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LEGISLATIVE INSTRUMENTS

NEW NEGOTIATIONS

Proposal for a Regulation of the European Parliament and of the Council on preventing the dissemination of terrorist content online

In June 2017, the European Council called at the industry to develop tools which would assist in the detection and removal of online content that incites to terrorist acts. These would, if needed, be supplemented by relevant legislative measures at the EU level. In September 2017, the Commission published a Communication on 'Tackling Illegal Content Online', addressed to online service providers. As a follow-up to this Communication, the Commission published, in March 2018, a Recommendation 'on measures to effectively tackle illegal content online', including online terrorist propaganda. In order to gain a more complete picture of the impact of the problem and the responses to it, and also to examine whether the guidelines proposed in this Recommendation had been adopted, the Commission held a public consultation 'on measures to further improve the effectiveness of the fight against illegal content online' between April and June of 2018.

Building on those initiatives, the Commission decided to take the matter a step further and table on 12 September 2018 a proposal for a Regulation on preventing the dissemination of terrorist content online. The proposed Regulation will apply to hosting service providers who offer their services within the Union, regardless of their place of establishment or their size. The definition of illegal terrorist content is based on the definition of terrorist offences, as set out in Directive 2017/541 and it is defined as information which is used to incite and glorify the commission of terrorist offences, encouraging the contribution to and providing instructions for committing terrorist offences as well as promoting participation in terrorist groups. The proposal aims to ensure a swift removal of terrorist content by offering different tools to Member States. It mainly introduces a 'removal order', which can be issued as an administrative or judicial decision by a competent authority in a Member State. Following such an order, the service provider will have to remove the said content within one hour. The proposal also includes a series of safeguards which aim to guarantee the respect of fundamental rights and protect non-terrorist content from erroneous removal.

The proposed Regulation also reinforces the system of referrals according to which a competent authority requests a service provider to examine a specific content and to check its conformity with their terms and conditions.

The proposed Regulation also obliges Member States to ensure that their competent authorities have the capacity to intervene against terrorist content online. In addition, Member States are placed under a duty to inform and cooperate with each other and may make use of channels set up by Europol to ensure co-ordination. It also imposes obligations on hosting service providers to inform law enforcement when they detect content which poses a threat to life or safety. Finally, hosting service providers are placed under a duty to preserve the content they remove - which functions as a safeguard against erroneous removal and ensures potential evidence is not lost for the purpose of the prevention, detection, investigation and prosecution of terrorist offences.

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

Affairs Committee and Daniel Dalton has been assigned as Rapporteur.

In the Council, the Terrorism Working Party assessed the proposal on 25 September, 5 and 25 October, and 6 and 15 November 2018 and the Justice and Home Affairs Counsellors discussed it on 22 November 2018. The Committee of Permanent Representatives also discussed the proposal between September and November 2018. On 6 December 2018, the Council agreed on a general approach.

Proposal for a Directive of the European Parliament and of the Council on the protection of persons reporting on breaches of Union law

Whistleblowers are individuals who, after coming across information that presents a threat or harm to the public interest in the course of their work environment, report it either within the organisation concerned or to an outside authority, or disclose it to the public. Fear of retaliation, however, often discourages individuals from reporting wrongdoing – which is why it is important that they are protected accordingly. But the current level of whistleblower protection in the EU is quite fragmented; it is available in specific sectors and in different degrees.

To address this fragmentation, the EU institutions have been calling for action at the EU level for some time. In October 2016, the Council, in its conclusions on tax transparency, highlighted the importance of whistleblower protection and urged the Commission to consider the possibility of EU-wide action. The European Parliament, from its part, in its resolution on the role of whistleblowers in the protection of the EU's financial interest, urged the Commission to submit a proposal that would establish a European whistleblowing protection programme. Similarly, in its resolution 'on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies' of 24 October 2017, the Parliament called, once again, on the Commission to take action on that front. The Committee on Legal Affairs also adopted a report on legitimate measures to protect whistle-blowers acting in the public interest when disclosing the confidential information of companies and public bodies. Finally, a public consultation on whistleblowing was organised in the course of 2017.

The Commission presented its proposal on 23 April 2018. The proposed Directive establishes a set of common minimum standards for the protection of persons reporting on the following unlawful activities or abuse of law: public procurement, financial services, money laundering and terrorist financing, product safety, transport safety, environmental protection, nuclear safety, food and feed safety, animal health and welfare, public health, consumer protection, privacy, data protection and security of networks and information systems. It requires, among other things, Member States to ensure that legal entities in the private and public sectors put in place adequate internal reporting channels and procedures for follow-up of reports. It also requires that reporting channels safeguard the confidentiality of the reporting person's identity and that the service responsible for receiving the report follows up diligently and informs the informant within a reasonable timeframe after the report. In addition, it provides for effective, proportionate and dissuasive penalties which are necessary a) to punish and proactively discourage actions aimed at hindering reporting, retaliatory actions, vexatious proceedings against reporting persons and breaches of the duty of maintaining the confidentiality of their identity, and b) to discourage malicious and abusive whistleblowing.

In the European Parliament, the proposal was assigned to the Committee on Legal Affairs. Several Committees have given their opinions on the proposal. On 27 November 2018, the Committee on Legal Affairs published its report

for plenary and on 30 November, the decision to open interinstitutional negotiations was confirmed by the plenary.

Within the Council, discussions over the proposal have been taking place since May 2018. On 10 December 2018, the Presidency presented delegations with a third revision of the proposal and invited them to share their positions on this version of the text.

ON-GOING NEGOTIATIONS

Approximation of substantive criminal law

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.

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.

On 12 July 2018, the European Economic and Social Committee adopted its opinion on the proposal, noting, among other things, that the proposal should strike a better balance between fundamental rights, such as the right to privacy, and the need for law enforcement in fighting crime.

In September 2018, the European Data Protection Supervisor shared its opinion on the proposed Directive. And while he welcomed the attention that the proposal pays to data protection, he found that several definitions in the proposal required further qualification, especially with regards to the competent authorities that are covered by the proposed Directive.

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. The Committee on Economic and Monetary Affairs published its opinion on 28 November 2018. The LIBE Committee tabled its report for plenary on 7 December 2018.

The Council, in November 2018, agreed on the mandate for negotiations with the European Parliament.

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, from its part, in its 'Conclusions on Improving Criminal Justice in Cyberspace' stressed the importance of electronic evidence in criminal proceedings in all types of crimes and called on the Commission to act.

What followed was extensive consultation with a wide range of stakeholders, which 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. Therefore, the competent authority of the Member State where their legal representative is located would only intervene if an execution of the order is missing.

To that end, the two proposals will

a) create a European Production Order, which will enable a judicial authority in one Member State to obtain electronic evidence directly from a service provider or its legal representative in another Member State, which will be obliged to respond in a designated timeframe;

b) create a European Preservation Order, which will enable a judicial authority in one Member State to request that a service provider or its legal representative in another Member State preserves specific data in view of a subsequent request to produce this data via mutual legal assistance, a European Investigation Order or a European Production Order.

The first discussions of the proposal by the Coordinating Committee in the area of police and judicial cooperation in criminal matters (COPEN Working Party) revealed several political issues. The Presidency brought two key issues for a discussion to the June 2018 Justice and Home Affairs Council. The first was the scope of the proposed Regulation - which in the view of a number of delegations is limited, because it does not address direct access to e-evidence (direct access to data without the assistance of a service provider) or real-time interception of data. The second was the impact of the recently adopted US CLOUD Act in March 2018 on the e-evidence file. 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. At the March 2018 meeting of the JHA Council 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 agreement between the EU and the US facilitating the access to e-evidence.

At its June 2018 meeting the Council debated the aforementioned issues. With regard to the first one, the Council agreed on the need to consider expanding the scope of the regulation to cover direct access to e-evidence and real time interception and called on the Commission to continue the expert process and report at the October JHA Council meeting. 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 and urged the Commission to present a recommendation for a negotiation mandate.

The Council held a policy debate on the proposed Regulation on 11-12 October 2018, during which Ministers were invited to discuss whether the approach taken in the proposal (that orders could be addressed directly to service providers without the involvement of any other MS at the stage of the request) should be kept, or whether it should be modified by introducing a notification procedure. The presidency noted that it is a complex question with different views among ministers but there was a willingness of many Member States to continue working towards a compromise over the inclusion of a some sort of notification procedure. It concluded that work will continue at expert level looking in particular at the sensitivity of the different categories of data (content and non-content data) and how they should be treated when envisaging a possible notification procedure. Moreover, the presidency indicated that experts will continue discussion on which Member State would be the most relevant one to receive such notification: the enforcing one or the member state of the affected person. In December 2018, the Council adopted its general approach on the proposed regulation.

In the European Parliament, the proposals have been assigned to the LIBE Committee. The Internal Market and Consumer Protection Committee was asked for opinion, but decided not to give one.

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

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. 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 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.

In the European Parliament, the proposal was assigned to the LIBE Committee. On 6 September 2018, the LIBE Committee tabled its report on the proposal. The Rapporteur made the following suggestions:

a) Strengthening the assistance to victims of non-cash fraud, since the consequences of the fraud are often aggravated because of reputational damage, loss in credit rating or serious emotional harm.
b) Facilitating the reporting of crime, including the setting-up of national secure online fraud reporting systems;
c) Stronger involvement of Eurojust and Europol in exchange of information;
d) More focussed prevention provisions on internet and computer fraud;
e) A shorter transposition period and an obligation for the Commission to present an evaluation of the Directive after 4 years.

Discussion in the trilogue have started in September 2018. Political agreement on the draft directive was provisionally stated at Coreper level on 19 December 2018

EU agencies and bodies

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) 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.

On 22 November 2018, the European Court of Auditors published an opinion, criticising the proposal on the grounds that the reforms are not sufficient to guarantee increased effectiveness of the investigations.

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.

Processing of personal data

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).

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, to obtain such information concerning a third-country national, 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. Following that, the Presidency submitted a revised text for the accompanying Directive on 31 July 2017, which takes into consideration the proposal for a Regulation tabled by the Commission. The Regulation will regulate all issues related to central database, while the Directive will complement the existing Framework Decision on matters of general nature related to functioning of ECRIS. On 11 September the supplementary file was referred to the LIBE Committee.

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, including meeting the requirements for any lawful limitation on fundamental rights.

In October 2018, the Council urged for the conclusion of an agreement by the end of the year. Indeed, on 11 December 2018, a provisional agreement on a final compromise text was reached.

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 on from 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:

a) 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;

b) 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;

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

d) 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 - Schengen Information System, EURODAC, Visa Information System, Entry/Exit System, European Travel Information and Authorisation System - and others at the stage of negotiation between co-legislators (European Criminal Record Information System for third-country nationals). The proposal also includes in its scope Interpol's Stolen and Lost Travel Documents (SLTD) database and Interpol's Travel Documents Associated with Notices 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) A European search portal that would provide a 'one-stop shop' on a computer screen when border guards or police officers are verifying identify 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.

b) 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).

c) 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.

d) 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 since January 2018. In the European Parliament, the file was assigned to the Committee on Civil Liberties, Justice and Home Affairs.

