Eclan

European Criminal Law Academic Network

Newsletter

January – June 2018 Issue no. 19

www.eclan.eu

CONTENTS

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

Proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration)

and

Amended proposal for a Regulation of the European Parliament and of the Council on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration) and amending [Regulation (EU) 2018/XX [the Eurodac Regulation],] Regulation (EU) 2018/XX [the Regulation on SIS in the field of law enforcement], Regulation (EU) 2018/XX [the ECRIS-TCN Regulation] and Regulation (EU) 2018/XX [the Eu-LISA Regulation]

Following the recommendations of the high-level expert group on information systems and interoperability, the European Commission tabled, in December 2017, a proposal **for a Regulation on establishing a framework for interoperability between EU information systems (police and judicial cooperation, asylum and migration)**. The primary objectives of the proposal are to:

ensure that end-users, particularly border guards, law enforcement officers, immigration officials and judicial authorities have fast, seamless, systematic and controlled access to the information that they need to perform their tasks;

provide a solution to detect multiple identities linked to the same set of biometric data, with the dual purpose of ensuring the correct identification of bona fide persons and combating identity fraud;

facilitate identity checks of third-country nationals, on the territory of a Member State, by police authorities; and

facilitate and streamline access by law enforcement authorities to non-law enforcement information systems at EU level, where necessary for the prevention, investigation, detection or prosecution of serious crime and terrorism.

Alongside an accompanying proposal on establishing a framework for interoperability between EU information systems (borders and visa), this interoperability proposal focuses on the EU information systems for security, border and migration management that are operated at the central level. Three of them already exist (Schengen Information System; Eurodac; Visa Information System); one is on the brink of development (Entry/Exit System), one as recently been agreed upon (European Travel Information and Authorisation System) and one is at the stage of negotiation between co-legislators (European Criminal Record Information System for third-country nationals). With the exception of Schengen Information System, these systems are exclusively focused on third-country nationals and are employed by national authorities in managing borders, migration, visa processing and asylum, and in fighting

crime and terrorism. The latter applies in particular to the SIS II, which is the most widely used law enforcement information-sharing instrument today.

The proposal also includes in its scope Interpol's Stolen and Lost Travel Documents (SLTD) database and Interpol's Travel Documents Associated with Notices (TDAWN) database. It also covers Europol data, as far as this is relevant for the functioning of the proposed ETIAS system and for assisting Member States when querying data on serious crime and terrorism. National information systems and decentralised EU information systems are outside the scope of this initiative.

In order to achieve the objectives of this proposal, four interoperability components are to be established:

- A European search portal that would provide a 'one-stop shop' on a computer screen when border guards or police officers are verifying identity documents. Rather than having to decide which database to check in a particular situation, officers will be able to simultaneously search multiple EU information systems.
- A shared biometric matching service that would enable the querying and comparison of biometric data (fingerprints and facial images) from several central systems (in particular, SIS, Eurodac, VIS, the future EES and the proposed ECRIS-TCN system).
- A common identity repository that would provide basic biographical and biometric information, such as names and dates of birth of non-EU citizens, so that they can be reliably identified.
- A multiple-identity detector that would help to establish that different names belong to the same identity and alert border guards and police cases of fraudulent or multiple identities.

Furthermore, the Commission proposed a two-step data consultation approach for law enforcement officers preventing, investigating, detecting or prosecuting terrorism or other serious crimes to access the information on third-country nationals they need stored in non-law enforcement systems. The approach clarifies that as a first step searches will be carried out on a 'hit/no hit' basis. As a second step, if a 'hit' is generated, law enforcement officers can request access to the information needed in line with the respective rules and safeguards.

Within the Council, the proposal has been under examination by the Working Party on Information Exchange and Data Protection since January 2018.

In the European Parliament, the file was assigned to the Committee on Civil Liberties, Justice and Home Affairs (LIBE) and the Rapporteur presented his draft report on 31 May 2018. The Committee on Budgets also published a draft opinion on 19 April 2018.

In light of the impact of the proposals on the right to private life and to the protection of personal data, the European Union Agency for Fundamental Rights published its opinion on the proposal in April 2018.

It must be noted that the Commission, on 13 June 2018, published an amended proposal, which seeks to amend the original proposal only insofar as it presents the further necessary amendments to other legal instruments that are required under the interoperability proposal.

Proposal for a Regulation of the European Parliament and of the Council

amending Regulation (EU, Euratom) No 883/2013 concerning investigations conducted by the European Anti-Fraud Office (OLAF) as regards cooperation with the European Public Prosecutor's Office and the effectiveness of OLAF investigations

The European Anti-Fraud Office (OLAF), established in 1999, was entrusted with the task to carry out administrative investigations against fraud and any other illegal activity affecting the financial interests of the EU, and to assist Member States in the fight against fraud. Its investigative mandate is presently governed by Regulation 883/2013. The adoption of the European Public Prosecutor's Office (EPPO) Regulation in 2017, however, which has significantly reinforced the EU's fight against fraud, created the need to adapt Regulation 883/2013.

For that reason, in May 2018, the Commission tabled a proposal to amend Regulation 883/2013. The proposal seeks to adapt the operation of OLAF to the establishment of the EPPO, enhance the effectiveness of OLAF's investigative function as well as clarify and simplify selected provisions of Regulation No 883/2013. OLAF will have to report to the EPPO, without undue delay, any criminal conduct in respect of which the latter could exercise its competence. To this end, OLAF may be required to carry out a preliminary evaluation of incoming information, to ensure that the information supplied to the EPPO is sufficiently substantiated and contains the necessary elements. Furthermore, OLAF may be asked by Union institutions, bodies, offices and agencies to perform this verification on their behalf.

Some other rules concern the need to avoid duplication of work between the EPPO and OLAF. Nonetheless, in duly justified cases, OLAF may carry out administrative investigations on the same facts on which the EPPO is investigating. In such circumstances, OLAF's investigations complement the activities of the EPPO as they are not aimed at ascertaining possible elements of a criminal offence, but are instead focused at ensuring recovery, or at preparing the ground for administrative or disciplinary action.

To ensure a smooth transition into the new framework, the amended Regulation should enter into force before the EPPO becomes operational (envisaged for the end of 2020).

In the European Parliament, the file was assigned to the Budgetary Control Committee and Ingeborg Grässle was appointed as rapporteur.

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 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, which resulted to a 'non-paper' presented at the 8 June 2017 Justice and Home Affairs Council meeting. At this meeting, Ministers asked the Commission to put forward concrete legislative proposals. Following that, the Commission issued (in August 2017) an Inception Impact Assessment on a possible Directive on 'Improving cross-border access to electronic evidence in criminal matters' and launched a public consultation on the issue.

This extensive preparatory process was concluded in April 2018 with the publication of two legislative proposals: 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 will 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 a designated timeframe;

- 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;

They also provide safeguards for fundamental rights (such as the right to the protection of personal data) and remedies. Service providers must, pursuant to the proposals, designate a legal representative in the EU for the receipt of, compliance with and enforcement of decisions and orders.

The first discussions of the proposal by the Coordinating Committee in the area of police and judicial cooperation in criminal matters revealed several political issues. In particular, in May 2018, the Presidency invited the Justice and Home Affairs (JHA) Council to discuss two key elements. First, in the view of a number of delegations, the scope of the proposed Regulation is limited, because it does not address direct access to e-evidence or real-time interception of data. Second, the adoption of the US CLOUD Act in March 2018 will impact on e-evidence. The Act clarifies through an amendment of the Stored Communications Act of 1986 that US service providers are obliged to comply with US orders to disclose content data regardless of where such data is stored. It also enables the conclusion of executive agreements with foreign governments, on the basis of which US service providers would be able to deliver content data directly to these foreign governments, subject to conditions spelled out by the agreements. Given that, at an earlier meeting of the JHA Council (March 2018) the Ministers spoke in favour of a common EU approach towards the US, the Presidency invited them to confirm their wish to swiftly engage in negotiations with

the US on the conclusion of an executive agreement between the EU and the US.

In June 2018 the Council debated the two aforementioned issues. With regard to the first one, the Council agreed on the need to consider expanding the scope of the regulation and called on the Commission to continue the expert process on those two topics and report at the October JHA meeting. The Council will then discuss whether to include or not those (or one of those) elements within the scope of the current regulation. And as to the second issue, the Council confirmed the common EU approach towards the US regarding the conclusion of an executive agreement under the US CLOUD Act.

In the European Parliament, the proposals have been assigned to the LIBE Committee. Birgit Sippel has been appointed as rapporteur for the two proposals.

