrawal Agreement, which provides for the continuance of EAW regime in respect of the United Kingdom, during the transition period provided for in that agreement, can be considered binding on Ireland. The same question was asked regarding the TCA, which provide for the continuance of the EAW regime in respect of the United Kingdom after the relevant transition period.

The Court decided to examine both questions together as in essence they both concern the binding effect on Ireland of post-Brexit agreements. More specifically, it should be examined whether the legal bases of both Agreements – which are Articles 50 TEU and 217 TFEU respectively – were appropriate for the purposes of regulating the surrender regime, or whether instead Article 82(1) TFEU should have also been included in the substantive legal basis for the conclusion of those agreements, thus triggering the application of Protocol (No 21). However, in accordance with the latter no measure adopted pursuant to that title and no provision of any international agreement concluded by the

European Union pursuant to that title are to be binding on or applicable to Ireland.

Regarding the Withdrawal Agreement, the court emphazied that this means to cover all the fields and issues covered by Treaties. Thus, Article 50 TEU may constitute the only appropriate legal basis for concluding such an agreement, as its purpose is to organise a withdrawal in an orderly fashion, thus granting the EU the competence to negotiate and conclude an agreement laying down the rules for the withdrawal in all the areas falling within the scope of the Treaties. Pursuant to that competence, the EU concluded the Withdrawal Agreement which provides that EU law, of which Framework decision 2002/584 forms part, is to be applicable to and in the United Kingdom and its territory during the transition period.

Likewise, as far as the TCA is concerned, the rules laid down in the latter regarding the surrender of persons on the basis of an arrest warrant could be included in that agreement on the basis of Article 217 TFEU alone as this empowers the EU to guarantee commitments towards third countries in all the fields covered by the TFEU.

Therefore, the Court ruled, based on its previous jurisprudence and on a teleological interpretation of Article 50 TEU, Article 217 TFEU and Protocol No 21 on the position of the United Kingdom and Ireland in respect of the Area of Freedom, Security and Justice, annexed to the TEU and the TFEU, that Ireland is bound by the EAW provisions of the Withdrawal Agreement as well as by those enshrined in the TCA.

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Joined Cases C-748/19 to C-754/19, WB, XA, YZ, DT, ZY, AX, BV, CU, Judgement of 16 November 2021 (Grand Chamber)

On 16 November 2021, the Grand Chamber of the Court of Justice rendered its decision in joined cases C-748/19 to C-754/19 concerning the independence of the judiciary in Poland.

The present requests for a preliminary ruling were made by the Regional Court of Warsaw in connection with the examination of seven criminal cases assigned to its Tenth Division. In the first place, the referring court has doubts as to whether the composition of the adjudicating panels called upon to rule on those cases is in line with the second subparagraph of Article 19(1) TEU, having regard to the presence in those panels of a judge seconded in accordance with a decision of the Minister for Justice pursuant to Article 77 § 1 of the Law on the organisation of the ordinary courts. The Court explained that through such a procedure, the Minister of Justice has an influence over the composition of criminal courts by way of secondment. The minister can also terminate a judge secondment without the need to explain his decision. Such a system therefore creates an incentive for seconded judges to give a ruling in accordance with the wishes of the Minister of Justice, even if those wishes are not explicitly expressed, which would ultimately infringe the right of the accused person to a fair trial, that right being one of the expressions of the principle of effective judicial protection.

Therefore the referring court asked the Court of Justice whether Article 19(1) TEU and Article 2 TEU should be interpreted as meaning that the requirements of effective judicial protection, including the independence of the judiciary, and the requirements arising from the presumption of innocence are infringed in the present case.

Secondly, the referring Cour asked whether the same requirements refered to in question 1 are breached, where the parties can lodge an extraordinary appeal against a judgment handed down in court proceedings such as those of the present case and where the appeal decisions by the Supreme Court are not subject to appeal under national law while national law imposes a dubious procedure for the allocation of cases of appeal.

Thridly, the referring court further asked what is the effect of a judgment handed down in court

proceedings such as those described in the first question, and of a judgment handed down in proceedings before the polish supreme court if the person referred to in the second question participates in the handing-down of that judgment. Finally, the referring court asked whether EU law makes the effects of the judgments referred to in third question conditional upon whether the court has ruled in favor of or against the accused person.