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. Following the amendments, the Council adopted a revised mandate for negotiations with the European Parliament on 12 September 2018. The Parliament's LIBE Committee tabled its report on 19 October 2018. Several trilogues have taken place since then, with the view of reaching a political agreement by the end of December.

ADOPTED TEXTS

Directive of the European Parliament and of the Council of 23 October 2018 on combating 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 on 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.

Within the European Parliament, the proposal was referred to the LIBE Committee. In September 2018, the Committee tabled its report for plenary and on 17 January 2018, the decision to enter into interinstitutional negotiations was confirmed.

In May 2018, European Parliament and the Council reached a political agreement on the legislative proposal. On 1 June 2018, the Council Presidency invited the Committee of Permanent Representatives (COREPER) to approve the compromise text and to confirm that the Presidency can indicate to the European Parliament that, should the parliament adopt its position at first reading, the Council would formally adopt the Directive. On 7 June 2018, the Council confirmed that an agreement had been reached between the presidency and the European Parliament.

On 12 September 2018, the European Parliament adopted its first reading position on the proposal and on 11 October the Council formally adopted the Directive. It was published in the Official Journal of the European Union on 12 November 2018.

Regulation (EU) 2018/1725 of the European Parliament and of the Council of 23 October 2018 on the protection of natural persons 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 of 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 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".

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 trialogues 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. In 18 May 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 on the regulation. Eurojust is covered by the Regulation, with the exception for special rules set out in the Eurojust Regulation. Europol and the EPPO are, for the time being, excluded from the scope. A review will be carried out by the Commission in 2022.

On 13 September 2018, the European Parliament adopted the text at first reading and on 11 October, the Council approved the Parliament's position. On 23 October, the Act received the signature of the President of the European Parliament and of the Council and it was published in the Official Journal of the European Union on 21 November 2018.

Regulation (EU) 2018/1726 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for the Operational Management of Large-Scale IT Systems in the Area of Freedom, Security and Justice (eu-LISA), and amending Regulation (EC) No 1987/2006 and Council Decision 2007/533/JHA and repealing Regulation (EU) No 1077/2011

The establishing Regulation of 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 aimed 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. On 18 December 2017, the Committee tabled its report and on 17 January 2018, the decision to enter interinstitutional negotiations was confirmed by the plenary.

On 7 December 2017, the Council agreed on a general approach, which formed 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. On 5 July 2018 the text was approved by the Plenary of the European Parliament and on 9 November 2018, it was approved by the Council.

The Act received the signature of the European Parliament and of the Council on 14 November 2018. It was published on the Official Journal of the European Union on 21 November 2018.

Regulation (EU) 2018/1727 of the European Parliament and of the Council of 14 November 2018 on the European Union Agency for Criminal Justice Cooperation (Eurojust), and replacing and repealing Council Decision 2002/187/JHA

On 17 July 2013, the European Commission submitted a proposal for a Regulation on Eurojust, which aimed to replace the consolidated version of Council Decision 2002/187/JHA and 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. It pursued several objectives, 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. 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.

At the European Parliament, the LIBE Committee decided to withhold its position to await progress on the issue of the relationship with the EPPO. 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 trialogues, the European Parliament and the Council reached a political agreement on the text on 19 June 2018. In October 2018, the Parliament adopted the text at first reading and on 6 November it was adopted by the Council. It was published in the Official Journal of the EU on 21 November 2018.

Regulation (EU) 2018/1805 of the European Parliament and of the Council of 14 November 2018 on the mutual recognition of freezing orders 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 aimed to address the deficiencies of the existing legal framework, by simplifying the standing 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.

The proposal covered all types of freezing and confiscation orders issued in the context of criminal proceedings, extends the scope of the current rules 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 aimed 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 included 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). The Coordinating Committee in the area of police and judicial cooperation in criminal matters also discussed the legal form of the instrument and noted the existence of a blocking minority opposing the form of a Regulation. 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, on the basis of which the Presidency will be able to start negotiations with the European Parliament. Germany, however, did not agree to the general approach, arguing the current text did not adequately protect fundamental rights.

In the European Parliament, the proposal was assigned to the LIBE Committee. On 8 November 2017, the Committee on Economic and Monetary Affairs published its opinion. On 6 December 2017, 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.

On 4 May 2018, the Council Presidency sent a revised draft consolidated text to the delegations, which was updated on 14 May. Following a trialogue, provisional political agreement was reached on 20 June 2018.

On 4 October 2018, the European Parliament adopted the text at first reading and the Council approved the parliament's position on 6 November 2018. On 14 November, the text was signed by the President of the European Parliament and the President of the Council. It was published on the Official Journal of the European Union on 24 November 2018.

Regulation (EU) 2018/1862 of the European Parliament and of the Council of 28 November 2018 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 and repealing Council Decision 2007/533/JHA, and repealing Regulation (EC) No 1986/2006 of the European Parliament and of the Council 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 relating to border management, police and judicial cooperation in criminal matters and return of illegally staying third country nationals, respectively.

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. The text was adopted at first reading by the European Parliament on 24 October 2018 and by the Council on 19 November. It was signed by the President of the European Parliament and the President of the Council on 28 November 2018 and published in the Official Journal on 7 December 2018.

CASE LAW

JUDGMENTS

Case C-390/16, Lada, Judgment of 5 July 2018 (Second Chamber)

On 5 July 2018, the Court of Justice (Second Chamber) delivered its judgment in case C-390/16, on the interpretation of Framework Decision 2008/675/JHA on taking account of convictions in the Member States in the course of new criminal proceedings.

Mr Lada, a Hungarian national, was convicted by an Austrian court to a custodial sentence of 14 months. The Austrian court sent this judgment to the Hungarian Ministry of Justice, upon request of the latter. The Ministry forwarded the documents, drawn up in German, to the referring court (Szombathely Court, Hungary) to implement the procedure for the 'recognition of the validity of foreign judgments' provided for in Hungarian law. Hungarian Law on international judicial assistance in criminal matters indeed establishes a special procedure for prior recognition, by the Hungarian courts, of convictions not subject to appeal handed down by foreign courts ('Hungarian special procedure'), with the aim of ensuring that the decision recognising those convictions has the effect of a conviction handed down by a Hungarian court. Hungarian courts have to examine, first, whether fundamental rights were observed in the foreign proceedings. Next, the Hungarian special procedure entails a review of the foreign conviction, which may lead to the reclassification of the criminal offence that led to the conviction as well as to an adjustment of the sentence imposed, if those aspects are not compatible with Hungarian criminal law.

The referring court thus enquires whether such special recognition procedure is consistent with EU law, having regard, in particular, to the principle of mutual recognition in criminal matters, on which judicial cooperation in criminal matters in the EU is based (Article 82 TFEU).

The Court of Justice first discusses the rationale of Framework Decision 2008/675/JHA, by referring to its previous judgment of 21 September 2017, *Beshkov*. This Framework Decision is directed in principle to situations in which *new* criminal proceedings have been brought against a person previously convicted in another Member State. In new criminal proceedings, previous convictions handed down in other Member States are taken into account to the extent that previous national convictions are taken into account under national law, and the legal effects attached to them are equivalent to those attached to previous national convictions, in accordance with national law.

The proceedings in Hungary against Mr Lada, i.e. the special procedure that has been initiated to recognise the Austrian judgment, cannot be considered as 'new criminal proceedings' for the purpose of the Framework Decision. Nonetheless, the Hungarian special procedure is inseparably linked to the implementation of Framework Decision 2008/675, as such a procedure is necessary for the taking into account of a person's foreign criminal convictions in new criminal proceedings. Hence, it should be assessed whether the Hungarian special procedure renders the Framework Decision ineffective. The Court of Justice replies in the affirmative.

The Hungarian special procedure is liable, in the absence of exceptional circumstances, to call in question the principle of mutual trust and hence one of the objectives of Framework Decision

2008/675. The principle of mutual recognition precludes the taking into account, in the context of that Framework Decision, of a previous conviction by a court in another Member State being conditional on the implementation of a national procedure for prior recognition, and precludes that conviction being reviewed in that procedure.

In accordance with recital No 13 of Framework Decision 2008/675, the exclusion of a possibility to review a previous conviction should however not prevent a Member State from issuing a decision, if necessary, in order to attach the equivalent legal effects to such previous conviction. Nonetheless, the adoption of such a decision can never involve the implementation of a national special procedure for prior recognition such as that provided for by Hungarian law. The Court of Justice agrees with the Opinion of Advocate General Bot, who noted that the decision to which Recital No 13 of the Framework Decision refers requires an examination on a case-by-case basis, while the Hungarian special procedure is necessary for *any* foreign conviction to be taken into account in new Hungarian criminal proceedings, and may even lead to a reclassification of the sentence imposed and of the offence.

Finally, the Court emphasises that Framework Decision 2008/675 is inseparably linked to Framework Decision 2009/315 on the exchange of information extracted from the criminal record between Member States. Their common aim is to avoid national judicial authorities before which new criminal proceedings are brought against persons who have previously been convicted of other offences in other Member States giving judgment without being able to take those previous convictions into account. In *Balogh*, the Court had argued that Framework Decision 2009/315, together with Decision 2009/316 on the establishment of the European Criminal Records Information System (ECRIS), must be interpreted as precluding the implementation of a special recognition procedure in Hungary. It follows that national procedures liable to affect the diligent exchange of information on criminal convictions among competent authorities clash both with Framework Decision 2009/315, read in conjunction with Decision 2009/316, and with Framework Decision 2008/675.

The Court therefore concludes that Framework Decision 2008/675/JHA, read in the light of Article 82 TFEU, must be interpreted as precluding the taking into account in a Member State, in new criminal proceedings brought against a person, of a final judgment previously handed down by a court of another Member State convicting that person of other offences being conditional on a special procedure for prior recognition by the courts of the first Member State.

Case C-268/17, AY, Judgment of 25 July 2018 (Fifth Chamber)

On 25 July 2018, the Fifth Chamber of the Court of Justice issued its decision in case C-268/17, on the interpretation of Framework Decision 2002/584/JHA on the European Arrest Warrant (EAW).