Proposal for a Directive of the European Parliament and of the Council laying down rules facilitating the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences and repealing Council Decision 2000/642/JHA

Improving access to, and greater exchange of financial information is considered a crucial element to the success of criminal investigations. In February 2016, the Commission published an 'Action Plan to strengthen the fight against terrorist financing'. Among other things, the Action Plan called for a mapping of obstacles to the access to, exchange and use of information and to the operational cooperation between Financial Intelligence Units (FIUs). In June 2017, when considering the results of this mapping exercise, the Commission indicated that it would examine the possibility of legislative proposals that would allow better sharing of information between FIUs and between FIUs and law enforcement authorities.

In September 2017, Europol also called attention to the fact that criminal investigations are often hampered due to existing barriers in cooperation and exchange of financial information, in the sense that financial data does not always reach or is accessible to the authorities entrusted with the relevant investigation, at least in a timely manner. In October 2017, in the 'Eleventh Progress Report Towards a Security Union' the Commission indicated that it was assessing the mechanisms through which competent authorities can access financial data stored in other Member States and the obstacles to doing so in a timely and effective manner and that it was considering possible measures to address these obstacles.

On 17 April 2018, the Commission published a proposal for a Directive aiming to facilitate the use of financial and other information for the prevention, detection, investigation or prosecution of certain criminal offences. The proposal provides designated law enforcement authorities and Asset Recovery Offices direct access to bank account information held in national centralised bank account registries and data retrieval systems, as established under the anti-money laundering Directive. Access will be granted on a case-by-case basis for the purposes of combating serious crime. On top of that, the proposal enhances cooperation between FIUs and law enforcement authorities, as well as between FIUs.

In the European Parliament, the proposal has been assigned to the Civil Liberties, Justice and Home Affairs Committee

(LIBE) and Radev Emil was appointed as Rapporteur.

ON-GOING NEGOTIATIONS

Approximation of substantive criminal law

Proposal for a Directive of the European Parliament and of the Council on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA

In the 'European Agenda on Security', the Commission observed that the 2001 Framework Decision combating fraud and counterfeiting of non-cash means of payment no longer corresponded to the challenges posed by contemporary practices, such as virtual currencies and mobile payments. As a result, it decided to review and possibly extend the Framework Decision currently in force. To that end, in September 2017, the Commission adopted a proposal for a Directive on combating fraud and counterfeiting of non-cash means of payment and replacing Council Framework Decision 2001/413/JHA.

Compared to the Framework Decision, the proposed Directive offers, among others, a broader - and technologically neutral - definition of non-cash instruments, extends the scope of preparatory acts that are criminalized, as well as the scope of criminal offences related to information systems. It also strengthens the measures on the exchange of information and the reporting on payment fraud in order to reinforce cross-border law enforcement cooperation.

In the European Parliament, the proposal was assigned to the LIBE Committee. The Committees on Economic and Monetary Affairs, Industry, Research and Energy, as well as the Legal Affairs Committee decided not to give opinions. The rapporteur presented her draft report on 27 March 2018. The amendments to the draft report were discussed on 25 April 2018.

In the Council, the proposal is being examined by the Working Party on Substantive Criminal Law (DROIPEN) since October 2017. On 8 March 2018, the Council adopted its general approach to the proposal.

Proposal for a Directive of the European Parliament and of the Council on countering money laundering by criminal law

On 21 December 2016, the Commission issued a proposal on the harmonisation of the criminal offence of money laundering (COM (2016) 826 final). Due to the limited scope of Council Framework Decision 2001/500/JHA this proposal, which was announced in the Commission's 'Action Plan to strengthen the fight against terrorist financing', means to implement into EU criminal law the relevant international standards and obligations that address the fight against money laundering - and to

reinforce the measures in place aimed at detecting, disrupting and preventing the abuse of the financial system for money laundering and terrorist financing purposes as provided for by the Fourth anti-money laundering Directive.

On 8 June 2017, the Council agreed on a general approach with regards to the proposed directive. The debate in the Council focused in particular on the scope of the definition of a 'criminal activity' (which, according to the Council, should cover cybercrime), the criminalisation of self-laundering, and the relationship with the recently adopted Directive 2017/1371.

In February 2017, the proposal was referred to the LIBE Committee. In September 2017, the LIBE Committee released a draft report on the proposal and in October 2017, the Committee discussed the proposed amendments to the draft report presented in September. Between September and November 2017, the Committee on Legal Affairs, the Committee on Development and the Committee on Economic and Monetary Affairs also released their opinions on the proposed Directive. On 11 December, the LIBE Committee adopted the draft report on the proposal and decided to open interinstitutional negotiations. On 17 January 2018, the decision to enter into interinstitutional negotiations was confirmed by plenary and several trilogue meetings have taken place since then.

On 30 May 2018, European Parliament and the Council reached a political agreement on the legislative proposal. The text has not been formally adopted by the Council and the European Parliament yet.

Proposal for a Regulation of the European Parliament and of the Council on the mutual recognition of freezing and confiscation orders

In response to the 'Action Plan to strengthen the fight against terrorist financing' presented in February 2016, the Commission tabled a proposal for a Regulation for the mutual recognition of asset freezing and confiscation orders on 21 December 2016. The proposed Regulation aims to address the deficiencies of the present legal framework, by simplifying the existing procedures and improving the cross-border enforcement of freezing and confiscation orders, by virtue of a single legislative instrument for the recognition of freezing and confiscation orders in the EU.

Currently, there exist four main legislative instruments at EU level dealing with freezing and confiscation of criminal assets; two mutual recognition instruments (Council Framework Decision 2003/577/JHA of 22 July 2003 on the execution in the EU of orders freezing property or evidence and Council Framework Decision 2006/783/JHA of 6 October 2006 on the application of mutual recognition to confiscation orders) and two harmonisation instruments (Council Framework Decision 2005/212/JHA on confiscation of crime related proceeds, instrumentalities and property and Directive 2014/42/EU of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the EU).

The proposed Regulation, which covers all types of freezing and confiscation orders issued in the context of criminal proceedings, extends the scope of the current rules of FD 2003/577 and FD 2006/783 to new types of confiscation orders, such as third-party confiscation and non-conviction based confiscation and reduces the possibilities for refusal for

extended confiscation orders. It also aims to improve the speed and efficiency of executing the freezing and confiscation orders by introducing tighter deadlines and one standard certificate/form simplifying the recognition and enforcement procedure. Finally, it includes provisions to ensure that victims' rights to compensation and restitution are respected.

The Commission presented its proposal to the Council's Working Party on Cooperation in Criminal Matters on 13 January 2017 and Member States' representatives held a first exchange of views. In general, the proposal was welcomed. Some Member States, however, expressed concerns over the fact that the proposed instrument came in the form of a Regulation, rather than a Directive, which was the preferred form of similar initiatives in the past. The JHA Council examined the proposal on 28 March 2017. In May 2017, the Presidency issued suggestions on the 'Legal form of the instrument: Regulation or Directive' (ST 8924 2017 INIT). At the JHA Council meeting of 12-13 October, EU ministers discussed the proposed Regulation, in particular its scope. The Council expressed broad support for the inclusion of 'preventive confiscation' in the scope of the draft Regulation, as this concept exists in some Member State (e.g. Italy), provided that there is a clear link to a criminal offence and procedural safeguards are respected. The Working Party was invited to adapt the text accordingly. On 8 December 2017, the Council adopted its general approach. Germany, however, did not agree to the general approach, arguing the current text did not adequately protect fundamental rights. Germany especially required the insertion of a ground for non-recognition on fundamental rights.

In the European Parliament, the proposal has been assigned to the LIBE Committee. On 8 November, the Committee on Economic and Monetary Affairs published its opinion. On 6 December, the Committee on Legal Affairs published its opinion. On 11 January 2018, the LIBE Committee adopted its report and decided to open interinstitutional negotiations. The Parliament endorsed the negotiating mandate on 17 January 2018, allowing for the start of the talks with the Council. Trilogues, on the state of which the rapporteur has informed the LIBE Committee, have taken place since then.

On 4 May 2018, the Council Presidency sent a revised draft consolidated text to the delegations, which was updated on 14 May. Following the sixth trilogue, provisional political agreement was reached on 20 June 2018. Worth to be noted is that the institutions agreed on a wide scope of types of confiscation in criminal matters such as value based confiscation and non-conviction based confiscation, including certain systems of preventive confiscation, provided that there is a link to a criminal offence. They also agreed on the inclusion of a ground for non-recognition based on fundamental rights but under very strict conditions.

The formal text is currently being revised by legal-linguists, and will most probably be adopted in the autumn 2018.

Proposal for a Regulation of the European Parliament and the Council on the establishment, operation and use of the Schengen Information System (SIS) in the field of police cooperation and judicial cooperation in criminal matters, amending Regulation (EU) No 515/2014 and repealing Regulation (EC) No

1986/2006, Council Decision 2007/533/JHA and Commission Decision 2010/261/EU

On 21 December 2016, the Commission put forward a proposal amending the existing legal framework on the SIS to reinforce the ability of the system to fight terrorism and cross-border crime (COM(2016) 883 final). Following an evaluation of SIS in 2016, this proposal is part of a legislative package of three proposals, the two others being related to border management and return of illegally staying third country nationals.