To answer these questions, the Court called upon the underlying logic behind Articles 2 and 19 TEU and the principle of independence and the necessity to protect judges against any external interventions while rendering Justice. The Court recalled its previous jurisprudence on the independence of the judiciary in Poland, especially in the context of the first question, since it ruled that questions 2 to 4 were inadmissible due to their hypothetical nature. Thus the Court focused mainly on the nomination procedure of judges. In the Court's view, the second subparagraph of Article 19(1) TEU, read in the light of Article 2 TEU, and Article 6(1) and (2) of Directive 2016/343 must be interpreted as precluding provisions of national legislation pursuant to which the Minister for Justice of a Member State may, on the basis of criteria which have not been made public, second a judge to a higher criminal court for a fixed or indefinite period and may, at any time, by way of a decision which does not contain a statement of reasons, terminate that secondment, irrespective of whether that secondment is for a fixed or indefinite period.

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Case C-564/19, IS, Judgement of 23 November 2021 (Grand Chamber)

On 23 November 2021, the Grand Chamber of the Court rendered its judgement concerning the interpretation of article 5(2) of Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, and article 4(5) and article 6(1) of Directive 2012/13/EU on the right to information in criminal proceedings in a case concerning a swedish national, IS, against whom criminal proceedings had been brought by the Hungarian authorities in a language he does not speak.

During his questioning by the Hungarian investigative authorities, IS, who does not speak Hungarian, was assisted by a Swedish-language interpreter. However, according to the Hungarian District Court in charge of the case, there is no information as to how the interpreter was selected, how that interpreter's competence was verified, or whether the interpreter and IS understood each other.

In these circumstances, the referring judge expressed doubts as to whether Hugarian law, which does not provide for an official register of translators and interpreters, nor it specifies who may be appointed in criminal proceedings as a translator or interpreter and according to what criteria, is compatible with Directive 2010/64 on the right to interpretation and translation in criminal proceedings, and Directive 2012/13, on the right to information in such proceedings. In the event of incompatibility, the referring court also seeks to know whether the criminal proceedings may be continued in the absence of the accused, as such proceedings are provided for under Hungarian law, in certain cases, where the accused is not present at the hearing.

The referring court raised also some other questions of interpretation related to the principle of judicial independence as referred to in the second subparagraph of Article 19(1) TEU and Article 47 of the Charter of Fundamental Rights of the European Union which were though deemed inadmissible.

By decision of 10 September 2019, the Hungarian Supreme Court held that the initial request for a preliminary ruling was unlawful on the ground, in essence, that the questions referred were not relevant for the resolution of the dispute in the

main proceedings. Since the referring judge was uncertain whether such decision can be compatible with the preliminary ruling system established by Article 267 TFEU and given the deterrent impact such decision may have on judges in the lower courts to request the Court of Justice to give a ruling, he made a supplementary request for a preliminary ruling in that regard.

The Grand Chamber first addressed the complementary question, ruling that Article 267 TFEU must be interpreted as precluding the supreme court of a Member State from declaring, following an appeal in the interests of the law, that a request for a preliminary ruling which has been submitted to the Court under article 267 TFEU by a lower court is unlawful on the ground that the questions referred are not relevant and necessary for the resolution of he dispute in the main proceedings, without, however, altering the legal effects of the decision containing that request. In such circumstances, the principle of the primacy of EU law requires the lower court to disregard the decision of the supreme court of the Member State concerned. In connection to this, the Court also found that Article 267 TFEU must be interpreted as precluding disciplinary proceedings from being brought against a national judge on the ground that he or she has made a reference for a preliminary ruling to the Court of justice under that provision.

Lastly, concerning the obligations of the Member States with regard to interpretation and translation in criminal proceedings to which the first question relates, the Grand Chamber provided clarification on the two applicable directives on procedural rights. According to the Court, Article 5 of Directive 2010/64 on the right to interpretation and translation in criminal proceedings must be interpreted as requiring Member States to take concrete measures in order to ensure that the quality of the interpretation and translations provided is sufficient to enable the suspect or accused person to understand the accusation against him or her and in order that that interpretation can be reviewed by the national courts. Nevertheless, the establishment of a register of independent translators or interpreters cannot be regarded as being required of Member States by that directive, but this is only one of the means likely to contribute to the attainment of the aforementioned objective. In that regard, the Court of Justice noted that it is for the referring court to carry out a specific and precise assessment of the facts of the particular case in order to ascertain that the interpretation provided in that case to the person concerned was of a sufficiently quality.

In addition, the Court of Justice explained that Directive 2010/64 on the right of interpretation and translation in criminal proceedings and Directive 2012/13, on the right of information in criminal proceedings read in the light of Article 48(2) of the Charter, must be interpreted as precluding a person from being tried *in absentia* when, on account of inadequate interpretation, he or she as not been informed, in a language which he or she understands, of the accusation against him or her or where it is impossible to ascertain the quality of the interpretation provided and therefore to establish that he or she has been informed, in a language which he or she understands, of the accusation against him or her.