AY is a Hungarian national accused of having bribed a Croatian politician. Croatian authorities opened an investigation against AY in 2011, prior to the access of Croatia to the EU, and they sought the extradition of AY from Hungary by means of several letters rogatory. None of them was successful. On the basis of information shared by Croatian authorities, however, an investigation against unknown persons was launched in Hungary on the same facts. In the context of the Hungarian investigation, AY testified as a witness. In January 2012, the Hungarian investigation was closed as the acts committed did not constitute a criminal offence under Hungarian law. After Croatia's accesso to the EU, in October 2013 Croatian authorities transmitted an EAW to Hungary requesting the surrender of AY. Surrender was refused as the case had already been investigated and closed in Hungary. AY was nonetheless

indicted in Croatia, and a new EAW was sent to Hungary in December 2015. As not even this EAW was executed, Croatian authorities issued a new EAW in January 2017. Nonetheless, Hungarian authorities replied that they did not consider themselves obliged to act on the EAW that was issued, as a decision had already been taken in the course of the pre-trial phase of the criminal proceedings in Croatia. The County Court of Zagreb, Croatia, thus decided to stay the proceedings and to refer a number of questions to the Court of Justice for a preliminary ruling on the interpretation of the EAW Framework Decision.

With its fifth question, the Croatian court asks whether Hungarian authorities can refuse to take a decision on the execution of an EAW that has been issued after the indictment because a decision concerning a previous EAW issued during the pre-trial phase had been taken. The Court replies in the negative, as the EAW Framework Decision requires the judicial authority of the executing Member State to adopt a decision on any EAW forwarded to it. This principle applies even when, in the executing Member State, a ruling has already been made on a previous EAW concerning the same person and the same acts, but the second EAW has been issued only on account of the indictment, in the issuing Member State, of the requested person.

In its first four questions, the referring court asks, in essence, whether the adoption of the Hungarian decision closing the case bars the surrender of AY to Croatia. The CJEU replies in the negative, after discussing the two grounds for refusal of execution of the EAW that could come to the fore.

First, in accordance with Article 3(2) of the EAW Framework Decision, the executing judicial authority shall not execute a EAW in case of bis in idem, i.e. when it is informed that the requested person has been finally judged by a Member State in respect of the same acts provided that, where there has been sentence, the sentence has been served or is currently being served or may no longer be executed under the law of the sentencing Member State. The Court however argues that Hungarian authorities cannot rely on this ground. The ne bis in idem principle applies indeed to persons who have been finally judged in a Member State, but it does not extend to persons who were merely interviewed as witnesses in the course of a criminal investigation, as it was the case for AY in the frame of Hungarian investigations.

Second, Article 4(3) of the Framework Decision provides three different grounds for optional non-execution of an EAW, but only one of them is relevant for the case at issue, namely when the executing authorities has decided to halt proceedings in respect of the 'offence on which the [EAW] is based'. The Court acknowledges that such an expression refers to the 'offence' rather than to the person who committed it. Nonetheless, it argues that the executing authorities cannot rely on this ground for optional non-execution when an investigation was conducted against an unknown person, not the person requested by the EAW, and when the decision that terminated that investigation was not taken in respect of the requested person. This conclusion is supported by two arguments. First, as any other ground for non-execution of EAWs, Article 4(3) of the Framework Decision must be interpreted strictly and in the light of the need to promote the prevention and combating of crime. Second, Article 4(3) of the Framework Decision reflects Article 9 of the 1957 Convention on Extradition, according to which 'extradition may be refused if the competent authorities of the requested Party have decided either not to institute or to terminate proceedings in respect of the same offence or offences'. The Court notes that, according to the explanatory report to that Convention, this provision applies in regard to whom a decision has been taken precluding proceedings or terminating them.

In sum, a decision of public prosecutors terminating an investigation opened against an unknown person, during which the person who is the subject of the EAW was interviewed as a

witness only, without criminal proceedings having been brought against that person and where the decision was not taken in respect of that person, cannot be relied on for the purpose of refusing to execute the EAW pursuant to either Article 3(2) or Article 4(3) of the EAW Framework Decision.

Case C-216/18 PPU, LM, Judgment of 25 July 2018 (Grand Chamber)

On 25 July 2018, the Grand Chamber of the Court of Justice delivered its judgment in case C-216/18 PPU, which concerns the impact of the recent reforms of the Polish justice system on the European Arrest Warrant (EAW) proceedings.

LM was subject to three EAWs issued by Polish authorities. Arrested in Ireland, LM opposed to being surrendered because he argued, inter alia, that in Poland he would be exposed to a real risk of a flagrant denial of justice in violation of Article 6 ECHR (right to a fair trial). His right to receive a fair trial would be seriously jeopardised by the recent legislative reforms of the Polish justice system, which have undermined the independence of Polish judiciary. The referring court shares these doubts but it is uncertain whether the principles singled out by the Court of Justice in Aranyosi and Căldăraru should apply also in case of potential breaches of the rule of law. In that judgment, the Luxembourg Court established a two-step procedure to be applied by an executing judicial authority in the context of a surrender liable to result in a breach of Article 3 of the ECHR (prohibition of torture). The executing authority must, first, make a finding of general or systemic deficiencies in the protections provided in the issuing Member State and, second, seek all necessary supplementary information from the issuing Member State's judicial authority as to the protection for the individual concerned.

As in the case of LM there is cogent evidence that conditions in the issuing Member State are incompatible with the fundamental right to a fair trial because the system of justice itself in the issuing Member State is no longer operating under the rule of law, the referring court asks whether the second limb of the procedure envisaged in Aranyosi and Căldăraru should still apply. In other words, the Irish court wonders whether it shall proceed with a further assessment, specific and precise, as to the exposure of the individual concerned to the risk of unfair trial where his trial will take place within a system no longer operating within the rule of law. In case of an affirmative reply, which would imply that the executing authority should revert to the issuing judicial authority requesting further information that could enable the national court to discount the existence of the risk to an unfair trial, the Irish court wonders which guarantees as to fair trial would be required.

The Court of Justice confirms that the two-step procedure envisaged in Aranyosi and Căldăraru applies also when the right to a fair trial is at stake. In its reasoning, the Court first reminds that mutual trust underpins the principle of mutual recognition, and that limitations may be placed on these principles only in exceptional circumstances. The execution of the EAW thus constitutes the rule, while the refusal to execute is intended to be an exception which must be interpreted strictly. Recalling Associação Sindical dos Juízes Portugueses, the Court acknowledges that the principle of judicial independence forms part of the essence of the fundamental right to a fair trial. The latter is in turn of cardinal importance as a guarantee that all rights which individuals derive from EU law will be protected and that the values common to the Member States – with the rule of law at the forefront – will be safeguarded. Maintaining the independence of judicial authorities is also crucial in the frame of EAW proceedings: both the issuing and the executing authority shall meet the requirements inherent in effective judicial protection – including the guarantee of independence – so that the entire surrender procedure between Member States is carried out under judicial supervision.

The Court of Justice then extends the application of the Aranyosi and Căldăraru test to the situation where there is a real risk that the individual concerned will suffer a breach of the fundamental right to a fair trial. Hence, the first step that the executing authority should undertake is that of assessing, on the basis of material that is objective, reliable specific and properly updated concerning the operation of the system of justice in the issuing Member State, whether there is a real risk, connected with a lack of independence of the courts of that Member State on account of systemic or generalised deficiencies there, of the fundamental right to a fair trial being breached. The proposal addressed by the Commission to the Council on basis of Article 7(1) TEU is especially relevant for the purposes of that assessment. The Court clarifies that the principle of independence of the courts is composed of two facets: i) external independence, i.e. protection against external interventions or pressure; and ii) internal independence, i.e. equal distance from the parties. Furthermore, dismissals of the members of the judiciary should be determined by express legislative provisions and the disciplinary regime for judges should display the necessary guarantees in order to prevent any risk of its being used as a system of political control of the content of judicial decisions.

If the first step of the assessment leads to the conclusion that in the issuing Member State there is a real risk of breach of the essence of the fundamental right to a fair trial on account of systemic or generalised deficiencies concerning the judiciary of that Member State, such as to compromise the independence of that State's courts, the executing authority must proceed with the second step. The executing authority must assess whether the person whose surrender is sought will run that risk. The Court argues that this second step cannot be neglected even in circumstances such as those of the main proceedings, as it is only a decision of the European Council that can suspend the implementation of the EAW mechanism in the event of a serious and persistent breach of the principles set out in Article 6(1) TEU by one of the Member States (Recital No. 10 of the EAW Framework Decision). In the absence of such a decision, the executing authority can refrain from giving effect to an EAW only in exceptional circumstances and upon carrying out a specific and precise assessment of the particular case.

After (eventually) requesting necessary supplementary information to the issuing authority, the executing authority is thus called to assess whether there are substantial grounds for believing that the person whose surrender is sought will run a real risk of breach of his fundamental right to an independent tribunal. For the purpose of such an assessment, the executing authority shall have regard to the personal situation of the individual concerned, as well as to the nature of the offence for which he or she is being prosecuted and the factual context that from the basis of the EAW.

If the executing authority is not in a position to discount the existence of a real risk that the individual concerned will suffer in the issuing Member State a breach of the fundamental right to an independent tribunal and, therefore, of the essence of the fundamental right to a fair trial, the executing judicial authority must refrain from giving effect to the EAW relating to that person.

Case C-220/18 PPU, ML, Judgment of 25 July 2018 (First Chamber)

On 25 July 2018, the First Chamber of the Court of Justice delivered its judgment in case C-220/18 PPU, which concerns the execution of European Arrest Warrants (EAWs) in case of allegedly appalling detention conditions in the issuing Member State. As in LM (C-216/18 discussed above), which was handed down on the same day, the Court of Justice is required to further clarify the Aranyosi and Căldăraru test, namely the two-step

procedure that executing judicial authorities must carry out when they have reason to believe that the fundamental rights of persons whose surrender is requested by means of EAWs can be violated in the issuing Member State.

ML is a Hungarian national who was arrested in Germany upon execution of a number of EAWs issued by Hungarian authorities. Although ML should have been surrendered to Hungary as his detention in Germany would not increase his chances of social reintegration, German authorities delayed the execution of the EAWs to be sure that ML would not be subject to inhuman or degrading treatments in Hungarian prisons. Upon request of German authorities, the Hungarian Ministry of Justice first explained that, should ML be surrendered, he would be detained in Budapest prison and thereafter in Szombathely regional prison, Hungary. The Ministry also gave an assurance that ML would not be subjected to any inhuman or degrading treatment as a result of his detention in Hungary. The Ministry added that that assurance could equally well be given in the event of ML being transferred to another prison in Hungary.

While this assurance was regarded as satisfactory with regard to the detention in Szombathely regional prison, German authorities sent a list of 78 questions about prison conditions in Budapest prison as well as in other detention centres to which ML might be transferred. The Hungarian Ministry replied by pointing out that, on the one hand, Hungarian law has now been amended so as to provide a legal remedy enabling persons in detention to challenge the legality of the conditions of their detention. On the other hand, Hungarian law also provides a new form of detention that allows to commute prison sentence to house arrest. German authorities were not satisfied and requested further clarification about prison conditions in Budapest prison and in other prisons to which ML might be transferred. The Hungarian Ministry of Justice gave a further assurance that, wherever ML was incarcerated, he would not be subjected to inhuman or degrading treatment during his detention in Hungary.