In April 2017, the European Parliament referred the proposed Regulation (alongside the other two proposals) to the LIBE Committee. In May, the European Data Protection Supervisor released Opinion 7/2017 that emphasised, inter alia, the lack of an overall impact assessment accompanying the proposal. This view was supported by a letter sent to the President of the Council by the SIS II Supervision Coordination Group in August, highlighting a series of data protection concerns raised by the proposed changes to the Schengen Information System.

The proposed Regulation was discussed by the Council at its meeting of 8-9 June. The Working Party for Schengen Matters (Acquis) also discussed the proposals in several meetings in May, July, September and October 2017. On 8 November, the Committee of the Permanent Representatives of the Governments of the Member States to the European Union (COREPER) agreed to mandate the Presidency to start interinstitutional negotiations on the basis of a revised compromise text.

On 10 November 2017, the LIBE Committee of the European Parliament tabled its report. The rapporteur suggested amendments with regard to the architecture of the system, the circumstances under which access to the system may be granted, data security and data protection and the alert system. He also proposed that the new legal framework should become applicable one year after the entry into force.

Negotiations on the proposal began on 16 November 2017 and several trilogue meetings have taken place since then. On 12 June 2018, a political agreement was reached by the European Parliament and the Council, which will need to be formally adopted by the European Parliament and the Council.

EU agencies and bodies

Proposal for a Regulation of the European Parliament and of the Council on the European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice, and amending Regulation (EC) 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) 1077/2011

The Regulation establishing the European Agency in charge of the operational management of large-scale IT systems in the area of freedom, security and justice, (referred to as Eu-LISA) was adopted in 2011 (Regulation (EU) No 1077/2011) and

amended in 2015 by Regulation (EU) 603/2013. Eu-LISA is responsible for the operational management at central level of the second generation Schengen Information System (SIS II), the Visa Information System (VIS) and Eurodac. The first evaluation concerning the work of the Agency was carried out in 2015-2016 and concluded that eu-LISA effectively carried out the operational management of large-scale IT systems as well as the other tasks entrusted to it, however a number of amendments were necessary.

In response to this evaluation, the Commission published a proposal in June 2017. The proposal seeks to review the Regulation establishing the eu-LISA Agency in order to adapt it to the recommendations for legislative amendments stemming from the evaluation, as well as to improve the functioning of the Agency and strengthening its mandate, so as to allow the agency to perform the necessary actions and develop technical solutions that will facilitate the interoperability of large-scale IT systems.

On 9 October 2017, the European Data Protection Supervisor published its opinion on the proposal.

In the European Parliament, the file of the legislative proposal was assigned to the LIBE Committee. The Budget's committee of European Parliament adopted an opinion on 9 November 2017. On 7 December 2017, the LIBE Committee decided to open interinstitutional negotiations and on 18 December, it tabled its report for plenary.

In the Council, the proposed Regulation was examined a number of times between July and October 2017. On 7 December, the Council agreed on a general approach, which forms the basis for the negotiations with the European Parliament. On 24 May 2018, the Bulgarian Presidency of the Council and the European Parliament came to an informal agreement on the draft regulation.

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; 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. No recent activity in the Council has been reported and the proposal is awaiting a decision by the LIBE Committee.

Proposal for a Regulation of the European Parliament and of the Council on the European Union Agency for Criminal Justice Cooperation (Eurojust)

On 17 July 2013, the European Commission submitted a proposal for a Regulation on Eurojust (COM(2013) 535 final). This proposal seeks to replace the consolidated version of Council Decision 2002/187/JHA. It aims to provide a single and updated legal framework for Eurojust, streamlining its functioning and structure with the Lisbon Treaty and the common approach on decentralised agencies. Several objectives are pursued, notably providing Eurojust with a new governance structure, homogeneously define the status and powers of National Members, involving the European and national parliaments in the evaluation of its activities and ensuring that Eurojust could cooperate closely with the European Public Prosecutor's Office (EPPO).

During the JHA Council meeting of 12-13 March 2015, a partial general approach was adopted. It reflects a different vision of Eurojust's governance, the powers of its National Members and the data protection regime. The provisions on the Agency's relationship with the EPPO were excluded from the general approach, as there had not been sufficient advancement on the EPPO regulation at the time.

Inthe European Parliament, the LIBE Committee decided to withhold its position to await progress on the issue of the relationship with the EPPO. The reason behind this approach is the close link between the establishment of the EPPO and Eurojust's functions. Following the adoption of the EPPO Regulation, discussions within the European Parliament restarted. The LIBE Committee adopted its report on the proposal on 20 October 2017. The rapporteur concluded that the draft proposal has to be aligned with the partial general approach of the Council and the EPPO Regulation. He also called for an update of the data protection provisions of the proposed Regulation and finally, for precise definitions and a clear delimitation of the competences between the EPPO and Eurojust.

Following a series of trilogues, the European Parliament and the Council reached a political agreement on the text on 19 June 2018. The agreement has not been formally adopted by the European Parliament and the Council yet.

Processing of personal data for law enforcement purposes

Proposal for a Directive of the European Parliament and of the Council amending Council Framework Decision 2009/315/JHA, as regards the exchange of information on third country nationals and as regards the European Criminal Records Information System (ECRIS), and replacing Council Decision 2009/316/JHA

and

Proposal for a Regulation of the European Parliament and of the Council establishing a centralised system for the

identification of Member States holding conviction information on third country nationals and stateless persons (TCN) to supplement and support the European Criminal Records Information System (ECRIS-TCN system) and amending Regulation (EU) No 1077/2011

On 19 January 2016, the Commission tabled a proposal for a Directive improving the existing European Criminal Records Information System (ECRIS) with regard to third country nationals (TCN). The proposal was part of the Joint Declaration of the EU's legislative priorities for 2017.

Under the current system, Member States receive systematically information on convictions of their nationals from other Member States, to store in their criminal records. This enables Member States to obtain complete information on previous convictions of an EU national from the Member State of nationality of that person. However, in order to obtain complete information on previous convictions of non-EU nationals, requesting Member States have to send 'blanket requests' to all Member States, which creates a heavy administrative burden.

During the examination of the proposal by the Council, Member States expressed a strong preference for establishing a centralised, rather than decentralised, system for third country nationals at EU level. In light of this, the negotiations on the draft Directive were suspended following the request by the Member States to the Commission, at the Justice and Home Affairs (JHA) Council on 9 June 2016, to evaluate the legislative framework and present a proposal for establishment of a central database for convicted third country nationals.

The proposal for a Regulation to establish a central database was submitted by the Commission on 29 June 2017. The Presidency submitted a revised text for the accompanying Directive on 31 July 2017, which took into consideration the proposal for a Regulation tabled by the Commission. The Regulation will regulate all issues related to the central database, while the Directive will complement the existing Framework Decision on matters of general nature related to the functioning of ECRIS. On 11 September 2017 the file was referred to the LIBE Committee.

Within the Council, the Working Party for Cooperation in Criminal Matters (COPEN) examined these proposals at several meetings between July and November 2017. Some of the issues were also discussed by the Coordinating Committee in the area of police and judicial cooperation in criminal matters (CATS) in September 2017. Finally, on 8 December 2017, the Council reached a general approach on the proposed Directive and the proposed Regulation.

On 12 December 2017, the European Data Protection Supervisor (EDPS) issued its opinion on the proposal for a Regulation on the ECRIS-TCN centralised system. The EDPS pointed out that, as ECRIS is a system adopted by the EU prior to the Lisbon Treaty, the new proposals for a Directive and a Regulation must bring the system up to the standards required by Article 16 TFEU and the EU Charter of Fundamental Rights, and must meet the requirements for any lawful limitation on fundamental rights.

Trilogues begun on 7 March 2018 and are still ongoing. Among the most difficult issues dual nationals and fingerprints are to be mentioned. Major concern of the European Parliament is the inclusion into the central system of EU citizens who also

hold the nationality of a third State, which creates a potential discrimination compared to other EU citizens.

Processing of personal data by the Union Institutions, Bodies, Offices and Agencies

Proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by the Union institutions, bodies, offices and agencies and on the free movement of such data, and repealing Regulation (EC) No 45/2001 and Decision No 1247/2002/EC

In April of 2016, the European Parliament and the Council adopted the General Data Protection Regulation (GDPR) and the Directive for the protection of personal data in the area of law enforcement - which became applicable in May 2018. Both legislative texts call for the alignment of Regulation (EC) No 45/2001 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data with the updated data protection rules and principles. To that end, the Commission adopted a proposal for a Regulation on 10 January 2017.

The European Data Protection Supervisor (EDPS) adopted its opinion on the proposal in March 2017, highlighting the need for consistency in the data protection rules regardless of who the data controller is. Commenting on the scope of the proposal, the EDPS noted that the "the fragmentation and increasing complexity of the legal framework for data processing by the various EU institutions active in the former first and third 'pillars' is not a fully satisfactory outcome".