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Case C-724/19, HP, Judgement of 16 December 2021 (Fourth Chamber)

On 16 December 2021, the Fourth Chamber of the Court delivered a judgement concerning the interpretation of the conditions for issuing a European Investigation Order.

On 23 February 2018, criminal proceedings were initiated on the ground that it was suspected that financial resources to be used to commit terrorist acts were collected and made available in Bulgaria and abroad. In the course of the investigation conducted in the context of those proceedings, evidence was gathered concerning HP's activities. In order to collect HP traffic and location data, the Bulgarian public prosecutor issued four EIOs which were addressed to the Belgian, German,

Austrian and Swedish authorities. The latters – except for the Belgian authorities – did not transmit a decision recognising the EIOs. However, the replies of these member states contained information on the telephone communications from HP's phone which was of some importance in order to determine whether HP committed an offence. On 18 January 2019, on the basis of the evidence gathered, including evidence from the replies of the authorities of the Member States concerned to the four EIOs, HP was charged, together with five other persons, with illegally financing terrorist activities and participating in a criminal organisation seeking to finance those activities.

In order to determine whether that accusation is well founded, the referring court expressed doubts as to whether it is lawful to request the collection of traffic and location data associated with telecommunications by means of the four EIOs. Thus, the referring court referred two questions to the Court of justice, and namely first whether a national law providing that the authority competent to issue the EIO for the provision of traffic and location data related to telecommunications is a public prosecutor, is consistent with Article 2(c)(i) of Directive 2014/41 and the principle of equivalence, provided that in an identical domestic case the competent authority is a judge; and secondly, whether recognition of that EIO by the competent authority of the executing State may replace the court order required under the law of the issuing State.

In relation to the first question, it was essentially asked whether a prosecutor had the competence to issue an EIO during the pre-trial stage of criminal proceedings where, in a similar domestic case, the judge has exclusive competence to do so. In order to answer that question, the Court of Justice took into account the context and the objectives of Directive 2014/41 as its wording cannot lead to a clear conclusion.

The Court underpinning, in a first place, on Articles 6(1)(a) and (b) of the Directive – which provide that the issuing authority should assess the necessity and proportionality of the investigative measure requested by the EIO and that an EIO may be issued only where the measure referred to therein could have been ordered under the same conditions in a similar domestic case – held that only an authority competent to order such an investigative measure under the national law of the issuing State may be competent to issue an EIO. This interpretation is also born out by the fact that a potential distinction between the authority issuing an EIO and the one being competent to order investigative measures in domestic cases would risk complicating the system of cooperation and thus jeopardising the establishment of a simplified and effective system.

Concerning the second question, the Court started its assessment by recalling that where the executing authority believes that the conditions for issuing an EIO have not been met, it may decide to withdraw the EIO after consulting the issuing authority. In this regard, if the executing authority were able, by means of a recognition decision, to remedy non-compliance with the conditions for issuing an EIO the balance of the EIO system based on mutual trust – that implies the recognition of an EIO without any further formality being required – would be called into question, since that would amount to giving the executing authority the power to review the substantive conditions for issuing such an EIO.

Therefore, the Court of Justice ruled that Article 6 and Article 9(1) and (3) of Directive 2014/41 must be interpreted as meaning that recognition, on the part of the executive authority, of an EIO issued with a view to obtaining traffic and location data associated with telecommunications may not replace the requirements applicable in the issuing State, where that EIO was improperly issued by a public prosecutor, whereas, in a similar domestic case, the judge has exclusive competence to adopt an investigative measures seeking to obtain such data.

AG's Opinions

X and Y (Joined Cases C-562/21 PPU and C-563/21 PPU) – Opinion delivered on 16 December 2021 (AG Athanasios Rantos)

On 16 December 2021, AG Athanasios Rantos delivered his opinion on Cases C-562/21 PPU and C-563/21 PPU concerning the execution of a European Arrest Warrant (EAW) issued by Polish judicial authorities. At the request of the rechtbank Amsterdam (referring court), clarifications were sought concerning the interpretation of Article 1(3) of the Framework Decision 2002/584/JHA on the EAW read in conjunction with Article 47 of the Charter of Fundamental Rights of the European Union, and more precisely on the conditions allowing the judicial executing authority to refuse the execution of an EAW because of the risk that the person to be surrendered will suffer a violation of his/her right to a fair trial in the issuing State.

In case C-562/21, a Polish judicial authority issued a EAW against X, a Polish national, with the aim to arrest and surrender him for the purpose of executing a custodial sentence imposed by a final judgement of 20 June 2020 for offences of extorsion and threat of violence.