Despite this exchange of information, the German court was still not able to discount the existence of a risk that ML would suffer a violation of his right not to be subject to inhuman or degrading treatment in Hungarian prisons (Article 4 of the Charter of Fundamental Rights). It thus sought some guidance from the Court of Justice on the extent of the assessment of prison conditions in Hungary that it is called to undertake in accordance with the Aranyosi and Căldăraru judgment. In particular, the German Court required the Court of Justice to rule on the importance that should be attached, in its assessment, to the new legal remedy on which persons detained in Hungary may rely to challenge the legality of their detention conditions. Furthermore, the referring court requires some clarification on whether it should assess the prison conditions in all Hungarian prisons in which ML may potentially be transferred, and on which prison conditions should be taken into account in its assessment. Finally, the German court inquires whether the assurance given from the Hungarian Ministry of Justice is sufficient to lead to the conclusion that ML will not be subject to inhuman or degrading treatment in Hungarian prisons.

In its reasoning, the Court first reminds that mutual trust underpins the principle of mutual recognition, and that limitations may be placed on these principles in exceptional circumstances. The execution of the EAW thus constitutes the rule, while the refusal to execute is intended to be an exception which must be interpreted strictly. As ruled in Aranyosi and Căldăraru, to which the Court largely refers, such an exception may occur in case of violation of the right not to be subject to inhuman or degrading treatment, which the executing authority shall ascertain in accordance with the two-step procedure described in that judgment. In essence, once the executing authority has reason to believe that there are systemic or generalised deficiencies in the detention conditions in the issuing Member State, it must also determine

specifically and precisely whether, in the particular circumstances of the case, there are substantial grounds for believing that the person concerned will run a real risk of being subject to inhuman and degrading treatment because of the detention conditions in the issuing Member State.

In the case of ML, the referring court considers to have sufficient information to conclude that there are systemic or generalised deficiencies in detention conditions in Hungary. The Court of Justice is not asked to rule on whether such an assessment is well-founded or not, and it only gives the clarifications required on the second limb of the Aranyosi and Căldăraru test.

First, while welcoming the recent reforms of Hungarian law, the Court argues that the existence of a legal remedy allowing detainees to challenge the legality of their detention conditions is not capable as such of averting the risk that, once surrendered, the person concerned will be subjected to treatment that is incompatible with Article 4 of the Charter. This remedy shall be taken into account by the executing authority for the purpose of deciding on the surrender, but it cannot, on its own, lead that authority to rule out that the person concerned will be subject to inhuman or degrading treatment in the prisons of the issuing Member State.

Second, the Court states that the assessment to be carried out by the executing authority under the second limb of the Aranyosi and Căldăraru test cannot involve all the prisons of the issuing Member State in which a person may be detained after his or her surrender. This would be clearly excessive and would also run counter to the swift execution of EAWs required by the Framework Decision. Hence, executing authorities must only assess the conditions of detention in prisons in which, in accordance to the information available to them, it is likely that the person concerned will be detained, including on a temporary or transitional basis. In the case of ML, this means that the scrutiny of German authorities should only concern the prisons in Budapest and in Szombathely.

Third, the Court acknowledges that the list of 78 questions sent to Hungarian authorities on detention conditions in Hungary makes it impossible for those authorities to provide a useful answer. This is not compatible with the duty of sincere cooperation that must underpin the dialogue between executing and issuing authorities provided for by the EAW Framework Decision. The executing judicial authority must only assess the actual and precise conditions of detention of the person concerned that are relevant for determining whether that person will be exposed to a real risk of inhuman or degrading treatment. In that respect, the Court makes a reference to a number of judgments of the European Court of Human Rights, including those arguing that a strong presumption of a violation of Article 3 ECHR (which corresponds to Article 4 of the Charter) arises when the personal space available to a detainee is below 3 m2 in multi-occupancy accommodation.

Finally, as for the assurance that the person concerned will not suffer inhuman or degrading treatment on account of the conditions of his or her detention, the executing authority must rely on that assurance if it has been given – or is at least endorsed – by the issuing judicial authority. On the contrary, when the assurance comes from authorities other than the issuing ones (e.g. the Ministry of Justice, as it is the case in the proceedings concerning ML), the executing authority may take such an assurance into account but shall in any case carry out an overall assessment of all the information available to it.

Case C-310/18 PPU, Emil Milev, Judgment of 19 September 2018 (First Chamber)

On 19 September 2018, the Court of Justice (First Chamber) delivered its judgment in case C-310/18 PPU on the interpretation of the Directive (EU)

2016/343 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.

Mr Milev was suspected to have committed a robbery with violence in 2008 in Bulgaria but he was not charged. That investigation was suspended in 2009 and subsequently reopened in January 2018. On 11 January 2018, Mr Milev was arrested with a view to being brought before the court responsible for deciding whether to remand him in custody pending trial. In first and second instance, the prosecution's application that Mr Milev should be remanded in custody was upheld. Mr Milev brought an appeal before the Specialised Criminal Court, which decided to stay the proceedings and to refer some questions for preliminary ruling to the Court of Justice.

The Bulgarian court mentions that, when there are 'reasonable grounds' to believe that a person has committed an offence, that person may be kept in pre-trial detention in Bulgaria. The referring court thus wonders whether EU law – and especially Articles 3, 4(1) and 10 of Directive 2016/343 and Articles 47 and 48 of the Charter – requires an examination of whether it is highly probable that that person committed that offence or whether, as it is the case in Bulgaria, it is sufficient that the court confines itself to finding that, prima facie, that person may have committed that offence. The referring court is also uncertain whether the above-mentioned provisions of EU law require the national court to undertake a detailed examination of incriminating and exculpatory evidence in deciding whether to keep the suspect under pre-trial detention.

The Court of Justice rules out that issues connected with the right to an effective remedy (Article 10 of Directive 2016/343) come to the fore in the case of Milev and thus focuses its reasoning on Articles 3 and 4(1) of the Directive, read in light of Recital No. 16. In essence, these provisions require that the Member States shall ensure that suspects and accused persons are presumed innocent until proved guilty. Hence, judicial decisions, other than those on guilt, shall not refer to suspects and accused persons as being guilty. This shall be without prejudice to preliminary decisions of a procedural nature, such as decisions on pre-trial detention, which are taken by judicial or other competent authorities and which are based on suspicion or incriminating evidence. Furthermore, Directive 2016/343 has the limited aim of establishing common minimum rules on the protection of procedural rights of suspects and accused persons, in order to strengthen the trust of Member States in each other's criminal justice systems and thus to facilitate mutual recognition of decisions in criminal matters. It follows that it is for national law to lay down all the detailed rules concerning the adoption of decision on pre-trial detention, as long as these decisions do not refer to the person in custody as being guilty.

In the light of these remarks, the Court concludes that Articles 3 and 4(1) of Directive (EU) 2016/343 must be interpreted as not precluding the adoption of preliminary decisions of a procedural nature, such as a decision taken by a judicial authority that pre-trial detention should continue, which are based on suspicion or on incriminating evidence, provided that such decisions do not refer to the person in custody as being guilty. The Court also adds that Directive 2016/343 does not govern the circumstances in which decisions on pretrial detention may be adopted.

Case C-327/18 PPU, RO, Judgment of 19 September 2018 (First Chamber)

On 19 September 2018, the First Chamber of the Court of Justice handed down its decision in case C-327/18 PPU concerning the impact of the notification by the United Kingdom of its intention to withdraw from the European Union on ongoing European Arrest Warrant (EAW) proceedings.

UK authorities sought the extradition of RO from Ireland to the UK by means of two EAWs. RO

objected to the surrender by arguing that, in the aftermath of Brexit, the UK will not be bound by EU law. As a consequence, the rights he currently enjoys under EU law may not be capable of enforcement. The High Court of Ireland thus inquires whether, in such a situation, a refusal to execute the EAW would be justified. Along the lines of the Opinion of Advocate General Szpunar, the Court of Justice replies in the negative.

In its reasoning, the Court first reminds that mutual trust underpins the principle of mutual recognition, and that limitations may be placed on these principles in exceptional circumstances. The Court then argues that the UK's notification of its intention to withdraw from the EU does not imply that EU law, including the EAW Framework Decision, cases to apply to the UK.

The Court however adds that it remains the task of the executing judicial authority to examine, after carrying out a specific and precise assessment of the particular case, whether there are substantial grounds for believing that, after withdrawal from the European Union of the issuing Member State, the person who is the subject of that arrest warrant is at risk of being deprived of his fundamental rights. In that respect, the Court emphasises that, first, the UK is party to the ECHR, and it has incorporated Article 3 ECHR (which corresponds to Article 4 of the Charter) into national law. Second, the fact that, in the aftermath of Brexit, UK authorities cannot rely anymore on the support of the CJEU via the preliminary reference proceedings does not justify the non-execution of a European Arrest Warrant. On the one hand, individual rights should be ensured first and foremost by national courts. On the other hand, for more than ten years the UK was allowed to exchange EAWs with other EU countries without having accepted the jurisdiction of the CJEU in that respect.

Hence, in a case such as that before the High Court of Ireland, it is essential that, when the decision on the execution of the EAW is to be taken, the executing judicial authority is able to presume that the issuing Member State will apply the substantive content of the rights derived from the EAW Framework Decision that are applicable in the period subsequent to the surrender, after the withdrawal of that Member State from the European Union. It is possible to make such an assumption when, for instance, the issuing Member State will continue to participate in international conventions such as the ECHR even after its withdrawal from the EU. Only if there is concrete evidence to the contrary, the Court concludes, the judicial authorities of a Member State can refuse to execute the European arrest warrant.

Case C-207/16, Ministerio Fiscal, Judgment of 2 October 2018 (Grand Chamber)

On 2 October 2018, the Grand Chamber of the Court of Justice handed down its judgment in case C-207/16 on the interpretation of Directive 2002/58/EC on privacy and electronic communication, as amended by Directive 2009/136, read in the light of Articles 7 (respect for private and family life) and 8 (protection of personal data) of the Charter of Fundamental Rights.

In the frame of an investigation concerning a robbery that took place on 16 February 2015, the Spanish police requested the investigative magistrate to have access to some personal data stored by various providers of electronic communications services. As a mobile phone was stolen in the robbery, the police requested access to the telephone numbers that had been activated between 16 and 27 February 2015 with the International Mobile Equipment Identity Code of the stolen phone, as well as to the personal data (name and surname, and if need be addresses) relating to the identity of the owners or users of the telephone numbers corresponding to the SIM cards activated with the code. The investigative

magistrate refused that request, as Spanish law would allow such an access only in case of serious offences, namely offences punishable with more than five years of imprisonment, while the crimes under investigation did not appear to meet such a threshold.