The European Economic and Social Committee adopted an opinion welcoming the proposal, but suggesting some amendments, in May 2017.

In the European Parliament, the file was assigned to the LIBE Committee. The Committee on Legal Affairs adopted its opinion on 5 October 2017. In October 2017, the LIBE Committee decided to open interinstitutional negotiations. It tabled its report for plenary in 23 October 2017.

The Council, meanwhile, agreed on a general approach in June 2017. In the trilogues that followed, differences between the Parliament and the Council delayed the conclusion of an agreement. In particular, the Parliament wished to include data processing by agencies such as Europol and Eurojust in the scope of the Regulation, whereas the Council wanted to exempt them from its scope. On 26 March 2018, the Council presented a redrafted compromise text concerning the scope of the regulation and Member States commented on it. At the trilogue on 16 May 2018, the Presidency and the Rapporteur succeeded in solving most of the unresolved issues. On 18 May 2018 the Council presented an updated compromise text. Following a trilogue held on 23 May 2018, representatives of the

Council and the European Parliament found agreement on an overall compromise text. Eurojust is covered by the Regulation, whereas Europol and the EPPO are, for the time being, excluded. A review will be carried out by the Commission in 2022.

ADOPTED TEXTS

Directive of the European Parliament and of the Council amending Directive (EU) 2015/849 on the prevention of the use of the financial system for the purposes of money laundering or terrorist financing and amending Directive 2009/101/EC

On 5 July 2016, the Commission issued a proposal for a Directive amending the so-called fourth anti-money laundering Directive (COM(2016) 450 final). Opinions on this proposal have been issued by the European Central Bank and the European Economic and Social Committee. The Council of Bars and Law Societies of Europe issued comments strongly criticizing the proposal.

The Slovak Presidency released a compromise text on 13 December 2016. Austria, Poland, Slovenia, France and Italy issued statements relating to the adoption of the Council's negotiating mandate on the proposal, evidencing the divisions within the Council on this issue.

The European Data Protection Supervisor released Opinion 1/2017 criticizing the proposal for not respecting the principles of purpose limitation and proportionality.

In the European Parliament, two Committees have assumed responsibility for the dossier: the Committee on Economic and Monetary Affairs and the LIBE Committee. The Committees presented their draft report on 7 November 2016 and it was adopted by joint committee vote on 28 February 2017. On 14 March 2017, the Parliament plenary confirmed the joint Committees' decision to enter into interinstitutional negotiations.

On 13 December 2017, the Council reached a provisional agreement which resulted in a final compromise text and on 20 December 2017 the Council and the European Parliament reached political agreement on the text. On 19 April 2018 the European Parliament adopted its position at first reading. On 14 May 2018, the Council adopted the act. The text was published in the Official Journal of the European Union on 19 June 2018.

CASE LAW

JUDGMENTS

C-367/16 Piotrowski (Grand Chamber, 23 January 2018)

On 23 January 2018, the Court of Justice (Grand Chamber) delivered its judgment in case C-367/16 on the ground for mandatory non-execution of a EAW provided for in Article 3(3) of the EAW Framework Decision.

This case relates to the execution in Belgium of a EAW issued by the Polish authorities against Mr Piotrowski, a Polish national resident in Belgium, for the purposes of execution of two prison sentences. In relation to one of the convictions on which the EAW is based, the competent Belgian investigating judge found that the arrest warrant could not be executed because Mr Piotrowski was a minor at the material time. The competent Belgian Public Prosecutor appealed against that order, as a minor over the age of sixteen may be the subject of a EAW issued by the Belgian authorities if the Juvenile Court has declined to hear the case, pursuant to the Belgian law on youth protection. In this context, the referring court, asks, in essence, whether a minor aged sixteen may or may not be surrendered in the execution of a EAW and, if need be, under which conditions.

The Court first considered that it is apparent from the wording of Article 3(3) of the EAW Framework Decision that the ground for non-execution laid down in that provision does not cover minors in general but refers only to those who have not reached the age required, under the law of the executing Member State, to be regarded as criminally responsible for the acts on which the warrant issued against them is based.

It inferred therefrom that the EU legislature intended to exclude from surrender not all minors but only those persons who, on account of their age, cannot be the subject of any criminal prosecution or conviction in the executing Member State in respect of the acts in question, giving that Member State, in the absence of harmonisation in this field, the discretion to determine the minimum age from which a person satisfies the requirements to be regarded as criminally responsible for such acts.

The Court therefore held that Article 3(3) of Framework Decision 2002/584 is to be interpreted as meaning that the executing judicial authority must refuse to surrender only those minors who are the subject of a EAW and who, under the law of the executing Member State, have not yet reached the age at which they are regarded as criminally responsible for the acts on which the warrant issued against them is based.

It also noted that it follows from the terms of that provision that, in order to refuse to surrender a minor who is the subject of a EAW, the executing judicial authority must simply satisfy itself that that person has not reached the minimum age at which he may be prosecuted and convicted under the law

of the executing Member State for the same acts as those on which the EAW is based.

It therefore concluded that it is not possible under Article 3(3) of Framework Decision 2002/584 for the executing judicial authority also to consider, when deciding whether to surrender the person concerned, the additional conditions relating to an assessment based on the circumstances of the individual to which the law of its Member State specifically makes the prosecution and conviction of a minor subject, such as those laid down in the Belgian law on youth protection. It is for the issuing judicial authority to apply the specific rules governing criminal-law penalties for offences committed by minors in its Member State.

C-524/15 Menci (Grand Chamber, 20 March 2018)

On 20 March 2018, the Court of Justice (Grand Chamber) delivered its judgment in case C-524/15 on the interpretation of Article 50 of the Charter on the *ne bis in idem* principle in the context of a national legislation which provides for an administrative penalty and a criminal penalty for the same acts, relating to non-payment of VAT.

Mr Menci, in his capacity as proprietor of the sole trading business of the same name, was subject to an investigation by the Italian tax authorities as a result of non-payment of VAT for the tax year 2011. The investigation concluded with the relevant notice of assessment and the imposition on Mr Menci of a financial penalty. On conclusion of such administrative proceedings, the Public Prosecutor's Office commenced criminal proceedings against Mr Menci, on the ground that non-payment of VAT was a criminal offence.

In this context, the Bergamo District Court asked the Court whether Article 50 of the Charter, interpreted in the light of Article 4 of Protocol No 7 to the ECHR and the related case law of the ECtHR, precludes the possibility of conducting criminal proceedings concerning an act for which a definitive administrative penalty has been imposed on the defendant.

Building on its judgment in the M.A.S. and M.B. case, the Court first recalled that, since they seek to ensure the proper collection of VAT and to combat fraud, administrative penalties imposed by the national tax authorities and criminal proceedings initiated in respect of VAT offences, such as those at issue in the main proceedings, constitute implementation of Articles 2 and 273 of Directive 2006/112 and of Article 325 TFEU and, therefore, of EU law for the purposes of Article 51(1) of the Charter.

As regards assessing whether proceedings and penalties, such as those at issue in the main proceedings, are criminal in nature, it then recalled that, according to the Court's case-law, three criteria are relevant. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur.

With respect to the administrative procedure involving Mr Menci and the final administrative penalty imposed on him following that procedure, the Court noted that national law classifies the procedure giving rise to the imposition of that penalty as an administrative procedure. It nevertheless appeared to the Court that that penalty had a punitive purpose and that it had a high degree of severity which is liable to support the view that that penalty is of a criminal nature for the purposes of Article 50 of the Charter, which it is however for the referring court to determine.

It then noted that Article 50 of the Charter prohibits the imposition, with respect to identical facts, of several criminal penalties as a result of different proceedings brought for those purposes.

In those circumstances, in the Court's view, it appeared that the national legislation at issue in the main proceedings allows criminal proceedings to be brought against a person, such as Mr Menci, in respect of an offence consisting in the failure to pay VAT due on the basis of the tax return for a tax year, after the imposition on that person, in respect of the same acts, of a final administrative penalty of a criminal nature for the purposes of Article 50 of the Charter. Such a duplication of proceedings and penalties constitutes a limitation of the fundamental right guaranteed by that article.

It nevertheless noted that, in its judgment in the Spasic case, the Court ruled that a limitation to the *ne bis in idem* principle guaranteed by Article 50 of the Charter may be justified on the basis of Article 52(1) thereof.