In case C-563/21, Polish judicial authorities issued six EAWs against Y, a Polish national, with the aim to arrest and surrender him. Two EAWs were issued for the purpose of executing custodial sentences and the remaining four were issued for the purpose of conducting criminal prosecution in relation to several offences, including fraud.

The two defendants were remanded in custody in the Netherlands pending decision on their surrender to which they didn't consent.

The referring court (rechtbank Amsterdam) seized of the cases at issue asks whether, in application of the principles set out in the cases *Minister for Justice and Equality* and *Openbaar Ministerie*, it must refuse the surrender of the wanted person.

In its conclusions, the AG starts by recalling that Executing judicial authorities may, in principle, refuse to execute a EAW only on the grounds for non-execution exhaustively listed by the Framework Decision 2002/584/JHA or, in accordance with the well-established jurisprudence of the Court of Justice, in 'exceptional circumstances', which, because of their seriousness, require that limitations be placed on the principles of mutual recognition and mutual trust.

As a next step of its reasoning, the AG stresses that for the purpose of establishing such 'exceptional circumstances', among which is the violation to certain fundamental right enshrined in the Charter of Fundamental Rights of the European Union, the Court has required a 'two-step examination'. In the present cases, the referring court identified systemic and generalised deficiencies affecting the right to a fair trial as a result of an irregularity in the appointment of members of the judiciary.

According to the AG, in the second step of the examination of the cases at issue, the referring court is required to verify whether the situation of the person concerned exposes him or her to the risk that their case will not be treated in an impartial manner. In this respect, the AG clarifies that a doubt as to the actual impact of the participation (actual or potential) of improperly appointed judges is not sufficient, in itself, to demonstrate the existence of a real risk of violation of the fundamental right to an independent tribunal of the person concerned. Such a doubt is therefore not sufficient to justify a possible refusal to execute a EAW.

According to the AG, it is incumbent upon the person requested, on the one hand, to provide evidence that the judge involved in his or her case are among those appointed under the controversial

rules, or that the issuing judicial authority is itself subject to a lack of independence from the executive, and, on the other hand, to provide reasons why he or she believes that such a situation is likely to adversely affect his or her case, having regard to the relevant conditions of his or her personal situation, the nature of the offenses involved and the facual context in which the EAW has been issued.

ACADEMIC ACTIVITIES

PUBLICATIONS

Books

M. Böse, M. Bröcker, A. Schneider (eds.), *Judicial Protection in Transnational Criminal Proceedings*, Springer, 2021, 443 p.

M. Zubik, J. Podkowik, R. Rybski (eds.), *European Constitutional Courts towards Data Retention Laws*, Springer, 2021, 384 p.

E. Bilis, N. Knust, J.-P. Rui (eds.), *Proportionality in Crime Control and Criminal Justice*, Hart Publishing, 2021, 408 p.

A. Klip, *European Criminal Law*, 4th ed., Intersentia, 2021, 676 p.

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

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

F. Casarosa and M. Moraru (eds.), *The Practice of Judicial Interaction in the Field of Fundamental Rights.The added Value of the Charter of Fundamental Rights of the EU*, Edward Elgar Publishing, 2022, (forthcoming), 432 p.

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 atre 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.

Symposium (online), *The normative foundations of European criminal law*, Örebro University, Sweden, 17 January 2022 → Link

Seminar, *Obtaining e-Evidence when Investigating and Prosecuting Crimes. Special Investigation Techniques for*

Mobile Phones, ERA, Tessaloniki, 7-8 February 2022 → Link

Seminar, *Detention: Framework Decision 821 and 947 and their impact on Alternatives in the EU*, ERA, Bucharest, 28 February – 1 March 2022 → Link

Annual Conference on *White-Collar Crime in the EU* (hybrid), ERA, Trier/online, 17-18 March 2022 → Link

Seminar, *Obtaining e-Evidence when Investigating and Prosecuting Crimes. Focus on the whole life-cycle of e-evidence*, ERA, Cracow, 24-25 March 2022 → Link

Seminar, *Trafficking in Human Beings: Countering Impunity*, ERA, Trier, 24-25 March 2022 → Link

Seminar (hybrid), *Anti-Money Laundering for the Judiciary and Law Enforcement*, ERA, Trier/online, 12-13 May 2022 → Link

Conference, *Artificial Intelligence in Criminal Justice*, ERA, Warsaw, 19-20 May 2022 → Link

Seminar, *Obtaining e-Evidence when Investigating and Prosecuting Crimes. Focus on internet searches for EU legal practitioners*, ERA, Vilnius, 14-15 June 2022 → Link

PhD Seminar (hybrid), ECLAN, University of Vilnius, 2022 (TBC).

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

Summer School, *The EU Area of Criminal Justice*, ECLAN, June-July 2022, Brussels (format TBC).