After this decision, which the public prosecutor's office appealed before the referring court, Spanish law was amended in a way that now provides for two alternative criteria for determining the degree of seriousness of an offence. In addition to a formal normative criterion (i.e. more than three years of imprisonment), Spanish law also contemplates a substantive criterion. The latter relates to conduct which corresponds to criminal classifications the criminal nature of which is specific and serious, and which is particularly harmful to individual and collective legal interests.

The referring court notes that – as acknowledged by the Court of Justice in Digital Rights Ireland – retention and communication of traffic data constitute particularly serious interferences with the rights guaranteed by Articles 7 and 8 of the Charter. Article 15(1) of the Directive on privacy and electronic communication however allows the Member States to restrict citizens' rights when this restriction constitutes a necessary, appropriate and proportionate measure within a democratic society to safeguard the prevention, investigation, detection and prosecution of criminal offences. Hence, the referring court asks whether the sufficient seriousness of offences, as a criterion justifying the interference with the fundamental rights enshrined in the Charter, can be determined taking into account only the penalty that may be imposed or whether the levels of harm to individual and/or collective legally protected interests should be considered as well. Should the penalty be a sufficient criterion, the court seeks further clarification on the threshold of such a penalty and on whether a minimum of three years' imprisonment is sufficient.

After confirming that the access of public authorities to personal data retained by providers of electronic communications service constitutes an interference with the rights enshrined in Articles 7 and 8 of the Charter, the Court discusses whether such interferences are justified. In Tele2 Sverige and Watson, the Court argued that, in accordance with the principle of proportionality, serious interferences can be justified only by the objective of fighting 'serious crime'. On the contrary, when the interference is not serious, the access to personal data can be justified by the objective of preventing, investigating, detecting and prosecuting 'criminal offences' generally. In the case under scrutiny, the Court argues that the Spanish police's request for access to personal data aimed only to identify the owners of SIM cards activated over the 12-day period between 16 and 27 February 2015. Those data do not concern the content of the communications and are not cross-referenced with the location data. It follows that those data do not allow precise conclusions to be drawn concerning the private lives of the persons whose data is concerned. As these interferences are not 'serious', they can be justified for the purpose of preventing, investigating, detecting and prosecuting 'criminal offences' generally, without it being necessary that those offences be defined as 'serious'.

The Court thus concludes that Article 15(1) of the 2002 Directive on privacy and electronic communications, as amended by Directive 2009/136, read in the light of Articles 7 and 8 of the Charter of Fundamental Rights, must be interpreted as meaning that the access of public authorities to data for the purpose of identifying the owners of SIM cards activated with a stolen mobile telephone, such as the surnames, forenames and, if need be, addresses of the owners, entails interference with their fundamental rights, enshrined in those articles of the Charter, which is not sufficiently serious to entail that access being limited, in the area of prevention, investigation,

detection and prosecution of criminal offences, to the objective of fighting serious crime.

Case C-234/17, XC and Others, Judgment of 24 October 2018 (Grand Chamber)

On 24 October 2018, the Court of Justice (Grand Chamber) delivered its judgment in case C-234/17, on the interpretation of the principle of sincere cooperation (Article 4(3) TEU) in conjunction with 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, Switzerland 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, Austria. As the latter court adjudicated at second and final instance, that decision is final, in accordance with the Austrian Code of Criminal Procedure. 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 their right not to be tried twice for the same criminal offence. In particular, they claimed that the existence of criminal proceedings concluded in Germany and Liechtenstein in 2011 and 2012 precluded, because of the ne bis in idem principle enshrined in Article 54 of the Convention Implementing the Schengen Agreement (CISA), Article 50 of the Charter and Article 4 of Protocol No. 7 to the ECHR, further prosecutions concerning suspected criminal offences committed to the detriment of the Swiss tax authorities being brought against them.

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 judgments of the European Court of Human Rights (ECtHR), Article 363a of the Austrian Code of Criminal Procedure allows for the submission of applications for the rehearing of a closed criminal case. In this context, the Austrian Supreme Court asks the Court of Justice whether such procedure for rehearing must, in accordance with the principles of equivalence and effectiveness, also apply for violations of EU law.

The Court of Justice analyses separately the principle of equivalence and the principle of effectiveness. The former prohibits a Member State from laying down less favourable procedural rules for actions for safeguarding rights that individuals derive from EU law than those applicable to similar domestic actions. In this context, the remedy enshrined in Article 363a of the Austrian Code of Criminal Procedure shall be considered as a domestic action. In accordance with a judgment of 2007 by the Austrian Supreme Court, Article 363a allows the submission of applications for the rehearing of a closed case even when there is no prior decision of the ECtHR. Hence, Article 363a may also apply where the Austrian Supreme Court has itself identified the existence of an infringement of one of the rights guaranteed by the ECHR or the protocols thereto. However, the Court argues that the principle of equivalence does not require national courts to extend the remedy provided for by Article 363a of the Austrian Code of Criminal Procedure to cases of alleged violation of rights protected under EU law.

In essence, the Court argues that the remedy at issue has been specifically introduced to implement the judgements of the ECtHR, while, on the other hand, EU law has entirely different characteristics. It enjoys primacy over national law and a number of its provisions have direct effect; it envisages a judicial system intended to ensure consistency and uniformity in the interpretation of EU law, the cornerstone of which is represented by Article 267 TFEU (request for preliminary ruling); and, if

necessary, national courts are required to set aside national law that is incompatible with EU law. Such a constitutional framework guarantees everyone the opportunity to obtain the effective protection of rights conferred by the EU legal order before a national decision with the force of res judicata even comes into existence.

By the same token, the principle of effectiveness does not require the extension of the remit of Article 363a of the Austrian Code of Criminal Procedure to cases of alleged violation of rights protected under EU law. The Court notes that no information in the file of the case leads to the conclusion that there are not, in the Austrian legal system, legal remedies which effectively guarantee the protection of the right to *ne bis in idem*. It is instead common ground that the applicants were able to file their complaints with the competent courts in the main proceedings. Furthermore, the referring court also points out that the Code of Criminal Procedure provides for various avenues of protection for individuals who are affected to assert the rights conferred on them by the EU legal order.

The Court thus concludes that EU law, in particular the principles of equivalence and effectiveness, must be interpreted as meaning that a national court is not required to extend to infringements of EU law, in particular to infringements of the fundamental right to *ne bis in idem*, a remedy under national law permitting, only in the event of infringement of the ECHR, or one of the protocols thereto, the rehearing of criminal proceedings closed by a national decision having the force of res judicata.

Case C-247/17, Denis Raugevicius, Judgment of 13 November 2018 (Grand Chamber)

On 13 November 2018, the Grand Chamber of the Court of Justice delivered its judgment in case C-247/17 on the extradition of EU citizens to third countries. As in Petruhhin (Case C-182/15), to which the Court often refers in its reasoning, the case concerns a request for extradition issued by Russian authorities and concerning an EU citizen who has exercised his right to freely move within the EU.

Mr Raugevicius is a Lithuanian national who has moved to Finland and has lived there for several years. He is also father to two children residing in Finland and having Finnish nationality. In 2011, he was convicted by Russian authorities, which subsequently issued an international arrest warrant. In 2016, a court of first instance in Finland imposed an order prohibiting Mr Raugevicius from leaving Finland. In order to decide on the request for extradition issued by Russian authorities, the Finnish Ministry of Justice asked for an opinion of the Supreme Court of Finland, which in turn referred a request for preliminary ruling to the Court of Justice. The Finnish Court points out that: i) Mr Raugevicius is an EU citizen who has exercised his right to free movement within the EU; ii) the request for extradition has been issued for the purpose of executing a custodial sentence (and not of prosecuting, as it was the case in Petruhhin); iii) Finnish law prohibits the extradition of own nationals to third countries for the purposes of the enforcement of a sentence; and iv) Finnish law allows the execution of a sentence pronounced abroad on Finnish territory. The Supreme Court of Finland inquires whether it should ascertain whether there is an alternative to extradition that is less prejudicial to the exercise of the right to free movement. The Court of Justice replies in the affirmative.

The Court of Justice recalls its previous judgment in Petruhhin, where it argued that – in general – extradition aims to ensure that persons suspected of having committed a crime do not enjoy impunity. The fact that some Member States prohibit the extradition of own nationals is in line with this objective: in accordance with the principle *aut dedere aut iudicare*, the bar on the extradition of own nationals is usually counterbalanced by the obligation of a Member State to prosecute its

citizens for the crimes committed abroad. This may not be possible when the extradition concerns a citizen of another Member State. However, in Petruhhin, the Court noted that there was an alternative to the extradition of EU nationals living in a Member State other than that of their nationality to third countries. Pursuant to the Framework Decision on the European Arrest Warrant, the person whose extradition was sought by a third country may be first surrender to the country of his or her nationality to be prosecuted there.

However, in the case at hand, there is already a foreign conviction, so that the principle *aut dedere aut iudicare* would not apply. Member States could not prosecute again the same person for the same facts, as this would violate the principle of ne bis in idem. Nonetheless, the Grand Chamber notes that there are already some mechanisms that make it possible for persons subject to an extradition request for the purpose of enforcing a sentence to serve their sentences in the State of which they are national. This is for instance the case of the Convention on the Transfer of Sentenced Persons, in which Russia participates as well. In addition, Finnish legislation provides that its own nationals can serve a sentence pronounced in another State in its territory.

Against this backdrop, it must be assessed whether extradition of Mr Raugevicius to Russia is the only option or whether there are measures which are equally effective in achieving the objective of extradition (i.e. preventing the risk of impunity) and which are at the same time less prejudicial to his freedom of movement. The Court of Justice notes that Article 3 of the Finnish Law on international cooperation for the enforcement of certain criminal law sanctions allows Finnish nationals and foreign nationals permanently residing in Finland to serve in Finland a sentence pronounced abroad, if they agree to this. Hence, the Court argues, it is clear that Mr Raugevicius could serve the Russian sentence in Finland, provided that both Russia and Mr Raugevicius himself consent to this, and provided that competent national courts establish that Mr Raugevicius can be considered as a foreign national permanently residing in Finland.

The Court emphasises that each EU citizen should enjoy the right to non-discrimination on grounds of nationality as enshrined in Article 18 TFEU in all situations falling within the scope of EU law, such as when he or she has exercised the right to free movement (Article 21 TFEU). As the aim of extradition is to prevent the risk of impunity, Finnish nationals and nationals of other Member States residing permanently in Finland are in a comparable situation. As it did also in Petruhhin, the Court finally notes that, should Finnish authorities eventually decide to extradite Mr Raugevicius to Russia, they must check that the extradition will not infringe the rights guaranteed by the Charter, and especially Article 19 thereof (prohibition of extradition to a State where there is a serious risk that the extradited person would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment).