The court ruled that Article 50 of the Charter must be interpreted as not precluding national legislation in accordance with which criminal proceedings may be brought against a person for failing to pay VAT due within the time limits stipulated by law, although that person has already been made subject, in relation to the same acts, to a final administrative penalty of a criminal nature for the purposes of Article 50 of the Charter, on condition that that legislation

– pursues an objective of general interest which is such as to justify such a duplication of proceedings and penalties, namely combating VAT offences, it being necessary for those proceedings and penalties to pursue additional objectives,

– contains rules ensuring coordination which limits to what is strictly necessary the additional disadvantage which results, for the persons concerned, from a duplication of proceedings, and

– provides for rules making it possible to ensure that the severity of all of the penalties imposed is limited to what is strictly necessary in relation to the seriousness of the offence concerned.

It stressed that it is for the national court to ensure, taking into account all of the circumstances in the main proceedings, that the actual disadvantage resulting for the person concerned from the application of the national legislation at issue in the main proceedings and from the duplication of the proceedings and penalties that that legislation authorises is not excessive in relation to the seriousness of the offence committed.

C-537/16 Garlsson Real Estate e.a.(Grand Chamber, 20 March 2018)

On 20 March 2018, the Court (Grand Chamber) delivered its judgment in case C-537/16 on the interpretation of Article 50 of the Charter on the *ne bis in idem* principle in the context of a national legislation which provides for an administrative penalty and a criminal penalty for the same acts, relating to market manipulation.

The Italian National Companies and Stock Exchange Commission (Consob) imposed an administrative penalty on Mr Stefano Ricucci and two companies under his direction, for market manipulation. Mr Ricucci and the two companies appealed against the administrative penalty to the Corte di appello di Roma and subsequently lodged an appeal against that judgment with the Corte Suprema di Cassazione. In his appeal, Mr Ricucci relied on the fact that he had been convicted for the same acts in criminal proceedings by a final judgment given by the Tribunale di Roma.

The Italian Court of Cassation essentially asked the Court whether Article 50 of the Charter, read in the light of Article 4 of Protocol No 7 to the ECHR, must be interpreted as precluding national legislation which permits the possibility to bring administrative proceedings against a person in respect of unlawful conduct consisting in market manipulation for which the same person has already been finally convicted.

The Court first noted that under Article 14(1) of Directive 2003/6, read in conjunction with Article 5 thereof, Member States are to impose, without prejudice to their right to impose criminal penalties, effective, proportionate and dissuasive administrative measures or sanctions against the persons responsible for market manipulation. It therefore found that the administrative procedure and the administrative fine at issue in the main proceedings amount to an implementation of EU law and, as a result, they must inter alia respect the fundamental right not to be tried or punished twice in criminal proceedings for the same criminal offence, guaranteed by Article 50 thereof.

As regards the assessment as to whether proceedings and penalties, such as those at issue in the main proceedings, are criminal in nature, it then recalled that, according to the Court's case-law, three criteria are relevant. The first criterion is the legal classification of the offence under national law, the second is the intrinsic nature of the offence, and the third is the degree of severity of the penalty that the person concerned is liable to incur

It found that, although it was apparent from the case file before the Court that national law classified the procedure giving rise to the imposition of that penalty as administrative proceedings, that penalty was not only intended to repair the harm caused by the offence, but that it also pursued a punitive purpose and that it had a high degree of severity which is liable to support the view that that penalty is criminal in nature for the purposes of Article 50 of the Charter, which it is, however, for the referring court to determine.

As it appeared that the national legislation at issue in the main proceedings permitted the possibility of bringing administrative proceedings of a criminal nature for the purposes of Article 50 of the Charter against a person, such as Mr Ricucci, in respect of unlawful conduct consisting in market manipulation for which the same person has already been finally convicted, such a duplication of proceedings and penalties constitutes a limitation of the right guaranteed by Article 50 of the Charter.

The Court held that concerning offences relating to market manipulation, it seemed legitimate that a Member State might wish, first, to dissuade and punish any infringement, whether intentional or not, of the prohibition of market manipulation by imposing administrative penalties set, as the case may be, on a flat-rate basis and, secondly, to dissuade and punish serious infringements of such a prohibition, which have particularly negative effects on society and which justify the adoption of the most severe criminal penalties.

It however seemed, in the Court's view, that the act of bringing proceedings for an administrative fine of a criminal nature such as the one at issue in the main proceedings exceeds what is strictly necessary in order to achieve that objective, in so far as the final criminal conviction is, given the harm

caused to the company by the offence committed, such as to punish that offence in an effective, proportionate and dissuasive manner, which it is for the referring court to determine.

The Court concluded that Article 50 of the Charter must be interpreted as precluding national legislation which permits the possibility of bringing administrative proceedings against a person in respect of unlawful conduct consisting in market manipulation for which the same person has already been finally convicted, in so far as that conviction is, given the harm caused to the company by the offence committed, such as to punish that offence in an effective, proportionate and dissuasive manner.

It also specified that the *ne bis in idem* principle guaranteed by Article 50 of the Charter confers on individuals a right which is directly applicable in the context of a dispute such as that at issue in the main proceedings.

C-596/16 and C-597/16 Di Puma and Consob (Grand Chamber, 20 March 2018)

On 20 March 2018, the Court (Grand Chamber) delivered its judgment in joined cases C-596/16 and C-597/16 on the interpretation of Article 50 of the Charter on the *ne bis in idem* principle in the context of a national legislation which provides for an administrative penalty and a criminal penalty for the same acts, relating to insider dealing.

Consob imposed penalties on Mr Zecca and Mr Di Puma, who purchased certain shares using inside information. More specifically, Mr Zecca, in his capacity as the director of the Transaction Services section of Deloitte Financial Advisory Services S.p.a., had inside information concerning a plan to make a public offer to purchase shares in Guala Closures S.p.a. He also had confidential information concerning a plan to take control of Permasteelisa S.p.a. Mr Zecca disclosed that information to Mr Di Puma, inducing him to purchase shares in those two companies. Mr Di Puma purchased shares in Guala Closures and, with the assistance of Mr Zecca, shares in Permasteelisa.

Consob imposed a financial penalty on Mr Zecca for having induced Mr Di Puma to purchase shares in Guala Closures, for having disclosed to Mr Di Puma inside information concerning the plan to take control of Permasteelisa, and for the purchase shares in Permaasteelisa. In the same decision, Consob imposed a financial penalty on Mr Di Puma for the purchase of the shares in Guala Closures and for the purchase of the shares in Permaasteelisa. Mr Zecca and Mr Di Puma appealed against the administrative penalty to the Corte di appello di Milano and subsequently lodged an appeal against that judgment with the Corte suprema di cassazione. They submit that the Criminal Division of the Tribunale di Milano acquitted them in relation to the conduct for which Consob imposed the administrative penalties on them, on the ground that the relevant facts had not been made out, and that that judgment has become final.

After observing that that judgment of acquittal indeed related to the same acts as those in respect of which Consob imposed, by decision of 7 November 2012, the administrative fines at issue in the main proceedings, the Cassation Court noted that, under the Italian Code of Criminal Procedure, the findings contained in that judgment of acquittal as regards the lack of an offence have *res judicata* effect with regard to administrative proceedings.

By its questions, the Italian Cassation Court asked, in essence, whether Article 14(1) of Directive 2003/6, read in the light of Article 50 of the Charter, must be interpreted as precluding national

legislation in accordance with which proceedings for an administrative fine of a criminal nature may not be brought following a final criminal judgment of acquittal ruling that the acts capable of constituting a violation of the legislation relating to insider dealing, on the basis of which those proceedings had also been initiated, were not established.

In its judgment, the Court first stressed that, in light of the importance of the principle of *res judicata* both in the legal order of the EU and in national legal orders, it has held that EU law does not preclude the application of national procedural rules conferring *res judicata* effects on a judicial decision. In the cases in the main proceedings, it found no particular circumstances which may justify a different approach.

It noted that the *res judicata* effects which a national provision confers on the factual conclusions of such a criminal judgment in relation to proceedings for an administrative fine do not prevent the finding of violations of the legislation on insider dealing and that they be effectively punished, where, according to the terms of that judgment, the facts at issue are established.

It found that Article 14(1) of Directive 2003/6 does not preclude national legislation, such as that at issue in the main proceedings and that such interpretation is confirmed by Article 50 of the Charter.

In particular, it noted that, in a situation such as that at issue in the main proceedings, the bringing of proceedings for an administrative fine of a criminal nature clearly exceeds what is necessary in order to achieve the objective of protecting the integrity of financial markets and public confidence in financial instruments, since there exists a judgment of acquittal holding that there are no factors constituting an offence which Article 14(1) of Directive 2003/6 seeks to punish.

It concluded that Article 14(1) of Directive 2003/6, read in the light of Article 50 of the Charter, must be interpreted as not precluding national legislation in accordance with which proceedings for an administrative fine of a criminal nature may not be brought following a final criminal judgment of acquittal ruling that the acts capable of constituting a violation of the legislation relating to insider dealing, on the basis of which those proceedings had also been initiated, were not established.