The Court thus concludes that Articles 18 and 21 TFEU must be interpreted as meaning that, where an extradition request has been made by a third country for an EU citizen who has exercised his right to free movement, not for the purpose of prosecution, but for the purpose of enforcing a custodial sentence, the requested Member State, whose national law prohibits the extradition of its own nationals out of the EU for the purpose of enforcing a sentence and makes provision for the possibility that such a sentence pronounced abroad may be served on its territory, is required to ensure that that EU citizen, provided that he resides permanently in its territory, receives the same treatment as that accorded to its own nationals in relation to extradition.

Case C-551/18 PPU, IK, Judgment of 6 December 2018 (First Chamber)

On 6 December 2018, the Court of Justice delivered its judgment in case C-551/18 PPU on the interpretation of the Framework Decision on the European Arrest Warrant (EAW).

In 2013, IK had been convicted by Belgian courts to a three-year imprisonment sentence ('main sentence') and to an additional sentence of release conditional to placement at the disposal of the Court for the enforcement of custodial sentences for a 10-year period ('additional sentence'). In accordance with Belgian law, the additional sentence can be served after the main sentence has been executed and upon decision of the Court for the enforcement of custodial sentences. As IK left Belgium in 2014, Belgian authorities issued an EAW, where they only mentioned the main sentence, without any reference to the additional sentence. Once surrendered by Dutch authorities, IK was deprived of liberty in execution of the main sentence. Before the expiry of the latter, the Court for the enforcement of custodial sentences sentenced IK to conditional release at its disposal, which would have taken place after the end of the deprivation of liberty deriving from the main sentence. IK argued that further deprivation of liberty could not be ordered against him, as the EAW did not mention the additional sentence. The Court for the enforcement of custodial sentences rejected his line of argument. He then lodged an appeal before the Court of Cassation, which referred three questions for preliminary ruling to the Court of Justice. In essence, the Belgian Court asked whether the omission of the additional sentence in the EAW would prevent Belgian authorities from enforcing that additional sentence. The Court of Justice replies in the negative, agreeing with the conclusions of Advocate General Sharpston.

The Court of Justice argues that the execution of an EAW must, in principle, be refused when it is not drafted in accordance with Article 8 of the Framework Decision. Article 8(1)(f) provides that the EAW shall contain information on the penalty imposed, if there is a final judgment. However, the Court notes that such a provision is meant to allow the executing authority to check whether the thresholds of penalty laid down in Article 2(1) of the Framework Decision are respected. As the EAW issued by Belgian authorities mentioned the main sentence (three years), which exceeds the minimum threshold provided for by the Framework Decision (four months) for the execution of an EAW, Dutch authorities were right in surrendering IK to Belgium. Furthermore, the Court adds, the absence of any reference to the additional sentence does not prevent Belgian authorities from executing that sentence. Three arguments are marshalled by the Court to support this conclusion.

First, it is wrong to consider – as argued by IK and the Dutch Government – the Dutch decision on the execution of the EAW as a ground for deprivation of liberty in the issuing Member State. Such a ground is instead represented by the enforceable judgment pronounced in Belgium, while the Dutch decision on the execution of the EAW merely grants surrender of the person requested, in accordance with the provision of the EAW Framework Decision.

Second, there is no violation of the principle of speciality, which is enshrined in Article 27 of the EAW Framework Decision and which implies that a person surrendered may not be prosecuted or sentenced for an offence committed prior to his or her surrender other than that for which he or she was surrendered. The Court notes that, in the present case, the additional sentence neither concerns an offence 'other' than that on which the surrender was based nor it was added after the surrender of IK. On the contrary, it was pronounced for the same offence and by the same judicial decision as that of the main sentence of three years' imprisonment.

Third, the European Commission argued that the principle of mutual trust requires the executing authority to be informed of the additional sentence, so that it is in a position of invoking, if

necessary, one of the grounds for refusal listed in the Framework Decision or of subjecting the execution of the EAW to certain guarantees (Articles 3 to 5 of the Framework Decision). While acknowledging that the additional sentence should have been indicated in the EAW, the Court of Justice rebuts the argument of the Commission. It notes that the omission of the additional sentence in the EAW did not prevent the executing authority from exercising its jurisdiction in accordance with Articles 3 to 5 of the Framework Decision. Furthermore, IK did not mention that the additional sentence was missing in the EAW during the proceedings before the executing authority, and in any case he can challenge the lawfulness of his detention in the issuing Member State. Finally, the Court argues that informing the executing authority of the additional sentence and waiting for its decision on the possibility of enforcing that sentence in the issuing Member State would run counter to the objective of facilitating and accelerating the judicial cooperation sought by the EAW Framework Decision.

Against this background, the Court concludes that Article 8(1)(f) of the EAW Framework Decision must be interpreted as meaning that failure to indicate, in the EAW pursuant to which the person concerned has been surrendered, an additional sentence of conditional release which was imposed on that person for the same offence in the same judicial decision as that relating to the main custodial sentence does not, on the facts of the case in the main proceedings, preclude the enforcement of that additional sentence, on the expiry of the main sentence after an express decision to that effect is taken by the national court with jurisdiction for the enforcement of sentences, from resulting in deprivation of liberty.

Case C-514/17, Marin-Simion Sut, Judgment of 13 December 2018 (First Chamber)

On 13 December 2018, the First Chamber of the Court of Justice delivered its judgement in Case C-514/17, which concerns the interpretation of the Framework Decision on the European Arrest Warrant (EAW).

Mr Sut is a Romanian national who has been convicted by Romanian authorities to a custodial sentence of one year and two months for having driven a vehicle without valid licence plates and without a valid driving licence and for having caused an accident. As he left the country and went to Belgium, where he has been working and living with his spouse since February 2015, Romanian authorities issued an EAW for the purpose of enforcing that sentence. In Belgium, the crimes covered by the EAW are punishable by fines only. Article 6(4) of the Belgian law on the European arrest warrant transposes Article 4(6) of the EAW Framework Decision and, along the lines of this Article, it provides that execution may be refused 'if the European arrest warrant has been issued for the purposes of enforcement of a sentence or order, where the requested person is Belgian or is resident in Belgium and the competent Belgian authorities undertake to enforce the sentence or order in accordance with Belgian law'. Moreover, the Belgian law transposing Framework Decision 2008/909 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences provides that a sentence issued abroad may be adapted if it is incompatible with Belgian law in terms of its duration or nature. However, it expressly excludes that a custodial sentence may be converted into a fine. The referring court, i.e. the Court of Appeal of Liège, thus inquires whether Belgian legislation is compatible with Article 4(6) of the EAW Framework Decision. If it is not possible to convert the custodial sentence, it is not possible to enforce the Romanian sentence and Mr Sut should thus be surrendered to Romania, although his chances of reintegrating into society would be higher in Belgium rather than in Romania.

The Court of Justice notes that the application of the ground for optional non-execution enshrined in Article 4(6) of that Framework Decision requires two conditions to be satisfied: i) the requested person shall be staying in, or be a national or a resident of the executing Member State; ii) that State shall undertake to enforce the sentence or detention order in accordance with its domestic law. If both these conditions are met, the executing judicial authority should then ascertain whether there is a legitimate interest which would justify the sentence imposed in the issuing Member State being enforced on the territory of the executing Member State.

In the case of Mr Sut, while the executing authority found that he is residing in Belgium, it believes that the sentence issued by Romanian authorities cannot be enforced because the offences covered by the EAW are only punishable by fines in Belgium. The Court of Justice however clarifies that, first, Article 4(6) of the EAW Framework Decision does not give any indication from which the condition sub ii) could be interpreted as automatically precluding a judicial authority of the executing Member State from refusing to execute an EAW where the law of that Member State provides only for a fine in response to the crimes covered by the EAW. Second, Member States have some margin of discretion in implementing the EAW Framework Decision and, if they decide to limit the situations in which the surrender can be refused, this would simply reinforce the system of surrender to the advantage of an area of freedom, security and justice. Third, Article 4(6) of the EAW Framework Decision makes it clear that the surrender can be refused only upon the executing Member State's undertaking to order that the custodial sentence imposed on the person requested actually be enforced. Finally, no provisions of Framework Decision 2008/909 can affect the scope of the ground for optional non-execution stated in Article 4(6) of the EAW Framework Decision.

Against this backdrop, the Court thus concludes that Article 4(6) of the EAW Framework Decision must be interpreted as meaning that, where a person who is the subject of an EAW issued for the purposes of enforcing a custodial sentence resides in the executing Member State and has family, social and working ties in that Member State, the executing judicial authority may, for reasons related to the social rehabilitation of that person, refuse to execute that warrant. The executing authority may refuse to surrender the concerned person despite the fact that the offence which provides the basis for that warrant is, under that national law of the executing Member State, punishable by fine only, provided that, in accordance with its national law, that fact does not prevent the custodial sentence imposed on the person requested from actually being enforced in that Member State, which is for the referring court to ascertain.

AG'S OPINIONS

Peter Dzivev and others (C-310/16) – Opinion delivered on 25 July 2018 (AG Bobek)

On 25 July 2018, AG Bobek delivered his Opinion in case C-310/16 concerning the relationship between national criminal law and the protection of the Union's financial interests.

Mr Dzivev is under investigation for leading a criminal gang that has committed VAT fraud. Some interceptions were ordered during the proceedings and they would represent crucial evidence to prove the criminal liability of Mr Dzivev. However, due to some irregularities, they could not be used at trial according to Bulgarian law. The competent national court thus wonders

whether such law preventing national authorities to rely on illegally obtained wiretapping is compatible with EU law. In particular, the referring court mentions Article 325 TFEU on the protection of the Union's financial interests, the PIF Convention that, as interpreted by the Court of Justice, requires the Member State to criminalise VAT fraud, and Article 47 of the Charter on the right to an effective remedy before a tribunal previously established by law. AG Bobek suggests rephrasing the referred question so as to take into account also to the VAT Directive and Article 7 (respect for private life) and 48(2) (respect for the rights of the defence) of the Charter.

The AG summarises the most recent cases concerning the protection of the Union's financial interests and its relationship with national criminal law (Fransson, Taricco, M.A.S., M.B., Scialdone, Menci, and Kolev). At the end of this overview, he concludes that it appears to be established case-law that Article 325(1) TFEU – either by itself or in combination with other provisions such as those of the PIF Convention and of the VAT Directive – requires Member States to adopt any measure necessary for the purposes of safeguarding the EU budget, including effective and dissuasive sanctions. National rules should not have the effect of impeding the imposition of such criminal penalties. At the same time, however, they should not infringe fundamental rights.

AG Bobek then delves into the margin of discretion that Member States enjoy in abiding by their obligations stemming from EU law. In his view, (at least) three different scenarios can be inferred from the existing case law. First, there are cases where there is a clear rule or set of rules in EU law that govern a specific field in an exhaustive manner. Rules on the grounds of non-execution of a European Arrest Warrant in case of in absentia convictions are a case in point (Melloni). Second, national rules can sometimes have some connection to a provision of EU law, but that connection is weaker than in the previous scenario. The Court's case-law on sanctions in the area of VAT, e.g. Fransson, would fall within this category. Finally, there are cases where national rules are quite remote from any clear EU law provision, although they still fall within the scope of EU law. The case of Kolev, which concerned time limits applicable to the closure of the pre-trial stage of criminal proceedings, is an example in that respect.

The differences among these scenarios concern the margin of discretion left to the Member States. As AG Bobek argues, the closer a situation is to a clearly defined requirement of EU law, the less discretion there is for the Member States and there more uniformity there will be. The role of the Charter changes as well. When it comes to rules of EU law governing a specific aspect of a given field in an exhaustive manner, the Charter represents the maximum standard of protection of fundamental rights. In all the other cases, it instead lays down only the minimum threshold of such a protection, and Member States' constitutions are free to provide for higher standards of protection. He also rejects an argument that one may perhaps infer from existing case-law of the Court of Justice on Article 325 TFEU (especially Taricco and M.A.S, M.B.), namely that according to which 'procedural' and 'substantive' rules of criminal law should be treated differently when they conflict with EU law. He indeed claims that any such classification is problematic and very difficult to apply.

Finally, he does not agree with the case-law of the Court that requires national courts to disapply rules of criminal law that are allegedly incompatible with Article 325 TFEU. In his view, any finding of incompatibility ought to be limited only to a declaratory statement producing purely prospective effects. In the light of the principles of legal certainty, legality, and the protection of fundamental rights (as relevant in the specific case), that finding should not be applied in ongoing cases, if it were to be to the detriment of the individual accused. It should be for the national legislature to repair the incompatibility between national law and EU law. Should it fail in doing so, the appropriate

remedy would be a, potentially accelerated, infringement procedure under Article 258 TFEU.

Applying these principles to the case of Dzivev, AG Bobek notes that there is no harmonisation of the rules on evidence or on interceptions for the purposes of safeguarding the financial interests of the European Union. Member States thus retain discretion in regulating the interceptions. Yet the matter falls under EU law, as Member States are required to ensure effective protection to the Union's financial interests by providing, inter alia, for effective and dissuasive sanctions. Rules on evidence have a clear impact on sanctions, since they make the latter more or less likely or effective as a result of their operation, as it is the case for Mr Dzivev. It follows that, when applying such rules, Member States exercise their discretion within two sets of limits, including fundamental rights: limits stemming from national law and those deriving from EU law, including the Charter. As for the latter, he discusses in particular the principle of effectiveness, which obliges the Member States to ensure effective collection of VAT.

AG Bobek defines the effectiveness of EU law as a questionable argument, because it has no internal limits: if effectiveness of protection of the Union's own resources were to be equated with 'putting people in prison for committing fraud and not paying VAT', then any national rule standing in the way of a conviction should be set aside. However, this would overlook the need to balance the principle of effectiveness with other interests and values stemming from EU and national law, including the protection of fundamental rights. In the case under scrutiny, the interceptions of communications represent an interference with the right to a private life (Article 7 of the Charter) and, if used unlawfully within a criminal trial, also with the rights of the defence (Article 48 of the Charter). In that respect, the national rule prohibiting the use of incorrectly authorised interceptions serve both the main interests at stake: the effectiveness of VAT collection, as it allows for such interference with the right to private life to occur at all, and also the respect for fundamental rights involved, since it limits the use of such evidence when it has been obtained unlawfully.

In sum, AG Bobek concludes that Article 325(1) TFEU, as well as the other relevant provisions of the PIF Convention and of the VAT Directive, interpreted in the light of the Charter of Fundamental Rights, do not preclude national legislation, such as that at issue in the main proceedings, that prohibits the use of evidence obtained in breach of national law.

TC (C-492/18 PPU) – Opinion delivered on 6 November 2018 (AG Szpunar)

On 6 November 2018, AG Szpunar delivered his Opinion in case C-492/18 PPU, which concerns the interpretation of the Framework Decision on the European Arrest Warrant (EAW) and of Article 6 of the Charter of Fundamental Rights (right to liberty and security).

TC had been arrested in the Netherlands upon execution of an EAW issued by UK authorities. Article 22(4) of the Dutch law on the surrender of sentenced persons (hereinafter OLW, for 'Overleveringswet') obliges to release the arrested person after 90 days from his or her arrest. Dutch authorities consider this obligation to be inconsistent with the EAW Framework Decision, especially considering that the final decision on the execution of an EAW, and thus on the surrender of the individual concerned, may be delayed if a request for a preliminary ruling is lodged before the Court of Justice. The referring court (the Court of Amsterdam) thus interprets Article 22(4) OLW as allowing for a suspension of the surrender proceedings when the Court of Justice is required to rule on a request for preliminary ruling, both when the request concerns that specific case and when it has been lodged by other judicial authorities but it may nonetheless be relevant for the surrender procedure before the Court of Amsterdam. For instance, the referring court

suspended the proceedings concerning TC to wait for the Court of Justice's judgment in RO.

At the same time, the referring court notes that the court of second instance, i.e. the Court of Appeal of Amsterdam, does not endorse such an interpretation of Article 22(4) OLW. However, albeit by means of a different approach, the Court of Appeal of Amsterdam determines in each case whether it is necessary to suspend the time-limits for the adoption of a decision on the execution of the EAW. The referring court notes that, in practice, the different approach of the Court of Appeal of Amsterdam has always brought about the same results as those achieved by the Court of Amsterdam. The referring court thus wonders whether, in circumstances such as those just described, keeping in custody for more than 90 days a person who is at risk of fleeing violates Article 6 of the Charter.

AG Szpunar argues that, in accordance with Article 52(1) of the Charter, any limitation to Article 6 of the Charter – such as the deprivation of liberty following the execution of an EAW – must be provided for by 'law'. The Advocate General takes the view that 'law' may also refer to 'case law', as long as such case law is accessible and foreseeable (general requirements), as well as established and not systematically called into question (specific requirements). These requirements shall be applied in a strict way when it comes to the fundamental right to liberty. As AG Szpunar argues, they are in fact not respected in the case under scrutiny. The fact that the case law of the Court of Amsterdam is not consistent with that of the Court of Appeal of Amsterdam undermines the clarity, precision and foreseeability of case law. Hence, keeping a person in custody for more than 90 days in similar circumstances – and thus in clear violation of the wording of Article 22(4) OLW – entails a limitation to the right to liberty that cannot be considered as provided for by 'law'.

AG Szpunar then discusses whether the EAW Framework Decision is compatible with a rule such as that laid down in Article 22(4) OLW. He replies in the negative. As the Court of Justice held in Lanigan, a general and unconditional obligation to release the requested person where the total duration of the period that person has spent in custody exceeds the time-limits stipulated in Article 17 of the EAW Framework Decision could limit the effectiveness of the surrender system put in place by the Framework Decision and, consequently, obstruct the attainment of the objectives pursued by it. Although Article 12 of the Framework Decision provides that the concerned person may be released provisionally at any time in conformity with the domestic law of the executing Member State, this provisional release is conditional upon the competent authority of the said Member State taking all the measures it deems necessary to prevent the person absconding. If there are no such measures available, the release of the person whose surrender is sought would violate Article 17(5) of the Framework Decision, which requires the executing authority to ensure that the material conditions necessary for effective surrender of the person remain fulfilled as long as the final decision on the EAW has not been taken. Furthermore, the mandatory release of the persons concerned upon expiry of the 90-day period from the arrest would discourage national authorities from referring requests for preliminary ruling to the Court of Justice and would instead encourage dilatory practice of those persons.

Finally, the AG wonders whether it should be thus concluded that Dutch authorities are required to disapply the provisions of national law – Article 22(4) OLW in this case – because they run counter to the provisions of the EAW Framework Decision. He replies in the negative. Such a disapplication would lead to a serious interference with the right to liberty of TC and would also entail a reverse direct effect, i.e. the State would disapply its own national law, which has implemented the Framework Decision in a wrong way, to the detriment of the individuals. The Court of Justice has already ruled out in several occasions that such

a reverse direct effect is not admissible under EU law.

In the light of the foregoing, AG Szpunar concludes that Articles 6 and 52(1) of the Charter preclude the introduction, by means of case law, of a limitation to the right to liberty such as that entailed by keeping in custody a person who is subject to a EAW after 90 days from his or her arrest, when such a limitation is based on divergent interpretations of Article 22(4) OLW, which obliges the executing authority to release that person after the expiry of the 90-day period from the arrest.

Popławski (C-573/17) – Opinion delivered on 27 November 2018 (AG Sánchez Bordona)

On 27 November 2018, AG Sánchez Bordona delivered his Opinion in case C-573/17 concerning the interpretation of Framework Decision 2002/584/JHA on the European Arrest Warrant (EAW) and Framework Decision 2008/909/JHA on the mutual recognition of judgments imposing custodial sentences. This case is a follow-up of the previous Popławski decision (C-579/15, hereinafter 'Popławski I').

Mr Popławski, who has been residing in the Netherlands for a long period, was sentenced in 2007 in Poland to a one-year suspended custodial sentence. Polish courts issued an EAW in 2013 for the purposes of executing this sentence. Upon receiving the EAW, the District Court of Amsterdam referred some requests for preliminary ruling to the CJEU concerning the compatibility of Dutch law on the surrender of sentenced persons (hereinafter OLW, for 'Overleveringswet') with EU law. In particular, the bone of contention in Popławski I was represented by the Dutch transposition of Article 4(6) of the EAW Framework Decision. This provision sets out a ground for optional non-execution of the EAW under which the executing judicial authority may refuse to execute an EAW for the purposes of enforcing a custodial sentence where the requested person is staying in, or is a national or a resident of the executing Member State and that State undertakes to enforce that sentence in accordance with its domestic law.

In Popławski I, Dutch legislation – and namely Article 6(2), (3) and (5) OLW – was found to be incompatible with this provision because, first, it bars without any exception the surrender of a Dutch national or of a foreign national in possession of a residence permit of indefinite duration, if that surrender is sought for the purposes of execution of a custodial sentence imposed on him or her by final judicial decision (Article 6(2) and (5) OLW). On the contrary, Article 4(6) of the EAW Framework Decision envisages a margin of discretion for national executing authorities as to whether or not it is appropriate to refuse to execute the EAW.

Second, Article 6(3) OLW merely lays down the obligation for Dutch judicial authorities to inform the judicial authorities of the issuing Member State that they are 'willing' to take over the enforcement of the judgment, even if, on the date of the refusal to surrender, the execution has not in fact been taken over. Besides, such a refusal may not be challenged in the event that taking over that execution subsequently proves to be impossible. This is incompatible with Article 4(6) of the EAW Framework Decision, which instead requires that the executing authority relying on that optional ground for refusal 'undertakes' to execute the sentence or detention order in accordance with its domestic law.