C-191/16 Pisciotti (Grand Chamber, 10 April 2018)

On 10 April 2018, the Court of Justice (Grand Chamber) delivered its judgment in case C-191/16 on the application of the principle of non-discrimination on grounds of nationality in the context of the extradition of an EU citizen to a third country.

Suspected of having been engaging in concerted practices in the United States, Romano Pisciotti, an Italian national, was the subject of a request for extradition for the purposes of prosecution made by the US authorities. On 26 August 2010, an arrest warrant was issued against him by the US District Court for the Southern District of Florida in Fort Lauderdale and a bill of indictment was returned by the Grand Jury of the same court. On 17 June 2013, as his flight from Nigeria to Italy made a stopover at Frankfurt am Main airport, Mr Pisciotti was arrested by officers from the German federal police. In January 2014, the Higher Regional Court of Frankfurt am Main declared Mr Pisciotti's extradition to the US to be permissible. Mr Pisciotti made an application to the German Constitutional Court for interim measures to prevent execution of the order to extradite him, arguing that his extradition would be contrary to EU law in that a literal application of Article 16(2), first sentence, of the Basic Law which is confined to German

nationals would infringe the general prohibition on discrimination on grounds of nationality. His application was dismissed. On 17 March 2014, the German Government granted Mr Pisciotti's extradition. On the same day, he brought an action before the Regional Court of Berlin for a declaration that the Federal Republic of Germany was liable for having granted his extradition to the United States of America and an order requiring it to pay damages. His extradition to the US took place on 3 April 2014. Mr Pisciotti was sentenced in the US and served his prison sentence until his release on 14 April 2015.

Against this background, the Regional Court of Berlin asks the Court whether, when applying the extradition agreement concluded between the EU and the US, the nationals of another Member State must benefit, in the light of the principle of non-discrimination laid down in the first paragraph of Article 18 TFEU, from the rule which prohibits extradition of nationals.

Building on its judgment in the Petruhhin case, the Court first found that in a case such as that in the main proceedings, in which a Union citizen who has been the subject of a request for extradition to the United States has been arrested, for the purposes of potentially acceding to that request, in a Member State other than the Member State of which he is a national, the situation of that citizen falls within the scope of EU law since he has made use of his right to move freely within the European Union and the request for extradition was made under the EU-USA Agreement.

It then held that the application by a Member State, on the basis of Article 17(1) or (2) of the EU-USA Agreement, of a rule refusing extradition laid down in a bilateral treaty between a Member State and the United States of America, such as Article 7(1) of the Germany-United States Extradition Treaty, or of a provision of national law, such as Article 16 of the Basic Law, according to which no German is to be extradited, must comply with the TFUE, in particular with Articles 18 and 21 thereof.

With respect to the question of whether the Federal Republic of Germany could adopt a course of action with regard to Mr Pisciotti which would be less prejudicial to the exercise of his right to free movement by considering surrendering him to the Italian Republic rather than extraditing him to the United States of America, the Court recalled that the exchange of information with the Member State of which the person concerned is a national must be given priority in order, where relevant, to afford the authorities of that Member State the opportunity to issue a EAW for the purposes of prosecution.

It stressed that, although that solution was adopted in a context characterised by the absence of an international agreement on extradition between the European Union and the third State in question, it may be applied in a situation such as that at issue in the main proceedings, in which the EU-USA Agreement gives the requested Member State the option of not extraditing its own nationals.

In the present case, it stemmed from the case file before the Court that the consular authorities of the Italian Republic were kept informed of Mr Pisciotti's situation before the request for extradition at issue in the main proceedings was granted and that the Italian judicial authorities did not issue a EAW in respect of Mr Pisciotti.

The Court therefore concluded that, in a case such as that in the main proceedings, in which a Union citizen who has been the subject of a request for extradition to the United States under the EU-USA Agreement has been arrested in a Member State other than the Member State of which he is a national, for the purposes of potentially acceding to that request, Articles 18 and 21 TFEU must be interpreted as not precluding the requested Member State from drawing a distinction, on the basis of a rule of constitutional law, between its

nationals and the nationals of other Member States and from granting that extradition whilst not permitting extradition of its own nationals, provided that the requested Member State has already put the competent authorities of the Member State of which the citizen is a national in a position to seek the surrender of that citizen pursuant to a EAW and the latter Member State has not taken any action in that regard.

C-612/15 Kolev a.o. (Grand Chamber, 5 June 2018)

On 5 June 2018, the Court of Justice (Grand Chamber) delivered its judgment in case C-612/15, on the interpretation of Article 325 TFEU, Directive 2012/13 on the right to information in criminal proceedings, and of Directive 2013/48 on the right of access to a lawyer in criminal proceedings.

Mr. Kolev and Mr. Kostadinov were accused of having taken part in a criminal conspiracy as Bulgarian customs officers. They allegedly demanded bribes from drivers crossing the Turkish-Bulgarian border in order for them to avoid customs inspections. Following Articles 368 and 396 of the Bulgarian Code of Criminal Procedure, they brought proceedings to request the termination of the criminal proceedings, as the pre-trial investigation was not concluded within a two-year time limit.

The referring court essentially raises doubts as to the compatibility with EU law of these criminal procedure provisions, which require the national court to conclude the criminal proceedings owing to the failure to observe a pre-determined time-limit, even if the delay is attributable to the accused person and irrespective of the seriousness or complexity of the matter.

With respect to Article 325 TFEU, the Court first recalled, in light of its judgments in the Taricco and M.A.S. and M.B. cases, that the Member States must, in order to guarantee the effective and comprehensive collection of customs duties, provide for the application of penalties that are effective and that act as a deterrent in cases of contravention of the EU customs legislation. The Member States must also ensure that the rules of criminal procedure permit effective investigation and prosecution of offences linked to such conduct.

It found the national legislation at issue in the main proceedings is liable to impede the effectiveness of criminal prosecution and the punishment of acts that may be categorised as serious fraud or other serious illegal activity affecting the financial interests of the Union, contrary to Article 325(1) TFEU. It specified that it is for the national courts to give full effect to Article 325(1) TFEU, by disapplying that legislation, where necessary, while also ensuring respect for the fundamental rights of the persons accused.

As regards Directive 2012/13 on the right to information in criminal proceedings, and, more precisely, when that disclosure of detailed information on the charges and when access to material evidence, both incriminatory and exculpatory, that is in the possession of the competent authorities, are to occur, the Court noted that Article 6(3) and Article 7(3) of Directive 2012/13 make no reference to a precise time.

As these provisions aim at allowing for an effective exercise of the rights of the defence and to ensure the fairness of the proceedings, the person accused must receive detailed information on the charges and have the opportunity to acquaint himself with the case materials in due time, at a point in time that enables him to prepare his defence effectively. More precisely, that objective and the proper conduct of proceedings presuppose, as a general rule, that disclosure should take place, and that the opportunity to have access to the case materials should be afforded, no later than the point in time

when the hearing of argument on the merits of the charges in fact commences before the court that has jurisdiction to give a ruling on the merits.

The Court nevertheless specified that in the event of any failure to meet that requirement, there is nothing in Directive 2012/13 that precludes the court from taking the measures necessary to correct that failure, provided that the rights of the defence and the right to a fair trial are duly protected.

The Court ruled that Article 6(3) of Directive 2012/13 must be interpreted as not precluding the disclosure of detailed information on the charges to the defence after the lodging before the court of the indictment that initiates the trial stage of proceedings, but before the court begins to examine the merits of the charges and before the commencement of hearing of argument before the court, and after the commencement of that hearing but before the stage of deliberation, where the information thus disclosed is the subject of subsequent amendments, provided that all necessary measures are taken by the court in order to ensure respect for the rights of the defence and the fairness of the proceedings.

It further ruled that Article 7(3) of that directive must be interpreted as meaning that it is for the national court to be satisfied that the defence has been granted a genuine opportunity to have access to the case materials, such access being possible, in some cases, after the lodging before the court of the indictment that initiates the trial stage of the proceedings, but before that court begins to examine the merits of the charges and before the commencement of any hearing of argument by that court, and after the commencement of that hearing but before the stage of deliberation where new evidence is placed in the file in the course of proceedings, provided that all necessary measures are taken by the court in order to ensure respect for the rights of the defence and the fairness of the proceedings.

With respect to Directive 2013/48 on the right of access to a lawyer in criminal proceedings, building on the ECtHR case law on the right of access to a lawyer that is laid down in Article 6(3) ECHR, the Court held that while such right implies that it should be open to the person concerned to use a lawyer of his own choice, that possibility is not, however, absolute.

The Court noted that the objective of the national legislation at issue in the main proceedings is to safeguard the right of accused persons to an effective defence and that it is essential that a lawyer have no conflict of interest if the effectiveness of the rights of the defence is to be protected.

The Court concluded that Article 3(1) of Directive 2013/48 must be interpreted as not precluding national legislation that requires a national court to dismiss the lawyer instructed by two accused persons, against their wishes, on the ground that there is a conflict of interest between those persons and, further, as not precluding the court from allowing those persons to instruct a new lawyer or, when necessary, itself naming two court-appointed lawyers, to replace the first lawyer.