In Popławski I, the Court added that, although the provisions of the EAW Framework Decision do not have direct effect, the competent national court is nonetheless obliged to interpret the provisions of national law, so far as is possible, in the light of the wording and the purpose of that framework decision. In the case of Popławski, this means that, in the event of a refusal to execute an EAW issued with a view to the surrender of a person who has

been finally judged in the issuing Member State and given a custodial sentence, the judicial authorities of the executing Member State are themselves required to ensure that the sentence pronounced against that person is actually executed.

After Popławski I, the District Court of Amsterdam was thus faced with the dilemma of how to interpret national law in accordance with EU law, as the Dutch legislator had not amended the law. In fact, the referring court argues that it is not possible to interpret Article 6(2), (3) and (5) OLW in a way that is consistent with EU law. The only solution would be to disapply those provisions. The first question that the Dutch court raises is thus whether, in accordance with the principle of primacy, it can disapply national law that is not in conformity with the EAW Framework Decision.

The other question concerns instead an alternative approach envisaged by the referring court, which argues that it may potentially apply Framework Decision 2008/909 to the recognition and enforcement of the sentence issued against Mr Popławski. In accordance with Article 25 of Framework Decision 2008/909, indeed, 'without prejudice to the [EAW Framework Decision], provisions of this Framework Decision shall apply, mutatis mutandis to the extent they are compatible with provisions under that Framework Decision, to enforcement of sentences in cases where a Member State undertakes to enforce the sentence in cases pursuant to Article 4(6) of that Framework Decision'. However, Article 28(2) of Framework Decision 2008/909 allows any Member State, on the adoption of the Framework Decision, to make a declaration indicating that, in cases where the final judgment has been issued before a given date (in any case no later than 5 December 2011, i.e. the date in which the Framework Decision entered into force), it will – as an issuing and an executing State – continue to apply the existing legal instruments on the transfer of sentenced persons applicable before 5 December 2011.

Poland made a declaration under Article 28(2) in 2011. Addressing the second question of the referring court, AG Sánchez Bordona argues that such a declaration is out of time, since it was not made 'on the adoption' of Framework Decision, as Article 28(2) of Framework Decision 2008/909 instead requires. In the view of the Advocate General, it follows that the declaration of Poland is not capable of producing legal effects. Therefore, in accordance with Article 28(1) of Framework Decision 2008/909, requests received after 5 December 2011 – as that concerning the enforcement of the sentence against Mr Popławski – shall be governed by the rules adopted by the Member States pursuant to that Framework Decision.

Once clarified this point, the Advocate General moves on to the first question, namely that on the effect of the incompatibility between framework decisions and national law. He first summarises Popławski I and the main principles connected with the obligation for national courts to interpret national law in conformity with EU law, including the prohibition for such an obligation to end up in a *contra legem* interpretation of national law.

Second, he addresses the relationship between the two Framework Decisions. The above-mentioned Article 25 of Framework Decision 2008/909 should imply that – when such a Framework Decision applies to the enforcement of a sentence – the executing authority can verify the existence of grounds for non-execution and non-enforcement as provided in Article 9 of Framework Decision 2008/909. If the executing authority does not intend to rely on any of these grounds, it can refuse the surrender of the person and can give a firm and final undertaking to execute that sentence, if it believes that executing the sentence in its Member State would facilitate the reinsertion of the sentenced person.

Third, he argues that it is possible to interpret national law in conformity with EU law. In particular, it must be possible to interpret Article

6(2), (3) and (5) OLW in a way that the power of the executing authority to refuse to execute the EAW is conditional on the sentence imposed on Mr Popławski being effectively executed in the Netherlands. He rebuts Poland's argument that the execution of the sentence of Mr Popławski in the Netherlands can only take place if Poland requests or agrees to such an execution. Apart from being inconsistent with Article 4(6) of the EAW Framework Decision, this approach would also run counter to the objective of enhancing the possibility of social rehabilitation of the sentenced person, which is pursued both by the EAW Framework Decision and by Framework Decision 2008/909. In sum, he claims that a national authority with jurisdiction to rule on execution of an EAW that intends to rely on Article 4(6) of the EAW Framework Decision must interpret the national provisions adopted to implement that Framework Decision and Framework Decision 2008/909, to the fullest extent possible, in a manner such as to reconcile the aims of combating impunity and of facilitating the social reinsertion of sentenced persons.

Finally, he considers the hypothesis where the national court finds itself unable to interpret domestic law in conformity with the two Framework Decisions. In this scenario, he posits that the fact that a 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. This obligation flows directly from the principle of primacy of EU law and should not be interpreted as an example of direct effect of the provisions of framework decisions. In his view, the consequence of disapplying Articles 6(2), (3) and (5) OLW is that Dutch authorities would be obliged to execute the Polish EAW, as there would be no further ground to refuse such an execution corresponding to Article 4(6) of the EAW Framework Decision.

ACADEMIC ACTIVITIES

RESEARCH

Multiple Framework Contract for Compliance Assessment services in the Policy area under the responsibility of DG Justice and Consumers. Ref. JUST/2015/PR/01/0003 LOT 2 – ECLAN is involved in this contract (partner) with the College of Europe and Deloitte (BE).

Framework contract on impact assessment, evaluation and evaluation-related services in the area of migration and home affairs under the responsibility of DG Migration and Home Affairs. Ref. HOME/2015/EVAL/02 – ECLAN is involved in this contract (partner) with Odysseus and Deloitte (BE).

CALL FOR PAPERS

Call for papers – Brazilian Journal of Criminal Procedure. In order to broaden its scope and the quality of the scientific articles published, the editorial board of Brazilian Journal of Criminal Procedure announces this public call for authors to thematic dossiers that will be published on the three issues of the review in 2019. Link

Contributions are welcome for the two remaining dossiers:

- **Vol. 5, n. 2 - "International Judicial Cooperation in Criminal Matters"** - associated editor: Prof. Dr. Pedro Caeiro (Universidade de Coimbra/Portugal) - deadline for submission March 31st 2019.
- **Vol. 4, n. 3 – "New technologies and criminal procedure"** - associated editor Profa. Dra. Claudia Cesari (Università degli Studi di Macerata/Italia) - deadline for submission July 10th 2019.

PUBLICATIONS

Books

V. Mitsilegas, *EU Criminal Law After Lisbon: Rights, Trust and the Transformation of Justice in Europe*, Hart Publishing, 2018, 336 p.

C. Marzo, M. Fartunova-Michel (eds), *Les dimensions de la reconnaissance mutuelle en droit de l'Union européenne*, Bruylant, 2018, 262 p.

U. Sieber, V. Mitsilegas, C. Mylonopoulos, E. Billis, N. Knust (eds), *Alternative Systems of Crime Control: National, Transnational, and International Dimensions*, Research Series of the Max Planck Institute for Foreign and International Criminal Law, 2018, 343 p.

K. Ligeti, S. Tosza (eds), *White Collar Crime: A Comparative Perspective*, Hart Publishing, 2018, 440 p.

S. Tosza, *Criminal Liability of Managers in Europe: Punishing Excessive Risk*, Hart Publishing, 2018, 344 p.

P. Simon, *La compétence d'incrimination de l'Union européenne*, Groupe Larcier, 2018.

A. Weyembergh, E. Sellier, *Criminal procedural laws across the European Union – A comparative analysis of selected main differences and the impact they have over the development of EU legislation*, Study commissioned by the European Parliament's Policy Department for Citizens' Rights and Constitutional Affairs at the request of the LIBE Committee, 2018, 217 p.

D. Flore, V. Franssen (eds), *Société numérique et droit pénal : Belgique, France, Europe*, Bruylant, January 2019 (forthcoming).

L. Bachmaier Winter (ed), *The European Public Prosecutor's Office: The Challenges Ahead*, Springer, 2018, 279 p.

D. Meyer, F. Kauff-Gazin, C. Haguenau-Moizard (eds), *Droit pénal de l'Union européenne – État des réalisations*, tome 2, Bruylant, February 2019 (forthcoming).

K. Ligeti, V. Franssen (eds), *Challenges in the Field of Economic and Financial Crime in Europe and the US*, Hart publishing, June 2019 (forthcoming), 312 p.

L. Mancano, *The European Union and Deprivation of Liberty: A Legislative and Judicial Analysis from the Perspective of the Individual*, Hart Publishing, March 2019 (forthcoming), 208 p.

H. Carrapico, A. Niehuss, C. Berthélémy (eds), *Brexit and Internal Security: Political and Legal Concerns on the Future UK-EU Relationship*, Palgrave Macmillan, 2019 (forthcoming), 181 p.

D. Flore, *Droit pénal européen*, 3rd ed., Groupe Larcier, March 2019 (forthcoming).

S. Ferreira, *Human Security and Migration in Europe's Southern Borders*, Palgrave Macmillan, 2019 (forthcoming), 211 p.

UPCOMING EVENTS

ECLAN PhD Seminar, *25 Years After Maastricht: Achievements, Failures and Challenges of the EU Criminal Justice Area*, University of Luxembourg, Luxembourg, 23-25 January 2019. Link

International Conference, *European Investigation Order: A Code of Best Practices*, University Complutense of Madrid, Madrid, 15 February 2019. Link

Seminar, *Investigating Web 2.0. Special Investigation Techniques to Tackle Internet Crimes*, ERA, Valetta, 18-19 February 2019. Link

Seminar, *Applying the European Investigation Order*, ERA, Riga, 21-22 February 2019. Link

Seminar, *Investigating and Prosecuting Offences in Cooperation with the EPPO*, ERA, Trier, 14-15 March 2019. Link

Seminar, *Computer Forensics in Legal Proceedings. Fundamentals and principles*, ERA, Vilnius, 25-26 March 2019. Link

Conference, *New EU-Rules on e-Evidence. The Proposed European Production and Preservation Orders*, ERA, London, 4-5 April 2019. Link

ECLAN Annual Conference, *Brexit and the EU Area of Criminal Justice*, Brussels, 25-26 April 2019, further information will be posted on http://eclan.eu/en/news-events

Seminar, *Computer Forensics in Legal Proceedings. The web, the dark/deep web and other sources of evidence available online: what legal practitioners need to know*, ERA, Lisbon, 27-28 May 2019. Link

Seminar, *Investigating Web 2.0. The rise of evidence on mobile devices*, ERA, Barcelona, 17-18 June 2019. Link

Conference, *Freezing, Confiscating and recovering the Proceeds of Crime. Tools, experiences and challenges in the recovery of assets*, ERA, Trier, 4-5 June 2019. Link

ECLAN Summer School

ECLAN Summer School, *The EU Area of Criminal Justice*, Brussels, 1-5 July 2019, further information will be posted on the, following link: http://eclan.eu/en/summer-school