Lada (C-390/16) – Opinion delivered on 6 February 2018 (AG Bot)

On 6 February 2018, Advocate General Bot delivered his opinion in case C-390/16 on the conformity with EU law, in particular, Council Framework Decision 2009/315 on the organisation and content of the exchange of information extracted from the criminal record between Member States, Council Decision 2009/316 on the establishment of the European Criminal Records Information System (ECRIS), and Council Framework Decision 2008/675 on taking account of convictions in the Member States of the European Union in the course of new criminal proceedings, of a national procedure for the recognition by the court of a Member State of a final judicial decision handed down by a court of another Member State convicting a person for the commission of an offence.

Mr Lada, a Hungarian national, was convicted by an Austrian court to a custodial sentence of 14 months for attempted aggravated burglary in relation to high-value goods. At the request of the Hungarian Ministry of Justice, this Austrian court sent the former its judgment in the case. The Ministry forwarded the documents, drawn up in German, to the referring court to implement the procedure for 'recognition of the validity of foreign judgments' provided for in Hungarian law.

According to the information provided by the referring court, Hungarian Law on international mutual legal assistance in criminal matters establishes a special procedure for prior recognition, by the Hungarian courts, of convictions not subject to appeal handed down by foreign courts, with the aim of ensuring that the decision recognising those convictions has the effect of a conviction handed down by a Hungarian court. That procedure entails a review of the foreign conviction at issue which may lead to the reclassification of the criminal offence that led to the conviction as well as an adjustment of the sentence imposed if those aspects are not compatible with Hungarian criminal law. The referring court enquires whether such a recognition procedure is consistent with EU law, having regard, in particular, to the principle of mutual recognition in the area of judicial cooperation in criminal matters.

In his opinion, Advocate General Bot recalls that the Court has already had the occasion to rule, in its judgment of 9 June 2016, Balogh, that Framework Decision 2009/315 and Decision 2009/316 must be interpreted as precluding the implementation of a special recognition procedure in Hungary. Specifically, it held that, in accordance with those instruments, the central authority of the Member State of the person's nationality must enter in the criminal record convictions handed down by the courts of the convicting Member State directly on the basis of the transmission by the central authority of the convicting Member State, via ECRIS, of the codified information relating to those convictions. In those circumstances, the entry of such convictions cannot depend on the prior application of a procedure for judicial recognition of those convictions, such as the Hungarian special procedure, still less on the communication to the Member State of the person's nationality of

the decision convicting the person concerned for the purpose of such recognition.

The Court also ruled, in its judgment of 21 September 2017, Beshkov, that Framework Decision 2008/675 must be interpreted as precluding the possibility that it should be a prerequisite of account being taken, in a Member State, of a previous conviction handed down by a court of another Member State that a national procedure for prior recognition of that conviction by the courts with jurisdiction in the former Member State be implemented.

Advocate General Bot therefore considers that the system established by Framework Decision 2008/675 prevents a Member State from applying a national recognition procedure to convictions handed down by the courts of other Member States, whereby those convictions are subject to a review that may result in them being altered in order to adapt them to the criminal law of the first Member State.

He then stressed that the Court has yet to specify the conclusions that national courts are to draw from a finding of incompatibility between national legislation and a framework decision and, in particular, to make clear that where those courts are unable to interpret such national legislation in a way that is consistent with a provision of secondary EU law, they are required, pursuant to the principle of the primacy of EU law, to refrain from applying the conflicting national legislation.

Building on the opinion he delivered in the Popławski case, he held that, in accordance with the logic of uncoupling the 'substitution' effect from the 'invocability of exclusion', the fact that the framework decision is not directly effective does not mean that the national court is not under an obligation to refrain from applying the provisions of its domestic law which are incompatible with EU law. After all, that obligation flows directly from the fact that EU law takes precedence over national provisions that hinder its full effectiveness.

He concluded that it is for the national court, by taking the whole body of domestic law into consideration and applying the interpretative methods recognised by it, to interpret the provisions of national law at issue in the main proceeding, so far as is possible, in the light of the wording and the purpose of Framework Decision 2009/315, Decision 2009/316 and Framework Decision 2008/675. If such an interpretation were to prove impossible, the referring court would be required to refrain from applying those national provisions contrary to EU law.

AY (C-268/17) – Opinion delivered on 16 May 2018 (AG Szpunar)

On 16 May 2018, Advocate General Szpunar delivered his opinion in case C-268/17 on the ground for mandatory non-execution of a EAW provided for in Article 3(2) of the EAW Framework Decision and on the ground for optional non-execution of a EAW provided for in Article 4(3) of the EAW Framework Decision.

AY is a Hungarian national, the chairman of a Hungarian company, against whom criminal proceedings have been brought before a Croatian Court. In the indictment issued by the Croatian Office for Suppression of Corruption and Organised Crime, AY is alleged to have agreed to pay a considerable amount of money to the

holder of a high office in Croatia, in return for the conclusion of an agreement between the Hungarian company and the Croatian Government.

In the context of the investigation against AY as a suspect of acts of active corruption opened by this Office, several letters rogatory were sent to Hungarian authorities, notably requesting them to provide international legal assistance by interviewing AY as a suspect. The Hungarian authorities did not execute the letters rogatory and decided instead to open an investigation in connection with the alleged criminal offence, in the context of which AY was interviewed as a witness.

The execution of a first EAW issued by the Croatian authorities against AY was refused by Hungarian authorities on the ground that the available information showed that criminal proceedings had already been brought in Hungary in respect of the same acts as those on which the arrest warrant was based, which the Hungarian judicial authority had halted. A second EAW against AY was subsequently issued by Croatian authorities, but was not executed by Hungarian authorities.

In his opinion, Advocate General Szpunar first advocated that, as the questions referred by the Croatian Court concern the interpretation of the EAW Framework Decision in the context of issues belonging to the competence of the authorities of the executing Member State (Hungary), the Court lacks jurisdiction to answer the first four questions referred. In a case such as the one at issue, he stressed that he fails to see the necessity of the Court's reply for the procedure before the referring court. Although this court specified that, on the basis of the Court's reply, it may find itself in a position where it would withdraw the EAW, he considers that the question of whether or not an authority issuing the EAW decides to maintain an EAW is and should be independent from the question of possible grounds for non-execution.

However, for the eventuality that the Court should not share his analysis on jurisdiction, Advocate General Szpunar examined the first four questions on the interpretation of the ground for mandatory non-execution of a EAW provided for in Article 3(2) of the EAW Framework Decision and of the ground for optional non-execution of a EAW provided for in Article 4(3) of the EAW Framework Decision.

With respect to Article 3(2) of the EAW Framework Decision, which is a manifestation of the *ne bis in idem* principle, he noted that, for a situation to fall under Article 3(2) of the Framework Decision, proceedings must have been brought against the same person. Consequently, in his view, in order to be 'finally judged', an individual must have been at a certain stage in the proceedings an accused. However, AY only had the status of a witness in the Hungarian investigation. Given that proceedings have not been brought against AY in Hungary, Article 3(2) of the Framework Decision cannot be triggered.

As concerns Article 4(3) of the EAW Framework Decision, he considered that it is wider in scope than the *ne bis in idem* principle. He nevertheless specified that, although the wording of that provision does not expressly state that the criminal proceedings in question must be directed against the requested person, to interpret this provision as meaning that execution could even be refused where the facts in question are the same, but where the

persons concerned are different, would appear to be too broad.

He advocated that, for Article 4(3) of the EAW Framework Decision to be applied, the decision not to initiate criminal proceedings or to discontinue them should concern the requested person, without it being necessary, however, for that person to be formally designated as a defendant or a suspect. What is decisive, in his view, is that there should be an examination of the possibility that the person sought committed the offence in question has been examined.

The fifth question referred is to know whether the executing judicial authority is required to adopt a decision on an EAW transmitted to it, even where, in that Member State, a previous EAW has already been decided on concerning the same requested person, in the same criminal proceedings, where the second EAW has been issued by another judicial authority because of a change of circumstances in the issuing Member State.In light of several provisions of the EAW Framework decision, Advocate General Szpunar opined that, even in such circumstances, the authorities of an executing Member State which do not reply to an EAW are in breach of their obligations under the EAW Framework Decision.

XC, YB and ZA (C-234/17) – Opinion delivered on 5 June 2018 (AG Saugmandsgaard Øe)

On 5 June 2018, Advocate General Saugmandsgaard Øe delivered his opinion in case C-234/17, on the interpretation of EU law, in particular the principles of equivalence and effectiveness.

XC, YB and ZA are suspected of having committed several offences in Switzerland, notably tax evasion. In this context, the Public Prosecutor's Office for the Canton of St Gallen sent requests for mutual legal assistance to the Public Prosecutor's Office of Feldkirch, Austria, aiming, in particular to hear ZA as an accused person. XC and YB raised objections, which were rejected by the Regional Court of Feldkirch and the Higher Regional Court of Innsbruck. As the latter court adjudicated at second and final instance, in accordance with the Austrian Code of Criminal Procedure, that decision is final. XC, YB and ZA nevertheless lodged an application for rehearing before the Austrian Supreme Court, submitting that the grant of mutual legal assistance to the Public Prosecutor's Office for the Canton of St Gallen constitutes an infringement of Article 6 of the ECHR, Article 4 of Protocol 7 to the ECHR, Article 50 of the Charter and Article 54 of the CISA.

The Austrian Supreme Court specified, in its request for a preliminary ruling, that the ECHR has constitutional status in Austria and that, in order to ensure the implementation of the ECtHR's judgments, the Austrian Code of Criminal Procedure allows for the submission of applications for the rehearing of a criminal case.

In this context, the Austrian Supreme Court asks the Court whether such procedure for rehearing must, in accordance with the principles of equivalence and effectiveness, also apply for violations of EU law.

In his opinion, Advocate General Saugmandsgaard Øe first recalled that, according to the settled case-law of the Court, in the absence of harmonisation of the national enforcement mechanisms, the details of their implementation are governed

by the internal legal order of the Member States by virtue of the principle of procedural autonomy of those States. Nevertheless, the Court has pointed out that the means of implementation must meet the dual condition that they are no less favourable than those governing similar domestic actions (principle of equivalence) and do not make it in practice impossible or excessively difficult to exercise the rights conferred on consumers by EU law (principle of effectiveness).

With respect to the principle of effectiveness, he recalled the importance of the principle of *res judicata* both in the EU and national legal orders. He also stressed the existence of a constitutional framework ensuring the effectiveness of EU law before national decisions acquire the force of *res judicata*.

He found that the impossibility, in circumstances such as those at issue in the main proceedings, to call into question a judicial decision in criminal matters which has become *res judicata* invoking violations of EU law does not constitute a violation of this principle.

As regards the principle of equivalence, he considered that this principle does not oblige Member States to extend to EU law claims based on the ECHR, as the latter do not constitute "a similar domestic actions". He specified that the status granted to the ECHR under the domestic legal order of the Member State concerned should not lead to a different conclusion.

He thus concluded that the principle of equivalence does not require a domestic court to extend to violations of EU law a judicial remedy under national law which allows the rehearing of a criminal case terminated by a final decision for violations of the ECHR. He nevertheless specified that Member States are free, in the exercise of their procedural autonomy, to provide for such a remedy for violations of EU law.

LM (C-216/18 PPU) – Opinion delivered on 28 June 2018 (AG Tanchev)

On 28 June 2018, Advocate General Tanchev delivered his opinion in case C-216/18 PPU on the execution of EAWs in cases where the executing judicial authority finds that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself of that Member State is no longer operating under the rule of law.

This case falls within the context of the development and reforms of the Polish system of justice which led the European Commission to adopt, on 20 December 2017, a reasoned proposal inviting the Council of the European Union to determine, on the basis of Article 7(1) TEU, that there is a clear risk of a serious breach by the Republic of Poland of one of the values common to the Member States referred to in Article 2 TEU, namely the rule of law.

LM is the subject of three arrest warrants issued by Polish courts on the basis of the EAW Framework Decision. He asserts that, on account of the reforms of the Polish system of justice as analysed in the Commission's reasoned proposal, he runs a real risk of not receiving a fair trial in Poland and he submits that that risk precludes his surrender by the referring court to the Polish judicial authorities.

In this context, the High Court asks the Court some clarifications on its judgment in joined cases Aranyosi and Căldăraru (C-404/15 and C-659/15 PPU).

In his opinion, Advocate General Tanchev first recalled that limitations on the principle of mutual recognition have hitherto been accepted only in the light of the right enshrined in Article 4 of the Charter, which is absolute.

He nevertheless considered that if there is a real risk of the procedure conducted in the issuing Member State not satisfying the requirements of the second paragraph of Article 47 of the Charter, the premiss forming the basis of the obligation in Article 1(2) of the Framework Decision to execute any EAW is absent. The risk of breach of the second paragraph of Article 47 of the Charter in the issuing Member State is therefore capable of preventing the execution of a EAW.

Building on the ECtHR case law on Article 6 ECHR, he held that the executing judicial authority can be required to postpone the execution of a European arrest warrant only if there is a real risk of breach not of the right to a fair trial but of the essence of that right, amounting to a flagrant denial of justice.

In his view, the executing judicial authority is required to postpone the execution of a EAW only where it finds not only that there is a real risk of flagrant denial of justice on account of deficiencies affecting the system of justice of the issuing Member State but also that the individual concerned will be exposed to that risk.

He specified that, in order to show that the individual concerned is exposed to the risk of flagrant denial of justice that is at issue, it is necessary to establish that there are particular circumstances relating either to that person or to the offence in respect of which he is being prosecuted or has been convicted which expose him to such a risk. Regarding the burden of proof, the individual concerned should, in his view, be required to establish that there are substantial grounds for believing that there is a real risk that he will suffer a flagrant denial of justice in the issuing Member State.

He further held that, where the executing judicial authority finds that there is a real risk of flagrant denial of justice in the issuing Member State, it is required to request from the issuing judicial authority, on the basis of Article 15(2) of the EAW Framework Decision, all the necessary supplementary information concerning, as the case may be, first, legislative changes subsequent to the details which it possesses for finding that there is a real risk of flagrant denial of justice and, second, the particular features relating to the person who is the subject of the European arrest warrant or to the nature of the offence in respect of which he is being prosecuted or has been convicted.

ACADEMIC ACTIVITIES

RESEARCH PROJECTS

Ref. JUST/2015/PR/01/0003 LOTI - ECLAN is involved in this contract (partner) with the College of Europe and Deloitte (BE).

Study for the Directorate General for internal policies policy department – Directorate for citizens' rights and constitutional affairs, "Criminal procedural laws across the Union – a comparative analysis of selected main differences and the impact they have over the development of EU legislation", 2017-2018, ongoing.

PUBLICATIONS

Books

S. Carrera, V. Mitsilegas, J. Allsopp, L. Vosyliute, *Policing humanitarianism - EU policies against human smuggling and their impact on civil society*, Hart Publishing, 2019 (forthcoming), 176 p.

C. Chevallier-Govers (eds), *L'échange des données dans l'Espace de liberté, de sécurité et de justice de l'Union Européenne*, Editions mare & martin, 2017, 559 p.

D. Flore, *Droit pénale européen – les enjeux de la justice pénale européenne 3eme édition,* Larcier Group, Septembre 2018

W. Geelhoed, L. H. Erkelens, A. W. H. Meij (eds), *Shifting Perspectives on the European Public Prosecutor's Office*, Springer, 2018, 197 p.

R. E. Kostoris (eds), *Handbook of European Criminal Procedure*, Springer, 2018, 445 p.

K. Ligeti, S. Tosza (eds*), White collar crime - A comparative perspective*, Hart Publishing, 2019 (forthcoming), 432 p.

S. Miettinen, *The Political Constitution of EU Criminal Law: Choices of Legal Basis and Their Consequences in the New Constitutional Framework*, Hart Publishing, 2019 (forthcoming), 320 p.

S. Neveu, *Le transfert de l'exécution des peines privatives et restrictives de liberté en droit européen – A' la recherche d'un équilibre entre intérêts individuels et collectifs*, Anthemis, 2016, 502 p.

P. Simon, *La compétence d'incrimination de l'Union européenne 1ere édition,* Larcier Group, août 2018

UPCOMING EVENTS

Conference, *The Life Cycle of Electronic Evidence - Acquisition of e-Evidence and Jurisdictional Issues*, Hotel Europa, Tallinn, 18 – 19 September 2018, Link

Seminar, *Anti-Money Laundering: Update on the EU Policy and Legislative Framework*, ERA, Trier, 11 – 12 October 2018, Link

Conference, *Annual Conference on EU Criminal Justice 2018*, Madrid, 18 – 19 October 2018, Link

Conference, *Annual Conference on Countering Terrorism in the EU 2018 - Tools and Challenges*, ERA, Trier, 29 – 30 November 2018, Link

Conference, *Recent Case Law of the European Court of Human Rights in Criminal Matters*, ERA, Strasbourg, 6 -7 December, Link

Seminar, *Better Understanding Trafficking in Human Beings - Protecting Victims and Enhancing Financial Investigations,* ERA, Trier, 13 – 14 December 2018, Link

ECLAN PhD Seminar

Seminar, *ECLAN PhD Seminar 2018 - The External Dimension of the EU Criminal Justice Area,* Faculty of Law, Economics and Finance, University of Luxembourg, Luxembourg, 25-26 October 2018, Link